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**THE CONCEPT AND REGIME OF THE EXCLUSIVE
ECONOMIC ZONE UNDER THE LAW
OF THE SEA CONVENTION AND
IN STATE PRACTICE**

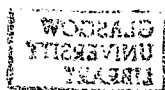
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**Thesis submitted to the University of Glasgow
for the Degree of Doctor of Philosophy**

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A. BOUHEDJILA

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TABLE OF CONTENTS

Acknowledgments	2
Table of Contents.....	3
Summary	7
Abbreviations	10
Table of Cases	14
INTRODUCTION	15
CHAPTER ONE : ACCESS TO LIVING RESOURCES OF THE SEA'S WATER COLUMN PRIOR TO THE FIRST SUBSTANTIVE SESSION OF UNCLOS III, JUNE 20, 1974	26
Introduction	
Section I : Freedom of Access to Living Resources of the Sea's Water Column under the General Concept of Freedom of the Seas	26
Section II : The Coastal State's Exclusive Fishing Rights	30
A. The Territorial Sea	30
B. The Post - 1930 Period Claims to the Resources of the High Seas	32
C. The Question of Exclusive Fishing Rights at UNCLOS I (1958) and UNCLOS II (1960)	38
D. The Geographical Scope of the Coastal State's Exclusive Fishing Rights in the Post-Geneva Conferences Period	42
CHAPTER TWO : EEZ-COASTAL STATES	72
Introduction	
Section I : The Coastal State's Economic Rights in the EEZ	72
A. The Scope of the Coastal State's General Rights over the EEZ's Economic Activities	73
B. The Content of the Coastal State's Jurisdiction over the Living Resources of the EEZ Water Column	76
1. The Coastal State's Powers with Regard to Allocation of the EEZ Fisheries	76
1.1. The Power to Determine the Allowable Catch	77
1. 2. The Power to Determine its Harvesting Capacity	79
1. 3. The Power to Determine the Surplus Catch and to Allow Access to Third States	80
2. The Coastal State's Power with Regard to Prescription of Laws and Regulations for Fishing in its EEZ	83
3. The Coastal State's Powers with Regard to Enforcement of Conservation and Management Measures	84
4. Special Provisions for Specific Species	87
4. 1. The Regime for Resources Located in More than One Zone	87
4. 2. Resources Straddling the High Seas and the EEZ	88
4. 3. Regulation of Highly Migratory Species	93

4. 4. Conservation and Protection of Marine Mammals	96
4. 5. Conservation of Anadromous Species	97
4. 6. Management of Catadromous Species	98
C. The Nature of the Coastal State's Rights over Sedentary Species and the Non-Living Resources of the Seabed and Subsoil of the EEZ	100
1. Sedentary Species	100
2. The Non-Living Resources of the EEZ	102
D. The Coastal State's Rights over Other Economic Resources of the EEZ....	107
Section II : The Coastal State's Non-Economic Rights in the EEZ	108
A. The Competence of the Coastal State with Regard to Artificial Islands, Installations, and Structures	109
B. The Competence of the Coastal State with Regard to Marine Research in the EEZ	111
C. The Competence of the Coastal State with Regard to the Protection and Preservation of the EEZ Marine Environment	116
1. Dumping in the EEZ	117
2. Pollution from Seabed Activities	118
3. Pollution from Vessels	119
CHAPTER THREE : EEZ-THIRD STATES	143
Introduction	
Section I: The Rights of Third States Related to Non-Economic Uses of the EEZ	144
A. Freedoms of Navigation, Overflight and of Laying Submarine Cables and Pipelines	145
1 - Freedom of Navigation.....	146
2 - Freedom of Overflight.....	152
3 - Freedom of Laying Submarine Cables and Pipelines	154
B. Other International Uses of the Sea Related to Navigation, Overflight, and the Laying of Cables and Pipelines	155
C. Non Attributed (Residual) Rights	159
Section II : The Rights of Third States Related to Access to the EEZ Living Resources	161
A. Access of Third States to the Surplus Resources of the EEZ in General	162
B. LL and GDSs Access to the Living Resources of Other States EEZs	164
1. The Origin and Meaning of the Terms 'Land-locked' and 'Geographically Disadvantaged States'	164
1. 1. The Term 'Land-locked' State	164
1. 2. The Term 'Geographically Disadvantaged' State	166
2. Sharing of EEZ's Living Resources	170

CHAPTER FOUR : STATE PRACTICE RELATED TO THE EEZ : 1975 - TO PRESENT	189
Introduction	
Section I : The Territorial Sea Trend	190
Section II : The Exclusive Fishery Zone [EFZ] Trend	193
Section III : The EEZ Claims and their Conceptual Content	200
A. The Evolution of EEZ Claims from 1975 to 1996	200
B. The General Ingredients of the EEZ in National Claims	204
1. Definition of the EEZ	205
2. The Legal Status of the EEZ	206
3. Delimitation of the EEZ between Adjacent and Opposite States	209
4. The Basic Rights and Jurisdiction of the Coastal State in the EEZ	211
4. 1. The Coastal State's Rights Contained in Art.56 (1)(a).....	211
4. 2. The Coastal State's Rights Contained in Art. 56 (1) (b)	212
5. The Basic Rights of the Generality of States in Foreign EEZs	216
Section IV : The Specific Legal Regimes Regulating the Various Activities in the EEZ in State Practice	220
A. The EEZ Fisheries System in Coastal States Practice	220
1. Coastal States Conservation and Management Responsibilities	221
2. Optimum Utilization and Foreign Access	223
2. 1. Criteria of Access	228
2. 1. 1. Reference to the Provisions of Article 69 and 70 (LL/GDSs)	228
2. 1. 2. States whose Fleets Habitually Fished in the Waters Now Encompassed by the EEZ	232
2. 1. 3. States which Cooperated in Research and Identification of Stocks	237
2. 1. 4. The Requirements of Developing States in the Sub-Region or Region in Harvesting Part of the Surplus	238
2. 2. Conditions Governing Access	238
2. 2. 1. Licensing and Payment of Fees	239
2. 2. 2. Conservation and Management Measures	240
2. 2. 3. Reporting Requirement and Observers	241
2. 2. 4. Joint Ventures	241
2. 2. 5. Cooperation in Research and Fishery Development Assistance	242
2. 2. 6. Other Conditions	243
3. Surveillance and Enforcement	243
4. State Practice on the Specific Regimes Contained in Articles 63 to 67 of the LOS Convention	247
4. 1. Resources Located in More than one Zone	248
4. 2. Resources Occuring both Within the EEZ and the High Seas	249
4. 3. Marine Mammals	251

4. 4. Anadromous Species	252
4. 5. Catadromous Species	254
4. 6. Highly Migratory Species	255
B. The Specific Regimes Relating to Marine Research, Artificial Islands and Installations, and the Protection of the Marine Environment	259
1. The Regime of the Conduct of Marine Scientific Research (MSR) in the EEZ in State Practice	260
2. The Specific Regime Relating to Artificial Islands, Installations and Structures in State Practice	263
3. The Preservation and Protection of the Marine Environment in the EEZ in State Practice	265
 CHAPTER FIVE : THE PRESENT SITUATION OF THE CONCEPT AND REGIME OF THE EEZ IN INTERNATIONAL CUSTOMARY LAW	311
Introduction	
Section I : Prerequisites for the Emergence of a Rule of International Custom and their Application to the 200 Miles EEZ	311
A. Generality and Uniformity of the Practice	312
B. Continuation or Repetition of the Practice over a Considerable Period of Time	316
C. Conception that the Practice is Required by Prevailing International Law (opinio juris)	317
D. Protest and Acquiescence	318
Section II : The Scope of the EEZ General Concept in Customary International Law	320
A. National Practice	320
B. Recent Jurisprudence of the ICJ	322
C. Opinions of Publicists	323
Section III : The Situation of the EEZ Specific Regime in Customary International Law	325
A. The LOS Convention's EEZ Provisions Concerning Fisheries	326
B. The LOS Convention's Specific Regimes Concerning the Coastal State's Non-Economic Rights and Duties in the EEZ	331
C. The Provision of Article 59 Concerning Residual Rights	332
 FINAL CONCLUSIONS	344
Bibliography	350
Appendices	371

SUMMARY

Under the traditional law of the sea, the sea was divided into the territorial sea and the high seas, and in each case different rules apply. In the former, the coastal state has full sovereignty subject to the right of innocent passage, while on the high seas all states enjoy the various uses of the sea subject, of course, to the reasonable use doctrine and to other limitations imposed by international law. This traditional dualism has recently come to an end as a result of the creation of the EEZ, whose specific regime is embodied, particularly in Part V of the LOS Convention

The creation of the EEZ has occurred through a combination of treaty formulation and state practice. Numerous states from both developing and developed worlds, including the United States, Canada, the members of the EEC established their own 200 miles jurisdictional zone in the second half of the 1970s, simultaneous to the consensus reached in this respect during UNCLOS III negotiations. After the Convention was signed, the United States and the USSR restructured their 200 miles EFZs into the EEZ in 1983 and 1984 respectively. On a worldwide basis states are currently implementing aspects of the new law relating to the 200 miles EEZ, particularly those rules appertaining to fisheries, which emerged from UNCLOS III negotiations and are embodied in the LOS Convention, though it is a selective process of implementation. The new propositions are essentially being put into effect as customary law on the basis that they have received general recognition.

Although the development of the EEZ has attracted the attention of international law publicists from both developing and developed states, the largest part of the ensuing literature in this field focuses on the evolutionary stages of the concept and its legal content as formulated at UNCLOS III. Some more recent few writings have dealt also with the issue of implementation of the LOS Convention's EEZ provisions, but the results attained in this field do not coincide. Thus, though there is a general agreement that the most important evolution regarding the implementation of the principles of the LOS Convention is that a 200 mile EEZ is already an accepted rule of public international law, opinions diverge in terms of exactly what this acceptance entails, what are the basic component of this new rule, and what specific rights and duties it encompasses.

This thesis attempts to study, in a comprehensive manner, the EEZ rule in both the LOS Convention and in state practice. Its central aim is to try to establish with

exactitude the scope of the rule that has been taken into international custom.

In this respect, after giving in chapter one a short exposé on the prevailing rules of the law of the sea that had governed all maritime spaces before UNCLOS III, serving as a background against which a better apprehension of the LOS Convention's EEZ provisions can be attained, an analysis of the rights of both coastal states and third states in the EEZ and their corresponding duties is provided in chapters two and three respectively. It has been asserted that, although a coastal state by claiming an EEZ would only enjoy specific functional rights, viz., the fields of activities they are connected with are explicitly defined, the vagueness often found in the wording of the Convention makes the situation not clear in all respect. While such a phenomenon may widen the functional limitations placed upon the general right of freedom of the high seas, it does not seem, however, to have any bearing on the high seas quality of the principal freedom of overflight, of laying cables and pipelines, and the freedom of navigation.

Chapter four is a thorough examination and analysis of state practice as evidenced in EFZ and EEZ claims against the yardstick of LOS Convention. This is followed by a last chapter determining the scope of the rule that has been picked up in the new custom relating to the EEZ. In this connection, it is asserted that state practice gives strong evidence that a general right to claim a jurisdictional maritime zone as defined in Articles 55 and 57 of the LOS Convention, viz., extending seaward up to 200 miles from the baselines, is firmly established in international customary law. Moreover, state practice proves also that within the asserted zone the claimant state can invoke and claim all the general functional rights and jurisdictions described in Article 56. (1) (a) and (b) of the LOS Convention. But, if it chooses to assert only one of those basic rights, its action remains within the confines of international law, but other states retain the possibilities they have had, before the new customary rule came into being, because under both the LOS Convention and state practice the EEZ does not exist *ipso facto* as does the continental shelf, but has to be claimed.

Furthermore, state practice suggests also that the basic rights of third states of freedom of overflight, of laying cables and pipelines and of navigation included in Article 58 (1) of the LOS Convention have been received into the new international custom relating to the 200 miles EEZ, thus affirming the functional and *sui generis* nature of the zone agreed upon at UNCLOS III. Consequently, the fear of the eventual territorialization of the EEZ by means of state practice, which has been expressed in the aftermath of UNCLOS III, has proven unwarranted.

In addition, state practice indicates further that the conservation goals embodied in Article 61, and utilization principles included in Article 62, as well as the enforcement provisions enshrined in Article 73 have been also picked up into the new customary rule.

ABBREVIATIONS

AALCC	Asian African Legal Consultative Committee
AC	Allowable Catch
ACP	African Carribean and Pacific Costal States
AFDI	Annuaire Francais de Droit International
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
ASIL	American Society of International Law
BYIL	British Yearbook of International Law
Colum JWB	Columbia Journal of World Business
Courier	The Courier (Africa - Caribbean - Pacific - European Community)
Colum LR	Columbia Law Review
CMLR	Common Market Law Review
CYILA	Chinese Yearbook of International Law and Affairs
CYIL	Canadian Yearbook of International Law
Dods	Dodson's Admiralty Reports (Great Britain)
DJILP	Denver Journal of International Law and Policy
DLJ	Dalhousie Law Journal
DWFS	Distant Water Fishing States
ECR	European Court Reports
EEC	European Economic Community
EFC	European Fisheries Convention
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishing Zone
FA	Foreign Affairs
FAO	Food and Agriculture Organization
FRG	Federal Republic of Germany
GA Res	United Nations General Assembly Resolutions
GDR	German Democratic Republic
GDS(s)	Geographically Disadvantaged state(s)
Grotius Trans	Transactions of The Grotius Society - 1915 - 1958/59
GYIL	German Yearbook of International Law
HC	Harvesting Capacity
Harvard LR	Harvard Law Review
HMSs	Highly Migratory species
ICJ	International Court of Justice
ICJ Reports	International Court of Justice Reports

ICNT	Informal Composite Negotiating Text
ICLQ	International and Comparative Law Quarterly
IJ	International Journal
IJIL	Indian Journal of International Law
IJMCL	International Journal of Marine and Coastal Law
Int. L	International Lawyer
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ISNT	Informal Single Negotiating Text
IUHEI	Institut Universitaire de Hautes Etudes Internationales
It. YIL	Italian Yearbook of International Law
JAIL	The Japanese Annual of International Law
JDI	Journal de Droit International
JMLC	Journal of Maritime Law and Commerce
JORADP	Journal Officiel de la Republique Algerienne Democratique et Populaire
Keesing's	Keesing's Contemporary Archives
LCP	Law and Contemporary Problems
Law of the Sea Bulletin	U.N., Law of the Sea Bulletin Office for Ocean Affairs
LLS	Land-Locked States
LNTS	League of Nations Treaty Series
LOS	UN Convention on the Law of The Sea.
Moore	International Arbitrations. Moore, J. B., History and digest of International Arbitrations to which the United States has been a Party, 1898.
Mod LR	Modern Law Review
Moore, Digest	J. B. Moore, A Digest of International Law 8 vols, 1906.
MP	Marine Policy
Marit. Pol. Mgmt.	Maritime Policy and Management
Marit. Stud. Mgmt	Maritime Study Management
MULR	Melbourne University Law Review
NAFO	North Atlantic Fisheries Organization
NILR	Netherlands International Law Review
NLJ	Nigeria Law Journal
NYIL	Netherlands Yearbook of International Law
OAU	Organization of African Unity
ODIL	Ocean Development and Internation Law
OJEC	Official Journal of the European Community
OLR	Oregon Law Review
OPN	Ocean Policy News
Official Records 1958	Official Records of the First United Nations Conference on the Law of the Sea

Official Records 1960	Official Records of the Second United Nations Conference on the Law of the Sea
Official Records 1973-1982	Official Records of the Third United Nations Conference on the Law of the Sea
Para (s)	Paragraph (s)
PCIJ	Permanent Court of International Justice
Phil LJ	Philadelphia Law Journal
Polish YBIL	Polish Yearbook of International Law
RCADI	Recueil des Cours de l'Academie de Droit International
RBDI	Revue Belge de Droit International
REDI	Revue Egyptienne de Droit International
RGDIP	Revue Generale de Droit International Public
RHDI	Revue Hellinique de Droit International
RIAA	UN Reports of International Arbitral Awards
RICNT	Revised Informal Composite Negotiating Text
RIRI	Revue Irannienne des Relations Internationales
RSNT	Revised Single Negotiating Text
SAYIL	South African Yearbook of International Law
SDLR	San Diego Law Review
SEP OP	Separate Opinion
ST/LEG/SER. B/1	United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas vol. I, 1951
B/2	United National Legislative Series, Laws and Regulations on the Regime of the High Seas, vol. II, 1952
B/6	United Nations Legislative Series, Laws and Regulations on the Regime of the Teritorial Sea, 1957
B/8	United Nations Legislative Series, Supplement to Laws and Regulations on the Regime of the High Seas and Laws Concerning the Nationality of Ships, 1959
B/15	United Nations Legislative Series, National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, and the Continental Shelf, the High Seas and to Fishing and Conservation of Living Resources of the Sea, 1970
B/16	United Nations Legislative Series, National Legislation and Treaties Relating to the Law of the Sea, 1974
B/18	United Nations Legislative Series, National Legislation and Treaties Relating to the Law of the Sea, 1976
B/19	United Nations Legislative Series, National Legislation and Treaties Relating to the Law of the Sea, 1980
Subpara (s)	Subparagraph (s)
Supp	Supplement
SYIL	Spanish Yearbook of International Law

Swiss YIL	Swiss Yearbook of International Law
Texas ILJ	Texas International Law Journal
Trans AFS	Transactions of the American Fisheries Society
UN	United Nations
UNCLOS I	First United Nations Conference on the Law of the Sea (Geneva 1958)
UNCLOS II	Second United Nations Conference on the Law the Sea (Geneva 1960)
UNCLOS III	Third United Nations Conference on the Law of the Sea (1973-1982)
UN Doc	United Nations Document
UK	United Kingdom
UNTS	United Nations Treaty Series
USSR	Union of Soviet Socialist Republics
US	United States, United States of America
V.	Versus
Viz	Videlicet
VCT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
WILJ	West Indian Law Journal
YILC	Yearbook of International Law Commission
YUN	Yearbook of the United Nations
YWA	Yearbook of the World Affairs

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INTRODUCTION

Whatever role the UN has played since its establishment in 1945 in the maintenance of international peace and security, and in other fields of international relations, its role in the codification and progressive development of international law, particularly the law of the sea, is of particular significance. Certainly, the most important work done under the auspices of the UN in the latter field is the convening of UNCLOS III¹ which has resulted in a new law set out in the LOS Convention². The most important aspect of this new law is that of the 200 miles EEZ³.

From a historical perspective, the 200 miles EEZ has antecedents in the unilateral exclusive claims to offshore areas put forward by Latin American States not blessed with broad continental shelves in the 1940s, embracing not only the seabed but also the resources of the water column as well⁴. But its more direct and immediate origins are to be found in the various regional declarations, and in certain other instruments adopted in the very early seventies by Latin American and African States⁵. The basic structure and legal content of the concept was further developed at UNCLOS III and set forth in Articles. 45-61 of the ISNT⁶ issued at the end of the Second Substantive Session of UNCLOS III which was held at Geneva from March 26 to May 10, 1975⁷. These provisions were largely discussed and refined at the 1976 New York Sessions⁸ and embodied in the RSNT⁹. The principles relating to the EEZ, which were expressed in the RSNT, were in the main reproduced in the ICNT¹⁰, the 1981 Draft Convention¹¹ and the LOS Convention itself¹².

In general terms, the EEZ concept as developed at UNCLOS III, entitles every coastal state to establish a maritime zone beyond and adjacent to the territorial sea extending seaward to 200 miles from the baselines (i.e. 188 miles in width), and exercises therein sovereign rights regarding all the natural resources (e.g. fish, oil, gas, lobsters,

crabs etc.) and other activities for the economic exploration and exploitation of the zone. The coastal state would also have, in the zone, jurisdictional rights relating to artificial islands, installations and structures; marine scientific research, and the preservation of the marine environment. On the other hand, third states would enjoy therein the classical rights of all states in the high seas of overflight, of laying cables and pipelines and, most importantly, the right of navigation and other activities related thereto¹³.

The most important characteristic of the 200 miles EEZ concept is, possibly, that it was developed in state practice before UNCLOS III concluded its work in 1982. Whereas at the start of the Conference there was only a small number of states with fisheries jurisdictional claims extending beyond 12 miles limit, by 1978 there were more than 90, including over forty states establishing an EEZ¹⁴. State legislative and treaty practice evolved on the basis of UNCLOS III negotiations, the rules agreed upon in the consecutive versions of the negotiating texts, and thereafter the Draft Convention. In this context one prominent lawyer has correctly said that, "the provisions of the Negotiating Texts and of the Draft Convention elaborated by the Third U.N. Conference on the Law of the Sea and the consensus which emerged at the Conference, have had... a constitutive or generating legal effect, serving as the focal point for and the authoritative guide to a consistent and uniform practice of states..."¹⁵.

The process of implementing the EEZ provisions elaborated at UNCLOS III has continued after the LOS Convention was signed in 1982. On a worldwide basis, states are currently implementing aspects of this new Law¹⁶, though it is a selective process of implementation.

This thesis attempts to undertake a systematic and comprehensive research into the concept and the detailed regime of the EEZ under the LOS Convention and in the ongoing state practice. Others will possibly contend that the result of such an effort would be an exercise in the obvious since there is wide scholarly agreement that the right of

coastal states to establish a 200 miles EEZ is part and parcel of today's international legal order. However, in the author's opinion, such a view remains simplistic and vague. This is because, while it is true that an evaluation of opinions of international law publicists evidences a wide reasoning in favor of the emergence of a rule of customary law regarding the 200 miles EEZ, it is also true that big uncertainties still exist with regard to the legal content of the EEZ. In this context, Professor Juda has correctly observed that, "though there is general agreement that the EEZ is already or is fast becoming an accepted doctrine in international law there are differences in terms of exactly what this acceptance entails and what specific rights and duties it encompasses"¹⁷. In the same line of thinking, Boczek has said, "while the institution of the EEZ... has been universally recognized the exact scope of the rights of the coastal and other states in the zone is far from settled"¹⁸. Thus, the EEZ rule needs more thorough examination and research in order to establish the exact scope of the rights and duties of every single group of states in the EEZ under current international law of the sea.

The precise aim of this thesis is to try to analyze the LOS Convention's EEZ provisions, particularly in the light of their evolution at UNCLOS III, and proceed, thereafter to evaluate the ongoing evolving state practice as evidenced in national proclamations and/or legislation and decrees, in order to identify which provisions, if there are any, are taken in state practice, and which provisions in claims have no counterpart in the LOS Convention. The exact scope of the rule which has been taken into custom will be determined, thus enabling conclusions to be drawn as to what rights states non-parties to the LOS Convention are entitled after 16 November 1994, the date of entry into force of the LOS Convention.

To assure a full coverage of the subject, the thesis is partitioned into five chapters. The first chapter presents a short review of the prevailing rules of international law regarding access to the living resources of the sea's water column prior to the

convening of the First Substantive Negotiating Session of UNCLOS III at Caracas in 1974. It is intended to serve as a concise background against which a better apprehension of the EEZ regime developed at UNCLOS III and embodied in the LOS Convention may be attained.

The second chapter centers on the examination of the nature and scope of the coastal state's rights and correlative duties within the EEZ under the LOS Convention. In the author's opinion, although the EEZ concept and its legal content received general acceptance relatively soon at UNCLOS III, the vagueness surrounding the wording of the LOS Convention and its long and complex negotiating history renders the situation not clear in all respects. Hence, an analysis of the Convention's EEZ provisions concerning the coastal state's rights and jurisdiction in the light of their evolution at UNCLOS III, appears to be useful. Due to the fact that the coastal state's rights in the EEZ have been listed in the LOS Convention under various juridical terms, this chapter is divided into two principal sections. The first one appertains to the coastal state's rights relating to economic uses of the EEZ, and the second section deals with the coastal state's rights and corresponding duties relating to non-economic uses of the EEZ.

The third chapter is concerned with the rights and corresponding duties of third states users of the EEZ as they were hammered out at UNCLOS III and crystalized in the relevant provisions of Part V of the LOS Convention. These rights and duties are of two categories : those related to non-economic uses, and those related to access to the EEZ living resources. With regard to the first category of rights, both navigational rights and non-navigational military uses are subjected to a thorough examination in the light of UNCLOS III negotiations and the relevant provisions of the LOS Convention. The analysis of 'residual rights', that is rights which the LOS Convention does not attribute to either coastal or other states, constitutes the next crucial point of the discussion. With respect to the second category of rights, the controversial issue of whether or not the

provisions concerning access to the EEZ living resources give priority of access to any specific group of states forms the central point of the discussion contained in section II.

Chapter four is a thorough examination and research into the process of states implementation of the EEZ provisions from 1975 to present. Here, the various 200 miles claims are identified, the prevailing trend in state practice as evidenced in claims to extended jurisdictional zones is also identified. Furthermore, the provisions in claims that have no counterpart in the LOS Convention will be determined.

Chapter five is concerned with the evaluation of the present situation of the concept and the detailed regime of the EEZ in international customary law. Here, the prerequisites for the emergence of a rule of international custom are briefly reviewed and applied to the 200 miles EEZ; the precise scope of the customary right to an EEZ will be ascertained and compared with the scope of the conventional right, thus enabling conclusions to be drawn as to the provisions which can be invoked by and against third states.

In treating the topic of the thesis, the author has generally employed an historical legal and positivist approach. Legal developments relating to coastal states control over living resources of the adjacent sea's water column and certain other related activities have been followed in three principal stages, namely, the pre-UNCLOS III stage, the UNCLOS III negotiating stage, and the post-UNCLOS III stage, with special emphasis on the last two stages. In both periods, legal developments are followed in state practice, as well as in conventional law, especially in the context of UNCLOS III negotiations. The main purpose is to establish the exact scope of the rights that modern international law has accorded to coastal states in this field in response to the extensive jurisdictional claims made in the Post-World War II period.

The positivist side in the author's approach means that states claims as evidence of state practice is essential. The relevant state practice¹⁹ has been, principally, found in

national legislation, executive decisions and practices, policy statements, press releases, and treaties. The principal area of difficulty has been the substance of the material, the broad variety of primary source materials to be examined, and the relative inaccessibility of much of this material. The disjuncture often encountered between the textual claim of jurisdiction and the actual activity of the state concerned has been another problem. The author's attempt as a partial resolution of this problem involves acceptance of the textual claim of jurisdiction as the primary datum. The position of Judge Read held in the Anglo-Norwegian Fisheries Case, 1951, has thus not been followed²⁰. As Professor Charney has noted, analysis must often proceed on the basis of the textual claim as, "to the extent that actual practice is unknown by the international community it is difficult to give that practice a juridical effect if it conflicts with publicized claims"²¹.

It must be made clear that the special emphasis on state practice in both chapter four and five does not mean that subsidiary sources of public international law have been ignored. Indeed, decisions of judicial tribunals and the teaching of international law publicists have been invoked in every convenient occasion.

Introduction

Notes and References

1. UNCLOS III lasted from 1973 to 1982 and has been described as the largest and longest international legal conference ever held. See Official Records, 1974-1982; also T. B. Koh : "Negotiating a New World Order for the Sea", 24 VJIL No. 4, 1984, pp. 761-762; D.H. Anderson : "Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea", 44 ICLQ-April 1995, p.313; and Jean-Pierre Lévy : "Les Nations Unies et la Convention de 1982 sur le Droit de la Mer", 28 RBDI, No.1, 1995, p.13.
2. For the full text, see 21 ILM, 1982, pp. 1261-1354. It is noteworthy that according to Art.308 of the LOS Convention, the latter enters into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession. In November 16, 1993, Guyana has ratified it bringing the number of ratifying or acceding states to 60 and thus the LOS Convention has become law binding upon the parties in November 16, 1994. See I. Kawaley : "The Implications of the Exclusive Economic Zone and EEZ Management for Bermuda, a Small Midocean Island Commonwealth Territory", 26 ODIL No. 3 July-September, 1995, pp. 227-228. For an update list of signatures, ratifications, accessions and succession, see the list contained in Appendix A of this thesis.
3. Ibid., Part V; see also, T. Treves : "Codification du Droit International et Pratique des Etats dans le Droit de la Mer", 223 RCADI, 1990/4, p. 84, also Kawaley, *ibid.*, p. 227.
4. E. g. The Chilean claim made by means of Presidential Declaration Concerning the Continental Shelf, June 23, 1947. In ST/LEG/SER. B/1, 1951, p. 6; the Peruvian claim made by Decree No. 781 of 1 August 1947, in *ibid.*, p. 16; and Ecuadorian claim made by Legislative Decree of February 1951, in ST/LEG/SER.B/8, 1959,

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5. See the Declaration of Montevideo on the Law of the Sea, May 1970, in 9 *ILM*, 1970, p. 1081; the Declaration of the Latin American States on the Law of the Sea (Lima Declaration), August 1970, in 10 *ILM*, 1971, p. 207; Declaration of Santo Domingo, Specialized Conference of the Caribbean Countries on the Problems of the Law of the Sea, June 9, 1972, in 11 *ILM*, 1972, p. 22; Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, held at Yaoundé from 20-30 June 1972, in 12 *ILM*, 1973, p. 210; and the African States Declaration on the Issues of the Law of the Sea, May 1973, in *ibid.*, p. 1200.
6. ISNT, UN Doc. A/Conf. 62/WP. 8/pt. II, in IV Official Records, 1975, p. 152. It is noteworthy to recall that the ISNT was informal in character and provided only a basis for negotiations, without affecting the right of any delegation to suggest revisions in the search for a consensus. See V Official Records, 1975, p. 125.
7. See J. R. Stevensen and B. H. Oxman : "The Third United Nations Conference on the

- Law of the Sea : The 1975 Geneva Session", 69 AJIL, 1975, p. 763.
8. The Third Substantive Session of UNCLOS III was held in New York from March 15 to May 7, 1976, while the Fourth Session was held from August 2 to September 10, 1976. See B. H. Oxman : "The Third United Nations Conference on the Law of the Sea : The 1976 New York Sessions", 71 AJIL, 1977, p. 248.
 9. RSNT Part. II, UN Doc. A/Conf. 62/WP. 8/Rev. 1/Pt. II, in V Official Records, 1976, p. 151.
 10. ICNT, UN Doc. A/Conf. 62/WP. 10 July 1977. in 16 ILM, 1977, P. 110. For later revisions, see UN Doc. A/Conf. 62/WP. 10/Rev. 1, April 28, 1979; UN Doc. A/Conf. 62/WP. 10/Rev. 2, 11 April, 1980; and UN Doc. A/Conf. 62/WP. 10/Rev. 3 September 1980.
 11. Draft Convention on the Law of the Sea, UN Doc. A/Conf. 62/L. 78, August 28, 1981, in XV Official Records, 1981, p. 172.
 12. Op. cit., supra note 2, Arts. 55-75
 13. This is a preliminary definition based on Articles. 56 and 58 of the LOS Convention. For a more detailed description of the rights and competences of each group of states, see C. Parry, J. P. Grant, A. Parry, A. D. Watts, (eds.), Encyclopaedic Dictionary of International Law. Oceana Publications Inc, New York/ London/ Rome, 1986, p.122.
 14. See R. B. Kruger and M. H. Nordquist : "The Evolution of the 200 Mile Exclusive Economic Zone : State Practice in the Pacific Bassin", 19 VJIL No. 2, 1979, pp. 324-325
 15. Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahyria), Judge Jimenez de Arechaga, Sep. Op. ICJ Reports, 1982, P. 115 Para. 54; see also, F. H. Paolillo : "The Exclusive Economic Zone in Latin American Practice and Legislation", 26 ODIL No. 2, 1995, p. 106.

16. See Law of the Sea Bulletin, No. 23, 1993, p. 15; see also, UN Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, 1994, pp. 9 - 18, 35 - 40, 70 - 75, 91 - 100, 128 - 136 and 176 - 191.
17. L. Juda : "The Exclusive Economic Zone : Compatibility of National Claims and the UN Convention on the Law of the Sea", 16 ODIL, 1986, p. 2
18. Boleslaw A. Boczek : "Peacetime Military Activities in the Exclusive Economic Zone of Third Countries", 19 ODIL, 1988, p. 446. For similar views, see D. P. O'Connell : *The International Law of the Sea*, vol. 1, (ed.), I. A. Shearer, Clarendon Press, Oxford, 1982, p. 231; N. Q. Dinh, P. Daillier and A. Pellet : *Droit International Public*, 3rd ed., Librairie Generale de Droit et de Jurisprudence, Paris, 1987, p. 990; Churchill and Lowe, *op. cit.*, supra note 4, p. 233; I. Brownlie : *Principles of Public International Law*, 4th ed., Clarendon Press, Oxford, 1990, p. 210; D.J. Harris : *Cases and Materials on International Law*, 4th ed., Sweet and Maxwell, London, 1991, p. 424; E. D. Brown : *The International Law of the Sea*, vol. 1 : Introduction Manual. Dartmouth Publishing Company Limited, Aldershot/ Brookfield USA/ Singapore/ Sydney, 1994, p. 224; T. W. Burke : "National Legislation on Ocean Authority Zones and Contemporary Law of the Sea", 9 ODIL, 1981, p. 289; M. Fitzmaurice, Lachs : "The Legal Regime of the Baltic Sea Fisheries", 29 NILR No. 2, 1982, p. 231; G.A.B. Peirce: "Selective Adoption of the New Law of the Sea : The United States Proclaims its Exclusive Economic Zone", 23 VJIL, 1983, p. 239; J. I. Charney : "The Exclusive Economic Zone and Public International Law", 15 ODIL, 1985, p. 239; also for the same author, "The United States and the Revision of the 1982 Convention on the Law of the Sea", 23 ODIL, 1992, pp. 297 - 298; R. Bernhardt : "Custom and Treaty in the Law of the Sea", RCADI, 1987/ 2, p. 322; R. W. Smith : "Global Maritime Claims",

20 ODIL, 1989, pp. 95-96; and Paolillo, *op. cit.*, *supra* note 15, pp. 105 - 106.

19. It is important to recall that the ILC defined state practice in non-exhaustive terms as comprising treaties, decisions of international and national courts, national legislations, diplomatic correspondences, opinions of national legal advisers, and the practice of international organizations. See II YILC, 1950, pp. 368-372; see also Brownlie, *ibid.*, p. 5.

20. ICJ Reports, 1951, p. 116. According to the Judge, state practice "can not be established by citing cases where Coastal States have made extensive claims but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships such claims may be important as starting points which, if not challenged may ripen into historic title in the course of time. The only convincing evidence of state practice is to be found in seizures, where the coastal state asserts its sovereignty over the waters in question by asserting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration". *Ibid.*, p. 191.

21. *Op. cit.*, *supra* note 18, p. 240.

CHAPTER ONE
ACCESS TO LIVING RESOURCES OF THE SEA'S WATER
COLUMN PRIOR TO THE FIRST SUBSTANTIVE
SESSION OF UNCLOS III, June 20, 1974.

Introduction

For a better apprehension of the manner in which access to fisheries beyond the territorial sea was governed in international law of the sea before the opening of the First Substantive Session of UNCLOS III, the author would first consider the high seas regime as it applies to the living resources of the sea's water column, then proceeding to give a brief account of the evolution of extended national jurisdiction over fisheries, especially from the Truman Proclamations of 1945 via the failures to agree on fishery limits at the Geneva Conferences of 1958 and 1960 to the First Substantive Session of UNCLOS III in Caracas in 1974.

The aim of this first chapter is to serve as a concise background against which a full appreciation of the LOS Convention's EEZ provisions may be attained.

Section I : Freedom of Access to Living Resources of the Sea's Water Column under the General Concept of Freedom of the Seas

It is well known that the doctrine of the "freedom of the sea" was formulated by a Dutch jurist, Hugo Grotius, in his famous work, *Mare Liberum*, published in 1609¹. *Mare Liberum* was written by Grotius in an attempt to justify and defend the interests of his client, the Dutch East India Company, and to provide theoretical grounds for his country's right to navigate freely in the Indian Ocean and other oceans and seas over which Spain and Portugal asserted monopoly use as well as political dominion². Yet fisheries were very much on Grotius' mind and he argued for freedoms of navigation and

fishing on the ground that the oceans were very vast and unappropriable and their fishery resources where inexhaustible. In this context, he said :

"The sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or fishing"³.

Despite the effect Grotius' theory had on the early development of law the sea, his theory did not go unchallenged⁴. His assertion that there should be open and free fishing in the seas stood directly against the interests of several maritime states, especially England⁵. England and some other European countries were not prepared to accept the freedoms of the seas. The Dutch in those days were excellent adversaries for whom the ever increasing herring fishery along the British coast was a principal source of riches and power. In order to protect the fisheries found in the seas surrounding the British Isles, England asserted sovereignty over the undefined English seas, and in 1609 King James decided to severely limit and tax all alien fishing activities undertaken along the British and Irish coasts⁶. William Welwood, a Scottish lawyer responded to Grotius's theory, defending appropriation of fish resources by coastal nations. He maintained that a coastal nation had the duty to protect and conserve fisheries in the waters off its coasts and foreign fisherman should be precluded from fishing in those waters⁷. In support of his view, Welwood relied mainly on the Bible and on an interpretation of Roman law⁸. With regard to the latter argument, he contended that Rome's treatment of the sea as being open to the free use of all applied only to Roman citizens and not to fishermen of other states⁹. He then cited with approval a 100 mile limit for coastal state sovereignty¹⁰.

Indeed, the most important reply to the theory of the freedom of the seas advocated by Grotius was advanced by John Selden, an English lawyer in his major work entitled *Mare Clausum* written in 1635 at the request of the English Crown¹¹. He claimed that the sea was decreed to be controlled by man¹². In support of his theory he invoked

both the Bible and ancient customs. Quoting Genesis, Selden relied upon the following verse : "And the fear of you and the dread of you shall be uponall the fishes of the sea"¹³. He interpreted the words "fear of you and dread of you" as being an expression of dominion¹⁴. He found further backing for his Biblical argument in God's instruction to Adam and Eve : "Replenish the Eearth and subdue it, and have dominion over the fish of the sea, and over the fowl of the Air, and over every living thing that moveth upon the Earth"¹⁵.

With regard to the custom argument, unlike Grotius who relied on custom to disprove any appropriation of the seas, Selden invoked the customs of ancient and modern countries which appropriated portions of the sea¹⁶ to justify acquisition of the sea¹⁷.

Welwood and Selden, along with several other European scholars, argued and stood firm against the freedom of the seas and carried the day. Indeed, for more than 200 years, Selden's work remained the most authoritative work on maritime law in England and the Continent and the theory of the freedom of the seas remained in limbo¹⁸. It was only after the Napoleonic wars in the very early nineteenth century, after which England appeared as the supreme maritime power, that the freedom of the seas came to be accepted in Europe¹⁹. The doctrine was backed by the British navy. Europe adopted the doctrine of freedom of seas, especially of navigation, because it became necessary to do so in the wake of the industrial revolution. Moreover, by this time, the Dutch fisheries had, more or less, been ruined and England had risen as the strongest fishing country in the world²⁰.

Thus, by the early nineteenth century the freedom of the seas established itself as a fundamental principle of the law of the sea.

In so far as fisheries of the sea outside a narrow belt of the territorial sea were concerned, as long as they were believed to be inexhaustible, no action of any form of any state which tends to restrict the freedom of the seas could be justified²¹. Fishing as one of the freedoms of the seas, meant that no state could legally claim jurisdiction over fishing

activities taking place beyond the narrow limits of the territorial sea. Courts of many jurisdictions accepted the free use of the high seas regime as national as well as international law. The English Admiralty Court accepted this status. The Court correctly stated :

"All nations being equal, all have an equal right to the unappropriated parts of the ocean for their navigation, in places where no local authority exists. Where the subject of all states meet upon a footing of entire equality and independence, no one state, or any of its subject, has a right to assume or exercise authority over the subject of another"²².

Fisheries resources beyond the territorial sea, were subject only to the law of possession²³, viz., the title in them was vested in him who first reduced them to his possession. This was the rule confirmed in the Behring Sea Fur Seals Arbitration in 1893²⁴. The arbitration arose from attempts to enforce conservation measures on the high seas. British fishermen had taken cruel and wasteful actions against the fur seals of the Behring Sea, to which the USA had strongly objected. The Tribunal held that activities outside the territorial sea were a legitimate exercise of the freedom of the seas and therefore the USA had no right of property over the fur seals when they were outside the ordinary three miles territorial sea²⁵.

However, since the last quarter of the nineteenth century advances in fishing technology and fishing techniques have began to occur²⁶. Such advances had developed, in the first half of the twentieth century, at a good pace²⁷. The development of trawler fishing, increases in the number, size, speed, and storage capacity of trawling vessels, the use of sonar in fish locations, mechanization of net handling, new types of nets, and new freezing and processing techniques, as well as substitution of steam vessels for the sailing smacks, revolutionized the fishing industry²⁸.

One of the most important effects of these developments was the emergence of intensive distant water fishing activities²⁹. Fishermen, in particular those of developed maritime nations, became able to operate efficiently for extended periods of time in areas far away from their home ports³⁰. Furthermore, fishermen of these states who were well equipped and manned invaded and exploited the traditional fishing grounds of many smaller coastal states³¹. This evolution had several consequences. It greatly increased the world catch. It has also led to that many stocks of fish have been seriously depleted³².

The abovementioned facts have rendered the traditional assumption that the resources of the sea are inexhaustible not valid³³. As a consequence, this traditional assumption have become, in the 20th century, especially since 1945, unable to justify fully unregulated freedom of fishing on the high seas. Thus, the need that this concept should be adapted to the state of affairs created by the emergence of these new techniques and technology in the use and exploitation of the sea's resources become very clear and pressing. How has the law of the sea responded to this new developments up to 1974? This question will be answered in the following section.

Section II : The Coastal States Exclusive Fishing Rights

Indeed, the international law of the sea has not remained indifferent to the improvement of fishing techniques and technology that has brought with it not only the danger of depletion to the fishery resources but also the threat of deterioration of the fishing industries³⁴. It has, in fact, limited the freedom of fishing on the high seas by subjecting this general principle to several limitations. Some of them are territorial in scope, while some others are non-territorial limitations.

A.The Territorial Sea

The territorial sea is commonly viewed as a belt of the sea adjacent to the coast of a state, beyond its land territory and its internal waters, over which the sovereignty of

the coastal state extends³⁵. The justifying necessity for its establishment has been, mainly, the protection of the coastal states territory and its people³⁶.

Thus, the first important limitation on the freedom of fishing in the seas is a direct consequence of the fact that not all waters of the sea are covered by the regime of the high seas³⁷. The high seas are commonly defined as all parts of the sea which are not included in the territorial sea or in the internal maritime waters of a state³⁸. Accordingly, the freedom of fishing does not extend to the sea areas included in the territorial sea and in the internal maritime waters of coastal states.

Although the establishment of the territorial sea has been, as mentioned above, derived from the need to restrict the freedom of navigation for security and defense purposes, the issue of the coastal states' exclusive jurisdiction over adjacent fisheries has been closely connected to the issue of the width of the territorial sea. Coastal states that had fought against a narrow territorial sea have always maintained that, if a narrow territorial sea is not supplemented by the recognition of the coastal state's jurisdiction in a zone beyond the territorial sea for fisheries purposes, no useful purpose could be served by the establishment of a narrow limit for the territorial sea³⁹. With regard to fisheries, a narrow territorial sea belt was viewed by those states as inadequate for the protection of local fishing activities.

The notion of exclusive fisheries jurisdiction existing separately from the concept of the territorial sea had been energetically invoked after the First Codification Conference of 1930⁴⁰. Indeed, the failure to reach an agreement at the conference on a maximum width of the territorial sea left the door wide open, in the post 1930 period, for the emergence of series of claims to adjacent resources of the high seas, either by extending the territorial sea itself or by extending the exclusive fishing rights or by means of other new concepts.

B.The Post - 1930 Period Claims to the Resources of the High Seas

The expansion of national jurisdictional claims over large parts of the high seas started early in Latin America. These claims had emerged before the Second World War, but they were more concerned with defense purposes⁴¹. Since the Second World War, claims to special rights of control by coastal states with regard to fishing in waters adjacent to the territorial sea have appeared, marking the start of the emergence of a major limitation on the traditional concept of freedom of fishing on the high seas. The post - World War II period has been, in fact, characterized by a rapidly increasing trend towards extending coastal state jurisdiction over the waters adjacent to the territorial sea for the purpose of gaining full economic control for the exploitation of all resources, including the living resources, of such waters⁴². Two main motive forces had lain behind those claims. They were, in the first place, a concern to achieve the most effective regime for the conservation of the living resources of the sea; and in the second place, a concern to achieve maximum control over the primary economic resources by coastal states⁴³.

The wave of such unilateral extensions had its beginning in the 1945 Truman Proclamations on the seabed and coastal fisheries⁴⁴. A detailed consideration of the proclamations is beyond the scope of this thesis, as they have been extensively treated in legal literature⁴⁵. Suffice it to recall here that on September 28 1945, in order to protect the Alaskan salmon fisheries from exploitation by Japanese fisherman⁴⁶, the United States decided by means of the Truman Proclamation Concerning the Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas that conservation zones contiguous to its coasts were to be established. Areas traditionally fished by nationals of the United States or expected to be fished only by nationals of the United States were to be subject to the control of the latter, while areas jointly exploited by nationals of different nations should be regulated by agreements between pertinent

states. These zones have, however, never been brought into existence⁴⁷.

In a twin proclamation on the same day, the United States asserted jurisdiction and control over the natural resources of the subsoil and the sea bed of the continental shelf contiguous to its coasts⁴⁸ primarily to assure a stable investment climate for American oil companies⁴⁹. The Proclamation stressed that the status of the waters above the shelf would not be affected. They would remain open for the exercise of freedom of navigation by all states. Furthermore, while no outer boundary was specified, an accompanying White House Press Release indicated 100 - fathoms⁵⁰ as a maximum outer limit⁵¹.

Thus, it is very evident that what was asserted by means of the latter Proclamation was not sovereignty over the area itself, but only over the natural resources of the continental shelf⁵².

Since no state at that time considered its interests violated by the Proclamation, no protests were raised against this claim. In fact, instead of protesting, numerous other states rapidly started making the same type of claim⁵³; thus was born the concept of coastal state jurisdiction over the continental shelf.

Several other coastal states, however, particularly from the Latin American Continent, asserted wider jurisdictions involving not only the continental shelf but also the waters above it⁵⁴. Thus, one month after the Truman Proclamation on the Continental Shelf, Mexico declared that the continental shelf adjacent to its coasts was to be considered as incorporated in its national territory⁵⁵, and Panama made a similar claim in March 1946⁵⁶. These first two Latin American proclamations, unlike the Truman Proclamation, extended the coastal state's sovereignty to include not only the resources of the continental shelf, but the whole shelf as such. Président Peron of Argentina proclaimed in October 1946 that not only the continental shelf adjacent to Argentine territory, but also the so-called "epicontinental sea" covering the shelf, was under

Argentine sovereignty.

On June 23, 1947, Chile, having virtually no continental shelf along its coasts, not only declared its sovereignty over the continental shelf and its resources, but also confirmed and proclaimed, "its national sovereignty over the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources... found on, within and bellow the said seas"⁵⁸. The area of the seas concerned was fixed at 200 miles. In addition, the Declaration, specifically provided that the free navigation for third states would not be affected⁵⁹. Chile based its claim partly on the international precedent of October 1939, Declaration of Panama⁶⁰, and on the principle of unilateralism of the Truman Proclamations⁶¹. The fact that the objectives of establishing the zone were the protection and preservation as well as the exploitation of the zone's resources would seem to suggest that the Chilean Declaration aimed at the establishment of a maritime zone of limited functional sovereignty rather than a full territorial sea.

Peru, interested in developing its fishmeal industry based on its anchovy resources, established in 1947 Peruvian sovereignty and jurisdiction over the adjacent sea to a distance of 200 miles. But it expressly accorded freedom of navigation to vessels of all nations within the zone⁶². The Peruvian continental shelf is even narrower than that of Chile⁶³. This fact seems to be the main reason for Peru's rejection of the depth criterion in favour of a distance of 200 mile criterion.

The fact that the Peruvian Supreme Decree No. 781 contained a provision preserving the freedom of navigation, which is incompatible with the traditional concept of the territorial sea as expressed in the 1958 Convention, combined with the preambular considerations in the decree, appear to suggest that the claim was one of a maritime zone of limited functional sovereignty rather than a claim to a full territorial sea.

The legislation⁶⁴ enacted by Costa Rica in 1949 made the continental shelf

subject to the national sovereignty "at whatever depth it is found". But as regards fisheries jurisdiction in the superjacent waters, only the inadequately defined "rights and interests of Costa Rica" were proclaimed thereover, according to which "maritime fishing and hunting carried on in said areas shall be under the surveillance of the government of Costa Rica"⁶⁵. Consequently, that state extended its protection over a zone of 200 miles in which the rights of free navigation on the high seas were, however, to subsist.

Ecuador has a continental shelf, but a rather narrow one, and has rich fishing waters off its coasts as well. It asserted in a declaration in 1950 that the continental shelf up to the 200 - meter isobath pertained to Ecuador, and that Ecuador likewise had the right to exert necessary control over that part of the shelf as well as over corresponding fishing areas⁶⁶.

The Constitution of El Salvador of 17 September 1950⁶⁷, which became effective in the same year, described the territory of the Republic to include "the adjacent seas to a distance of 200 miles from the low water line and the corresponding airspace, subsoil and continental shelf"⁶⁸. Freedom of navigation was maintained but not freedom of overflight.

This Constitution made the 200 miles area, including the subsoil, the sea, and the airspace above it part of the territory of El Salvador. Such a description is a feature of the territorial sea. Moreover, though freedom of navigation was maintained, reference to it was made not to cover freedom of overflight. Exclusion of overflight within the zone is also one of the essential elements of the regime of the territorial sea. Therefore, this claim appears to be a claim to a territorial sea in a strict sense.

On March 7, 1950, Honduras passed Legislative Decree No. 102, which regarded the continental shelf and "the waters which cover it, in both the Atlantic and Pacific Oceans, at whatever depth it may be found and whatever its extent may be" to form a part of the national territory⁶⁹. It claimed "full", and "inalienable", and

"imprescriptible" dominion over all the resources which were found in the area⁷⁰.

Moreover, Congressional Decree No. 104 of 7 March 1950, had amended Article 621 of the Civil Code of Honduras to read as follows :

"...The sovereignty of the state shall extend to submarine platform, as continental and insular shelf and the overlaying waters, at whatever may be its extent, without prejudice to the right of free navigation in accordance with international law"⁷¹.

The words used in describing the authority of this state with respect to the asserted maritime area are "part of national territory", "dominion", "sovereignty". As we have already explained, in international law, this terminology is, usually, employed to describe the authority of a state over its own territory as well as the territorial sea and not the high seas. Therefore, it would seem that this was a claim to a territorial sea. This interpretation is supported by the fact that the Congressionnal Deree No. 21 of 19 December 1957 had provided that the sea and the airspace above the shelf belong to the State of Honduras and are subject to its jurisdiction and control⁷².

At a tripartite Conference held, in August 1952 at Santiago, the capital of Chile, Peru and Ecuador established a policy of a "200 miles maritime zone", by means of the well known sub-regional Declaration of Santiago⁷³, the first multilateral agreement on the 200 miles zone policy. Asserting that their governments were "bound to ensure for their peoples access to necessary food supplies and to furnish them with the means of developing their economy", they proclaimed that :

"As a principle of their international maritime policy... each of them possesses sole sovereignty and jurisdiction over the area of the sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast"⁷⁴.

Two aspects of the declaration, in particular, must be stressed. The first is its

underlying economic and social rationale, expressed in terms of economic development and the conservation and protection of natural resources⁷⁵. The second aspect, which is the most important from a legal point of view, is that the declaration is concerned with a maritime zone for specific objectives rather than the territorial sea *stricto sensu*⁷⁶. This is because, while it is true that the declaration has used the terms "sovereignly" and "jurisdiction", it is also true that it has refrained from attaching the label "territorial sea" to the asserted area. Furthermore, while the declaration has spoken of sovereignty, it impliedly recognized the freedom of navigation⁷⁷.

The declaration rapidly filtered through the Inter-American system, drawing support from regional organs and conferences, such as the Inter-American Congress of International Law and the Tenth Inter-American Conference⁷⁸.

The above analysis shows that early Latin American states' claims to the resources of the sea beyond the territorial sea were not uniform in form and content. In this context, Garcia Amador has correctly said: "it would be inappropriate to refer to a unified Latin American position on the law of the sea regarding the exploitation and conservation of the natural resources of the sea"⁷⁹.

As long as these Latin American claims were confined to the continental shelf they have never been the subject of any objection from other states. However, those claims which were aimed at extending the coastal state exclusive rights not only to the resources of the shelf but also to the living resources of the waters above the shelf, were rapidly and repeatedly challenged and met by consistent protests from several maritime states, on the ground that they breached the principle of the freedom of the seas, in general, and the freedom of fishing, in particular⁸⁰.

In the North Sea Continental Shelf Cases 1969, the ICJ insisted that, to become a rule of general customary law, "state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform"⁸¹.

Furthermore, in several other occasions, the Court made it clear that a state objection to a rule in the process of formation can prevent it from becoming binding upon it⁸². It follows that Latin American states claims were not valid⁸³ and, consequently, they violated the prevailing rules of the law of the sea around the 1950s.

C. The Question of Exclusive Fishing Rights at UNCLOS I (1958) and UNCLOS II (1960)⁸⁴

Attempting to bring some order into the confusing situation which prevailed in the 1940s and 1950s, the United Nations convened in 1958 the First Conference on the Law of the Sea at Geneva to develop and codify the law of the sea in a systematic manner. As a basis for discussion, the Conference had draft conventions produced by the ILC and statements by Governments on various law of the sea issues. Four Conventions⁸⁵ were concluded which, on the whole, reasserted the traditional freedoms of the sea, including freedom of fishing.

UNCLOS I dealt with the question of fisheries in two ways : first, in connection with the high seas regime, and secondly, in connection with the issue of the breadth of the territorial sea.

In so far as the first way is concerned, the debates centered on the issue of which state may exercise conservation control over fishing in waters remaining part of the high seas. The results of discussions were enshrined in the Convention on Fishing and Conservation of the Living Resources of the High Seas⁸⁶. This Convention was adopted to ensure sufficient protection of the living resources of the high seas against abusive exploitation as well as to put an end to coastal states' assertions to exclusive fishing rights or privileges in adjacent high seas areas⁸⁷. It was thought that, since the Convention assures coastal states of necessary conservation measures, they would possibly abandon

their extensive claims, or at least such concessions would lead to their containment⁸⁸.

The Convention did not attempt to delineate specific conservation measures to be implemented by coastal states, such as permissible types of fishing gear, types of fishing nets, closed fishing seasons and minimum size of fish that may be fished. What the Convention did, in fact, was to specify which state may enact or apply such conservation measures and to indicate the circumstances and conditions under which such measures may be applied to foreign fishing vessels in areas of the high seas. Article 6 has confirmed the principle of the freedom of fishing on the high seas. However, conceding the need for the conservation of the living resources of the high seas, the Convention placed upon all states the duty to adopt or cooperate with other states in adopting conservation measures for their respective nationals as may be necessary⁸⁹. It defined "conservation" to mean "the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products"⁹⁰.

What is perhaps important, and this is from the point of view of coastal states, is that the exercise of the freedom of fishing by other states has been made subject to the interests and rights of the coastal states as provided for in the Convention⁹¹.

The interests and rights accorded to coastal states beyond the territorial sea are enshrined in Articles 6 and 7. Article 6 para. 1 recognized explicitly the coastal state's special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea, and the right to initiate unilateral measures of conservation. The legal meaning of this special interest has been defined in Article 7. It states that regulation of fisheries was to be by mutual agreement with other interested fishing states but, when this could not be secured, any coastal state may adopt unilateral measures of conservation appropriate to any stock of fish in any area of the high seas adjacent to its territorial sea. However, such measures would be valid as to other states

only in the circumstances included in Article 7 (2), namely :

- a) Where there is a need for urgent application of conservation measures in the light of existing knowledge of the fishery;
- b) If the measures adopted are based on appropriate scientific findings;
- c) If they do not discriminate in form or in fact against foreign fishermen. Still, if such measures are not accepted by the other states concerned, any one of them may invoke the compulsory arbitration procedure outlined in Articles 9-12⁹².

This Convention did not recognize any preferential or exclusive right for the coastal state to fisheries in waters beyond its territorial sea, for any conservation measures were to be applied without discrimination, and with the aim of securing a maximum supply of food and other marine products. Moreover, it did not disturb the established rule of the freedom of the high seas under which vessels need observe only the law of their own flag state. Although a coastal state is empowered to adopt conservation measures applicable to offshore fisheries in the circumstances indicated above, it is not entitled to extend its control directly over nationals of other states, but fishing states would be obliged to apply the measures adopted unilaterally by a coastal state to their own nationals. From the point of view of those states that had by that time already declared a 200 mile zone, the unsatisfactory side in this approach to the concept of the special interest of the coastal state was that the coastal state's special interest was so hedged about with conditions as to be illusory⁹³.

In so far as the treatment of the question of fisheries in connection with the breadth of the territorial sea is concerned, the main issue was whether coastal states should be granted exclusive fishing rights in the high seas adjacent to and beyond the territorial sea. It was then thought that, if the best means available to the coastal state to secure recognition of its right to exclusive fishing outside the territorial sea was to expand

the territorial sea itself, the recognition of this right in a contiguous zone would secure a narrow territorial sea and would therefore halt the desire to extend the territorial jurisdiction⁹⁴. It was in this line of thinking that the USA proposed to establish a 3 mile territorial sea and a further 6 mile for exclusive fishing, with the proviso that traditional fishing rights would not be excluded within a 10 years period⁹⁵. The ten years period was reduced to 5 years only in a revised version. In the same direction, Canada proposed the setting of 3 mile territorial sea and the recognition to the coastal state of exclusive fishing rights in a contiguous zone of a distance up to 12 miles⁹⁶. This proposal was later brought in line with the American proposal and co-sponsored with Mexico and India⁹⁷.

