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LAND AND SEA: TWO SOVEREIGNTY REGIMES IN SEARCH OF A COMMON DENOMINATOR

LEA BRILMAYER* & NATALIE KLEIN**

I. INTRODUCTION

The coastal State has inherent and primordial rights over the continental shelf, which, unlike other rights of a territorial nature, are not susceptible of being subverted by any of the recognized legal means, such as prescription . . . . No adverse interest is capable of derogating in any way from these rights.¹

The international legal regimes for allocation of sovereign rights to land and water areas are fundamentally different, both substantively and procedurally.² As a substantive matter, rights to land territory are acquired by the fact of phys-

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2. Distinctions are made in the law of the sea between “sovereignty,” “sovereign rights,” and “jurisdiction” whereby each term connotes what powers a state may exercise in a particular maritime zone. “Sovereign rights” over the exclusive economic zone and the continental shelf are rights for specific purposes and thus do not permit a state to exercise full powers over these areas, as “sovereignty” might allow. No such distinction is made with respect to a state’s rights over land territory. For simplicity of exposition we are not adhering to this technical distinction and use the phrase “sovereign
ical possession while rights to maritime areas are acquired by operation of law in accordance with "equitable" rules. Procedurally, jurisdiction over disputes to land territory is available only with the consent of the disputing states, while jurisdiction over disputes to maritime areas is essentially mandatory.

This Article investigates the possible reasons for the different substantive and procedural treatment of these two types of sovereign rights and posits that there is an important connection between the substantive and procedural divergences. We explore two types of explanations for the fact that sovereign rights to land and water are treated in diametrically different ways.

The first explanation, more immediately obvious for international lawyers, focuses primarily on the different histories of the development of property rights in land surfaces and maritime spaces. The earth's land surfaces were divided mostly at a time when there were no international legal institutions for allocating property rights, and during a time when war was not outlawed. Land was therefore allocated primarily through physical appropriation by powerful states. The oceans were deemed *res communis* during this period because of the sheer practical difficulties in, and lack of incentive for, the exercise of exclusive title. By the time that the practical means for making exclusive use of maritime spaces developed, so had legal institutions for effective allocation. Furthermore, political support existed for distribution on criteria other than power politics. Water areas therefore are allocated by operation of law, through legal processes rather than by force, and in accordance with basic notions of fairness.

The second explanation also relies importantly on the fact that land has always been easier to occupy than water. But from this self-evident premise it proceeds to examine economic consequences. Since maritime spaces (unlike land) are not useful for occupation, ownership of maritime spaces is mainly sought for purposes of resource extraction. Resource extraction is facilitated enormously by marketable title, and its efficiency depends on the existence of reasonably workable legal institutions. Hence, the doctrine that maritime title is determined by operation of law emerged, and a system of

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rights" to refer to title held by sovereign states to both land and water areas. See infra note 48 and accompanying text.
mandatory dispute resolution to allocate marketable title was created.

Part II of this Article first briefly traces the historical development of allocation of land and water areas, explaining how the two regimes evolved so differently. It then summarizes the basic principles relating to allocation of land and maritime areas, highlighting the differences and explaining these in terms of the different historical contexts in which the two regimes emerged. Part III outlines a more functional explanation of those differences, emphasizing the importance of marketable title to water areas. The different dispute resolution regimes for land and water are described and explained in terms of the differing strengths of the need to quiet title in the two contexts.

Finally, Part IV examines the lessons for international relations theory that might be drawn from the diametric differences in treatment. Overall, the jurisprudence of land territory is heavily realist in tone. It reflects the "anarchical" state of world politics in that its substantive rules privilege physical power and its decision procedures acknowledge the inability of the international legal system to wrest from powerful states any concessions that these states choose not to make. The jurisprudence of maritime spaces reflects a cooperative regime and is considerably more egalitarian and idealistic. Maritime spaces are allocated according to legal rules that determine what constitutes a fair share, and states are essentially subject to mandatory dispute settlement procedures. As such, the legal regime of maritime spaces supports a norm-based, rather than power-based, approach to international relations. We consider whether it is possible to reconcile these competing theories and what important feature may explain the variable that underlies the laws of land and maritime territory.

II. SOVEREIGN RIGHTS TO LAND AND WATER: A QUICK LEGAL HISTORY

Sovereignty over land territory is governed by a regime that developed over several centuries. Acquisition of land traditionally was, and still remains, dependent on power processes, often backed by military strength. Even once a dispute over land finds its way into third-party dispute resolution,
the rules for allocating title to a particular state are heavily dependent on a showing of physical control.

The development of legal rules and institutions for allocation of rights to water areas is relatively recent. Rights to maritime spaces are allocated through entirely different processes than those applicable to land territory, and in accordance with a radically different jurisprudence. Allocation of maritime territory is by operation of legal rules and is divorced from physical acts of occupation. Moreover, the United Nations Convention on the Law of the Sea (UNCLOS) contains a mechanism for mandatory dispute resolution. No comparable mechanism exists for disputes concerning land territory and it is extremely unlikely that a system of compulsory dispute resolution for land territory will be created in the near future.

A. Historical Antecedents: Exclusive Sovereignty Versus Res Communis

The Peace of Westphalia, which ended the Thirty Years War in 1648, typically is viewed as the moment that the modern nation-state first was created. It was at that point (according to the conventional wisdom) that assortments of communities first could be said to have been recognized as “sovereign entities possessed of the centralized structures typical of the modern State.” The various systems of government that arose subsequent to that point were constituted in order to regulate the relations of people living within these defined areas of land. Traditionally, public international law was based on the notion of a community of independent sovereign states in which the sovereignty of a state could be restricted only through its consent. The hallmark of the modern state, according to this conventional understanding, has always been its exclusive sovereignty over a defined territory.

During the historical period in which the legal regime for exclusive rights to land territory developed, maritime space continued to be characterized as a res communis, available for

4. Id. pt. XV, 1833 U.N.T.S. at 508-16.
5. See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 34-38 (1986).
6. Id. at 38.
all users. The philosophy of *mare liberum* (as it was known) applied to all the high seas, which excepted a narrow belt of "territorial sea" adjacent to the coasts of states that existed for protection of local fishing interests and for security. This view, which predominated from the seventeenth century until very recently, was grounded jurisprudentially on the writings of a Dutch scholar, Hugo Grotius, who asserted that things that cannot be seized or enclosed cannot become property.\(^7\) Grotius noted that use of the oceans for fishing or for navigation by one did not preclude their use by others.\(^8\) The oceans were created by nature in such a state that their usage could not be exclusive but belonged to all humankind.\(^9\) 

**B. The Likely Explanation: Physical Occupation Versus Transient Passage**

Grotius's rationale for treating water areas as *res communis* was convincing in its historical context. Exclusivity was almost impossible to achieve, and virtually limitless common use seemed possible; it was for this reason, Grotius posited, that no state owned the oceans or any part of them.\(^10\) An obvious basis for the historical difference in treatment between land and water spaces during this time period is the manifest physical difference between the two types of areas: land is susceptible to human occupation while water is not.

The human occupation that is physically possible on land supports exclusivity because intrusions into inhabited land areas can be detected and punished. The fact that land is susceptible to habitation makes density of physical occupation possible; indeed, as will be argued below, one appeal of land territory is precisely that it is a place for people to live. And it

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7. Hugo Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* 22-44 (Ralph Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916) (1633). A British legal scholar, John Selden, took the opposite approach, arguing that the sea and its resources were capable of being subject to appropriation and dominion. John Selden, *Of the Dominion, Or, Ownership of the Sea* (Marchamont Nedham trans., 1972) (1635). Although this view attracted some support, it ultimately was discarded in favor of Grotius’s *mare liberum* approach.


9. *Id.*

10. *Id.* at 27-29.
is density of occupation that permits exclusive appropriation. The transient passage of humans on vast ocean areas, in contrast, does not permit the necessary monitoring, because it is so difficult to detect adequately the presence of other states and to take action to thwart that presence.

There are quibbles at the margin, of course. Some land is scarcely capable of habitation; it is too hot, too cold, too dry, or at too high an altitude. (It is perhaps suggestive here that such inhospitable terrain is the subject of many still-outstanding territorial disputes; it is primarily such uninhabited areas that to this day have not been definitively appropriated.) Conversely, water is habitable in the rather limited sense that people can live on floating oil platforms, on polar ice caps, in submarines, or on houseboats.

Regardless of the minor exceptions, the fact remains that the vast majority of the world's population lives on land, not water. This situation is likely to continue despite advances in technology that allow people to live on the seafloor, on oil platforms, or on pontoons strung together to form enormous islands. Generally, people can carry out their daily lives in ways that they find ordinary and sustainable only when they are on land.

Physical facts being as they are, there was neither the incentive for nor the possibility of exclusive appropriation of water areas. The possibility of exclusive appropriation did not exist because it was simply too difficult to fend off competitors when there was no way to inhabit permanently the areas in question. The incentive did not exist because exclusivity was not a necessary condition for states to get what they wanted from the seas. Transient passage was sufficient and the transient presence of one state was entirely compatible with the transient presence of others.

11. As we will discuss below, the various claims to Antarctica have been "frozen" by virtue of Article IV of the Antarctic Treaty, Dec. 1, 1959, art. IV, 12 U.S.T. 794, 796, 402 U.N.T.S. 71, 74. See infra notes 149-60 and accompanying text. Outer space, including the moon and other celestial bodies, are part of the common heritage of mankind and are "not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." 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, art. 2, 610 U.N.T.S. 205, 208.
C. Entrenched Interests Versus Equity

This system prevailed with little change until the years following World War II. At that point, states gradually sought increasing control over maritime areas adjacent to their coasts. A number of international conferences—as discussed below—were held at which states voiced the need for legal regimes to allocate rights to what previously had always been treated as res communis.

The first major effort to codify the legal regime of the oceans was held under the auspices of the United Nations in 1958;12 it resulted in the adoption of four conventions and an optional protocol for the settlement of disputes.13 These conventions failed to garner widespread support. A second conference14 was convened in 1960 to resolve the intensely controversial issue of the permissible breadth of the territorial sea, which had been left undecided at the first conference; it was no more successful than the 1958 Conference had been. It was not until a third conference15 was held that consensus on this issue emerged. In addition to resolving the question of the permissible breadth of the territorial sea, the 1982 UNCLOS also comprehensively codified international law with regard to a variety of other subjects, such as navigation rights, pollution control, marine scientific research, and fisheries regulation.16 UNCLOS went into effect in 1994, when the required number of ratifications (sixty) were obtained.17

The UNCLOS legal regime for determining coastal states' legal interests in maritime zones will be described in greater

16. UNCLOS, supra note 3.
17. Id. art. 308, 1833 U.N.T.S. at 518.
detail in the section that follows; here, however, it is important to note immediately a central aspect. As had been true with earlier Conventions, the mode of allocation that UNCLOS adopted for attribution of maritime space was not based on possession or control, as had been typical with acquisition of land territory, but was instead borne of juridical processes.\textsuperscript{18} The doctrine that allocation did not depend on physical use or possession but instead on geographical proximity became known as the \textit{ab initio} doctrine, meaning that title existed from the outset—title was inherent and did not require any actions by the coastal state to perfect it.

The decision not to incorporate physical occupation as a criterion was deliberate. Britain, for instance, initially had favored a regime whereby rights could be acquired through occupation, particularly through the exploitation of the continental shelf by means of mineral exploration.\textsuperscript{19} However, the drafters of both the 1958 Convention on the Continental Shelf and UNCLOS,\textsuperscript{20} as well as the academics who have commented on their work, were quite insistent that physical occupation should be irrelevant to rights over the continental shelf.\textsuperscript{21} The reasons given are revealing.

Foremost among these reasons was the desire to prevent a land rush at the expense of developing states.\textsuperscript{22} The International Court of Justice has stated:

\begin{itemize}
\item \textsuperscript{18} Id. arts. 2 (territorial sea), 33 (contiguous zone), 55 (exclusive economic zone), 86 (high seas), 1833 U.N.T.S. at 400, 409, 418, 432.
\item \textsuperscript{19} According to O'Connell, "[a]t that time, the doctrine in the United Kingdom Foreign Office was that the seabed could be acquired by occupation, and this was the way in which it was intended to proceed—by claim and exploitation, the animus and factum conjoined." O'Connell, supra note 1, at 470-72.
\item \textsuperscript{22} According to Richard Young:
\end{itemize}
The 'ab initio' doctrine . . . was adopted at the Geneva Conference as a means of protecting coastal States which had not made a proclamation of their continental shelf rights and had no means of exploring or exploiting their resources . . . . All coastal States accepted the doctrine without hesitation mainly because of its negative consequences, namely, that it prevented a rush and grab for sea-bed resources being undertaken by a few States on the basis of the Grotian dogma of 'freedom of the sea.' It is for this reason that the 1958 Convention does not subordinate the acquisition ab initio of sovereign rights to actual exploitation or occupation, or even to a proclamation of these rights.23

Rejection of the "first come, first served" doctrine was based on widespread unwillingness to accept its distributional consequences. The developing states were well aware that they would be last to arrive and would probably not be served at all.