Whilst this compromise attracted the greatest support, it failed to obtain the necessary two-thirds majority. Other proposals, although less ambitious in scope, suffered the same fate when put to the vote. One which is worth mentioning is the Icelandic proposal that sought to grant the coastal state preferential rights where a people is "overwhelmingly" dependant upon coastal fisheries for their livelihood or economic development, and where the "coastal population depends primarily on coastal fisheries"⁹⁸. Nonetheless, this "dependence on fisheries" did not convince the conferees as conferring any preferential rights upon coastal states. The final outcome of the Conference was the rejection of all the proposals regarding the territorial sea limit and the extent of the coastal state's exclusive fishing rights. On these two issues, the Conference had to content itself with the convening of UNCLOS II.

Thus, another attempt was made two years later at UNCLOS II held in 1960 for further consideration of the questions concerning the breadth of the territorial sea and the fisheries delimitation. Although the United States/Canada sponsored "six plus six" formula was allowed at this Conference to include an amendment sponsored by some Latin American States, whereby the coastal state would have preferential fishing rights in any area of the high seas beyond the exclusive fishing zone when certain conditions are

met⁹⁹, the proposal failed to be adopted by a single vote¹⁰⁰. No agreement was reached with regard to a convention. However, it was clearly stated that the extent of the territorial sea was closely linked to fishing, and that one of the main reasons why many coastal states were claiming territorial sea extensions was their desire to be entitled to exclusive fishing or at least to preferential rights over the living resources of the expanded zones.

D. The Geographical Scope of the Coastal States' Exclusive Fishing Rights in the Post - Geneva Conferences Period.

The failure of UNCLOS I and UNCLOS II to achieve agreement on the issue of the territorial sea breadth and to recognize to the coastal state any special right of exclusive access to fisheries in adjacent seas beyond the territorial sea had a fundamental influence on the conduct of coastal states of the post-Geneva Conferences period. It left the door wide open for coastal states to decide for themselves. Thus, the period between 1960 and 1974 witnessed the biggest wave of claims to exclusive fishery zones not only in one particular region but, in fact, in various parts of the globe.

Generally speaking, two main trends had emerged during this period. The first one was particularly led by Western European and Scandinavian states¹⁰¹. These states asserted exclusive fishing zones to a distance of 12 miles, seemingly aiming at developing the law of the sea more or less along the line of the general consensus and near agreement revealed at UNCLOS II¹⁰². That is to restrict the geographical scope of the coastal state's exclusive fishing rights to a maximum distance that should not exceed twelve mile and, at the same time, limit the breadth of the territorial sea at a lesser distance.

In order to realize these goals, these states resorted to concerted action on both bilateral and multilateral levels. On the bilateral level, numerous agreements were concluded between various Western European and Scandinavian States and other states

containing the twelve mile exclusive fishing zone¹⁰³. These bilateral agreements have accorded mutual recognition to the rights of the respective parties to establish such zones and were particularly concerned with working out arrangements between the parties for the continuance of the fishing rights for the parties other than the coastal state in the twelve miles zones which were established¹⁰⁴. Most of these agreements made provisions for phasing out periods after which foreign fishing would cease to exist. In this connection Straburzynski has correctly said :

"The temporary right of foreign fishermen to continue to fish in the fishery zone of a given coastal state is almost universally recognized in the contemporary international practice"¹⁰⁵.

The purpose of "traditional" or "historic" fishing rights is to protect fishermen of non-coastal states as well as those of certain distant waters fishing states against being excluded from their traditional fishing areas in an abrupt manner. An exclusion of foreign fishermen would be performed gradually, i.e. by way of "phasing out", allowing them time to adapt to cease fishing in the coastal state's fishery zone and to move away to new fishing areas without excessive economic hardship¹⁰⁶.

As regard the multilateral level, concerted action for the development of the twelve miles exclusive fishing zone materialized in the conclusion of the European Fisheries Convention in 1964¹⁰⁷ which resulted from the European Fisheries Conference held in London from December 1963 to March 1964. The EFC was the first international Convention to recognize exclusive fisheries zones¹⁰⁸. From a historical perspective, the significance of the Convention lies in the fact that it was established by a group of states that had traditionally stood against all attempts made by other states to expand their fisheries jurisdiction beyond the territorial sea.

Under the EFC each party could establish a fishery zone. This zone is, according to the principles provided by the Convention, divided into two sections [two 6 - miles

belts], under different regimes. Within the first section extending 6 miles from the baselines, the coastal state was accorded the exclusive right to fish and exclusive jurisdiction in fishery matters (Art. 2). The second section formed a belt between 6 and 12 mile limits from the baselines. In this latter section, the right to fish is to be exercised exclusively by the coastal state together with such other contracting parties the vessels of which have habitually fished in that belt between 1 January 1953 and 31 December 1962¹⁰⁹. These states were, however, prohibited to direct their fishing efforts towards fish stocks different from those they habitually fished.

Several states non-signatories to the EFC recognized the right to set up such zone. Shortly after the conclusion of EFC, the United Kingdom enacted an Act by means of which a 12 mile fishery zone was established¹¹⁰. The British claim was, in part, determined by the interests of British coastal fishermen being anxious about the growing competition of Belgian, French, Polish and the Soviet fishing vessels in the waters around the United Kingdom's coast¹¹¹. This fishery zone was recognized by Poland, a state which at that time did not claim any exclusive fishing rights beyond the 3 - mile territorial sea¹¹². This recognition was pursuant to the agreement of 26 September 1964 that allowed Polish fishermen the temporary right (up to December 31, 1967) to fish for herring in certain areas within 6 and 12 miles, and permitted use of the British fishery zone "outside the territorial sea for purposes ancillary to fishing" but not fishing in the belt between 3 and 6 mile from the baselines of the United Kingdom's territorial sea¹¹³.

The former Soviet Union recognized the right of the coastal state to establish a 12 miles fishery zone by means of the Exchange of Notes of 30 September 1964 with the United Kingdom¹¹⁴. Furthermore, the German Democratic Republic, Japan, the US, New Zealand and the South Korean Republic all recognized this zone as part of the general principle of the right of a coastal state to extend its sovereign right up to a limit of twelve miles, a principle against which they did not protest¹¹⁵, and the recognition of which they

subsequently confirmed by the conclusion of bilateral agreements on fishing in the exclusive fisheries zones of other states¹¹⁶.

In addition, Finland recognized the twelve miles fishery zone by voting for adoption of the Canadian -American proposal on the exclusive fisheries zones of 6 miles adjacent to the 6 miles territorial sea at UNCLOS I¹¹⁷.

The second trend was mainly led by Latin American, African and Asian States. These states embarked too in the 1960s and the very early 1970s on concerted action at regional as well as international levels to attract political support for their 200 miles exclusive fishing or full economic zones.

Thus, having asserted in 1969 its sovereignty over a 200 mile maritime zone, including, the airspace and the corresponding seabed and subsoil¹¹⁸, Uruguay invited in March 1970 Latin American 200 miles claimants to a meeting with the purpose of exchanging views and coordinating their positions and defending their maritime policy¹¹⁸. These states eventually met at a conference held in Montevideo in May 1970 and adopted unanimously a joint statement entitled "The Declaration of Montevideo on the Law of the Sea"¹²⁰.

The Montevideo Conference appears to have resulted from two events which prompted the 200 miles states to make such a joint statement. These are, first, the attempts of the Soviet Union and the United States to convene an international conference whose task would be mainly to resolve the issue of the limit of the territorial sea¹²¹; and, secondly, the United Nations Resolution requesting the views of member states as to the desirability of a new conference on the law of the sea¹²².

In the preamble, mention was made of the ties of a geographic, economic, and social nature binding the sea, the land, and man who inhabits it, which give the coastal state a "legitimate priority" to benefit from the natural resources that are found in the adjacent seas. Relying on these ties, the Declaration recognized the coastal state's rights to

exercise control over the marine resources adjacent to their coasts and of the seabed and subsoil thereof "in order to achieve the maximum development of their economy and to raise the living standards of their peoples"¹²³. The limit of this control was to be "in accordance with their geographical and geological characteristics and with factors governing the existence of marine resources and the need for their national utilization"¹²⁴.

Taking into consideration the fact that only the 200 miles states were invited to the Montevideo Conference, it seems odd that the spatial limit of the 200 miles was not established in the operative part of the Declaration, but was mentioned only in the preamble. Possibly this was a tactical position in order not to deter the other non-200 miles Latin American States from supporting the declaration.

The Declaration also provided that the right to adopt measures in areas under maritime sovereignty and jurisdiction should be exercised "without prejudice to freedom of navigation by ships and overflight by aircraft of any flag"¹²⁵. Bearing in mind that the freedom accorded to third states in the asserted maritime zone is the essential feature of the regime of the high seas, one could argue that the established zone was created for specific jurisdictional purposes only. However, a close reading of the statements attached to the Declaration by several delegates of the participating states would reveal a significant divergence in the approach to the 200 miles zone¹²⁶. For instance, the statements of Brazil, Ecuador, Panama, Peru and Nicaragua all equated the freedom of navigation with innocent passage. Such cryptic statements seem to give a restrictive interpretation.

Among the points agreed upon at the Montevideo Conference was the idea of calling another conference on aspects of the law of the sea, to be held at Lima, the capital of Peru¹²⁷. It was to embrace all the states of the Latin American and Caribbean Regions with the aim of co-ordinating a common position and adopt a common declaration on coastal states' rights in adjacent seas¹²⁸. In all, twenty states attended this Conference held from 4 to 8 August 1970¹²⁹. In the hope of securing broad recognition, observers were

invited from Canada, India, Iceland, Egypt, Senegal, the Republic of Korea, Yugoslavia and the UN¹³⁰. The Conference adopted the Declaration of the Latin American States on the Law of the Sea¹³¹.

The common principles contained in this Declaration were substantially similar to those enunciated three months earlier in the Montevideo Declaration¹³². However, no mention was made to the 200 miles limit criterion. The limit of the claimed maritime zone was left to be decided by each contracting state in accordance with reasonable criteria, having regard to its geographical, geological, and biological characteristics, and the need to make rational use of its resources¹³³. As was the case with the Montevideo Declaration, most states signing it made statements to the effect that principle 3, which preserved expressly the freedom of navigation and overflight, did not apply to them¹³⁴. Such an attitude, added to the fact that no less than six states refused to sign the Declaration, though each one for its particular reasons¹³⁵, seems to confirm the lack of a unified Latin American conception on the legal regime which would govern the various uses of the 200 miles zone, at least up to the issuance of the Lima Declaration.

Two years later, a Specialized Conference of the Caribbean States on Problems of the Sea was held at Santo Domingo, the capital of the Dominican Republic. It aimed at discussing problems common to their region and harmonizing their positions on the fundamental issues of the law of the sea, including the question of the coastal state's exclusive fishing rights beyond the territorial sea¹³⁶. Fifteen states from the sub-region attended this Conference as full members¹³⁷. All other American States were invited to it as observers¹³⁸.

The Conference produced the Declaration of Santo Domingo¹³⁹ which not only sets out certain principles on the law of the sea agreed upon by the participating states, but enunciated also the principle of the patrimonial sea. The Subsection in which the patrimonial sea is defined provides a basis for a new zone *sui generis* to be called the

patrimonial sea. It says :

"1 - The coastal state has sovereign rights over the renewable and non-renewable natural resources, which are found in the waters, sea-bed and in the subsoil of an area adjacent the territorial sea called the patrimonial sea"¹⁴⁰.

The coastal state would have the right to promote and regulate scientific research and control pollution in the new zone¹⁴¹. And while the breadth of the zone was to be the subject of international agreements within the framework of the UN Charter, the whole of the area encompassed by the territorial sea and the patrimonial sea should not exceed a maximum of 200 miles in breadth¹⁴². Delimitation of the zone between two or more states should be effected in accordance with the peaceful procedures stipulated in the UN Charter¹⁴³. It was also explicitly stated that freedom of navigation and overflight would be preserved in and over the patrimonial sea¹⁴⁴.

It is, therefore, clear that the patrimonial sea concept corresponds closely to the zone of maritime sovereignty included in the Montevideo and Lima Declarations in giving the coastal state the right to all resources in the adjacent sea and sea bed, without control over navigation and overflight beyond the territorial sea. However, certain novelties have been brought by it. Perhaps the most evident ones were the explicit proposal of 12 mile territorial sea and the emphasis put on coastal state's jurisdiction for economic purposes, rather than on the extension of jurisdiction for all purposes, including, security and defense. Such an attitude made a clear distinction between the territorial sea and the proposed functional zone called the patrimonial sea¹⁴⁵. It must be recalled that certain participating states abstained or did not participate in the signing ceremony. El Salvador and Panama, which had earlier extended their respective territorial seas to 200 miles¹⁴⁶, were among the abstaining states¹⁴⁷. The reasons of their abstentions were not disclosed. Possibly their dissent was due to the fact that they viewed the 200 miles zone differently.

In so far as African States are concerned, these states were, before the conclusion

of the 1958 Geneva Conventions, very few¹⁴⁸. Moreover, the territorial sea limit and the fishery limits that were enforceable, in most of those independent states, were those observed by the metropolitan powers.

In the period between UNCLOS I and the start of UNCLOS III, African practice on fishing limits shows that no regional limit was observed. In this post-Geneva era fifteen African States asserted a territorial sea of 12 miles without making any other independent claims to fishing limits¹⁴⁹. Amongst these were Algeria, Benin, Ethiopia, Kenya, Libya, Madagascar, Nigeria, Togo, Somalia, Sudan, and Sierra-Leone¹⁵⁰. For instance, the Kenyan Proclamation of June 6, 1969¹⁵¹ fixed the breadth of the territorial sea at 12 miles. The Proclamation remained silent on the question of fisheries as a whole. Similarly, the Malgash Decree No. 66.007 issued on July 5, 1966¹⁵² fixed the breadth of the territorial sea at 12 miles. Article 5 of this Decree stated that within this limit, "la pêche et réservée aux navires Malgash et sous reserve de reciprocité aux navires des autres Etats ayant conclu avec la Republic Malgash des accords particuliers". It follows that the fisheries limits of these states corresponded with the territorial sea limits.

Some African States had opted for a territorial sea less than twelve miles with a fishery zone of 12 miles¹⁵³. Typical of this is the claim of Ivory Coast of 1967. This state fixed the limit of the territorial sea at six miles by means of a Decree issued on August 1, 1967¹⁵⁴. The same Decree established a contiguous zone of six miles making the fishery limits of the country extend up to twelve miles. Within this additional fishery zone, fishing was also reserved for nationals of the Ivory Coast, and no provision was made to the rights of other states whose nationals had habitually fished therein.

Certain other African States fixed their territorial seas at twelve miles with a contiguous fishing zone extending beyond this limit. Typical of these claims was the Moroccan claim made by means of the law relating to the territorial sea and fishery limits of 1973¹⁵⁵. This law stated in Article 1 that, "les eaux territoriales Marocaines s'étendent

jusqu'à une limite fixée à douze milles marins à partir des lignes de base". Article 4 stated further that, "une zone de pêche exclusive Marocaine est instituée sur une étendue de 70 miles marins à partir des lignes de base définie dans l'article premier".

At the regional level, the African States had shown at the end of the 1960s, strong determination to advance the development of the law of the sea more or less along the lines of the early Latin American functional claims. That is to say, to extend the geographical scope of the coastal state exclusive fishing rights to a maximum distance of 200 miles¹⁵⁶. Several factors were behind such move. Amongst them were, first, more than forty African States emerged as independent members of the international community after UNCLOS I, and did not participate in the making of the 1958 Geneva Conventions. They viewed these Conventions which reiterated the principle of the freedom of the seas as being shaped in a way to protect the interest of the maritime states¹⁵⁷. They favoured a new law that would reflect their interests, particularly a law which would accelerate their social and economic development, and reduce the inequalities between the developed and developing countries¹⁵⁸. Secondly, the significant advance in fishing technology increased the capacity of a few technologically advanced states to indulge in massive overfishing on the high seas and thus threatened the fishery resources near the coasts of other states. Some big maritime states, especially Japan and the Soviet Union, developed and expanded their worldwide fishing fleets to include hundreds of "factory ships" which were "complete mass production that can catch, clean, fillet and can or freeze great quantities of fish without entering the ports of the adjacent coastal states"^{158a}. Such fleets operated to the detriment of small native coastal fishing vessel, and the new states of Africa like some other small coastal states, became alarmed at the actual or possible effect of such large scale operations of foreign origin in high seas areas off their coasts¹⁵⁹. To achieve their objective, African States, like European States, resorted to concerted action. Thus, in 1971 the OAU Council of Ministers adopted two important Resolutions, one on fisheries and

the other on the permanent sovereignty of the African States over their natural resources.¹⁶⁰ By means of the former, African States "confirmed the inalienable rights of the African Countries over the fishery resources of the continental shelf surrounding Africa"¹⁶¹. The African States reaffirmed by virtue of the latter that the exploitation of natural resources in each country shall be conducted in accordance with its national laws and regulations¹⁶². The two resolutions were, therefore, complementary.

Moreover, a group of African Countries composed of sixteen states held a seminar at Yaounde, the capital of Cameroon, from 20 to 30 June 1972 to discuss issues of the law of the sea. The Seminar adopted various recommendations¹⁶³. On the question of the natural resources, it recommended that the African states had the right to establish beyond the territorial sea an economic zone. The African States would enjoy in the zone "exclusive jurisdiction for the purpose of control, regulation and national exploitation of the resources of the sea and their reservation for the primary benefit of their peoples and their respective economies"¹⁶⁴. The other reason given for the establishment of the EEZ was to prevent and control pollution in the area¹⁶⁵. It was, however, expressly stated that the zone's establishment would not affect the non-economic high seas freedoms, namely freedom of navigation, overflight and freedom to lay submarine cables and pipelines¹⁶⁶.

On the question of the external limits of the zone, no maximum limit was suggested, though it was stated that such a limit should be fixed in nautical miles. It was stated further that the determination of such limits should be effected,

"... in accordance with regional considerations, taking duly into account the resources of the region and the rights and interests of the land-locked states without prejudice to limits already adopted by some states within the region"¹⁶⁷.

Recommendation II stated, however, that the economic zone should include at least the continental shelf, which meant in practice that the zone could extend, in certain instances, hundreds of miles from the coast.

With respect to the participation of LLSs in the resources of the EEZ, the Seminar recommended that exploitation of the living resources, "should be open to all African States, both land-locked and near land-locked..."¹⁶⁸. The only limitation placed on such participation was that the enterprises to be operated by land-locked states should be "effectively controlled by African capital and personnel"¹⁶⁹. The latter proposal concerning effective control of the enterprises seems to suggest joint venture arrangements between the LLSs and the coastal states of Africa in that capital to be used in the exploration and exploitation of the resources of the EEZ was to be entirely African.

The establishment of such a zone was also being debated in other forums. It was discussed within the Asian-African Legal Consultative Committee¹⁷⁰ meetings held at Colombo 1971, Lagos 1972, and New Delhi 1973¹⁷¹. At the 1972 Lagos Session, the representative of Kenya took the initiative and presented a working paper on the "Exclusive Economic Zone Concept". It described the zone's purpose as to safeguards the coastal state's economic interests.¹⁷² Article 2 dealt with the right of all states to establish an economic zone beyond the territorial sea extending out to 200 miles, in which they would exercise sovereign rights over the natural resources for the purpose of exploring and exploiting them. All other states would, however, exercise, in the zone the traditional freedoms of the sea with the exception of the freedom of fishing. Article 6 was concerned with the rights of LLSs. It provided for the coastal state to permit a neighbouring developing LLS to exploit the living resources in its economic zone. Similar to the conclusions of the Regional Seminar held at Yaounde, the Kenyan proposal sought to restrict the participation of LLSs in the resources of the EEZ by providing that the enterprises of those states be effectively controlled by their national capital and personnel¹⁷³. This proposal was, of course, even more restrictive in nature given the fact that developing LLSs may lack both the capital and the trained personnel to run an enterprise. The effect of the proposal would therefore amount to a *de facto* exclusion of

these states in the exploitation of the resources of the EEZ.

The question of the establishment of the EEZ was again discussed at a regional level in 1973 as well as in 1974 at the Twenty First and Twenty Third Ordinary Sessions of the OAU. The Declaration of the Organization of African Unity on the Issues of the Law of the Sea¹⁷⁴ which was a result of the Twenty-First Ordinary Session recognized that each African State had the right to establish an EEZ of not more than 200 miles¹⁷⁵. The regime of the zone as described in the Declaration was substantially similar to that which had been proposed one year earlier by the delegate of Kenya to the AALCC. It included references to : permanent sovereignty of the coastal state over all the mineral and biological resources in the zone¹⁷⁶; exclusive jurisdiction of the coastal states for the purposes of pollution prevention and control; safeguards against undue interference with the legitimate uses of the area¹⁷⁷; the recognition of the right of LLSs and other geographically disadvantaged states to share in the exploitation of living resources of neighbouring economic zones on an equal bases with nationals of coastal states¹⁷⁸. This entitlement was said to be derived from the concept of African solidarity¹⁷⁹.

Further support was given to the EEZ concept at the Fourth Summit Conference of Non-Aligned Countries Meeting in Algiers (Algeria), from 5 to 9 September 1973¹⁸⁰.

Thus, it seems that by the early seventies most developing countries had given their accord to the idea of the establishment of the 200 miles for economic purposes.

The objective sought by developing coastal states to establish such a zone was the protection of the resources of their adjacent seas from exploitation by other states, particularly the developed distant water fishing states¹⁸¹. It may be recalled at this juncture that this was a time of intense feeling of the developing states seeking to create a new international economic order¹⁸². One of the many ways it was thought this new international economic order could be recognized was through exclusive appropriation and utilization of the resources of the sea adjacent to the territorial sea. This area of the sea had

also been shown to possess most of the fisheries resources¹⁸³.

On the basis of the above analysis the author may conclude that African, Asian and Latin American states have been very active in advancing the law of the sea towards recognition of the 200 miles exclusive fishing or full exclusive economic zone. But it must be stressed that, while in the early seventies these states resorted to concerted actions at both regional and international levels seeking political support for the 200 miles zone, until that time the 200 miles resources zone remained principally a phenomenon of Latin American and African practice in the law of the sea. Indeed, the majority of states restricted their fisheries jurisdiction to 12 miles. In this connection, taking into consideration the data included in the lists drawn up by the FAO and by Professor Alexander¹⁸⁴ by the end of the 1970s, the numerical ratio of states asserting exclusive fisheries rights within twelve miles to those asserting to exercise this rights in wider maritime areas was 91 to 18¹⁸⁵.

Moreover, these excessive claims were far from being uniform in content or in form. There was wide variation in the scope and the nature of the rights claimed within the asserted maritime zones. In this respect, three types of claims may be distinguished. The first is that of some Latin American and African States which asserted extension of sovereignty over adjacent high seas waters and the natural resources therein under extended territorial seas of varying breadths ranging between 30 and 200 miles¹⁸⁶. The second is that of claims promoted under the pretext of conservation of the living resources within the asserted maritime areas. Examples of these claims are to be found in the Indian claim of 1956¹⁸⁷ and the claim of 1957¹⁸⁸. In the author's opinion, these latter claims differ, substantially, from the former ones. The reason is that, in the case of conservation zones, foreign fishing activities within these zones would not be eliminated totally but would be limited only for the sake of preserving the living resources within the zone. In this context, Straburzynski has correctly said that it should be :

"Pointed out that we ought to differentiate claims to exclusive fishery zones from claims to conservation zones, since the latter does not deprive foreigners of the right of fishing but only limits that right in order to preserve the living resources of the sea. In other words, the conservation zone does not exclude the application of the freedom of fishing but only limits it, firstly but not exclusively, in the interest of the coastal state, but at any rate the establishment of such a zone also indirectly serves the interest of all states in the maintenance of the productivity of living resources of the sea"¹⁸⁹.

The third type is that of exclusive fishery or economic zones made for the purpose of fisheries jurisdiction and control.

Moreover, the general picture of state practice around the very early seventies shows, as indicated above, that the numerical ratio of states limiting the breadth of the belt in which they reserved exclusive rights of fishing for nationals up to twelve miles to those asserting similar rights in wider areas was 91 to 18. Furthermore, states subscribing to a 12 miles exclusive fishing zone come from all parts of the globe. Such a practice appears, therefore, sufficiently large enough to be called general, and consequently, in the author's judgment, the ICJ was absolutely right in deciding in the Fisheries Jurisdiction Case, 1974, that the extension of the fishery zone up to 12 miles from the baselines "appears to be generally accepted"¹⁹¹.

As to the question of whether or not customary international law permitted at that time coastal states to extend their exclusive fishing rights beyond the twelve mile limits, a plausible answer seems to be in a negative. This is because, first, as has been mentioned above, by 1974 there were only few coastal developing states which had made actual claims to exclusive fishing rights beyond the twelve miles limit. Secondly, UNCLOS I granted "sovereign rights" to the coastal state for resources of the continental shelf, but

only "preferential rights" with respect to coastal fisheries¹⁹². In short, preference did not give coastal states exclusive regulation of their coastal fisheries, but only preference in fishing the waters¹⁹³. Thirdly, in the Fisheries Jurisdiction Case, the ICJ stated that, "two concepts have crystalized as customary law in recent years arising out of the general consensus revealed at [the 1960] Conference. The first is the concept of the fishery zone... the second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal state in a situation of special dependence on its coastal fisheries"¹⁹⁴.

On the latter concept, the ICJ stated further that :

"State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal states, particularly in favour of countries or territories in a situation of special dependence on coastal fisheries... After these conferences, the preferential rights of the coastal state were recognized in various bilateral and multilateral international agreements"¹⁹⁵.

This statement of the ICJ implies that the waters beyond twelve miles remained parts of the high seas and not the *tertium genus* of an exclusive fishing zone, for preferential rights must *ipso facto* exclude the right to an exclusive fishing zone.

Chapter One

Notes and References

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4. Fulton, op. cit., supra note 2, pp. 349 - 77.
5. Ibid., p. 351
6. Ibid.
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13. Genesis 9. 2, cited by J. Selden, ibid., p. 28.
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32. Koers, op. cit., supra note 19, p. 28.
33. Ibid., p. 17.
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45. See generally, M. W. Mouton : *The Continental Shelf*. Martinus Nijhoff, the Hague, 1952; F. A. Vallat : "The Continental Shelf", 23 BYIL, 1946, pp. 333-338; H. Lauterpacht : "Sovereignty Over Submarine Areas", 27 BYIL, 1950, pp. 376 - 433; K. Hjertenson : *The New Law of the Sea : Influence of the Latin American States on Recent Development of the Law of the Sea*. A. W. Sijthoff, Leiden/Stockholm, 1973, pp. 20-21; Extavour, *op. cit.*, *supra* Introduction note 4, pp. 66-89.

46. Hudson, *op. cit.*, supra Introduction note 4. pp. 661 - 666.
47. Hjertenson, *op. cit.*, supra note 45, p. 20; Attard, *op. cit.* supra Introduction note 4, p. 2; see also for a detailed consideration of this proclamation, William T. Burke : *The New International Law of Fisheries : UNCLOS 1982 and Beyond*. Clarendon Press, Oxford, 1994, chapter 1.
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95. For the full text of the proposal, see UN Doc. A/ Conf. 13/C. 1/L. 159, in III Official Records, 1958, p. 253.
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97. Revision 2 of the proposal, in *ibid.*, p. 232.
98. UN Doc. A/Conf. 13/C. 1/L. 131, in *ibid.*, p. 269.
99. UN Doc. A/ Conf. 19/8, in *ibid.*, p. 173. According to the proposal, the coastal state would have preferential fishing rights in any area of the high seas beyond the exclusive fishing zone "when it is scientifically established that a special situation makes the exploitation of the living resources in that area of fundamental importance to the economic development of the coastal state or the feeding of its population". See, for more details, S. Oda : "International Law of the Resources of the Sea", RCADI, 1986/2, pp. 417-418.
100. The proposal was rejected, however by a vote of 30 in favor to 21 against, with 18 abstentions, with the necessary two third majority not being met. Oda, *ibid.*, p. 417.
101. Straburzynski, *op. cit.*, *supra* note 42, pp. 57-71.

102. Fisheries Jurisdiction Case (United Kingdom v. Iceland), Merits, Judgement 25 July 1974. ICJ Reports 1974, p. 23.
103. See, for instance, the United Kingdom and Denmark Agreement Regarding the Fisheries Zone Around the Faroe Islands, 1959, in RGDIP, 1963, Documents, p. 621; United Kingdom and Norway Fisheries Agreement, 1960, UNTS, vol. 398, p. 189; United Kingdom and Iceland Exchange of Notes Constituting an Agreement Settling the Fisheries Dispute, Reykjavik, March 11, 1961, UNTS, vol. 397, p. 27; Iceland-Federal Republic of Germany Exchange of Notes Constituting an Agreement Concerning the Fishery Zone Around Iceland, Reykjavik, July 19, 1961, UNTS, vol. 409, p. 47; Norway and USSR Fisheries Agreement, 1964; United Kingdom and USSR Exchange of Notes, 1964; Spain and France Fisheries Agreement, 1967; Japan and New Zealand Fisheries Agreement 1967; Denmark and Federal Republic of Germany Fisheries Agreement, 1963, in ST / LEG/ SER. B/15, 1970, pp. 879-931; also Japan and Republic of Korea Fisheries Agreement of 1965, 4 ILM, 1965, p.1128.
104. Straburzynski, op. cit., supra note 42, pp. 261-62; also Oda, op. cit., supra note 99, pp. 394-95.
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109. *Op. cit.*, supra note 107, Art. 3.
110. 3 ILM, 1964, p. 1067.
111. J. De Brencker : "La Convention de Londres sur la Pêche du 9 Mars 1964", RBDI, 1966/1, pp. 144-45.
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115. Fitzmaurice, *op. cit.*, supra Introduction note 18, p. 202.
116. See for instance, the Agreement between the Polish People's Republic and the Government of the GDR Concerning the Granting of Rights to Fishing Vessels of the GDR to fish in the Polish Fisheries Zone, 19 December, 1971, in ST/LEG/SER.B/15, 1970, pp. 879-82; Japan and Republic of Korea Fisheries Agreement of 1965, *op. cit.*, supra note 103, pp. 891-892; the Soviet Union and Norway Agreement, of 28 September 1964, in 3 ILM 1964, pp.144-48; Soviet Union and United States Fisheries Agreement of 1969, 8 ILM, 1969, pp. 502-506 and; Mexico and the United States Fisheries Agreement of 1968, in 7 ILM, 1968, pp. 312-321.
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118. Decree No. 664.976, 3 December 1969, in 8 ILM, 1969, p.1067. On other Latin American unilateral claims, see generally A. Szekely : Latin America and the Development of the Law of the Sea, vol. 1. Oceana Publications, Dobbs Ferry 1979.
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120. For the text, see 9 ILM, 1970, p. 1081. The states parties to it were Argentina, Brazil, Chile, Ecuador, El Salvador, Panama, Peru, Nicaragua and Uruguay.
121. B. M. Taitt : "The Exclusive Economic Zone : A Caribbean Community Perspective Part I - Evolution of a Concept", 7 WILJ, 1983, p. 43.
122. Hjertenson, *op. cit.*, supra note 45, p 68.
123. The Declaration of Montevideo, *op.cit.*, supra Introduction note 5, para. 1.

124. Ibid., para. 2.
125. Ibid., para. 6.
126. L. D. M. Nelson : "The Patrimonial Sea", 22 ICLQ, 1973, p.676; also Taitt, op. cit., supra note 121, p.43.
127. Resolution No.3 taken at the Montevideo Conference adopted the proposal of Peru to convoke all Latin American States at Lima in August 1970. Cited by Extavour, op. cit., supra Introduction note 4, p. 147.
128. Ibid., p. 147.
129. The participating states were : Argentina, Barbados, Paraguay, Peru, Dominican Republic, Trinidad and Tobago, Uruguay, and Venezuela. See Taitt, op. cit., supra note 121, p. 44.
130. Attard, op. cit., supra Introduction note 4, p. 19.
131. Op. cit., supra Introduction note 5. It is noteworthy that the Declaration was adopted by 14 states only. See Taitt, op. cit., supra note 121, p. 44.
132. The most important addition was the provision enshrined in principle 5 concerning scientific research activities in the zone. This provision reads as follows : "The right of the coastal state to authorize, supervise, and participate in all scientific research activities which may be carried out in the maritime zone subject to its sovereignty or jurisdiction and to be informed of the findings and the results of such research".
133. The Declaration of the Latin American States on the Law of the Sea (Lima 1970), op. cit., supra Introduction note 5, para. 2.
134. Attard, op. cit., supra Introduction note 4, p. 19.
135. The states concerned are Barbados, Bolivia, Jamaica, Paraguay, Trinidad and Tobago, and Venezuela. For reasons of not signing, see Taitt, op. cit., supra note 121, p.44.
136. The conference met at Santo Domingo the capital of the Dominican Republic, from 6-9 June 1972. For details on the work of the conference, see particularly Extavour,

- op. cit., supra Introduction note 4, pp 148-50.
137. These states are Barbados, Colombia, Costa Rica, the Dominican Republic, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, Venezuela, El Salvador and Guyana. UN Doc. A/AC.138/SR.78, 1972, p.11.
138. Hjertenson, op. cit., supra note 45, p. 73.
139. Op. cit., supra Introduction note 5.
140. Ibid., Patrimonial Sea, para.1.
141. Ibid., para. 2
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145. Nelson, op. cit., supra note 126, pp. 676 - 679; also J. Castaneda : "The Concept of the Patrimonial Sea in International Law", 12 IJIL, 1972, p. 538.
146. See, the Decree No. 97 of September 1970 of El Salvador on Distant-Water and Middle-Distance Fishing, cited by F. V. Kramer : "Central America and the Caribbean", in R. Zacklin, (ed.), *The Changing Law of the Sea : Western Hemisphere Perspectives*. Sijthoff, Leiden, 1974, pp.107-113; The Law No. 31 of February 1967 extending the territorial sea of Panama to 200 miles, in ST/LEG/SER. B/15, 1970, p. 105.
147. Kramer, *ibid.*, p. 120.
148. Before the convening of UNCLOS I only seven African states were independent. See N.S. Rembe : *Africa and the International Law of the Sea : A Study of the Contribution of the African States to the Third United Conference on the Law of the Sea*. Sijthoff and Noordhoff, The Netherlands, 1980, p, 236, Appendix IV.
149. D. M. Johnston and E. Gold : "Extended Jurisdiction : The Impact of UNCLOS III on Coastal State Practice", in T. A. Clingan, (ed.), *The Law of the Sea : State Practice in Zones of Special Jurisdiction*, Proceedings of the Thirteenth Annual Conference,

- October 15-18, 1979, Law of the Sea Institute, University of Hawaii, Honolulu, 1982, pp. 27-49.
150. Ibid.
151. Presidential Proclamation, June 6, 1969, in ST/LEG/SER.B/15, 1970, pp. 95-96.
152. S. H. Lay, R. Churchill & M. Nordquist, (eds.), *New Directions in the Law of the Sea*, vol. 1. Oceana Publications, Dobbs Ferry, New York, 1973, p. 250.
153. Among these States were Cape Verde, Tunisia, and Senegal. See Johnston and Gold, *op. cit.*, supra note 149, pp. 27-49.
154. Churchill and others, *op. cit.*, supra note 152, p. 250.
155. Cited by A.Lahlou : "Le Maroc et le Droit des Pêches Maritimes", RCADI, 1983, pp. 254-55; Congo opted for 12 miles territorial sea with an additional fishery zone of 15 miles, while Cameroon and Gambia established 18 and 50 miles territorial seas, respectively. Johnson and Gold, *op. cit.*, supra note 149, pp. 39-43.
156. Rembe, *op. cit.*, supra note 148, p. 234.
157. Ibid., p. 122; also Anderson, *op. cit.*, supra Introduction note 1, p. 319.
158. Rembe, *op. cit.*, supra note 148; also Dupuy and Vignes, *op. cit.*, supra Introduction note 4, pp. 280 - 281.
- 158^a. Anand, *op. cit.*, supra note 29, p. 273.
159. Ibid., pp. 272-273; also Dean, *op. cit.*, supra note 94, pp. 764-62.
160. OAU Resolution on Fisheries (CM/Res. 250), in S. Oda : *The International Law of the Ocean Development : Basic Documents*. Sijthoff, Leiden, 1972, p.28; OAU Resolution on Permanent Sovereignty of African Countries over their Natural Resources, (CM/Res. 245), in *ibid.*, p. 27.
161. Resolution on Fisheries, in *ibid.*, para. 1.
162. Resolution on Permanent Sovereignty, *op. cit.*, supra note 160, para.1.
163. The Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea , *op. cit.*, supra Introduction note 5, p. 210.

164. Ibid., Recommendation I (a) (3).

165. Ibid.

166. Ibid.

167. Ibid.

168. Ibid., Recommendation III.

169. Ibid.

170. The AALCC originally called the Asian Legal Consultative Committee was constituted as from 15 November 1956 by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria, to serve as an advising body of legal experts to deal with problems that may be referred to it and, to help in exchange of views and informations on matters of common concern between the participating countries. After 19 April 1958, the name was changed to AALCC when the participation of countries from the African continent was accepted.

171. For discussions at the Colombo Session (Twelfth Session) held from 18 to 27 January 1971, see Report of the Twelfth Session of the AALCC, pp. 203-204; for the Thirteenth Session held from 18 to 25 January 1972, see Report of the Thirteenth Session, pp. 155-160; and for the Fourteenth Session, held in New Delhi from 10 to 18 January 1973, see Report of the Fourteenth Session, pp. 61 - 63.

172. Draft Articles on the Exclusive Economic Zone Concept, in 12 ILM, 1973, p. 210.

173. Ibid., Art. 6.

174. The Declaration of the Organization of African Unity on the Issues of the Law of the Sea, *op. cit.*, *supra* Introduction note 5.

175. Ibid., para. C.

176. Ibid.

177. Ibid.

178. Ibid.

179. Ibid. It is worth mentioning that the Declaration referred the development of the

200 miles EEZ to a number of considerations that were set forth in the preambular clauses. Among these were the need to reinforce the principle of the permanent sovereignty of states over their natural resources which was endorsed by the OAU and the UN General Assembly in various resolutions; the right of the African countries to exploit the resources of the sea surrounding their continent for the benefit of their peoples; the non-participation of the African States at UNCLOS I and UNCLOS II; and the great imbalance between the developed and the developing states in their capacity to draw benefits from the exploitation of the resources of the seas.

180. Resolution Concerning the Law of the Sea, 9 September 1974, in Oda, *op. cit.*, supra note 160, p.4.
181. A. M. Singela : "Land-locked States' Rights in the Exclusive Economic Zone from the Perspective of the UN Convention on the Law of the Sea : An Historical Evaluation", 20 ODIL No. 1, 1989, p. 65.
182. Declaration on the Establishment of a New International Economic Order, adopted by the UN General Assembly at its Sixth Special Session. GA. Res. 3201, UNGAOR, Supp. No. 1 UN. Doc. A / 9559, 1974; Program of Action on the Establishment of a New International Economic Order, adopted at the same Session, GA. Res. 3202, GA Official Records, Supp. No.1, UN Doc. A/9559, 1974, and Charter of Economic Rights and Duties of States, GA. Res. 3281, 29 UN GAOR, Supp. No. 31, p. 50, UN Doc. A/9631 1974.
183. R. P. Anand : Legal Regime of the Seabed and the Developing Countries. Thomson Press, India, 1975, p 43; L. Henkin : "Old Politics and New Directions", in New Directions, *op. cit.*, supra note 152, p. 3.
184. Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fisheries Conservation Zones and the Continental Shelf, FAO Legislative Series No.8, Rome, 1969, pp. 5-24; L. M. Alexander : "Breadth of Territorial Sea and other Offshore Zones", in Alexander, *op. cit.*, supra note 30, pp. 313-318; also 9 ILM, 1969, pp. 516-39.
185. Straburzynski, *op. cit.*, supra note 42, pp. 269-70.
186. For instance, Brazil extended in May 1970 its territorial sea to 200 miles by Decree

- Law No. 1098 of 15 may 1970, in 10 ILM, 1971, p. 1224; Ecuador did the same in 1969 by means of amendment to Article 633 of its Civil Code by Decree No.1542 of 10 November 1966, in ST/LEG/SER. B/15, 1970, p.78; Panama took similar action in 1966 by Law No.31 of 2 february 1967, in *ibid.*, p.1050; and Uruguay followed suit a in 1969 by Decree No. 604.967 of 3 December 1969, cited by Hjertonsen, *op. cit.*, *supra* note 45, p. 58. For more details, see particularly Nelson, *op. cit.*, *supra* note 126, pp. 674-75.
187. Presidential Proclamation of 29 November 1956, in ST/LEG/SER.B/15, 1970, p. 49.
188. Proclamation of Governor-General of 20 December 1957, in *ibid.*, p. 107.
189. Straburzynski, *op. cit.*, *supra* note 42, p. 269.
190. Fisheries Jurisdiction Case (United Kingdom v. Iceland), Merits, Judgement of July 25, 1974. ICJ Reports, 1974, p.3; Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), Merits, Judgement of July 25, 1974, *ibid.*, p.175.
191. *Ibid.*, p. 23.
192. Convention on the Continental Shelf, *op. cit.*, *supra* note 85; and Resolution on Special Situations Relating to Coastal Fisheries, adopted on 26 April, 1958.
193. R.R. Churchill : "The Fisheries Jurisdiction Cases : The Contribution of the International Court of Justice to the Debate on Coastal State's Fisheries Rights", 24. ICLQ, 1975, pp. 87-88; also. C. A. Fleischer : "The New Regime of the Maritime Fisheries", RCADI, 1988/2, pp. 122-23.
194. Fisheries Jurisdiction Case (United Kingdom v. Iceland), *op. cit.*, *supra* note 190, p. 23.
195. *Ibid.*, p. 26.

CHAPTER TWO

EEZ - COASTAL STATES

Introduction

One of the most important features of the EEZ concept viewed from the angle of the classical conception of the law of the sea is that its approach to the notion of functional competence in the new 200 miles EEZ differs significantly from that which was adopted, in the past, with regard to other functional zones, viz., the contiguous zone and the continental shelf¹. With regard to these zones, the traditional approach has been to attribute well-defined rights and competences to the coastal state with all other residual rights vesting with the international community.

The EEZ concept as shown in the LOS Convention² took another approach. In the EEZ, there are not only the rights and duties of the coastal state that are spelled out, but also the rights of third states in general and the rights of some specific states.

A wide range of rights has been accorded to the coastal state within its EEZ, with certain duties. Its rights over all economic activities carried out in the zone have been described in terms of "sovereign rights" as opposed to "sovereignty", while the rest of rights have been couched in terms of "jurisdiction"³. In the author's opinion, this differentiation underlines that the rights conferred upon the coastal state are not of the same plenitude, and hence an investigation in the exact nature and scope of these rights appears to be useful. For the purpose of the analysis, each set of the above mentioned rights will be dealt with separately.

Section I : The Coastal State's Economic Rights in the EEZ

In this section, the author's aim is to attempt to establish, first, the scope of the coastal state's general rights over the EEZ's economic activities; secondly, to identify the

content of the coastal state's jurisdiction over living resources of the superjacent waters of the EEZ; thirdly, to determine the nature of the coastal states' rights over the EEZ's non-living resources; and lastly, to establish the extent of the coastal states jurisdiction over all other economic activities that may be carried out within the EEZ. This will be done essentially by analysing the relevant provisions of the LOS Convention.

A. The Scope of the Coastal State's General Rights Over the EEZ'S Economic Activities

Part V of the LOS Convention sets out the negotiated understanding of UNCLOS III with respect to the EEZ concept.

The most important principle enshrined in Part V is that every coastal state by virtue of Article 56 has, within its EEZ, sovereign rights with regard to the purposes specified in the article, viz. exploration, exploitation, conservation and management of the natural resources of the superjacent waters, the seabed and subsoil, and all other activities relating to the economic exploitation and exploration of the EEZ.

During negotiations at UNCLOS III most of the EEZ proposals emanating from the developing states of Africa and the patrimonial sea from the States of Latin America described the coastal state's rights over the EEZ's natural resources in terms of "sovereign rights"⁴. This term found its place in the first negotiating text of UNCLOS III, 1975⁵, and has not been changed since.

"Sovereign rights" denotes, in general, the rights which are owned or which only a sovereign has or can exercise⁶. In the case of the EEZ, Article 56 (1) (a) grants to the coastal state "sovereign rights" for the purposes of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the superjacent waters. The utilized formulation of "sovereign rights" tied to specific purposes is the same approach as was used in the 1958 Convention on the Continental

Shelf⁷. The phrase "for the purpose of" in Article 56 qualified "sovereign right" and therefore necessarily limits and restricts it to economic activities. Thus, what the above-mentioned provision vests in the coastal state is not full sovereignty as on its land territory or in the territorial sea, but only particular sovereign rights to enable it to achieve specific and defined economic objectives. It is clear from the phraseology that the sovereign rights of the coastal state pertain only to the resources of the zone rather than to the zone itself. In this context, Professor Fleischer has correctly said :

"The term [sovereign rights], conveys the idea of a functional approach : The coastal state does not have full sovereignty as on its land or in its territorial sea but a right of jurisdiction that is related to certain purposes. Beyond the jurisdiction so defined, there is no special basis for coastal state rights, and the traditional rules developed for the high seas will continue to apply"⁸.

This interpretation is in accord with the vast majority of the proposals submitted to the UN Seabed Committee⁹. The rationale of this limitation is that any acknowledgement of rights over the sea bed and superjacent waters themselves might serve as a basis for subsequent extensions of the powers of a coastal state which might jeopardize the freedoms of communication and navigation¹⁰.

The issue of whether the coastal state's sovereign rights within the EEZ exist *ipso facto* is, however, relevant to the question of how one distinguishes the continental shelf and the EEZ in the LOS Convention. It must be recalled that part VI on the Continental Shelf incorporates Article 2 of the 1958 Continental Shelf Convention. Article 77 (2) states that, if the coastal state does not exercise its sovereign rights over the continental shelf, no other state may unilaterally exercise them. Furthermore, paragraph three of the same article clearly indicates that the rights over the continental shelf do not depend on occupation or any declaration or other express pronouncement¹¹.

In so far as the EEZ is concerned, the language employed in Part V, particularly Article 55 and 56, seems to suggest that the EEZ rights exist *ipso facto* in a manner similar to the continental shelf rights. Article 55 defines the EEZ "as an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this part", which is Part V. Article 56 then states that "in the exclusive economic zone, the coastal state has...". It does not say that the coastal state may establish an EEZ, but rather the coastal state "has" certain rights in the maritime area described as the EEZ. Thus, reading the two articles together one may draw the conclusion that the Convention either supposes that every coastal state becoming a party to it will eventually claim an EEZ or that the Convention places upon every coastal state an obligation to claim an EEZ. However, both interpretations would seem unreasonable for the following reasons. First, there is no reason for the Convention to cast an obligation upon the coastal state to establish an EEZ if that state does not desire to have one¹². Secondly, Article 57 states that the EEZ shall not extend beyond 200 miles from the baselines from which the territorial sea is measured. This provision appears to indicate that the decision on the actual breadth of the zone rests with the coastal state. Consequently, the decision of whether a state should have a zone of its own or not remains within the hands of that state itself¹³. Thirdly, while in the case of the continental shelf, the LOS Convention explicitly states that the coastal state's rights do not depend on occupation or proclamation, there is no such provision in Part V on exclusive economic zone. Thus, it may be inferred from the absence of any express provision that the drafters had no intention to apply the same characteristics to the EEZ.

Therefore, in the author's opinion, it does not seem that an EEZ accrues to a coastal state *ipso facto*, but must be specifically claimed, making the EEZ a concessive rather than a peremptory zone¹⁴. Neither does it seem compulsory that the full permissible breadth of 200 mile should be so designated¹⁵, geography limiting the claim in some cases¹⁶, as well as specific choice¹⁷. Rocks without a means of sustaining human

habitation or economic life of their own can generate neither a continental shelf nor an EEZ, but islands can¹⁸. In this context, in the Greenland/Jan Mayen Case (Denmark v. Norway), the Court was prepared to accept that the island of Jan Mayen, with its polar climate and population consisting entirely of 25 scientific station personnel, was entitled to generate an EEZ under Article 121 para. 3 of the LOS Convention^{18a}.

B. The Content of the Coastal State's Jurisdiction over the Living Resources of the EEZ Water Column

Fishing rights are the centerpiece of the rights comprised by the EEZ concept¹⁹. Coastal state's rights and duties relating to the EEZ fisheries are set out in broad terms in Article 56. 1 (a), and amplified later in Articles 61 and 62. Consistent always with the concept of sovereign rights enshrined in Articles 56, Articles 61 and 62 provide the coastal state with extensive powers related mainly to the EEZ fisheries. These powers related mainly to four areas : first, the allocation of the EEZ fisheries; secondly, the prescription or promulgation of laws and regulations for fishing in the EEZ; thirdly, the enforcement of fisheries laws and regulation within the EEZ and; fourthly, the special provisions for specific species. For the purpose of clarity, these powers are considered, hereunder, in turn.

1- The Coastal State's Powers With Regard to Allocation of EEZ Fisheries

According to the provisions of the LOS Convention, the coastal state enjoys, in its EEZ, extensive powers with regard to allocation of fisheries. The basic principles on allocation of the EEZ fisheries are contained in the following provisions : "The coastal state shall determine the allowable catch of the living resources in its exclusive economic zone" (Art. 61 para. 1), and "the coastal state shall determine its capacity to harvest the living resources of its economic zone" (Art. 62 para. 2), and it "shall... give other states

access to the surplus of the allowable catch" (Art. 62 para. 2)²⁰.

1. 1 The Power to Determine the Allowable Catch²¹

The idea of empowering the coastal state to determine the AC of living resources in the EEZ appeared in the Six Eastern European Nation's Proposal of August 5, 1974²², which stated that except for highly migratory species, the annual AC should be determined for each species of fish or other living marine resources²³. The first draft prepared by UNCLOS III in 1975²⁴ dropped the specification "for each species"; at the same time, more complex provisions were added so that the provisions as retained in the LOS Convention read "the coastal state shall determine the allowable catch of the living resources in its economic zone and shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over exploitation"²⁵.

Thus, by virtue of the above provisions, determination of the AC has been made the right and responsibility of the coastal state. What this term "allowable catch" refers to is nowhere defined in the LOS Convention, yet it is upon the determination of AC that the issue of allocation and access of third states to the surplus resources will probably depend. AC is, however, a term that has received much attention in international fisheries management literature. It has been defined by the Department of Fisheries of the FAO as "that catch which, if taken in any one year, will best enable the objectives of fisheries management (e.g. the optimum long term yield) to be achieved"²⁶.

According to Article 61 (2), the process of determining the AC must be based on the "best scientific evidence" to ensure that the EEZ living resources are not endangered by over-exploitation²⁷.

In the author's opinion, the determination of the AC seems to be a discretionary decision, not to the extent as to whether it can be made, but as to how it can be made by

the coastal state. While the LOS Convention goes to great lengths to define the process, it also includes numerous qualifications that allow the coastal state to make the determination at its own discretion.

The first of these qualifications is to be found in Article 61 (2) which requires the coastal state to employ the "best scientific" evidence available to it. The problems here are twofold. First, "best" implies that the coastal state is not required to find the most accurate scientific information and data but only the best that it can manage to gather from its own sources, as obtained from foreign fleets in pursuance of their obligation to provide catch statistics, as well as from other coastal states in the region²⁸. This interpretation is reinforced by the latter part of the phrase "available to it", which again suggests that the coastal state is not put under a duty to actively conduct scientific investigations in order to obtain the best scientific evidence necessary for taking the required measures, but can take these measures on the basis of the scientific information it has access to²⁹.

Moreover, like most international fisheries conventions³⁰, the LOS Convention has adopted the maximum sustainable yield³¹ as one of the fisheries conservation objectives to be achieved by the coastal state when exercising its fisheries rights in the EEZ. Article 61 (2) states that the coastal state "shall ensure through proper conservation and management measures that the maintenance of the living resources is not endangered by overexploitation". The same article goes on saying in para. 3 that "such measures shall be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield as qualified by relevant environmental and economic factors, including the economic needs of the coastal fishing communities and the special requirement of developing countries".

However, the concept of MSY is now regarded by fishery scientists as unsatisfactory³². Its combination here with even more indeterminate qualifiers, such as the relevant "environmental and economic" factors, suggests that the coastal state may use

any number of references to qualify its determination of the MSY. This interpretation is supported by the wide range of factors that are listed subsequently. They are the economic needs of coastal fishing communities and special requirements of developing states, and taking into account fishing patterns, the interdependence of stocks. Thus, if the particular fishing community is entirely dependent on fishing for its livelihood, the coastal state may adjust its MSY accordingly. The implication which can be drawn from the wordings of the LOS Convention is, therefore, significant. It is that MSY is, to some extent, a discretionary measure.

1. 2 The Power to Determine its Harvesting Capacity

In compliance with the concept of sovereign rights enjoyed by the coastal state in its EEZ, Article 62 (2) further empowers the coastal state to determine its harvesting capacity³³, in some other words, to decide the part of the AC which it will reserve for itself. If it happens that the HC of the coastal state is higher or equal to the AC, only the coastal state can fish in its EEZ. Of course, a coastal state is free to allow other states to fish even if its HC is equal to the AC if it believes it appropriate to do so. Nevertheless, for other states willing to take part in fishing activities in the EEZ of a coastal state, the determination by that state of its HC amounts to a determination of whether or not it will give the access to the fisheries resources of its EEZ. Yet the sole obligation placed upon the coastal state in this regard is to establish a HC which is loosely defined.

It has been suggested by Professor Burke and certain other authors that the provision in Article 62 (2) means the domestic harvesting capacity of the coastal state³⁴. It seems, however, difficult to agree with this restrictive interpretation to the coastal state's harvesting capacity. In the author's opinion, the HC of the coastal state should be given a broad sense. In other words, it includes not only the capacity of the coastal state's fishing fleet, but also the use of foreign capital and fishing vessels³⁵. This is because, first, there

is no provision in the LOS Convention compelling the coastal state to harvest the catch only through its own nationals and with its own means. Secondly, the concept of the EEZ was advanced by developing countries for economic reasons. Many of these states do not have the proper fishing technology to enable them to satisfy the demands of their populations and the needs of their small fishing industries. A restriction of their harvesting capacity to that of their domestic fishing fleets would, therefore, mean a reduction in the economic benefit to be gained from those resources; and, consequently, the economic improvement awaited by these states from the establishment of the EEZ would not be realized.

Thus, the fact that the LOS Convention does not lay down any guidelines as to how the HC is to be made seems to have made the determination of the HC of the coastal state within its own discretion. This is all the more so because, like the coastal state power to determine the AC, its power to decide its harvesting capacity is excluded from the compulsory dispute settlement procedure of Part XV, Section 2, Article 297 (3) (a).

1.3. The Power to Determine the Surplus Catch and to Allow Access to Third States

Under Article 62 (1) the coastal state is put under an obligation to promote the objective of optimum utilization of the living resources in its EEZ. To this end, it is required to determine two levels of exploitation before the surplus can be determined. The first level is that of the AC of fish within its EEZ, and the second is its HC³⁶. If it happens that the two levels are the same, there is no obligation upon the coastal state to allow access to foreign fishing vessels. But, should there be a surplus, it should allow access to this surplus to other states through agreements or other arrangements³⁷. Rather than leave the surplus unfished, this method would encourage optimum utilization. If a surplus is declared, it would seem that a comparatively weak obligation to grant access follows. That

an obligation of some sort exists is evidenced by Article 297 (3) (b) (iii) which states that compulsory recourse to conciliation may be sought where a coastal state has "arbitrarily refused to allocate to any state... the whole or part of the surplus it has declared to exist". However, exclusion of this area from compulsory dispute settlement suggests that this is a weak obligation. Moreover, it is not an obligation to allow automatic access³⁸, but one to enter into agreement only, and then only in accordance with terms and conditions, some of which may make access an uneconomic proposition. The requirement in Article 62 (2) relating to access of third states is, therefore, reduced to nothing. To borrow the words of Professor Burke, it "places no meaningful obligation upon the coastal state"³⁹.

Despite its centrality in the process of allowing for access to the EEZ living resources, the surplus concept is a "slippery"⁴⁰ one, the determination of which is "the culmination of very complex operations"⁴¹ combining both scientific and nonscientific considerations.

Even in cases where a coastal state has limited HC, there are often biologically justifiable situations in which a surplus does not exist, or in which the declaration of the surplus would be prejudicial to the interests of the coastal state⁴². Thus, the issue of whether there is an obligation on the part of the coastal state to declare a surplus is important, because the answer determines the strength of third states' access rights accorded by the LOS Convention.

In practical terms, the procedures available to the coastal state allow it to set its HC at a level equal to the level of the AC, or to decide an AC below its HC. The question is whether this is legally permissible.

Foreign states are given the right to invoke compulsory conciliation when a coastal state has arbitrarily refused to determine, at their request, the allowable catch of the living resources within its EEZ and its capacity to harvest living resources with respect to stocks that foreign state are interested in fishing^{42a}. In that sense, there is a basis for

challenging the coastal state's act. However, in the author's opinion, it is not a strong basis in view of two issues : first, the big difficulty of establishing whether such an act has been taken arbitrarily; and secondly, the fact that it is compulsory conciliation, rather than compulsory settlement, that is available, the former being subject to rejection by the coastal state⁴³.

Another approach is to consider whether the failure of the coastal state to declare an AC or a surplus could be challenged on the basis of the principle of abuse of rights⁴⁴. It is true that this principle makes an attack on unreasonable, arbitrary and abusive use of lawful authority. But, in the author's opinion, it does not seem to be of great practical importance to third states which have been denied access. If these states invoke the principle of abuse of rights, they would find it much more difficult to prove such an abuse of rights than the coastal state would in its plea of having exercised its rights in good faith. For, as the International Law Association has observed :

"[I]t may be accepted that the principle of good faith is a universally recognized principle of law, but its logical counterpart... the doctrine of abuse of rights... is an invalidating ground likely to be invoked only with great reluctance by an International Tribunal, and in very flagrant cases. Where, as in the situation presently under study, the contest is likely to be between two states arguing about a delicate balance of rights and duties affecting vital aspects of national sovereignty, the issue is unlikely to be presented in terms such as to invite application of the doctrine of abuse rights"⁴⁵.

Thus, on the basis of the above analysis, the author is inclined to say that at the very best there is an obligation to allocate a surplus when one has already been declared and a fishing state has specifically so requested.