The most obvious [objection], perhaps, is the difficulty of determining what constitutes effective occupation at the bottom of the sea, and of defining the limits of the occupied areas . . . . Still more objectionable is the premium placed by such a rule on 'snatch-and-squat' tactics reminiscent of the California gold rush and the Cherokee Strip . . . . It is not sufficient to say in reply that a coastal state by forehanded action may place itself in the position of occupant; many coastal states do not have the technical or financial means to hand to win a race for occupation against some other state on the hunt for additional resources.


23. Concerning the Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), 1982 I.C.J. 123 (Feb. 24) (separate opinion of Judge Jimenez de Arechaga). A commentator has argued:

Thus opinion formed in support of a rule conferring exclusive jurisdiction ipso facto and ab initio over resource-related activities in the areas of sea-bed off the coast of a given State on that state. First it was thought that this was the best way to avoid potential conflict . . . . [I]t would also, through its inherence, avoid the potential for conflict involved in a system of unregulated freedom of exploitation or of occupation; conflicting claims, dual exploitation, 'squatting' and so on.

Just as the original doctrines of *res communis* and *mare liberum* reflected political and technological realities of times when they came into favor, the *ab initio* doctrine was compatible with the dominant political rhetoric of the late 1950s and the decades that followed. These decades witnessed a dramatic increase in the number of new states as a result of the post World War II decolonization movement. The large numbers of new states altered the political balance and also revised the political discourse so as to favor equity at the expense of entrenched interests. Moreover, Cold War political dynamics offered developing states the opportunity to trade political allegiance to one of the superpowers for support of developing country economic agendas.

The economic aspirations of the new states were expressed through their declaration of a "New International Economic Order," which was intended to reconstruct the existing international economic system to the benefit of the world's poor. The oceans gave developing states an opportu-


26. The basic goals of the New International Economic Order were the reconstruction of the existing international economic system in order to improve development and welfare in developing countries, to narrow disparities between developing and developed states, and to give developing countries more control over their political, social, and economic destinies. See Edwin P. Reubens, *An Overview of the NIEO, in The Challenge of the New International Economic Order* 1, 1 (Edwin P. Reubens ed., 1981). The main forum for the expression of these ideas was the United Nations Conference on Trade and Development, which was established in 1964 with the aim of restructuring international trade for development purposes. *Id.* at 3. The General Assembly adopted several resolutions addressing the New International Economic Order that primarily called for revising international resource transfers, restructuring markets for primary products and for manufacturing goods, and reorganizing international financial and managerial institutions. See Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 28th Sess., U.N. Doc. No. A/Res/3201 (S-VI) (1974); Programme of Action on the Establishment of a New International Eco-
nity to claim large areas of previously unowned space as a means of access to a wealth of resources. If developing states had been required to press these claims to maritime spaces at the expense of pre-existing claims by western colonial powers, success undoubtedly would have proved elusive. Western colonial powers were poised at that very moment to claim and exploit vast ocean areas, and by the time that developing nations obtained comparable technological capability it would have been much too late.

The legal regime that developed to allocate maritime spaces effectively denied industrialized states this opportunity by granting rights based on geographical proximity rather than on prior occupation. A central reason that the regime was accepted without a fight was undoubtedly that, given the long history of res communis, the industrialized states were being required only to forgo an opportunity to appropriate a disproportionate share of an area that previously had had no owner. No vested rights were upset. In addition, the western states had significant economic and military interests in maintaining the freedom of the high seas, interests that were not shared by the weaker and poorer states. So long as this important interest of the developed states was adequately protected, they were willing to forgo the opportunity to stake out enormous claims to maritime areas at the expense of developing nations.

It is thus entirely plausible to explain the differences between the two legal regimes of land and water in terms of the different historical contexts during which appropriation of land and water areas first became technologically possible and necessary. Doctrines for sovereignty over land developed during an age when raw physical power was the only consideration; doctrines for sovereign rights to maritime areas developed in a more legalistic, and more egalitarian and idealistic, age. A closer look at the international legal doctrines constituting the two regimes lends support to this historical interpretation.

D. Current Legal Regimes: Appropriation Versus Allocation

As noted in the Introduction, the main factor in acquiring rights to land is the physical possession of that land—what is known as "effective occupation." The military and political power of the state is a paramount determinant in founding territorial sovereignty, in resolving disputes over title to that territory, and in seeking compliance with any decision on title. Maritime areas, in contrast, are allocated in accordance with legal rules (relating primarily to geographical proximity) that place little emphasis on priority of presence or use.

1. Effective Occupation as the Foundation for Sovereignty over Land

Doctrinally, when title to territory is contested, the single most important indicator of legal title to land is possession—a consistent history of physical power over it. No matter how sympathetic a naked claim to title may be, if it is unaccompanied by any historical showing of physical authority, it is unlikely to be successful. Of course, this does not mean that the current possessor of the land necessarily will prevail—international sanctions may be so intense as to require an intruder to leave, particularly when the possessor came into possession through a demonstrable act of aggression. Nonetheless, a paper claim to title is unlikely to survive in the absence of physical control.

By far the vast proportion of the world’s land territory found its first owner through what international law has come to call "effective occupation." The importance of acquiring

27. An example of such a naked claim to title might be Argentina’s claim to the Falkland/Malvinas Islands.
28. Indonesia’s unlawful occupation of East Timor has recently come to an end. After fifty years of occupation, the Baltic states regained their independence from the Soviet Union. Israel is in the process of negotiating its withdrawal from lands it seized over thirty years ago, and has already pulled out of one contested area. These situations can be compared with the ongoing stand-off in Cyprus and China’s continued occupation of Tibet.
29. For states to acquire title over territory either by occupation or by prescription, they must exercise “effective control,” which generally refers to the continued and peaceful display of sovereignty over a particular area. States must have the intention to acquire sovereignty over the area as well as undertake acts that constitute the exercise of sovereignty (such as raising a flag, investigating accidents, imposing taxes). The leading cases on the ac-
title through actual physical possession, as opposed to symbolic acts or discovery, has long been recognized. Emer de Vattel noted as much in the middle of the eighteenth century:

All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession... But it is questioned whether a Nation can thus appropriate, by the mere act of taking possession, lands which it does not really occupy, and which are more extensive than it can inhabit or cultivate. It is not difficult to decide that such a claim would be absolutely contrary to the natural law, and would conflict with the designs of nature, which destines the earth for the needs of all mankind, and only confers upon individual Nations the right to appropriate territory so far as they can make use of it, and not merely to hold it against others who may wish to profit by it. Hence the Law of Nations will only recognize the ownership and sovereignty of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them.30

The doctrine of effective occupation is still dispositive of many contemporary disputes over land territory.31 Modern international law consciously continues to ground title to territory on the fact of physical possession.32 The name “effective occupation” suggests as much, with the qualifier “effective” underscoring that the “occupation” must be real, physical posses-


32. See Sharma, supra note 31, at 197-98.
sion of the territory in question, not hypothetical possession founded on symbolic acts. The state must engage in acts of jurisdiction that demonstrate its sovereignty over the territory; it must treat the area in question as its own. Furthermore, the fact that, historically, no other state interfered with the occupier's "peaceful" possession (even if this "peaceful" possession went unchallenged only because of evident military superiority) is accorded substantial importance where the current occupier's title is put in dispute later.

2. The Substantive Law of Maritime Spaces

The substantive law for allocation of maritime spaces is very different from the substantive law for allocation of land territory. Sir Robert Jennings contrasted ownership of land and maritime areas by saying that maritime spaces are allocated according to "certain a priori legal principles," while disputes over land boundaries are settled by consulting "the juridical and geographical history of the particular boundary in question," especially with regard to physical occupation.33 Another commentator notes:

The aspect of such questions [of boundaries] unique to the law of the sea is that resolution of delimitation problems must proceed from permissible legal bases for geographic jurisdiction at sea (in this context essentially meaning adjacency to the coastal State, limited variously by concepts of proximity or "natural prolongation") and cannot proceed from an impermissible basis of jurisdiction at sea (e.g. first in time to achieve effective occupation).34

These observations are borne out by both case authority and treaty law. We briefly describe below the three most important types of maritime zones:35 territorial sea, continental...

35. UNCLOS also includes provisions defining and/or regulating bays, internal waters, archipelagic waters, straits, and the contiguous zone. UNCLOS, supra note 3, arts. 8 (internal waters), 10 (bays), 33 (contiguous zone), 33-44 (strait), 46-54 (archipelagic waters), 1833 U.N.T.S. at 401, 402, 409, 410-13, 414-18. These are not addressed below, although the rules reg-
shelf, and exclusive economic zone. A final construct of maritime law—the regime of the deep seabed—also will be discussed briefly.

3. **Territorial Sea**

The territorial sea is the concept most firmly grounded in international customary law of the sea. It is also the legal interest in maritime areas most nearly akin to the legal interest that states have in their land areas. Traditionally, each state was entitled to a territorial sea extending in a band around its coast wherein it exercised virtually full sovereignty, with the limited exception that other states' vessels had to be allowed a right of “innocent passage” through it. These belts of waters historically were set at three miles, explained as the distance a cannon ball could be fired.

By taking as its breadth the distance that a cannon ball could fly, the three-mile belt was intended in theory only to include the area over which a state could exercise military control. However, the “cannon shot rule” was known to rest on fiction from the outset. The reach of military weaponry soon greatly exceeded the traditionally accepted breadth. Three miles was a convenient and useful standard, however, and it was employed consistently despite the acknowledged fact that the original rationalization for this breadth was largely hypothetical.

The extension of the breadth of the territorial sea became a controversial issue in international maritime relations after World War I. The importance of a coastal state’s fishing rights and the concomitant necessity of extending the three mile

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36. “Innocent passage” refers to the right of other states to pass through the territorial seas of a coastal state in order to reach the ports of that state or to traverse those waters to reach another part of the high seas. The passage must be “innocent” in that it must not prejudice the peace, good order, or security of the coastal state. See id. arts. 17-19, 1833 U.N.T.S. at 404-05.

37. This rule has been based on a statement by Cornelius van Bynkershoek, who stated that “the territorial sovereignty ends where the power of arms ends.” See Arthur H. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 Am. J. Int’l L. 751, 759-61 (1960) (noting that the cannon did not have a three-mile range during Bynkershoek’s day but that the rule was based on military strength).
limit were acknowledged at the 1930 Codification Conference and were probably the most polemic issues during the 1958 and 1960 United Nations Law of the Sea Conferences. Coastal states, particularly the newly independent developing countries, wished to protect their resources from the long distance fishing fleets of the major maritime powers and thereby promote their own economic prosperity through exclusive entitlement to the area directly adjacent to their coasts. The developing states wanted to benefit from their geographical proximity but needed a legal regime to protect this advantage:

[T]he natural resources of sea areas contiguous to coasts were a source of immense wealth. For some countries that wealth merely provided an opportunity of increasing national income and conducting profitable activities; but for many of the so-called underdeveloped countries it represented a major part of

38. 2 League of Nations, Conference for the Codification of International Law [1930] (Shabtai Rosenne ed., 1975). During the debates on the breadth of the territorial sea at the Hague Conference, one delegate remarked:

Fishing constitutes the living of the local population, and is closely bound up with the economic life of the country. The creation of big undertakings and the application of new methods to the exploitation of the riches of the sea have also raised new problems in this matter which are not less important than those of the security of the coastal State and the safeguarding of its laws.


39. To this effect, the delegate from Mexico stated that:

Unfortunately, the maritime Powers, which were usually also fishing Powers, were not confining themselves to exercising special powers in the areas of sea adjacent to their coasts, but were only too often attempting to exercise them in the territorial sea of other countries too. To condone such behaviour would be a flagrant injustice and would impair the legitimate rights of the immense majority of States which were known as coastal States. Such a situation might have been explicable, although not justifiable, in past ages when a few Powers had exerted a prevailing influence on the formulation of the rules of international law. It was totally unacceptable in the twentieth century.

their limited national resources. The difficulties ob­structing a settlement were enhanced by the interna­
tional anarchy prevailing in state claims over sea ar­
eas, and by the changing and sometimes inconsistent 
attitude taken by certain countries at different times 
in order to protect their transient interests under 
changing conditions. 40

Claims to extend sovereignty over a broader breadth territ­
orial sea were resisted by developed nations mainly because of 
their potential for encroachment on the freedoms of the high 
seas. 41 It was widely perceived by states with large navies and 
merchant marine fleets that freedom of navigation was 
threatened by a zone that extended further than three miles 
from shore. 42 When the UNCLOS drafters accommodated 
this concern through the adoption of safeguards for naviga­
tion elsewhere in the Convention, consensus quickly emerged 
on a territorial sea breadth of twelve nautical miles. 43 Article 3 
of UNCLOS now states: “Every State has the right to establish 
the breadth of its territorial sea up to a limit not exceeding 
twelve nautical miles, measured from baselines determined in 
accordance with this Convention.” 44

40. Id. at 43. See also id. at 46:
   For, in determining the breadth of their territorial sea and their 
fishery limits, States, particularly those whose economies were in 
process of development, were primarily guided by the need to safe­
guard the right of their peoples to live decently by drawing upon 
available natural resources for their economic development and 
the improvement of living conditions.

41. Those states in favor of a narrow belt of territorial sea were responsi­
ble for approximately two-thirds of the world’s maritime traffic at the time of 
the first and second Law of the Sea Conferences. See Carl M. Franklin, The 
Law of the Sea: Some Recent Developments (With Particular Reference to the United 

Accomplished, 52 Am. J. Int’l L. 607, 612 (1958) (claiming an increase in territ­
orial sea meant that “[t]he right and ability of merchant ships carrying 
goods and passengers to schedule the most economical passage possible be­
tween ports, to enter and leave harbors freely, and to move on the surface of 
the water without interruption or delay would be jeopardized”).