2. The Coastal State's Powers with Regard to Prescription of Laws and Regulations for Fishing in its EEZ

Article 62 (4) expressly empowers the coastal state to legislate and issue regulations for fishery activities exercised in its EEZ. This provision seems, however, to be more concerned with the types of regulatory powers of the coastal state with regard to foreign fishing activities. The reason is that, as far as the coastal state nationals are concerned, it would in any case exercise unlimited legislative and administrative jurisdiction either on the basis of personal or quasi-territorial jurisdiction⁴⁶.

Thus, with regard to its nationals, the coastal state is, in principle, free to issue laws and regulations that suit its national interests such as the increase of employment, the increase of food supply or the preservation of economic efficiency of its fishing industry. Nevertheless, in exercising such jurisdiction, it should satisfy the requirement enshrined in Article 61 relating to conservation of the EEZ's living resources.

Article 62 (4) provides a list of areas to which the coastal state's regulatory powers may relate. The range of these areas is not, however, limited by the LOS Convention. This is because of the presence of the expression 'inter alia' before the start of the listing. In this context, Professor Arbour has correctly said :

"Ce qu'on doit nécessairement souligner avec force ici, c'est que cette énumération des pouvoirs réglementaires de l'Etat côtier n'est aucunement exhaustive puisque le mot 'notamment' indique clairement que l'énumération qui suit constitue tout au plus des exemples d'application des pouvoirs généraux"⁴⁷.

Thus, the list is meant to be illustrative, possibly to reflect the importance attached by numerous developing coastal states at UNCLOS III to their competence to impose terms and conditions on the rights of foreigners to fish in their EEZs⁴⁸.

Two sets of regulatory powers are contemplated by Article 62 (4). The first set relates to the enactment of conservation and management measures that will be applied to

all fishermen, including nationals. Sub-paragraphs (b) (c) (d) (e) and (f) pertain to this first set. Under the provisions of these sub-paragraphs, the coastal state is entitled to issue laws and measures in respect of, inter alia, fishing quotas, fishing seasons and fishing areas, sizes and number of fishing vessels, and the size and age of fish that may be caught. The second set concerns the terms and conditions regarding fisheries access. Sub-paragraphs (a) (g) (h) (i)(j) relate to this set. Terms and conditions found in these sub-paragraphs include those that would be expected in fishing laws and regulations, including licenses, fees, place of landings, training, technology transfer and joint ventures. Thus, the coastal state is provided with an enormous range of details in the terms and conditions that the coastal state is authorized to impose. The coastal state's authority to vary these conditions underscores the state's total control over access.

In exercising its regulatory powers, the coastal state is put under a specific restraint that its laws and regulations "shall be consistent with the Convention"⁴⁹. However, given that Article 297 (3) (a) of Part XV (settlement of disputes), provides that the coastal state "shall not be obliged to accept the submission to such settlement of any disputes relating to its sovereign rights with respect to the living resources in the EEZ or their exercise, including its discretionary powers for... the terms and conditions established in its conservation and management laws and regulations", it seems that this competence of the coastal state is exclusive.

3. The Coastal State's Powers with Regard to Enforcement of Conservation and Management Measures

In general, the term "enforcement" denotes "the process designed to compel obedience to the rules"⁵⁰. In the sphere of fisheries, it means the process by means of which compliance by fishermen with fisheries legislations enacted by coastal states or competent international fisheries organizations is ensured.

The coastal state is empowered under the LOS Convention to take enforcement procedures to protect its fisheries within the EEZ. Article 73 of the LOS Convention dealt with this matter. Its provisions have not changed since they first appeared in the ISNT in 1975⁵¹.

These fisheries enforcement provisions, effectively amalgamate proposals made by a group of African coastal states⁵², and the United States⁵³. Other proposals made by the EEC⁵⁴, the territorialist states⁵⁵ and the USSR⁵⁶ found no place in the LOS Convention.

Article 73 of the LOS Convention recognizes the right of the coastal state to take enforcement measures as may be necessary to ensure compliance with its fisheries laws and regulations in its EEZ. This process involves two types of activity. First, preventive activities which include surveillance, stopping, boarding and inspection⁵⁷. Surveillance refers to the observation of fishing operation or other activities being carried out by fishing vessels in the EEZ. Stopping and boarding are activities undertaken to confirm suspected violations detected by surveillance or in order to perform inspection. This latter refers to activities carried out by appointed officials on board fishing vessels to ascertain that suspected vessels have or have not complied with fisheries regulations.

The second type of activities refers to the means available to punish violations. They include arrest or detention of vessels and their crews before the trial and penalties after the vessel has been found guilty at the trial⁵⁸. Thus, any person whether a national or a foreigner charged with a violation of the coastal state fisheries regulations and laws may be arrested by the police of the coastal state and may be punished if found guilty by the courts of that state⁵⁹.

It is also interesting to note that, although Article 73 is entitled "enforcement of laws and regulations of the coastal state", it relates only to measures taken against acts violating the regulations and laws enacted by the coastal state to protect its rights over the

living resources of the EEZ. This is made evident in paras.1 and 3 that are only concerned with fisheries laws and regulations. Nonetheless, it appears that such measures may be applied to any vessels and not only fishing vessels found guilty of violations of coastal state fisheries laws and regulations. The reason is that, while it is true that Article 73 (1) and (3) are explicitly concerned with fisheries laws and regulations, it is also true that paras. 2 and 4 of the same article are not concerned only with fishing vessels, but with every vessel. Therefore, a research vessel taking a sample of fish in violation of fisheries laws for research purposes might find itself subject to the coastal state's enforcement powers contained in Article 73.

Article 73 imposes some limitations on the coastal state's enforcement powers. These are, mainly, the limitations on the kind of punishment and that of the prompt release of arrested vessels and their crews on posting of reasonable bond or other security⁶⁰. With respect to the first limitation, Article 73 (3) states that a "coastal state penalties... may not include imprisonment in the absence of agreements to the contrary by the states concerned"⁶¹. Accordingly, in its judicial proceedings against the arrested vessel and crew, the coastal state is required to impose financial penalties only. However, to the author's knowledge, there is no international standard for such financial penalties. It seems, therefore that the degree of these penalties would fall exclusively within the domestic jurisdiction of each coastal state.

As far as the second limitation is concerned, Article 73 (2) provides that arrested vessels and their crews "shall be promptly released upon the posting of reasonable bond or other security". However, no indication is given in the LOS Convention as to what is "reasonable bond or other security". The bond or other security can never be determined from an objective point of view⁶². Thus, the amount of the bond or other security would be a discretionary decision of the coastal state.

However, if the release of arrested vessels and crews is unduly delayed, and if

the states concerned are parties to the LOS Convention, an appeal may be made to the International Tribunal for the Law of the Sea^{62a}.

4. Special Provisions for Specific Species

As it has been already explained, Article 56 "is an establishment clause, a substantive description of the rights of the coastal state"⁶³ in its EEZ. In it, the rights of the coastal state with regard to the EEZ living resource are described in terms of sovereign rights. The authority of the coastal state with regard to the EEZ's living resources is further detailed in certain subsequent articles, particularly in Article 61 and 62. But, the same part of the LOS Convention that is Part V contains several specific provisions that are to be applied to certain categories of fish. The issue which is therefore discussed, is that of the relation of the regimes contained in these specific provisions with the sovereign rights of the coastal state.

4.1. The Regime for Resources Located in More than one Zone

The law of the sea recognizes the reality that fish do not respect national boundaries, but instead migrate across boundaries separating the EEZs or EFZs of neighbouring states, and across boundaries separating the EEZs or EFZs of states and areas of the high seas. Accordingly, the new law of the sea requires states to cooperate in the conservation and exploitation of transboundary stocks. In this connection, Article 63 of the LOS Convention casts an obligation on coastal states to cooperate, directly or through an international organization, with other states that fish for the so-called shared or straddling stocks associated with their zones in enacting appropriate conservation and management measures. As regards shared stocks (i.e. stock or stocks occurring within the EEZs of two or more coastal states), Article 63 (1) places an obligation on coastal states concerned to "seek to agree" either directly or through existing regional or subregional

organizations or through similar arrangements that can be established for that purpose, upon the measures necessary to coordinate and ensure the conservation and development of such stocks⁶⁴. In this connection, certain international law publicists⁶⁵ have asserted that the obligation contained in this provision is one obliging the coastal states concerned to agree upon the necessary measures for conserving and developing shared living resources. However, in the author's opinion, such a view seems to be incorrect. This is because the stated objective is to seek to agree. Thus, the obligation is only to enter into negotiations and to pursue them as far as possible, with a view to concluding agreements⁶⁶.

Moreover, it must be made very clear that the measures to be agreed upon by the coastal states concerned are without prejudice to the other provisions of Part V of the LOS Convention, which is the part on the EEZ. This means that the provisions enshrined in Article 63 (1) do not displace the more general provisions of Part V of the LOS Convention, but complement them. Accordingly, each coastal state continues to enjoy the sovereign rights, given to it by means of Article 56 (1) (a) over that part of the shared stock of species found in its EEZ, but is bound by the conservation and utilization obligations contained in Article 61 and 62 of the LOS Convention.

4. 2. Resources Straddling the High Seas and the EEZ

Straddling fish stocks are stocks located within the EEZ and in the area of the high seas adjacent to it, as set out in Article 63 (2) of the LOS Convention⁶⁷. Among the best known straddling fish stocks in the Pacific Ocean are found pollok, fished mainly in two areas on the high seas, the "Donut Hole" in the Bering sea, and the "Peanut Hole" in the Okhotsk Sea; giant squid extending from California to the south end of Latin America; orange roughy, found in the Challenger Plateau of New Zealand; and jack mackerel, that spawns along the coasts of Chile and Peru and migrates westward over long distances⁶⁸.

In the Northeast Atlantic are found blue whiting, redfishes, cod, haddocks, and halibut from Greenland, as well as Norwegian herring⁶⁹. In the Northwest Atlantic, there are important stocks of northern cod, American plaice, yellowtail, and redfish, which are found in the EEZs of Canada, Greenland, and member states of the EEC⁷⁰. Such stocks are exploited by the coastal states within their EEZs, and by vessels from other states fishing on the adjacent high seas.

In the southwest Atlantic are found squid, hake, southern blue whiting, and patagonian granadier⁷¹.

Straddling fish stocks provide one important case where there is a very close interaction between the high seas and the EEZ. The LOS Convention clearly recognizes this reality in Article 63 (3). This article states that where the same stock or stocks of associated species are located both within the EEZ and in an area beyond and adjacent to the zone, the coastal state and the states fishing for such stocks in the adjacent area "shall seek, either directly or through appropriate subregional or regional organization, to agree upon the measures necessary for the conservation of these stocks in the adjacent area". This provision has made it very clear that where the same stock of species occurs in an EEZ and an adjacent area of the high seas frequented by foreign fishermen, the states concerned are obliged to seek to agree on the conservation and management measures for the stock as a whole, including that part of it that lies in the high seas. However, this obligation appears to be a weak one as the states concerned are not put under a duty to establish joint measures or to concert conservation actions, but only to "seek to agree" on such measures. Should this search fail, the coastal state would be entitled to adopt conservation and management measures which are to be applied only to that portion that lies in its EEZ. Beyond 200 miles the coastal state would be, as a matter of international law, virtually powerless to unilaterally deal with non-national fishing activity even where the activity creates detrimental effects on the living resources which are found within its EEZ⁷².

In fact, since the adoption of the LOS Convention, a number of new problems

have emerged in relation to the conservation and management of straddling stocks⁷³. Many important fish stocks are accessible outside the 200 miles EEZ and, in recent years, foreign fishing beyond the EEZ outer limit has been growing in intensity⁷⁴. Since the harvested species occur within the same ecosystem as that of the EEZ and conservation measures are not unified, signs of overexploitation have begun to show⁷⁵. Some coastal states regard that as a threat to the stocks of species which lie within their EEZs as well as to the fisheries management regimes that have been established since the introduction of the 200 miles EEZ⁷⁶. Various countries concerned expressed their concern over this issue at the Conference on Conservation and Management of High Seas Living Resources held in St. John, Newfoundland, in 1990⁷⁷. On this occasion, the adoption of measures to avoid adverse effects of high seas fisheries on living resources found in the EEZ was emphasized, together with the idea that conservation and management of straddling stocks in the high seas shall be consistent with those applied by the coastal state in the EEZ. The issue was also discussed in the context of the work of the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992⁷⁸, which recommended the convening of a United Nations conference on HMSs and straddling fish stocks⁷⁹.

In accordance with the recommendation made at the UNCED⁸⁰, the General Assembly convened, between 1993 and 1995, an intergovernmental conference bearing the title of "The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks"⁸¹, with a view towards promoting effective implementation of some provisions of the LOS Convention. The conference was to identify and assess existing issues related to the conservation and management of such fish stocks and search for means of improving cooperation on fisheries among states. Moreover, the work and the results of the conference were to be consistent with the provisions of the LOS Convention, in particular the rights and duties of coastal states and states fishing on the

high seas⁸².

The conference held five substantive sessions⁸³. At the Fifth Substantive Session which was held in New York from 24 July to 4 August 1995, the conference ended its work by concluding the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks⁸⁴. This Agreement has made it very clear that the biological unity of the straddling fish stocks requires compatibility between the conservation and management measures adopted on the high seas and in areas within the national jurisdiction of the parties⁸⁵. The instrument would apply to straddling stocks on the high seas, and, consistent with the LOS Convention, the coastal states are responsible for the conservation and management of such fish stocks within the areas of the sea falling under their jurisdiction⁸⁶.

In order to achieve compatibility between the measures adopted on the high seas and in areas within national jurisdiction, and in line with Article 63 (2) of the LOS Convention, the relevant coastal states and the states whose nationals fish for such stocks in the adjacent high seas areas have been placed under a duty to cooperate. In determining compatible conservation and management measures, the states concerned are required to take into account, amongst other things, (a) the conservation measures adopted and applied in accordance with Article 61 of the LOS Convention in respect of the same stocks by coastal states within areas under national jurisdiction; (b) previously agreed measures established and applied for the high seas in accordance with the LOS Convention in respect of the same stocks by relevant coastal states and states fishing on the high seas; (c) previously agreed measures established and applied in respect of the same stocks by a subregional or regional fisheries management organization; (d) the biological unity and other biological characteristics of the stocks; and (e) the respective dependence of the coastal states and the states fishing on the high seas on the fish stocks

concerned⁸⁷.

The Agreement has also established general principles regarding, for instance, the nature and objectives of the conservation and management measures, precautionary measures, and the consistency of such measures which must be applied by the coastal state in its EEZ and by the coastal state and other states concerned in the sea areas beyond the EEZ outer limit⁸⁸. Moreover, the coastal state and all other states concerned have been put under a duty to make every effort to agree on compatible conservation measures within a reasonable period of time⁸⁹. Pending agreement on such measures, the states concerned are required to enter into provisional arrangements⁹⁰. When cooperative efforts are unsuccessful in reaching an agreement within a reasonable period of time, any of the states concerned may invoke the procedures for the settlement of disputes provided for in Part VIII of the Agreement⁹¹.

An important part of the Agreement deals with compliance and enforcement of the conservation and management measures and imposes a duty on states to cooperate in order to ensure compliance with and enforcement of conservation and management measures for straddling fish stocks⁹². In this context, where there are reasonable grounds for believing that a vessel on the high seas has been engaged in unauthorized fishing within a sea area under the coastal state's jurisdiction, the flag state of that vessel, at the request of the coastal state concerned, must immediately investigate the matter⁹³. Moreover, the flag state of that vessel must cooperate with the coastal state in whose waters the violation occurred in taking appropriate enforcement action in such cases and may authorize the relevant authorities of that coastal state to board and inspect the vessel on the high seas⁹⁴.

Furthermore, the agreement empowers any state party that is a member of a subregional or regional fisheries organization to board and inspect vessels flying the flag of other states when they are found in any high seas areas covered by that organization⁹⁵.

Where, following boarding and inspection, there are clear grounds for believing that a vessel has violated the conservation and management measures, the inspecting state must secure evidence and promptly notify the flag state of the alleged violation⁹⁶. The latter shall immediately and fully investigate the matter and, if evidence so warrants, take enforcement action with respect to the vessel and shall promptly inform the inspecting state of the results of the investigation and of any subsequent enforcement action taken⁹⁷.

In addition, port states may inspect documents, fishing gear and catch on board fishing vessels when such vessels are voluntarily in their ports or at their offshore terminals⁹⁸.

They are also empowered to enact legislation to prohibit landings and transshipments when the catch is the result of fishing activities undermining the effectiveness of conservation measures⁹⁹.

With regard to the resolution of disputes concerning the interpretation or application of the agreement, Article 27 contains a provision which is more or less similar to the provision enshrined in Article 33 (1), of the United Nations Charter. It puts an obligation upon the parties to any dispute to seek a solution by a variety of specified peaceful means. This involves negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements. It has also made it very clear that they are able to choose peaceful methods other than those specified in the agreement¹⁰⁰.

4.3. Regulation of Highly Migratory Species¹⁰¹

The term "Highly Migratory Species" is not defined in the LOS Convention. However, it refers to some species of fish that traverse very wide distances and spend a considerable portion of their life cycle outside the 200 miles limit¹⁰². They are listed by species designations in Annex I of the LOS Convention. The list includes 9 tuna species,

12 marlin species, 2 species similar to tuna, 4 saury species, pomfrets, common dolphinfish, several kinds of oceanic sharks, and cetaceans. All these species are characterized by their great mobility; they travel thousands of kilometers, thus creating a wide geographical distribution both within and outside the limits of the EEZ. In the North Pacific, bluefin tuna and albacore may cross the Pacific Ocean in a very few months. They may be exploited first in the American continent's coastal waters, then a year later or less than that in the coastal waters of Japan¹⁰³. Southern bluefin tuna found only in the Southern Hemisphere migrate from spawning areas around Australia to areas throughout the Atlantic, Pacific, and the Indian Ocean¹⁰⁴. At present, the scientific accuracy of the LOS Convention's list concerning HMSs is questionable because it has included some small species of tropical tuna with limited regional migrations¹⁰⁵.

From a commercial standpoint, the different varieties of tuna are the most important fish species among HMSs, and the majority of the international agreements dealt with them¹⁰⁶.

In the LOS Convention, special provisions are made in Article 64 concerning HMSs. The provisions contained in the first paragraph of this article calls for cooperation between the coastal state and other states whose nationals fish for HMSs either directly or through appropriate international organizations, with a view toward ensuring conservation and promoting the objective of optimum utilization of such species throughout the region both within and beyond the EEZ. In fact, this provisions appeared first in the ISNT¹⁰⁷ and has suffered no substantial change throughout the whole subsequent texts of UNCLOS III. However, it must be noted that these provisions are set out in the part dealing with the EEZ. Moreover, these provisions are to apply "in addition to other provisions" of Part V of the LOS Convention¹⁰⁸. Therefore, the coastal state has sovereign rights over HMSs in its EEZ under Article 56 of the LOS Convention. Thus, the effect of the provisions included in paragraph 1 of Article 64 is, to borrow the words

of Professor Brown, "to place limitations upon the exercise of these sovereign rights by requiring the coastal state to co-operate with other states in the region"¹⁰⁹.

In the beginning, the United States did not recognize the jurisdiction of the coastal state over tuna. On the contrary, it had until very recently held the view that Article 64 of the LOS Convention confirmed a rule of customary law under which tuna, but not other HMSs, did not come under the general coastal state authority when present in its EEZ. Rather, the freedom of fishing on the high seas extended in the case of such fish species, and their conservation, management and optimum utilization could be effected only through international arrangements among the coastal state and other fishing states in the region¹¹⁰. The United States position received some backing from Costa Rica, Panama¹¹¹ and the Bahamas¹¹².

However, the US view remained isolated. Most eminent international law publicists who have dealt with the subject took a different view¹¹³. Using an argument from within the LOS Convention itself, they have argued that Article 64 (2) states expressly that the provisions contained in paragraph 1 of Article 64 will be applied "in addition to the other provisions" of Part V. In their view, this provision represents a reaffirmation of Article 56 and, consequently, highly migratory tuna also fall under the sovereign rights of the coastal state¹¹⁴. Moreover, all other distant water fishing states rejected the US view¹¹⁵. In this connection, Australia, for instance, has expressly stated that the United States juridical position is "inconsistent with international law"¹¹⁶. In addition, the overwhelming state practice recognizes coastal state jurisdiction over highly migratory tuna throughout the EEZ¹¹⁷. The combination of all these factors has in 1992 prompted the United States to abandon the view indicated above, and asserted by amendment of the Magnuson Act jurisdiction over highly migratory tuna within its EEZ, thus rendering its practice consistent with the overwhelming state practice subsequent to the adoption of the LOS Convention¹¹⁸.

Thus, HMSs provide a second important situation in which there is a very close interaction between the EEZ and the high seas. The LOS Convention clearly recognizes this reality in Article 64, which calls for arrangements on cooperation. Moreover, recognition of such reality is further confirmed in the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks¹¹⁹. Article 3 applies the provision of the Agreement discussed above in relation to straddling stocks to HMSs.

4. 4. Conservation and Protection of Marine Mammals

The main species falling under the denomination "Marine Mammals" are whales, seals and other cetaceans, such as porpoises¹²⁰. When these species are present in the EEZ, they are subject to the sovereign rights of the coastal state under Article 56 of the LOS Convention. In addition, however, some marine mammals, such as dolphins, are listed in Annex I as HMSs and are therefore governed by Article 64 of the LOS Convention.

Marine mammals do not reproduce themselves on a large scale and can therefore be depleted within a relatively short time. The LOS Convention appears to have responded positively to the biological character of these species. Indeed, a specific provision relating to them is contained in Article 65. Under it, the coastal state or an appropriate international organization is entitled to limit or prohibit the exploitation of these resources more strictly than other resources. This specific provision is, entirely, compatible with the sovereign rights of the coastal state¹²¹. Some lawyers¹²² have maintained that there is no duty to establish an allowable catch for these species or ensure their optimum utilization as a resource to be harvested. States are to cooperate in conserving the various species, particularly cetaceans, and must work through the appropriate international organization,

principally the International Whaling Commission (IWC), for their conservation, management and study. Article 120 of the LOS Convention mandates the same duties for the high seas.

In the author's opinion, however, the interpretation which would exclude optimum utilization is not self-evident, for the simple reason that cetaceans and dolphins are enshrined in Annex I of the LOS Convention as HMSs, and are, therefore, subject to the optimum utilization requirement¹²³.

4. 5. Conservation of Anadromous Species

The term "Anadromous Species" refers to those fish species that spawn in fresh waters or estuarine waters and then migrate to oceans to live in salt waters¹²⁴. From a commercial point of view, salmon is the most important amongst anadromous species¹²⁵ and the majority of the international agreements concluded have dealt with it¹²⁶.

Special provisions also have been included in Article 66 of the LOS Convention with regard to anadromous fish species. The central principle enshrined in the latter article is that the state of origin of anadromous stocks, i.e. the state in whose rivers they originate, has "primary interest and responsibility for such stocks"¹²⁷. Like most of the EEZ provisions, this principle was inserted in the first negotiating text of UNCLIS III¹²⁸ and suffered no change since then.

The direct consequence of the principle mentioned above is that, as a general rule, anadromous species, such as salmon, can be fished only in the jurisdictional waters of the state in whose rivers they originate¹²⁹. This means, from a legal standpoint, that they are equally subject to the sovereign rights of the state of origin.

An exception to the general rule mentioned earlier is, however, included in Article 66 (1) (a). According to this provision, fisheries for anadromous stocks might be conducted on the high seas when the limitation of fishing for such stocks to the

jurisdictional waters of the state of origin would result in economic dislocation for a state other than the state of origin. If a situation of this kind arises, consultations between the states concerned should be conducted in order to determine the measures and circumstances of fishing¹³⁰.

Moreover, as a result of its responsibility for such stocks, the state of origin can, according to Article 66 (2), establish a total allowable catch for stocks originating in its rivers, but this is conditioned by the duty of prior consultation with the other states fishing these stocks. The duty of consultation applies to establishing a total allowable catch not only for anadromous species that are to be fished beyond the outer limits of the EEZ¹³¹, but also for anadromous species which migrate into or through the EEZs of states other than the state of origin¹³². The established total allowable catch must be observed in the high seas as well as in the EEZs of other states¹³³. This position represents the universalization of the primary interest and responsibility of the state of origin and its rights.

4. 6. Management of Catadromous Species

The term "Catadromous Species" refers to certain fish species which spend most of their life cycle in fresh waters then migrate to the sea to spawn in salt waters"¹³⁴. Examples of these species are eel and mullet. Unlike Article 66 on anadromous species, Article 67 concerning catadromous species contained only general provisions on these species. Possibly this is due to the fact that states are not as interested in them as they are in anadromous stocks¹³⁵.

In short, the provisions of Article 67 on catadromous species are similar to those of Article 66 on anadromous species. The central principle is that the state in whose waters catadromous species spend the greater part of their life cycle has the primary interest in and responsibility for the management of these species¹³⁶. Here again, the direct consequence

of this principle is that these species will be fished solely in the sea areas that lie landward of the outer limits of the EEZ¹³⁷. Fishing for catadromous species on the high seas is prohibited.

Moreover, in the event of catadromous species migrating through the EEZ of a state other than the state in whose waters these species spend the greater part of their life cycle, these two states should cooperate with a view to enact management measures by agreement¹³⁸. The agreement must ensure the rational management of the species and take into account the responsibilities of the management state for the maintenance of the species¹³⁹. Thus, although they may have some interest in the same species, other coastal fishing states are not fully free to control these species in their zones.

The general conclusion to be drawn from the above discussion is that, under the EEZ fisheries regime contained in Part V of the LOS Convention, the coastal state enjoys extensive rights with respect to the management and use of the EEZ fisheries. In exercising these rights the coastal state is placed under certain obligations, the most important of which are : first, the coastal state should use proper conservation and management measures to protect the EEZ's living resources; secondly, that it should promote the objective of optimum utilization of the EEZ's living resources, including the provision of access to foreign fishermen. Nevertheless, much flexibility is provided to the coastal state in setting the allowable catch and the capacity of the coastal state in harvesting the resources. A decision concerning access of foreign states may take into account the economy of the coastal state and other national interests. Furthermore, the dispute settlement system established by the LOS Convention in Article 297 (3) (a) precludes effective review of the coastal state's decisions on these questions. This means that the LOS Convention essentially provides the coastal state with exclusive decision-making

based on its interests with regard to what gets fished, how much gets fished how it gets fished and who fishes in its EEZ.

C. The Nature of the Coastal State's Rights over Sedentary Species and the Non-Living Resources of the Seabed and Subsoil of the EEZ

This subsection is concerned with sedentary species and the non-living resources of the seabed and its subsoil within the EEZ. The two subjects fall under the sovereign rights of the coastal state by virtue of Article 56 of Part V of the LOS Convention¹⁴⁰. But the coastal state's authority over them is articulated in Part VI of the LOS Convention, under two cross-references from Article 68 in the EEZ part with respect to the former and Article 56 (3) with regard to the latter. These two cross-references are not without legal consequences. This subsection investigates these legal consequences.

1. Sedentary Species

The background to the subject is to be found in the framing of the 1958 Geneva Conventions. The ILC included sedentary species in its definition of natural resources in its meeting in 1953¹⁴¹. The final definition adopted in the 1958 Geneva Conference after an extensive debate was a compromise solution between states which wanted to exclude living resources altogether and others which wanted to include bottom fish¹⁴². The definition of sedentary species adopted in the Geneva Convention on the Continental Shelf¹⁴³ has been retained unchanged in the ICNT and its revisions. These are living organisms which, at the harvestable stage, are either immobile on or under the sea floor or which are unable to move except in constant physical contact with the sea floor or subsoil¹⁴⁴. They include such creatures as sponges, corals, oysters, lobsters, mussels and possibly crabs¹⁴⁵.

This definition lacks precision, it has been said¹⁴⁶. This view seems to be

correct, for there has been no uniform list of sedentary species. The fishing states have, in practice, adopted different lists based on their appreciation of how their fishery interests would be served by inclusion or otherwise of a particular species¹⁴⁷. Thus, the decision of whether or not a particular species falls within the content of the category sedentary species remains to some extent a subjective one.

As indicated earlier, Article 68 of Part V expressly excludes sedentary species from the application of this part. Article 77 (1) of Part VI, "Continental Shelf" states, in part, that the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources. Natural resources are defined to include amongst others the living organisms belonging to sedentary species. The rights accorded to coastal states under the latter provision are, therefore, the same rights that coastal states enjoy under both the Geneva Convention on the Continental Shelf¹⁴⁸ and customary law¹⁴⁹. These rights do not depend on occupation or any express proclamation. They are exclusive, in the sense that if the coastal state does not exploit its resources no one may do so without the express consent of the coastal state¹⁵⁰. The coastal state will be free to give its consent or withhold it without giving any reason. This separate treatment of sedentary species from ordinary fish resources of the EEZ implies that a coastal state is under no obligation to take any management or conservation measures, nor to accommodate foreign fishermen¹⁵¹. In Article 77 the sovereign rights are for the purpose of exploring and exploiting, thus omitting the terms conserving and managing. When this omission is linked with the injunction at Article 68 that no provisions in Part V are to apply to sedentary species as defined in Article 77 (4), it is clear that the already-discussed conserving and managing obligation to the international community is not required from the coastal state. The other provisions on declaring and providing access to a surplus, safeguarding associated and/or dependent species, arrangements for economically dislocated, geographically disadvantaged, or land-locked states would also be excluded,

as would the requirements to Article 73 regarding imprisonment, release on bond and related matters¹⁵².

2. The Non-Living Resources of the EEZ

One element of the EEZ regime is that the coastal state has sovereign rights for the purpose of the exploration and exploitation, conservation and management of non-living resources of the seabed and subsoil of the EEZ¹⁵³. With the exception of the provisions relating to "conserving and managing" and "superjacent waters", the rights granted to the coastal state, in this field, are exactly the same rights already enjoyed in respect of seabed resources under the 1958 Convention on the Continental Shelf and in customary international law¹⁵⁴. All states which could gain by exercising jurisdiction over their continental shelves have done so¹⁵⁵. In this respect, it has been correctly observed that, since what are involved are, principally, non-living resources, the purpose of such rights are related particularly with their exploration and exploitation and not with their conservation and management; the latter are concepts which refer appropriately to the case of living resources of the water column¹⁵⁶.

Because the continental shelf overlaps within the 200 miles limit with the EEZ in respect of these particular resources, one of the basic issues that faced UNCLOS III negotiations was that of which one of these two regimes should prevail. In this connection, two main trends emerged when discussing this issue at UNCLOS III. The first trend appeared in the early stages of UNCLOS III. It was for the continental shelf regime to be absorbed within the 200 miles limit of the EEZ¹⁵⁷. This trend was led by many African and Latin American states as well as by some LLSs¹²⁰. These states advanced several arguments in support of their position. Some of these arguments were summarized in the statement made by Mr. Kalondji, the representative of Zaire at the Caracas Session, 1974. He said :

"The principle of the common heritage of mankind was of great importance to his delegation. Any application of the exploitability criterion would leave for the common heritage merely those areas that were unexploitable and therefore of little value. The only criterion should be that of distance. It was logical for the limits of the continental shelf and the economic zone to coincide. Consequently, the shelf as a separate entity would disappear. Those states that claimed acquired rights over the continental shelf were doing so under the 1958 Convention that was now being reviewed"¹⁵⁹.

However, for the broad-shelf states, such as the United States, Australia, Canada, the Soviet Union, and Argentina¹⁶⁰, the arguments advanced were not convincing, particularly because they ignored the fact that broad-shelf states already enjoy sovereign rights beyond the proposed 200 miles limits under the 1958 Convention on the Continental Shelf¹⁶¹. In their view, the absorption of the continental shelf regime within the 200 miles limits of the EEZ would, therefore, damage these established rights¹⁶².

The broad-shelf states were on the minority side at UNCLOS III. Nevertheless, the fact that their position was, essentially, based on valid arguments, viz. the wording of Article 1 of the 1958 Convention on the Continental Shelf and the principle of the "natural prolongation"¹⁶³ of the land mass, had made it necessary that the demands of these states should not be ignored. UNCLOS III had, therefore, to resort to a compromise solution on this issue. This compromise is reflected in Articles 76, 82 and 56 of the LOS Convention. This last now allows a coastal state to extend its continental shelf beyond the 200 miles limit as far as 350 mile¹⁶⁴. This position has assured consistency with existing international law and has brought satisfaction to broad margin states. On the other hand, a percentage of the products resulting from the exploitation of the continental shelf mineral resources found beyond 200 miles was made payable to the international seabed authority

which would distribute it between the states parties to the LOS Convention¹⁶⁵. This was a concession made for those states adhering to the first trend.

More importantly, under Article 56 (1) and 57 of Part V entitled "Exclusive Economic Zone" the coastal state enjoys sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the seabed and subsoil up to 200 miles. The same rights have been granted to the coastal state by virtue of Article 77 (1) of Part VI on the Continental Shelf. Moreover, under a cross reference from Article 56 (3), the coastal state's sovereign rights with respect to the seabed and subsoil resources, are made exercisable in accordance with the Continental Shelf Part. This cross reference raises the issue of whether or not the EEZ regime merges with that of the continental shelf.

In the author's opinion, the provision enshrined in Article 56 (3) seems to recognize the autonomy of both institutions. This interpretation finds support in the existence of parallel provisions in Part V and Part VI on several matters such as the sovereign rights with respect to the resources of the seabed and subsoil, sedentary species and artificial islands¹⁶⁶. In both parts, two related but separate and independent regimes are set up. It is not, thus, difficult to agree with Judge Gros who pointed out, in the Continental Shelf (Libyan Arab Jamahiriya v. Malta) Case, 1984, that "comparison of Articles 56-62 and 73-74 (Zone) with Articles 76,77,78,81 and 83 (Continental Shelf) seems to leave only this alternative : either two legal regimes or chaos"¹⁶⁷.

This parallel system of EEZ and continental shelf, however, creates a difficult problem with regard to delimitation especially between states with opposite coasts. If the distance between two states with opposite coasts exceeds 400 miles and there exists a continental shelf between them, then the delimitation issue can be resolved by resorting to the principles contained in Article 83 (1)¹⁶⁸, viz. agreement¹⁶⁹, consistency with international law¹⁷⁰, and equitable solution¹⁷¹. If the distance between these states is less than 400 miles, however, then the situation becomes more complex. If the two states have

asserted an EEZ, and both consented to ignore the continental shelf between them, then the issue may not be difficult to resolve. But assuming that the continental shelf of one of them goes beyond the median line of the two opposite coasts, can that state still exercise sovereign rights over that part of the continental shelf as stated in Article 77 (1) of the LOS Convention?

Due to the fact that the regime of the continental shelf appeared earlier than that of the EEZ, and given the fact that, under the 1958 Convention on the Continental Shelf and the LOS Convention, the rights of the coastal state do not depend on occupation or any express proclamation, it seems that it is unlikely that a coastal state would abandon its claim to its continental shelf beyond the median line of the two states with opposite coasts. On the other hand, by virtue of Article 56 (1), a coastal state enjoys, within its EEZ, sovereign rights for the purpose of exploring and exploiting the non-living resources of the seabed and subsoil. It seems, thus, that it is unlikely that a state would allow an opposite state to assert the continental shelf underlying its EEZ.

One possible method to solve this problem appears to be that of absorbing the continental shelf regime within 200 miles into the EEZ. Thus, if the distance between two states with opposite coasts is less than 400 miles, then the EEZ should be delimited regardless of the continental shelf between these states. Professor Oda appears to favor this view¹⁷².

On the other hand, a state with a broad shelf *vis a vis* an opposite state is likely to reject this view. Under such circumstances, it is possible for this latter state not to assert an EEZ and base its claim on the continental shelf theory. Furthermore, even if a state claims an EEZ, it can assert its rights on a continental shelf based on customary rules of international law. For example, the Statement of the Socialist Republic of Vietnam made in May 1977 on the economic zone provides that the EEZ of the Republic extends to 200 miles from the baselines¹⁷³. It further stated that : "The continental shelf of the Socialist

Republic of Vietnam comprises the seabed and subsoil of the submarine areas that extend beyond the Vietnamese Territorial Sea throughout the natural prolongation of the Vietnamese land territory to the outer edge of the continental margin"¹⁷⁴.

Another solution is to have different maritime boundary lines for the EEZ and the continental shelf. For instance, in the hearing on the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya) Case on October 9, 1981, Libya took the following view :

"Libya considers that, as between states with opposite or adjacent coasts, the delimitation of their respective continental shelf areas and of their economic zones ought not, in the majority of cases, to be different. Nevertheless, there may be factors relevant to fishing, such as established practices, which have no relevance to shelf resources; and conversely, there may be factors relevant to shelf resources such as geological features controlling the extent of a natural prolongation - of no relevance to fishing. It therefore follows that the two boundaries need not necessarily coincide"¹⁷⁵.

In actual cases of delimitation, not all states have utilized a maritime boundary line for delimiting the two zones. However, a large number of coastal states have already used the concept of the single maritime boundary that serves for the purpose of delimiting both the EEZ and the continental shelf in several regions of the globe¹⁷⁶. On the other hand, only very few states have agreed to have two different maritime boundary lines for different purposes. For example, in the Agreement between Australia and France relating to maritime boundaries separating the Heard and Kerguelon Islands in the South Indian Ocean and the Australian mainland and New Caledonia concluded on 4 January 1982, the two states agreed to have two different maritime boundary lines for different purpose¹⁷⁷. Similarly, in the Agreement between Australia and Papua New Guinea concluded on 18 December 1978, the fisheries jurisdiction boundary line does not correspond to the continental shelf boundary line¹⁷⁸.

The sum of the above discussion is that the rights of the coastal state over the EEZ non-living resources of the seabed and its subsoil are, in reality, governed by the law of the continental shelf. This substantial prevalence of the continental shelf regime results from the cross reference contained in Article 56 (3) to Part VI on the Continental Shelf. It ensues from such a prevalence that the nature of the coastal states rights over the EEZ seabed and subsoil is identical to that of the coastal state rights over the resources of the continental shelf. These rights have a functional character. In other words, their purposes, and the field of activity they are connected with, are explicitly defined. But, what is still more important is that, as a consequence of the prevalence of the continental shelf regime, these rights are exclusive. Nonetheless, the EEZ and the continental shelf remain legally autonomous even though within the 200 miles limit they operate with respect to the same area and similar non-living resources. They are concepts that have dissimilar structure and origin¹⁷⁹, which can, occasionally, justify the drawing of two different boundaries.

D. The Coastal State Rights over Other Economic Resources of the EEZ

Article 56 (1) (a) provides that the sovereign rights of the coastal state also apply to "other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds".

Under the RSNT Part II Article 44 (1) (c), the coastal state was given "exclusive jurisdiction" with regard to other activities for the economic exploration and exploitation of the EEZ. This means that the coastal state alone was empowered to legislate and to take the necessary enforcement measures in the zone with respect to these activities¹⁸⁰.

The words "exclusive jurisdiction" were, however, replaced later in the ICNT of 1977 by the words "sovereign rights" in the context of the changes made to the EEZ provisions to stress the economic nature of the EEZ¹⁸¹.

In the above provision, three types of activities relating to other economic uses of

the EEZ have been specifically mentioned. They are activities concerning the production of energy from, first, water ; second, currents ; and lastly winds. In the author's opinion, the listing of these activities is only illustrative. This is because, first, the comprehensive nature of the expression "other activities for economic exploitation and exploration of the zone" seems to suggest that the management and control of all other economically-oriented activities in the EEZ are vested in the coastal state; secondly, the use of the words "such as" denotes that the few activities mentioned in that provision are meant to be illustrative and not conclusive.

Thus, the rights of the coastal state over the economic uses of the EEZ are not confined to those activities that are related to the production of energy from the water, currents and winds, but extend to include all other economically-oriented activities which will be made accessible either by present or future technological development . It is interesting to note that, prior to the convening of UNCLOS III, neither customary nor conventional international law had conferred these rights upon the coastal state. Although the regime of the territorial sea, included coastal state jurisdiction over all activities directed to the economic exploitation and exploration of the territorial sea area, by virtue of its sovereignty over it¹⁸², none of the regimes of the contiguous zone, the exclusive fishing zone and the continental shelf were concerned with such activities. Under each one of these last three regimes, third states retained the right to make such uses of the sea as a reasonable use of the high seas.

Section II : The Coastal State's Non-Economic Rights in the EEZ

The other coastal state's rights in the EEZ relate to artificial islands, installations and structures, marine scientific research and preservation of the EEZ's marine environment. In this connection, Article 56 (1) (b) stipulates that in the EEZ the coastal state has jurisdiction as provided for in the relevant provisions of the LOS Convention

with regard to :

- (I) The establishment and use of artificial islands, installations and structures;
- (II) Marine scientific research;
- (III) The protection and preservation of the marine environment.

Unlike the coastal state's economic rights which are couched in terms of "sovereign rights", the rights enumerated in this provision are described in terms of "jurisdiction". Although this term is often associated with the power of courts to hear and adjudicate controversies, it has a broader meaning in international law. Jurisdiction is the capacity of a state under international law to prescribe or to enforce a rule of law¹⁸³. Thus, jurisdiction involves a state's right to exercise certain of its powers. Jurisdiction is necessary for the validity of legislation, the most striking assertion of jurisdiction, and for the judicial actions of a state. As Beale correctly observed, "the sovereign can not confer jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law"¹⁸⁴. Jurisdiction may be plenary or limited in scope. In other words, a state may assert jurisdiction over all persons in a given geographical area and for all purposes, or it may limit the extent of the jurisdiction exercised by type of person, area, or purpose¹⁸⁵.

The other EEZ competences set out in Article 56 (1) (b) relate to certain specific topics. Moreover, these competences are to be exercised in accordance with the relevant provisions of LOS Convention. This section attempts to establish the precise extent of these competences. For the sake of analysis, the author will deal with these competences, separately.

A. The Competence of the Coastal State with Regard to Artificial Islands, Installations and Structures

As has already been mentioned, Article 56 (1) (b) gives the coastal state, with

respect to the establishment and use of artificial islands, installations and structures, only jurisdiction. In the first text¹⁸⁶ of UNCLOS III, the words exclusive rights and jurisdiction were employed in this regard, which were later changed in the manner shown in Article 56 (1) (b). In the author's opinion, this change in terminology does not seem to have, in reality, any significant importance. This is because Article 60 of the LOS Convention, which elaborates further on these rights envisages, on the one hand, that the coastal state shall have the exclusive right to construct and authorize and regulate the construction, operation and use of such objects, and from the other hand, it states that the coastal state shall have exclusive jurisdiction over the same objects.

It is important to note that Article 60 of the LOS Convention addressing the issue of artificial islands, installations and structures in the EEZ, establishes a distinction between artificial islands, on the one hand, and installations and structures on the other, but none of these terms has been defined in the LOS Convention¹⁸⁷. Article 60 (1) (a) grants the coastal state exclusive jurisdiction to construct and authorize and regulate the construction, operation, and use of artificial islands regardless of their purposes. This means that third states are not allowed to build or operate such islands for military or any other purpose without the coastal state's consent.

On the other hand, as far as installations and structures are concerned, Article 60 (1) (b) (c) gives the coastal state exclusive jurisdiction and the right to construct and authorize and regulate the construction, operation, and use of such objects only if they are for resources, marine scientific research, environmental and other economic purposes, or which could interfere with the exercise of the rights of the coastal state in the EEZ. This provision represents a compromise between two different approaches which emerged at UNCLOS III. According to the first approach, all artificial islands, structures, and installation should fall under the jurisdiction of the coastal state; according to a second approach supported by the big maritime powers, it should only embrace artificial islands,

structures, and installations which serve economic purposes¹⁸⁸.

The latter provision means, at least in the interpretation of the maritime powers, that third states have the right to place, within the EEZ, installations and structures that do not have an economic purpose, except when they interfere in the exercise of the coastal state's rights in the EEZ. The distinction between artificial islands for any purposes on the one hand and structures and installations for limited purposes on the other hand is not clear¹⁸⁹, but since the LOS Convention does name these three categories of objects, they are presumed not to overlap¹⁹⁰. However, the coastal state's position appears to be strengthened by the fact that it can always claim that a foreign installation or structure interferes with the exercise of its right in the EEZ, an assertion that would be difficult to challenge.

The rights of the coastal state in respect of emplacement of such objects are subject to certain limitations. Thus, the coastal state must give due notice of their construction; provide warning of their presence; and remove them when they are no longer used.¹⁹¹ These objects should not be constructed where they may interfere with "recognized sealanes essential to international navigation"¹⁹².

In sum, the rights enjoyed by the coastal state in respect of artificial islands, installations and structures in its EEZ are similar to the rights enjoyed by coastal states under Article 5 of the 1958 Convention on the Continental Shelf¹⁹³ in respect of structures relating to the exploitation of the shelf resources. But the scope of the rights has been considerably broadened as they may be exercised for a broader range of purposes.

B. The Coastal State Competence with Respect to Marine Research in the EEZ

Prior to UNCLOS I, there were no established international provisions covering marine research. Therefore, ocean scientists enjoyed full freedom to conduct marine

scientific research¹⁹⁴ without restrictions¹⁹⁵. Even in territorial seas, permission was rarely requested and when required was often given informally¹⁹⁶.

At UNCLOS I, new provisions related to the conduct of MSR beyond the territorial sea were adopted. Article 2 of the 1958 Convention on the High Seas states that the high seas are open to all states and "no state may validly purport to subject any part of them to its sovereignty". It further states that this freedom includes, *inter alia*, freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, freedom of overflight and others which are recognized by the general principles of international law.

Some have argued that, since the freedom to conduct MSR on the high seas is not explicitly mentioned in this article, this activity was not regarded as a freedom of the high seas¹⁹⁷. In the author's opinion, however, this view does not seem to be correct for two reasons. First, the inclusion of the expressions "*inter alia*" and "others which are recognized by the general principles of international law" clearly indicate that the list of the freedoms listed in Article 2 is not exhaustive; secondly, such a view has no support in the drafting history of this provision. In fact, the ILC had expressly stated, in its commentary on Article 27 of its Draft Articles concerning the law of the sea prepared in 1956, that the carrying out of MSR on the high seas is one of the freedoms of the high seas¹⁹⁸. Thus, under the 1958 Geneva Convention on the High Seas, the right to conduct MSR, at least in the water column of the sea beyond the territorial sea, appears to be a freedom of the high seas not subject to prior consent.

The relevant provisions of the 1958 Geneva Convention on the Continental Shelf are contained in Article 5. Article 5 (1) enjoins noninterference "with fundamental oceanographic or other scientific research carried out with the intention of open publication", but stipulates in a subsequent paragraph that the "consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there". Nevertheless, the coastal state shall not normally withhold its consent if

the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal state shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the result shall be published. These provisions are somewhat vague. The lack of distinction between "pure scientific research" and exploration¹⁹⁹ provided the coastal state with a good basis for the denial of the right to undertake research. Thus, this Convention helped to establish the precedent for coastal state jurisdiction over research in an area outside the territorial sea and for the coastal state's right to place conditions on the research, such as coastal state participation and representation in the investigation and mandatory publication of results.

The issue of the scope of coastal state authority over research in areas beyond the territorial sea was one of intense controversy in the Third Committee of UNCLOS III²⁰⁰. The consent regime evolved as a compromise solution between two major opposing interests, those of industrialized researching states advocating the complete freedom to conduct research in all nonterritorial waters, and those of developing states seeking protection against economic exploitation and threats to their national security²⁰¹. Initial proposals submitted for negotiation ranged from that of researching states, a requirement only to notify a coastal state in advance and comply with internationally agreed upon conditions²⁰², to that of developing states, an absolute coastal state consent regime.

An important innovation, submitted at the Second Substantive Session of UNCLOS III in 1975, proposed that research related to natural resource exploration and exploitation be subject to an absolute consent regime, while other (i.e. fundamental scientific) research be subject only to notification of the coastal state and certain other specified obligations²⁰³. Criticism by developing states of the proposed latitude afforded fundamental research²⁰⁴, eventually, led to the development of a regime in which consent is required for all research in the EEZ, but should be granted if specified

conditions are met.

In accordance with Article 56 of the LOS Convention, the coastal state has "jurisdiction as provided for in the relevant provisions of this Convention" with regard to MSR. The relevant provisions are set out in Part XIII of the LOS Convention, especially Articles 246-254.

Article 246 (1) stipulates that the coastal state has the right to "regulate, authorize and conduct marine scientific research" in the EEZ. The same article further stipulates in paragraph 2 that "marine scientific research in the exclusive economic zone... shall be conducted with the consent of the coastal state." This means that any research without consent would violate the coastal state's jurisdiction. The coastal state is, however, put under an obligation to grant consent for all other marine scientific research activities in "normal circumstances"²⁰⁵. Yet the delineation of what specifically constitutes normal circumstances remains undefined, and is thereby left, essentially, to the discretion of the coastal state²⁰⁶.

Given that normal circumstances exist, a coastal state may still withhold its consent under certain specific situations, one of which is if the project "is of direct significance for the exploration and exploitation of natural resources"²⁰⁷, arguably true of much fundamental MSR²⁰⁸. The coastal state may also suspend or stop research activities if they are not being conducted according to agreement or a major change is effected after consent has been granted²⁰⁹.

Coastal state consent need not necessarily be given expressly. It may be implied in two situations: (1) when the coastal state has not reacted within four months to the communication informing it of the intention to conduct the research (i. e., the request for consent)²¹⁰, or (2) when the research project is to be carried out by or under the auspices of an international organization of which the coastal state is a member and the research in question was approved by the coastal state when the decision was taken by the

organization to carry out the project, and the coastal state has not expressed any objection within a period of time of four months of notification of the project by the organization²¹¹.

Any state intending to carry out MSR in the EEZ or on the continental shelf of a coastal state must provide the latter state with certain, specified information at least six months before the expected starting date of the research work; this is to be regarded as the request for coastal state consent²¹². The researching state is required to comply with a number of specified conditions. The most important of these are giving the coastal state an opportunity to participate or to be represented in the research, providing it with the results of the research and with access to the data and samples collected, and assisting in assessing or interpreting the data, samples, and research results, and the removal of installations and equipments subsequent to completion²¹³.

Finally, any dispute related to the exercise by the coastal state of its rights to withhold consent for MSR or to order its suspension or cessation are exempted from the compulsory binding dispute settlement system²¹⁴. However, these disputes remain subject to the LOS Convention's compulsory conciliation procedures²¹⁵. All other disputes concerning MSR are to be settled in accordance with the procedures entailing binding decisions²¹⁶.

In sum, the LOS Convention's provisions concerning the conduct of MSR in the EEZ have extended the consent regime of the 1958 Convention on the Continental Shelf to the water column above the shelf. This is clearly seen in the fact that these provisions establish the coastal state's consent as a prerequisite for foreign access to MSR in the EEZ. Though the coastal state has been placed under an obligation to give its consent to pure research to be conducted by third states in its EEZ in "normal circumstances", this obligation is imprecise and does not therefore constitute a tangible obligation upon the coastal state. Moreover, even if normal circumstances exist, access to MSR in the EEZ is made subject to certain conditions enumerated in Article 246 (5). The inclusion of

imprecise terms in these conditions gives a coastal state wide prerogatives to withhold its consent. Coastal state prerogatives appear to be underlined by the fact that the decision to prohibit foreign scientific research in its EEZ is explicitly exempted from compulsory binding third-party dispute settlement under the terms of the LOS Convention²¹⁷.

C. The Coastal State Competence with Regard to the Protection and Preservation of the EEZ Marine Environment

From the start, the proponents of the EEZ concept suggested that the regime of the EEZ should include the competence of the coastal state to protect and preserve the EEZ marine environment.²¹⁸ During the course of negotiations at UNCLOS III, the sponsors of the concept of the EEZ emphasized the close link that exists between resource jurisdiction and jurisdiction with regard to the protection of these resources from the harmful effects of marine pollution. The statement made on July 16, 1974, by the delegate of Canada in the Third Committee at the Caracas Session of UNCLOS III emphasized this particular link. The Canadian delegate said that :

"What had to be emphasized was that the economic zone was not simply a contiguous resource zone... but involved the function and inter-relationship between resource jurisdiction and the prevention of pollution"²¹⁹.

However, to what degree a state would be able to exercise this competence was a matter of great controversy at UNCLOS III²²⁰. The maritime states had argued that any exercise of jurisdiction in this regard should be within internationally-agreed pollution controls, for if coastal states were allowed to impose their own rules as to shipping design and construction, freedom of navigation could be impeded. The compromise adopted by UNCLOS III is set out in Articles 56 (1) (b) (iii), 208, 210, 211, 214, 216, and 220 of the LOS Convention.

In general terms, all states parties are obliged by the LOS Convention to "protect

and prevent the marine environment "²²¹ and are to take all measures, consistent with the treaty, to prevent, reduce, and control pollution of the marine environment from whatever source ²²².

Specifically, as to the EEZ, Article 56 (1) (b) (iii) states that in the EEZ the coastal state has jurisdiction as provided for in the relevant provisions of the LOS Convention with regard to the protection and preservation of the marine environment. The relevant provisions are contained in Articles 210 and 216 dealing with the dumping of wastes; Articles 208 and 214, on pollution from seabed activities ; and Articles 211, 220 and 234 on pollution from vessels.

1. Dumping in the EEZ

The term "dumping" refers to any deliberate disposal of wastes from vessels, aircraft, platforms, as well to any deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea²²³.

Article 210 (5) of the LOS Convention provides that dumping within the territorial sea or the EEZ, or onto the continental shelf, "shall not be carried out without the express prior approval of the coastal state". This provision has, thus, made it very clear that the freedom of states to dump is limited by informed consent requirements when states desire to dump into the EEZs of other nations²²⁴.

Moreover, under the same paragraph, the coastal state is given the right to enact laws and regulations concerning dumping within its EEZ "after due consideration of the matter with other states which by reason of their geographical situation may be adversely affected thereby". This prescriptive competence is, however, not a discretionary one, for the coastal state is placed under a duty to legislate in accordance with the applicable international rules and standards established through competent international organizations or diplomatic conferences.

In so far as enforcement is concerned, Article 216 (1) (a) stipulates that the laws and regulations issued in accordance with the LOS Convention and applicable international rules and standards for the prevention, reduction and control of dumping shall be enforced "by the coastal state with regard to dumping within its... exclusive economic zone". This means that enforcement of laws and regulation aiming at preventing and reducing dumping in the EEZ is the sole competence of the coastal state. This prerogative of the coastal state is new in international law. In this connection, Douay has correctly said :

"Le domaine de l'immersion marque....une extension de la juridiction nationale en matière de preservation du milieu marin aux fins d'assurer la protection des ressources sur lesquelles l'Etat cotier exerce des droits souverains"²²⁵.

2. Pollution from Seabed Activities

The LOS Convention vests the relevant environmental powers and duties in those states that have jurisdiction over the activity in question. In this connection, Article 208 states that "coastal states shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea bed activities subject to their jurisdiction". Thus, within the zones placed under its jurisdiction, that is to say, its internal waters, its territorial waters, its EEZ and its continental shelf, the fight against pollution caused by activities relating to the sea bed falls within the competence of the coastal state. The competence assigned to the coastal state, in this regard, appears to be broadly similar to the powers that a coastal state has hitherto enjoyed under the continental shelf regime²²⁶. It includes both the enactment of laws and regulations and their enforcement²²⁷. As regards the former, the coastal state is entitled to establish national laws and regulations aiming at preventing, reducing, and controlling pollution from the seabed activities within national jurisdiction²²⁸. Such laws and regulations and measures" shall be no less effective than international rules, standards and recommended

practices"²²⁹. This means that coastal states are left free to establish more effective and stringent laws and regulations than internationally agreed ones.

Regarding enforcement, Article 214 provides that "states shall enforce their laws and regulations adopted in accordance with Article 208 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards" for the protection of the marine environment from pollution arising from seabed activities under their jurisdiction. It follows that the coastal state is the only state enjoying the competence of enforcing norms aiming at preventing and reducing pollution from the seabed activities undertaken in the EEZ.

3. Pollution from Vessels

With respect to pollution from vessels²³⁰ in the EEZ, the approach of the LOS Convention is dissimilar to that adopted in respect of pollution by dumping and seabed activities. It recognizes the jurisdiction of the coastal state concerning the marine environment in this case, but taking into account the interest of other states in navigation"²³¹. It follows that the laws and regulations pertaining to pollution from vessels established for that zone must, according to Article 211 (5), conform and give effect to "generally accepted international rules and standards established through the competent international organization or general diplomatic conference"²³². This is particularly important for maritime states because a universal 200 miles economic zone would embrace some of the worlds most important shipping routes²³³.

Exceptionally, where such international rules and standards are deemed inadequate to meet special circumstances in clearly defined areas of a state's EEZ²³⁴, the competent international maritime organisation, presumably the IMO²³⁵, is to be consulted and within 12 months, if that international organisation agrees, the coastal state may for that area :

"Adopt laws and regulations for the prevention reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organisation, for special areas"²³⁶.

Furthermore, the LOS Convention states further in Article 211 (6) (c) that :

"If the coastal states intend to adopt additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels, they shall when submitting the aforesaid communication, at the same time notify the organization thereof. Such additional laws and regulations may relate to discharge or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards; They shall become applicable to foreign vessels 15 months after the submission of the communication to the organization, provided that the organization agrees within 12 months after the submission of the communication".

These provisions empower a coastal state to enact additional rules for certain areas of the EEZ and for the prevention and reduction and control of pollution from ships. However, in exercising this additional enactment competence, a coastal state is required to satisfy specific conditions that are, first of all, such competence can be exercised only when it is based on technical reasons linked to the oceanographic and ecological characteristics of the zone, to its utilization and to the particular nature of the character of the traffic, and all scientific and technical justifications should be provided by the coastal state itself; secondly, it is not the coastal state which determines whether or not an area of the EEZ has particular circumstances, but this would be the decision of the competent international organization, which in fact means, in most cases, the IMO; and lastly, and

most importantly, the regulation thus issued by the coastal state cannot enter into force and be binding on other states until it has received the official consent of IMO. Moreover, such consent can be given only upon the expiry of 12 months after the submission of the communication to the organization. Three months later the regulation may be applied to foreign vessels.

The purpose of the above precautions is, certainly, to avoid any unjustified interference with navigation in certain parts of the EEZ, and their effect is to subordinate the exercise of the competence to IMO monitoring of the motives and content of the national regulation. IMO will make sure that they are in conformity with the provisions it will itself have adopted in connection with areas that might be placed under special protection.

Therefore, it is submitted that the coastal state has no discretion in this field, but its competence is internationally controlled.

With respect to enforcement of the relevant international rules and standards or the international legislative and regulatory provisions adopted in conformity with them, jurisdiction is shared by the flag state, the port state, and the coastal state when violations are committed in the EEZ²³⁷. In this domain, authority is, generally, denied to the coastal state²³⁸. Exceptional authority is, however, provided in two situations. These are, first, enforcement action could be taken when the vessel accused of having committed in the EEZ a violation of the internal and international rules in force is voluntarily within a port or at an offshore terminal of the coastal state, which is therefore regarded in this case the port state²³⁹; secondly, action could be taken when there is manifest proof that, by reason of the violation committed by the foreign vessel in the EEZ, there have occurred discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state or to the resources of the EEZ²⁴⁰.

Furthermore, even in cases where a coastal state has a clear objective evidence

that a vessel navigating in its EEZ or its territorial sea has committed a violation of applicable rules for the prevention, reduction, and control of pollution from vessels, its enforcement action is limited in two ways. They are, first, the proceedings instituted against the offending vessel should be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag state within six months of the date on which proceedings were first instituted²⁴¹; secondly, only monetary penalties may be imposed upon foreign vessels for such violations²⁴².

In sum, the coastal state's competence regarding the marine environment has greatly increased as a consequence of the EEZ. The coastal state's competence for the protection and preservation of the marine environment predominates in all matters related to the EEZ and continental shelf resources. But, while the coastal state has, in the EEZ, jurisdiction with regard to the protection and preservation of the marine environment, and the jurisdiction in question may apply to foreign vessels navigating within its EEZ, it is not an exclusive but rather a shared jurisdiction.

Chapter Two

Notes and References

1. Convention on the Continental Shelf, *op. cit.*, supra chapter 1 note 85, Arts. 2-3; Convention on the Territorial Sea and the Contiguous Zone, *ibid.*, Art. 24.
2. *Op. cit.*, supra Introduction note 2, Part V.
3. *Ibid.*, Art. 56.
4. M. Dahmani : The Fisheries Regime of the Exclusive Economic Zone. Martinus Nijhoff, Dordrecht/ Boston/ Lancaster, 1987, p. 39.
5. Stevensen and Oxman, *op. cit.*, supra Introduction note 7, p. 775.
6. C. A. Fleischer : "The Exclusive Economic Zone Under the Convention Regime and in State Practice", in A. W. Koers and B. H. Oxman, (eds.), The 1982 Convention on the Law of the Sea, Proceedings of the Seventeenth Annual Conference, July 13-16, 1983, Law of the Sea Institute, 1984, p 253; Brownlie, *op. cit.*, supra Introduction note 18, pp 111 - 12; and A. E. Bruce : "The Territorial Sea of the United States : Is It Twelve Miles or Not ?", 20 JMLC, 1989/4, p. 458.
7. Article 2 of the 1958 Convention on the Continental Shelf, and Art. 77 (1) - (3) of the LOS Convention.
8. Fleischer, *op. cit.*, supra chapter 1 note 193, p. 149; see also E. D. Brown : "The Exclusive Economic Zone : Criteria and Machinery for the Resolution of International Conflicts between Different Users of the EEZ", Marit. Pol. Magmt, 1977/4, pp. 332 - 33, and Dupuy and Vignes, *op. cit.*, supra Introduction note 4, p. 279.
9. Report of the Committee on the Peaceful Uses of the Sea Bed and Ocean Floor, GAOR 28th Sess., Supp. No. 21, UN Doc. A/ 9021.
10. B. O. Okere : "Nigeria's Exclusive Economic Zone", 12 NLJ, 1984, p. 69.
11. *Op. cit.*, supra note 7.
12. C. A. Fleischer : " The Right to a 200 Mile Exclusive Economic Zone or a Special

- Fishery Zone", 14 SDLR, 1977/3, p. 551.
13. Bernhardt, *op. cit.*, supra Introduction note 18, p. 295.
 14. O'Connel, *op. cit.*, supra Introduction note 18, pp. 571-72; also Brown, *op. cit.*, supra Introduction note 18, p. 218.
 15. Juda, *op. cit.*, supra Introduction note 17, p. 2.
 16. K. Ming Sun : "Policy of the Republic of China Towards the South China Sea", 19 MP, 1995/5, p. 401.
 17. Bernhardt, *op. cit.*, supra Introduction note 18, p. 295.
 18. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 121 paras. 2 and 3.
 - 18^a. Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), ICJ Repots, 1993, pp. 73-74.
 19. Bernhardt, *op. cit.*, supra Introduction note 18, p. 296.
 20. Fitzmaurice, *op. cit.*, supra Introduction note 18, p. 233.
 21. Hereinafter cited as AC.
 22. Bulgaria, Byelorussian SSR, German Democratic Republic, Poland, Ukrainian SSR, and USSR : Draft Articles on the Economic Zone, UN Doc. A/Conf. 62/ C. 2/L.38, August 5, 1974, in III Official Records, 1975, pp. 214-15. It is important to note that the name of Byelorussian SSR was officially changed to the Republic of Belarus as of 19 Sep 1991. See Law of the Sea Bulletin, No. 19, October 1991, p. 1, note 5.
 23. Ibid., Art. 12.
 24. ISNT, *op. cit.*, supra Introduction note 6.
 25. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 61 paras. 1 and 2.
 26. Definition provided by the Department of Fisheries of FAO, mimeographed document submitted to UNCLOS III, Geneva Session of 1975, Doc. GE. 75-64093.
 27. It is worth mentioning that the process of establishing measures to prevent over exploitation must also be based on the best scientific evidence available to the coastal

state. See Art. 61 para. 2.

28. Alfred H.A. Soons : "Regulation of Marine Scientific Research by the European Community and its Member States", 23 ODIL, 1992, pp. 259-60; also S.K.B Mfodwo, B.M. Tsamenyi and S.K.N. Blay : "The Exclusive Economic Zone : State Practice in the African Atlantic Region", 20 ODIL, 1989, p. 452.
29. However, the lack of compulsion in this Article is to a large extent alleviated, by the requirement in para. 5 to contribute and exchange any relevant information through international organizations.
30. See for instance, Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, op. cit., supra chapter 1 note 85, Art. 2; also Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, United Nations, Doc. A/Conf. 164/37, 8 September 1995, Art. 5 (b). (copy on file with the author).
31. The term maximum sustainable yield (MSY) refers to a constant amount of catch produced by a fish stock at a given effort of fishing. See John P. Harville : "Multidisciplinary Aspects of Optimum Sustainable Yield ", in Optimum Sustainable Yield as a Concept in Fisheries Management, Proceedings of a Symposium, Honolulu, Hawaii, September 9, 1974, American Fisheries Society, Special Publication, No.9, Washington D.C, 1975, pp. 51-64; also Sohn and Kristen, op. cit., supra chapter 1 note 54. p. 124.
32. W.T. Burke : "The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction," 63 OLR, 1984, p. 78; P. A. Larkin : "An Epitaph for the Concept of Maximum Sustainable Yield", in Tran. AFS, vol. 1, 1977/1, pp. 3-7; S. P. Balasubramanian : "Fishery Provisions of the ICNT- Part II", 6 MP, 1982, pp. 27 - 28; also J. M. Macdonald : "Appreciating

the Precautionary Principle as an Ethical Evolution in Ocean Management", 26 ODIL No.3 July - September 1995, p. 273.

33. Hereinafter cited as HC.
34. W. T. Burke : "US Fishery Management and the New Law of the Sea", 76 AJIL, 1982, p. 33; also Sohn and Kristen, *op. cit.*, supra chapter 1 note 54, p. 124.
35. S.Oda : "Fisheries Under the United Nations Convention on the Law of the Sea", 77 AJIL, 1983, p. 744.
36. LOS Convention, *op. cit.*, supra Introduction note 2, Arts. 61 (1) and 62 (2).
37. It is worth to note that it was at the First Session of the Enlarged Seabed Committee in 1971 that Mexico first advanced the basic principles that evolved into the surplus concept stating that the share of the resources off the shores of a coastal state that should be reserved for its nationals, should be commensurate with the state's fishing capacity, at any given time. The surplus could then be made available to others. For a good account of the historical evolution of the surplus concept, see J.F. Carroz : "Le Nouveau Droit de la Mer et la Notion d'Excedent", 24 AFDI, 1978, pp. 851-65.
38. J.F. Carroz and M. Savini : "The Practice of Coastal States Regarding Foreign Access to Fishery Resources : An Analysis of the Bilateral Agreements, in FAO Fisheries Report No. 293, FAO, Rome, April 1983, p.47.
39. Burke, *op. cit.*, supra note 32, p. 90.
40. J. A. Gulland : "Conditions of Access to Fisheries : Some Resource Considerations", in FAO Fisheries Report, *op. cit.*, supra note 38, p. 86.
41. Carroz and Savini, *op. cit.*, supra note 38, p. 47.
42. Gulland , *op. cit.*, supra note 40, pp. 82-86;
- 42^a. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 297 (3) (b) (ii).
43. This further absence of compulsory dispute settlement is viewed by Professor Burke as confirming the exclusive competences of the coastal state. Burke, *op. cit* supra note 32, p. 79.

44. Article 300 of the LOS Convention states that the States parties undertake to fulfill in good faith the obligations assumed under this Convention, and "to exercise the rights, jurisdictions and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights".
45. Report of the International Law Association, Belgrade Conference, 1980, Committee on Land-Locked States, 1980, P. 11; Professor Burke has argued that it is difficult to maintain that non-declaratory procedures undertaken by a coastal state in pursuance of its national interest is an instance of abuse of rights. Burke, *op. cit.*, *supra* note 32, p. 91.
46. Dahmani, *op. cit.*, *supra* note 4, pp. 81-82.
47. J. M. Arbour : "L'Affaire du Chalutier - Usine 'La Bretagne' ou les Droit de l'Etat Côtier dans sa Zone Economique Exclusive", 24 CYIL, 1986, p. 70; see also F.O. Vicuna : "La Zone Economique Exclusive : Regime et Nature Juridique dans le Droit International", RCADI, 1986/4, pp. 63-64; and Burke, *op. cit.*, *supra* note 32, p. 92.
48. See, for instance, the statement of the representative of Sri-Lanka made at the First Substantive Session of UNCLOS III, Caracas, 20 June - 29 August 1974, in III Official Records, 1975, p. 186.
49. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 62 (4).
50. A.W. Koers : Enforcement of Fisheries Agreements in the High Seas : A Comparative Analysis of International State Practice, Law of the Sea Institute, University of Rhode Island, Occasional Paper No. 6, June 1970, p. 2
51. *Op. cit.*, *supra* Introduction note 6, Art. 61.
52. See in this connection, UN Doc. A / Conf . 62 / C.2 / L.82, of August 26, 1974, in R. Platzöder (ed.), Third United Nations Conference on the Law of the Sea : Documents of the Caracas Session. Hamburg, 1975, pp. 186-88. The main aspect of this proposal which did not relate only to fisheries but encompassed all

activities in the zone was that the coastal state should have the exclusive right to make and enforce regulations relating to, inter-alia, the following : licensing vessels and gear; closed fishing seasons; types, sizes, and amount of gear; and numbers, sizes, and types of vessels as well as the quota and sizes of fish that may be caught. The African proposal also had a provision for regional and subregional arrangements to secure enforcement.

53. UN Doc. A / Conf. 62 / C.2 / L. 47 of August 8, 1974, in *ibid.*, pp. 155-62. The aspects of the US proposal retained in the LOS Convention are those relating to release of arrested personal and vessels upon the posting of a bond, as well as the prohibition on corporal forms of punishment.
54. UN Doc. A / Conf. 62 / C. 2 / L. 40. of August 5, 1974, in *ibid.*, pp. 145-52.
55. UN Doc. A / AC. 138/SC. II/L. 27 of July 13, 1973, in S. Oda : *The Law of the Sea in Our Time - II : The United Nations Seabed Committee, 1968 - 1973*. Sijthoff Publications on Ocean Development, the Hague, 1977, p.243. This proposal made by Peru, Ecuador and Panama envisaged full territorial sea powers of enforcement out to 200 miles.
56. UN Doc. A/Ac. 138/SC. II/L.6 of July 18,1972, in *ibid.*, pp. 213-14. This proposal allowed the coastal state to stop and inspect foreign vessels with reasonable cause, but only permitted the coastal state to draw up a statement of violations to be presented to the flag state. Further action was left to the discretion of the flag state which was expected to notify the coastal state of the actions taken.
57. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 73 (1).
58. *Ibid.*, paras. 2, 3 and 4; see also W. T. Burke, R. Legatski and W. W. Woodhead : *National and International Enforcement in the Ocean*. University of Washington Press, Seattle & London, 1975, p.1
59. Oda , *op. cit.*, supra note 35, p. 747.
60. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 73 paras. 2 and 3.

61. This exclusion of imprisonment as a form of penalty seems to apply only to violations of fisheries laws and does not extend to cover cases of fishing without a licence. See Oda, *op. cit.*, supra note 35, p. 747
62. *Ibid.*, p. 749
- 62^a. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 73 paras. 1 and 2 and Art. 292.
63. B.H. Oxman : "An Analysis of the EEZ as Formulated in the Informal Composite Negotiating Text", in Clingan, *op. cit.*, supra chapter 1 note 149, p. 67.
64. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 63 (1). For detailed analysis of Article 63 which sets forth the general regime applicable to transboundary marine fisheries between EEZs, and between EEZs and adjacent high seas area, see E. Hey : *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*. Martinus Nijhoff Publishers, Dordrecht, 1989, chap. 5.
65. See for instance, G. H. Knight : "Effects of a Law of the Sea Treaty on the Fishery Conservation and Management Act of 1976", in Report to Gulf Regional Fishery Management Council, 1977, p.13; also Attard, *op. cit.*, supra Introduction note 4, p. 183.
66. Burke, *op. cit.*, supra note 32, p. 106; also Brown, *op. cit.*, supra Introduction note 18, p. 227.
67. See J.F. Caddy ; "Some Considerations Relevant to the Definition of Shared Stocks and their Allocation between Adjacent Economic Zones", in FAO Fisheries Circular No. 1749, July 1982, pp. 29-30; also FAO Report of the Technical Consultation on High Seas Fishing, Doc. A/Conf. 164/INF/2, 1993.
68. World Review of Highly Migratory Species and Straddling Stocks, FAO Fisheries Technical Paper No. 337. Food and Agriculture Organization of the United Nations, Rome, 1994, pp. 50 - 54.
69. *Ibid.*, pp. 58-60.

70. Ibid., pp. 54-58.
71. Ibid., pp. 61-63.
72. Brown, op. cit., supra Introduction note 18, p. 228; also T. L. Mc Dorman : "Stateless Fishing Vessels, International Law and the UN High Seas Fisheries Conference", 25 JMLC, 1994/4, pp. 546-547.
73. F. O. Vicuna : "Towards an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea", 24 ODIL, 1993, p. 84.
74. R. Hannesson : "Fishing on the High Seas : Cooperation or Competition", 19 MP No. 5 September 1995, p. 371.
75. Ibid.
76. Ibid.
77. Conference on the Conservation and Management of the Living Resources of the High Seas, St. John. Newfoundland, 5-7 September 1990.
78. "Conservation and Management of Living Resources of the High Seas : Proposal Submitted to the Third Session of the Preparatory Committee for the United Nations Conference on the Environment and Development, Geneva, 12 August - 4 September 1991" (cosponsors : Argentina, Barbados, Canada, Cape Verde, Chile, Fiji, Guinea - Bissau, Iceland, Kiribati, New Zealand, Peru, Western Samoa , Senegal, Solomon Islands, and Vanuatu), reprinted in Law of the Sea Bulletin, No. 19, 1991, pp. 42-44.
79. See UN Doc. A/Conf. 151/4 (Part II), chap. 17 paras. 17-52 bis, 1992.
80. UN General Assembly Resolution 47/192, 1992.
81. It is cited in the text of the thesis as the conference.
82. Frida M. Armas Pfirter : "Straddling Stocks and Highly Migratory Stocks in Latin American Practice and Legislation :New Perspectives in Light of Current International Negotiations", 26 ODIL, 1995/2, p. 138.
83. The proceedings of the Second, Third and Fourth Sessions of the Conference have been sunmarized in Earth Negotiations Bulletin, vol. 7, No. 30, 4 April 1994, vol. 7,

No. 39, 29 August 1994, and vol. 7, No. 43, 14 April 1995.

84. UN Doc. A/Conf. 164/37, 8 September 1995. It is worth mentioning that according to Article 37, the Agreement shall be open for signature and remain open for signature at the United Nations headquarters for twelve months from the fourth of December 1995.

85. Ibid., Art. 7 para. 2.

86. Ibid., Art. 3 para. 1.

87. Ibid., Art. 7 para. 2.

88. Ibid., Art. 5.

89. Ibid., Art. 7 para. 3.

90. Ibid., para. 5.

91. Ibid.

92. See Part VI and Art. 20 para. 1.

93. Ibid., para. 6.

94. Ibid.

95. Ibid., Art. 21 para.1.

96. Ibid., para. 5.

97. Ibid., para. 6 (a).

98. Ibid., Art. 23 para. 2.

99. Ibid., para. 3.

100. It is worth noting that Article 30 concerning the procedures for the settlement of disputes provides that, "the provisions relating to the settlement of disputes set out in Part XV of the" LOS Convention "apply mutatis mutandis to any dispute between states parties to" the Agreement concerning the interpretation or application of the Agreement, whether or not they are also parties to the LOS Convention.

101. Hereinafter cited as HMSs.

102. S.R. Katz : "Consequences of the Economic Zone for Catch Opportunities of

- Fishing Nations", 2 Marit. Stud. Mgmt., 1975, p. 149; also Hanneson, *op. cit.*, *supra* note 74, p. 371 note 1.
103. C. Narokobi : "International Management of Highly Migratory Species", in J.M. Van Dyke, (ed.), *Consensus and Confrontation : The United States and the Law of the Sea Convention*. Published by the Law of the Sea Institute, University of Hawaii Honolulu, 1985, p. 376.
 104. *Ibid.*
 105. For instace, skipjak tuna or yellowfin tuna.
 106. Balasubramanian, *op. cit.*, *supra* note 32, p. 35; also Pfrter, *op. cit.*, *supra* note 82, p. 134.
 107. *Op. cit.*, *supra* Introduction note 6, Art. 53.
 108. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 64 para. 2.
 109. *Op. cit.*, *supra* Introduction note 18, p. 229.
 110. See President Reagan Statement on the 200 miles EEZ, reproduced in 23 VJIL, 1983/4, pp. 598-601; also C. Healey : "United States Tuna Management Policy", 5 ASIL, 1981, pp. 84-85; and Balasubramanian, *op. cit.*, *supra* note 32, p. 35.
 111. See Costa Rica, Panama, and United States : Agreement on Tuna Fishing and Protocol, April 12, 1983, cited by Vicuna, *op. cit.*, *supra* note 73, p. 85.
 112. The Bahamas Fisheries Resources Act, 1977, in ST /LEG/SER. B/19, 1980, pp. 18-19.
 113. See, for instance, Fleischer, *op. cit.*, *supra* note 6, pp. 241-285; W.T. Burke : "Highly Migratory Species in the New Law of the Sea", 14 ODIL 1983, pp. 273-314; H. Caminos : "The Regime of Fisheries in the Exclusive Economic Zone" in F.O. Vicuna, (ed.), *The Exclusive Economic Zone : A Latin American Perspective*. Westview Press, Boulder / Colorado, 1984, p. 149.
 114. See for instance, Fleischer, *ibid.*, p. 256.
 115. D.Cass : "The Quiet Revolution : The Development of the Exclusive Economic Zone

- and Implications for Foreign Fishing Access in the Pacific", 19 MULR, 1987, p. 95.
116. Australian Foreign Affairs Records, vol. 56, Sept, 1985, p. 824
117. See Aide - mémoire Concerning Amendments to the Magnuson Fishery Conservation and Managment Act : Amendment to Include Highly Migratory Tuna as Species of Fish under United States Jurisdiction, 22 May, 1991, in Law of the Sea Bulletin No. 19, 1991, p. 21.
118. Ibid., para. 2.
119. Op. cit, supra note 84.
120. See Generally, Cyntia E. Carlson : "The International Regulation of Small Cetaceans", 21 SCLR, 1984, pp. 577-632.
121. J. F. Carroz : "Les Problèmes de la Pêche à la Conférence sur le Droit de la Mer et dans la Pratique des Etats", 84 RGDIP, 1980/2, at p. 721.
122. Burke, op. cit., supra note 32, p. 115; Churchill and Lowe, op. cit., supra Introduction note 4, p. 238.
123. It is worth noting that Professor Burke suggests that this inclusion in Annex I is a technical error arising from the fact that Arts. 64 and 65 were once one article in the Informel Negotiating Text. In his view, Article 64 should no longer be regarded as applicable to cetaceans, optimum utilization not being required in this case by virtue of Article 65 read together with Article 61 (4). Burke, *ibid.*, p. 115.
124. This is a definition drawn from the Canadian Working Paper entitled : "The Special Case of Salmon - The most Important Anadromous Species", submitted to UNCLOS III, Caracas Session, 1974, UN Doc. A / Conf. 62 / C. 2 / L.81, 23 August 1974, in Platzöder, op. cit., supra note 52, pp. 185-86.
125. Examples of other anadromous species include, sturgeon, feed and shad.
126. See, for instance, the Convention for the Conservation of Salmon in the North Atlantic Ocean, 1982, in OJEC, 1982, L/378/24; also the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean of 1992, in Law of

the Sea Bulletin, No. 22, 1993, p. 21.

127. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 66 (1).
128. SNT, *op. cit.*, supra Introduction note 6, Art. 54
129. Kwiatkowska *op. cit.*, supra chapter 1 note 80, p.29; also LOS Convention, *op. cit.*, supra Introduction note 2, Art. 66 (3) (a).
130. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 66 (3) (a).
131. *Ibid.*, para. 2.
132. *Ibid.*, para. 4.
133. Fleischer, *op. cit.*, supra note 6, p. 278.
134. Anand, *op. cit.*, supra chapter 1 note 29, p. 293, note 50.
135. Attard, *op. cit.*, supra Introduction note 4, p. 189.
136. LOS Convention. *op. cit.*, supra Introduction note 2, Art 67 (1); also Sohn and Kristen, *op. cit.*, supra chapter 1 note 54, p. 132.
137. *Ibid.*, para. 2
138. *Ibid.*, para. 3.
139. *Ibid.*
140. It must be noted that the two subjects also fall under the sovereign rights of the coastal state under Article 77 (4) of Part VI (Continental Shelf).
141. Bowett , *op. cit.*, supra chapter 1 note 87, p. 35.
142. E. Osieke : "The Contribution of States from the Third World to the Development of the Law on the Continental Shelf and the Concept of the Economic Zone ".15 *IJIL*, 1975, pp. 321-322.
143. Art. 2 (4)
144. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 77 para. 4.
145. Bowett, *op. cit.*, supra chapter 1 note 87, p.35; also M. Dixon : Textbook on International Law, 2nd reprinted edition, Blackstone Press Ltd., London, 1995, p. 177.

146. Balasubramanian, op. cit., supra note 32, p. 38; also S. Oda : "International Law of the Resources of the Sea", RCADI, 1986/ 2, p. 427.
147. Oda, ibid.
148. Arts. 2 and 3.
149. North Sea Continental Shelf Cases, op. cit., supra chapter 1 note 81, p. 39.
150. Ibid., p. 36.
151. Burke, op. cit., supra note 32, p. 115; O'Connell, op. cit., supra Introduction note 18, pp. 579-580; and Dixon, op. cit., supra note 145, p. 183.
152. R. Puri : "The Legal Regime of Marine Fisheries", 22 IJIL, 1982, p. 249.
153. LOS Convention, op. cit., supra Introduction note 2, Art. 56 (1) (a); also Brown, op. cit., supra Introduction note 18, p. 234
154. Churchill and Lowe, op. cit., supra Introduction note 4, p. 137.
155. Charney, op. cit., supra Introduction note 18, p. 244.
156. Churchill and Lowe, op. cit., supra Introduction note 4.
157. O'Connell, op. cit., supra Introduction note 18, p. 579; J. F. Pulvenis : "Zone Economique et Plateau Continental Unité ou Dualité", 12 RIRI, 1978, pp.107-110; also Dixon, op. cit., supra not 145, p. 178.
158. Pulvenis, ibid., pp. 107-108.
159. II Official Records, 1974, p. 176; see also Pulvenis, ibid., p. 109.
160. Ibid., p. 112.
161. Ibid.
162. See, for instance, the statement of the representative of Canada made at UNCLOS III, Caracas Session, 1974, in II Official Records, 1974, pp. 146-147.
163. This was a principle introduced by the ICJ in the North Sea Continental Shelf Cases, 1969. ICJ Reports, 1969, p. 31.
164. Art. 76 (6).
165. Art. 82.

166. Arts. 68 and 56 (1) (b) (i), respectively.
167. ICJ Reports, 1984, p. 21.
168. It may be worth noting that the principles enumerated in Art. 83 (1) are the same ones enshrined in Art. 74 (1) concerning the delimitation of the EEZ.
169. In the North Sea Continental Shelf Cases, the ICJ noted that according to basic tenets of law, and of opinio juris, delimitation is to be effected by agreement between the parties concerned. ICJ Reports, op. cit., supra chapter 1 note 81, p. 47; see also Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), ICJ Reports, 1984, pp. 299-300 para. 112; and Brown, op. cit., supra Introduction note 18, p. 158.
170. Arts. 74 (1) and 83 (1) provide that the delimitation of the EEZ and the continental shelf shall be effected by agreement on the basis of international law, as referred to in Art. 38 of the Statute of the International Court of Justice. Neither the LOS Convention nor Article 38 of ICJ tell us explicitly which norms should be taken into account by the parties in the process of delimitation. However, several norms have been included in international judicature. For instance, one of the norms that are to be taken into consideration by states is that the delimitation should be carried out in accordance with equitable principles. See for more details, Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, *ibid.*, p. 295; Case Concerning the Continental Shelf (Libyan Arab Jamahyria v. Malta), ICJ Reports, 1985, p. 33; and J. Symonides : "Delimitation of Maritime Areas between the States with Opposite or Adjacent Coasts." 12 PYIL, 1984, pp. 36-44.
171. See the Delimitation of Maritime Areas between Canada and the French Republic, Decision of Arbitration dated 10 June 1992, 31 ILM, 1992, p. 1163 para. 38; also symonides, *ibid.*, pp. 44-46.
172. S.Oda : International Law of the Resources of the Sea. Alphen aan den Rijn; Germantown, Md : Sijthoff and Noordhoff, 1979, p. 93.

173. Statement on the Economic Zone, May 20, 1977, in R.W. Smith, ed., *Exclusive Economic Zone Claims -An Analysis and Primary Documents*. Martinus Nijhoff Publishers, Dordrecht/ Boston/ Lanchaster, 1986, p. 481.
174. *Ibid.*, para. 4.
175. ICJ Reports, *op. cit.*, *supra* Introduction note 15, pp. 232.
176. See UN Division for Ocean Affairs and the Law of the Sea, the Law of the Sea : Practice of States, *op. cit.*, *supra* Introduction note 16, p. 14; also Brown, *op. cit.*, *supra* Introduction note 18, p. 186.
177. See J.R.U. Prescott : "Maritime Boundaries and Issues in the Southwest Pacific Ocean", in D.M. Johnston and P.M. Saunders, (eds.), *Ocean Boundary Making : Regional Issues and Developments*. Croom Helm, London/ New york/ Sydney, 1988, pp. 288-290.
178. *Ibid.*, p. 289.
179. E.D. Brown : "The Continental Shelf and the Exclusive Economic Zone : The Problem of Delimitation at UNCLOS III", 4 *Marit. Pol. Mgmt.*, 1976/77, p. 402.
180. Extavour, *op. cit.*, *supra* Introduction note 4, p.48.
181. Attard, *op. cit.*, *supra* Introduction note 4, p. 48.
182. Convention on the Territorial Sea and the Contiguous Zone, *op. cit.*, *supra* chapter 1 note 85, Art. 1.
183. Dixon, *op. cit.*, *supra* note 145, p. 115.
184. J. Beale : "Jurisdiction of a Sovereign State", 33 *Harvard. L. R.*, 1922/23, p. 43.
185. Alexander, *op. cit.*, *supra* chapter 1 note 184, pp. 457 - 58.
186. See ISNT, *op. cit.*, *supra* Introduction note 6, Art. 45 (1) (b); also RSNT, *op. cit.*, *supra* Introduction note 9, Art. 44.
187. Bouchez, Jaenicke, and Jennings have defined the term artificial islands as a "man - made structure or area of land surrounded by water and physically connected with the seabed, always above water at high - tide, intended to be permanent, and which

- cannot be removed without losing its identity". L. Bouchez, G. Jaenicke, and R. Y. Jennings : International Law Aspects of Feasibility Study on the Development of Industrial Islands in the North Sea, vol. 4, 1974, p. 2. On the meaning of "structures", see A. H. A. Soons : Marine Scientific Research and the Law of the Sea. Kluwer Law and Taxation Publishers, Deventer, 1982, p. 233.
188. B.H. Oxman : "Customary International Law in the Absence of Widespread Ratification of the UN Convention on the Law of the Sea", in Koers and Oxman, op. cit., supra. note 6, p. 676; also R. Wolfrum : "The Emerging Customary Law of Marine Zones : State Practice and the Convention on the Law of the Sea", 18 NYIL, 1987, p. 137.
 189. Churchill and Lowe, op. cit., supra Introduction note 4. pp. 138 - 139.
 190. Ibid., p. 139.
 191. LOS Convention , op. cit., supra Introduction note 2, Art. 60 (3). For detailed consideration of the limitations in question, see particularly Brown, op. cit., supra Introduction note 18, pp. 259-261.
 192. Ibid., para 7.
 193. It is worth noting that Article 80 of the LOS Convention stipulates that, "Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf".
 194. Hereinafter cited as MSR.
 195. D. P. O'Connell : The International Law of the Sea, vol II, (ed.), I. A. Shearer, Clarendon Press, Oxford, 1984, p. 1026.
 196. R. J. McLaughlin : "The Classification of Multi-Beam Bathymetric Mapping of the US EEZ : Is a US Marine Scientific Research Policy in Order ?", 19 ODIL, 1988/1, p. 12.
 197. See, for instance, the statement of Mr. Bohte the delegate of Yugoslavia made at UNCLOS III, Caracas Session, 1974, in II Official Records, 1974, p.348 para.19.

198. I YILC, 1956, pp. 29 - 32; see also the statement of Mr. Oda the delegate of Japan made at UNCLOS III, Caracas Session, 1974, in II Official Records, 1974, p. 353 para. 72.
199. O'Connell , op. cit., supra note 195, p. 1030. For a detailed analysis of the international legal regime of marine scientific research under the 1958 Geneva Conventions, see Soons, op. cit., supra note 187, pp. 5-8 and 118-125.
200. J.R. Stevensen and B.H. Oxman : "The Third United Nations Conference on the Law of the Sea : The 1974 Caracas Session", 69 AJIL, 1975, pp. 27-28; see also for the same authors, op. cit., supra Introduction note 7, pp. 793-95.
201. Ibid., pp. 793-94.
202. See, for instance, the Draft Articles on Marine Scientific Research submitted to UNCLOS III, at the Caracas Session 1974 by Belgium, Austria and fifteen other States, UN Doc. / Conf. 62 / C. 3 / L. 19, 23 August 1974, in III Official Records, 1974, p. 307; also Tullio Treves: "Principe du Consentement et Recherche Scientific dans le Nouveau Droit de la Mer", 84 RGDIP, 1980/1, pp. 151- 57; Abdulquawi A.Yusuf : "Towards a New Legal Framework for Marine Research : Coastal State Consent and International Coordination", 19 VJIL, 1979/2, pp. 413-15.
203. Doc . A / Conf. 62 / S R. 26, April 3, 1975, in III Official Records, 1975, p. 252; see also, Extavour, op. cit., supra Introduction note 4, pp. 209 - 210.
204. Extavour, ibid., pp. 208 - 209.
205. LOS Convention , op. cit., supra Introduction note 2, Art. 246 (3).
206. Yusuf, op. cit., supra note 202, p. 418.
207. LOS Convention, supra Introduction note 2, Art. 246 (5) (6).
208. In this connection, O'Connell said that "the line between pure marine scientific research and the gathering of information which is significant for the exploration and exploitation is one difficult to maintain", op. cit., supra note 195, p. 1028; Singela

argued that "all marine scientific research bears some direct significance to the exploration and the exploitation of the marine resources". A. M. Singela : *Land-Locked States and the UNCLOS Regime*. Oceana Publications Inc. / London/ Rome/ New York, 1983, p. 324.

209. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 253 (1) (a) and (b).

210. *Ibid.*, Art. 252.

211. *Ibid.*, Art. 247.

212. *Ibid.*, Art. 248.

213. *Ibid.*, Arts. 248 and 249.

214. *Ibid.*, Art. 297 para. 2 (i) (ii).

215. See Jonathan I. Charney : "Entry Into Force of the 1982 Convention on the Law of the Sea", 35 *VJIL*, 1995/2, p. 390 note 53.

216. Art. 264 and Part XV.

217. *Ibid.*, Art. 297 (2) (a) and (b).

218. See, for instance, the Declaration of Santo Domingo, *op. cit.*, *supra* Introduction note 5, subsection entitled the "Patrimonial Sea", principle 2.

219. Doc. A/Conf. 62/ C.3 / SR. 4, in *II Official Records*, 1974, p. 318.

220. Stevensen and Oxman, *supra* note 200, pp. 793 - 789.

221. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art.192.

222. *Ibid.*, Art. 194 (1).

223. *Ibid.*, Art. 1.

224. Macdonald, *op. cit.*, *supra* note 32, p. 264.

225. M.C. Douay : "Le Droit de la Mer et la Preservation du Milieu Marin", 81 *RGDIP*, 1984/1, pp. 206-207.

226. Churchill and Lowe, *op. cit.*, *supra* Introduction note 4 , p. 140.

227. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 214.

228. *Ibid.*, Art. 208 paras. 1 and 2; and Arts. 193 and 194 para. 2.

229. Ibid., Art. 208 (3).
230. For a general review of development of international law for the prevention and control of pollution from vessels, see J. Schneider : "Pollution from Vessels", in D. M. Johnston, (ed.), *The Environmental Law of the Sea*. International Union for Conservation of Nature and Natural Resources, Gland, 1981, pp. 203-217; L. Juda : "IMCO and the Control of Pollution from Ships", 26 ICLQ, 1977, pp. 558-584; and Brown, *op. cit.*, *supra* Introduction note 18, pp. 377-397.
231. Alan E. Boyle : "Marine Pollution under the Law of the Sea Convention", 79 AJIL, 1985, pp. 360-361.
232. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 211 (5).
233. J. C. Philips : "The Economic Resources Zone and the South West Pacific", 16 Int. L., 1982, p. 273.
234. The existence of special circumstances may be justified by the presence of oceanographical particularities of the area such as tides, currents and winds; ecological factors such as temperature and salting; and by the presence of heavy traffic in the area. See LOS Convention, *op. cit.*, *supra* Introduction note 2 , Art. 211 (6).
235. It is interesting to note that UNCLOS III meant by the competent international organization to be the International Maritime Organization (IMCO). J. L. Vallarta : "Protection and Preservation of the Maritime Environment and Marine Scientific Research at the Third United Nations Conference on the Law of the Sea", 46 LCP, 1983/2, p. 151.
236. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 211 (6) (a).
237. Ibid., Arts. 211, 217, 218 and 220. It is noteworthy to recall that the flag state has a leading role in the enforcement of the relevant measures regarding vessels that fly its flag, or which are registered in its territory, *ibid.*, Art. 216.
238. Charney, *op. cit.*, *supra* Introduction note 18, p. 253.

239. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 220 (1).

240. *Ibid.*, para. 6; See also, F.O. Vicuna : *The Exclusive Economic Zone : Regime and Legal Nature under International Law*. Cambridge University Press, Cambridge/ New York/ Melbourne/ Sydney, 1989, pp. 87-88; E.E.E. Mtango and F.Weiss : "The Exclusive Economic Zone and Tanzania : Considerations of a Developing Country", 14 ODIL, 1984/1, pp. 31-32; and Dupuy and Vignes, *op. cit.*, *supra* Introduction note 4, p. 1204.

241. *Ibid.*, Arts. 220 (2) and 228 (1)

242. *Ibid.*, Art. 230.

CHAPTER THREE

EEZ - THIRD STATES

Introduction

Under both customary law and the 1958 Geneva Conventions on the Law of the Sea, the high seas started at the point of the termination of the territorial sea¹. The high seas were open to all states, and no state may validly subject any part of them to its sovereignty². Moreover, according to Article 2 of the Convention on the High Seas, the freedom of the high seas comprises, inter alia, freedom of navigation; freedom of fishing; freedom to lay submarine cables and pipelines; freedom of overflight; and other freedoms that are recognized by the general principles of international law.

The situation that exists now, as a consequence of the LOS Convention, is that the high seas *stricto sensu* begins only at the outer limit of the EEZ³. This new concept has given coastal states sovereign rights for the purpose of exploring and exploiting, conserving and managing all natural resources found in the water column, seabed and its subsoil up to 200 miles from the baselines⁴. It has also granted coastal states jurisdictional rights as provided in the LOS Convention with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection of the marine environment⁵. On the other hand, third states have also certain rights in the EEZ. These rights are of two categories, rights related to non-economic uses, and rights related to access to the EEZ living resources. As far as the former category is concerned, Article 58 (1) states that in the EEZ all states "enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87, [the article setting forth high seas freedoms], of navigation and overflight and of the laying of submarine cables and pipelines and other internationally uses of the sea related to these freedoms, such as those associated with operation of ships, aircraft and submarine cables and pipelines, and

compatible with the other provisions" of the LOS Convention. The issue that arises here is that are the freedoms accorded to third states, in the EEZ, of the same scope as the traditional high seas freedoms ? This question is discussed in section I.

Regarding the second category of rights, two specific provisions of Article 62 concern which states will be granted access to the EEZ fisheries. Paragraph 2 provides for the basic coastal state obligation, such as it is, to grant access, and also singles out LL and GDSs for "Particular regard". Paragraph 3 requires the coastal state to "take into account all relevant factors" and then emphasizes four different categories of states : first, the coastal state; secondly, LL⁶ and GDSs⁷; thirdly, developing states in the region or subregion; and lastly, states which have made substantial efforts in research and identification of fish stocks. In the the author's opinion, these provisions on access are not clear⁸. Their vagueness is partly due to the fact that the LOS Convention does not state whether or not the relevant factors referred to in paragraph 3 are to be taken into account in the order in which they are listed. Section II examines the LOS Convention provisions in relation to the latter three categories of states. The rights of each category of states will be considered in the context of coastal states' authority over EEZ access.

Section I : The Rights of Third States Related to Non - Economic Uses of The EEZ

As has already been noted, under both customary law and the Law of the Sea Conventions adopted in 1958, in the high seas freedoms of navigation, fishing, overflight, the laying of submarine cables and pipelines and other freedoms recognized by the general principles of international law were available to ships and planes of all states. These freedoms were subject only to the criteria of "reasonable use" and consideration for the legitimate rights of others⁹.

The need to safeguard the right of free communication within practicable limits

was a constant theme during the evolutionary stages of the concept of the EEZ. Specific reference to the preservation of the freedom of navigation within the asserted zones was made in the pre-UNCLOS III Latin American and African States' extensive claims over large areas of the high sea¹⁰. Moreover, later during the debates at UNCLOS III, especially at the 1974 Caracas Session, the need to preserve the freedoms of navigation, overflight, and the laying of submarine cables and pipeline in the EEZ was repeatedly emphasized. In this connection, at that Session, the Chilean delegate said :

"The economic zone could be defined legally as a jurisdictional zone over which the coastal state exercised sovereign rights of a primary economic nature, without prejudice to the freedoms of navigation and overflight, up to 200 miles"¹¹.

As a result, all the negotiating texts of UNCLOS III contained a provision preserving these freedoms in the EEZ, and eventually they have been enshrined in Article 58. (1), together with other internationally lawful uses of the sea related to these freedoms and compatible with the other provisions of the LOS Convention. Accordingly, the non-economic rights pertaining to third states, in the EEZ, could be classified under two categories : first, freedoms of navigation, overflight and of laying of submarine cables and pipelines; secondly, other internationally uses of the sea related to the rights included in the first category. For the sake of analysis, the two categories are treated separately.

A. Freedoms of Navigation, Overflight and of the Laying of Submarine Cables and Pipelines

All these freedoms are essentially concerned with international communications. However, each freedom has its own peculiarities and thus are discussed hereunder in turn.

1. Freedom of Navigation

In the Behring Sea Fur Seal Arbitration (Great Britain v. United States), 1893, Britain defined the freedom of navigation as "the right to come and go on the high seas without let or hindrance"¹². In the same line, Gidel observed that :

"L'idée essentiellement contenue dans le principe de liberté de la haute mer est l'idée d'interdiction d'interference de tout pavillon dans la navigation en temps de paix de tout autre pavillon"¹³.

Thus, one of the basic freedoms emanating from the general principle of the freedom of the high seas is that ships of all states, including warships¹⁴, enjoy the right to navigate freely on the high seas. This freedom entails as a general rule that each subject of international law exercise, in time of peace, exclusive jurisdiction on the high seas over all ships that are entitled to fly its own flag, but not over others¹⁵. Freedom of navigation has not, however, been regarded as absolute in scope. In this connection, in the Fisheries Jurisdiction Case (United Kingdom v. Iceland), the ICJ noted that in the exercise of the freedoms of the high seas all states must have "reasonable regard to the interests of other states"¹⁶. Other restraints on the exercise of freedom of navigation, both of customary and conventional nature, are also in existence. Amongst others, the prohibition of states from allowing ships flying their flag to engage in piracy or transportation of slaves; hot pursuit; right of approach of warships; and fisheries conservation¹⁷. The LOS Convention adds to the list of prohibited activities in the high seas, unauthorized broadcasting and engaging in illicit traffic in narcotic drugs and psychotropic substances contrary to international conventions¹⁸.

Now and as a direct consequence of UNCLOS III negotiations, specific functional rights have been accorded to coastal states in the EEZ which extends seaward to 188 miles from the outer limit of the territorial sea, and which was traditionally regarded as part of the high seas. On the other hand, third states, irrespective of their geographical location,

enjoy the freedom of navigation referred to in Article 87 which sets forth the freedoms of the high seas. But the exercise of navigation is made subject to the relevant provisions of the LOS Convention. Certain observers have questioned whether navigation in the EEZ is sufficiently protected against coastal state encroachment. In this connection Congressman John Breaux, for instance, has said that the LOS Convention fails "to offer clear protection for navigation rights in the new 200 miles exclusive economic zone"¹⁹.

In the present author's opinion, this view appears to be not sufficiently founded. In fact, the basic provisions of the LOS Convention and the specific regime of the EEZ show a constant concern for duly safeguarding the freedom of navigation in the EEZ. This is perfectly natural since, as already explained, it is the most traditional of the freedoms of the sea and forms an integral part of the rules of customary and conventional international law governing the law of the sea²⁰.

Precisely, Article 58 (1) of the LOS Convention provides that in the EEZ all states enjoy "the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines". This cross-reference to Article 87, which lists the major freedoms of the high seas, has made it abundantly clear that the freedom of navigation accorded to third states in the EEZ is identical to that enjoyed in the high seas. In this context, Bernard Oxman a member of the U.S delegation to the UNCLOS III, explaining the existence of such identity, has correctly observed :

"As to the qualitative nature of the 'freedom' of navigation, overflight, and laying of submarine cables and pipelines, the adjectival clause "referred to in article 87" inserted after "freedoms" establishes the qualitative identity of these freedoms with those beyond the economic zone, as Article 87 is the basic Article enumerating high seas freedoms..."²¹.

Moreover, in the context of UNCLOS III, the generalized opinion has reaffirmed this basic freedom²², which has not been the subject of disagreement save in some isolated situations.

However, the application of the regime of freedom of navigation to the EEZ proved to be a difficult task, not because the territorialization of the EEZ was intended, but because this regime had to be harmonized with the interests recognized therein for coastal states.

As Professor Riphagen has rightly observed, "la conclusion semble s'imposer qu'en matière de navigation *lato sensu* le nouveau droit de la mer ne s'écarte pas pour l'essentiel des principes de l'ancien"²³. What has occurred in the EEZ, as has been further explained, is the substitution of the traditional dichotomy between the regime of the high seas and the regime of the territorial sea by a new dichotomy of a functional nature that entails the interest in navigation and the interest in the exploitation of natural resources²⁴. This new functionality explains the limitations which the freedom of navigation may face in the EEZ²⁵.

It is interesting to recall that the freedom of navigation accorded to third states in the EEZ is subject to the relevant provisions of the LOS Convention²⁶. Some of these relevant provisions are contained in Part V on the EEZ, while certain others are scattered in several other parts of the LOS Convention. In several cases, these relevant provisions place certain limitations on the exercise of freedom of navigation within the EEZ. The first explicit limitation is the general principle of due regard²⁷ to the interests of other states in the exercise of the high seas freedoms, as stipulated by Article 87 (2), which is cross referenced in Article 58 (3). "Other" states must also include the coastal state to whose rights in the EEZ other states must in any case have due regard under Article 58 (3)²⁸. Secondly, freedom of navigation in the EEZ is subject to Articles 88 to 115 of the LOS Convention dealing with navigation on the high seas "in so far as they are not incompatible" with the provisions contained in the EEZ Part²⁹. This means that other limitations on absolute freedom of navigation on the high seas, such as the nationality of ship³⁰, the prohibition of transport of slaves³¹, piracy³², and the right of hot pursuit³³ are

applicable in the EEZ as they are universally recognized³⁴.

More important is that Article 60 (4) provides that :

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

This provision, like that contained in Article 5 (2) of the 1958 Convention on the Continental Shelf, explicitly empowers the coastal state to regulate navigation of third states in some parts of its EEZ³⁵. The absence of specific guidelines as to the content of the words "appropriate measures" gives a coastal state a wide discretion with respect to the measures to be taken in the established safety zones.

However, Article 60 (7) prohibits the establishment of safety zones "where interference may be caused to the use of recognized sea lanes essential to international navigation". Moreover, paragraph 5 of the same article stipulates that the size of the safety zones should be limited to 500 metres around the established islands, installations and structures, save when authorized by generally accepted international standards or recommended by the competent international organization. These provisions have been taken almost verbatim from Article 5 (3) of the Convention on the Continental Shelf. They contain important limitations on the siting of safety zones as well as on their size and, consequently, on the sphere of the coastal state's unilateral regulatory competence explained above. With these limitations on the discretion of the coastal state, it seems that it is unlikely that the siting of artificial islands and installation or rules governing navigation in the surrounding safety zones would have any appreciable impact on the freedom of navigation in the EEZ. Nonetheless, with the recognition to the coastal state of exclusive right to construct artificial islands and installations and structures for the purpose of the economic uses of the EEZ, it is not possible to say conclusively that the exercise of navigation in the EEZ will not be limited at all. This is because, although such objects may not be established where interference may be caused to the use of recognized sea lanes

essential to international navigation, they could be strategically placed in a way that allows the coastal state to monitor foreign submarines and thus limit the use of the EEZ by the navies of third states³⁶.

The second provision in the EEZ Part of the LOS Convention which grants coastal states certain powers which would adversely affect the freedom of navigation in the EEZ is Article 73 (i) dealing with the enforcement powers of the coastal state concerning fishing in the EEZ³⁷. This provision provides :

"The coastal state may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention".

The coastal state competence to adopt enforcement measures affecting navigation by foreign vessels in the EEZ is a very controversial issue. One view has given it a narrow interpretation³⁸. In a commentary offering detailed examination of the problem of accommodation of coastal state resources rights with rights of third states in the EEZ, Professor Bernard Oxman, one adherent to this view, has observed that :

"The sovereign rights of the coastal state with respect to fishing do not deprive a fishing vessel of freedom of navigation. Absent specific evidence, it would be manifestly unjustifiable to stop and board a freighter or oil tanker navigating through the zone to ensure that it is not fishing, but it would also be manifestly imprudent to expect the coastal state to refrain from inquiry regarding a large fishing fleet moving slowly with gear in readiness and with no apparent destination through a rich fishing ground far from any known navigation route"³⁹.

This statement restricts the coastal states regulatory and enforcement competences over foreign vessels passing through the EEZ to very narrow limits. It seems that it suggests that the coastal state would only be allowed to board and inspect vessels which

are actually engaged in fishing⁴⁰. Other measures would be prohibited even if reasonable in regard to coastal and flag state interests.

A very different view of the balance in the LOS Convention is that the right of freedom of navigation is subject to the relevant provisions of the LOS Convention and that, therefore, this right is subordinate to the coastal competences in the EEZ. Under this broad view, any foreign vessel passing through the EEZ could be subject to being stopped and inspected to ensure that it was not violating the coastal state's laws and regulations adopted in accordance with the LOS Convention⁴¹.

However, in the author's opinion, some middle ground appears to be the correct position. The circumstances of the presence of a foreign vessel in the EEZ should determine the reasonableness of the coastal state's enforcement action. Thus, if the vessel involved is a freighter or oil tanker, the fact that it follows its route slowly does not entitle the coastal state to take any enforcement action against it. Moreover, the mere fact that crewmen may have streamed a few fishing lines astern would not warrant boarding and inspecting. On the other hand, if the foreign unit involved is a fleet of fishing trawlers not adhering to recognized sea lanes while in transit, or is accompanied by a factory ship, it does not seem unreasonable that a coastal state would take enforcement measures to ensure that vessels appearing to be merely passing through the EEZ are not actually fishing in it.

Furthermore, the coastal state is empowered under certain provisions of Part XII of the LOS Convention⁴² to take certain measures with respect to vessels navigating in its EEZ, to enforce environmental laws on vessel-source pollution that conform to generally accepted international rules and standards, and for enforcing its own regulations on dumping of wastes. This competence of the coastal state, of course, constitutes a further limitation⁴³. But, as has been observed by one author, this limitation does not affect the

"rights" specified in Article 58, but only the "manner" in which those rights are to be exercised⁴⁴.

2. Freedom of Overflight

Under both customary and conventional international law, the coastal state's sovereignty extends to its territorial sea and the airspace above it⁴⁵. While alien vessels, with the exception of warships, enjoy the right of innocent passage in the territorial sea⁴⁶, such a right is denied to foreign aircraft through the airspace above it⁴⁷.

In the Convention on the Territorial Sea and the Contiguous Zone⁴⁸, the sole article on the contiguous zone, which is Article 24, refers to control by the coastal state "in a zone of the high seas contiguous to its territorial sea" for defined purposes only. By virtue of this article, a coastal state may, if it wishes to do so, exercise certain preventive and punitive powers in relation to custom, fiscal, immigration or sanitary matters⁴⁹. Moreover, Article 1 of the Convention on the High Seas⁵⁰ defines the 'high seas' as "all parts of the sea that are not included in the territorial sea or in the internal waters of a state". It follows that the rights of the coastal state in such a zone do not amount to sovereignty, and thus other states have therein the rights exercisable in the high seas including the right of overflight.

Under the 1958 Geneva Convention on the Continental Shelf⁵¹, the coastal state has also sovereign rights over the shelf, but only for the exploration and exploitation of the natural resources of the continental shelf⁵². The Convention expressly states that the rights of the coastal state do not affect the status of the superjacent waters as high seas or that of the airspace above the waters⁵³. Finally, in exclusive fishing zones, generally recognized more recently, the coastal state enjoys exclusive rights in relation to all fishery matters⁵⁴. It must be emphasized, however, that in all the above-mentioned zones, the residual status remains that of the high seas and the rights of the coastal state, being

simply limitations upon the predominant principle of the freedom of the high seas, must be restrictively interpreted in case of conflict with rights underlying the principle of the freedom of the high seas⁵⁵. Thus, like the freedom of navigation, freedom of overflight beyond the territorial sea remained available to all states, subject of course to the criteria of "reasonable use" and consideration for the legitimate rights of other states in those sea areas.

What does the LOS Convention state in relation to overflight over the EEZ? Article 58 (1) provides that all states enjoy within the EEZ the freedoms referred to in Article 87 of navigation and overflight. The cross-reference to Article 87 of the LOS Convention, which lists the major freedoms of the high seas, is important. It makes it evident that the freedom of overflight accorded to the generality of states above the EEZ is qualitatively the same as that enjoyed over the high seas⁵⁶. However, this is not the end of the story. In fact, the same paragraph adds that the enjoyment of freedom of overflight in the EEZ is subject to the relevant provisions of the LOS Convention. Moreover, paragraph 3 of the same article provides that, "in exercising their rights and performing their duties under this Convention in the exclusive economic zone, states shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal State". This means that this freedom is not unlimited, for its exercise is to be compatible with the provisions of the LOS Convention.

This freedom, like the freedom of navigation in the EEZ, is subject to two explicit limitations, namely due regard for other states and Articles 88-115 of the LOS Convention dealing with navigation on the high seas and other rules of international law compatible with the EEZ provisions⁵⁷. In addition, the freedom of overflight in the EEZ is implicitly subject to two further possible limitations. First, the EEZ regime, for instance, grants a coastal state sovereign rights with regard to activities for the exploration and exploitation of the zone, such as the production of energy from, inter alia, winds. This

could involve the presence of wind-energy exploitation devices at heights normally used by aircraft, which would prevent low flying in the vicinity of such devices⁵⁸. Secondly, aircraft are subject to the coastal state's competence to regulate the dumping of waste⁵⁹.

3. Freedom of Laying Submarine Cables and Pipelines

The general principle of freedom to lay cables and pipelines under the ocean has long been accepted in international law without any question⁶⁰. This right, enjoyed by all states, remained protected under the law of the continental shelf contained in the 1958 Convention on the Continental Shelf⁶¹.

The LOS Convention has, in fact, confirmed the old position. Article 58 ensures this freedom in the same terms as the freedoms of navigation and overflight, that is by means of cross-reference to Article 87, with the requirement that its enjoyment is subject to the explicit limitations of due consideration for the interests of other states and Articles 88-115 of the LOS Convention. While many of these Articles do not apply to cables and pipelines, Articles 112-15 are specifically concerned with them⁶². These are designed to prevent injury to cables and pipelines, and to compensate ships for sacrificing gear for this purpose. The 1958 High Seas Convention contains similar provisions⁶³.

Moreover, there exists a further limitation included in Article 79. Despite the fact that this latter article is found in Part VI on the continental shelf, it also applies to the EEZ, since the seabed of the EEZ is coterminous with the continental shelf⁶⁴. Unlike the 1958 Convention on the Continental Shelf,⁶⁵ Article 79 (3) provides that "the delineation of the course for the laying of such pipelines" is subject to the consent of the coastal state. An interesting problem arises in this respect. Article 58 (1) recognizes that all states are to enjoy the freedom of laying of pipelines within the EEZ. Thus, one may argue that the coastal state's consent is only required with regard to the shelf that lies beyond the EEZ. On the other hand, the same Article does provide that the enjoyment of the said freedom is

"subject to the relevant provisions of this Convention". It seems therefore reasonable to apply the consent requirement contained in Article 79 (3) even within the EEZ⁶⁶.

Furthermore, Article 79 (4) gives the coastal state the power to set conditions for cables and pipelines which enter its territorial sea, and enables it to exercise its jurisdiction over cables and pipelines that are constructed or which are used in connection with the exploration of its continental shelf or exploitation of its natural resources. This appears to be logical since a coastal state enjoys under both customary and conventional international law sovereignty over its territorial sea and sovereign rights for the purpose of exploring and exploiting the shelf's resources. But, to what extent the provision enshrined in Article 79 (3) is compatible with a freedom to lay pipelines may be questioned. In fact, as Churchill has correctly, observed, the use of the "term freedom here is perhaps misleading"⁶⁷.

B. Other International Uses of the Sea Related to Navigation, Overflight, and the Laying of Cables and Pipelines

Article 58 (1) provides also that the rights of third states in the EEZ extends to "other internationally lawful uses of the sea "related to the freedoms of movement and communication that have already been discussed, "such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions" of the LOS Convention. This formulation first appeared in Article 46 (1) of the RSNT⁶⁸. Its textual predecessor, though with some minor modification, was Article 2 (2) of the Convention on the High Seas⁶⁹. The latter states that the freedoms of navigation, fishing, overflight and the laying of cables and pipelines referred to in paragraph 1 of Article 2 "and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas". The inclusion of such a

provision in the Convention on the High Seas was designed to emphasize two points. The first one is that the listing of the freedoms in paragraph 1 is not exhaustive⁷⁰, and the second point is that military uses are accepted in the regime of freedoms of the high seas.⁷¹

What seems certain is that the insertion in Article 58 (1) of the LOS Convention of the formulation "other internationally lawful uses of the sea related" to the basic freedoms was designed to make it clear that, while coastal states are entitled to any unspecified residual rights in connection with resource exploitation, third states can exercise in the EEZ any unspecified rights associated with the basic freedoms specified⁷². Nevertheless, the words employed in this formulation for the purpose of expressing the scope of the said uses are vague, open to different interpretations, and lacking the required precision, as had been pointed out by the delegate of Peru⁷³. No convincing explanation was given to elucidate the significance of such uses; on the contrary, their precise meaning and scope was questioned both in the Consultative Group and in Informal Negotiating Group No. 1⁷⁴. This ambiguity has led certain promoters of the coastal state's jurisdiction to claim that certain foreign military activities in their respective EEZs could not be regarded as related to the freedoms of navigation, overflight and the laying of cables and pipelines; and could not also be accommodated under Article 58 of the LOS Convention as internationally "lawful uses of the sea", and / or compatible with Article 88 of the LOS Convention on the reservation of the high seas for the peaceful purposes. On this narrow interpretation, only routine navigation and operations in a strictly technical sense come within the scope of this article; military maneuvers, especially those involving the testing of weapons and explosives, cannot be regarded as associated with the operation of ships and aircraft⁷⁵.