43. UNCLOS, supra note 3, art. 3, 1833 U.N.T.S. at 400. UNCLOS cre­
ated a new regime of transit passage in order to accommodate interests in 
navigation through international straits in the face of greater coastal state 

44. Id. art. 3, 1833 U.N.T.S. at 400.
4. Continental Shelf

Development of the doctrine of "continental shelf" similarly centered on the need to regularize particular economic interests in extended maritime areas while still protecting the traditional status of the oceans as high seas. The trend toward ever-widening national claims to exclusive exploitation of seabed resources was triggered in 1945 when a proclamation by U.S. President Harry Truman asserted "jurisdiction and control" over the "natural resources" of the seabed and subsoil. Other states, and particularly developing states, almost immediately took advantage of the Truman Doctrine's implicit invitation to promulgate comparable claims.

The push by coastal states to acquire rights over the continental shelf was for the specific purpose of exploiting the seabed's natural resources. The claims were limited to this economic purpose in order to protect the status of the waters above the shelf as high seas. The resulting accommodation between economic rights and freedom of the seas was enshrined in both the 1958 Continental Shelf Convention as well as the 1982 UNCLOS. The distinctive features of the allocation of maritime property, as opposed to allocation of land territory, are particularly evident in the ascription of "sovereign rights" over the continental shelf.

States, it is said, have "sovereign rights," not "sovereignty," over the continental shelf. The former term was adopted in order to denote a status of rights less than full sovereignty and to reinforce the principle that rights to explore and exploit the resources of the seabed did not entail rights over the waters above the seabed or to the airspace. The rights over the

45. Proclamation No. 2667, 10 Fed. Reg. 12,303, reprinted in 59 Stat. 884 (Sept. 28, 1945). This claim was justified on the grounds of the global need for new sources of petroleum and other resources, the presence of these resources in the seabed and the existence of the necessary technology to exploit them, and finally the need for some form of recognized jurisdiction in the interest of their conservation and utilization.

46. See Lauterpacht, supra note 21, at 380-82.


48. During the 1958 Conference, there was support for the term "sovereign rights" as a "justifiable and realistic modification of the freedom of the high seas." United Nations Conference on the Law of the Sea: Summary Records of
continental shelf were recognized as distinct from rights over land territory:

While the concept of sovereignty was inherent in the relationship between a State and its territory and, by a logical process of extension, between a State and its territorial sea, it did not apply to the relationship of a coastal State to its continental shelf. Territorial sovereignty was an absolute and exclusive power which a State exercised over its territory. It was inconceivable that power of that nature should be exercised over areas which did not form part of the territorial domain.49

Furthermore, a state's rights to its maritime areas do not depend on what that state does in order to acquire them; they exist *ipso facto* and *ab initio*:

The right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view which, as has already been indicated, the Court accepts, that the coastal State's rights exist *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned.50

The principle that the rights in question exist *ipso facto* and *ab initio*—that rights to these maritime spaces is inherent—has been characterized as "the most fundamental of all rules."51 The coastal state would not lose its rights to its mar-

*M*eetings and *A*nnexes, U.N. GAOR, 13th Sess., at 23, U.N. Doc. A/CONF/13/42 (1958). "Sovereign rights" was also considered to be "based on general principles corresponding to the present needs of the international community and was in no way incompatible with the principle of the freedom of the seas." *Id.* at 59.

49. *Id.* at 16.

50. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 30 ¶ 39 (Feb. 20). *See also* Aegean Sea Continental Shelf (Gr. v. Turk.), 1978 I.C.J. 3, 36 (Dec. 19) (noting that "legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory adjoining on that continental shelf . . . . The continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea' . . . .")

51. North Sea Continental Shelf, 1969 I.C.J. at 23 ¶ 19:
time spaces simply because another state had moved to exploit those areas first. It was well appreciated that this rule sharply differentiated the law of maritime spaces from the rules for territorial sovereignty:

The sea, including the seabed and subsoil, are subject to a special system of law that incorporates some, but not all, of the rules applicable on land. Perhaps the most important difference is that the rule that sovereignty may be acquired by effective occupation is a stranger to the modern law of the sea . . . . An attempt to extend 'first come, first served' rules of preemptive occupation to large chunks of the seabed is inconsistent with the nature of the modern law of the sea.52

Both the 1958 Geneva Convention on the Continental Shelf (in Article 2) and Article 77 of UNCLOS explicitly incorporate the ab initio rule with regard to the continental shelf:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the conti-

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation. 53

The same principle has been recognized to be part of customary international law even independently of these two conventions. 54

5. Exclusive Economic Zone

The international legal regime of the “exclusive economic zone” (EEZ) was an innovation of the Third United Nations Conference on the Law of the Sea. Earlier conferences had primarily focused on progressive codification of existing interests in maritime zones, such as territorial sea and continental shelf. With the creation of the EEZ, UNCLOS extended the same sort of protection to interests of coastal states in the living resources of the waters over the continental shelf (fish, crustaceans, marine mammals, and plant life) as the continental shelf regime previously had extended only to coastal state interests in the resources on or beneath the ocean floor. 55

The 1982 UNCLOS recognized coastal states’ EEZ claims to the living resources of the sea to a distance of 200 nautical miles from shore. 56 EEZ rights are for the purpose of exploring, exploiting, conserving, and managing the natural resources of the waters superjacent to the seabed. The Convention’s articles dealing with the EEZ also duplicated provisions

54. See O’CONNELL, supra note 1, at 475-76:
[The International Court of Justice in the North Sea Continental Shelf cases] pointed out that the first three Articles of the [1958] Convention were not subject to reservation, and it explained this as following from the fact that at the Geneva Conference these three articles ‘were regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law’ . . . . It cannot be questioned that the main principles of the continental shelf doctrine as formulated in the Geneva Convention are customary law.
56. Id. arts. 56-57, 1833 U.N.T.S. at 418-19.
for coastal state authority over the continental shelf by extending EEZ protection to the seabed and its subsoil.\footnote{Id. art. 56(1)(a), 1983 U.N.T.S. at 418.}

6. The Delimitation of Maritime Zones

The rules just stated prescribe which maritime zones the coastal state will have when no other state is proximate and there is thus no competing claimant for the same maritime area. In such circumstances, as already noted, UNCLOS gives states a twelve mile band of territorial sea and a 200 mile band of EEZ and continental shelf.\footnote{UNCLOS does allow for the possibility of the continental shelf extending to a maximum of 350 miles provided certain geographic criteria are met. See id. art. 76, 1983 U.N.T.S. at 428-29.} Obviously, allocation of legal rights becomes more complicated when the water areas are too narrow to afford all states a full complement of legal rights.

The process of resolving two or more states’ competing claims to the same maritime area is referred to as “delimitation.” Thus, for example, if the water area between two opposite states is fewer than 24 nautical miles wide, it will be necessary to delimit the territorial sea; if it is more than 24 miles but fewer than 400 miles, each state will possess a full territorial sea but it will be necessary to delimit the EEZ and continental shelf. Delimitation is also necessary as between adjoining states, as a boundary must be drawn to divide the waters from the point where the land boundary meets the sea to a distance of 200 miles from shore.

For the delimitation of territorial seas between opposite or adjacent states, Article 15 of UNCLOS provides that ordinarily the dividing line will be a line equidistant from the two contending states.\footnote{Article 15 of UNCLOS replicates the language of Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone. Id. art. 15, 1983 U.N.T.S. at 403; Convention on the Territorial Sea and Contiguous Zone, supra note 13, 15 U.S.T. at 1610, 516 U.N.T.S. at 212, 214.} The equidistance line need not, however, be applied if there are historic interests or any other special circumstances that would justify the displacement of the line. In its citation to historic interests, the territorial sea regime is somewhat more accommodating to claims of past appropriation than the regimes of EEZ and continental shelf. States negotiating the method of delimitation to be used for this partic-
ular maritime zone did not wish to be bound by a strict application of a mathematical formula but preferred to retain a degree of flexibility. Such an approach was intended to increase the likelihood of reaching an equitable solution.

The delimitation process for the EEZ is governed by Article 74 of UNCLOS, which specifies that states are to settle on delimitation through mutual agreement. Where agreement is not possible, states are required to resort to dispute resolution procedures outlined in Part XV of UNCLOS, which are discussed below. The standard to be applied is that the delimitation shall be made "on the basis of international law . . . in order to achieve an equitable solution."63

Similar provisions govern delimitation of the continental shelf. Where two opposite states are separated by fewer than 400 nautical miles, or where it is necessary to divide the shelf areas between adjacent states, Article 83 gives the same guidance as that contained in Article 74 of the Convention.64 Delimitation must be either through agreement, or, failing agreement, through UNCLOS dispute resolution processes and must be made "on the basis of international law . . . in order to achieve an equitable solution."65

The allocation of coastal state rights to territorial sea, continental shelf, and exclusive economic zone is therefore entirely different from the allocation of sovereignty rights to land

61. UNCLOS, supra note 3, art. 74, 1833 U.N.T.S. at 427-28.
62. Id. pt. XV, 1833 U.N.T.S. at 508-16.
63. Id. art. 74(1), 1833 U.N.T.S. at 427.
64. Id. arts. 74, 83, 1833 U.N.T.S. at 427-28, 431. In some maritime delimitation cases, such as the Chamber's decision in Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Can. v. U.S.), 1984 I.C.J. 67 (Oct. 12), or the International Court of Justice in Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 78 (June 14), a single maritime boundary for both the continental shelf and the fishing zones has been established.
65. UNCLOS, supra note 3, art. 83, 1833 U.N.T.S. at 431. Where a state seeks more than 200 miles of continental shelf (due to its unusual geophysical circumstances), it must submit information to a Commission on the Limits of the Continental Shelf, established under Annex II of UNCLOS. That Commission has the power to make binding recommendations. Id. art. 76(8) & Annex II, 1833 U.N.T.S. at 429, 525-27.
territory. The primary determinant is not a history of use or occupation but legal rules and "equity." The same pattern is manifest with regard to the final aspect of maritime rights that we consider: rights to exploit the deep seafloor. While the deep seafloor is not the property of any state (as are territorial sea, continental shelf, and exclusive economic zone), the legal treatment of the seafloor is rather similar in important respects. Rights allocated by operation of law and "equity" strongly shaped the formulation of the legal rules in question.

7. Deep Seafloor

The deep seafloor beyond the reach of any particular state's maritime zones is known in UNCLOS parlance as the "Area." Impetus for special treatment of the deep seafloor came in the late 1960s, when the possible exploitation of the minerals found in manganese nodules on the ocean floor first attracted widespread attention. The technological capability to recover polymetallic nodules from the ocean floor was perceived as an opportunity for developing states to share in the world's resources rather than remain economically marginalized. Such sentiment led Ambassador Arvid Pardo of Malta to propose that the United Nations declare the seafloor and ocean floor "underlying the seas beyond the limits of present national jurisdiction" to be "the common heritage of mankind," not subject to appropriation by any state for its sole use.

The efficacy of Pardo's proposal depended on establishment of an international regime to govern deep seafloor mining activities for the benefit of all states; absent such a legal regime, the states with the greatest technological ability would reap all the profits. Although a system of exclusive explora-

66. Id. art 1(1)(1), 1833 U.N.T.S. at 399. Article 1 of UNCLOS defines the "Area" as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."

tion was not established for the deep seabed, as had been the case with the continental shelf and the EEZ, states still acted on the assumption that appropriation through occupation was not appropriate for this area of the oceans. In this instance, the majority of states advocated a system of shared ownership between all nations of the world.68

The major maritime states, including the United States and the Soviet Union, were initially resistant to this idea. During the negotiations of UNCLOS, the United States proposed a “parallel” system to permit mining by an international entity, known as the Enterprise, as well as by private investors.69 Such a solution was generally acceptable to the majority of states, but the actual operation, benefits, and financing of the Authority remained controversial.

As of 1982, when UNCLOS’s text was adopted, the United States and other industrialized powers still remained opposed to the deep seabed regime contained in UNCLOS and refused


69. See Bernard H. Oxman, The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions, 71 Am. J. Int’l L. 247, 253-54 (1977); Euripides L. Evriviades, The Third World’s Approach to the Deep Seabed, 11 Ocean Dev. & Int’l L.J. 201, 217-19 (1982). The proposal envisaged that such a system would grant the Authority effective administrative and financial supervision over activities in the Area in order to ensure compliance with the Convention and the Authority’s rules and regulations. The parallel system adopted under Article 153(2) and Annex III of UNCLOS, supra note 3, 1833 U.N.T.S. at 455, 528-47, involves an applicant nominating a single continuous area, sufficiently large and of sufficient estimated commercial value to allow two mining operations. The applicant is to divide this area into two separate areas of equal commercial value and submit all data obtained with respect to these areas. The Authority then designates one of these areas to be reserved solely for the conduct of activities by the Authority through the Enterprise or in association with developing states. The selected area is designated as a “reserved area” upon approval of the plan of work and signature of contract for the applicant to have exclusive rights to the non-reserved area. The Enterprise is entitled to decide whether it will carry out activities in the reserved area or not. The Enterprise may act on its own or as a joint venture with an interested state or entity. Developing states are entitled to submit plans of work for a reserved area in the event that the Enterprise decides not to carry out activities in that area. See generally Evriviades, supra, at 218; Oxman, supra, at 254.
to sign the Convention for that reason.70 These states nonetheless did not proceed to appropriate the deep seabed areas through acts of possession. Instead, a system of interim domestic legislation,71 coupled with multilateral understandings to avoid overlapping claims, was pursued.72 The legal basis for

70. The United States considered that the Convention was contrary to its vital national interests and was, thus, in the view of President Reagan:

- unwilling to compromise those interests for the sake of world opinion or American participation in a global regime structured with an institutional bias against the interests of the United States and its allies; a regime at odds with important principles of political liberty, private property, and free enterprise; an experiment viewed as a prototype for future multilateral arrangements.