At the Seventh Session of UNCLOS III meeting at Geneva 1978⁷⁶, both Brazil and Peru still tried to assert this restrictive view in an unsuccessful attempt to reconsider

the whole issue, by adding a provision which prohibits foreign warships and military aircraft passing through the EEZ from engaging in any military activity in their 200 miles EEZs without prior consent⁷⁷. Certain other developing coastal states, e.g. Cape Verde and Uruguay, insisted in their Declarations upon signing the LOS Convention that the provisions of the Convention do not allow third states to carry out in the EEZ military activities that might affect the rights and interests of the coastal state without the consent of that state⁷⁸. This position seems to imply that, with the exception of the routine navigation activities of warships and military aircraft, any other military activity falls within residual rights vested in the coastal state⁷⁹.

On the other hand, reference to internationally lawful uses of the sea associated with operation of ships, aircraft and submarine cables and pipelines has been understood by some others, especially the large maritime powers, as implying that third states navigational rights extend to the military uses of the EEZ, including the conduct of military maneuvers and weapons exercises subject only to the obligation to have due regard to the rights of other states exercising their freedom of the high seas⁸⁰.

In the author's opinion, it seems very certain that the military use of the EEZ and the air above it is authorized under the LOS Convention as a result of the inclusion of a general reference to freedoms of navigation and overflight in Article 58 paragraph 1 and the insertion of the phrase "and other internationally lawful uses of the sea related to these freedoms". Nevertheless, it seems excessive to give these words a very broad interpretation. This is because, first, the military use of the EEZ has been subjected to the condition of compatibility with the other relevant provisions of the LOS Convention, including, of course, those relating to the interests of the coastal state with respect to living resources⁸¹. Secondly, under Article 58 (1), a genuine link must exist between internationally lawful uses of the sea and freedoms in respect of which the said uses are associated with⁸². It follows, that while anchoring, patrolling, emplacement of some

devices to ease navigation for submarines and other warships, and operational activities needed for the laying of cables and pipelines appear to be related to the specified freedoms⁸³, and pose no incompatibility problems, it is not the case with regard to certain other military uses. For instance, emplacement of weapons, such as mines, in the EEZ has nothing in common with the freedom of the seas, and conflicts with the interests of the coastal state and would justify their removal or destruction by the coastal state in the exercise of the right of self-defense under Article 51 of the UN Charter⁸⁴. Similarly, military maneuvers involving explosives and weapons testing have no genuine link with the freedoms specified in Article 58 (1) and disregard the coastal state's rights over the EEZ's living resources. Yet in a situation of high political tension, naval exercises involving gunnery and launching of missiles in the waters of another country's EEZ may be regarded as provocative and intimidating *vis à vis* that coastal state. The borderline is rather murky, but under the circumstances such exercises could qualify as illegal threat of force proscribed by Article 2 (4) of the UN Charter, as well as Article 301 of the LOS Convention. In addition, a coastal state might also claim that certain devices emplaced by a third state, for instance, antisubmarine tracking systems, are not associated with the operation of ships and consequently not available to third states in its EEZ.

The conclusion that may be drawn from the above analysis on third state's attributed rights in the EEZ is that the freedoms accorded to these states are qualitatively the same as the high seas freedoms. They are qualitatively the same in the sense that the nature of the rights are the same as the traditional high seas freedoms. Nevertheless, they do not represent an extension of the regime of the high seas *per se*, but originate from the *sui generis* regime of the EEZ and, as such, are subject to its limitations and modalities.

Quantitatively speaking, these freedoms are less inclusive than traditional high seas freedoms, evidently because, under Article 58 of the LOS Convention, the uses have been limited to those having a genuine link with the freedoms of navigation, overflight and

the laying of submarine cables and pipelines.

C. Non Attributed (Residual) Rights

Regarding the exercise of rights in the EEZ, all the most obvious economic rights have been attributed in the LOS Convention⁸⁵. Rights appertaining to scientific research are expressly dealt with⁸⁶. All drilling into the seabed requires the coastal state's consent⁸⁷. Moreover, all the most obvious communication rights have been attributed to third states⁸⁸. For the latter, the freedoms of navigation and overflight are the most important.

Thus, unlike the previous functional regimes that affected the high seas, this system produces a situation in which a big uncertainty still exists as to which state could retain the possible uses which do not fall within the rights of either the coastal state or third states. In case of such residual rights, including rights to unforeseen uses of the ocean brought about by advances in technology, the provision of Article 59 of the LOS Convention is to apply. It says that :

"In cases where this Convention does not attribute rights or jurisdiction to the coastal state or to other states within the EEZ, and a conflict arises between the interests of the coastal state and any other state or states, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole".

This provision finds its origin in a proposal made by Ambassador Castaneda of Mexico at the Second Substantive Session of UNCLOS III, Geneva 1975⁸⁹. It was later

inserted in the ISNT by the Chairman of the Second Committee of UNCLOS III as a compromise between those states that firmly advocated residual competences for the coastal state and the big maritime states which strongly advocated the view that residual uses should remain subject to the high seas regime. It has been retained intact in all subsequent texts⁹⁰.

It has been viewed by certain developing states as establishing a presumption in favor of coastal states⁹¹. However, in the author's opinion, such a view does not seem to be correct. This is because, first, it finds no support in the negotiating history of UNCLOS III⁹². Secondly, such a view was rejected by the big maritime states after the conclusion of the LOS Convention⁹³. This rejection was evidenced by Italy's Declaration made upon the signing of the LOS Convention which states that :

"According to the Convention, the coastal state does not enjoy residual rights in the exclusive economic zone..."⁹⁴.

Thus, Article 59 suggests that, in case of unattributed rights, there is no presumption in favor of either the coastal state or third states; each case, as it occurs, will have to be decided on its own merits on the basis of the criterion contained in Article 59⁹⁵.

Indeed, the provision enshrined in Article 59 is general and vague⁹⁶. Nevertheless, it has, at least, made it clear that all the relevant circumstances must be considered as well as the interests of the international community as a whole. The criterion of equity seems to refer to equitable principles as part of international law and specifically the rules of interpretation which would permit the court to take into consideration all the relevant circumstances to avoid extreme injustice and inequities. It is not the same as the concept of *ex aequo et bono* under Article 38 (2) of the Statute of the International Court of

Justice, under which the Court may in its decision go beyond the rules of international law if the parties agree⁹⁷. As far as the procedures for the resolution of the conflicts are concerned, the guidelines of Article 59 seem to imply that the parties must first make an attempt at a diplomatic settlement by negotiating in good faith or using other peaceful means of their choice according to the general provisions of the LOS Convention governing the settlement of disputes⁹⁸. If the methods chosen by the parties prove to be of no avail, the dispute must be submitted at the request of any party to one of the judicial bodies listed in Article 287⁹⁹ of the LOS Convention, unless the dispute relates to military activities and one of the parties has, upon signing, ratifying, or acceding to the LOS Convention or at any time thereafter, made a written declaration exempting itself from settling such disputes by compulsory third-party procedures¹⁰⁰. To the author's knowledge, no such declarations have been made.

Section II : The Rights of Third States Related to Access to the EEZ Living Resources

The LOS Convention provides that coastal state's jurisdiction over the resources of the EEZ includes certain duties to manage the living resources and to provide access to foreign fishermen. As far as access is concerned, Article 62 (2) states that, if the coastal state's capacity does not permit it to harvest the entire allowable catch, it "shall" give third states access to the surplus. The word "shall" implies that an obligation is cast on the coastal state to give access to the surplus. The first question that will be considered relates to the scope of the coastal state's obligation to provide access to the surplus.

Furthermore, a foreign state's status as a LL or DGSs is given special recognition¹⁰¹. The LOS Convention describes the conditions for LL and GDS to get a share of the EEZ fishery both when there is a surplus and when there is none. But it has

left a number of issues unresolved. The most important issue is whether these states have any priority in sharing the surplus of the fishery of the coastal state in its EEZ. This is the second question that will be discussed hereunder.

A. Access of Third States to the Surplus Resources of the EEZ in General

Under Article 62 (2), if a coastal state declares a surplus after taking its share, it "shall" enter into agreements or other arrangements to give other states access to this surplus. The use of the word "shall" means that the coastal state is put under an obligation to give access to the surplus of the allowable catch. However, whether or not paragraph 2 of Article 62 casts an actual obligation on the coastal state to provide access for third states to the surplus must be evaluated in the light of several considerations. First, the provision in question speaks of the surplus to the harvesting capacity of the coastal state as determined by the same state and not the surplus to the actual harvesting capacity of the coastal state as determined by reference to objective criterion. Thus, to deny the existence of any surplus and consequently access of third states, a coastal state can simply equate its harvesting capacity with the allowable catch that is capable of being set at levels that suit best its economic interests. Secondly, third state's access to the surplus is made conditional upon an "agreement or other arrangements", the terms of which may not be satisfactory or acceptable to third states desiring access to the surplus. The phrase "shall through agreement or other arrangement" seems to suggest that an obligation to enter into negotiations with other states seeking access to the surplus is put upon the coastal state¹⁰². The obligation to negotiate does not imply an obligation to reach agreement. Nonetheless, a coastal state remains obliged under general international law and the provisions of the LOS Convention to conduct the negotiations in good faith. In this connection, in its Advisory Opinion in the Railway Traffic (Lithuania v. Poland) Case¹⁰³, the PCIJ

observed that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements"¹⁰⁴. Thus, it would be inconsistent with the provisions of the LOS Convention for a coastal state to impose terms and conditions in order to deny access or make access impractical for foreigners once it has declared that a surplus exists. Such action will be contrary to the provision of Article 300 which states that states parties to the LOS Convention undertake to discharge in good faith the obligation entered into in conformity with the Convention and to exercise their rights, jurisdiction and freedoms recognized in the Convention in a manner that would not constitute an abuse of rights. This is to say that the nonexhaustive list of the various regulatory powers contained in Article 62 (4), such as payment of fees, fixing of quotas, regulation of fishing seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels, etc., should be read in the light of the provision enshrined in Article 300 of the LOS Convention and so should the requirement to give access of Article 62 (2) in order to be meaningful in both practical and formal senses.

Finally, in the event of disputes concerning the coastal state's sovereign rights with respect to the living resources in the EEZ or to the exercise of those rights, such disputes may be resolved through various peaceful means, such as negotiations, or recourse to any procedure agreed upon by the parties concerned. A coastal state, however, is not obliged under Article 297 of the LOS Convention to submit to compulsory dispute settlement procedures on an issue arising out of the exercise of its sovereign rights to fisheries¹⁰⁵. This includes the coastal state's discretionary powers to determine the allowable catch, its harvesting capacity, and its allocation of the surplus to third states in accordance with the provisions of the LOS Convention. Thus, a coastal state's refusal to set an allowable catch or harvesting capacity, which would result in the allocation of its surplus, cannot be challenged. Only if the decision is "arbitrary" can it be pursued through

compulsory "conciliation". The Conciliation Commission, however, cannot substitute its discretion for that of the coastal state¹⁰⁶. Moreover, the report of the commission, including its conclusions and recommendations, are not binding on the parties¹⁰⁷.

In sum, the coastal state has been empowered under the terms of the LOS Convention to decide the total allowable catch of the living resources in its EEZ as well as its harvesting capacity. Much flexibility is provided to it in setting the two levels. Furthermore, the dispute settlement system established by the LOS Convention precludes effective review of the coastal state's decisions on these questions. It follows that the obligation to accommodate foreign states is not overwhelming. In fact, the LOS Convention gives the coastal state great latitude of discretionary power to decide whether or not to allow foreign states fishing in its EEZ.

B. LL and GDSs Access to the Living Resources of Other State's EEZ's

Article 62 (2) states that, in giving access for third states to the EEZ resources, the coastal state shall have particular regard to the provisions of Article 69 and 70 which deal with the rights and duties of LL and GDSs respectively. Some of the constraints on coastal state's authority to allocate their surplus are listed in the latter articles. The author will attempt, hereunder, to clarify the meaning of the terms "Land-Locked" and "Geographically Disadvantaged" states, then proceed to identify the constraints enshrined in Article 69 and 70 on coastal state's authority to allocate its surplus.

1. The Origin and Meaning of the Terms "Land-Locked" and "Geographically Disadvantaged" States

1. 1. The Term "Land-Locked" State

This term is not an innovation of UNCLOS III. In fact, its use and the

determination of its meaning in the domain of public international law had preceded the convening of UNCLOS III¹⁰⁸. The United Nations Convention on Transit Trade of Land Locked States¹⁰⁹, for instance, used this term eight years before the start of UNCLOS III. It refers to "any...state which has no sea coast"¹¹⁰. This definition has, in fact, been borrowed from the 1958 Geneva Convention on the High Seas¹¹¹. The LOS Convention has adopted the same definition¹¹².

The geographical factor is, thus, taken as the determining agent as to whether or not a state is land-locked. Any state located on the sea is a coastal state excluded from the definition and this is so regardless of whether such a state exhibits some of the characteristics of a truly LLS being on a sea coast useless for international trade, or having very short corridors out to the sea¹¹³. On the other hand, a LLS exhibiting certain characteristics of coastal states by being positioned on international navigable rivers¹¹⁴, and consequently having access to the sea through them or via any one of them, remains included in the definition of LLSs.

Until 1990, the number of LLSs all over the world remained stable. It was limited to thirty states : 14 African states, 9 European states, 5 Asian states and 2 Latin American states¹¹⁵. However, the number of these states has very recently increased considerably¹¹⁶. The big majority of the LLSs belong either to Asia or to Europe. The number of Asian LLSs has jumped from 5 to 12 because of accession to independence of the former Soviet Republics of Central Asia¹¹⁷. Those new states, i.e. Kazakhstan, Kyrgyzstan, Tadjikistan, Turkmenistan and Uzbekistan will look for access to the sea, just as the other LLSs of the subregion Afghanistan, Bhutan, Laos, Mongolia, and Nepal have done in the past.

With regard to European LLSs, their number has recently passed from 9 to 12. This has occurred as a result of the dissolution of the USSR and the disappearance of the former Yugoslavia, and the substitution of former Czechoslovakia in January 1993 by the

1. 2. The Term "Geographically Disadvantaged States"

The term "Geographically Disadvantaged states" evolved from the notion "shelf locked states" that became frequently used in legal works around the beginning of the 1970s¹¹⁹. The latter expression refers to states that are :

"Cut off from the sea-bed and subsoil beyond national jurisdiction... the continental shelf of such states have no boundary with the sea-bed beyond national jurisdiction, the area where no individual sovereignty exists"¹²⁰.

Such states have

"limited possibilities for extending their jurisdiction far offshore because of their geographic situation. This, for example, is the case with states that border on enclosed or semi-enclosed seas..."¹²¹.

By the time the UN Sea-Bed Committee¹²² embarked in its preparatory work for UNCLOS III in 1968, the prospects for the acceptance and establishment of a 200 miles functional zone became quite real. Several states discovered that, in addition to being shelf-locked, they were also zone-locked. That is, for geographical reasons, they would not be able to establish a full 200 miles zone. They also realized that their interests, as a consequence of a change of large parts of the high seas, would be adversely affected, especially because of the possible limitation or elimination of the freedom of fishing. As the expression 'Shelf-Locked States' no longer describes, adequately, this situation, the need for a more comprehensive denomination became urgent. This called into being a new concept : 'Geographically disadvantaged states'.

While in the early stages of the UN Sea-Bed Committee only very few states referred to this new concept by the end of its final session 1973, the concept acquired wide currency and recognition¹²³, though it was still in its fledgling state, since no definite and

precise legal definition was agreed upon.

During the first two Substantive Sessions of UNCLOS III, various proposals used the concept GDSs and attempted to define it¹²⁴. But, despite its broad use and acceptance, no definition was agreed upon. This was mainly due to the fact that several states suggested definitions involving political, biological, economic and ecological factors¹²⁵. Non-agreement on a definition seems to be the reason lying behind the non-inclusion of the concept in the ISNT.

Even in subsequent sessions the work on a definition was not an easy and quick task. The ICNT that was issued in 1977¹²⁶ referred in Article 70 (1) to "certain developing coastal states in a subregion or region". This was, however, met with certain displeasure from the Informal Group of LL and GDSs¹²⁷ which insisted on the inclusion of the term GDSs in the eventual treaty on the ground that it was the appropriate one because of its prolonged use in the Conferences's documents. On the other hand, fearing that it could not be defined precisely, coastal states persisted in objecting to its introduction in the provisions relating to the EEZ. All subsequent texts, including the Draft Convention¹²⁸, avoided the use of the term GDSs and referred instead to the phrase "states with special geographic characteristics". This phrase was concocted by Mr. Sataya Nandan of Fiji, the Chairman of the Informal Group of LL and GDSs. He explained that this was recommended as the best possible way of conveying the same idea of GDSs without being plagued by the inherent difficulties of defining a GDS¹²⁹.

The definition which was eventually enshrined in Article 70 (2) of the LOS Convention does not proceed on the basis of any fixed definition of GDSs. Instead, it refers to this group of states to include :

"Coastal states, including states bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other

states in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal states which can claim no exclusive economic zones of their own".

In the first place, it is important to note that this definition was, as already mentioned above, proposed by the Chairman of Negotiating Group 4, Ambassador Sataya Nandan of Fiji, on 15 May 1978¹³⁰. His suggestions were a part of an overall compromise concerning the right of access of GDSs to the living resources of the EEZs of coastal states. In the second place, the expression "including states bordering enclosed or semi-enclosed seas" was, as Mr Nandan explained, added as a clarification of the provisions of Article 70 and not as a new criteria for the identification of the group of states to which Article 70 addresses itself¹³¹. The terms 'enclosed or semi-enclosed sea' have been defined in Article 122 of the LOS Convention to mean "a gulf, basin or sea surrounded by two or more states and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states"¹³². Thus, most of the states situated on the Mediterranean, the Black Sea, the Red Sea, the Baltic and the Aegean Sea might possibly but not necessarily fall within the definition contained in Article 70 (2). This definition includes two categories of states. The first category appertains to coastal states that can assert no EEZ of their own. The problem here is that it is unclear whether this means states which can not assert an EEZ of 200 miles or which have no EEZ at all. In the author's opinion, only the latter states will fall within this category. This is because, first, under Article 57 of LOS Convention the 200 miles figure is the maximum breadth of the EEZ and not a compulsory breadth¹³³. Therefore, a state which can assert, say, a seventy miles EEZ can still claim an EEZ. Secondly, those states which are, for geographic reasons, unable to assert a full 200 miles EEZ might possibly be covered by the second category. The latter refers to coastal states whose geographical situation makes them dependent upon

the exploitation of the living resources of the exclusive economic zones of other states in the same subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof. Thus, in order to be identified as falling within this second category, a state must fulfill two conditions : the first one is that of the existence of a special geographical characteristics; the second condition is that, because of such a situation, the state in question is dependent upon the exploitation of the living resources of the EEZs of other states belonging to the same region or subregion for adequate supplies of fish for the nutritional purposes of its populations or parts thereof. However, to say the least, both conditions are flawed and ambiguous¹³⁴. Several questions may be asked in this regard. Amongst others, what geographical situation is being referred to which makes such states dependant upon the exploitation of the EEZs of other states for the nutritional needs of their populations ? And what level of dependence is required for this purpose ?¹³⁵

With regard to the first question, it seems that the plausible answer is that the expression "geographical situation" refers to those coastal states which, because of their proximity to other states of the same sub-region or region, can assert only small EEZs, or those which because of the characteristics of the adjacent seas gain only minimal benefits in fisheries exploitation from the assertion of an EEZ. While every member-state of the Group of Land-Locked and Geographically Disadvantaged States¹³⁶ may satisfy the first condition, only very few of them can assert their dependence upon the exploitation of the fisheries resources of other states EEZs for the nutritional needs of their populations. These might include Belgium, the former Federal Republic of Germany, the Netherlands, Singapore and Sweden. The reason is that, apart from these states, the other members of the Group are not involved in fishing on a significant scale¹³⁷ and, consequently, no state of dependence upon marine fisheries has emerged. However, taking into account the nutritional needs of the developing GDSs and the nutritional value of the fisheries resources in these states, it seems fair to say that the provision of Article 70 (2) must be

understood to mean previous and future dependence. This view appears to be warranted by the provision of Article 62 (2) which states that in giving access to the surplus, coastal states should have particular regard to Article 69 and 70, especially in relation to the developing LL and GDSs of the same subregion or region. Nonetheless, the definition contained in Article 70 (2) remains vague and there exists room for argument as to which states are covered by it¹³⁸.

2. Sharing of EEZs Living Resources

While most developing states spoke in favor of the idea of the establishment of the 200 miles EEZ since the start of UNCLOS III negotiations, LLSs objected to the creation of such a zone for fear that they stood to lose their already established rights in the area, which till then was part of the high seas¹³⁹. Since objection came especially from these states, it was realized quite early in the debate that some concessions would have to be made to them to ensure their support for the concept. There was a long-drawn out battle between coastal states, on the one hand, and LL and GDSs, on the other hand, over the formula for sharing the living resources of the EEZs¹⁴⁰. LL and GDSs demanded that every coastal state should reserve to itself and to LL and GDSs in its neighbourhood that part of the living resources of its EEZ which would satisfy the needs of all these states, so that LL and GDSs might be able to exercise the right to participate in the use of those resources on an "equal and non-discriminatory basis"¹⁴¹. Only then would other states have the right to participate in the resources of the zone. In other words, they sought to grant to themselves access to the EEZ living resources in preference to all states other than the coastal states concerned. This proposal was objected to by both the distant-water fishing states which were not prepared to accept a grant of access to LLSs prior to themselves, and by coastal states that were in no mood to accept the right of LLSs "on an equal and non-discriminatory basis". The resultant compromise was the formula inserted

in the last text of UNCLOS III which gives LL and GDSs the right,

"...To participation, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal states of the same sub-region or region, taking into account the relevant economic and geographical circumstances of all the states concerned"¹⁴².

Thus, contrary to the demands of LL and GDSs, this provision has recognized to these states the right of participation "on an equitable basis", which implies the principles of fairness and justice and not of equality¹⁴³. Moreover, it has made it very clear that participation of these states in EEZ fishing of coastal states of the same region or subregion is like that of any other third states, limited only to the surplus of the allowable catch of the living resources of the EEZ of the same region or subregion as determined by coastal states¹⁴⁴. Thus, if a coastal state does not declare a surplus or finds that the allowable catch is equal or less than its harvesting capacity, then LL and GDSs have no right to claim access.

Furthermore, this provision gives LL and GDSs the right to participate in an "appropriate part of the surplus" of the living resources of the EEZs of coastal states of the same subregion or region. What is "appropriate" is not, however, defined in the LOS Convention. The lack of any definition means that coastal states are left free to use their own understanding of the word.

It is further provided that the terms and modalities of such participation will be established by the states concerned through bilateral, sub-regional or regional agreements¹⁴⁵. Inclusion of the principle of agreement was insisted upon by coastal states because they had argued strongly against the claim of LL states to the fishery resources of their EEZs as a matter of right¹⁴⁶. When seeking agreement, the states concerned are required to take into account a set of factors listed in Article 69 (2) and 70 (3)¹⁴⁷. The first

factor is "the need to avoid effects detrimental to fishing communities or fishing industries of the coastal state"¹⁴⁸. Accordingly, whether a particular LLS or GDS can secure access depends on whether it can negotiate appropriate arrangements with the coastal state and other interested states, considering the condition of coastal fishing communities and industries.

It is important to note that, since the right of LL and GDSs was limited in the ICNT only to the surplus, these states have expressed serious concern that coastal states, through joint ventures with advanced fishing nations, would harvest the entire allowable catch, and consequently exclude them from participation despite the provisions of Arts. 69 and 70¹⁴⁹. To meet such a situation, new provisions were added to Article 69 and 70 (para.3 and 4 respectively)¹⁵⁰, giving also a right of participation even when no surplus can be deemed to exist. "When the harvesting capacity of a coastal state approaches a point which would enable it to harvest the entire allowable catch of the resources in its exclusive economic zone", the coastal state and other states concerned shall cooperate in the establishment of "equitable arrangements" on a bilateral, subregional or regional basis. Such arrangements shall have the objective to allow for participation of developing LL and GDSs of the same subregion or region in the exploitation of the living resources of the EEZ on terms and conditions satisfactory to all parties, and taking into account the factors mentioned in paras. 2 and 3 of Articles 69 and 70¹⁵¹. As the Chairman of Negotiating Group 4 who introduced these new paragraphs noted the added paragraphs provided for a very special and limited situation and not to all cases where the coastal state is able to harvest the entire allowable catch. They do not apply to developed LL and GDSs. Moreover, the words 'as may be appropriate in the circumstances' means, as the Chairman further noted, that emphasis is put on the developing LL and GDSs that have actually been fishing in the particular EEZ when the situation arises¹⁵².

This obligation is, however, limited to one merely of 'cooperation' to achieve an

'equitable arrangement'. It seems that there is a duty upon the coastal state, but the use of these terms indicates that it is not an onerous one¹⁵³. Once the coastal state has given consideration to its duty by engaging in negotiations in good faith with a developing LLS or a developing GDS, its duty will be fulfilled¹⁵⁴.

Finally, it must be recalled that Article 62 (2) states that, when the coastal state does not have the capacity to harvest the entire allowable catch, it shall through agreements or other arrangements give other states access to the surplus, "having particular regard to the provisions of Article 69 and 70, especially in relation to the developing states mentioned therein". This provision, together with the specific provisions contained in Article 69 and 70 concerning the rights of LL and GDSs, have been understood by certain authors as giving a priority or preference to access of these states over third states¹⁵⁵. In this connection, Professor Punal, for instance, has said that "it is reasonable to consider the rights of participation of LL/GDS as being of a different nature ... and enjoying preference over those of third-party states"¹⁵⁶. However, in the author's opinion, it seems difficult to deduce a priority or preference for LL and GDSs from the simple fact that these states have a double basis for a possible right of participation in the exploitation of the EEZ's living resources, and that they can point to the specific provisions of Article 69 and 70. This is because, first, the interests of these states are among the relevant factors which shall be "taken into account" by a coastal state in its discretionary powers concerning the repartition of the surplus under Article 62 (3). As this provision, indeed, refers to Article 69 and 70 among the relevant considerations, it is to be expected that a certain allocation under Article 62 will also in practice suffice to fulfil the requirements of Article 69 and 70. Secondly, such a view finds no support in the negotiating history of UNCLOS III. The words "having particular regard to the provisions of Article 69 and 70, especially in relation to the developing countries mentioned therein" were introduced on 28 April 1978 by the Chairman of Negotiating Group 4, Ambassador Nandan, as amendments to Article

62 of the ICNT. In explaining the motives lying behind the proposed amendments, Ambassador Nandan stated¹⁵⁷ that he wanted to find a compromise between the position of the coastal states, which rejected any use of the term 'priority' or 'preference', and the position of LL and GDSs that argued to the contrary. In his opinion, such a compromise was reached in the amendment to Article 62 (2). This, he thought, had the merit of avoiding the use of the terms "priority" or "preference" in Article 69 and 70 and at the same time underlines the need for special consideration to be given to LL and GDSs and clarifies the relationship between Article 62 and Article 69 and 70¹⁵⁸. It follows that the message of Articles 62, 69 (3) and 70 (4) seems to be that, where the states competing for participation in EEZs fishing are subject to identical terms and conditions, there appears to be a basis for arguing the superior claim of the competing LL and GDSs. But, where the coastal state can make better arrangements with a state other than a LL or a GDS, the LOS Convention seems to leave this choice to the coastal state.

Overall, the provisions of Article 69 and 70 constitute a constraint on coastal state discretion as to access, but this constraint is limited. The author agrees with Burke's view that these provisions give the LL and GDSs or developing LL and GDSs a claim to secure access to the surplus. However, realization of this claim requires negotiating with the coastal state to reach bilateral, subregional, and regional agreement on terms and conditions satisfactory to the coastal state¹⁵⁹. It follows that the duty put upon the coastal state with regard to LL and GDSs is not significantly different to its duty to other third states.

Chapter Three

Notes and References

1. Article 1 of the Convention on the High Seas provides that "the term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a state". Moreover, the Preamble of this Convention states that the states parties to this Convention, "desiring to codify the rules of international law relating to the high seas... adopted the following provisions as generally declaratory of established principles of international law".
2. Ibid., Art. 2.
3. LOS Convention, *op. cit.*, supra Introduction note 2, Arts. 55 and 56; see also E.D. Brown : "The Significance of a Possible EC EEZ for the Law Relating to Artificial Islands, Installations, and Structures, and to Cables and Pipelines, in the Exclusive Economic Zone", 23 ODIL, 1992, p. 119.
4. Ibid., Arts. 56 (1) (a) and 57.
5. Ibid., Art. 56 (1) (b) (i) (ii) (iii).
6. Ibid., Art. 69.
7. Ibid., Art. 70.
8. Balasubramanian, *op. cit.*, supra chapter 2, note 32, p. 40.
9. Juda, *op. cit.*, supra Introduction note 17, p. 31.
10. See, for instance, the Montevideo Declaration on the Law of the Sea, 1972, *op. cit.*, supra Introduction note 5, principle 6; also the Declaration of the Organization of African Unity on the Issues of the Law of the Sea, 1973, *op. cit.*, supra Introduction note 5, Art. 7.
11. II Official Records, 1974, p. 203 Para. 8; also the statements of the delegates of Mauritania and Switzerland, in *ibid.*, pp. 178 and 180 respectively.
12. *Op. cit.*, supra chapter 1 note 24, p. 948.

13. II YILC, 1950, p. 69.
14. Reynaldo G. Pohl : "The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea", in Vicuna, op. cit., supra chapter 2 note 113, p. 55.
15. G. Schwarzenberger and E.D. Brown : A Manual of International Law, 6th ed., Professional Books Ltd, Oxon, 1976, p. 109.
16. Op. cit., supra chapter 1 note 102, p. 22.
17. Brownlie, op. cit., supra Introduction note 18, pp. 238-249.
18. LOS Convention, op. cit., supra Introduction note 2, Arts. 109 and 108.
19. See the letter of Congressman John Breaux of 10 December 1980, co-signed by 13 other members of the US House of Representative, addressed to the then President-elect Ronald Reagan, in US Senate, Committee on Arms Control, Oceans, International Operations and Environment, 97th Congress, 1st Session, pp. 144-45; and Alam who argued that the freedoms accorded to third states in the EEZ are not identical to those enjoyed on the high seas. S. Alam : "The Problem of the Legal Status of the Exclusive Economic Zone", 24 IJIL, 1984, p. 485.
20. See in general, Myres S. McDougal : "The Law of the High Seas in Time of Peace". 3 DJILP, 1973, pp. 45-58.
21. B. H. Oxman : "The Third United Nations Conference on the Law of the Sea : The 1977 New York Session", 72 AJIL, 1978, p. 72; also E.P. Richardson : "Power, Mobility and the Law of the Sea", 58 FA, 1980, P. 916.
22. See in general, T. Treves : "La Navigation", in Rene-Jean Dupuy and D. Vignes (eds.), *Traité du Nouveau Droit de la Mer*. Economica, Paris/ Bruylant, Brussels, 1985, pp. 687 - 708.
23. W. Riphagen : "La Navigation dans le Nouveau Droit de la Mer", 84 RGDIP, 1980/1, p. 174.
24. Ibid., pp. 174-175.

25. Vicuna, *op. cit.*, supra chapter 2 note 47, p. 81.
26. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 58 (1).
27. The concept of "due regard" was derived from the "reasonable regard" provision of Article 2 of the 1958 Convention on the High Seas. See B.H. Oxman : "The Third United Nations Conference on the Law of the Sea : The 1976 New York Session", 71 AJIL, 1977, p. 261. Professor Brown has concluded that there is no difference in meaning between the two terms. E. D. Brown, *op. cit.*, supra chapter 2 note 8, p. 339. This conclusion seems to be correct.
28. Churchill and Lowe, *op. cit.*, supra Introduction note 4, p. 141.
29. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 58 (2).
30. Convention on the High Seas, *op. cit.*, supra chapter 1 note 85, Arts. 4 - 6; LOS Convention, *ibid.*, Arts. 91 - 93.
31. Convention on the High Seas, *ibid.*, Art. 13; LOS Convention, *ibid.*, Art. 99.
32. Convention on the High Seas, *ibid.*, Art. 14; LOS Convention, *ibid.*, Art. 100.
33. Convention on the High Seas, *ibid.*, Art. 23; LOS Convention, *ibid.*, Art. 111.
34. Thomas A. Clingan : "Freedom of Navigation in a Post-UNCLOS III Environment", 46 LCP, 1983/2, p. 114.
35. Robertson, *op. cit.*, supra Introduction note 4, pp. 888-889.
36. Boczek, *op. cit.*, supra Introduction note 18, p. 451.
37. W. T. Burke : "Exclusive Fisheries Zones and Freedom of Navigation", 20 SCLR, 1983, p. 603.
38. Oxman, *op. cit.*, supra Introduction note 8, pp. 263-264; and E.P. Richardson: "Law of the Sea : Navigation and other Traditional National Security Considerations", 19 SCLR, 1982, p. 573.
39. *Ibid.*, p. 263.
40. Professor Burke said that at least Oxman's statement is open to this interpretation. See Burke, *op. cit.*, supra note 37, pp. 603-604.

41. Professor Brown would apparently support this view. See Brown, *op. cit.*, *supra* chapter 2 note 8, p. 334 ("The balance of principles is weighed heavily in favour of the coastal state").
42. Part XII of the LOS Convention relates to the protection and preservation of the marine environment. The provisions dealing with the coastal state's powers regarding vessel-source pollution and dumping are contained in Arts. 210, 211 paras 5, 6, 220 paras. 3, 7, and 234.
43. Churchill and Lowe, *op. cit.*, *supra* Introduction note 4, p. 141
44. Clingan, *op. cit.*, *supra* note 34, p. 115.
45. Convention on the Territorial Sea and the Contiguous Zone, *op. cit.*, *supra* chapter 1 note 85, Arts. 1 and 2; the LOS Convention, *op. cit.*, *supra* Introduction note 2, Part II, Art. 2 paras. 1 and 2; and M. N. Shaw : *International Law*, 3rd ed., Grotius Publications Ltd., Cambridge, 1991, p. 350.
46. Brownlie, *op. cit.*, *supra* Introduction note 18, pp. 203-204. The issue of innocent passage of warships in peacetime is still a controversial issue. *Ibid.*, pp. 206-207.
47. L. Oppenheim : *International Law : A Treatise*, vol. 1, Peace. H.Lauterpacht, (ed)., 8th ed., Longmans, Green & Co, London/ New York/ Toronto, 1955, p. 523.
48. *Op. cit.*, *supra* chapter 1 note 85.
49. *Ibid.*, Art. 24 (1) (a) (b) ; also Brown, *op. cit.*, *supra* chapter 2 note 8, p. 329.
50. *Op. cit.*, *supra* chapter 1 note 85. It is Noteworthy to recall that while under the 1958 system the contiguous zone was part of the high seas, under the LOS Convention it would form part of the EEZ. See LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 55.
51. *Op. cit.*, *supra* chapter 1 note 85.
52. *Ibid.*, Art. 2 (1); and Art. 77 of the LOS Convention.
53. *Ibid.*, Art. 3; also LOS Convention, *op.cit.*, *supra* Introduction note 2, Art. 78.
54. Brown, *op. cit.*, *supra* chapter 2 note 8, p. 229.

55. Ibid.
56. Oxman. op. cit, supra note 21, p. 72. For a Contrary view, see Attard, op. cit., supra Introduction note 4, p. 63.
57. Churchill and Lowe, op . cit., supra Introduction note 4, p. 142. It is worth noting, however, that many of these articles have no application to aircraft.
58. Boczek, op. cit, supra Introduction note 18, p. 415 ; Also Churchill and Lowe, op. cit. supra Introduction note 4, p. 142 .
59. Article 216 (1) (a) gives the coastal state the competence to enforce laws and regulations for the prevention, and reduction and control of pollution of the marine environment by dumping within its EEZ.
60. Convention on the High Seas, op. cit., supra chapter 1 note 85, Art. 2 (3); and G.Schwarzenberger : International Law as Applied by International Courts and Tribunals, vol. 1, 3rd ed., Stevens & Sons Ltd., London, 1957, p. 348.
61. Convention on the Continental Shelf, op. cit., supra chapter 1 note 85, Art. 4; and MC Dougal and Burke, op. cit., supra chapter 1 note 39, pp.631-642.
62. Churchill and Lowe, op. cit., supra Introduction note 4 , p.142.
63. Op. cit., supra chapter 1 note 85, Arts. 27, 28, and 29.
64. Churchill and Lowe, op. cit., supra Introduction note 4, p. 142.
65. Under the 1958 Convention on the Continental Shelf no consent is required. Op. cit., supra chapter 1 note 85, Arts. 3 and 4 .
66. Churchill and Lowe, op. cit., supra Introduction note 4, p. 142.
67. Ibid., p. 143.
68. Op. cit., supra Introduction note 9; see also Paolillo, op. cit., supra Introduction note 15, p. 112.
69. Op. cit., supra chapter 1 note 85.
70. See Commentary by ILC on Article 27 of its final Draft Articles entitled "Freedoms of the High Seas" which became later Article 2 of the Convention on the High Seas.

II YILC, 1956, p. 278.

71. Ibid., see also Pohl, *op. cit.*, supra note 14, p. 55
72. Clingan, *op. cit.*, supra note 34, p. 116.
73. II Official Records, 1975, p. 193; and Boczek, *op. cit.*, supra Introduction note 18, p. 451.
74. Awadh M. Al Mour : "The Legal Status of the Exclusive Economic Zone", 33 REDI. 1977, p.59. It is worth noting that extensive negotiations relating to Article 58 (1) took place in an informal group of interested states chaired by Ambassador Jorge Castaneda, head of the Mexican Delegation. He was assisted in this task by Ambassador Helge Vindenes of Norway. For an interesting insight into those negotiation, see Keith G. Brennan : "Jurisdiction of Coastal States and Other States in the Exclusive Economic Zone", unpublished manuscript presented before the Seventh International Ocean Symposium of the Ocean Association of Japan, Oct. 21-22, 1982, pp.45-50.
75. R. Elman : "Military Uses of the Oceans", 28 GYIL, 1985, p.242
76. B.H. Oxman : "The Third United Nations Conference on the Law of the Sea : The Seventh Session 1978," 73 AJIL, 1979, pp. 1-41.
77. See, for instance, the Peruvian proposal at Informal Meeting, C.2 Inf. Meeting/9. April 27, 1978.
78. See the interpretative Declarations of Cape Verde and Uruguay made under Article 310 of the LOS Convention, in Law of the Sea : Status of the United Nations Convention on the Law of the Sea, Office of the Special Representative of the Secretary General for the Law of the Sea, United Nations, New York, 1985, pp.12 and 28 respectively. It is worth mentioning that "Declarations" are possible under Article 310 of the LOS Convention although reservations, and exceptions are not allowed [Art.309]. Declarations or statements can be made, with a view , *inter alia*, to the harmonization of the declaring State's laws and regulations with the provisions of

the LOS Convention provided that such declarations or statements do not purport to exclude or modify the legal effects of the provisions of the LOS Convention in their application to that state [Art. 310].

79. This certainly can be inferred from the Declaration of Cape Verde. It is to be noted that the big maritime states expressed strong opposition to this position. See, for instance, Italy's Declaration upon the signing of the LOS Convention, in *ibid.*, p. 19.
80. See, for instance, Robertson, *op. cit.*, *supra* Introduction note 4, pp. 885-886; T. Treves : " Military Installations, Structures and Devices on the Seabed", 74 AJIL, 1980, p. 833; Boczek, *op. cit.*, *supra* Introduction note 15, p. 458; Oxman, *op. cit.*, *supra* note 21; and Dupuy and Vignes, *op. cit.*, *supra* Introduction note 4, p. 278.
81. LOS Convention, *op. cit.* , *supra* Introduction note 2, Art. 58 para. 1.
82. Al Mour, *op. cit.*, *supra* note 74, p.59.
83. John T. Bosna : " The Alternative Futures of Naval Forces", 5 ODIL, 1978, p. 194; Treves, *op. cit.*, *supra* note 80, pp. 843-194.
84. Treves, *ibid.*, p. 845.
85. LOS Convention, *op. cit.*, *supra* Introduction note 2, Part V, Art. 56 (1) (a).
86. *Ibid.*, Arts. 56 (1) (b) (ii) , and 246.
87. *Ibid.*, Art. 81.
88. *Ibid.*, Art. 58.
89. J. Castaneda : "Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea", in J. Makarczyck (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, the Hague, 1984, p. 615.
90. The provision enshrined in Article 59 of the LOS Convention was adopted in 1975 in paragraph 3 of Article 47 of the ISNT and has witnessed no change throughout the Conference's texts, except that it was later contained in a separate article which is Article 59.
91. See, For instance, the Declaration made by the representative of Uruguay at the

- signing ceremony of the LOS Convention on behalf of his Government, op. cit., supra note 78; also Paolillo, op. cit., supra Introduction note 15, pp. 110 - 111.
92. See the Statement of Jorge Castaneda before the Fisheries Committee of FAO, Doc. COFI/77/Inf.8 April 1977, cited by Jean Pierre Quéneudec : "Les Incertitudes de la Nouvelle Convention sur le Droit de la Mer", in Budislav Vukas, (ed.), Essays on the Law of the Sea, Zagreb, 1985, p. 53 note 51; also Treves, op. cit., supra note 80, p. 845.
 93. Boczek, op. cit., supra Introduction note 18, p.451.
 94. Declaration made upon signature of the LOS Convention, op. cit., supra note 79, p. 19.
 95. Churchill and Lowe, op.cit., supra Introduction note 4, p. 144.
 96. The Swiss delegate observed during the informal debates in the Second Committee of the Fifth Session of the Conference that such expressions in Article 59 as "interests of the respective parties" "relevant circumstances" and "equity" were vague and could give rise to serious problems of interpretation. Cited by Extavour, op, cit., supra Introduction note 4, p. 271, foote note 89.
 97. For the World Court view on this matter, see The Diversion of Water from the Meuse Case, (Netherlards v. Belgium), 1937, PCIJ Report, Series A/B, 70, pp. 76-77; North Sea Continental Shelf Cases, op. cit., supra chapter 1, note 81, pp. 46-50; Fisheries Jurisdiction Case, op. cit., supra chapter 1 note 102, p. 33; and the Continertal Shelf (Tunisia v. Libya) Case, op. cit., supra Introduction note 15, p . 60.
 98. Arts. 279-284; also Churchill and Lowe, op. cit., supra Introduction note 4, p. 144.
 99. Judicial bodies listed in Article 287 are : (a) the International Tribunal for the Law of the Sea established in accordance with annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; and (d) a special arbitral tribunal constituted in accordance with Annex VIII.

100. This is possible under Art. 298 (1) (b) of the LOS Convention.
101. LOS Convention, *op. cit.*, *supra* Introduction note 2, Arts. 62 (2) and (3), 69 (3) and 70 (4).
102. For a contrary opinion, see C.J. Phillips : "The Exclusive Economic Zone as a Concept in International Law", 26 ICLQ, 1977, pp. 602-603.
103. PCIJ Series A/B, No. 42, 1931.
104. *Ibid.*, p. 116.
105. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 297 (3); also Shabtai Rosenne : "Settlement of Fisheries Disputes in the Exclusive Economic Zone", 73 AJIL, 1979, p. 98.
106. *Ibid.*, para. 3 (c).
107. Annex V: Conciliation, Article 7 (2), in XV Official Records, 1981, p 235.
108. G.E. Toulmin : "The Barcelona Conference on Communications and Transit and the Danube Statute", 23 BYIL, 1922/23, p. 177; also Dupuy and Vignes, *op. cit.*, *supra* Introduction note 4, p. 297.
109. Done at New York, July 8, 1965. For the text, see 9 ILM, 1965, p. 957.
110. *Ibid.*, Art. 1 (a) .
111. *Op. cit.*, *supra* chapter 1 note 85, Art. 3 (1).
112. *Op. cit.*, *supra* Introduction note 2, Art. 124 (1) (a) .
113. For instance, Iraq and Jordan. See for more details, M.I. Glassner : Access to the Sea for Developing Land-Locked States. Nijhoff, The Hague, 1970, p.2.
114. Many European LLSs are crossed by several navigable river systems, including among others, the Danube, and the Rhine. Most of those rivers were opened for international traffic through various treaties at a very early date. See, particularly, A.M. Singela, *op. cit.*, *supra* chapter 2 note 208, p.1.
115. See J. Monnier : "Le Droit d'Acces a la Mer et la Liberté de Transit - Terrestre" in R.J. Dupuy and D. Vignes (ed.), *Traité du Nouveau Droit de la Mer. Economica*,

Paris/ Bruylant, Brussels, 1989, pp. 442 - 447; also L. Lucchini and M. Volckel :
Droit de la Mer. Pedone, Paris, 1990, Table 1, p. 506.

116. See Appendix C of this thesis.

117. For more details, see P. Tavernier : "Les Nouveaux Etats sans Littoral d'Europe
et d'Asie et l'Acces à la Mer", 97 RGDIP, 1993-94, p. 729.

118. Ibid., pp. 729-730.

119. J. Symonides : "The Concept and Claims of Geographically Disadvantaged States at
the Third United Nations Law of the Sea Conference", RCADI, 1988/2, p. 293;
also Dupuy and Vignes, op. cit., supra Introduction note 4, p. 297.

120. V. Ibler : "The Interests of the Shelf-Locked States and the Proposed Development
of the Law of the Sea", 11 IJIL, 1971, pp.389-390.

121. J.R. Stevensen and B.H. Oxman : "The Preparations for the Law of the Sea
Conference", 68 AJIL, 1974, p.18.

122. The Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the
Limits of National Jurisdiction. It was established by the UN General Assembly in
1968 by means of Resolution 2467 A (XXIII) of 21 December 1968. See for the
text, S. Oda, op. cit., supra chapter 2 note 55, pp. 40-41.

123. Symonides, op. cit., supra note 119, p. 295 .

124. See, for instance, the Nigerian proposal entitled Draft Articles on the Exclusive
Economic Zone, in III Official Records, 1975, p.199; and the proposal of Haiti and
Jamaica entitled, Draft Articles on Item 6.1, in ibid., p. 213.

125. Panama , for instance, considered itself as a disadvantaged state on a political
ground, while Jamaica regarded the term GDS as referring to developing states that
are either LL or for geographical, biological, or ecological reasons derive no
substantial economic advantage from establishing an EEZ, or are adversely affected
in their economies by the setting up of such zones, or had short coastlines. See the
statements of their corresponding delegates made at UNCLOS III, Caracas 1974,

in II Official Records, 1975, pp. 248-252 respectively.

126. *Op. cit.*, supra Introduction note 10.
127. The group was formed at the 1976 New York Summer Session. Its objective was to produce a text on the rights and duties of LL and GDSs which would be acceptable to LL and GDSs and coastal states. See for more details, Singela, *op. cit.*, supra chapter 2 note 208, p. 299.
128. UN Doc. A/ Conf. 62/L.78, 28 August, 1981, in XV Official Records, 1981, pp. 172-248.
129. See Explanatory Memorandum by the Chairman of Negotiating Group 4- Ambassador Sataya Nandan (Fiji), in X Official Records, 1978, pp. 88-92. It is noteworthy to recall that in its last Plenary Meeting on September 24, 1982, the Conference decided by consensus to replace the phrase "states with special geographical characteristics" with the expression "geographically disadvantaged states" in Article 70 of the LOS Convention. Moreover, since the term "geographically disadvantaged states" also appears in other parts of the LOS Convention it was agreed that the characterization of these states contained in Article 70 (2) would only apply for the purposes of Part V. See Caminos, *op. cit.*, supra chapter 2 note 113, p. 158 note 19.
130. See Doc. NG 4 / 9 / Rev. 2, 15 May, 1978, in X Official Records, 1978, p. 50 para. 16.
131. Explanatory Memorandum, *op. cit.*, supra note 129, p. 90.
132. For more details on enclosed and semi-enclosed seas, see generally Lewis M. Alexander : "Regionalism and the Law of the Sea : The Case of Semi -Enchosed Seas", 2 ODIL, 1974, pp. 151-186; Janus Symonides : "The Legal Status of the Enclosed and Semi- Enclosed Seas," 27 GYIL, 1984, pp.315-333; and the various essays collected by Vukas in B.Vukas (ed.), *The Legal Regime of Enclosed or semi-Enclosed Seas : The Particular Case of the Mediterranean* Zagreb, 1988, especially

the essay of Vukas, pp. 49-64.

133. Juda, *op. cit.*, supra Introduction note 17, p. 8.
134. Symonides, *op.cit.*, supra note 119, p. 307.
135. Among other questions that may be raised are : how the level of nutritional needs of claiming states will be determined ? by whom the level of nutritional needs will be determined ?
136. The Group was composed of 29 Land-Locked states that are Afghanistan, Austria, Bhutan, Bolivia, Botswana, Burundi, Byelorussian SSR, Central African Republic, Chad, Czechoslovakia, Hungary, Laos, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Mongolia, Niger, Paraguay, Rwanda, San Marino, Swaziland, Switzerland, Uganda, Upper volta, Zambia, Zimbabwe; and of 25 Geographically Disadvantaged states Which are Algeria, Bahrain, Belgium, Bulgaria, Ethiopia, Federal Republic of Germany, Gambia, German Democratic Republic, Greece, Iraq, Jamaica, Jordan, Kuwait, the Netherlands, Poland, Qatar, Romania, Singapore, Sudan, Sweden, Syria, Turkey, United Arab Emirates, United Republic of Cameroon and Zaire. See Symonides, *op. cit.*, supra note 119, p. 299.
137. L. Juda : "World Marine Fish Catch in the Age of Exclusive economic Zones and Exclusive Fishery Zones," 22 ODIL. No. 1, 1991, pp. 2-5.
138. Symonides, *op. cit.*, supra note 119, p. 307; also A. M. Punal : "The Rights of Land-Locked and Geographically Disadvantaged States in Exclusive Economic zones", 23 JMLC No. 3, July, 1992, pp. 430-436.
139. Singela, *op. cit.*, supra chapter 1 note 181, p. 65.
140. Singela, *op. cit.*, supra chapter 2 note 208, pp. 287-311 .
141. See Article 2 of a proposal introduced by Land-Locked States to the Caracas Session 1974, known as the Afghan Proposal, UN Doc. A /Conf. 62/C. 2/L. 39, in Platzöder, *op. cit.*, supra chapter 2 note 52, p. 124.
142. LOS Convention, *op. cit.*, supra Introduction note 2, Arts. 69 (1) and 70 (1).

143. Puri, *op. cit.*, supra chapter 2 note 152, p. 244.
144. Burke, *op. cit.*, supra chapter 2 note 32, p. 96; also Singela, *op. cit.*, supra chapter 1 note 181, p. 74 .
145. LOS Convention, *op. cit.*, supra Introduction note 2, Arts. 69 (2) and 70 (3).
146. Puri , *op. cit.*, supra chapter 2 note 152, p. 244 .
147. It is noteworthy that Articles 69 (2) and 70 (3) set out an open-ended list of factors which states are required to consider when seeking agreement. See Burke, *op. cit.*, supra chapter 2 note 32, p.99.
148. LOS Convention, *op. cit.*, supra Introduction note 2, Arts. 69 (2) (a) and 70 (3)(a).
149. Explanatory Memorandum, *op. cit.*, supra note 129, pp. 89-90
150. UN Doc. A / Conf. 62 / w.p. 10 / Rev. 1, 28 April, 1979 .
151. These are : (1) the need to avoid detrimental effects to the fishing communities or fishing industries of the coastal state; (2) the extent to which the LL or GDS, as the case may be, is participating in the exploitation or is entitled to participate under existing bilateral, subregional or regional agreements, in the exploitation of the living resources of EEZs of other coastal states; (3) the extent to which other LL and GDSs are participating in the exploitation of the living resources of the EEZ of the coastal state, and the consequent need to avoid a particular burden for any single coastal state or part of it; and the nutritional needs of the population of the respective states.
152. Explanatory Memorandum, *op. cit.*, supra note 129, p. 90 .
153. For detailed consideration of what constitutes cooperation in this context and what consequences would flow from a failure to co-operate, see particularly Burke, *op. cit.*, supra chapter 2 note 32, pp. 95-101.
154. *Ibid.*, p. 101; also Fleischer, *op. cit.*, supra chapter 1 note 193, p.157.
155. See, for instance, L. Caflish : "The Fishing Rights of Land-Locked and Geographically Disadvantaged States in the Exclusive Economic Zone", in

B. Conforti, (ed.), *La Zona Economica Esclusiva*. Dott. A. Giuffr , Milano, 1983, pp. 29-38; Symonides, *op. cit.*, supra note 119, p.331; M. Dahmani : "Access of Land-locked and Geographically- Disadvantaged States to the Fisheries Resources of the Exclusive Economic Zone (EEZ) under the New Convention on the Law of the Sea," 10 *Marit. Pol. Mgmt.*, 1983/4, p. 268.

156. *Op. cit.*, supra note 138, p. 454.

157. Explanatory Memorandum, *op. cit.*, supra note 129, p. 90 .

158. *Ibid.*

159. Burke, *op. cit.*, supra chapter 2 note 32, p. 100; also Wali who has noted that, "although the Convention characterized participation in the EEZ by land-locked states as a right, its status as such is overshadowed by a number of qualifications. In effect all the right amount to is a gratuity that may or may not be granted in any given situation". Ibrahim J. Wali : "An Evaluation of the Convention on the Law of the Sea from the Perspective of Land-Locked States", 22 *VJIL*, 1982, p. 649.

CHAPTER FOUR

STATE PRACTICE RELATED TO THE EEZ : 1975 TO PRESENT

Introduction

State practice relating to coastal state jurisdiction over marine fish resources and certain other related matters from 1975-1996 reveals that the big majority of coastal states whose geographical attributes allow for the establishment of an EEZ have chosen to claim and indeed to enforce the 200 miles EEZ. The proliferation of national claims to 200 miles zone with a view to controlling fisheries and other related matters within this zone witnessed an unprecedented pace in the years between 1976 and 1978¹. By 1977 alone more than thirty claims were made (Appendix B). Even those states that had previously protested against this practice, but failed to get across their views and to force other states concerned to desist from the establishment of a 200 miles zone, have extended their fishing rights over the coastal zones². Prominent among these states were the USA, the UK and the FRG³. This was significant because it was at that time a general consensus and a near-agreement were emerging at UNCLOS III with regard to the 200 miles EEZ.

This chapter starts with an identification of the various types of 200 mile unilateral claims as evidenced in state practice. Afterwards, an evaluation and comparison of the content of national EEZ claims on the general level against the yardstick of the LOS Convention will be attempted in order to determine to what extent general juridical rights and obligations in the EEZ described in the LOS Convention have been included in state practice. Finally an analysis of the details contained in EEZ claims with regard to the specific regimes which are applied to the various activities that can be undertaken in the EEZ will be attempted in order to be able to ascertain later in the next chapter with exactitude to what extent the LOS Convention's EEZ provisions are now reflective of international customary law.

Section I : The Territorial Sea Trend

As was explained earlier in chapter one, prior to the convening of UNCLOS III all attempts made by the international community in relation to the codification of the international law of the sea had failed to secure an agreement on a maximum breadth of the territorial sea⁴. When UNCLOS I was convened in 1958, territorial sea limits were being asserted ranging from 3 to 200 miles. All the broad territorial sea claims came from the Latin American and African continents. The principal aim of these extensive territorial sea claims has been the protection of the fish resources found in adjacent seas, and their reservation for the exclusive exploitation by nationals of the claimant states⁵. The majority of coastal states, however, were satisfied with a 3 miles territorial sea. The situation has changed recently as a result of UNCLOS III. By 16 November 1994, no less than 129 states had established a territorial sea of 12 miles or less⁶, of which 121 had a 12 miles limit which is also the maximum limit under the LOS Convention⁷, with the remainder having limits of either three, four or six miles⁸.

There has been a steady increase in the number of states claiming a 12 miles territorial sea since the adoption of the LOS Convention. Most of the conversions to 12 miles limit have come either from newly independent states or from those states that had previously claimed limits of less than 12 miles. In January 1972 Gabon, for instance, asserted a 30 miles territorial sea, and in less than one year later it had increased the limit to 100 miles⁹. Then, in 1984 Gabon rolled the limit back to 12 miles¹⁰. In 1985, the Netherlands extended its territorial sea from 3 to 12 miles¹¹. Similarly, in 1987 the United Kingdom, perhaps the oldest proponent of the 3 miles territorial sea rule, enacted a law which extended the breadth of the territorial sea from 3 to 12 miles, bringing it in line with the majority of states¹². Nearly all the big maritime states, including the two Super Powers, have adhered to the 12 miles territorial sea¹³. Moreover, three new coastal states born out of the disintegration of the Soviet Union have adopted legislation on their

respective state frontiers in which they have set the breadth of the territorial sea at 12 miles : Latvia on 20 December 1990, Ukraine on 4 November 1991 and Lithuania on 25 June 1992¹⁴. Estonia also established a 12 miles territorial sea by its law of 10 March 1993¹⁵.

However, there are some developing states which still claim a territorial sea of 200 miles. These states are Benin, Congo, Ecuador, El.Salvador, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia and Uruguay¹⁶. These claims, without exception, contained no detailed provisions concerning the duties of the coastal state to conserve and manage the living resources within the claimed 200 miles zone. Moreover, no reference has been made to the participation of third states in the exploitation of the said resources. In fact, fishing within the asserted 200 miles territorial sea has been reserved exclusively for vessels flying their flags. Furthermore, all these claims have made it very clear that vessels of third states enjoy only innocent passage in the claimed 200 miles maritime area. It is important to recall, at this stage, that international law has always recognized that a coastal state has sovereignty over its internal waters and almost absolute authority over its territorial sea, subject only to the right of innocent passage¹⁷. It follows that each of the above-mentioned states has made an assertion of a 200 miles territorial sea in a very strict sense.

It is interesting to note that most of these extensive territorial sea claims had existed a long time before the adoption of the LOS Convention¹⁸. Several of them might change in order to become more harmonious with the LOS Convention. Indeed, this is what has already happened with Guinea's claim that was widened in 1978 to 150¹⁹ miles, and was brought back later in 1980 to 12 miles²⁰. Similar action was taken by Cape Verde in 1977²¹, Senegal and Madagascar in 1985²², Argentina in 1991²³ and Brazil²⁴ in 1993. While the dates of reducing these territorial sea claims to 12 miles already indicate that this was meant to be a response to the consensus reached at UNCLOS III, such a

view has been explicitly confirmed by the legislation of the Cape Verde²⁵ and Madagascar²⁶.