71. The United States Congress passed the Deep Seabed Hard Mineral Resources Act (DSHMR) in 1980 in order to authorize mining of the deep seabed by U.S. multinationals pending adherence to a comprehensive treaty.


this system was claimed to be the freedom of the high seas with
the only limitation being reasonable regard to the rights of
other users. Following further negotiations, an agreement
implementing the relevant part of the Convention was
adopted in 1994. With U.S. support thus secured, UNCLOS
achieved the requisite number of ratifications and came into
force. The final result was thus the creation of an interna­
tional institution to regulate the exploration and exploitation
of resources from the deep seabed.

The pattern that we see for allocation of rights to the sea­
bed is compatible with the legal regimes for allocation of
rights to coastal state maritime zones. In both contexts, the
key is that legal rights are allocated by operation of law and in
accordance with equitable principles. The overall pattern of
allocation of territorial and maritime rights can be explained
readily as a result of historical shifts in political influence. The
essential point is that land territory was allocated during a time
that physical appropriation of water was not possible. By the
time that physical appropriation of the seabed had become
more technically feasible and living resources of the sea were
recognized as finite and exhaustible, legal institutions had de­
developed that allowed for greater influence by small and devel­
oping nations. At this point, there was still a large pie to be
divided. In accordance with the rhetoric of the times, its di­
vision reflected a more egalitarian and legalistic framework than
had dominated allocation of territorial sovereignty for the pre­
vious several centuries.

Although there is some historical truth to this explana­
tion, there is surely more to the matter. It would be naïve to
think that the differences we see in legal doctrine are all ex-

73. A number of commentators took this approach. See, e.g., Kathryn
Surace-Smith, United States Activity Outside of the Law of the Sea Convention:
Deep Seabed Mining and Transit Passage, 84 COLUM. L. REV. 1032, 1037 (1984);
James H. Breen, The 1982 Dispute Resolving Agreement: The First Step Toward
Unilateral Mining Outside the Law of the Sea Convention, 14 OCEAN DEV. & INT’L
L.J. 201, 207 (1984); Theodore G. Kronmiller, The Lawfulness of Deep
Seabed Mining 388-91 (1980); William C. Brewer, Jr., Deep Seabed Mining:
Can an Acceptable Regime Ever Be Found?, 11 OCEAN DEV. & INT’L L.J. 25, 31
(1982); Oxman, supra note 52, at 538.

74. Agreement Relating to the Implementation of Part XI of the United
plainable in terms of the new-found importance of equitable considerations in international law. It is reasonable to ask whether there are not differences between the doctrines of land and water ownership that inhere to the benefit of all states, rich as well as poor. We turn our attention now to an economic explanation of the different treatment that does not rely so centrally on differences in historical context of the doctrines' development.

III. The Economics of Land and Water Ownership

The argument that will be explored below is that different legal regimes naturally should be expected to evolve more for areas that are susceptible to physical occupation than for those not susceptible to physical occupation. Usage for physical occupation is an important benefit of land territory; maritime areas are valued primarily for the potential for resource extraction. Where resource extraction is a central motivation, marketable title is essential and so are legal regimes for determining ownership. This need for marketable title gives rise to mandatory dispute resolution and, hence, creates the possibility of requiring compliance with norms of equitable apportionment.

A. Land, Sea, and the Value of Marketable Title

Legal regimes for land are different from the legal regimes for water because land and water are valuable to people for different reasons. Land is valuable to its possessor regardless of whether the possessor has good legal title or not. It has direct consumption value because physical occupation is a good in and of itself. Water areas are not particularly valuable without generally recognized legal title because so much of their usefulness comes from resource extraction, which is vastly impeded by the inability to market and alienate legal interests.

1. Land Territory and the Consumption Value of Physical Possession

Possession of land is desirable whether or not it is accompanied by any legal right. The reason is that much of land territory's value comes from the fact that it is susceptible to occupation. Land gives people a place to build their houses,
grow their food, raise their children, and interact with their immediate neighbors and their extended communities. People need to have some place physically to live, and they develop strong attachments to the places where they settle into communities, build houses, farm, procreate, and socialize.

The value that particular parcels of land hold for the people that occupy them gives governments compelling political reasons for preserving physical control over those places. Governments have to care about pieces of land if they care about maintaining the support of their citizens. Governments that cannot maintain physical control over land but lose it to other countries, lose not only the citizens that occupy the lost land but also the support of their other citizens, who cannot maintain confidence in such a government.

The fact that land can be occupied also makes it useful for military purposes. Because land can be occupied, military fortifications can be built on it, and land that has strategic value is of substantial importance to states. The strategic value is both positive and negative. Land gives its possessor an opportunity to build its own strategic installations but also prevents competitors from building potentially threatening strategic installations of their own.

Land is therefore of value, in substantial part, because of its capacity for occupation, which contributes significantly to both its utilitarian and its non-utilitarian value. This is not to say that land is of value only as a place to live and build, but that whatever other value land has is surely increased by the fact that it gives people a place to put down roots. The reason that habitability matters is that people value physical possession of land—and states therefore value sovereignty over that land—regardless of whether their title is recognized as legally valid.

If a state consistently maintains possession of a piece of land and allows its people to live and put down roots there, then this value exists regardless of whether the rest of the world community views this possession as legally legitimate. The state may care for various reasons that its title is not viewed as good—the United Nations might levy sanctions, or its aggression may cost it a previously warm relationship with

75. An example on this point might be the Jewish settlers on the West Bank.
its neighbors—but the simple fact of physical possession does at least give the state something substantial that is worth having.

2. Water Areas and the Centrality of Resource Extraction

“Possession” and “occupation” of water areas are not really possible in the same sense as possession and occupation of land areas. Even to the extent that water areas can be occupied, the occupier derives little value from the sheer fact of occupation. Water areas are valuable instrumentally, primarily because of the opportunities that they create for resource extraction. Especially now that it is generally recognized that the oceans’ resources are finite, states desire to own maritime zones in order to appropriate the resources present in the seabed and the water column.

Habitability is not a prerequisite to harvesting either living or nonliving resources. Humans travel as necessary to reach the places where they fish or drill for oil. If it is necessary to remain in such places for relatively extended periods (at sea on a fishing boat or in a cabin on an oil platform), this is a necessary means to the end of resource extraction. Living on an oil platform is not, for most people, an end in itself. The difference between land and sea is that land is desirable both for habitation and for resource extraction. Maritime spaces are desirable almost exclusively for their resource potential and not because they provide an environment in which people can reside.

3. Marketable Title

To the extent that simple de facto possession of a particular area is a good in and of itself, absence of legal title is of diminished importance. In contrast, to the extent that one wishes to market legal interests in the areas one occupies, it is important to have de jure rights as well as physical possession. Thus the fact that land has direct consumption value means that generally recognized legal title is of diminished importance. The fact that maritime areas, in contrast, are valued primarily for resource extraction means that generally recognized legal title assumes a more central role in the calculation.

The point is not merely that maritime areas are valuable primarily for the resources that they contain. Resources them-
selves, of course, can have direct consumption value, and certain states value their marine resources primarily as a way of satisfying domestic needs (for instance, if the domestic diet includes fish or domestic energy needs are met by offshore oil reserves). Rather, what matters is whether the resources contained in maritime areas are intended for international markets. In many cases, the ability to market maritime resources internationally accounts for a high percentage of their value. It is the fact that international marketability matters so much to maritime resources that makes the land and sea regimes so different.

There are two ways in which marketability of interests in maritime resources is essential for the enjoyment of maritime areas. First, the owner of the maritime resources may wish to exploit the resources directly and sell them on world markets. In order to do this, it helps for the would-be seller to have recognized legal title to the areas in question. An obvious way for an outraged world to exert pressure against a usurper is through boycotts of the sale of resources. It may be difficult to sell resources that are generally recognized as stolen.

Second, and more important, however, marketability is important because the state may wish to sell to someone else the right to exploit the resource in question. Although all coastal states are allocated maritime zones, not all states possess the technological and economic means to profit effectively from these areas. In order to reap the economic benefits of maritime space, coastal states may grant concessions or licenses to private companies or enter into joint venture arrangements with these companies.

A prime example of the importance of marketability through leasing of maritime space is the granting of rights to oil and mineral exploration. While some states search for oil and minerals through state-owned enterprises, a typical pattern is to lease the rights to explore to a private company. Oil companies do not want to face the risk of finding another company operating in the exact same area. Certainty of title is necessary to ensure sufficient economic return on investments without risk of challenge to title or competition within the same concession area. Where the state does not possess generally recognized title to an area, it is likely to find it considerably more difficult to induce private companies to enter into leasing arrangements. Private companies require a stable re-
gime of title to warrant investing the considerable sums of money necessary to develop a mining site.

Similarly, states sell the right to fish in their waters to foreign fishing fleets. Most typically, access to a coastal state's zone involves a system of licensing.

Since 1975, more than 150 bilateral agreements have been concluded, providing for collaboration and cooperation between fishing activities in the economic zones, prescribing the terms and conditions under which the fishing vessels of one party may operate in waters under the EEZ of the other, or granting reciprocal fishing rights to vessels of both parties in their respective zones of jurisdiction.76

It is important to the value of maritime areas that their owner be able to market, or alienate, legal interests in the resources that the maritime areas contain. The capacity to market or alienate interests in maritime resources depends in substantial part on possession of recognized legal title to the areas in question. Since water areas gain their value primarily from the opportunities that they present for resource extraction, recognized legal title is more important for water areas than for land areas, and lack of recognized legal title is considerably more problematic with regard to the former than the latter.

4. Exclusivity

There is a further reason that marketable title is important to maritime areas. In order to sell the right to fish or to prospect for minerals, one needs the authority to exclude. It was the increasing interest in selling such rights, indeed, that largely motivated the trend towards acquisition of title to ever-larger maritime areas and thus to ever-larger areas from which

   Each coastal state is free to introduce foreign capital and to obtain technical assistance from foreign nations or foreign enterprises, and it is also free to allow any foreign nations or foreign enterprise it chooses to engage in fishing activities through concessionary agreements and to secure the maximum of the total allowable catch for itself, even though it might not wish to use this catch for the consumption of its own nationals.
other users might be legally excluded. As non-navigational uses of maritime areas (fishing and mineral extraction) assumed greater prominence, it became increasingly important to acquire ownership in order to bar alternative users from one’s maritime spaces. The object was not merely to conserve finite resources for oneself. The ability to exclude also carried with it the right to sell leases—since a state might deny use of the area, it could charge a fee to others who wished to exploit the area’s potential.

The right to exclude is, of course, important with regard both to land and to water areas. But the power to exclude is obtained in different ways for land and sea. In the case of land territory, power to exclude is obtained primarily through physical power; a militarily strong state can detect the presence of intruders and expel them. If resource extraction is to be undertaken on land, a state can protect the operation through the placement of military troops.

In the case of large maritime areas, however, military enforcement is hardly practical. States face considerable difficulties in patrolling water areas to prevent unlawful fishing or mineral exploration activities. Enforcement of maritime rights requires the control and surveillance of an extensive area through the use of trained personnel as well as significant funds for development and maintenance of naval or coastguard vessels, surveillance aircraft, coastal radars, and other equipment. 77 The majority of states cannot rely on physical power to ensure their rights to maritime resources but must depend on a legal right of exclusivity.

It should be noted that the legal authority to exclude is of greater value to some states than to others. Some states, having stronger navies, are better positioned than others to protect the exclusivity of their resources through patrolling. Furthermore, some states are in a better position than others to harvest resources themselves. The more capacity a state has to harvest resources itself, the less its ability to enjoy its maritime

77. See Barbara Kwiatkowska, The 200 Mile Exclusive Economic Zone in the New Law of the Sea 87 (1989). See also Francis T. Chrisy, Jr., Transitions in the Management and Distribution of International Fisheries, 31 Int’l Org. 235, 243 (1977) (noting that many states will not be able to enforce their rights within the EEZ nor be able to impose sufficient fines and penalties to deter continued fishing).
wealth depends on the capabilities of others and thus on the ability to sell to others the right to fish or prospect. The fastest, richest, and most capable states do not need the legal power to exclude as much as the slower, poorer, and technologically undeveloped. They do not need the legal power to exclude because they have the capacity in fact to exclude by harvesting the resources in question before others arrive.

Over the course of the last century, economic reality came to attach increasing importance to a right to exclude that was in some sense foreign to the nature of water spaces itself. Physical possession was perhaps an adequate way to maintain exclusive use of land spaces, but it was not practically feasible for maritime areas. The power to exclude depended on the existence of legal rights. The most efficacious method for obtaining exclusivity has been through general recognition of exclusive title by the international community. States have developed a system of mutual accommodation in allocating and recognizing legal title to maritime areas. It is in each state's own interest to respect the exclusivity of another state's maritime zones. States must rely on this system of reciprocity to create a stable environment for the exploitation of resources. Thus, exclusivity (which is necessary for full enjoyment of maritime spaces, because it makes alienation of interests possible) turns on international recognition of marketable title.

5. Deep Seabed Mining: An Illustrative Example

The importance of, and difficulty in, obtaining marketable title was confronted when interest in deep seabed mining first arose in the 1960s. At this point in time, we noted earlier, developing countries seized the initiative to have this maritime area declared to be the "common heritage of mankind." This characterization had the effect of deterring more powerful states from unilaterally claiming areas of the deep seabed as subject to their sovereignty. Developing states envisaged that the exploitation of the deep seabed would be conducted and controlled by an international authority for the benefit of all states, particularly developing and landlocked states.

Efforts were then undertaken over a ten-year period to formulate this regime, which was embodied in Part XI of UN-
CLOS and in the revised 1994 Agreement. The regime that was ultimately adopted imposed some costs on the powerful states that might have staked out sovereignty interests of their own, had this option been open to them. However, these powerful states at least received assurances of gains for private economic actors situated on their territory; for absent the existence of some legal regime, it would probably not be possible to engage in deep seabed mining at all. Private economic actors derived substantial benefits from the fact that the issue was settled, and powerful states were satisfied with this compromise.

States and companies interested in mining for polymetallic nodules considered that a recognized and acceptable legal regime was essential for the large-scale investment required. Deep seabed mining requires considerable research and testing of prototype mining equipment and processing plants, which, in turn, need large capital expenditure. The U.S. mining industry estimated that seabed mining companies would need to spend approximately $1 billion per mine site prior to the commencement of commercial recovery. Banking and finance officials were unwilling to finance significant mining efforts in the absence of a stable, widely recognized legal regime in place to protect investments. The United States General Accounting Office reported that “the principal

81. See Bergman, supra note 72, at 487. This figure was put at $2.5 billion by Marie Dubs of Kennecott Copper Corporation and the American Mining Congress. David L. Larson, Deep Seabed Mining: A Definition of the Problem, 17 Ocean Dev. & Int’l L.J. 271, 278 (1986).
82. See Michael R. Molitor, The U.S. Deep Seabed Mining Regulations: The Legal Basis for an Alternative Regime, 19 San Diego L. Rev. 599, 601 (1982); Breen, supra note 73, at 202-03. A vice president of Chase Manhattan Bank testified before a Senate subcommittee that: “In view of the demonstrated desire of the international community to establish control over such activity, the present absence of political sponsorship and security of tenure consti-
financial institutions that underwrite seabed mining ventures told us they would not finance further technological development of actual mining operations . . . without a satisfactory Law of the Sea Treaty, and that they did not consider the reciprocating states agreement as a viable alternative.83

If a large mining company or consortia proceeded with investing in the exploration and exploitation of natural resources when the title of a state granting the right to do so was questionable, the mining company would anticipate a legal challenge as soon as it discovered a marketable amount of hydrocarbons. Such a legal challenge might impose considerable costs. For example, the president of the Third Law of the Sea Conference at one point announced an intention to ask the International Court of Justice for an Advisory Opinion on U.S. proposals for deep sea mining in the absence of a universal regime.84 It was recognized by one commentator that an adverse ruling could:

(a) influence world opinion; (b) be used by forces hostile to the United States in other international issues; (c) be available to domestic publics in the democracies in their internal power struggles to pressure their governments to cease support of the United States; (d) or could be used by domestic United States pressure groups against the administration in power.85

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Litigation could also be pursued against mining companies in domestic courts.\textsuperscript{86} Indeed, a mining company operating in these circumstances will likely also anticipate a physical challenge; oil exploration and drilling equipment is vulnerable to attack.\textsuperscript{87}

The importance of arriving at a settled legal regime was noted by Ambassador Richardson, who was the United States's Ambassador-at-large for the greater part of the negotiations for UNCLOS:

The result is that, in order to achieve the security that will justify investing $1.5 billion in a single deep seabed mining site, and in order to have the opportunity to recover that investment over a period of twenty years, the miner must have the consent of substantially all countries. Universality thus becomes necessary to the investor.\textsuperscript{88}

The exclusive right to mine sites was thus imperative to the mining industry for technical and economic reasons.\textsuperscript{89} Financial investors were unwilling to provide the needed capital in the absence of “a reliable system for identifying and resolving disputes over mining claims.”\textsuperscript{90} Investors considered that mere statements by government officials that mining companies were free to exploit the natural resources of the seabed were insufficient protection to guarantee exclusive rights, and the lack of a clear legal regime thereby decreased the likelihood of investment.\textsuperscript{91} International recognition of legal title was considered essential in order to exploit the resources of the deep seabed directly and sell the minerals on world markets.

\textsuperscript{86} See id. at 349 (canvassing these possibilities). See also H.G. Knight, Consequences of Non-Agreement at the Third U.N. Law of the Sea Conference 34-35 (1976).

\textsuperscript{87} See Jones, supra note 85, at 344-45. See also Breen, supra note 73, at 219.


\textsuperscript{89} See Brewer, supra note 73, at 43 (“Bankers regard the right to take a known quantity of ore from a defined site as critical to their security.”).

\textsuperscript{90} Breen, supra note 73, at 205-06.

\textsuperscript{91} See id. at 208.
B. Marketability and Mandatory Dispute Resolution

The different degrees of importance attached to legally recognized title in the cases of maritime and land territory translates into different degrees of receptivity to mandatory dispute resolution. Jurisdiction over territorial disputes can only be obtained by mutual consent, while jurisdiction over maritime disputes is essentially mandatory. The best explanation for this difference lies in the fact that marketable legal title is important for maritime areas but not particularly important for land areas.

1. Dispute Resolution for Land Territory: Jurisdiction by Mutual Consent

The existing regime for settling legal title to disputed land areas is entirely consensual. The state that is in physical possession of disputed territory cannot be compelled to submit to any mechanism that might pass judgment on its legal claims. Jurisdiction by mutual consent thus privileges physical power. A powerful state, which can withstand military assault and international diplomatic pressure, has no incentive to agree to dispute resolution procedures and, if it chooses, can remain in possession of disputed territory indefinitely.

When disputes over ownership of territory or over the position of a boundary have arisen, states have throughout history characteristically resorted to force as means of asserting their claims. Since the adoption of the U.N. Charter, of course, the use of force has been deemed unlawful unless in self-defense.\(^92\) Instead, all states are under an obligation to settle disputes by peaceful means.\(^93\) The U.N. Charter provides various means that states may employ for the resolution of disputes: negotiation, diplomatic channels, and third-party settlement such as arbitration or adjudication before the International Court of Justice.\(^94\)

\(^{92}\) U.N. Charter art. 2, para. 4.

\(^{93}\) Id. art. 2, para. 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.").

\(^{94}\) Id. art. 33, para. 1 ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation,
Yet force continues to be used. And while in theory, possession that comes about by use of force cannot result in legal title, the fact remains that sufficiently longstanding possession cannot be ignored regardless of how it came to be. States rely on this simple fact of life. Despite an occupation's illegality, third states still need to regulate their economic affairs, provide diplomatic or consular protection to their citizens, or otherwise interact with the entity controlling that area. Moreover, although illegal possession supposedly cannot result in title, the possessor continues in possession and continues to enjoy whatever benefits possession might afford. There is no way either to compel a decision as to which state is the lawful owner or to deprive an illegal possessor of its wrongful gains.

The existing system of international dispute settlement is a confirmation of the centrality of state sovereignty. Even under the U.N. Charter, legal mechanisms are importantly consensual. Negotiations or mediation will not proceed if states categorically refuse to discuss, let alone compromise on, particular matters in dispute. Similarly, states are not compelled to submit a matter to adjudication or arbitration. The use of third-party mechanisms is entirely within the discretion of states. States may opt for ad hoc arbitral tribunals, which are established specifically for the resolution of a particular dispute, or may resort to more permanent institutions such as regional courts or the International Court of Justice (ICJ), but they need not. There is no way to force a powerful state to submit its claims to legal determination, and no court or arbitral tribunal will proceed to announce its view on the merits of competing claims unless consent to jurisdiction has been given.95

2. Dispute Resolution for Maritime Areas: Mandatory Jurisdiction Under UNCLOS

Dispute resolution mechanisms for maritime law are radically different; indeed, the entry into force of UNCLOS has

95. "One of the fundamental principles of [the Court's] Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction." Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 101 (June 30).
been termed "the most important development in the settlement of international disputes since the adoption of the UN Charter and the Statute of the International Court of Justice." UNCLOS requires every State Party to submit disputes related to the interpretation and application of the Convention to third-party adjudication.

Compulsory dispute settlement was viewed as essential to the new law of the sea regime. One of the primary motivations behind the establishment of a binding mechanism was the desire to avoid the instability and uncertainty that could eventuate if parties to UNCLOS were left to interpret the provisions of the Convention unilaterally. The dispute settlement provisions are thus designed to guarantee the integrity of the text as well as to control the implementation and development of the Convention by States Parties. Moreover, the binding nature of the regime was supported, particularly by developing states, because it would be more likely to give less powerful states "equal standing before the law." Developing states believed that a binding regime would reduce the risk of more


97. See UNCLOS, supra note 3, pt. XV, § 2, 1833 U.N.T.S. at 509-13. Section 1 of Part XV permits states to use political avenues or alternative means of dispute settlement while Section 3 sets out the limitations and exceptions to compulsory dispute settlement. Id. pt. XV, § 3, 1833 U.N.T.S. at 508-09, 513-16.

98. See Kindt, supra note 96, at 1116.


powerful states using political, economic, and military pressures to force the developing states to give up rights guaranteed under the Convention.  

The dispute settlement system in Part XV, Section 1, of UNCLOS encourages states to settle disputes through diplomatic channels prior to invoking the compulsory procedures found in Section 2 of Part XV. However, if diplomatic efforts are unavailing, then Section 2 permits submission of the dispute at the behest of one of the disputant states. "Unilateral action is sufficient to vest the court or tribunal with jurisdiction, and that court or tribunal may render a decision whether or not the other party participates in the process."  

Section 2 allows states great flexibility to select their preferred forum at the time they sign, ratify, or accede to UNCLOS, or at any time thereafter. Under Article 287, paragraph 1, states may choose among:

1. the International Tribunal for the Law of the Sea established in accordance with Annex VI;
2. the International Court of Justice;
3. an arbitral tribunal constituted in accordance with Annex VII; and
4. a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.  

This variety of fora was created to encourage the negotiating states to accept compulsory, binding dispute settlements. A State Party may institute the compulsory procedure by unilateral application if the parties in dispute have chosen the

101. Noyes, supra note 100.
102. UNCLOS, supra note 3, pt. XV, § 1, 1833 U.N.T.S. at 508-09.
103. Id. pt. XV, § 2, 1833 U.N.T.S. at 509-13. Disputes falling within the terms of Section 3 of UNCLOS (such as some disputes relating to marine scientific research, fishing, law enforcement, military activities, and protection and preservation of the environment) may be excluded from mandatory adjudication or arbitration. See id. arts. 297-98, 1833 U.N.T.S. at 513-16.
same forum in their declaration. For states that have not specifically selected one of the above-listed procedures, there is a default clause; these states are deemed to have accepted arbitration. The identical default rule applies in the event that the states in dispute have accepted different procedures for settlement.

The rationale for general processes of compulsory dispute resolution was widely accepted. Some opposition was expressed in the group drafting the dispute settlement provisions to applying compulsory dispute settlement to maritime boundaries, due to the strength of the interests at stake in maritime boundary disputes. The compromise position reached was that Article 298(1)(a)(i) permits states to exclude disputes over the interpretation and application of Articles 15, 74, and 83 dealing with maritime delimitation from automatically pro-

106. UNCLOS, supra note 3, art. 287(3), 1982 U.N.T.S. at 510. When this issue was being debated, it was initially accepted that the parties would use the tribunal chosen by the defendant. However, dissatisfaction was expressed because some states were not prepared to accept the jurisdiction of the International Court of Justice if the defendant selected this forum. See Sohn, supra note 96, at 206.

107. UNCLOS, supra note 3, art. 287(5), 1982 U.N.T.S. at 510. Professor Sohn provides an interesting insight to the negotiation process in working out this default provision:

[T]he informal rapporteur of the working group suggested a non-binding secret ballot, on which each participant would list both a first choice and a second one. The result was that while the first choice listed all four dispute settlement methods, almost all of those who did not list arbitration as their first choice selected it as their second choice. It was agreed, therefore, that where the parties do not agree on a first choice, the parties would have to resort to arbitration. A complex issue was resolved by a simple procedural devise, and the full meeting accepted it by consensus.

Sohn, supra note 96, at 212.


If states cannot resort to international adjudicatory procedures to protect their rights, they are ultimately faced with the same problems arising from unilateral treaty interpretation that arise from unilateral claims. If their own interests are not adequately protected, what then is the incentive for states to accept a treaty that will inevitably contain rules designed to accommodate interests they do not share?