Summing up, the existing practice of states relating to the territorial sea evidences that states asserting rights to a territorial sea of 200 miles have become a very dwindling minority. It has been suggested earlier in chapter 1 that claims to territorial seas beyond twelve miles, particularly those of the Latin American states, were occasioned by the perceived need of coastal states to protect their offshore resources from exploitation by technically advanced states in an age when the relevant divisions of the ocean space were simply those of territorial or high seas. The development of the legal concept of the EEZ, however, provides new possibilities and fulfills the functional requirements for coastal states to protect their offshore resources without resorting to excessive territorial sea claims. In other words, there is today no convincing reasons for such extensive territorial sea claims as coastal states economic interests are now sufficiently protected under the 200 mile EEZ. The author, therefore, expects that the remaining 200 miles territorial sea claims will ultimately fall into line with the relevant provisions of the LOS Convention.

Indeed, as indicated above, an overwhelming majority of states adheres today to the 12 miles territorial sea rule. State practice proves that big and small states, developed and developing states in every part of the globe and belonging to various economic systems are involved in this practice²⁷. This goes on without protests or persistent objection against it²⁸. In fact, adherence to this practice has been accompanied by the conception that such a practice is consistent with prevailing international law. In this connection, in 1987 the Minister of State, Foreign and Commonwealth Office of the UK has correctly observed: "We believe that such limits are permitted by customary law and I believe that, though it has a three miles limits, the United States now take the same view"²⁹. Thus, the requirements set by the ICJ in the North Sea Continental Shelf Cases 1969³⁰ for a practice to become a custom seem therefore to have been met. Consequently,

coastal states are now permitted to extend their territorial sea to a maximum limit of 12 miles. Any other state asserting a territorial sea of more than 12 miles would be violating current international law.

Section II : The Exclusive Fishery Zone [EFZ] Trend

The EFZ is, as has been explained earlier in chapter 1³¹, a maritime zone beyond the territorial sea within which a coastal state asserting such a zone can exercise exclusive rights with regard to fisheries found therein³². It has to be remembered, however, that, while the right of coastal states to establish such a zone was denied at both UNCLOS I and UNCLOS II, it became in the early seventies a well established right³³. Nonetheless, as it has been suggested earlier when dealing with the Fisheries Jurisdiction Case, 1974³⁴, international law of that time permitted the establishment of such a zone to a maximum extent not exceeding twelve miles. Moreover, the coastal state's jurisdictional rights were confined to fisheries of the water column and did not include jurisdiction over marine scientific research or preservation of the marine environment. Thus, 200 miles could not be regarded as an accepted limit in 1974, conferring on coastal states the right to expand their jurisdiction for fisheries purposes to that extent³⁵.

The situation had changed greatly in the following years, especially between 1976 and 1978. As indicated earlier, it was during those years that a consensus was emerging at UNCLOS III with regard to the new 200 mile functional maritime zone³⁶.

In addition to the 200 miles territorial sea claims already discussed under the previous section, over twenty states among them the major sea powers, the former USSR, the EEC States, the USA and Japan extended their exclusive fishery limits seaward, in the years between 1976 and 1978, to 200 miles³⁷.

The USA, formerly one of the strongest objectors to early Latin American extensive maritime claims, has asserted control over the living resources of the waters

within the 200 miles limit since March 1, 1977, the effective date of the Fisheries Conservation and Management Act³⁸, which extended U.S fisheries jurisdiction from 12 to 200 miles from the baseline of the territorial sea. The Act excludes foreign fishing from the fisheries zone, except as authorized by international agreement and permit, and asserts exclusive fisheries management authority over the fishing resources of the continental shelf and the zone's waters³⁹. Aside from evoking a diplomatic protest note from Japan⁴⁰, the FCMA has been successfully implemented and enforced with the cooperation of interested states⁴¹.

The states that have asserted a 200 miles EFZ made it clear that they were not violating international law when taking such action. On the contrary, the expansion of their exclusive fishery limits seaward up to 200 miles was in accord with the growing consensus among nations at UNCLOS III. For instance, when the USA established its 200 miles EFZ in 1976, it declared that the established zone was "generally consistent with the consensus emerging at the Conference"⁴². Being "in accord with a consensus" may also imply that it is in accord with international law. In the Fisheries Jurisdiction Case⁴³, the ICJ addressed, inter alia, the concept of preferential fishing rights in the adjacent high seas in favour of states that are especially dependent on coastal fisheries for their economic development or whose populations were overwhelmingly dependent thereon for their livelihood. As explained earlier in chapter 1, this concept had been introduced by Iceland at UNCLOS I, and had been the subject of discussion both there and at the ensuing Conference in 1960 (UNCLOS II). The ICJ held that such a concept had passed into customary law by the early 1970 s⁴⁴. In so doing, the Court held that, subsequently to UNCLOS II, "the law evolved through the practice of states on the basis of the debates and near agreements at the Conferences"⁴⁵.

Similarly, in a statement made to Parliament in June 1976 on the Canadian extension of its fishery zone to 200 miles, the Canadian Secretary for External Affairs stated that :

"Our action is based on a growing consensus among nations, a consensus which is increasingly finding its way into state practice and is reflected in the provisions of the Single Negotiating Text that emerged from the 1975 Session and has been confirmed in this year's revised SNT"⁴⁶.

In the second half of 1976, developments within the EEC in respect of a common fisheries policy took a new urgency. It became clear that before the end of the year a position had to be defined on the establishment of 200 miles EFZ⁴⁷. In September of that same year the Commission of the European Communities⁴⁸ submitted proposals to the EEC Council of Ministers⁴⁹ regarding not only a common fisheries policy, but /and perhaps more important/ a regime for negotiations between certain non-member states and the community. The Council adopted a series of negotiating authorizations and a short time later the Council of the European Community, in order to protect the legitimate interests of the member states and taking due account of the main trends emerging at UNCLOS III concerning fishery rights, decided that as from January 1, 1977, the Member States concerned would, through concerted action, establish 200 miles EFZs in the North Sea and the North-East Atlantic Ocean⁵⁰.

The United Kingdom, Ireland, the Federal Republic of Germany, Belgium, Denmark, France and the Netherlands complied with the decision in relatively short order⁵¹.

Other maritime powers took similar steps that year as well. Claiming the need to protect its interest, the USSR had, on December 10 1976, issued an Edict of the Presidium of the USSR Supreme Soviet⁵², Article 1 of which states, inter alia, that :

"In marine areas adjacent to the coast of the USSR, of a breadth up to 200

nautical miles computed from the same baselines as the territorial waters, there shall be introduced ...provisional measures for the preservation of living resources and for the regulation of fishing...".

Japan, which had made a protest in 1976 against the US claim of 200 miles EFZ⁵³, followed suit later on May 2, 1977⁵⁴. Japan has established a fishery zone extending seaward to 200 miles, but it does not apply beyond Japanese territorial waters in the areas facing China and the Republic of Korea⁵⁵.

As has been indicated earlier, most of these states have referred to the emerging consensus at UNCLOS III when making their claims. It seems, therefore fitting to ask the following question: was the consensus emerging at UNCLOS III around 1976 related to the EFZ or did it cover also the more comprehensive concept of the EEZ? Despite the fact that for fishery purposes, fishery zones serve as functional equivalents of EEZs⁵⁶, in the author's opinion, it is still important to determine the substance of this consensus since the EEZ does provide the coastal state with jurisdictional and sovereign rights to non-living resources extending beyond those associated with fishery zones. In the EEZ, the coastal state, for instance, is entitled to exercise jurisdiction over scientific research and environmental protection in addition to rights to non-living resources⁵⁷. In attempting to answer the above question, reference to the work of UNCLOS III is necessary. It has to be remembered that the Second Committee of UNCLOS III has the broadest mandate, embracing virtually all of the subjects of the traditional law of the sea such as the territorial sea, straits, archipelagos, the continental shelf and the high seas⁵⁸. The competence of the Committee covered also the topic of the EEZ, including both living and non-living resources⁵⁹.

Under the designation "Exclusive Economic Zone", several issues were at the center of the debates. Among others were, first, the economic rights and obligations of the coastal state within the 200 miles limits; secondly, the coastal state rights with regard to

non-economic uses of the zone; and thirdly, the rights and duties of third states therein.

A thorough examination of no less than twenty proposals⁶⁰ made by various states, from developing as well as from developed worlds, with a view to define the rights and duties of coastal states within the proposed 200 miles limit, has revealed that, with the exception of very few proposals, all of the other proposals made reference to the sovereign rights of the coastal state with regard to the natural resources found within the 200 miles limit, and to jurisdiction over marine scientific research as well as to the preservation of the marine environment.

Moreover, all of UNCLOS III texts starting with the ISNT⁶¹, RSNT⁶², ICNT⁶³, revisions 1 and 2⁶⁴ and eventually the Draft Convention⁶⁵ contained provisions concerning coastal states' fishing rights as well as coastal states' jurisdictional rights with regard to marine scientific research and the preservation of the marine environment within the 200 miles limit.

Furthermore, going through UNCLOS III documents the author has found not a single phrase attributed to the President of the Conference or to the Chairman of the Second Committee implying that he opposed the EEZ because it also deals with marine scientific research and the preservation of the marine environment. Reference to the words "exclusive economic zone" and not to "exclusive fishing zone" was, in fact, made in nearly every statement or explanation made by them regarding the work of the Conference.

In addition, all the LOS Convention's provisions related to the 200 miles jurisdictional zone refer to the EEZ and not to the EFZ. To borrow the words of Professor Brown, "the concept of the exclusive fishing zone is nowhere referred to in ... the UN Convention"⁶⁶.

On the basis of the above reasons, the author is inclined to say that the consensus which emerged at UNCLOS III between 1976 and 1978 was not restricted to the rights of

coastal states over fisheries within the 200 miles as contended by Japan and certain other Western European States, but covered the EEZ with its various uses, including scientific research and environmental protection. Indeed, as the United Kingdom observed in the Channel Continental Shelf Arbitration (UK v. France), 1977⁶⁷, there was still at that time controversies on the content of the jurisdiction to be exercised by coastal states within the 200 miles EEZ⁶⁸. But, those controversies concerned only very few matters, namely, the question of access to fisheries for LL and GDS states, the protection of marine mammals and anadromous species⁶⁹.

The topics of marine scientific research within the 200 miles EEZ and the continental shelf and that of the preservation and protection of the marine environment were among the topics falling within the competence of the Third Committee of UNCLOS III⁷⁰. The vast majority of statements and proposals relating to marine scientific research fully endorsed the view that coastal states would have jurisdiction over scientific research activities related to the natural resources found within the EEZ⁷¹. The main difference between those statements and proposals concerned the extent of coastal states jurisdiction with respect to research activities that have nothing to do with the natural resources of the EEZ⁷².

As will be shown later in more detail, it is today generally accepted that coastal states can exercise at least jurisdiction over marine scientific research activities taking place in the EEZ and having connection with the EEZ resources. In this context, Professor Bernhardt has correctly said that "state practice clearly shows that coastal states can claim some exclusive rights in the 200 miles zone, what is doubtful is not the existence of rights but their number and content". He has further stated that "there are good reasons for the assumption that customary international law also reserves to the coastal states the other rights mentioned in Article 56 of the Convention, if they claim such rights"⁷³. This means that coastal states can claim under current international customary law the right of

jurisdiction over marine research provided for in Article 56 paragraph 1 (b) (ii).

Moreover, in his extensive work entitled "Marine Scientific Research and the Law of the Sea" published in 1982, Soons observed that "claims to jurisdiction over marine scientific research in exclusive economic zones going beyond the jurisdiction which coastal states are entitled to exercise over marine scientific research involving the taking of fish, are not valid under present-day general customary law"⁷⁴. This statement implies that coastal states are allowed under customary law to exercise a right of jurisdiction over marine research activities related to the resources of EEZ, if they wish to do so.

As far as the preservation and protection of the marine environment in the EEZ is concerned, it has to be recalled that before the start of UNCLOS III several proposals were submitted to the UN Sea-Bed Committee advancing the idea that the future EEZ regime would also empower coastal states to take some measures for the purpose of controlling pollution in the EEZ in order to protect the economic resources found therein⁷⁵. This idea received later at UNCLOS III big support. In this connection, in 1975 Professor Oxman described the accomplishments of the Caracas Session of 1974 on the EEZ, in the following terms :

"Over 100 countries spoke in support of an economic zone extending to a limit of 200 nautical miles as part of an overall treaty settlement. With respect to the content of the zone, there is widespread support for the following : (a) Coastal state sovereign or exclusive rights for the purpose of exploration and exploitation of living and nonliving resources; (b) Exclusive coastal state rights over artificial islands and most installations; (c) Exclusive coastal state rights over drilling for all purposes; (d) Coastal state rights and duties with respect to pollution and scientific research..."⁷⁶.

On the basis of the above discussion, it is submitted that under present-day

customary international law related to extended jurisdictional zones, coastal states are entitled to claim exclusive economic zones and not only exclusive fishery zones. As has been explained earlier, the EEZ is the broader concept, and exclusive fishing rights are the centerpiece of the rights comprised by the broader concept⁷⁷. Customary international law does not mandate that a coastal state assert the broader concept⁷⁸. In this context, Soons has correctly said that states "are not required by international law to fully exercise all rights (with corresponding duties) they acquire under customary international law..."⁷⁹. It follows that, if a state desires to restrict its claim to one of the functions prescribed, as has been done by the United Kingdom⁸⁰, Canada⁸¹, Denmark⁸², Japan⁸³, and the Netherlands⁸⁴, its action remains within the confines of current customary international law.

Section III : The EEZ Claims and their Conceptual Content

In this section, the author will try, first, to trace the numerical evolution of EEZ claims from 1975 to 1996, and, secondly, to examine the content of the EEZ claims as evidenced in national proclamations and / or legislation and decrees and compare it with the EEZ content enshrined in Part V of the LOS Convention.

A. The Evolution of EEZ Claims from 1975 to 1996

The period between 1975 and the resumed Eight Session of UNCLOS III in New York from July 16 to August 24, 1977, was marked by a large advent of the 200 miles EEZ in state practice. In this short period alone, no less than 47 coastal states advanced claims to a 200 miles EEZ⁸⁵. Of these claims, Africa has produced 15, Asia 10, mainland Latin America 7, the Caribbean Island states 5, Western Europe 4 and Oceania / Australia 6⁸⁶. This rapid adoption of the 200 miles EEZ concept in state practice, and global spread of such practice to every geographic region at a time that two or more years

were still needed for the termination date of the work of UNCLOS III was, as has been explained earlier, engendered by the general consensus and the near-agreement which were emerging at UNCLOS III concerning the 200 miles EEZ in that period.

During the same period a minority of states had opted for the establishment of an EFZ⁸⁷, that is to say asserting something less than an EEZ. Among those states were the USA, the UK, the USSR, and Japan⁸⁸. The assertion by these states, especially the big maritime powers, of an EFZ when consensus allowed a full EEZ at the middle of UNCLOS III, is not without significance. It indicates their desire to undermine the EEZ concept sponsored by the developing states of Latin America and Africa. Already at the Caracas Session 1974, several of these big maritime powers expressed their dissatisfaction with the 200 miles EEZ concept. Mr Ogiso, on behalf of Japan, for instance, stated that :

"His Delegation interpreted proposals for an exclusive economic zone as involving a zone in the high seas in which the coastal state had exclusive rights over all resources, living and non-living"⁸⁹.

Similarly, Sir Roger Jackling, the representative of the United Kingdom said :

"His delegation had however, made it clear that it regarded the coastal state rights in an economic zone to be rights in relation to the resources of the sea-bed and the water column. It had therefore been deeply concerned to note a growing tendency to take for granted those rights to the resources and to make demands for further competences, not directly related to resources within the zone"⁹⁰.

Thus, these two statements assert clearly that the content of the 200 miles EEZ concept should be confined to the economic resources that are found therein. All other activities that may be undertaken in the zone and not directly connected with the exploration and exploitation of the natural resources, including the conduct of marine

scientific research, would remain outside the competence of the coastal state.

In the author's opinion, by resorting to exclusive fishery zones at a time UNCLOS III was still in progress, the maritime powers were seeking to influence the work of UNCLOS III on the EEZ so that the rights of coastal states within the zone would be restricted to fisheries. This view finds some support in the fact that national laws establishing those zones emphasized the provisional character of the measures enshrined in them. In this direction, one may quote the Decree of the Presidium of the Supreme Soviet of the USSR of 10 December 1976 on Provisional Measures to Conserve Living Resources and Regulate Fishing in the Sea Areas Adjacent to the Coast of the USSR, noting that an "increasing number of states, including some adjoining the USSR" have been establishing economic or fishing zones up to 200 miles without waiting for the conclusion of UNCLOS III, and that "pending the conclusion of a convention" immediate action is needed to protect the interests of the Soviet State⁹¹.

However, the action of these states did not succeed. In fact, many other coastal states, most of which were developing ones, had subsequently followed the EEZ pattern establishing their own 200 miles EEZ. Thus, in addition to the forty seven claims which were made up to 1978⁹², seven other claims were made in 1979, 4 in 1980, and 5 in 1981⁹³.

It was in 1982 that the practice of those states establishing 200 miles EFZs had totally failed. This happened when the EEZ concept was eventually retained in the final text of UNCLOS III.

Since the adoption of the LOS Convention in 1982, the number of EEZ claimant-states has been increasing gradually. In 1983 five more EEZ claims were made, 6 in 1984, 3 in 1986, 1 in 1987⁹⁴, 2 between 1989 and 1990⁹⁵, and no less than six EEZ claims were made between 1991 and 1995⁹⁶. Today, according to the latest available information, no less than 92 coastal states have proclaimed exclusive economic zones

within the limit of 200 miles from the baselines from which the breadth of the territorial sea is measured⁹⁷. Indeed, several other coastal states have not established EEZs⁹⁸. However, in the present author's opinion, the failure of those states to create EEZs has been due to certain practical considerations rather than to doubts about the legitimacy of such a zone. The majority of states that have not established EEZs border one or more of the semi-enclosed seas⁹⁹. One salient consideration is the fact that in such seas delimitation problems become especially difficult as they may involve, simultaneously, boundaries with both adjacent and opposite states¹⁰⁰. The Mediterranean Sea, for instance, is a semi-enclosed sea where the furthest point from shore is only 370 kilometres¹⁰¹. All of the Mediterranean would be under national jurisdiction if the states of the region had promulgated 200 miles EEZs. As a result, every state would have to delimit its boundaries not only with adjacent states but also with opposite states¹⁰². Needless to say, such claims could lead to jurisdictional disputes in an area renowned for its political volatility. To this end, the states of the region have been extremely cautious when making claims to extended jurisdiction.

Of the eighteen states bordering the Mediterranean Sea, only very few states have established EEZs¹⁰³. Upon ratifying the LOS Convention, Egypt declared that it would exercise the rights attributed to it in the EEZ by the provisions of Part V and VI of the LOS Convention¹⁰⁴. But, to the author's knowledge, this Egyptian claim has not been implemented. Moreover, while France and Spain have both created EEZs, the two states have proclaimed EEZs only on their Atlantic coasts, avoiding the creation of such a zone in the Mediterranean¹⁰⁵. The same holds true for Morocco, which promulgated a 200 miles EEZ for its Atlantic waters but not for its Mediterranean waters¹⁰⁶. Likewise, Turkey had established an EEZ in the Black Sea in 1987, but it has excluded the Mediterranean coast from the scope of its legislation, an area rife with delimitation problems with Greece¹⁰⁷.

Finally, those states which have asserted EFZs only were aware that modern international law permitted coastal states to claim more than sovereign rights over living resources. This is evidenced by the fact that, although a very considerable number of states had established EEZs before the adoption of the LOS Convention, none of the EFZ claimant states raised any protest against such practice. In fact, some of these states have subsequently indicated a willingness to adapt their national legislation to the LOS Convention¹⁰⁸ and some others have already done so. In this connection, the US and the former USSR converted their former 200 miles EFZs into EEZs in 1983 and 1984 respectively¹⁰⁹. These conversions have contributed much to the growth of the number of the EEZ claimant states. They also lend some more support to the view expressed earlier that the consensus which emerged at UNCLOS III concerned the full EEZ and not just the sovereign rights of the coastal state over living resources.

It is interesting to note that subsequent conversion of an existing 200 miles EFZ into an EEZ was effected by Poland in 1991¹¹⁰, Sweden in 1993¹¹¹ and Australia in 1994¹¹². Moreover, several European coastal states that had proclaimed EFZs in the past, have recently made their intention very clear that they are considering extension of jurisdictional competences in the North Sea in accordance with the LOS Convention, especially with regard to its Part XII¹¹³.

B. The General Ingredients of the EEZ in National Claims

The general ingredients of the concept of the EEZ have been included in Articles 55, 56 and 58 of the LOS Convention. When national EEZ claims are closely read, an important fact stands out immediately. With the exception of a few claims that have been shaped in a very brief manner, all the other EEZ claims have borrowed much from the EEZ concept which was agreed upon at UNCLOS III. In this subsection, the author will attempt to establish with precision the LOS Convention's EEZ basic ingredients that have

been widely contained in national EEZ claims.

1. Definition of the EEZ

Article 55 of the LOS Convention states that the EEZ is an "area beyond and adjacent to the territorial sea, subject to the specific legal regime established in" Part V. This provision suggests clearly that the territorial sea and the EEZ are two distinct geographical and juridical zones in the LOS Convention.

Of the eighty claims examined, over seventy claims included a provision related to the definition of the EEZ. Of these claims, fifty-one have adopted a definition that is more or less couched in the words of Article 55 and 57 of the LOS Convention. The US Presidential Proclamation No. 5030 of March 10, 1983, for instance, defined the United State's EEZ as a "zone contiguous to the territorial sea ... extending to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured"¹¹⁴. Similarly, Thailand's Royal Proclamation of February 23, 1981, has provided that the EEZ "of the Kingdom of Thailand is an area beyond and adjacent to the territorial sea whose breadth extends" to 200 miles measured from the baselines used for measuring the breadth of the territorial sea¹¹⁵. National EEZ legislation of Cuba¹¹⁶, Costa Rica¹¹⁷, Dominican Republic¹¹⁸, Guyana¹¹⁹, Iceland¹²⁰, India¹²¹, Indonesia¹²², Ivory Coast¹²³, Kiribati¹²⁴, Madagascar¹²⁵, Malaysia¹²⁶, Mauritius¹²⁷, Mexico¹²⁸, Morocco¹²⁹, Mozambique¹³⁰, New Zealand¹³¹, Nigeria¹³², Pakistan¹³³, Philippines¹³⁴, Sao Tome and Principe¹³⁵, Seychelles¹³⁶, Solomon Islands¹³⁷, Spain¹³⁸, Sri Lanka¹³⁹, Suriname¹⁴⁰, Tonga¹⁴¹, Trinidad and Tobago¹⁴², Vanuatu¹⁴³, Venezuela¹⁴⁴, Vietnam¹⁴⁵ and Western Samoa¹⁴⁶ contained identical provisions. Thus, like the LOS Convention, the majority of national EEZ legislation explicitly indicates that the territorial sea and the EEZ are two distinct institutions of the law of the sea, subject to two different legal regimes¹⁴⁷.

On the other hand, while a very few national EEZ legislation omitted any definition of the EEZ¹⁴⁸, certain others have adopted a definition which is imprecise. For instance, Guatemala's Decree No. 20/76 of July 1, 1976 states in Article 3 that : "The Republic of Guatemala establishes an exclusive economic zone which shall extend 200 nautical miles from the baseline from which the breadth of the territorial sea is measured"¹⁴⁹. Similarly, the Portuguese Law No. 33/77 of May 28, 1977 provides that : "An economic zone is hereby established, the outer limit of which is a line where each point is at a distance of 200 nautical miles from the point closest to the baseline from which the breadth of the territorial sea is measured"¹⁵⁰. Such a formulation has been repeated in the EEZ proclamations or legislation of a few other states¹⁵¹. However, in the author's opinion, in the case of such states, this problem seems to be more a matter of imprecise wording or oversight rather than actual intention to confuse the distinction between the two juridical zones. This is for the simple reason that most of these states have explicitly asserted a 12 miles territorial sea¹⁵².

2. The Legal Status of the EEZ

Article 55 and 56 of the LOS Convention indicate that the EEZ is neither a part of the territorial sea nor that of the high seas. Article 55 defines the legal status of the EEZ only within the framework of LOS Convention. It is a zone *sui generis*. It is worth recalling that the *sui generis* formulation attempts to resolve the conflict between certain developing coastal states which advocated a territorial sea character of the EEZ¹⁵³, implying that the residual competences remain with the coastal states, and the big maritime states advocating a high seas character in order to ensure that freedom of navigation and other uses of the ocean in the vast areas enclosed by the EEZ would lie with the flag states¹⁵⁴.

Of the ninety-two EEZ claims which have been made up to now, not a single

claim has either explicitly or implicitly attempted to assimilate the EEZ with the high seas. The absence of state practice favorable to the thesis of the EEZ as high seas is, in the author's opinion, logical, as this thesis was strongly rejected at UNCLOS III and has been expressly refuted by the final text of the Conference.

Similarly, the territorialist practice is, as indicated earlier, sporadic. Only very few developing coastal states, especially from Latin America, have claimed a 200 miles zone of national sovereignty¹⁵⁵, thus assimilating the asserted zone with a territorial sea claim. Moreover, the number of states adhering to this practice has recently decreased considerably owing to the fact that some of these states have recently revised their legislation to be consistent with the LOS Convention's EEZ provisions¹⁵⁶.

In addition, Uruguay has defected from the territorialist group by becoming a party to the LOS Convention¹⁵⁷, while Nicaragua, Panama and EL Salvador have all signed the LOS Convention, thus showing a clear degree of commitment to its principles¹⁵⁸. Indeed, Nicaragua went even further, promising, on signing the convention, to introduce adjustments into its domestic laws "as may be required in order to harmonize it with the Convention"¹⁵⁹.

Since state practice supports neither the high seas thesis nor the territorial sea thesis, the *sui generis* character of the EEZ is therefore the alternative. Of the 82 claims surveyed, more than sixty-five claims have enumerated the rights to be enjoyed by the claimant state within its EEZ and specified the rights of third states. For instance, Article 48 (1) of Decree No.77 of 7 January 1987 of the State Council of the People's Republic of Bulgaria on the Exclusive Economic Zone of Bulgaria in the Black Sea¹⁶⁰ provides that, in the EEZ, Bulgaria shall exercise "sovereign rights for the purpose of exploring developing, exploiting, protecting and managing the living, mineral and energy resources of the sea-bed, its subsoil and the waters superjacent to the sea-bed, and with regard to other activities for the exploration and exploitation of the zone". Paragraph 2 adds that

Bulgaria exercises also exclusive rights and jurisdiction with regard to the construction and use of artificial islands, installations and structures, marine scientific research and the protection of the marine environment. Article 49, on the other hand, states that in the EEZ, "all states enjoy the freedoms of navigation, overflight, the laying of cables and pipelines and other internationally lawful procedures related to the use of the sea for such purposes".

Similarly, the Territorial Sea and Exclusive Economic Zone Act of 1989¹⁶¹ of Tanzania states in Article 9 (1) that within the EEZ the United Republic of Tanzania has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and its subsoil, and with regard to other activities for the economic exploration and exploitation of the zone". The same Article states further in paragraph 2 that the Republic has also jurisdiction with regard to the establishment and use of artificial islands, installations and structures, as well as over scientific research and the protection and preservation of the marine environment. Moreover, Article 11 provides that the United Republic recognizes within its EEZ "the right of other states, whether coastal or land-locked, to freedom of navigation and overflight, the laying of cables and pipelines and other uses of the sea relating to navigation and communication". Similar provisions have been repeated in national EEZ proclamations and legislation of no less than sixty-three other coastal states¹⁶². This means that the EEZ is being viewed as a functional maritime area in which a coastal state and third states enjoy well defined rights and have certain duties towards each other. Such a practice is therefore in line with the provision contained in Article 55 of the LOS Convention. Consequently, the *sui generis* character of the EEZ seems to have been confirmed by state practice.

3. Delimitation of the EEZ between Adjacent and Opposite States

The issue of delimitation of the EEZ between states with opposite or adjacent coasts was the subject of long debates at UNCLOS III¹⁶³. Debates centered mainly on whether boundaries should be effected in accordance with the median or equidistance line or according to equitable principles and special circumstances¹⁶⁴. Because the conflict among the participating states could not be resolved, the resulting Convention text is too general and provides little of substance¹⁶⁵. The provision inserted in Article 74 (1) relating to the delimitation of the EEZ, which is identical to that contained in Article 83 (1) on the delimitation of the continental shelf, states that :

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

Accordingly, the process of delimitation of the EEZ and the continental shelf is based on three principles : agreement, consistency with international law and an equitable solution.

As far as EEZ delimitation is concerned, state practice is varied. In much of national EEZ proclamations and legislation surveyed by the author, the maritime boundary with adjacent or opposite states is to be determined by agreement. Pending such agreement, the boundary must not exceed the median or equidistance line from the nearest point from which the width of the territorial sea is calculated. This is valid for countries where the sea areas between them are less than 400 miles. In this connection, the provision of paragraph 3 of Article 7 of the Territorial Sea and Exclusive Zone Act of the United Republic of Tanzania of 1989¹⁶⁶ stipulates that, where the median line between the Republic and any adjacent or opposite state is less than 200 miles from the baselines, " the outer boundary limit of the zone shall be that fixed by agreement between the United

Republic and that other states, but where there is no such agreement, the outer boundary limit shall be the median line". A similar provision has been included in the Icelandic Law No. 41 concerning the Territorial Sea, the Economic Zone and the Continental Shelf¹⁶⁷, the Maritime Boundaries Act No. 10 of 1977 of Guyana¹⁶⁸, and the 1978 Act No. 20 of Grenada¹⁶⁹. Such a provision is, however, found in only a few national EEZ instruments.

In several cases, national EEZ legislation omits any reference to agreement¹⁷⁰. The LOS Convention provides for delimitation by agreement in accordance with international law. Thus, national legislation which does not acknowledge the important element of agreement in delimiting EEZ boundaries may be deviating not only from the requirements of the LOS Convention but, more importantly, also from general international law. In this context, it is worth recalling here that, with regard to analogous claims, the ICJ had, in the past, expressed the view that, according to the basic tenets of law, and of *opinio juris*, delimitation of boundaries is to be effected by agreement between the parties concerned in accordance with equitable principles and taking into account all relevant circumstances¹⁷¹.

In several other cases, only delimitation by agreement is provided for in national legislation, but without any reference to the median / equidistance line principle¹⁷². Yet, the practice of certain other states fluctuates. The United States, for example, has not subscribed to a strict rule of boundary delimitation whether by legislation or by action. Rather, in accordance with the theory of equitable principles, it has developed its position based on the circumstances of the particular boundary in question. Thus, it argued against the application of equidistance in the Gulf of Maine Area Case with Canada before a panel of the ICJ¹⁷³, but used equidistance in its agreement to fix the boundary with Mexico¹⁷⁴.

In addition, there exist also a number of enactments that make no reference at all to the question of delimitation of boundaries¹⁷⁵.

On the basis of this discussion, one may conclude that, with regard to EEZs

delimitation, state practice is not homogeneous and lacks stability. It will be some more time before the law in this area stabilizes.

4. The Basic Rights and Jurisdiction of the Coastal State in the EEZ

According to the LOS Convention, in the EEZ coastal states have sovereign rights over the natural resources of the zone and jurisdiction with respect to the establishment and use of artificial islands, installations and structures, marine research, and the protection and preservation of the marine environment¹⁷⁶. Thus, under this heading, the author will try to examine the extent to which these basic rights have been received in state practice.

4. 1. The Coastal State's Rights Contained in Art. 56 para. (1) (a)

Regarding the question of rights, Article 56 (1) (a) of the LOS Convention provides that, in the EEZ, the coastal state has "sovereign rights" for the purpose of exploring and exploiting, conserving and managing the natural resources found in the zone and with regard to other activities for the other economic exploitation and exploration of the zone such as the production of energy from the water, currents, and wind. There is, at the level of national legislation, widespread consensus with respect to the coastal state's sovereign rights for the purposes enumerated in the above-mentioned provision. Almost all states claiming rights to an EEZ have included in their national legislation this fundamental concept¹⁷⁷. Indeed, small variations in wording can be detected in some national instruments when they are compared with the corresponding provision of the LOS Convention, but they may be unintentional and perhaps even unimportant¹⁷⁸.

Moreover, the idea that in the EEZ coastal states have sovereign rights over the natural resources of the zone is also found in numerous agreements. For instance, Article 64 of the Fourth APC - EEC Convention of Lomé of December 15, 1989 provides that the Community and the ACP States recognize that coastal states exercise sovereign rights for

the purpose of exploring, exploiting, conserving and managing the fishery resources of their respective exclusive economic zones¹⁷⁹. Similarly, the preamble of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, which was concluded in July 9, 1992, states in part that, "in accordance with international law as expressed in the United Nations Convention on the Law of the Sea, coastal states have sovereign rights for the purpose of exploring and exploiting, conserving and managing the fisheries resources of their exclusive economic zones and fisheries zones"¹⁸⁰.

Of the states claiming an EEZ, only the claim of the Sultanate of Oman speaks of sovereignty. The Royal Decree No. 15/81 of 1981 provides that Oman "shall have all sovereignty of the EEZ for the purposes of exploring and developing its aquatic and other wealths"¹⁸¹. Sovereignty means a state "subject to no other state, and having a full and exclusive authority within its jurisdiction"¹⁸². Thus, the fact that the above provision speaks of sovereignty for only specific rights of economic nature means that the range of the claim is limited. Consequently, even Oman's claim seems to be a functional claim and not one of sovereignty over the zone itself.

4. 2. The Coastal State's Rights Contained in Art. 56 (1) (b)

The other rights set out in Article 56 (1) (b) are of a purely jurisdictional as opposed to sovereign character¹⁸³. These jurisdictional rights relate to artificial islands, installations and structures, the full regime for which is set out in Article 60; marine scientific research, which is stipulated in Part XIII of the LOS Convention, especially Articles 246-254; and preservation of the marine environment, which is set out in Articles 208, 210, 210, 211, 214, 216, and 220 of Part XII.

An examination of the provisions dealing with the rights of the coastal state as contained in the national legislation establishing EEZs reveals that most of the EEZ

claimant states have also asserted certain other jurisdictional rights within the EEZ. In this connection, an important number of this legislation has, expressly, made a specific claim with regard to the jurisdiction of the coastal state over artificial islands, installations and structures within the EEZ, thus following the provision contained in Article 56 (1) (b) (i) of the LOS Convention. Over sixty-eight legislation has made this type of claim¹⁸⁴. This legislation include among others that of Bulgaria¹⁸⁵, the Dominican Republic¹⁸⁶, India¹⁸⁷, Jamaica¹⁸⁸, Kenya¹⁸⁹, Malaysia¹⁹⁰, Mexico¹⁹¹, Nigeria¹⁹², Sweden¹⁹³, Suriname¹⁹⁴, Tanzania¹⁹⁵, United States¹⁹⁶ and Venezuela¹⁹⁷. For instance, the Decree No. 77 of 7 January 1987 of Bulgaria states in Article 2 (2) that in the EEZ the people's Republic of Bulgaria has jurisdiction over "the establishment and use of artificial islands, installations and structures". Similar provisions have been included in the domestic legislation of numerous other coastal states¹⁹⁸.

On the other hand, the legislation of several states claim jurisdiction not only over artificial islands, installations and structures, but also over devices for economic or other purposes. These include among others, the legislation of Burma, India, Kenya, Mauritania, Mauritius, Pakistan, Seychelles, Sri-Lanka, and Vanuatu. It is important to recall here that, unlike the 1958 Convention on the Continental Shelf¹⁹⁹, neither Article 56 nor Article 60 of the LOS Convention make reference to 'devices'²⁰⁰, a term used in other parts of the LOS Convention²⁰¹. Consequently, all national legislations listing such objects among those falling under the coastal state's jurisdiction appear to have exceeded the provisions of the LOS Convention.

Moreover, the vast majority of states claiming an EEZ have already either explicitly or implicitly asserted jurisdiction over scientific research activities in their respective EEZs. Of the claims relating to the EEZ included in Smith's compilation, 62 legislation has made this kind of claim²⁰². Examples of them are to be found in the cases of Antigua and Barbuda, Barbados, Colombia, Cook Island, Cuba, Dominica, Fiji,

Grenada, Honduras, Iceland, Indonesia, Malaysia, Maldives, Mauritania, Mexico, New Zealand, Norway, Philippines, Portugal and Western Samoa²⁰³, with the United States²⁰⁴, France²⁰⁵, and Spain²⁰⁶ being significant omissions.

It is to be noted that a significant number of this national legislation claim only 'jurisdiction' with regard to this matter, thus following generally Article 6 of the LOS Convention. But, there are also other states which have asserted, in their domestic legislation, 'exclusive jurisdiction' rather than merely jurisdiction as provided for in Articles 56 and 246 of the LOS Convention²⁰⁷. Examples of these claims are to be found in the legislation of Burma, Guatemala, Guyana, India, Kenya, Mauritius, Pakistan, Sri Lanka Vanuatu, and Vietnam²⁰⁸. The significance of referring to 'exclusive jurisdiction' is not clear. However, such a wording could have a connotation beyond the terminological aspect²⁰⁹.

Furthermore, the LOS Convention provides in Article 56 (1) (b) (iii), for the coastal state to exercise jurisdiction as provided for in its relevant provisions with regard to the protection and the preservation of the marine environment in the EEZ. A survey of national legislation establishing EEZs shows that most of them contain a specific claim regarding marine environmental protection in the the zone²¹⁰. In numerical terms, over 80 states made assertions to this type of claim²¹¹. Of these eighty claims, no less than sixty-nine of them have expressed the authority of the coastal state, in this field, in terms of jurisdiction²¹², thus coinciding in principle with the substantive description and the extent of the LOS Convention and other treaties²¹³. However, few of them have enacted detailed provisions designed to implement Articles 207 to 222 of the LOS Convention, which require states to adopt and enforce appropriate laws and regulations²¹⁴.

There are also several national claims which have asserted 'exclusive jurisdiction' over environmental protection within the EEZ, thus going beyond the wording of the LOS Convention, which confers upon coastal states only 'jurisdiction' with regard to the

protection and preservation of the marine environment. For instance, the Colombian Law No. 10 of August 4, 1978 states in Article 8 that the Colombian Nation "shall also exercise exclusive jurisdiction for... the preservation of the marine environment"²¹⁵. Identical provisions have been included in the domestic legislation of Burma²¹⁶, Guyana²¹⁷, India²¹⁸, Mauritius²¹⁹, Seychelles²²⁰, and Vanuatu²²¹. This, however, may be explained by the fact that all of these claims were made around the middle of UNCLOS III and, consequently, were possibly influenced by an earlier draft of UNCLOS III which provided for 'exclusive jurisdiction' in this matter²²². The wording was later altered to reflect the fact that both the coastal states and the flag state share responsibility for enforcing international standards for the reduction and control of certain types of marine pollution in the EEZ.

Moreover, it is interesting to note that even those European states which had earlier proclaimed EFZs only have recently made their intention very clear to take action with the aim of increasing their respective jurisdiction to include jurisdiction over environmental protection in accordance with the LOS Convention. In this context, the Paris Ministerial Declaration on the Coordinated Extension of Jurisdiction in the North Sea, adopted in September 1992, states in part that the states concerned "undertake to initiate the process either of establishing exclusive economic zones in areas of the North Sea where they do not exist for the purpose of protecting and preserving the marine environment or of increasing coastal state jurisdiction for that purpose, in accordance with international law and without going beyond the scope of the provisions of the United Nations Convention on the Law of the Sea"²²³.

In sum, the present author's review of national legislation establishing EEZs reveals that EEZ claimant states generally follow the conventional basic rights provided for in Article 56 of the LOS Convention. Despite the fact that, in certain national laws relating to the EEZ, the description of the asserted jurisdiction differs from that of the text of the

LOS Convention, those differences should not necessarily be seen as indications of the intention of the states concerned to apply to the zone rules different from those of the LOS Convention. In several cases those differences may be explained simply by the fact that some of the national laws establishing the EEZ were enacted before the texts being negotiated at UNCLOS III had taken their final form²²⁴.

Notwithstanding the aforesaid, it must be noted, at this stage, that almost all EEZ national legislation has put an emphasis on the coastal state's various rights and has omitted reference to the duties placed upon them by means of Article 56 (2). On this phenomenon, Moore has correctly said that there exists "almost universal elimination of the reference to 'duties' in the 'catch-all' phrase at the end of the enumeration of coastal states' rights over the EEZ"²²⁵. Moreover, an FAO survey identified the word duties as only being retained in the legislation of Antigua and Barbuda, Djibouti, Dominica, Guatemala, and Kenya²²⁶.

5. The Basic Rights of the Generality of States in Foreign EEZs

As has been explained earlier, under both customary international law and the Convention on the High Seas²²⁷, the freedom of navigation, overflight and the laying of submarine cables and pipelines in the high seas were available to ships and planes of all states subject, of course, to the criterion of 'reasonable use' and consideration for the legitimate rights of other high seas users. These freedoms are all recognized within the EEZ by means of Article 58 of the LOS Convention. Under Article 56 (2), the coastal state is expected to have due regard for these third state rights and duties, treating them in a manner compatible with the provisions of the Convention. A complementary due regard obligation vis-a-vis the coastal state is imposed on third states in Article 58 (3). The due regard standard is, as described by Professor Oxman, a latinized version²²⁸ of the

reasonable regard requirement stipulated in Article 2 of the 1958 Convention on the High Seas.

At the national level, the legislation of a considerable number of states has explicitly recognized freedom of navigation and overflight by foreign vessels and aircraft through or over the EEZ. For instance, Article 3 of the Royal Proclamation of Thailand²²⁹ provides that, in the EEZ, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines shall be governed by international law. Moreover, in a statement made in 1993 by the Thai Foreign Ministry²³⁰, Thailand has referred to the freedom of navigation in the EEZ of another state as part of customary international law codified by the 1982 Convention, and declared that it does not consider itself bound by the laws and regulations which tend to restrict such freedom. Along the same lines, the 1978 Act of Venezuela Establishing an Exclusive Economic Zone Along the Coasts of the Mainland and Islands of the Republic states categorically that "other states, whether coastal or land-locked, shall enjoy, subject to the relevant provisions of the present Act, the freedoms of navigation and overflight... and other internationally lawful uses of the sea associated with navigation and communication"²³¹. This provision is in line with the LOS Convention. Identical provisions have been included in the legislation of over forty-two states. These include among others that of Barbados²³², Bulgaria²³³, Burma²³⁴, Dominican Republic²³⁵, Grenada²³⁶, Guatemala²³⁷, Indonesia²³⁸, the Ivory Coast²³⁹, Jamaica²⁴⁰, Morocco²⁴¹, Philippines²⁴², Sao Tome and Principe²⁴³, Spain²⁴⁴, Suriname²⁴⁵, Sweden²⁴⁶, Thailand²⁴⁷, Trinidad and Tobago²⁴⁸, Tanzania²⁴⁹ and the United States²⁵⁰.

On the other hand, numerous other EEZ claims omitted reference to freedoms of navigation and overflight. Examples of these claims can be found in those of Bangladesh, Cape Verde, Colombia, Comoros, Cook Islands, France, Guinea Bissau, Haiti, Iceland, Mozambique, New Zealand, Sri Lanka, Togo and Vietnam²⁵¹. Such an omission has been

viewed by certain authors as indicating a reluctance to recognize such freedoms or to acknowledge such rights as being implicit and genuine rights of the regime on the EEZ²⁵². In the author's opinion, such a view does not seem to be correct. This is because all the states whose legislation contained no reference to freedom of navigation and overflight in the EEZ had argued at UNCLOS III in favor of retaining these freedoms in the EEZ. For instance, at the First Substantive Session, Caracas 1974, the delegate of Bangladesh stated that the future EEZ regime should include that :

"All states should enjoy freedom of navigation and overflight and freedom to lay submarine cables and pipelines subject to the exercise by the coastal state of its rights as provided in the future convention"²⁵³.

Similar statements were made at that same session by the representatives of Haiti²⁵⁴, Malaysia²⁵⁵ and Sri Lanka²⁵⁶.

This omission should not, therefore, be deemed to have, or intend to have, a negative impact upon navigation and overflight²⁵⁷, but should be interpreted as a simple omission which does not alter the essential features of the EEZ. This view appears to be reinforced by the fact that a number of the states belonging to the above-mentioned group have ratified the LOS Convention²⁵⁸, thus signifying their acceptance of the basic freedoms to be enjoyed by third states in the EEZ.

More worrisome perhaps are the EEZ claims of four developing states, namely Guyana, India, Mauritius, and Pakistan. All these states made assertions in their respective legislation that they may regulate, in nationally designated areas of the EEZ, entry into and passage through the waters and airspace of the EEZ²⁵⁹. For instance, Article 7(6) of the Indian Act on the Maritime Zones stipulates that the Government may provide for regulation of entry, passage through designated area "by establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation

which is not prejudicial to the interests of India"²⁶⁰. Identical provisions have been enshrined in the national legislation of Guyana, Mauritius and Pakistan²⁶¹. Such claims seem to go even beyond the rights provided for the coastal state in the territorial sea, in which, under Article 22 of the LOS Convention, for instance, traffic separation schemes may be established, but several specific matters are to be taken into account, including consideration of recommendations of the competent international organization and channels customarily used for international navigation. The national legislation of these states which apply to the EEZ do not even provide for any consideration of these factors, but rather stresses national discretion. Such asserted rights have no basis in the LOS Convention.

In addition to the claims analyzed above, three other states have asserted rights that may have some significance for navigation. For instance, section 1 of Law No. 32/76 of the Maldives provides that "ships of all states shall enjoy the right of innocent passage through the... exclusive economic zone of the Republic of the Maldives"²⁶². Innocent passage is a practice which relates to the territorial sea alone and its use in connection with the EEZ blurs the legal distinction between these two zones that should be clearly recognized. The same Law states further that the Maldives prohibits, without its authorization, the entry of foreign fishing vessels into its EEZ²⁶³. The protection of the EEZ fisheries from unauthorized foreign fishing activities seems to be the motive force lying behind this claim. Nonetheless, such a claim has no foundation in the LOS Convention.

Finally, numerous national legislation provides, in accordance with Article 58 of the LOS Convention, for the freedom of laying submarine cables and pipelines²⁶⁴. However, the record is not quite as good as with navigation and overflight. Either the reference to the laying of cables is omitted, although the freedom of navigation has been

accorded²⁶⁵, or the domestic legislation provides for subsequent restrictions²⁶⁶.

Section IV : The Specific Legal Regimes Regulating the Various Activities in the EEZ in State Practice

As has already been said in more detail in chapter 2 and 3, the LOS Convention sets out a detailed legal regime for every single activity that may be exercised within the EEZ. In this section, the author will attempt to study the detailed rules contained in state practice in relation to every particular activity in the zone. The purpose is to try to determine with precision the extent existing state practice has evolved in accordance with the LOS Convention's specific legal regime.

A. The EEZ Fisheries System in Coastal States Practice

According to the fisheries system set out in Part V of the LOS Convention, especially in Articles 61 to 73, the coastal state has sovereign rights over and the responsibility to secure conservation of living resources in the EEZ and to ensure that they are not endangered by over-exploitation²⁶⁷. Management and conservation measures are to be designed to maintain stocks at levels capable of producing maximum sustainable yields as qualified by relevant environmental and economic factors, and taking into account fishing patterns, the interdependence of stocks and generally recommended subregional, regional or global minimum standards. The coastal state is also placed under the duty to promote optimum utilization of those resources²⁶⁸, and, in this context, has to determine the allowable catch of fish species in its EEZ²⁶⁹ as well as its harvesting capacity²⁷⁰. If the coastal state does not have the capacity to harvest the entire allowable catch, access to any surplus has to be given to other states²⁷¹. In selecting such other states, the coastal state is required to take into consideration the significance of the living resources of the area to its own economy, the rights of LLSs, the requirements of the developing countries in the region or subregion and traditional fishing practices²⁷². It is proposed to examine under

this subsection to what extent these major constituent elements of the regime related to the conservation and utilization of the EEZ living resources have been expressed in state practice.

1. Coastal State's Conservation and Management Responsibilities

Under the terms of the LOS Convention, the coastal state has sovereign rights over and the responsibility for the conservation, management and utilization of the living resources of the EEZ²⁷³. Article 61 is the key article regulating conservation. The main conservation goals enshrined in it are to ensure : (1) the determination of the total allowable catch (TAC)²⁷⁴; (2) that the living resources in the exclusive economic zone are not endangered by over-exploitation²⁷⁵; (3) that the populations of harvested species are maintained or restored at levels which can produce the maximum sustainable yield (MSY)²⁷⁶; and (4) that associated or dependent species are maintained above levels at which their reproduction may become seriously threatened²⁷⁷.

An examination of EEZ legislation and proclamations and fisheries regulations of EFZ claimant states which, as has been seen earlier, may be relevant²⁷⁸, would show on the whole that reference to management and conservation responsibilities of the coastal state with regard to living resources found within the asserted 200 miles zone is common to the vast majority of those national instruments²⁷⁹. Some legislation and proclamations contain detailed provisions specifying the objectives of management and conservation of living resources in terms more or less reminiscent of the provisions of the texts of UNCLOS III²⁸⁰. The Mexican legislation²⁸¹, for instance, provides that the aim of management and conservation measures is to ensure that the living resources of the EEZ are not endangered by over-exploitation²⁸². The legislation places an obligation on the Federal Executive Branch to take proper management and conservation measures²⁸³. The relevant Portuguese law²⁸⁴ provides that the Government shall enact and enforce regulation of fishing in the EEZ, including, inter alia, the TAC and the MSY for the

fisheries as a whole, and the protection, conservation and restoration of the living resources of the EEZ²⁸⁵.

The United States EEZ Proclamation²⁸⁶ recognizes the responsibility of the US to manage and conserve the living resources of the EEZ, but does not elaborate on the conservation measures within the zone. It is the Fishery Conservation and Management Act of 1976²⁸⁷ which provides for such measures within the United States' 200 miles zone. Indeed, the measures provided are probably the most comprehensive measures found in any national legislation. Conservation and management measures are defined as being measures required to rebuild, restore or maintain fishing resources and the marine environment, and designed to ensure a supply of food, other products or recreational benefits on a continuing basis to avoid irreversible or long term adverse effects, and assure a future choice of options for the use of those resources²⁸⁸. The optimum yield is to be based on the MSY as modified by relevant economic, social or ecological factors²⁸⁹. A considerable number of other EEZ and EFZ claims have adopted the UNCLOS III conservation goals²⁹⁰.

On the other hand, numerous states, most of them developing ones, have referred in their EEZ legislation to the duty to manage and conserve the EEZ living resources, but such references are mainly at the general level which does not correspond to the precise wording of Article 61 and 62 of the LOS Convention²⁹¹. Bangladesh²⁹², Malaysia²⁹³ and Tuvalu²⁹⁴ can be classified in this group.

It has, nowadays, become obvious that, in the absence of a reliable factual basis, it is very difficult to formulate sound fisheries management and conservation schemes²⁹⁵. Reliable scientific information on fish stocks, technology and trained personnel are prerequisites for good fishery management and development²⁹⁶. Complex and timely scientific computations and research to satisfy the requirements contained in Article 61 paras. 1, 2, 3, and 4 are beyond the capacity of a significant number of developing coastal

states. There is, therefore, a great possibility that a number of developing states have been inhibited from adopting the LOS Convention's specific goals in their legislation simply because they lack the technology and know-how to obtain the scientific evidence required under the LOS Convention²⁹⁷.

Moreover, a third group of EEZ legislation has remained silent with regard to the conservation obligation and the specific management and conservation objectives contained in Article 61 and 62 of the LOS Convention. Examples of the claims belonging to this group are to be found in the cases of Cambodia²⁹⁸, Costa Rica²⁹⁹, Egypt³⁰⁰, Equatorial Guinea³⁰¹, Guatemala³⁰², Guinea³⁰³, Guinea Bissau³⁰⁴, Ivory Coast³⁰⁵, Mozambique³⁰⁶, Oman³⁰⁷ and Thailand³⁰⁸. However, in the author's opinion, the absence of any reference in this legislation to conservation responsibilities does not, of course, mean that such responsibilities are not accepted by these states. This is because, first, the very development of the 200 miles zones has been intimately connected with the idea of conservation³⁰⁹; secondly, the conservation obligation and the conservation objectives included in Article 61 and 62 of the LOS Convention received very large support at UNCLOS III and remained the same throughout the Conference's texts since their first appearance in the 1975 ISNT³¹⁰; and thirdly, legislative drafters are traditionally cautious in using language that unnecessarily acknowledges their states' obligations under international law³¹¹. They are mostly concerned with the coastal state's fisheries rights in the claimed zone. It follows that, in the case of such states, this problem seems to be a matter of legislative technique rather than any actual intention to refuse accepting management and conservation responsibilities.

2. Optimum Utilization and Foreign Access

As has been explained in chapter two in more detail³¹², the second main obligation placed upon the coastal state is to promote optimum utilization of its EEZ living

resources³¹³. However, any activity in this regard should not, according to Article 62, be allowed to prejudice or affect the conservation obligation found in Article 61. This means in effect that, whatever level of utilization 'optimum' may require, the exploitation of the EEZ living resources should not be undertaken beyond the limits prescribed in Article 61, i.e. beyond the level of MSY as qualified by relevant economic and environmental factors so as to ensure that the fish stocks are not endangered by over-exploitation.

Specific reference to this obligation is found in the EFZ and EEZ claims of many states. Examples of these claims can be found in the laws of Australia, Cuba, Mexico, Malaysia, New Zealand, Papua New Guinea, Fiji, Sao Tome and Principe, the former USSR, and Venezuela³¹⁴. For instance, Article 6 of the 1978 Act Establishing an Exclusive Economic Zone Along the Coasts of the Mainland and Islands of the Republic of Venezuela³¹⁵ provides that "the Republic shall promote the optimum use of the living resources of the exclusive economic zone without prejudice" to the provisions related to conservation of the living resources. This provision is exactly similar to the provision enshrined in Article 62 para. 1 of the LOS Convention. Australia's legislation declaring a 200 miles fisheries zone places an obligation upon the Minister of Fisheries to pay regard to the objective of optimum utilization of the living resources of the Australian fishing zone and to ensure that the living resources of the Australian fishing zone are not endangered by over-exploitation³¹⁶. Similarly, the Malaysian Exclusive Economic Zone Bill of 1984 requires the Director General of Fisheries to prepare and continuously upgrade fishery programmes based on the latest available scientific knowledge to ensure optimum utilization of fishery resources in line with good management practice³¹⁷.

In contrast, an overwhelming majority of national legislation is silent over 'optimum utilization' as an objective to be promoted by coastal states. However, this omission does not seem to imply that the states in question do not recognize the optimum use of the living resources found in their respective EEZs or EFZs. This is because, first,

both the historical development of the EFZ and EEZ and the negotiations which took place at UNCLOS III bear witness to the desire and aspiration of all states to improve the economic and social development of all peoples of the globe³¹⁸; secondly, although national legislation and proclamations of this group of states do not make any reference to the provision contained in Article 62 para. 2 of the LOS Convention according to which coastal states have an obligation to ensure harvesting of the entire allowable catch, direct or implied reference to the objective of optimum utilization of the living resources of the zone is found in a number of fishery agreements to which these states are parties. In this connection, the preamble to the Fisheries Agreement between the United Mexican States and the Republic of Cuba of July 26, 1976 provides in part that "considering that the Government of the United Mexican States plans to promote the optimum utilization..."³¹⁹. Identical wordings are contained in the Angola/Spain Fishing Agreement of April 6, 1981 as well as in the Mauritania/Spain Fishing Agreement of 1982³²⁰; thirdly, the Fourth Lomé Convention, concluded between the EEC and the ACP states in December 1989, obliges the parties "to promote the optimum utilization of the fishery resources" of the African, Caribbean and Pacific coastal states³²¹. It would, therefore, seem that, unless the coastal state can justify its refusal on such grounds as conservation measures, it is obliged under current customary international law to give due regard to the interests of third states and promote the objective of the optimum use of its EEZ fisheries.

As far as the right of third states to fish in foreign EEZs is concerned, the LOS Convention empowers and obliges a coastal state which is a party to it to determine the AC of the living resources of its EEZ to promote the objective of optimum utilization of its EEZ fisheries. Having determined the AC, it would be required to determine also its own capacity to harvest these resources. If its capacity does not permit it to harvest the entire allowable catch, it shall give other states access to the surplus³²². Nevertheless, as has been already explained in chapter 2, the duty to accommodate foreign states is not

overwhelming. Large flexibility is given to the coastal state in harvesting the EEZ resources. A decision concerning access of third states may take into account the economy of the coastal state and other national interests³²³. Moreover, the dispute settlement system established by the LOS Convention precludes effective review of the coastal state's decision on these questions³²⁴. Consequently, the LOS Convention, essentially gives the coastal state very wide discretion to determine whether or not to allow foreign states to fish in its EEZ³²⁵.

There is a big difference in the way in which the LOS Convention provisions on foreign access to the surplus are treated in national EEZ or EFZ legislation. Some of this legislation contains provisions that are almost similar to those included in the LOS Convention. Examples of them can be found in the legislation of Cape Verde, Cuba, Portugal, Sao Tome and Principe, New Zealand and the laws of those states that followed the New Zealand pattern, namely Cook Islands, Fiji, Niue and Tonga³²⁶. The Territorial Sea and Exclusive Economic Zone Act of New Zealand, for instance, requires the Minister of Fisheries to determine the TAC for every fishery in the EEZ and to determine the harvesting capacity of the national fleet, and goes on to specify that the remaining portion constitutes the allowable catch for foreign fishermen³²⁷. It also empowers the Minister to apportion the allowable catch for foreign fishing craft among foreign countries and sets out a number of criteria which the Minister may take into consideration in making such apportionment³²⁸. These criteria, on the whole, include support for the interests of states that have habitually fished within the zone or helped in research, identification of stocks, or cooperated in the conservation and management of resources and the enforcement of New Zealand law relating to such resources³²⁹. The list of criteria is expressly made non-exhaustive. Very similar provisions are included in the fisheries legislation of the Federated States of Micronesia, the Marshall Islands and Palau³³⁰.