Id.

109. Id. at 781.
ceeding to third-party dispute resolution.\(^{110}\) However, if no agreement can be reached within a reasonable period of time, the states concerned must resort to the compulsory procedures provided for in Part XV.\(^{111}\)

States are of course not subject to the compulsory dispute settlement mechanism until they ratify or accede to UNCLOS. However, the nature of the treaty is such that few states feel that they can afford to remain outside of the regime, and over 130 states are now Parties to the Convention.\(^{112}\) Moreover, without accepting the regime in its entirety, states are not entitled to claim the substantive rights in question. Generally, it has been recognized that the Convention represented a package deal and thus no state could take advantage of any single provision without accepting the totality of the legal regime for the oceans created by the Convention.\(^{113}\) Factors that were said to indicate that new legal rights enshrined in UNCLOS could not be claimed by non-parties as customary law included the mandate of the Conference, the use of consensus in negotiations, the prohibitions on reservations to the Convention, and the intent of States Parties.\(^{114}\)


\(^{111}\) UNCLOS, \textit{supra} note 3, pt. XV, 1833 \textit{U.N.T.S.} at 508-16. States are required to submit maritime boundary disputes that arise after the entry into force of the Convention to compulsory conciliation. States must negotiate on the basis of the conciliation report, and if no agreement is reached, they must consent to submitting the matter to the mandatory regime in Section 2 of Part XV. \textit{Id.} art. 298(1)(a)(i), Annex V, 1833 \textit{U.N.T.S.} at 515, 557-60.

\(^{112}\) There are currently 135 Parties to the Convention. For an updated list of the Parties, see United Nations Division for Ocean Affairs and the Law of the Sea, \textit{Status – UNCLOS and the Agreement on Part XI}, at \url{http://www.un.org/Depts/los/los94sI.htm} (last visited March 6, 2001).


\(^{114}\) Surace-Smith, \textit{supra} note 84, at 1057.
The fact that possession of the substantive rights is a consequence of signing the very instrument that submits the state to mandatory dispute resolution presents a sharp contrast with land territory regimes. States are recognized as having territorial interests—and being entitled to use force to assert them—without having submitted to any system of peaceful dispute resolution.

The striking difference between dispute resolution for land and maritime areas is a consequence of the fact that marketable title is central to the enjoyment of maritime areas but less important to the enjoyment of land territory. Because the benefits of a regime of marketable title are so substantial, all states—whether wealthy and powerful or poor and weak—benefit from a system of mandatory jurisdiction. There are two aspects to this widespread desirability of a regime of marketable title for maritime areas. The first is a strong incentive to quiet title. The second is a strong incentive to recognize adverse rulings resulting from third-party adjudication.

3. The Incentive to Quiet Title

There is an important incentive to quiet title over maritime areas that does not exist with regard to land areas. To the extent that land areas can be enjoyed through the simple fact of possession, there is no reason for the occupier to jeopardize its position by submitting its claim to third-party jurisdiction. In contrast, to the extent that resources in maritime areas cannot be harvested and sold without recognized legal title, there is an incentive to take precisely that risk.

The need to provide institutions to quiet title to maritime areas was one of the chief rationales for establishing dispute resolution mechanisms under the Convention. This was noted by commentators when discussing the United States’s ratification. While the substantive provisions of the Convention were a major advance, it was noted:

Far more significant are substantive and dispute settlement provisions of the Convention that enhance the stability of expectations in the business of transporting oil and gas by sea, as well as extracting oil and gas from the continental shelf. The Convention is also important to the stability of expectations of investment bankers, insurance companies and others...
who underwrite and support shipping, offshore exploration and drilling, fishing and many other activities at sea.\textsuperscript{115}

Although submitting to third-party jurisdiction carries with it the chance that some of one's claims will not be recognized, a state is still in a better position than if left without any legal resolution of the dispute at all. Without a legal resolution, a state may lose all capacity to harvest and market resources because it can no longer market exclusive rights to private fishing fleets or oil companies. Thus, the incentive to create (and submit to) institutions of mandatory enforcement jurisdiction is much stronger for maritime disputes than for territorial boundary disputes.

The incentive to quiet title is particularly strong for economically weak nations that lack domestic capacity to harvest resources and must depend on outside developers and for small nations that intend to market rather than consume directly their maritime resources. For these, a way to quiet title is essential, and substantial advantages accrue from the creation of institutions to perform that function. However, strong and wealthy nations gain an advantage also, as their corporations play a leading role in the exploration and exploitation of resources and therefore reap substantial economic advantages from increased stability of expectations.

4. \textit{The Incentive to Recognize an Adverse Ruling}

An additional fact makes mandatory dispute resolution much more effective in maritime than in territorial disputes. In territorial disputes, if the current possessor does submit to jurisdiction and loses, it simply may refuse to comply with the judgment. There is no way for the international community to enforce its decisions against recalcitrant states; in important respects, compliance is voluntary.

For a state to ignore the decision of a court or tribunal is of course not without risks. There may be political pressure from world opinion; there is also a possibility of military challenge by the state that prevailed in its legal claim. Whether world political pressure is much of a deterrent is a question

much discussed by international lawyers. Idealists characteristically predict optimistically that world opinion and careful, principled diplomacy ordinarily will prevail. Realists, of course, dismiss such predictions as naïve and insist that a state will voluntarily vacate territory after an adverse legal decision only if it is in its interest to do so.116

Regardless of which side is right with regard to enforcement of legal decisions about land territory, it is clear that the ability to resist an adverse ruling on maritime delimitation is much more limited. Due to the centrality of marketable title to maritime areas, there is little value in continuing to claim maritime areas as to which one has been declared not to be the owner. The ability of a state to market that maritime area is virtually nullified. Maritime law thus has an asset in seeking enforcement of its norms. Third-party opinion matters a great deal more in maritime than in territorial sovereignty. The views of potential buyers are critical since the expected consequence of maritime acquisition is the sale of resources, rather than simple direct occupation. If the potential buyers believe that the state extracting the resources is not the state with ultimate legal title, this will make them less likely to buy or more likely to discount the price in accordance with the perceived increase in risk.

The rules relating to the allocation of maritime territory thus cater to the need of states to be able to market their interests in the resources of the oceans. Indeed, states are dependent on the existence and functioning of legal rules to ascertain what interests states have in the maritime areas adjacent to their coasts and to protect those interests through dispute settlement procedures in cases of conflict. States cannot solely rely on their economic strength or military power to benefit from the exploitation of natural resources in maritime areas.

116. See, e.g., Beth Simmons, See You in “Court”? The Appeal / Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes, in A ROAD MAP TO WAR: TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT 205, 208 (Paul F. Diehl ed., 1999); Hans J. Morgenthau, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 298-99 (5th ed., rev. vol. 1978). The fear of military measures by the prevailing state does not alter this assessment. Realists would quickly agree that if the state with the better legal claim also has the stronger army, it will likely end up with the territory. However, this result is one of physical power, they would argue, and not a result of any legal determination of title. See id.
These factors are more likely to hold sway with respect to land territory, where determinations of ownership are grounded in considerations of occupation and control.

Parts II and III of this Article have explored the historic and economic reasons for these contrasting sovereignty regimes. We now turn to the question of what lesson these two regimes might offer to international relations theory.

IV. IN SEARCH OF A COMMON DENOMINATOR

The true explanatory variable, we therefore propose, is not whether a particular space on the globe is territorial or maritime; it is whether its value derives from its potential direct consumption value or from its potential for international marketing. If an area can be directly enjoyed without internationally marketable title, then there is an incentive to appropriate it physically. However, if direct possession of the asset is of little or no value, and the reason for ownership of an area lies in marketing of its resources, then marketable title is essential, and the area must be acquired in ways that will be recognized by the world community. We expand on this argument below by discussing some examples of maritime resources that can be directly consumed and some examples of land-based assets whose enjoyment depends on international markets.

The co-existence of these two very different regimes has significant implications for international relations theory. On the surface, the two sets of legal rules draw on mutually inconsistent international relations paradigms: allocation of land territory has an affinity for international realism, while assignment of maritime space seems incompatible with realism because it is done in accordance with norms. On a deeper level, the very fact that the need for marketable title is the important explanatory variable itself raises a challenge to realism, which posits that legal norms, in particular norms assigning legal title, are fundamentally irrelevant in an anarchical world. If realism were correct, then the absence of institutions of world government would make it difficult to create a stable regime to protect legal title. The existence of a legal regime for assignment of title to maritime spaces suggests that where marketable title is truly important, legal regimes can be devised to protect it, regardless of the "anarchical" state of world politics.
The maritime regime is successful, however, primarily because incentives to "cheat" do not exist in the normal sense. The important point is not that marketable title is valuable, but rather that maritime spaces are hardly worth possessing without it. Our ultimate conclusion, therefore, is that normative regimes are compatible with realism in circumstances where the norms themselves account for all, or a very high proportion, of the value of the assets in question. The fact that a mandatory regime of marketable title for maritime areas and resources exists should not be taken as a cause for general optimism about the creation of international legal decision-making processes in the future. Its success is limited to cases in which direct consumption of the particular property or asset in question is not possible.

A. The Economics of Marketable Title: Fish, Diamonds, and Antarctica

The correct variable explaining the divergent treatment of maritime and land-based assets is whether the particular sort of asset is amenable to physical capture and direct consumption without participation in international marketing institutions. The value of land territory is amenable to physical capture, because land can mostly be enjoyed through the simple fact of physical occupation. Maritime space in large part is not—because meaningful physical occupation is impossible and because the reasons for wanting title to maritime space lie elsewhere (in the need to market extracted resources internationally).

The conclusion that marketability of property interests is important is not new. Existing economic approaches to property law have long argued that private ownership of property increases the economic value of property and that marketability of title is an important contributor to property's economic value. Private ownership creates incentives to invest in and improve property, so that resources will not be overly exploited, leading to a "tragedy of the commons." Marketability of title increases this effect because the owner can enjoy the increase in value of the property resulting from investment or

conservation, regardless of whether the increase actually eventuates during the period of her or his ownership or at a later point. The owner captures later-occurring increases in value resulting from current investment or conservation through the present increase in the market value of the property.\textsuperscript{119}

Writers on the international law of sea have employed exactly this reasoning. It has often been argued that the maritime regime of \textit{res communis} familiar from earlier historical periods had potential for the classic "tragedy of the commons."\textsuperscript{120} Particularly with regard to living resources, allowing unrestricted fishing creates incentives for over-harvesting, as each state’s fishing vessels would seek to catch as much as they could without regard to any long-term need for conservation. Thus, the argument that a regime of private title promotes efficiency in the maritime context should strike most readers as familiar.

What has not been sufficiently highlighted, however, is the degree to which maritime resources depend on marketability rather than direct consumption and the importance that this factor plays in explaining the existence and contours of the international legal regime. From the point of view of economic justifications for private property, it is sufficient to point out that private title makes both sorts of value possible. Yet, for assets that can be enjoyed only if one has marketable title, the importance of legal regimes is heightened substantially. What accounts for the particular regime that has evolved for the assignment of maritime spaces is the fact that enjoyment of maritime resources is far more difficult if no reliable legal regime for acquiring marketable title exists.

The generalization about appropriation of land and maritime assets, however, is a rule of thumb. The real issue is the need to market assets internationally, not whether they are land-based or water-based. In the discussion below, we will

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point out how particular examples of land based and maritime assets differ from the paradigmatic examples on which the discussion has centered to this point. Our brief discussion of fishing rights confirms that the important question is whether possession of an asset must be accompanied by marketable title in order for its value to be enjoyed; the land/water distinction is important only insofar as it correlates with the question of importance of marketability. Our discussion of Sierra Leone diamonds and of the regime of Antarctica suggests that, for land territory as well, the true explanatory variable is the degree of importance attached to direct possession as opposed to marketability.

1. Fish

Certain types of maritime assets can be appropriated physically through simple capture, and, conversely, certain types of land-based assets are more dependent on marketable title. As an example of the former, consider fishing rights. Sale of fishing rights depends on marketable title. A country will only be able to license foreign fishermen to fish in an area if the area is one as to which their title is generally recognized. In this sense, our generalization holds true. With regard to maritime spaces, marketable title matters because it is a large part of the reason that states want to own particular maritime areas.

However, fish can be physically captured, and once captured, they are valuable even outside a regime of marketable title. The prevalence of illegal, unregulated, and unreported fishing is viewed as “one of the most severe problems currently affecting world fisheries.”

Fish may be caught unlawfully if vessels enter a coastal state’s EEZ and harvest stocks without a license. Alternatively, fishing vessels may stay just outside the EEZ and capture fish that cross from the EEZ into high seas areas, an activity that may also be unlawful under the Convention.


122. The situation of fish crossing from the EEZ into the high seas, or between the exclusive economic zones of several states, is addressed in UNCLOS in provisions relating to straddling stocks and highly migratory species. See UNCLOS, supra note 3, arts. 63-64, 1833 U.N.T.S. at 422-23. The
buyer can determine whether the fish were lawfully taken from a particular maritime area. The possession of the fish is sufficient to vest property rights without any constraints or dependence on legal rules.

In this respect, fish are different from hydrocarbons. Because of the extensive investment necessary to locate and then exploit hydrocarbons, and because of the difficulty of protecting one’s investment through purely physical means, hydrocarbon licensing is a better example of legal norms than fishing. Even though fish are a maritime resource, they are assets that do not fit in the contrasting land/sea paradigm. Certainly the very nature of fishing, as a smaller and mobile operation, distinguishes it from hydrocarbon exploitation. The norms relating to fishing, however, stand in contrast as well. Although rules have been established to regulate fishing in different maritime zones, considerable ambiguity and discretion remain in determining the substantive content of those rules.123 Continuing problems of illegal, unregulated, and unreported fishing, as well as the prevalent practice of reflagging vessels, allows these assets to be enjoyed by virtue of possession.124

The available dispute settlement procedures in UNCLOS reinforce this situation by excluding the vast majority of fisheries disputes from compulsory procedures entailing binding decisions.125 Even if fishing activities are within the jurisdiction

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123. The vagueness inhering in the principles relating to fishing on the high seas is evident in provisions imposing duties of cooperation for conservation and management, without further specification of what that duty might involve. See id. arts. 117, 118, 1933 U.N.T.S. at 441. Considerable discretion is apparent in the rules relating to the coastal state’s sovereign rights in the EEZ—the Convention leaves decisions relating to maximum sustainable yield, the total allowable catch and what states may access the zone under what conditions to the discretion of the coastal state. See id. arts. 61-62, 1933 U.N.T.S. at 420-22.

124. Harvesting of fish in contravention of regional management organizations or arrangements occurs precisely because fishing vessels do not consider themselves bound by rules if the flag state is not a member or signatory to the legal regime—or the fishing vessel will register with a state in order to avoid legal restrictions on fishing. See Oceans and the Law of the Sea, supra note 121, ¶¶ 249-251, at 29.

125. See UNCLOS, supra note 3, art. 297(3), 1933 U.N.T.S. at 514. Paragraph 3 of Article 297 excludes all disputes relating to the coastal state’s
of a tribunal or court constituted under UNCLOS, a decision that fish had been caught unlawfully cannot be easily enforced. The ability to sell fish in international markets by virtue of possession of the asset indicates that there is little incentive to obtain marketable title. The value of marketable title for fishing, as we mentioned above, is the ability of a state to license fishing in a defined area. This licensing activity remains valuable if a state wishes to sell the fish harvested from that defined zone in the ports of the licensing state. If the licensing state is unable to police the fishing activities under its legal jurisdiction, unlawful fishing can still prove profitable. As such, fishing is not a pure example of norm-based theory at work; the realist aspects arise out of the fact that fish can be captured, and enjoyed, outside the law.

2. Diamonds

Conversely, there are land-based resources that are vulnerable to legal norms because their enjoyment depends at least in part on possession of marketable title. A particular example of such a resource is diamonds from conflict zones. The so-called “blood diamonds” have been described as the heart of the conflict between government and rebel forces in Sierra Leone.126 The rebels control the major diamond producing areas in Sierra Leone and use the income generated from diamond sales to purchase weapons for the civil war.
The conflict in Sierra Leone has witnessed large numbers of civilian casualties and deaths as well as savage violations of human rights. The profitable trade of diamonds through international markets has been vital for the rebels as a source of income in pursuing the war. As one journalist has noted emotionally, "When diamonds as symbols of love become symbols of hate, it is time to see them for what they are and control their mobility."127

In early July, the Security Council adopted a resolution under Chapter VII of the United Nations Charter requiring all states to boycott the sale of diamonds from Sierra Leone.128 All states are required to carry out the decisions of the Security Council,129 and the obligations under the United Nations Charter override any obligations under other international agreements.130 The resolution requires all states to "take the necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory."131 This embargo remains in place until the government of Sierra Leone establishes an effective Certificate of Origin regime for its rough diamonds.132 At that time, the rough diamonds controlled by the government through the certification regime would be exempt from the sanction.133

The United Nations had previously placed embargos on diamonds from areas held by Angolan rebels and had set up a panel to monitor the illegal exploitation of resources, includ-

128. S.C. Res. 1306, U.N. SCOR, 4168th mtg. ¶ 1, U.N. Doc. S/RES/1306 (2000). In accordance with Article 41, which is part of Chapter VII, the measures the Security Council may take "include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." U.N. CHARTER art. 41. The measures typically taken by the Council in the face of a threat to international peace and security are economic sanctions, arms embargoes, and the suspension of air transport. The Council is not limited to the types of sanctions specifically mentioned in the Charter but may devise different sanctions, with differing degrees of severity, to meet the needs of the situation. See id. arts. 39, 42.
129. See U.N. CHARTER art. 48.
130. Id. art. 103.
132. See id. ¶ 2.
133. See id. ¶ 5.
ing diamonds, in Congo.\textsuperscript{134} However, the measures taken against Sierra Leone were of a different nature (described as “experimental”),\textsuperscript{135} as they were designed to create a particular cooperative regime to certify the origins of the diamonds.

The question of cooperation in this regime is paramount.\textsuperscript{136} In particular, the role of the Liberian president, who supports the rebels in Sierra Leone and has acted as a middleman in this diamond trade, is critical for its effectiveness.\textsuperscript{137} The Security Council resolution expressed concern over reports about Liberia’s role in diamonds transiting its territory, but did not apply any sanctions against Liberia’s diamond trade.\textsuperscript{138} This lacuna has the potential to allow the illegal trade to continue. However, the importance of marketable title nonetheless impacts on the extent that enjoyment can be derived from mere possession. A U.S. company had procured a contract from the rebels for the entire mining rights in Sierra Leone but has not been able to market the contract.\textsuperscript{139}

The effect of the Security Council resolution is that the value of the good in question is greatly reduced in the absence of marketable title:

\textquote{At least the UN ban will drive down the price of diamonds from Sierra Leone. Already De Beers, which handles about 70% of gemstone production, has said it will not buy diamonds from any conflict zone. Other leading traders have said the same, as have the governments of countries—Belgium, Israel...}

\begin{itemize}
\item[\textsuperscript{134}] See Carola Hoyos, \textit{Security Council Acts on Diamond Trade}, \textit{FIN. TIMES}, July 1, 2000, at 5.
\item[\textsuperscript{135}] Barbara Crossette, \textit{UN Outlaws Sierra Leone Diamonds}, \textit{INT’L HERALD TRIB.}, July 7, 2000, at 4.
\item[\textsuperscript{136}] “No one believes that a ban on something as tiny and valuable as diamonds can be completely effective; someone will always buy them.” \textit{Is That a Rebel Rock On Your Finger?}, \textit{ECONOMIST}, July 8, 2000, at 42 [hereinafter Rebel Rock]. See also Ewen MacAskill, \textit{Back Diamond Ban, Cook Urges Traders}, \textit{GUARDIAN (London)}, July 7, 2000, at 20 (noting that support was required from the major diamond trading centers in Antwerp, Tel Aviv, and Bombay).
\item[\textsuperscript{138}] S.C. Res. 1306, supra note 128, Part A.
\end{itemize}
and India—which import rough diamonds for cutting and polishing. This means that diamond smugglers will get less money from dealers prepared to break the ban.140

A further threat to the diamond industry comes from consumer pressure and the risk of a boycott against diamonds, similar to the boycott organized against furs.141 This potential backlash has affected both diamond producing countries as well as importing countries.142 Exports of diamonds can account for a significant proportion of a country's gross domestic product.143 The diamond industry has become very wary of diamonds from Liberia (which has acted as a conduit for the blood diamonds), making them more difficult to market.144

Importing countries are anxious to avoid the threat of a consumer boycott and have thus agreed to consider a plan whereby legally mined diamonds would be sold in sealed containers labeled with the country of extraction.145 In addition, the certificate will use special printing to avoid the possibility of certificates being counterfeited.146 The intention is to create a paper-based "chain of warranties" from the extraction of the diamond through to the jeweler.147 The importance of marketable title has been recognized as the key to preventing the illicit trade: "smuggling must be prevented by creating competitive business conditions for legal traders, making it easier and more profitable, or at least as profitable, to do business legally."148

140. Rebel Rock, supra note 136.
141. Masland, supra note 139, at 31.
143. See Masland, supra note 139, at 30.
144. Morning Edition Show, supra note 139. See also Andrew Parker et al., Liberia Stokes African Gem War: President Named as Key Figure in Sierra Leone Rebels' Illicit Diamond Trade, Fin. Times, July 10, 2000, at 1 (citing Peter Meeus, the general director of Antwerp's Diamond High Council, describing the black market in illicit diamonds as being "marginalised").
146. 'Clean' Stones diamonds: experts to set up certification system, Agence France Presse, July 12, 2000, LEXIS, News Group File.
147. Parker et al., supra note 142.
148. Id. (citing a report by the U.S. Agency for International Development on diamonds and the conflict in Sierra Leone).
3. Antarctica

The law relating to Antarctica provides another case study; like the case of the legal response to Sierra Leone diamonds, it is a regime of land-based property that in certain respects more nearly resembles the rules regulating maritime property. Although a land-mass, Antarctica is largely uninhabitable because approximately 98% of the continent is covered by ice. Beyond the land-mass and the permanently frozen shelf ice, there is a large area of sea that is frozen in some seasons and navigable in others.

Antarctica is important because of its pristine environment and its many scientific attributes relating to its marine ecosystem and its impact on the world’s climate. However, it is now reasonably certain that Antarctica also contains valuable reserves of natural resources, such as coal, oil, gas, and precious metals. With this potential wealth, it is unsurprising that states would make claims to sovereignty over areas in Antarctica. Claims to sovereignty have been based on the view that states consider Antarctica to be *terra nullius.*

States have sought to fortify their title by the ordinary methods of administrative control and state activity. The question has been

149. There is some uncertainty as to who first sighted Antarctica—the United States, the United Kingdom, and France have all claimed that they were the first to discover Antarctica. In the second half of the 19th century and then in to the 20th century, sealing and whaling activities increased in the area. Claims began to be made to the territory of Antarctica in 1917. In that year, the United Kingdom claimed the whole of Antarctica. This was followed by claims by New Zealand in 1923, France in 1924, Australia in 1933, Norway in 1939, and then Chile and Argentina in 1940. The claims of the United Kingdom, Chile, and Argentina overlap. There is also one sector, Marie Byrd Land, that has not been claimed. Admiral Byrd discovered this sector and claimed it for the United States, but his claim was not officially adopted. The United States and Russia do not recognize the claim of any other state.

150. For example, the United Kingdom resisted possible attempts at control by the United States when it learned in 1934 that an American explorer was to establish a post office at the expedition’s base in the Ross Dependency. Britain considered that this act could well infringe on its sovereignty as well as the administrative rights of New Zealand in the area. The United States claimed that the United Kingdom could not establish sovereignty based on mere discovery. In response, the United Kingdom pointed to regulations and an Order in Council that had been passed with respect to the Dependency and also to the issue of whaling licenses along with the appointment of a special officer to act as magistrate for the area. Any issuance of
whether acts of intermittent exploration and temporary sojourns by scientists in isolated camps could be considered sufficient for states to have established control over the relevant area.

The claimant states recognized that it was not physically possible for them to assert their sovereignty over Antarctica in the same way as other land territory. Instead, a legal regime was created by virtue of the 1959 Antarctica Treaty. This agreement basically “freezes” (or “puts on ice”) all territorial claims to Antarctica. Existing claims to sovereignty in Antarctica are not affected by the treaty, but Article IV(2) provides that:

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

The 1959 Treaty has been ratified by all the states actively interested in Antarctica. This basic legal regime has been supplemented by the 1972 Convention for the Conservation of

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stamps made in the United States or dispatch of mail was only acceptable to the United Kingdom if those acts were not meant to be an assertion of United States sovereignty over the Dependency.


152. Id. art. IV, 12 U.S.T. at 796, 402 U.N.T.S. at 74.

153. The treaty also provides for freedom of movement and scientific exploration throughout Antarctica. Antarctic Treaty, supra note 11, art. II, 12 U.S.T. at 795, 402 U.N.T.S. at 74. The parties further agree to cooperate with one another and not to use Antarctica for military purposes. Id. art. I, 12 U.S.T. at 795, 402 U.N.T.S. at 72. The treaty provides for meetings of the consultative parties at “suitable intervals and places.” Id. art. IX, 12 U.S.T. at 798, 402 U.N.T.S. at 78. These Consultative Meetings have adopted over 150 recommendations concerning activities in Antarctica. While these recommendations are non-binding, they have led to important conservation measures. CHRISTOPHER C. JOYNER, GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL PROTECTION 62-63, 66-67 (1998).
Antarctic Seals\textsuperscript{154} and the 1980 Convention for the Conservation of Antarctic Marine Living Resources.\textsuperscript{155}

Although the 1959 Treaty prevented any further assertions of sovereignty to Antarctica, it did not resolve the question of rights to mineral resources. Once again, the relevant states turned to legal norms as a way of formulating an approach that would accommodate mutual interests. An attempt to meet this need was first made in 1988 with the adoption of the 1988 Convention on the Regulation of Antarctic Mineral Resources Activities.\textsuperscript{156} This Convention has not entered into force—primarily because some States Parties wished to ban outright any mineral exploitation.\textsuperscript{157} The compromise reached led to the adoption of a Protocol on Environmental Protection to the Antarctica Treaty, which prohibits all mining for at least fifty years, with the option to continue the ban thereafter.\textsuperscript{158} The result of this inter-state cooperation is that no mining company will want to take the risk of investing in an operation where legal title is uncertain. The cooperative regime created is thus comparable to the system established for the non-living resources of the oceans.