On the other hand, a significant number of claims provide for foreign access to

fisheries in the EFZ or EEZ under national licences and permits but no mention is made of foreign right to fish for any surplus. These claims include among others those of Barbados, Grenada, Guinea Bissau, Mauritania, Norway, Spain, Togo and Western Samoa³³¹. Such a situation has led certain authors to question whether access provided by this legislation meant access to surplus or access in general³³². However, in the author's opinion such uncertainty can easily be excluded once one delves deeper into the practice of these states. The attitude of this legislation may reasonably be interpreted as meaning access to the surplus of fish as provided for in the LOS Convention. This is because, first, a number of these laws have expressly adopted the obligation of optimum use of the living resources found in the established zone³³³; secondly, a large number of bilateral fisheries agreements concluded subsequently by the states in question have contained in their preamble a direct reference to the work of UNCLOS III or a specific reference to the provisions of Article 62 of the LOS Convention. These fisheries agreements include, amongst many others, the agreements concluded in the very early eighties by Guinea Bissau and Guinea with the EEC³³⁴; thirdly, a number of these agreements have referred either to the concept of surplus³³⁵ or to that of optimum use of the fishery of the zone. The Spanish/Angola Agreement of 1980 and the 1982 Fishery Agreement between Mauritania and Spain, for instance, have both referred to the rational management and full utilization of the living resources in their respective EEZs as well as to optimum exploitation of the biological resources found therein³³⁶.

Moreover, in several other cases national legislation on EEZs have made no mention at all to foreign access to EEZ fisheries. This is, for instance, the case of the national legislation of Bangladesh, Burma, Colombia, Comoros, Dominican Republic, Iceland, India, Indonesia, Malaysia, Nigeria and Thailand³³⁷. However, this does not seem to imply that the states in question reject access of foreign fishermen to their respective EEZs. This is because, first, none of these states has explicitly denied foreign

access to the proclaimed zone for fishery purposes³³⁸; secondly, several fisheries or cooperation agreements to which many of these states are parties show that foreign access to fisheries resources that are found in the maritime zones under their jurisdiction is expressly recognized³³⁹.

On the basis of the above discussion, it can be concluded that most of coastal states that have established EFZs or EEZs allow access for foreign fishermen to the living resources found in their proclaimed zones. Thus, the most important remaining issue is what is the specific regime under which foreign access takes place? This question is dealt with hereunder.

2. 1. Criteria of Access

Article 62 (3) of the LOS Conventin states that the coastal state would take into account when providing access to foreign fishing vessels "all relevant factors". The same provision goes on to enumerate a number of factors that are meant to be illustrative. With the exception of the first one which relates to the significance of the EEZs living resources to the economy of the coastal state concerned and its other national interests, all other factors provide guidelines for selecting the states to be allowed access. These factors are considered hereunder in turn in the light of existing state practice.

2. 1. 1. Reference to the Provisions of Article 69 and 70 (LL/GDSs)

At the national level, only the legislation of two states has explicitly referred to the participation of LL/GDSs in the exploitation of the living resources of the asserted zone. The legislations in question are the Moroccan Law No. 1 181-179 and Togo's Ordinance N^o. 24/1977³⁴⁰. For instance, Article 4 of the Togolese Ordinance No. 24 of 1977 provides that "the Togolese state engages itself to allow neighbouring states in the hinterland to participate in the exploration of biological resources in the context of bilateral

and regional agreements". In a similar manner, the Moroccan Law No. 1-81-179 states that, "in particular, in consideration of African solidarity, Morocco will uphold the principle of privileged cooperation concerning biological resources with land-locked neighbouring countries under terms and conditions to be established by bilateral, regional, or subregional agreements"³⁴¹.

The wording of the above provisions is in line with the phrasing of the 1974 Declaration of the Organization of African Unity on the Issues of the Law of the Sea³⁴². This conformity may be explained by the fact that African coastal states had from the start of the work of UNCLOS III shown their sympathy to the problems of LL/GDSs and had expressed their readiness to give more concessions to these states³⁴³.

There is also certain conformity between the Moroccan and Togolese legislation and the texts of UNCLOS III. This is apparent in Article 62 of the LOS Convention and the previous corresponding provisions of the ISNT and RSNT. The two provisions and Article 62 (2) of the LOS Convention characterize the concession of fishing in the EEZ of a neighbouring country as a concession to participate, without describing this participation as a right. The modalities of such participation are to be agreed upon by the coastal state and the LL/GDSs concerned. Thus, no automatic access is recognized, but only a duty to negotiate agreement subject to the terms and conditions of the coastal state.

The difference between the Moroccan and Togolese provisions is very slight and almost insignificant. Both provisions precondition the participation of LL/GDSs in the utilization of the living resources upon a prior conclusion of bilateral or regional agreements. However, Togo appears to make it clear that there is a duty upon itself to grant LL/GDSs access to the living resources of its EEZ. Morocco, on the other hand, merely adheres to the principle of 'privileged cooperation'.

As has been indicated, all the other national legislation contains no specific provision on access of LL/GDSs to the EEZ living resources, and includes general

principles regarding foreign fishing, leaving the task of determining detailed rules to the administrators. For instance, the formulation that foreign fishing is to be exercised in accordance with bilateral or regional agreement has been enshrined in several claims.

Indeed, certain coastal states have translated the abovementioned formulation into somewhat concrete propositions. Among those states are New Zealand and the United States of America. The legislation of these two states has made allusion to some considerations, such as whether foreign fishermen have habitually fished in the waters encompassed by the EEZ, the pattern of cooperation of foreign fishermen in fishery research and the conservation and management of fish in that area³⁴⁴, without making any reference to LL/GDSs. Thus, comparing what is provided for in this legislation with the provision of Article 62 (3) of LOS Convention, one can only say that they are far apart. Not only did the legislation ignore altogether the participation of LL/GDSs in the utilization of the living resources of their EEZs, but, more importantly, there seems to be an implied rejection of access to the fisheries resources by LL/GDSs. This is clear from the above enumeration which omits any reference to LL/GDSs. It is worth noting, at this stage, that most of LL/GDSs are developing states³⁴⁵ having no marine fishing industry. It follows that any access which is restricted to states that have traditionally exercised fishing in the EEZ is an implied refusal of LL/GDSs participation in the use of the living resources of the zone. The reason is that LL/GDSs lack a marine fishing industry and, if a few of them possess such industry, they must have acquired it recently; and consequently they might have not been fishing in those areas for a long time as the word 'traditionally' seems to convey.

In practice, fishing in foreign EEZs has come to be governed under the terms of a growing number of agreements and other arrangements³⁴⁶. The network of those access agreements is complex and multiform with the result that identification of patterns or trends is not an easy task³⁴⁷. Four types of arrangements seem to predominate. These are

bilateral agreements, joint venture agreements³⁴⁸, charter arrangements³⁴⁹ and contracts for over-the-side sales³⁵⁰. Our focus, however, is put upon bilateral fishery agreements and joint venture agreements. For the coastal state, they serve as instruments for regulating and securing a broad range of benefits from granting access. For the foreign fishing states, they operate as a framework defining the concessions given regarding the 200 miles zone and, increasingly, as a technique to secure access in conditions of intensified competition.

With regard to Article 69 and 70 of the LOS Convention dealing with the rights of LL and GDSs to participate on an equitable basis in the surplus of the living resources of the EEZs of foreign coastal states, as in the case of national legislation, treaty practice has not been influenced by those provisions. In this context, an analysis covering more than one hundred bilateral fishing agreements was done in 1982 by Carroz and Savini in which the two authors have concluded that "none of the bilateral agreements concluded so far make an express reference to the right of these two categories of states"³⁵¹. Moreover, in a subsequent study related to fishery agreements concluded by the African coastal states located on the Atlantic Ocean, the same two authors reached a similar conclusion. In this connection, they have correctly said :

"Aucun des accords bilatereaux conclus jusqu'ici dans la region... ne se refere expressement au droit de ces deux types d'Etats ou ne confere des droits de pêche à des Etats sans littoral"³⁵².

However, since 1984 reference to Article 69 and 70 of the LOS Convention has began to emerge in treaty practice and positions of principle. In 1984 the seven states members of the Economic Community of West African States (ECOWAS) (Benin, Burkina Faso, Ivory Coast, Mali, Mauritania, Niger and Senegal) decided to create a Higher Fishery Science Institute for the purpose of training highly qualified specialists from the region. They discussed also the possiblility of setting up a joint fishing company with financial support from the African Development Bank³⁵³.

Needless to say, the setting up of such joint fishing venture would give a good opportunity to the three LLSs of the Community namely, Burkina Faso, Mali and Niger, to participate in the exploitation of the living resources in the EEZs of coastal states in the subregion.

Moreover, in 1987 Algeria and Mauritania concluded an Agreement relating to Cooperation in Fishing Matters whose preamble refers explicitly to the LOS Convention as well as to Article 70 dealing with the right of GDSs to participate in the exploitation of the EEZ's living resources³⁵⁴.

In addition, Bolivia, a signatory to the LOS Convention, signed with Peru on 24 January 1992 an agreement under which Peru grants to Bolivia the free use of its port facilities. The agreement includes also the possibility for Bolivia to enter into joint ventures with Peruvian companies to engage in fishing activities³⁵⁵. Such an agreement represents the first implementation of Article 69 of the LOS Convention granting fishing rights to a land locked state of the same region.

Nonetheless, like legislative practice, treaty practice referring to the provisions contained in Article 69 and 70 remains very scant.

2.1.2. States Whose Fleets Habitually Fished in the Waters Now Encompassed by the EEZ

Article 62 (3) has adopted "the need to minimize economic dislocation in states whose nationals have habitually fished in the zone" as one of the relevant factors that the coastal state shall take into account when giving access to the surplus of fish of its EEZ. This factor refers to states whose fishing fleets have, in the past, engaged in regular fishing activities in areas, previously high seas but now encompassed in the EEZ. It is the last mentioned factor in a non-exhaustive list of factors to be considered when giving access to the surplus. Thus, if the order of those factors is given legal weight, as has been

suggested by certain authors³⁵⁶, the factor of economic dislocation in states whose nationals have habitually fished in the zone together with that of states which have made substantial efforts in research and identification of stocks should have the least weight among those enumerated. However, as already suggested in chapter 3³⁵⁷, the coastal state's choice is ultimately dependent on the terms and conditions that it finds satisfactory, and this may mean that a state in this last category will be granted preference. If any order of priority is suggested by the provision contained in paragraph 3 of Article 62, it seems that it is undermined by the discretionary power given to the coastal state to establish the terms and conditions of access which satisfy it.

Thus, it seems that, under the above provision, the coastal state is only obliged to take this factor into consideration together with all other relevant factors. Moreover, it has to be taken into consideration only in so far as to minimize the economic dislocation of the state whose nationals have habitually fished in the waters now coming under the coastal state's jurisdiction. Therefore, such nationals are not recognized as having an automatic access to a part of the allowable catch reserved to third states.

Legislative practice concerning the criteria of access to the surplus of the EEZ's living resources displays considerable variety. A small number of national legislation referred to traditional fishing rights as a factor among others which is to be taken into account in giving access to the surplus. These states include, among others, Fiji, New Zealand, Papua New Guinea, Spain and the USA³⁵⁸. The national legislation of New Zealand, Papua New Guinea, and Fiji, for instance, has adopted very similar provisions. Each one of them assumes control over all fishing resources within the 200 miles EEZ and authorizes the Minister responsible for the administration of the Act to grant licences on a wide variety of terms and conditions, including payment of fees³⁵⁹. Moreover, all of them have specified the criteria to be applied in giving access to foreign fishing vessels. While all do refer in the criteria for granting access to states that have habitually fished in the

area³⁶⁰, none of them has made any reference to LL or GDSs. However, as one author has said, non-reference to LL and GDSs in the last three laws is possibly due to that the participation of LL and GDSs is postulated on a regional basis³⁶¹.

The Spanish Law No. 15/1978 provides that "fishing in the economic zone shall be reserved for Spanish nationals, and subject to agreements... to nationals of those countries whose fishing vessels have fished in the zone"³⁶². This provision omitted any reference to all the other factors cited in Article 62 of the LOS Convention. However, it seems that it reflects faithfully Spain's understanding of Articles 62 (3), 69 and 70 which give a top priority to states that have habitually fished in the EEZ over LL and GDSs which seek entrance to the zone³⁶³.

The United States legislation includes interesting details with regard to the criteria of access. Section 201 (e) of the 1976 Fishery Conservation and Management Act³⁶⁴ provides that the Secretary of State, shall determine the allocation among foreign nations of the total allowable level of foreign fishing which is permitted with respect to any fishery subject to the exclusive fishery management authority of the United States. In making any such determination, the Secretary of State and the Secretary shall consider, first, whether and to what extent foreign nationals have traditionally engaged in such fishery; secondly, whether such nations have cooperated with the United States in, and made substantial contributions to, fishery research and the identification of fishery resources and; thirdly, whether such nations have cooperated with the United States in enforcement and with respect to the conservation and management of fishery resources. Thus, while the United States legislation, like the LOS Convention, provides for an illustrative list of factors, it gives a top priority to traditional fishing rights. This approach of the United States is not immediately clear. It is probably due to the United States position towards the law of fisheries at that time. By 1976, the United States was still an opponent to the EEZ concept. The issuance of the 1976 Act was a clear indication of its support of the traditional law of

fisheries as reflected in the 1958 Convention and the 1974 Fisheries Jurisdiction judgement.

The 1980 amendment to the FCMA formula mentions traditional fishing as one of the factors to be taken into account in giving access to the surplus³⁶⁵. But allocation is made primarily on the basis of cooperative trade policies and a reciprocity scheme³⁶⁶.

With the exception of the above claims, none of the other existing national legislation establishing EFZs or EEZs made any reference to the notion of traditional fishing rights. All national legislation enacted by African and Latin American States have adhered to this pattern. A plausible explanation for such a pattern seems to be that a significant number of these states have attained their independence recently. Therefore, any allusion to traditional fishing rights would mean an open invitation to developing states to continue plundering what is left of the living resources of the sea adjacent to their coasts.

As far as bilateral fishery agreements are concerned, no clear picture of conduct is apparent. The big majority of bilateral agreements concluded between developed states have made reference to traditional fishing rights³⁶⁷. For instance, the preamble of Japan/South Africa Fishery Agreement of 6 December 1977 states that "considering also the desire of the Government of Japan that nationals and fishing vessels of Japan continue to pursue their traditional interests in the development and utilization of fishery resources off the coast of the Republic of South Africa"³⁶⁸. Similarly, the framework agreements entered into by the USA with EEC, Norway, Portugal and the USSR have all stipulated that "in determining the portion of the surplus that may be available to vessels of the country, the Government of the United States will decide on the basis of the factors identified in the United States law, including whether and to what extent the fishing vessels of such nations have traditionally engaged in fishing in such fishery"³⁶⁹. Moreover, almost all of the bilateral agreements concluded by Spain³⁷⁰ and the EEC³⁷¹

contain a preambular reference to this interest.

On the other hand, generally, most of the bilateral fishery agreements granting access to fisheries in waters under the jurisdiction of developing states made no mention of traditional fishing and of the need for reducing economic dislocation. However, exceptional cases are to be found, especially in the bilateral agreements concluded between the EEC and some developing states. These agreements include, among others, the Guinea Bissau/EEC Fisheries Agreement of April 26, 1981, the EEC/Senegal Agreement of January 21, 1982 amending the Agreement on Fishing off the Coast of Senegal signed on 15 June 1979, and the Equatorial Guinea/EEC Fisheries Agreement of 1984. All of them contain the routine EEC clause which states that "taking into account the fact that vessels flying the flags of Member States of the Community habitually engaged in fishing activities in that zone"³⁷².

Finally, before leaving this point, it is worth recalling that the concept of traditional fishing rights was sufficiently elucidated by the ICJ in the 1974 Fisheries Jurisdiction Cases³⁷³. There, the Court observed that the traditional rights of the applicant (the UK) should be accommodated with the preferential rights of Iceland. Such an accommodation could not be based, however, on a phasing out of the fishing rights of the United Kingdom. The Court then went on saying that "due recognition must be given to the rights of both parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of Iceland. Neither rights is an absolute one"³⁷⁴. The Court, thus, placed the British traditional rights on the same level as the Icelandic rights.

However, traditional fishing activities in areas previously high seas, but now encompassed by the 200 miles EFZ or EEZ, do not have the same position under both the LOS Convention and in state practice. As already explained, traditional fishing rights constitute, under the terms of the LOS Convention, only one of the numerous criteria that a coastal state may take into consideration in giving access to the living resources falling

under its jurisdiction. Moreover, access of third states, including access of states whose fishing fleets have habitually fished in the area included in the zone, has been limited to the surplus whose determination rests within the coastal state's absolute discretion. Furthermore, there is no duty upon the coastal state to give a portion of what is left of the TAC to states whose fishing fleets have traditionally carried out fishing activities in the asserted 200 miles zone. On the contrary, it may exclude them altogether. If they were excluded, no remedy to redress the situation would be available to them. This is simply because the dispute settlement system established by the LOS Convention precludes effective review of the coastal state's decision³⁷⁵.

2. 1. 3. States which Cooperated in Research and Identification of Stocks

According to Article 62 (3), the other consideration to be taken into account by the coastal state in granting access is that of states that have made substantial efforts in research and identification of stocks found in its EEZ. Like the preceding criteria, states that have made substantial efforts in research and identification of stocks are, at least as far as the underdeveloped states are concerned, also distant-water fishing states³⁷⁶.

This criterion has been reflected in the Territorial Sea and Exclusive Economic Zone Act of 1977 of New Zealand. The Act in question provides that in making an apportionment of the surplus the Minister may take into account, among other criteria, "whether such countries have co-operated with New Zealand in fisheries research and in the identification of fish stocks within the zone"³⁷⁷. The United States FCMA 1976, Section 201 (e), as amended in 1980, includes a similar provision.

However, the big majority of national legislation establishing EFZs or EEZs do not refer to that criteria. Moreover, with the exception of a few bilateral fisheries agreements concluded by some DWFSs, namely Japan, the United States and the

USSR³⁷⁸, no other agreement contained any allusion to it.

2.1.4. The Requirements of Developing States in the Sub-Region or Region in Harvesting Part of the Surplus

This criteria is the third item mentioned in the illustrative list of factors enshrined in Article 62 (3) of the LOS Convention.

Reference to this criteria in national legislation is very scant. Only two African coastal states, namely Morocco and Togo, appear to have expressly mentioned this criterion. Thus, Article 13 of the Moroccan Decree No. 1/81/79³⁷⁹ provides that, "in consideration of African solidarity, Morocco will uphold the principle of privileged cooperation concerning biological resources with landlocked neighbouring countries under terms and conditions to be established by bilateral, regional or subregional agreements". Similarly, the Togolese Ordinance No. 24 of 1977 states that, "in the spirit of intra-African solidarity, the Togolese State... allow neighbouring states in the hinterland to participate in the exploitation of biological resources in the context of bilateral and regional agreements"³⁸⁰. Thus, these two states remained faithful to the 1974 Declaration of the Organization of African Unity on the Issues of the Law of the Sea³⁸¹ to which they were parties.

Apart from the above legislation, all the other EFZ or EEZ claims kept silent on this criterion. Furthermore, only very few bilateral fisheries agreements appear to take into account the criterion relating to the requirements of developing states in the sub-region or region. These agreements include, among others, the Shrimp Fishing Agreements concluded in 1975 by Brazil with Barbados, Trinidad, Tobago and Suriname³⁸².

2. 2. Conditions Governing Access

Article 62 (4) of the LOS Convention states that foreign fishermen are to comply

with conservation measures and "other terms and conditions established in the regulations of the coastal state". These may include licencing and payment of fees (in the case of developing coastal states they may consist of 'compensation in the field of financing, equipment and technology relating to the fishing industry'), management measures, including regulation of catch effort, and conditions relating to surveillance, the conduct of specified research programs, the landing of catch in the coastal state, joint venture and other cooperative arrangements, the training of personnel³⁸³. The list of examples is illustrative.

An examination of national claims made by coastal states with regard to EFZs or EEZs indicates that the conditions attached to foreign fishing are, generally, in conformity with the provisions enshrined in Article 62 of the LOS Convention. In the majority of cases, these conditions include, but are not restricted to, the following : licensing and payment of fees; conservation and management measures; reporting requirements and observers; joint ventures; and research and fishery development assistance.

2. 2. 1. Licensing and Payment of Fees

The participation of foreigners in the sharing of the 200 miles living resources of coastal states is not allowed automatically once a surplus of the TAC is declared to exist by a coastal state. In fact, most of those states which have established EFZs or EEZs make such participation dependent upon the conclusion of an agreement and the issuance of a fishing licence by the competent authorities of the coastal state in whose waters fishing would take place³⁸⁴. Moreover, the main condition which most fishery agreements impose upon the exercise of foreign fishing within the EFZ or EEZ is the possession of a valid licence by foreign fishing vessels. In other words, even in the case of the presence of a fishery agreement between a coastal state and a foreign state, nationals of the latter must, as a preliminary condition, obtain a fishing licence whose obtainment depends on a prior

satisfaction of the conditions attaching to it. Licence conditions are in some cases included in the legislation itself³⁸⁵, while in certain other cases are left to be set later in regulations to be made by administrators³⁸⁶.

Generally speaking, obtainment of a fishing licence is subject to payment of fees. In establishing licence fees and other payments for fishing rights, coastal states are faced with a basic choice between fees based on the actual catch and lump sum payments³⁸⁷. Royalty payments may present a more accurate, in a sense more equitable, method of revenue sharing between coastal states and foreign fishing vessels, and they avoid the danger of encouraging over-intensive fishing methods. They also appear to place least risks on foreign vessels, which pay only for the fish actually fished. On the other hand, lump sum payments seem to place the least administrative burden on the coastal state.

In actual practice, licence fees to be paid are specified in a fishery agreement or the latter merely refer to the relevant national legislation of the coastal state³⁸⁸. Various methods of computing the licence fees are applied, including those based on the tonnage of fishing vessels³⁸⁹, a fixed sum per vessel³⁹⁰ and a total lump-sum fee covering all fishing operations³⁹¹.

2. 2. 2. Conservation and Management Measures

Most, if not all, coastal states which licence foreign fishing operations provide, at least in theory, for obedience of management measures as a condition of licences³⁹². These measures are of two types. The first type includes general management measures such as fishing seasons, minimum mesh or size and age of species that may be caught. These are normally contained in the basic fisheries law and regulations, and are usually incorporated by reference as conditions of the foreign fishing vessel licence³⁹³. The second category contains special measures that are based partly on conservation principles, but more commonly on national policies of protecting local and, in particular, local

artisanal fisheries from competition with foreign fleets. For instance, the Solomon Islands Foreign Fishing Vessels Regulations of 1981 provides that foreign fishing vessels shall not fish within the waters contained within the outermost limits of the territorial sea or other areas endorsed on the permission³⁹⁴.

2. 2. 3. Reporting Requirement and Observers

A number of national legislation relating to EFZs or EEZs make reference to reporting requirement and to the placing of observers on board foreign fishing vessels allowed to fish in the zone³⁹⁵. The points at which reporting is required, as specified in this legislation, tend to be entry into the zone, start of fishing operations, cessation of operations and the departure from the zone³⁹⁶. Moreover, in order to assist the ongoing process of stock assessment, several states require periodical statistics and other data on their catches and efforts. This is in line with Article 62 (4) (e) of the LOS Convention.

In addition, a number of states make provision for observers to be placed on board foreign vessels, very often at the expense of the foreign vessel, and to be given food, accommodation as well as the necessary access to vessel's facilities and equipment such as radio communications equipment, to achieve their missions³⁹⁷. This is also in accord with Article 62 (4) (g) of the LOS Convention. This system of observers appears to be most productive where large foreign fishing vessels are involved.

2. 2. 4. Joint Ventures

With the exception of the Gambian Fisheries Act No. 17 of 1977³⁹⁸, all other national legislation relating to EFZs or EEZs do not refer to any requirement for foreign fishing vessels' owners to operate in joint ventures with local interests. A number of coastal states, however, have recently started encouraging joint ventures as envisaged in Article 62 (4) (i) of the LOS Convention in bilateral agreements. Most of those agreements

tend to be couched in general terms, calling for facilitation of cooperation through joint ventures and other appropriate means. Useful instances of those agreements are to be found in the 1985 agreement between EEC and Seychelles³⁹⁹ and the 1992 agreement between Bolivia and Peru⁴⁰⁰. For example, the former stipulates that the EEC was to participate in projects connected with the development of fisheries in the Seychelles. However, some of those agreements are more specific, in the sense that they refer to such joint ventures for catching, buying processing and marketing sea fishery products⁴⁰¹.

2.2.5. Cooperation in Research and Fishery Development Assistance

Under Article 62 (4) (j), coastal states are also permitted to request the training of personnel and the transfer of fisheries technology, including improvement of their capacity to undertake fisheries research. This requirements is found in a number of national legislation. The Canadian legislation, for instance, makes it a condition of any licence issued in respect of a foreign fishing vessel that the master of the vessel should comply with instructions given to him by authorized officials of the flag state in respect of any programme of sampling, observation or research requested of the flag state by the Minister⁴⁰². An obligation to conduct specified programmes of fisheries research is also one of the possible conditions of foreign fishing vessel licences provided for under the national legislation of Fiji and New Zealand⁴⁰³.

This requirement is also found in bilateral fishery agreements. In this connection, several agreements concluded, especially between developed and developing states, include provisions to the effect that the developed state will provide the research vessel and equipment, and bear the cost of research activities. These agreements include, among others, the agreement concluded by the USSR with Gambia in 1975, Guinea Bissau 1975, Sierra Leone 1976, Angola 1977, Mauritania 1978, Morocco 1978 and Seychelles 1978⁴⁰⁴.

Moreover, in certain other cases, a developed state agrees to give fellowships and to accept trainees in its scientific institutions⁴⁰⁵.

2. 2. 6. Other Conditions

A number of states impose some other conditions not mentioned above. In this context, the Bahamas legislation, for example, stipulates that licence allocations can only be made to foreign states under a bilateral agreement that specifies, *inter alia*, that access to the markets of that foreign state shall be granted for the fishery resources and fishery products harvested by the fishermen of the Bahamas in the EEZ⁴⁰⁶. Some other states, such as Fiji, New Zealand, Tonga and Western Samoa, merely indicate that requirements concerning local landings and processing may be a condition of the fishing licence⁴⁰⁷. Whether local landings are to be encouraged or not appears to depend on the state of the local fishing effort and market, and the need of the processing industry sector. In several cases, a glut of landings would merely depress the local market prices to the detriment of local fishermen. This explains the prohibition imposed by certain coastal states on local landing by foreign vessels.

3. Surveillance and Enforcement

As has been discussed earlier in chapter 2, Article 73 of the LOS Convention empowers the coastal state to take enforcement measures in its EEZ, including boarding, inspection, arrest and judicial proceedings as may be necessary to ensure compliance with its laws and regulations. Arrested vessels and their crews, however, are to be released promptly on posting of reasonable bond or other security. Moreover, penalties do not include imprisonment in the absence of agreement to the contrary between the states concerned, or any other form of corporal punishment. Furthermore, in cases where vessels are arrested together with their crews or detained, the coastal state is put under a

duty to notify the flag state of the action taken and penalties imposed.

Generally speaking, similar powers of stopping, boarding, inspection, seizure and arrest in the event of suspected contraventions are contained in almost every single EFZ or EEZ claim, as well as in many agreements. For instance, Trinidad and Tobago's Act No. 24 of 1986⁴⁰⁸ lists the powers to be taken by the competent authorities in relation to any foreign fishing vessels within the country's fisheries limits as follows :

- (a) Stop and board, inspect, seize and detain a foreign fishing craft;
- (b) Seize any fish and equipment found on board the foreign fishing craft;
- (c) Arrest the master and crew of any foreign fishing craft... and may institute such criminal proceedings against them, as may be necessary to ensure compliance with the Act and the Regulations⁴⁰⁹.

These powers are to be enforced by members of the Trinidad and Tobago coast guard; members of the police service; fisheries officers; customs officers, as well as by any other person authorized in writing by the Minister to whom responsibility for fisheries is assigned⁴¹⁰. Enforcement of these powers and similar ones in national legislation of some other coastal states is assigned to the fisheries authorities and/or members of the armed forces⁴¹¹.

National legislation of a few states have set out procedures for reporting fisheries offences and for arresting offending foreign vessels in detail. A good instance of them is to be found in the Senegalese Maritime Fishing Law No. 76-89⁴¹² which provides for three different procedures for reporting offences and arresting foreign vessels, depending on the conditions and reaction of the offending vessels. The Senegalese procedures also authorize pursuit of offenders over jurisdictional boundaries provided that such pursuit and incursions are permitted under agreements with neighbouring countries⁴¹³. This raises the issue of whether or not coastal states are allowed to undertake hot pursuit of foreign

vessels violating their EFZs or EEZs regulations into another foreign EFZ or EEZ. As mentioned earlier, state practice relevant to such situations is extremely scant. In United States v. F/V Kaiyo Maru, 1974⁴¹⁴ a Japanese fishing vessel, the Kaiyo Maru, violated the fishery zone of the United States and was pursued by the United States Coast Guard into the high seas and arrested. There, a United States court held that Article 24 of the Geneva Convention on the Territorial Sea and Contiguous Zone, to which the United States was a party, is permissive, and the United States could establish a contiguous zone for fishery purposes and that hot pursuit could start therefrom.

The practice of the United Kingdom reflected in some of its policy statements⁴¹⁵ seems to be that the United Kingdom would undertake hot pursuit of vessels violating its EFZ regulations into the high seas but not into a foreign fishing zone. It is not clear whether the United Kingdom's policy has been influenced by the fact that Britain relies on its navy for its enforcement or whether foreign EFZs or EEZs would not be entered even if a civilian enforcement unit were in operation. However, there appears to be no legal obstacle to hot pursuit of an offending vessel into a foreign EEZ, either in customary law or under the LOS Convention⁴¹⁶.

As regards penalties for violating fisheries laws and regulations, the majority, if not all, EFZ or EEZ claims provide for fines⁴¹⁷. This is also the practice reflected in a number of agreements⁴¹⁸. However, the level of fines varies considerably from one state to another and according to the seriousness of the offence⁴¹⁹. In this connection, the Soviet national Law provides that fines for violations of fishing regulations, as well as for illegal fishing vary with the seriousness of the violations⁴²⁰. Fines for damaging certain species, such as walrus, have been specified in terms of rubles per animal, and fines for illegal trade in of certain fish and fish products, such as caviar, have been based on their market prices⁴²¹.

In addition to fines, many if not most claims, empower the courts to order

forfeiture of fishing gear and boats⁴²². This practice is reflected also in several bilateral agreements⁴²³. In several cases, forfeiture of catch and sometimes gear is automatic, even on the first offence⁴²⁴.

Despite the fact that imprisonment or any other form of corporal punishment is excluded by all the texts of UNCLOS III, it has been provided as a possible penalty for violations of fisheries regulations and illegal unlicensed fishing in a number of national claims⁴²⁵. The national legislation of the Bahamas, for instance, not only envisages imprisonment penalties for fishing violations, but also provides for summary punishment⁴²⁶. In the case of Cape Verde, the usual penalty would be a financial penalty, while imprisonment would be imposed only in cases of repeated violations⁴²⁷. Such a claim exceeds the powers given to coastal states in this field under the LOS Convention. However, the few states that had earlier included imprisonment in their national legislation appear to be moving gradually towards bringing their conduct on this issue into harmony with Article 73 paragraph 3 of the LOS Convention. This is evidenced by the fact that a number of those states have recently either eliminated imprisonment penalties in subsequent legislation or excluded such penalties in their actual practice. For instance, Australia eliminated imprisonment penalties by means of its 1978 amendments⁴²⁸ to the 1975 Fisheries Act⁴²⁹, while the bilateral agreement concluded by the United States of America with Japan in 1977 stipulates that in the case of violation of fishery regulations the representative of the US Government will recommend to the court that the penalty not include imprisonment or any other form of corporal punishment⁴³⁰.

Like the provisions of the LOS Convention, a significant number of EFZ and EEZ claims now provide for the release of seized fishing vessels and their crews on the posting of a satisfactory bond or other form of security⁴³¹. The bond is in most cases held as security for the full payment of any fine or any other penalty ordered by the court.

Effective surveillance and enforcement depends on the availability of the physical

and financial means. Thus, in a number of cases the burden of ensuring compliance with the laws and regulations of the coastal state is placed on the foreign flag state. The United States legislation, for instance, provides that entrance of any foreign fishing vessel into the United States fishery conservation zone for fishery purposes depends on the conclusion of an agreement under which the foreign flag state must take on binding commitment, both on its own behalf and on behalf of its vessels, to comply with the conditions applicable to foreign fishing operations⁴³². Similar provisions are included in the Bahamas legislation⁴³³. Some states also require that the flag state authorities should assume responsibility for compliance with certain aspects of coastal state controls, such as ensuring that proper reports are given on authorized fishing operations⁴³⁴.

Furthermore, foreign fishing vessels could escape punishment for offences committed due to lack of corroboration required under national law⁴³⁵. Most coastal states have circumvented such evidentiary problems by the use of rebuttable presumptions such as "all fish found on board a fishing vessel that has been discovered committing an offence in waters under the jurisdiction of the coastal state shall be presumed to have been caught in those waters during the commission of the offence"⁴³⁶. This would exempt a coastal state from proving the origins of the fish, a matter which would be difficult to prove after the catch, especially when harvested species are mingled with fish caught elsewhere.

4. State Practice on the Specific Regimes Contained in Articles 63 to 67 of the LOS Convention

As has been said earlier in chapter 2 in more details, Part V of the LOS Convention contains specific provisions dealing with certain particular species of fish, namely transboundary stocks, marine mammals, anadromous stocks, catadromous species, and highly migratory species. It is proposed to examine, hereunder, to what

extent these specific regimes have been reflected in state practice.

4. 1. Resources Located in More than One Zone

Under Article 63 a coastal states is obliged to cooperate with other states which fish for the shared or straddling stocks associated with its EFZ or EEZ. As far as shared stocks are concerned, the stated objective is to "seek to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks", without prejudice to the other provisions contained in Part V concerning fisheries. This means that cooperation does not infringe on the sovereign rights of the cooperating states.

Moreover, the form that cooperation should take according to Article 63 (1) is flexible; it may either be direct or through appropriate regional or subregional organizations. If consultations or efforts to achieve cooperation within these frameworks fail, coastal states would be free to exercise their sovereign rights unilaterally.

The Gambian Fisheries Act of 1977⁴³⁷, the United States FMCA of 1976⁴³⁸ and Venezuela's 1978 EEZ Act⁴³⁹ adopted an approach similar to that included in the above provision. For instance, the latter provides that the "Republic shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and enforce the conservation and development of the same stock or stocks of associated species occurring within the EEZ of the Republic and the EEZs of neighbouring states"⁴⁴⁰. This is also a practice that can be found in several fisheries agreements. Instances of those agreements are to be found in Canada/European Community Agreement on Fisheries of 30 December 1981⁴⁴¹, and the Convention Relating to Regional Development of Fisheries in the Gulf of Guinea concluded in June 21, 1984 between Congo, Gabon, Equatorial Guinea, Sao Tome and Principe and Zaire⁴⁴². For example, Article 4 of the former agreement states in part that "the two parties shall cooperate, either bilaterally or through appropriate international organizations, to

ensure the proper management and conservation of stocks occurring within the fishery zones of both parties and stocks of associated species".

Moreover, a conduct in line with the provision of Article 63 (1) of the LOS Convention is also found in the practice of the Fisheries Commission of the North West Atlantic Fisheries Organization (NAFO)⁴⁴³. In all these instances, cooperation has taken the form of agreeing on TAC for each stock, allocating this between the states concerned, and to some extent agreeing on other conservation measures. Unfortunately, the practice on this matter is still limited and it is thus not easy to gauge the positions of omitting states on the problem.

4. 2. Resources Occuring both Within the EEZ and the High Seas

The provision contained in Article 63 (2) deals with fish stocks that lie across the EEZ/high seas boundary line⁴⁴⁴ in a way similar to Article 63 (1). But, unlike the case of shared stocks, cooperation with a view to adopting the measures necessary for the conservation of the fish stocks concerned is required between coastal states and states fishing for such stocks in the high seas areas adjacent to the EEZ. Article 4 (1) of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas also contained this same obligation.

Moreover, the above provision envisages that conservation measures may be adopted directly or through existing appropriate subregional or regional organizations, or through appropriate organizations to be established for this purpose. Furthermore, it expressly states that the agreed conservation measures relate only to fishing on the high seas. Thus, if the search for agreement fails, the coastal state can exercise the rights given to it under Articles 56, 61 and 62 of the LOS Convention with respect to those fish species when they are found within its EEZ.

An examination of national claims made by coastal states with regard to EEZs

indicates that not even a single claim has made an express reference to the provision contained in Article 63 (2) of the LOS Convention concerning stocks which straddle the 200 miles zone and the high seas. Indeed, certain coastal states have recently indicated their desire to further extend their offshore claims to encompass 'El Mar Presencial' or the 'Presential Sea'.⁴⁴⁵

From the historical standpoint, the concept of the 'Presential Sea' was introduced for the first time by Chile in the 1991 amendments to its fisheries law. Geographically, the 'Presential Sea' area of interests for Chile has been defined as the high seas area beyond and adjacent to the EEZ, surrounded by the South American continent, Antarctica, and Easter Island, in a broad quadrangle of the South Pacific. A similar definition is contained in the Chilean fisheries law passed in 1991.⁴⁴⁶

The 1991 Chilean law provides that conservation measures may be enacted for fish stocks existing in the EEZ and in the high seas. When straddling stocks are fished in the high seas in violation of conservation measures, their landing in Chile may be prohibited. Similarly, when there is evidence that fisheries activities in the high seas are adversely affecting the resources of their exploitation by Chilean vessels in the EEZ, the landing of catches, the supplying of ships or the provision of other direct or indirect services in Chilean ports or other areas of the EEZ and the territorial sea may be prohibited.⁴⁴⁷

However, according to Article 86 of the LOS Convention, the asserted presential sea area constitutes a part of the high seas in which every state enjoys the freedom of fishing, subject, of course, to the duty to have due regard to the interests of other states, as well as to other duties imposed by international law.⁴⁴⁸ Moreover, where the same stock of species occurs within an EEZ and an adjacent area of the high seas frequented by foreign fishermen, the states concerned are, according to Article 63 (2) of the LOS Convention and Article 7 (a) of the 1995 United Nations Agreement for the

Implementation of the Provisions of the LOS Convention, placed under a duty to cooperate in enacting appropriate conservation and management measures. It follows that the presential sea claim referred to above is incompatible with current international law.

The straddling stocks problem has been one of the most contentious issues to emerge since the adoption of the LOS Convention⁴⁴⁹. Various cooperative initiatives relating to the conservation and management of these fish species in a way similar to that provided for in the LOS Convention have been undertaken by affected states. Instances of cooperative efforts, in this field, are to be found in the practice of the Fisheries Commission of the North West Atlantic Fisheries Organization⁴⁵⁰, the Latin American Organization for Fishery Development, which was established in 1982 by Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Peru, Guyana, Haiti, Honduras, Mexico, Nicaragua, and Panama⁴⁵¹, as well as in the 1991 Convention on Fisheries Cooperation among 22 African States Bordering the Atlantic Ocean⁴⁵².

4. 3. Marine Mammals

Article 65 of the LOS Convention authorizes coastal states or competent international organizations to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in the other EEZ fisheries provisions. It is, perhaps, worth recalling that this article does not apply to the conservation and exploitation of these fish species in the EEZ only but, pursuant to Article 120, it also applies to the conservation of marine mammals in the high seas. Thus, it envisages a single and uniform management regime to be applied both in the EEZ and the high seas.

Moreover, states are particularly urged to work through appropriate organizations for the conservation and management of whales and other cetaceans. But, Article 65, like most of the other articles of the LOS Convention, do not define the competent or appropriate international organization for which it envisages the power to prohibit or limit

the exploitation of marine mammals. However, it seems safe to say that the drafters had principally in mind the International Whaling Commission (IWC), by far the best known international organization dealing with the exploitation of marine mammals⁴⁵³.

At the national level, only three national claims contain specific provisions relating to conservation and management of marine mammals. These are the claims of Senegal, Guinea and the USA⁴⁵⁴. Nonetheless, a trend towards international regulation of marine mammals in a manner similar to that provided for in the LOS Convention seems to be emerging. This trend is particularly reflected in the practice of the IWC whose membership has increased lately to no less than 37 states⁴⁵⁵. This practice has taken the form of adopting regulatory measures such as regulating seasons and areas of fishing, TAC, and the age and size of the species that may be caught⁴⁵⁶.

4. 4. Anadromous Species

As has been said earlier in chapter 2, salmon is a well known example of an anadromous species. With respect to this species, the state of origin, viz. the state in whose rivers anadromous stocks spawn, has the primary interest in and responsibility for such stocks⁴⁵⁷. It may thus establish regulatory measures for fishing in waters landwards of the outer limits of its EEZ and, after consultations with all other states interested in harvesting these stocks, set a TAC for stocks originating in its rivers⁴⁵⁸. Furthermore, as a general rule, enforcement of regulations regarding anadromous species harvested beyond the EEZ requires an agreement between the coastal state and other states concerned. Exceptionally, the state of origin can enforce laws relating to salmon harvesting on the high seas against stateless vessels⁴⁵⁹.

Harvesting of anadromous species is allowed only in waters landwards of the outer limits of EEZs. There is, however, a certain exception for cases where the prohibition to fish on the high seas would "result in economic dislocation for a state other

than the state of origin"⁴⁶⁰. Furthermore, there is no requirement that a coastal state needs the consent of the state of origin before it harvests the species of its own EEZ.

A review of national EFZ or EEZ claims reveals that only a few national legislations have included specific provisions relating to anadromous species. Prominent among these legislations are the United States FMCA of 1976⁴⁶¹ and the Japanese Law No. 31/77 of 1977⁴⁶². The United States and Japan have both asserted, in their respective laws, exclusive management authority over anadromous species throughout their migratory range, even if beyond the 200 miles limit, with the exception of zones under the jurisdiction of other countries⁴⁶³. Thus, these two states claim more than what is allowed under the LOS Convention, which requires international cooperation in such matters. Some further evidence of the US claim of jurisdiction over anadromous species beyond the 200 miles limit is found in the 1988 Agreement with the USSR on cooperation in fishery matters⁴⁶⁴.

On the other hand, the big majority of EFZ or EEZ claims made up to now keep silent on the matter and do not extend the coastal state's jurisdiction beyond the 200 miles limit. It is probable that the restriction of their jurisdiction to a maximum limit of 200 miles implies that they consider the high seas regime to be applicable to anadromous species beyond the EEZ and that any enforcement of the coastal state's regulations beyond such a limit must be effected by agreement between the state in whose rivers these species spawn and other interested states.

However, treaty practice shows that there have been significant developments in recent years in cooperation between states with respect to the establishment of effective conservation and management measures as recognized by Article 66 of the LOS Convention. Both Canada and the United States manage their anadromous stocks on their west coasts in accordance with the provisions contained in Article 66. The two states have, however, established joint measures on a bilateral basis to facilitate management. In 1985,

acting in conformity with Article 66 (4), they concluded the Pacific Salmon Treaty⁴⁶⁵. The treaty is designed to deal with the interception by each state of salmon originating in the rivers of the other state. It establishes a bilateral commission with responsibility for conducting research on the state of the stocks and for developing and maintaining management plans for the stocks subject to its jurisdiction.

The problem of enforcement in the zone of each of the contracting states has been dealt with jointly by Canada and the United States, which have agreed upon measures to allow each state to prosecute its own nationals for illegally fishing in the other state's 200 miles zone.

Moreover, in the Northwestern Pacific, Japan and the USSR (now the Russian Federation) have concluded in 1985 an agreement on cooperation in fisheries, which refers specifically to the adoption of the LOS Convention⁴⁶⁶. Like the provision contained in Article 66 (3) (a), the agreement prohibited fisheries for anadromous stocks in the high seas except in cases where the prohibition would result in economic dislocation for the fishermen from the state other than the state of origin of such stocks.

In addition, on 11 February 1992, the four states concerned in the North Pacific area, i.e. Canada, Japan, the Russian Federation, and the United States of America signed the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean⁴⁶⁷. The Convention prohibits "directed fishing for anadromous fish", including the use of large-scale driftnets and, in effect, prohibits fishing for anadromous species in this area⁴⁶⁸.

4. 5. Catadromous Species

As has been seen earlier in chapter 2, the expression "catadromous species" refers to those species which spend part of their life cycle in fresh water rivers and lakes but spawn in the open sea⁴⁶⁹. The eel is a well-known instance of those species.

Under the LOS Convention, the states in whose waters these stocks spend the greater part of their life cycle have the primary interest in and responsibility for such stocks. Moreover, harvesting of these species may take place "only in waters landward of the outer limits" of EEZs. Thus, fishing for catadromous species on the high seas is categorically prohibited.

Where the fish migrate through the EEZ of another state, the coastal state and the state through whose waters these stocks migrate are, under Article 67 (3), required to cooperate in order to enact appropriate conservation and management measures by agreement.

Most EFZ or EEZ claims, if not all, do not make any specific reference to the LOS Convention's provisions on catadromous species. Furthermore, there is no clear evidence to suggest that any cooperative arrangements relating to these species exist. However, this phenomenon may be explained by the fact that, comparing these species with anadromous species, their commercial importance is limited either in terms of tonnage or value⁴⁷⁰.

4. 6. Highly Migratory Species

As has been said previously in chapter 2, due to their migratory character, HMSs are given special attention in Article 64 of the LOS Convention. This provision enjoins the coastal state and other states which fish for HMSs to cooperate directly or through international organizations to ensure conservation and optimum utilization of such species both inside and outside of the EEZ. A regional approach is specifically envisaged with an obligation incumbent on concerned states to establish an international organization where none exists⁴⁷¹. The same provision, however, goes on by stating that these species are subject to the entire regime of Part V⁴⁷². It follows that the obligation to cooperate does not displace the sovereign rights of the coastal state over HMSs in its EEZ and, should

measures of cooperation or prior consultation fail, the coastal state's unilateral action would be permissible⁴⁷³.

At the national level, a great number of EEZ or EFZ legislation provide simply that the coastal state's management authority in the EEZ embraces all living resources of that zone, without reflecting on Article 64 of the LOS Convention on HMSs⁴⁷⁴. There are also some other legislation which provide specifically for the national management of HMSs in the EEZ. For instance, New Zealand's Territorial Sea and Exclusive Economic Zone Act of 1977 provides that the Governor General may from time to time make regulations for the purpose of specifying particular types of HMSs of fish, as well as for regulating fishing for these species within the zone⁴⁷⁵. The national legislation of Cook Islands, Fiji, and Western Samoa have all included similar provisions. Thus, these states have remained faithful to their position they had taken at UNCLOS III on this matter⁴⁷⁶.

Moreover, some other coastal states have made declarations in this sense when signing the LOS Convention. This is the case of Costa Rica and Sao Tomé and Príncipe⁴⁷⁷. In this context the declaration of Costa Rica states that :

"The Government of Costa Rica declares that the provisions of Costa Rican Law under which foreign vessels must pay for licences to fish in its exclusive economic zone, shall apply also to fishing for highly migratory species, pursuant to the provisions of articles 62 and 64, paragraph 2, of the Convention".

This declaration reaffirms clearly the right of the Costa Rican state to regulate HMSs in its EEZ.

It is also interesting to note that the United States Proclamation of 10 March 1983⁴⁷⁸ asserted jurisdiction with respect to the living resources found in the United States EEZ as recognized under the LOS Convention, except for the express exclusion of

its jurisdiction over HMSs; it confirmed the United States policies concerning "marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction and require international agreement for effective management". Since that time, however, the United States position with respect to HMSs gradually began to change in light of the specific problems that have to be addressed in practice⁴⁷⁹. This was initially and indirectly done by means of the 1987 Treaty on Fisheries between a group of Pacific Island states and the United States⁴⁸⁰ under which United States vessels were granted licences to fish for tuna within the exclusive economic zones of those states; and next in a direct manner in 1991 when the United States amended its own legislation to include highly migratory tuna as species of fish under its jurisdiction throughout the EEZ. The change, as the aide memoire dated 33 May 1991 of the Permanent Mission of the United States to the United Nations provides, is to "make the United States position consistent with the overwhelming state practice subsequent to the 1982 United Nations Law of the Sea Convention, with regard to highly migratory species"⁴⁸¹.

In the case of HMSs, the coastal state and other states whose nationals fish in the region for such fish species are required under Article 64 (1) of the LOS Convention to cooperate directly or through an international organization in enacting appropriate conservation and management measures. The idea of cooperation between affected coastal states or between coastal states and other concerned states is almost completely absent from coastal states laws regulating the EEZ⁴⁸². Indeed, two pieces of recent legislation have even provided for national regulation of HMSs in the EEZ and beyond it. The 1991 Chilean fisheries law⁴⁸³, for example, allows for the enactment of conservation and management measures in relation to HMSs in the EEZ and high seas, with the requirement of prior consultation with the Ministry of Foreign Affairs. Penalties are also envisaged in this context. Similarly, Argentina's Act of 1991 does not make any reference to

cooperation, and asserts the right of the government to extend the application of relevant national legislation to the high seas adjacent to the Argentine EEZ⁴⁸⁴. Article 5 of the act states :

"National provisions concerning the conservation of resources shall apply beyond the two hundred (200) nautical mile zone in the case of migratory species or species which form part of the food chain of species of the exclusive economic zone of Argentina".

Thus, the Chilean and the Argentine claims concerning HMSs both go beyond the rights given to states by the LOS Convention. However, the existing inconsistency between the provisions of Article 64 of the LOS Convention and the 1991 Argentine Law appears to have lost importance as Argentina has since December 1, 1995, become party to the LOS Convention⁴⁸⁵, and, consequently, the provisions of the latter will prevail.

Despite the fact that the laws regulating the EEZ do not generally make reference to the duty of the coastal state and other concerned states to cooperate on a regional basis for ensuring conservation of HMSs, cooperative measures of one sort or another appear to be necessary⁴⁸⁶ and are being put into effect among states. Such cooperation has been undertaken particularly for tuna in the South Pacific, Atlantic and Indian Oceans. The Treaty on Fisheries signed on 2 April 1987, between the United States and Certain Pacific Island States⁴⁸⁷ provide one example of cooperation in this field. Its preamble starts by recognizing the sovereign rights of the coastal state over fishing resources of the EEZ, thus putting an end to the longstanding dispute between the United States and the South Pacific states. The treaty has established specific mechanisms involving the payment of licences, compliance with national legislations related to the EEZ, enforcement of the agreement, liability, observers and other matters⁴⁸⁸.

Moreover, on 21 July 1989, Ecuador, El Salvador, Mexico, Nicaragua and Peru concluded the Agreement Establishing the Eastern Pacific Tuna Fishing Organization⁴⁸⁹.

This agreement covers both the areas under national jurisdiction and the high seas and calls for the establishment of a total allowable catch for the areas as a whole. Licenses for fishing in the areas under national jurisdiction shall be granted by coastal states while those for fishing on the high seas shall be granted by the organization. Conservation measures can also be adopted by the Council of the Organization⁴⁹⁰. However, the agreement has not entered into force, mainly due to disagreement of distant water fishing states with the provisions giving coastal states preferential treatment in the regulatory area beyond 200 miles.

As far as the Indian Ocean is concerned, the second Ministerial Conference on Economic, Scientific and Technical Cooperation in Marine Affairs in the Indian Ocean, which was held in Arusha, United Republic of Tanzania in 1990, adopted on 7 September 1990 an Agreement on the Organization for Indian Ocean Marine Affairs Cooperation⁴⁹¹. One of the main objectives of the new established intergovernmental organization is the promotion of cooperation between East African states and other states of the Indian Ocean, bearing in mind the ocean regime embodied in the LOS Convention⁴⁹².

Moreover, cooperation particularly in fisheries matters has been pursued through the Indian Ocean Fishery Commission (IOFC), established by FAO. IOFC's detailed study on the conservation and management of Indian Ocean highly migratory tuna has resulted in the adoption in November 1993 of an agreement to establish the Indian Ocean Tuna Commission⁴⁹³. The new body to be set up would include the Indian Ocean states and other states harvesting tuna in the Indian Ocean and the adjacent seas.

B. The Specific Regimes Relating to Marine Research, Artificial Islands and Installations, and the Protection of the Marine Environment

As has been said earlier, the EEZ provides coastal states with sovereign rights to nonliving resources and certain other jurisdictional rights extending beyond those

associated with fishery zones. The latter rights relate to marine scientific research, which is stipulated in Part XIII of the LOS Convention, especially Articles 246-254; artificial islands; installations and structures, the full regime for which is set out in Article 60; and preservation of the EEZ marine environment, which is set out in Articles 208, 211, 214, 216 and 220 of Part XII. It is proposed to examine, hereunder, the extent and the manner in which the specific regimes of the LOS Convention relating to the above-mentioned matters are expressed in state practice.

1. The Regime of the Conduct of Marine Scientific Research (MSR) in the EEZ in State Practice

Most states having claimed an EEZ or an EFZ⁴⁹⁴ assert also their authority to regulate and control marine scientific research activities undertaken in the 200 miles zone. It is important to recall here that the MSR regime established by the LOS Convention provides that coastal states have the right to regulate, authorize, and conduct MSR in their EEZs. In addition, the carrying out of such research by any other state or individual requires the consent of the coastal state concerned. A distinction, however, has been made between pure MSR and MSR for economic purposes. With respect to the former, the coastal state shall, under normal circumstances, grant its consent and it may establish rules and procedures necessitating that such consent will not be delayed or denied unreasonably⁴⁹⁵. As regards the latter, the granting or withholding of permits rests with the discretion of the coastal state. State practice, however, does not reflect these limitations or safeguards imposed by the LOS Convention upon the jurisdictional powers of the coastal states. Antigua and Barbuda, for instance, claim "jurisdiction with regard to marine scientific research"⁴⁹⁶, but do not indicate under what circumstances it would give its consent for research projects to be carried out by foreign states within its EEZ. Identical provisions have been inserted in numerous claims including, inter alia, the claim of

Barbados⁴⁹⁷, Burma⁴⁹⁸, Colombia⁴⁹⁹, Grenada⁵⁰⁰, India⁵⁰¹, Indonesia⁵⁰², Kenya⁵⁰³, Malaysia⁵⁰⁴, Mexico⁵⁰⁵, Sao Tome and Principe⁵⁰⁶ and Sri Lanka⁵⁰⁷.

A number of states do not refer to MSR in their claims at all⁵⁰⁸. However, provision is made to permit the coastal state authorities to control research. For instance, the Territorial Waters and Maritime Zones Act of 1974 of Bangladesh empowers the Government to pass rules regulating the conduct of any person in the EEZ⁵⁰⁹. Perhaps, these states believe that the rights to control MSR inside the zone, at least with respect to resources development, is implied in their assertions to control the zone's resources⁵¹⁰. Indeed, the matter is often dealt with in separate regulations⁵¹¹.

Moreover, only a few national laws, such as, for example, the legislation of Iceland and Venezuela⁵¹², contain detailed rules on the conduct of MSR in the EEZ. In this connection, the 1978 EEZ Act of Venezuela requires that prior consent be given before research is carried out in the EEZ⁵¹³. It further provides that the "Republic will not withhold its consent to the conduct of a marine scientific research project" unless the latter is related to the circumstances similar to those contained in Article 246 (5) (a), (b), and (c) of the LOS Convention⁵¹⁴. Thus, this regime is generally in line with the LOS Convention's regime. In addition, there are a very few national laws which contain no rules on the conduct of MSR in the EEZ, but include reference to international law. Reference to international law seems to mean that these states pay due attention to the regime on MSR as established by the LOS Convention.

The position of the United States concerning the conduct of marine scientific research in the EEZ attracts particular attention. The President's Proclamation on the United States EEZ omits reference to jurisdiction over MSR in the EEZ⁵¹⁵. It was explained that it is in the interest of the United States to encourage MSR and avoid any unnecessary jurisdictional hurdles⁵¹⁶. However, in his statement accompanying the Proclamation, President Reagan affirmed that the US would nevertheless recognize the

right of other states to exercise jurisdiction over MSR if done "reasonably in a manner consistent with international law"⁵¹⁷. Thus, although the United States practice deviates from the LOS Convention, it does so only in a permissive sense, merely declining to assert certain rights but not challenging the validity of those rights if asserted by other coastal states.

More important is that the United States Administration has indicated through the Policy Statement which accompanied the EEZ Proclamation creating the United States EEZ, and through repeated statements by the United States Department of State, that it recognizes MSR provisions contained in the LOS Convention as reflecting the current state of customary law regarding MSR within foreign EEZs. In this context, James Malone, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, stated the following :

"The United States believes that most of the provisions of the treaty, apart from the seabed mining text in part XI, fairly balance the interests of all states and are fully consistent with norms of customary international law"⁵¹⁸.

This statement appears to suggest that the detailed provisions on MSR found in the LOS Convention constitute a reflection of existing customary law. However, in the author's opinion, this view does not seem to be correct. This is because, while it is true that under existing state practice relating to the EEZ coastal states are entitled to exercise some control over the conduct of MSR in their EEZs, there is not sufficient evidence in state practice to suggest that customary international law contains also the convention's detailed regime relating to the conduct of MSR in the EEZ. In other words, as Professor Burke has correctly pointed out, although customary law may recognize that a coastal state has control over MSR within its EEZ, the actual safeguards, conditions and obligations set out in the treaty have not yet become an established part of state practice and therefore can not be treated as customary law⁵¹⁹. It follows that, even if the proper interpretation of a

provision is established, which is a problem in itself, it would still be very difficult for the United States or any other state to argue that states which will not become party to the LOS Convention abide by its detailed provisions concerning MSR.