B. \textit{International Realism, International Norms, and the Two Sovereignty Regimes}

This emphasis on the importance of international marketable title appears to present a challenge to international relations theory. Certain theorists—those of the "realist" school of thought—have dismissed the importance of international legal institutions.\textsuperscript{159} Yet, with regard to the international law of the sea, the existence of legal institutions for acquisition and

\begin{itemize}
\item \textsuperscript{156} Convention on the Regulation of Antarctic Mineral Resources Activities, June 2, 1988, 27 I.L.M. 859, 868.
\item \textsuperscript{157} Australia and France, for example, proposed that Antarctica should be turned into a wilderness reserve where all mining and exploitation would be forbidden. Catherine Redgwell, \textit{Current Developments: International Law (Antarctica),} 39 INT’L & COMP. L.Q. 477 (1990).
\item \textsuperscript{159} See, \textit{e.g.}, John J. Mearsheimer, \textit{The False Promise of International Institutions,} 19 INT’L SEC., Winter 1994/95, at 5.
\end{itemize}
quieting of title is of central importance. It appears from the
UNCLOS example that, where marketability of title really mat­
ters, states have been able to devise ways to overcome the "an­
archy" of international relations and create mandatory legal
regimes. We conclude, however, that the success of interna­
tional law in creating such regimes depends on the special cir­
cumstances of the maritime law situation and that UNCLOS,
even if it fulfills its creators' expectations, may not be cause for
general optimism about international legal processes. The
reason is that what is central about the maritime situation is
not so much that marketable title is of value, but that without
marketable title maritime areas are not of much use at all.

1. Land and Realism; Water and Norms

Speaking generally, the legal doctrines dealing with the
acquisition of land territory have a natural affinity for the real­
ist international relations paradigm (sometimes thought to be
the dominant paradigm in the discipline). By contrast, the
doctrines for assignment of rights to maritime spaces do not fit
so easily within this power-based model, but have been very
much dependent on the creation and recognition of norms.

The general affinity of land acquisition rules for realism
follows from the realist focus on force. Realism, put very sim­
ply, explains international relations in terms of the interests
that states have and their ability to effectuate those interests
through imposition of their will on other states. Realists insist
that states are not bound by norms, but remain free to violate
international law with impunity whenever it is in their interest
to do so.160 In the "anarchical" international system, no supe­
rior force exists to coerce states into compliance if it is not in
their interest to act so.161

160. Traditional realists have analyzed international relations through a
lens where power and laws represent two different poles. The scholars that
have classically represented this approach include Hans Morgenthau, Georg
Schwarzenberger, and George Kennan. See generally HANS MORGENTHAT,
POLITICS AMONG NATIONS (5th ed. 1973); Ian Brownlie, The Relation of Law
and Power, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN
HONOUR OF GEORG SCHWARZENBERGER 19 (1988). Neorealists (or "structure­
realists"), such as Kenneth Waltz, also construct the international system
without a role for international law. See, e.g., KENNETH N. WALTZ, THEORY OF

161. MORGENTHAL, supra note 160, at 290-91, argues:
The affinity between realism and the legal doctrines surrounding acquisition of land territory lies in the fact that the legal doctrines regulating acquisition of land rely importantly on the sheer fact of physical possession. As we have described above, this reliance has both substantive and procedural aspects. Substantively, the most important consideration for assignment of title to land territory is continuous effective occupation of the territory. Procedurally, there is no legal mechanism by which a state in occupation of territory can be forced to submit to a binding determination of title. Thus, a powerful state with military capability can continue to hold territory and, over the long term, can consolidate its legal claim at the expense of its weaker neighbors.

A different explanation is needed, however, to understand the way that maritime territory is allocated. As noted above, maritime territory cannot be occupied in the same manner as land territory.\textsuperscript{162} For the oceans, physical occupation is irrelevant, and for this reason military capabilities are irrelevant as well. Furthermore, in order to become fully eligible for assignment of maritime space, a state must sign the United Nations Convention on the Law of the Sea.\textsuperscript{163} The procedural consequence of signing the Convention is automatic amenability to the jurisdiction of international tribunals. Moreover, once adjudication of the correct maritime boundary is complete, the resulting delimitation is in large part self-enforcing, because third parties will not be interested in purchasing rights to explore or exploit an area from the losing party.

The realist explanation of international relations therefore does not explain satisfactorily the legal doctrines regulating the allocation of maritime territory. Allocation of maritime territory is largely dependent on norms (rather than force) and realists deny that norms constrain state behavior.

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\textsuperscript{162} See supra Part II.B.

\textsuperscript{163} UNCLOS, supra note 3.
when important interests are at stake. To understand maritime law, it is therefore necessary to turn to alternative international relations paradigms. Liberal and neoliberal theories (which are sometimes referred to as "idealist" because of their reliance on norms) have responded to realists' emphasis on power by insisting that legal and social norms constrain states in important ways. These legal and social constraints exist regardless of the absence of any single actor with the capacity to force recalcitrant states into compliance.

The emphasis on norms is perhaps best articulated in what has been denominated "regime theory." Regimes are "implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations." They are formed,

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165. Thus, Keohane writes, "the implication that the search for power constitutes an overriding interest in all cases . . . [is] rejected. Under different systemic conditions states will define their self-interests differently." Robert O. Keohane, Theory of World Politics: Structural Realism and Beyond, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 503, 529 (A. Finifter ed., 1983). See also Duncan Snidal, The Limits of Hegemonic Stability Theory, 39 INT'L ORG. 579, 593-94 (1985); Abbott, supra note 164, at 350.

166. As with international liberal theory, a variety of theories employing the concept of regimes have been devised and analyzed. For an overview of the different theories, see generally Stephan Haggard & Beth A. Simmons, Theories of International Regimes, 41 INT'L ORG. 491 (1987); Oran R. Young, International Regimes: Toward a New Theory of Institutions, 39 WORLD POL. 104 (1986); Andreas Hasenclever et al., Theories of International Regimes (1997).

167. Stephen Krasner has defined regimes as:

implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given
regime theory predicts, when the interests of states in a particular issue area converge around certain norms and there is widespread, general recognition that cooperation is essential to achieve particular goals. 168 International regimes enhance compliance with international agreements as they establish legitimate standards of behavior for states to follow by reducing the incentives to cheat and enhancing the value of reputation. 169 Norm-based theories—and in particular, regime theory—more adequately account for the substantive and procedural aspects of the legal doctrines for assignment of maritime space than does realism. It is for this reason that regime theory has been used, not surprisingly, to explain the emerging law of the oceans. 170

2. Maritime Law as a Special Case

The law for allocation of maritime areas poses a challenge to realism in the following sense. The above analysis suggests that where marketable title really matters, ways can be found to provide for it. The two regimes of maritime and land property are reconcilable because the common denominator is the

area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.

Stephen D. Krasner, Structural Causes and Regime Consequences: Regimes as Intervening Variables, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983). This definition has been criticized because of the difficulties in precisely identifying, and distinguishing between, the relevant procedures. See, e.g., Haggard & Simmons, supra note 166, at 493-94; Young, supra note 166, at 106. Robert Keohane has defined regimes more simply as, “institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations.” Robert O. Keohane, Neoliberal Institutionalism: A Perspective of World Politics, in INTERNATIONAL INSTITUTIONS AND STATE POWER, supra note 164, at 4.

168. “The creation of international rules, regimes and institutions is seen as a purposeful activity designed to improve unsatisfactory situations.” Abbott, supra note 164, at 354.


presence or absence of a need for legal mechanisms to clear title. Realism, however, seems to predict that strong and stable legal regimes, regardless of their desirability, are not possible in a state of anarchy such as international relations. 171 To the realist, legal norms require the presence of a sovereign capable of forcing individual actors to comply. The realist would recognize that, in some circumstances, a stable system of norms and norm enforcement would be mutually preferable. The realist would predict, however, that in such circumstances, the suboptimal state of affairs would remain in effect because a mutually beneficial solution would be impossible to attain.

While the existence of a stable set of rules and institutions for allocation of maritime space poses a challenge to realism, it turns out on closer examination that the challenge is a very limited one. Maritime territory presents a special case, perhaps not entirely unique, but of quite limited relevance. The reason is that in an important sense the rules and institutions for allocation of maritime territory are not conflictual. The realist can explain the special treatment of maritime territory by pointing to the unusual circumstance that no state has an incentive to appropriate maritime assets outside the regime of marketable title. There is, in other words, no incentive to cheat.

The possibility of an incentive to violate the rules is precisely the typical issue of concern to the realist. States with the power to seize the assets of their neighbors will do so without concern for normative prohibitions, even in circumstances where all states might benefit from general norms against seizure. Each state knows that its own conformity to the rules may not be reciprocated by the others; moreover, regardless of what the others do, the incentive to violate the rules oneself exists. The realist thus bases her or his pessimistic conclusion on the existence of incentives to cheat.

The important distinction between paradigmatic land-based and maritime assets lies in the existence of incentives to cheat. The realist is concerned that it will be possible to cheat by seizing property belonging to others and notes that such

171. See, e.g., Joseph M. Greico, Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism, 42 INT'L ORG. 485 (1988) (arguing that the inhibitions for cooperation are considerably greater than acknowledged in neoliberalism).
seizures are achievable in the absence of centralized enforcement mechanisms. What makes paradigmatic maritime assets distinctive is that they are not valuable in the absence of legally sanctioned title. There is no reason to seize an asset that cannot be marketed when the asset is of a type that is only valued for its sale price. If an asset has no direct consumption value, and the fact of its illegal acquisition will be public knowledge, then the incentive to seize it is correspondingly diminished.

The paradigmatic example of maritime assets—rights to license hydrocarbon exploration and exploitation—supports a strong and stable regime of maritime rights because once the owner is determined, other states have a very much diminished capacity to enter into licensing arrangements themselves. Maritime law is importantly cooperative rather than conflictual. The history of the drafting of UNCLOS provides ample evidence of the divergent demands and the difficulty of reconciling them. However, the incentive to reach agreement was strong (because some regime for allocation was perceived to be necessary) and, more importantly, once agreement was reached, ability to violate the rules was minimal.

Ironically, allocation of rights to land territory and to maritime space appear equally “zero sum” in the sense that what is given to one state necessarily comes at the expense of its competitors. However, at a deeper level, allocation of maritime space is importantly a coordination problem, rather than a distribution problem. Once rights are assigned, all states lose their interests in violating those rights. All states have an interest in reaching a solution to the problem of maritime allocation, and once a solution is reached, it is self-enforcing. The

172. This conclusion can be rephrased in terms of game theory. Game theorists have long recognized that certain games pose pure coordination problems; that the players have no conflict of interest. One example, attributed to Thomas Schelling, concerns two friends who become separated in a department store. They each wish to guess where to go to find the other, knowing that the other will be engaged in the same endeavor. The only thing that matters is that they both arrive at the same conclusion, for if they do, they will be able to meet. There is no conflictual interest so long as neither care about the location except insofar as it is the one chosen by the other friend. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 54 (1980).

International examples of coordination problems are easy to identify. Standardization of equipment, such as electric plugs or communications conventions (where neither state has yet developed a vested interest in any of the alternative standards) are commonly given examples.
essential difference between the regimes for allocation of land and water rights is that in the former case, illegally seized property is almost as desirable as property that is acquired consistently with legal norms, while in the latter, illegally seized property is hardly worth having.

IV. CONCLUSION

Seen thus, the basic principles for land and sea appear consistent. First, the initial dichotomy we noted is oversimplified because certain land-based assets (Antarctica) more nearly resemble maritime assets than they resemble paradigmatic assets on dry land. Second, once the true explanatory variable is identified—the proportion of the asset's value that is dependent on possessing legal title to the asset—the inconsistency disappears. In a context where legal title is necessary to enjoy a particular asset, it is not surprising that de facto possession is devalued and conformity to rules of acquisition becomes predominant. Law works well in the maritime context only because there is no incentive to violate it.

Does this mean that the egalitarian historical account of the rules for allocation of maritime space is an illusion? And does this economic analysis implicitly cast doubt on the ability of international law generally to structure conduct for the better, by explaining the appearance of conformity to rules in the UNCLOS context in terms of self-interest? Perhaps UNCLOS is not, in reality, “the most important development in the settlement of international disputes since the adoption of the U.N. Charter and the Statute of the International Court of Justice,” as one author claimed.173 Perhaps the UNCLOS solution works only because maritime law is a uniquely easy case.

One test of this pessimistic conclusion is likely to be the robustness of UNCLOS decision-making in areas outside the paradigmatic ones on which we have mainly focused in this article. The ability of UNCLOS adjudication to command respect even when self-interest counsels defiance might better be tested with regard to fishing rights, vessel seizures, international maritime pollution, or marine scientific research. Surely, however, one should not become too pessimistic. A habit of obedience to international tribunals—and of genera-

173. See Boyle, supra note 96, at 37.
lized respect for international legal norms—might prove, over time, ever harder to break. We have not yet arrived at the final answer in the debate between international realists and their opponents. Whether progress towards a generalized international rule of law will be significantly hastened by the development of institutions such as UNCLOS remains to be seen.