2. The Specific Regime Relating to Artificial Islands, Installations and Structures in State Practice

As has been indicated earlier, over sixty-five national laws, decrees and proclamations have made reference to the general concept of coastal state jurisdiction with regard to the establishment and use of artificial islands, installations and structures⁵²⁰. But, there are also some legislation which do not contain any reference to the general concept of coastal state jurisdiction in the matter, as it is set forth in Article 56 (1) (b)⁵²¹. However, in the author's view, this silence should not be interpreted as indicating that the silent states do not recognize the coastal state's jurisdiction in the matter, but should be regarded in most cases as a simple omission, because a number of those states have become parties to the LOS Convention⁵²², thus signifying their recognition of the coastal state jurisdiction in question.

Unfortunately, EEZ claimant states have generally been reluctant to adopt the detailed rules regarding the rights and duties of the coastal state that are enshrined in Article 60 of the LOS Convention. Indeed, a number of states have phrased their national legislation in a way that possibly goes beyond the powers given to them under Article 56 (1) (b) in connection with Article 60 of the LOS Convention. It is important to recall, at this stage, that Article 60 addresses the question of artificial islands, installations and structures in the EEZ by granting the coastal state the 'exclusive right' to construct any artificial island itself and authorize and regulate the construction, operation and use of artificial islands without any limitation. But, in relation to installations and structures, coastal states have exclusive jurisdiction and the right to construct, and authorize and

regulate the construction, operation and use of such objects only if they serve the purposes mentioned in Article 56 (1) (b), viz. economic purposes, marine scientific research, and environmental protection purposes⁵²³, or if such objects may interfere with the exercise of the rights of the coastal state in the zone⁵²⁴. Thus, due to the wording of the LOS Convention, not all types of installations and structures, e. g., those which serve military purposes, come under the jurisdiction of the coastal states.

An analysis of the laws which do refer to this question reveals that several EEZ legislation or / and proclamations have used identical or similar language to that of Article 56 (1) (b) and 60 (1) of the LOS Convention. Examples of such a practice are to be found in the national instruments of Antigua and Barbuda, Barbados, Belize, Djibouti, Dominica, Egypt, Saint Christopher and Nevis, Saint Lucia, the United States and Venezuela⁵²⁵. The uncertainties of the LOS Convention have, thus, been transmitted to the national laws.

In the laws of a number of states, the formulation of the rights of the coastal states to establish and use artificial islands, installations, and structures in the EEZ differs from that of the LOS Convention in a manner that suggests the attribution of powers to the coastal states wider than those that the LOS Convention intend to assign to them. For example, the national legislation of the Dominican Republic, Guatemala, Guyana, Honduras, Ivory Coast, and Sao Tomé and Príncipe have all referred to the 'exclusive rights and jurisdiction' of the coastal state rather than to 'jurisdiction'⁵²⁶. In this context, the Law No. 573 of 1977 of the Dominican Republic provides that the Republic "shall exercise exclusive rights and jurisdiction with regard to establishment and utilization of artificial islands, installations, and structures within the zone"⁵²⁷. Identical wording is included in the Hondurian Decree No. 921 of 13 June 1980⁵²⁸.

However, these differences may be explained by the fact that most of this legislation was adopted in the 1970s when the elaboration of the texts of Article 56 and 60 of the LOS Convention was under way and no final draft had been agreed on. Therefore, the differences in question appear to be a problem of the past.

Moreover, the laws of some other states have specifically claimed jurisdiction not only over artificial islands, installations, and structures, but also over the use of all devices in the EEZ irrespective of the purposes they would serve. The national legislation of Argentina, Burma, India, Kenya, Mauritania, Mauritius, Pakistan, Seychelles, Sri Lanka and Vanuatu fall in this category⁵²⁹. For instance, according to the Indian Maritime Zones Act of 28 May 1976, India would exercise "exclusive rights and jurisdiction for the construction, maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the zone or for the convenience of shipping or for any other purpose"⁵³⁰.

From the above review of state practice, it seems clear that almost all EEZ claimant states have asserted exclusive authority over the construction, operation and use, and regulation of all types of artificial islands in the zone. The LOS Convention and state practice are therefore consistent on this point, and it seems thus reasonable to conclude that the provision contained in Article 60 (1) (a) of the LOS Convention reflects the position under current customary law.

On the other hand, as far as the construction, use and regulation of installations and structures is concerned, it is very evident that the substantive differentiation between installations and structures for limited purposes on the one hand, and installations and structures for all other purposes, has not been properly reflected in national legislation. Therefore, it is questionable whether the consensus on the jurisdiction over installations and structures which was reached in the LOS Convention will prevail as part of customary law.

3. The Preservation and Protection of the Marine Environment in the EEZ in State Practice

The protection of the marine environment is one important element asserted by EEZ claimant states. In this context, the national legislation of over eighty states has made provision for jurisdiction on the protection and preservation of the marine environment in

their respective EEZ⁵³¹. But, few of them have contained detailed provisions designed to implement Articles 207 to 222 of the LOS Convention. Moreover, the scope of jurisdiction claimed in this matter varies. Some states assert powers to take measures to protect the marine environment without setting any limits on their powers. This is true, for instance, in respect of Bangladesh, Guyana, India, The Ivory Coast, Malaysia, Mauritius, Pakistan, The Seychelles, Spain and Sri Lanka⁵³², which assert in their EEZs wide-ranging authority to take measures which they themselves see appropriate for the purpose of preserving and protecting the environment. Pursuant to the Spanish Law No. 15/1978, for instance, Spain has "the authority to enact regulations concerning the preservation of, exploration for and exploitation of [the EEZ] resources with a view to the protection of the marine environment"⁵³³ and "exclusive jurisdiction to enforce all relevant measures"⁵³⁴.

It is perhaps worth recalling at this stage that, while it is true that under the LOS Convention the coastal state has the power to enact laws and regulations pertaining to pollution from vessels, it is also true that the power given to it, in this field, is not absolute. In fact, coastal state's rules and regulations are supposed to conform and give effect to generally accepted international rules and standards established through competent international organization or general diplomatic conference⁵³⁵. Where such international rules and standards are deemed inadequate to meet special circumstances in clearly defined areas within the EEZ, the coastal state may adopt special mandatory measures for the prevention of pollution from vessels for those areas, provided that prior approval by international bodies is given⁵³⁶. Moreover, with respect to the EEZ, coastal state rules may be enforced only when a foreign vessel is voluntarily in port⁵³⁷ or when the violation has resulted in a discharge causing major damage or threat thereof to the coastline or related interests of the coastal states or to the resources of the EEZ⁵³⁸.

No reference is made in the claims mentioned above to generally accepted international rules and standards nor to the involvement of competent international

organizations, though they are required in several articles of the LOS Convention. The formulation of the rights of the coastal states concerning the protection and preservation of the marine environment in the EEZ in that manner suggests the attribution of powers to coastal states wider than those that the LOS Convention intended to assign to them. In EEZs governed by those laws, the potential for interference with navigation rights exercised by third states will increase.

Several other coastal states claim jurisdiction in relation to the protection of the marine environment following the basic rule contained in Article 56 (1) (b) (iii) of the LOS Convention. Comoros, Egypt, Ghana, Guatemala, Kenya, Madagascar, Mexico, Sao Tomé and Príncipe, the United Republic of Tanzania and Venezuela⁵³⁹ are listed in this category. But, the national laws of these states do not contain detailed rules on their competence as regards pollution from various sources. Therefore, the exact extent of jurisdiction claimed by them in this matter remains unclear.

The Bulgarian⁵⁴⁰ and Soviet legislation⁵⁴¹ are more detailed and clearly inspired by the provisions of Part XII of the LOS Convention. However, they sometimes deviate from these provisions. For example, the Soviet decree on the EEZ of 28 February 1984, in providing that the prevention, reduction and control of pollution in the EEZ shall be effected in accordance with the legislation of the USSR and with treaties concluded by it, does not make any reference to the "generally accepted international rules and standards established through the competent international organization or general diplomatic conference" mentioned in Article 211 (5) of the LOS Convention. Similarly, Article 13 of the same decree, in providing for the authority to establish 'special areas', does not provide for the involvement of the 'competent international organization' referred to in Article 211 (6) of the LOS Convention. Moreover, the Soviet decree, as well as the Russian Environmental Law of March 1992⁵⁴², do not contain a provision corresponding to Article 228 (1) of the LOS Convention, providing for the suspension of proceedings

concerning pollution from ships started in the coastal or port state when such proceedings are initiated in the flag state. This last remark applies also to the Romanian Decree No. 142 of 25 April 1986⁵⁴³ and the Bulgarian Law of 8 July 1987⁵⁴⁴. Article 58 (2) of Bulgaria's Law, moreover, provides for the prohibition "to pollute the marine environment in the exclusive economic zone in a way that interferes with the interests of the People's Republic of Bulgaria", a criterion whose flexibility goes far beyond the provisions of the LOS Convention.

A fourth category of claims provides expressly that the competence of the coastal states as regards environmental protection in the EEZ is to be exercised in accordance with international law. The French Law No. 76/655 of July 1976, for instance, states that "within the economic zone ... the French authorities shall exercise the powers recognized by international law regarding the protection of the marine environment"⁵⁴⁵. Identical provisions have been included in the national legislation of Cape Verde, Fiji, Norway, Portugal and the United States⁵⁴⁶. The reference by these claims to the rules of international law seems to imply that the specific limitations imposed by the pertinent provisions of the LOS Convention are recognized. Unfortunately, the coastal states adhering to this practice constitute a dwindling minority.

Chapter Four

Notes and References

1. Smith, op. cit., supra chapter 2 note 173, p.33; also Dupuy and Vignes, op. cit., supra Introduction note 4, p. 302.
2. Fitzmaurice Lachs, op. cit., supra Introduction note 18, p. 230.
3. Ibid. It is noteworthy that through accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the German States have unified to form one sovereign state. As from the date of unification, the Federal Republic of Germany acts in the UN under the designation of "Germany". See Law of the Sea Bulletin No. 19, October, 1991, p. 2, note 6
4. Schwarzenberger and Brown, op. cit., supra chapter 3 note 15, p. 105; and Clingan, op. cit., supra chapter 3 note 34, p. 108.
5. Hjertonsen, op. cit., supra chapter 1 note 45, pp. 34-36.
6. See The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, op. cit., supra Introduction note 16 pp. 203 - 214 Annex 1.
7. Ibid. It is worth recalling that Article 3 of the LOS Convention provides that "every state has the right to establish the breadth of the territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this convention".
8. Ibid.
9. Smith, op. cit., supra chapter 2 note 173, p. 20 Annex 2.
10. Ibid., p. 23.
11. The Netherlands Territorial Sea Act, of 9 January 1985, in Law of the Sea Bulletin, No. 6, 1985, p. 16.
12. The Territorial Sea Act 1987, in Law of the Sea Bulletin, No. 14, 1989, p. 1.

13. Among these states are Canada, France, Japan, New Zealand, the USSR and the United States. See Law of the Sea Bulletin, No. 25 June 1994, pp. 2, 3, 5, 6, 9, and 10 respectively.
14. The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, op. cit., supra Introduction note 16, p. 120.
15. Ibid.
16. Ibid., p. 23 note 3; also Levy, op. cit., supra Introduction note 1, p. 32.
17. Schwarzenberger and Brown, op. cit., chapter 3 note 15, p. 100; also Krueger and Nordquist, op. cit., supra chapter 1 note 63, p. 323.
18. See Pfirter, op. cit., supra chapter 2 note 82, p. 132.
19. Smith, op. cit., supra chapter 2 note 173, p. 8.
20. Ibid.
21. Ibid.
22. Ibid.
23. See Act No. 23. 968 of 14 August 1991, in UN Division for Ocean Affairs and the Law of the Sea, The Law of the Sea : National Legislation on the Exclusive Economic Zone. United Nations, New York, 1993, pp. 17-18.
24. Ibid., p. 38.
25. Decree Law No. 126 of 31, December, 1977, in Smith, op. cit., supra chapter 2 note 173, p. 95.
26. Ordinance of 16 September, 1985, in ibid., p. 254.
27. See The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on The Law of the Sea, op. cit., supra Introduction note 16, pp. 1-10.
28. Bernhardt, op. cit., supra Introduction note 18, p. 289.

29. Parliamentary Debates, Territorial Sea Bill, House of Lords, 5 February, 1987, p. 401.
30. ICJ Reports, 1969, p. 43.
31. See chapter 1, pp. 41-43.
32. Fitzmaurice, *op. cit.*, supra Introduction note 18, p. 231.
33. *Ibid.*, p. 230.
34. *Op. cit.*, supra chapter 1 note 102 and 194.
35. Fitzmaurice, *op. cit.*, supra Introduction note 18, p. 230.
36. Levy, *op. cit.*, supra Introduction note 1, p. 13.
37. Smith, *op. cit.*, supra chapter 2 note 173, pp. 21-22; also Dupuy and Vignes, *op. cit.*, supra Introduction note 4, p. 301; and Harris, *op. cit.*, supra Introduction note 18, p. 419.
38. For the text, see 15 ILM, 1976, p. 635.
39. Peirce, *op. cit.*, supra Introduction note 18, p. 587; see also generally W. T. Burke, *op. cit.*, supra chapter 2 note 34, pp. 24-55.
40. Japan contended that the unilateral establishment of exclusive management authority to 200 miles was invalid under international law. See note from the Embassy of Japan to the United States Department of State, April 15, 1976, reproduced in H. G. Knight : *The Law of the Sea : Cases, Documents and Readings*, 1980, p. 121.
41. Peirce, *op. cit.*, supra Introduction note 18, p. 587.
42. See The Statement of the US President upon signing the FCMA, in 15 ILM, 1976, p. 634.
43. *Op. cit.*, supra chapter 1 note 194.
44. *Ibid.*, p. 195.
45. *Ibid.*
46. For the full text, see 15 CYIL, 1977, p. 327.
47. Albert. W. Koers : "The External Authority of the EEC in Regard to Marine

Fisheries", 14 CMLR, 1977, p. 269.

48. The Commission of the European Communities is composed of several members chosen on the grounds of their general competence. The Commission is generally made up of a mixture of lawyers, economists, ex-ministers, ex-members of parliament and ex-diplomat. see, for more details, D. Lasok and J.W. Bridge : *An Introduction to the Law and Institutions of the European Communities*, 5th ed., Butterworth and Co. (publishers) Ltd., 1991, pp. 107-117; also Shaw, *op. cit.*, *supra* chapter 3 note 45, p. 766.
49. It is noteworthy that the Council of Ministers of the European Communities is made up of one representative of the Government of each of the Member States. The usual minister who represents a member on the Council is its Foreign Minister. But the composition of the Council may vary depending upon the subject matter to be discussed. For further information, see Lasok and Bridge, *ibid.*, pp. 118-129; also D. Freestone : "Some Institutional Implications of the Establishment of Exclusive Economic Zones by EC Member States", 23 ODIL, 1992, p. 99.
50. European Communities, Council Resolution on External Aspects of the Creation of a 200 Mile Fishing Zone, November 3, 1976. For the full text, see 15 ILM, 1976, p. 1425. It is noteworthy that Member States are called upon to establish fishery zones only off their North Sea and North Atlantic Coasts without prejudice to any future claim in other areas such as the Mediterranean Sea. For a comprehensive examination of the common fisheries policy of the European Community, see generally, R.R Churchill : *EEC Fisheries Law*. Martinus Nijhoff, Dordrecht, 1987, pp. 83-165.
51. Koers, *op. cit.*, *supra* note 47, p. 299.
52. Edict on Provisional Measures for the Preservation of Living Resources and the Regulation of Fishing in Marine Areas, December 10, 1976. For full text, see 15 ILM, 1976, p. 1381.

53. See Note from the Embassy of Japan to the United States Department of State, April 15, 1976, *op. cit.*, *supra* note 40.
54. Law No. 31 of 2 May 1977 on Provisional Measures Relating to the Fishing Zone as amended by Law No. 83 of 29 November, 1977, in ST/LEG/SER. B/19, 1980, p. 215.
55. A map showing the defined Japanese fishing zone is found in Kiyofumi Nakauchi : Japan's Ocean Affairs, Saitama, the Law of the Sea Institute, Japan, February 1988, p. 23.
56. Lawrence Juda : "The Exclusive Economic Zone : Non-Claimant States" 19 ODIL, 1988, p. 439; also Fitzmaurice, *op. cit.*, *supra* Introduction note 18, p. 231.
57. See Article 56 of the LOS Convention, as well as other pertinent provisions in Parts V, XII and XIII of that Convention; also Hudson, *op. cit.*, *supra* Introduction note 4, p. 667; and R. Jansoone : "La Pratique Etatique Belge et la Zone Economique Exclusive", 28 RBDI, 1995/1. pp. 93-94.
58. See Stevensen and Oxman, *op. cit.*, *supra* chapter 2 note 200, pp. 12-25.
59. *Ibid.*, pp. 15-18.
60. Among the proposals examined are Nicaragua's Proposal on the National Zone, A/Conf. 62/C.2/L.17, 23 July 1974, in Platzöder, *op. cit.*, *supra* chapter 2 note 52, pp. 102-103; Nigeria Draft Articles on the Exclusive Economic Zone, A/Conf. 62/C. 2/L. 21, Rev.1, 5 August, 1974, in *ibid.*, pp.111-113; Jamaican Draft Articles on the Rights of Developing Geographically Disadvantaged States within the Exclusive Economic Zone, A/Conf. 62/ C. 2/ L.35 of August 1, 1974, in *ibid.*, pp. 138-139; the Draft Articles on the Exclusive Economic Zone submitted by Greece, A/Conf. 62/ C. 2/L. 32, 31 July 1974, in *ibid.*, p. 153; the US Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, A/ Conf. 62 / L. 47, 8 August 1974, in *ibid.*, pp. 155-162; also Doc. A/ Conf. 62/ C. 2/ L. 38, 5 August 1974, in *ibid.*, p. 140; and Doc. A/ Conf. 62/ C. 2/ L. 39, 5 August 1974, in *ibid.*, p. 144. See also

generally A. Aguilar : "The Patrimonial Sea or Economic Zone Concept", 11 SDLR, 1974/3, pp. 579 - 602.

61. Op. cit., supra Introduction note 6.
62. Op. cit., supra Introduction note 9.
63. Op. cit., supra Introduction note 10.
64. Ibid.
65. Op. cit., supra Introduction note 2.
66. Op. cit., supra chapter 1 note 2, p. 148.
67. Channel Continental Shelf Arbitration (United Kingdom v. France), 1977, XVIII RIAA, 1978, p. 3.
68. Ibid., pp. 34-37.
69. Oxman, op. cit., supra chapter 3 note 76, p. 6.
70. See Platzöder, op. cit., supra chapter 2 note 52, p. 216.
71. For more details, see Extavour, op. cit., supra Introduction note 4, pp. 205-212.
72. Ibid., p. 208.
73. Op. cit., supra Introduction note 18, p. 296.
74. Soons, op. cit., supra chapter 2 note 187, p. 305.
75. See, for instance, Doc. A/AC. 138/SC. II/L. 10 Draft Articles on the Exclusive Economic Zone Concept, submitted by Kenya, in Oda, op. cit., supra chapter 2 note 55, pp. 215-216.
76. See Stevensen and Oxman, op. cit., supra chapter 2 note 200, p. 16.
77. Bernhardt, op. cit., supra Introduction note 18, p. 296.
78. C. A. Fleischer : "Global Situation with Respect to National Legislation, Bilateral Agreements and Regional Commissions", in Clingan, op. cit., supra chapter 1 note 149, pp. 97-98; also Fitzmaurice, op. cit., supra Introduction note 18, p. 233.
79. Op. cit., supra chapter 2 note 28, p. 172.
80. Churchill and Lowe, op. cit., supra Introduction note 4, p. 145.

81. Law of the Sea Bulletin, June 1993, p. 2.
82. Ibid., p. 3.
83. Ibid., p. 5.
84. Ibid., p. 6.
85. Johnston op. cit., supra chapter 1 note 149, pp. 47-50 table 3.
86. Ibid.
87. Ibid.
88. Ibid.
89. II Official Records, 1975, p. 217.
90. Ibid., p. 200. For similar views, see the statement of the delegate of Belgium, in ibid., p. 206 para. 52; the delegate of the former USSR, in ibid., p. 221 para. 51; and Italy ibid., p. 195 paras. 10, 11, 12 and 14.
91. Op. cit., supra note 52. To some extent, this may be said also of the EEC Resolution on External Aspects of the Creation of a 200 Mile Fishing Zone, November 3, 1976 wherein it is stated that "the present circumstances, and particularly the unilateral steps taken or about to be taken by certain third countries, warrant immediate action by the community to protect its legitimate interests". Op. cit., supra note 50.
92. Jonshon, op. cit., supra chapter 1 note 149, p. 82.
93. Juda, op. cit., supra note 56, p. 433 table 1.
94. Ibid.
95. See the Territorial Sea and Exclusive Economic Zone Act of Tanzania, 1989 , in The Law of the Sea : Current Developments in State Practice, No. 2. United Nations Publications, New York, 1989, p. 76; and the claim of Namibia of 1990, in The Law of the Sea : Current Developments in State Practice, No. 3. United Nation Publications, New York, 1992, p. 81.
96. See, for instance, Jamaica's Exclusive Economic Zone Act No.33 December 31, 1991, in Law of the Sea Bulletin, No. 21, August 1992, p. 28; Belize Act of 24 January

1992, in *ibid.*, p. 3; the Estonian claim, *op. cit.*, *supra* note 15; the Argentine claim, *op. cit.*, *supra* note 23; the Brazilian claim, *op. cit.*, *supra* note 24; Sweden's Act on Sweden's Economic Zone, December 3, 1992, in *Law of the Sea Bulletin*, No. 23 June, 1993, pp. 24-28; the United Kingdom of Great Britain and Northern Ireland. Pitcairn, Henderson, Ducie and Oeno Islands, Proclamation No. 1 of 1992; South Georgia and the South Sandwich Islands Proclamation No. 1 of 1993, in *Law of the Sea Bulletin*, No. 24, 1993, pp. 46-47.

97. See Appendix C.

98. Among the states which have not established EEZs are Algeria, Bahrain, Cyprus, Greece, Israel, Italy, Lebanon, and Tunisia. For more details, see Juda, *op. cit.*, *supra* note 56, p. 435 table 3.

99. Semi-enclosed seas include the Gulf of Aden, Arabian sea, Andaman Sea, Baltic sea, Bay of Bengal, Behring Sea, Black Sea, Caribbean Sea, Celebes Sea, East China- Yellow Sea, Gulf of Guinea, Sea of Japan, Mediterranean Sea, Gulf of Mexico, North Sea, Sea of Okhotsk, Gulf of Oman, Persian / Arabian Gulf, Red Sea, Soloman Sea, South China Sea, Sulu Sea, and Timor - Arafura Seas. See L. M. Alexander : "Regional Arrangement in the Oceans", 71 *AJIL*, 1977, p. 90.

100. Norman G. Letalik : "Boundary Making in the Mediterranean", in Johntson and Saunders, *op. cit.*, *supra* chapter 2 note 177, p. 122; Choon ho Park : "Offshore Oil Development in the China Seas: Some Legal and Territorial Issues", in E.M. Borgese and N. Ginsburg (eds.), *Ocean Yearbook*, vol. 2. University of Chicago Press, Chicago, 1980, p. 307; K. Kittichaisaree : *The Law of the Sea and Maritime Boundary Delimitation in South - East Asia*. Oxford/ Singapore, 1987, p. 10; and Ming Sun, *op. cit.*, *supra* chapter 2 note 16, p. 401. It is also worth noting that many of these states are located on semi-enclosed seas and spoke against the concept of the EEZ at UNCLOS III, because they can obtain no significant benefit from it. See Juda, *op. cit.*, *supra* note 56, p. 440.

101. Letalik, *ibid.*
102. T. Scovazzi : "Implications of the New Law of the Sea for the Mediterranean", 5 MP, 1981, p. 306.
103. The Mediterranean States that have asserted 200 miles EEZs are: Egypt, France, Morocco, Spain, and Turkey. See Appendix B of this thesis.
104. Declaration (upon ratification of the United Nations Convention on the Law of the Sea, of December 10, 1982). In Smith, *op. cit.*, chapter 2 note 173, pp. 123-124.
105. See French Decree No. 77-130 of February 11, 1977, in *ibid.*, pp. 147-149, Art.1; and Spanish Law No. 15 - 1978 of February 20, 1978, in *ibid.*, p. 425.
106. Decree No. 1- 81- 179 of April 8, 1981, in *ibid.*, p. 303; see for details, Juda, *op. cit.*, *supra* note 56, p. 434.
107. On Turkey's establishment of an EEZ, see Keesing's Contemporary Archives, May 1987, p. 35133.
108. Juda, *op. cit.*, *supra* note 56, p. 440.
109. See for instance, Presidential Proclamation No. 5030, in Smith, *op. cit.*, *supra* chapter 2 note 173, p. 467; and Decree of the Presidium of the Supreme Soviet of the USSR on the Economic Zone of the USSR, 28 February 1984, in *ibid.*, p. 417.
110. Act Concerning the Maritime Areas of the Polish Republic and the Marine Administration, 1991, in Law of the Sea Bulletin, No. 21, 1992, p. 66.
111. Sweden's Act on Sweden's Economic Zone December 3, 1992, *op. cit.*, *supra* note 96; see also S. Mahmoudi : "Sweden : Sweden's Economic Zone Act". 28 IJMCL, 1993, p. 524; also Jansoone, *op. cit.*, *supra* note 57, p. 95.
112. See S. Kaye and D. R. Rothwell : "Australia's Antarctic Maritime claims and Boundaries", 26 ODIL No. 3 July - September, 1995, p. 209.
113. See Soons, *op. cit.*, *supra* chapter 2 note 28, p. 272; Brown, *op. cit.*, *supra* chapter 3 note 3, p. 115; and Jansoone, *op. cit.*, *supra* note 57, p. 95.
114. Smith, *op. cit.*, *supra* chapter 2 note 173, p. 467.

115. Ibid., p. 437.
116. Decree Law No. 2 of February 24, 1977, in *ibid.*, p. 109 Art. 2.
117. Decree No. 56-99 of 1975 amending Article 6 of the Constitution, in *ibid.*, p. 107.
118. Law No. 573 of 1977, in *ibid.*, p. 119 Art. 4.
119. Act No. 10 of 1977. in *ibid.*, p. 209 Art. 15.
120. Law No. 41 of June 1979, in *ibid.*, p. 209, Part II Art. 3.
121. Maritime Zones Act. 1976, in *ibid.*, p. 213 Art. 7 (1).
122. Act No. 5 of 1983, in *ibid.*, p. 228 chapter II Art. 2.
123. Act No. 77-926, in *ibid.*, p. 241 Art. 2.
124. Act No. 7 of 1983, in *ibid.*, p. 245, Part II Art.7 (1).
125. Ordinance No. 85-013 of September 1985, in *ibid.*, p. 255 Art. 1
126. Exclusive Economic Zone Bill 1984, in *ibid.*, p. 259 Part II Art. 3 (1).
127. Act No. 13 of 1977, in *ibid.*, p. 288 Art. 6.
128. Act of 10 February 1976 Regulating the Provisions of Paragraph 8 of Article 27 of the Political Constitution of the United Mexican States Concerning the Exclusive Economic Zone, in *ibid.*, p. 295 Art. 1.
129. Law No. 1-81 of 1981, in *ibid.*, p. 303 Art. 1.
130. Decree No. 31-76, of 1976, in *ibid.*, p. 307 Art. 2
131. Territorial Sea and Exclusive Economic Zone Act, 1977, in *ibid.*, p. 309 Art. 9 (1).
132. Decree No. 28 of 1978, in *ibid.*, p. 347 Art. 1 (1).
133. Territorial Waters and Maritime Zones Act, 1976, in *ibid.*, p. 357 Art. 6.
134. Presidential Decree No. 1599 of 1979, in *ibid.*, p. 369 section 1.
135. Decree Law No. 15-78 of 1978, in *ibid.*, p. 405 Art. 1.
136. Act. No. 15 of 1977, in *ibid.*, p. 407 Art. 6 (1).
137. Act. No. 32 of 1978, in *ibid.*, p. 413 Art. 6 (1).
138. Law No. 15- 1978, in *ibid.*, p. 425 Art.1.
139. Maritime Zones Law No. 22 of 1976, in *ibid.*, p.427 Art. 5 (1).

140. Law No. 26 of 1978, in *ibid.*, p. 433 Art. 3.
141. Act. No. 32 of 1978, in *ibid.*, p. 441 Art. 9 (1).
142. Ministry of Foreign Affairs Notice No. 500 of 1983 of May 27, 1983, in *ibid.*, p. 456.
143. Maritime Zones Act No. 23 of 1981, in *ibid.*, p. 471 Art. 9 (1).
144. Act Establishing an Exclusive Economic Zone Along the Coasts of the Mainland and Island of the Republic of Venezuela, in *ibid.*, p. 477 Art. 1.
145. Statement on Economic Zone of May 12, 1977, in *ibid.*, p. 481 para. 3.
146. Exclusive Economic Zone Act 1977, in *ibid.*, p. 483 Art. 3 (1).
147. Juda, *op. cit.*, *supra* Introduction note 17, p. 9; also Pfirter, *op. cit.*, *supra* chapter 2 note 82 p. 132.
148. National EEZ legislations omitting any definition of the EEZ include amongst others Haiti's Decree No. 38 of 8 April 1978, in Smith, *op. cit.*, *supra* chapter 2 note 173, p. 201; and Maldives Law No. 30/76 of December 5, 1976, in *ibid.*, p. 277.
149. In Smith, *ibid.*, p. 185.
150. In *ibid.*, p. 371 Art. 1 (1).
151. These states include, among others, the Democratic People's Republic of Korea, Guinea, Guinea-Bissau, Norway, Oman and Togo.
152. See for instance, Article 1 of Decree No. 20/76 of Guatemala, *op. cit.*, *supra* note 149, p. 185; also Article 1 of Decree No. 336/PRG/80 of Guinea, in Smith, *op. cit.*, chapter 2 note 173, p. 187; and Article 2 of Law No. 3/78 of Guinea-Bissau, in *ibid.*, p. 191.
153. See, Mfodwo and others, *op. cit.*, *supra* chapter 2 note 28, p. 450.
154. For the *sui generis* formulation, see Introductory Note to Part II of the RSNT, in III Official Records, 1975, pp. 151-153. For further readings on this point, see generally Al Mour, *op. cit.*, *supra* chapter 3 note 74; and Alfonso Arias Schreider: "The Exclusive Economic Zone : Its Legal Nature and the Problem of Military

Uses", in Vicuna, *op. cit.*, supra chapter 2 note 113, pp. 123-141.

155. See supra note 16.

156. See supra notes 23 and 24.

157. See Appendix A.

158. See Paolillo, *op. cit.*, supra Introduction note 15, p. 106.

159. See Law of the Sea Bulletin, No. 5, 1985, p. 17.

160. For full text, see The Law of the Sea : Current Developments in State Practice No. 2. United Nations Publication, New York, 1989, pp. 2-18.

161. *Op. cit.*, supra note 95.

162. These include, amongst others, the claims of the following states: Antigua, Barbados, Burma, Cambodia, Cape Verde, Comoros, Cuba, Djibouti, Dominica, Dominican Republic, Egypt, Republic of Equatorial Guinea, Fiji, Gabon, Grenada, Guatemala, Guinea Bissau, Guyana, Honduras, India, Indonesia, Ivory Coast, Kenya, Kiribati, The Democratic People's Republic of Korea, Malaysia, Mauritania, Mexico, Morocco, Norway, Oman, Pakistan, Philippines, Portugal, Seychelles, Solomon Islands, Spain, Suriname, Thailand, Trinidad and Tobago, Tuvalu, The United States, Vanuatu, Venezuela, and Western Samoa.

163. See B.H. Oxman : " The Third United Nations Conference on the Law of the Sea : The Tenth Session, 1981", 76 AJIL, 1981, pp. 14-15; Hundah Chiu : "Some Problems Concerning the Application of the Maritime Boundary Provisions of the 1982 United Nations Convention on the Law of the Sea", 4 CYILA, 1984, pp. 68-69; and Brown, *op. cit.*, supra Introduction note 18, pp. 155-159.

164. Chiu, *ibid.*, p. 69; also Brown, *ibid.*, p. 155.

165. Charney, *op. cit.*, supra Introduction note 18, p. 243.

166. *Op. cit.*, supra note 95.

167. *Op. cit.*, supra note 120.

168. *Op. cit.*, supra note 119.

169. For the text, see Smith, *op. cit.*, supra chapter 2 note 173, p. 176.
170. For instance, the legislation of Norway, Spain and New Zealand.
171. See, for instance, North Sea Continental Shelf Cases, *op. cit.*, supra chapter 1 note 81, pp. 47 and 54; the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, *op. cit.*, supra Introduction note 15, p. 45; the Delimitation of the Maritime Boundary in the Gulf of Maine Area Case, *op. cit.*, supra chapter 2 note 169, pp. 299-300; also Dixon, *op. cit.*, supra chapter 2 note 145, p. 181.
172. See for instance, Venezuela Act, *op. cit.*, supra note 132; and Mexican Act, *op. cit.*, supra note 116.
173. *Op. cit.*, supra chapter 2 note 169 p. 313; also M.B. Feldman and D. A. Colson : "The Maritime Boundaries of the United States", 75 AJIL, 1981, pp. 754-756.
174. *Ibid.*, pp. 743-745. The United States has favored equidistance in the three boundary disputes with Canada on the West Coast and the Arctic. *Ibid.*, p. 750.
175. For instance, Chilean Law No. 18.565 of 13 October 1986 Amending the Civil Code with Regard to Maritime Space, in *The Law of the Sea*, *op. cit.*, supra note 160, p. 28; Mauritanian Ordinance 88-120 of 31 August 1988, in *ibid.*, p. 34.
176. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 56 paras. 1 (a) and (b).
177. Smith, *op. cit.*, supra chapter 2 note 173, pp. 35-73 table 7 column titled 'Natural Resources'.
178. Paolillo, *op. cit.*, supra Introduction note 15, p. 107. The words used include among others, 'sovereign powers', 'exclusive powers'.
179. For the text, see 29 ILM, 1990, p. 783.
180. For the text, see 32 ILM, 1993, p. 136; similar provisions are found in the preamble of the Treaty on Fisheries between the Government of Certain Pacific Island States and the Government of the United States of America, April 2, 1987, in 26 ILM, 1987, p. 1048; Convention Relative au Developpement Regional des Pêches dans le Golf de Guinée, 2 Juin 1984, in 91 RGDIP, 1987, p. 1115 Art. 2; and Accord Cadre de

Cooperation en Matière de Pêche entre le Gouvernement de la République Algérienne
Democratique et Populaire et le Gouvernement de la République Islamique de
Mauritanie, 1988, in JORADP, No. 6, 1988, p. 149 preamble.

181. Smith, *op. cit.*, supra chapter 2 note 173, p. 355 Art. 4.
182. E.N. Van Kleffens : "Sovereignty in International Law" 82 RCADI, 1953, p. 84.
183. See Dixon, *op. cit.*, supra chapter 2 note 145.
184. Smith, *op. cit.*, supra chapter 2 note 173, pp. 35-37 table 7, column titled
"Artificial Islands etc...".
185. Decree No. 77 of 1987, *op. cit.*, supra note 160.
186. Law on the Territorial Sea, Contiguous Zone, Exclusive Economic Zone, and
Continental Shelf, April 1, 1977, in Smith, *op. cit.*, supra chapter 2 note 173,
p. 119.
187. See supra note 109.
188. *Op. cit.*, supra note 96, para. 4.
189. Presidential Proclamation of February 28, 1979, in Smith, *op. cit.*, supra chapter 2
note 173, p. 243.
190. Supra note 126.
191. Law Concerning Maritime Zones, December 20, 1985, in 25 ILM, 1986, p. 889
Art. 6.
192. Supra note 132.
193. *Op. cit.*, supra note 96, Art. 5.
194. Supra note 140.
195. Supra note 95.
196. Supra note 109.
197. Supra note 144.
198. For instance, the Legislation of Antigua and Barbuda, Cambodia, Comoros, Cuba,
Dominicia, Egypt, Iceland, Indonesia, Morocco, Nigeria, Trinidad and Tobago,

United States, United Arab Emirates, and Venezuela.

199. *Op. cit.*, supra chapter 1 note 85, Art. 5.
200. The term "installations" is not new in the domain of the law of the sea. It was enshrined in Article 71 of the ILC Draft Articles and later in Article 5 para. 2 of the 1958 Convention on the Continental Shelf. In Addition to that, the same article speaks of other 'devices' necessary for the exploration and exploitation of the continental shelf. Indeed, the two terms were not defined in the said Convention. However, the introduction of the term 'devices' in Article 71 of the ILC Draft Articles was a Dutch proposal, based on the consideration that the term 'installations' refers to fixed installations used in the exploration and exploitation of the natural resources of the continental shelf, while the term "devices" was deemed to refer to certain other objects like mobile drilling rigs. For more details, see P. Peters, A. H. A. Soons, and L. A. Zima : "Removal of Installations in the Exclusive Economic Zone", 15 NYIL, 1984, p.171.
201. LOS Convention, *op. cit.*, supra Introduction note 2, Part XI the Area, Art. 145 (a); Part XII Protection and Preservation of the Marine Environment, Art. 194 (3) (c) (d); and Part XIV Development and Transfer of Marine Technology, Art. 274 (b).
202. *Op. cit.*, supra chapter 2 note 173, pp. 35-37, table 7, column titled "Scientific Research".
203. Juda, *op. cit.*, supra Introduction note 17, p. 29 table 7.
204. *supra* note 109.
205. See Law No. 76- 655 of July 16, 1976 regarding the Economic Zone Off the Coasts of the Territory of the Republic, in Smith, *op. cit.*, supra chapter 2 note 173, p. 147.
206. See *supra* note 138.
207. Juda, *op. cit.*, supra Introduction note 17, p. 29 table 7 (A).
208. *Ibid.*, (B).
209. *Ibid.*, pp. 28-29.

210. Charney, *op. cit.*, supra Introduction note 18, p. 253; and Smith, *op. cit.*, supra chapter 2 note 173, p. 38.
211. Smith, *ibid.*, pp. 35-37, column entitled "Protection of Environment"; The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, *op. cit.*, supra Introduction note 16, p. 17; also Jamaica's Act on the Exclusive Economic Zone, *op. cit.*, supra note 99, para. 4; the Mexican Law Concerning Maritime Zones, *op. cit.*, supra note 191, Art. 6; Sweden's Act on Economic Zone, *op. cit.*, supra note 96, Art. 2; and United Kingdom of Great Britain and Northern Ireland, Pitcairn, Henderson, Ducie and Oeno Island, Proclamation No. 1, 1992, *op. cit.*, supra note 96, Art. 3.
212. Smith, *ibid.*
213. *Ibid.*, p. 38.
214. The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, *ibid.*
215. Law No. 10 of August 4, 1978 Establishing Regulations on the Territorial Sea, Exclusive Economic Zone and Continental Shelf, and Other Provisions, in *ibid.*, p. 99 Art. 8.
216. Territorial Sea and Maritime Zones Law, April 9, 1977, in *ibid.*, p. 85 Art. 18 (d).
217. Supra note 119, Art. 16 (d).
218. Supra note 121, Art. 7 (4) (d).
219. Supra note 127, Art. 7 (1) (d).
220. Supra note 136, Art. 7 (1) (d).
221. Supra note 143, Art. 10 (d).
222. Smith, *op. cit.*, supra chapter 2 note 173, p. 38.
223. For the full text, see Law of the Sea Bulletin, No. 23 June, 1993, pp. 65-66.
224. Paolillo, *op. cit.*, supra Introduction note 15, p. 107.
225. G. Moore : "Coastal State Requirements for Foreign Fishing", in FAO Legislative

Study No. 21, Rev. 2, FAO, Rome, 1985, pp. 4-6.

226. Ibid.

227. See Convention on the High Seas, op. cit., supra chapter 1 note 85, preamble.

228. Op. cit., supra chapter 2 note 63, p. 70.

229. Op. cit., supra note 115.

230. Document A/48/90, cited in The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, op. cit., supra Introduction note 16, p. 72.

231. Op. cit., supra note 144, Art. 4.

232. Maritime Boudaries and Jurisdiction Act, 1978, in Smith, op. cit., supra chapter 2 note 135, p. 73 Art. 7.

233. Supra note 160, Art. 49.

234. Supra note 215, Art. 19.

235. Supra note 118, Art. 6.

236. Supra note 169, Art. 7.

237. Supra note 149, Art. 4.

238. Supra note 122, Art. 4.

239. Supra note 123, Art. 7.

240. Op. cit., supra note 99.

241. Supra note 129, Art. 6 (3).

242. Presidential Decree No. 1599 of July 11, 1979, in Smith, op. cit., supra chapter 2 note 173, p. 369 section 4.

243. Supra note 135, Art. 5.

244. Supra note 138, Art. 4.

245. Supra note 140, Art. 5.

246. Op. cit., supra note 96, Art. 10.

247. Supra note 115, Art. 3.

248. Supra note 142.
249. Supra note 95, Art. 11.
250. Supra note 109.
251. Juda, *op. cit.*, supra Introduction note 17, p. 34 (B).
252. See for instance, Wolfrum, *op. cit.*, supra chapter 2 note 188, p. 140.
253. II Official Records, 1975, p. 182.
254. *Ibid.*, p. 215.
255. *Ibid.*, p. 198.
256. *Ibid.*, p. 186.
257. See Attard, *op. cit.*, supra Introduction note 4, pp. 50-51; also T. Scovazzi : "Coastal State Practice in the Exclusive Economic Zone : The Right of Foreign States to Use this Zone", in L. M. Alexander, S. Allen and C. Hanson, (eds.), *New Developments in Marine Science and Technology: Economic, Legal and Political Aspects of Change, Proceedings of the Twentieth Annual Conference 1988*, Law of the Sea Institute, University of Hawaii, Honolulu, 1989, pp. 312-313.
258. See Appendix A.
259. Guyana, Maritime Boundaries Act No. 10, *op. cit.*, supra note 119, Art. 18 paras. (a) and (b) (vi); India, Territorial Water, Continental Shelf, Exclusive Economic Zone, and other Maritime Zones Act, *op. cit.*, supra note 121, Art. 7 (b); Mauritius, the Maritime Zones Act, 1977, supra note 127, Art. 9 (a) and (b) (vi); and Pakistan Territorial Waters and Maritime Zones Act. 1976, *op. cit.*, supra note 133, Art. 6 (a) and (b) (vi).
260. *Ibid.*
261. See supra note 259.
262. Law No. 32/76 Relating to the Navigation and Passage by Foreign Ships and Aircrafts Through the Airspace, Territorial Waters and the Economic Zone of the Republic of Maldives, December 5, 1976, in Smith, *op.cit.*, supra chapter 2

note 173, p. 278, Art.1.

263. Ibid.

264. Antigua and Barbuda, the Comoros, Cuba , Djibouti, Dominica, Dominican Republic, Egypt, Fiji, Gabon, Guatemala, Honduras, the Ivory Coast, Kiribati, Mexico, Morocco Norway, the Philippines, Sao Tome and Principe, the Solomon Island, Tuvalu, the USA, Venezuela, and the Yemen.

265. Portugal, Qatar, Spain, and the United Arab Emirates.

266. Barbados, Cape Verde, St. Lucia, and the Seychelles.

267. LOS Convention, *op.cit.*, supra Introduction note 2, Arts. 56 and 61.

268. Ibid., Art. 62 (1).

269. Ibid., Art. 61 (1)

270. Ibid., Art. 62 (2).

271. Ibid.

272. Ibid.

273. Ibid., Arts. 56 (1) (a), 61 and 62; also Fleischer, *op. cit.*, supra chapter 2 note 6, p. 255.

274. Ibid., Art. 61. (1); Oda, *op. cit.*, supra chapter 2 note 35, p. 742.

275. Ibid., para. 2.

276. Ibid., para. 3.

277. Ibid., para. 4.

278. See Section II entitled 'Fisheries Zone Trend', pp.176-184.

279. Juda, *op. cit.*, supra Introduction note 17, pp. 22-23; also B. Kwiatkowska : "Conservation and Optimum Utilization of Living Resources", in Alexander and others, *op. cit.*, supra note 257, p. 248.

280. It is important to recall that the main conservation goals enshrined in Article 61 of the LOS Convention received widespread support at UNCLOS III and suffered no change since their first inclusion in the 1975 ISNT. See Attard, *op. cit.*, supra

Introduction note 4, p. 154.

- 281. Amendment to Article 27 of the Constitution, *op. cit.*, *supra* note 128.
- 282. *Ibid.*, Art. 6 (1).
- 283. *Ibid.*, (2).
- 284. *Op. cit.*, *supra* note 150.
- 285. *Ibid.*, Art. 5.
- 286. *Op. cit.*, *supra* note 109.
- 287. *Op. cit.*, *supra* note 38.
- 288. *Ibid.*, section 3 (18).
- 289. *Ibid.*, section 3 (18) (B); also G. Moore : "National Legislation for the Management of Fisheries under Extended Coastal State Jurisdiction", 11 JMLC, 1980/2, p. 159.
- 290. See for instance, Australian Fisheries Amendment Act, 1978, in R. Churchill, M. Nordquist, and S.N. Lay, (eds.), *New Directions in the Law of the Sea : Documents*, vol. 10, p. 19 Art. 6; Fiji's Marine Space Act. 1978, in Smith, *op. cit.*, *supra* chapter 2 note 173, p. 129 Art. 2; the Japanese Law No. 31, 1977, *op. cit.*, *supra* note 54 Art. 2 (3); the Pakistanese Territorial Waters and Maritime Zones Act, 1976, *op. cit.*, *supra* note 133, section 6; and Act No. 24 of 1986 of Trinidad and Tobago, in *The Law of the Sea : Current Development in State Practice*, *op. cit.*, *supra* note 160, pp. 36-47 Art. 21.
- 291. See Mtango and Weiss, *op. cit.*, *supra* chapter 2 note 240, p. 14.
- 292. Territorial Waters and Maritime Zones Act, 1974, in Smith, *op. cit.*, *supra* chapter 2 note 173, p. 69 Art. 6.
- 293. *Op. cit.*, *supra* note 126, Art. 9.
- 294. Marine Zones Ordinance, 1983, in Smith, *op. cit.*, *supra* chapter 2 note 173, p. 459 Art. 10.
- 295. Hamisi S. Kibola : " A Note on Africa and the Exclusive Economic Zone", 16 ODIL, 1986, p. 377.

296. Ibid., also I. Kawaley, *op. cit.*, supra Introduction note 2, pp. 231-232.
297. Mtango and Weiss, *op. cit.*, supra chapter 2 note 240.
298. Decree on the Limits of the PRK's Maritime Zones and Continental Shelf, in Smith, *op. cit.*, supra chapter 2 note 173, p. 91.
299. Decree No. 5699 of May 20, 1975, in *ibid.*, p. 107.
300. Declaration Concerning the Exercise by Egypt of its Rights in the Exclusive Economic Zone, December 10, 1982, in *ibid.*, p. 124.
301. Act. No. 15/ 1984 of 12 November 1984, in *ibid.*, p. 125.
302. *Op. cit.*, supra note 149.
303. Decree No. 336/ PRG/ 80, in Smith, *op. cit.*, supra chapter 2 note 173, p. 187.
304. Law No. 3/ 78, in *ibid.*, p. 191.
305. *Op. cit.*, supra note 123.
306. *Op. cit.*, supra note 130.
307. Royal Decree No. 15/81 of February 20, 1981, in Smith, *op. cit.*, supra chapter 2 note 173, p. 355.
308. *Op. cit.*, supra note 115.
309. Fleischer, *op. cit.*, supra chapter 2 note 6, p. 261.
310. Attard, *op. cit.*, supra Introduction note 4, p. 154.
311. Moore, *op. cit.*, supra note 289, p. 260 note 33.
312. Supra chapter 2, section 1 (B) (1) (3).
313. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 62 para. 1. Literally, optimum utilization is an expression which refers to that utilization which is "best or most favorable". For more details, see Dahmani, *op. cit.*, supra chapter 2 note 4, p. 49; also Extavour, *op. cit.*, supra Introduction note 4, pp. 193-94.

314. Australia, Fishing Ammendment Act of 1978, op. cit., supra note 290; Cuba, Decree Law No. 2 of 1977, in Smith, op. cit., supra chapter 2 note 173, p. 109; Mexico, Law Regulating the Eighth Paragraph of Article 27 of the Constitution Relating to the Exclusive Economic Zone, op. cit., supra note 128; New Zealand, Territorial Sea and Exclusive Economic Zone Act of 1977, op. cit., supra note 131; Papua New Guinea, Fisheries Act of 1977, in Smith, op. cit., supra chapter 2 note 173, p. 363; Fiji, Marine Space Act of 1977, op. cit., supra note 290; Sao Tome and Principe, Decree Law No. 15-78 of 1978, op. cit., supra note 135; Decree of the Presidium of the Supreme Soviet of the USSR on the Economic Zone of the USSR, op. cit., supra note 109; Venezuela, Act Establishing an Exclusive Econmic Zone Along the Coasts of the Mainland and Islands of the Republic of Venezuela, op. cit., supra note 134; and Malaysia, Exclusive Economic Zone Bill of 1984, op. cit., supra note 126.
315. Ibid.
316. Op. cit., supra note 314, Art. 6; see also Phillips, op. cit., supra chapter 2 note 233, p 269.
317. Op. cit., supra note 126, Art 7; also Mohd Ibrahim Hj Mohamed : "National Management of Malaysian Fisheries", 15 MP, No. 1, 1991, p. 10.
318. The Preamble to the LOS Convention particulary refers to the desirability to promote, "taking due regard for the sovereignty of all states... the equitable and effecient utilization of their resources...". It goes on saying that the achievement of such goals will contribute to "the realization of a just and equitable international economic order which take into account the interests and needs of mankind as a whole...".
319. United Nations ST/LEG/SER.B/ 19, 1980, p. 425.
320. Angola/Spain Fishing Agreement April 6, 1981, in Boletin Oficial del Estado, No. 34, February 9, 1981, pp. 2916-2919, cited by Mfodwo and others, op. cit., supra chapter 2 note 28, p. 456 note 146; Mauritania/Spain Fishing Agreement,

in Industrias Pesqueras June 1, 1982, p. 9; also US/Mexico Fisheries Agreement of November 24, 1976, in United Nations ST/LEG/SER.B/19, 1980, p. 430; and Spain/US Fisheries Agreement concerning Fisheries off the United States Coasts 16 February, 1977, in *ibid.*, p. 228. An implied reference to the same principle is found in some other fishery agreements by the inclusion of the factors mentioned in Article 62 para. 3. See For instance, EEC/Denmark (Faroes) Agreement Concerning Fisheries of March 15, 1977 and Brazil/Trinidad and Tobago Shrimp Agreement of February 28, 1975, cited by Mtango and Weiss, *op. cit.*, *supra* chapter 2 note 240, p. 7.

321. 29 ILM, 1990, p. 783 at p. 824 Art. 58. It is interesting to note that the duration of Lomé IV is set for 10 years, commencing March 1, 1990.
322. LOS Convention, *op. cit.*, *supra* Introduction note 2, Art. 62 (2).
323. *Ibid.*, para. 3.
324. *Ibid.*, Art. 297 para. 3.
325. Burke, *op. cit.*, *supra* chapter 2 note 32, p. 93.
326. Cape Verde, Decree Law No. 126/77 of 1977, in Smith, *op. cit.*, *supra* chapter 2 note 173, p. 95; Cuba, *op. cit.*, *supra* note 116; Portugal, *op. cit.*, *supra* note 150; Sao Tomé and Príncipe, *op. cit.*, *supra* note 135; New Zealand, *op. cit.*, *supra* note 131; Cook Islands, Act No.16 of November 14, 1977, in Smith, *op. cit.*, *supra* chapter 2 note 173, p. 325; Fiji, *op. cit.*, *supra* note 290; Niue Territorial Sea and Exclusive Economic Zone Act. of 1979, in Smith, *ibid.*, p. 336; Tonga, *op. cit.*, *supra* note 141.
327. *Ibid.*, Arts. 11, 12 and 13.
328. *Ibid.*, Art. 13.
329. *Ibid.*, Art. 13. (2).
330. Federated States of Micronesia- Title 52 of the Trust Territory Code, section 15 (3); Marshall Islands, Marine Resources Jurisdiction Act of 1978, S. 406; Paulu, Public

- Law 6-7-14 S. 12 (3). See Regional Compendium of Fisheries Legislation (Western Pacific Region), the South Pacific Forum Fisheries Agency, vol. 2. FAO, Rome 1984, pp.1-150.
331. Barbados, Marine Boundaries and Jurisdiction Act 1978, Art. 11, in Smith, *op. cit.*, supra chapter 2 note 173, p. 73; Grenada, Marine Boundaries Act, 1978, Art. 6. *op. cit.* supra note 169; Guinea Bissau, Law No. 3/78, Art. 4, *op. cit.*, supra note 304; Mauritania, Law 78-043, Art. 186 para. 2, in Smith, *op. cit.*, supra chapter 2 note 173, p. 281; Norway, Act No. 91 of 1976 para. 4, in *ibid.*, p. 303; Spain, Law No.15/1978, Art. 3, *op. cit.*, supra note 138; Togo, Ordinance No. 24 of 1977, Art. 4, in Smith, *op. cit.*, supra chapter 2 note 173, p. 439; Western Samoa, Exclusive Economic Zone Act of 1977, Art. 5, *op. cit.*, supra note 146.
332. See, for instance, Vicuna, *op. cit.*, supra chapter 2 note 240, p. 157; also Wolfrum, *op. cit.*, supra chapter 2 note 188, p. 135.
333. *Op. cit.*, supra note 314.
334. Accords passés avec la Guinée Bissau le 27 Février 1980, in OJEC, No. L. 226 du 29 Août 1980, p. 33; avec la Guinée, in *ibid.*, No. L. 237 du 28 Août 1983, p. 15; and Accord Cadre de Cooperation en Matière de Pêche entre le Gouvernement de la Republique Algérienne Democratique et Populaire et le Gouvernement de la Republique Islamique de Mouritanie, 11 Juin, 1987, in 6 JORADP, 1987, p. 149.
335. This is particularly the case of Norway/Potugal, Exchange of Notes on Fishing, 23 December 1980 and Norway/Spain, Fisheries Agreement 21 January 1981, cited by Carroz, *op. cit.*, supra chapter 2 note 38, p. 48.
336. *Op. cit.*, supra note 320.
337. Bangladesh, Territorial Waters and Maritime Zones Act, 1974, in Smith, *op. cit.*, supra chapter 2 note 173, p. 69; Burma, *op. cit.*, supra note 337; Colombia, *op. cit.*, supra note 337; Comoros, Ordinances No. 76-038/CE, in Smith, *op. cit.*, supra chapter 2 note 173, p. 197, Dominican Republic, *op. cit.*, supra note 118;

- Iceland, *op. cit.*, supra note 120; India, *op. cit.*, supra note 121; Indonesia, *op. cit.*, supra note 122; Malaysia, *op. cit.*, supra note 126; Nigeria, *op. cit.*, supra note 132; and Thailand, *op. cit.*, supra note 115.
338. See Juda, *op. cit.*, supra Introduction note 17, p. 23.
339. See, for instance, Iceland/Norway Exchange of Notes on Fishing of March 10, 1976, cited by Carroz, *op. cit.*, supra chapter 2 note 38, p. 51; also the Fourth APC - EEC Convention of Lomé of December 1989, *op. cit.*, supra note 179, Arts. 58, 64 and 66.
340. Morocco, *op. cit.*, supra note 129; Togo, *op. cit.*, supra note 331; see also The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, *op. cit.*, supra Introduction note 16, p. 12.
341. *Ibid.*, Art. 13 para. 2.
342. *Op. cit.*, supra Introduction note 5. The Declaration states in part that "the African Countries recognize in order that the resources of the region may benefit all peoples therein, that the land-locked and other disadvantaged countries are entitled to share in the exploitation of living resources of neighbouring economic zones on an equal basis as national of coastal states on bilateral agreements as may be worked out".
343. See the Conclusions of the African States Regional Seminar on the Law of the Sea, *op. cit.*, supra Introduction note 5.
344. New Zealand, *op. cit.*, supra note 131, Art. 13 para. 2; USA, *op. cit.*, supra note 38, section 201 (e).
345. Singela, *op. cit.*, supra chapter 2 note 208, p. 1; also Tavernier, *op. cit.*, supra chapter 3 note 117, p. 730.
346. Juda, *op. cit.*, supra Introduction note 17, p. 25; also W. R. Edeson : "Types of Agreements for Exploitation of EEZ Fisheries", in E. D. Brown and R. R. Churchill (eds.), : " The UN Convention on the Law of the Sea : Impact and Implementation,

Proceedings of the Nineteenth Annual Conference, Cardiff, 1985, Law of the Sea Institute, 1987, pp. 157-77.

347. See further J. Carroz and M. Saviny : " Les Accords de Pêche Conclus par les Etats Africains Riverains de l'Atlantique", 24 AFDI, 1983, pp. 674-708; for the same authors : "The Practice of Coastal States Regarding Foreign Access to Fishery Resources", op. cit., supra chapter 2 note 38, pp. 42-72; Edeson, *ibid.*, and R. Teiwaki : "Agreements in the South Pacific : Kiribati and the Distant Water Fishing States", 11 MP, 1987, pp. 273-84.
348. A joint venture, commonly defined is an association of two or more parties, whether private or governmental, formed to undertake a commercial project and involving an agreement on the sharing of risks and profits. The term covers a multitude of arrangements, many of them entailing the setting up of a separate joint company in which each of the parties holds a proportion of the capital/shares. In other cases, no independent company is formed and the relationship between the two parties is governed solely by contractual provisions in a contractual joint venture. When the partners come from different countries, the expression international joint venture is often used.
349. The displacement of fishing vessels belonging to developed states from the 200 miles EFZs or EEZs has resulted in a considerable surplus of vessels which are not granted access to the various zones under bilateral agreements. Local companies may therefore hire/charter such vessels to fish within their own EFZ or EEZ, or serve as a floating factory, receiving supplies from artisan fisherfolk for freezing and subsequent export. Legislation regulating charters exists in Nigeria, Ghana Senegal, and Mauritania. See G. Moore: "Coastal States Requirements for Foreign Fishing", FAO Legislative Study No. 21, 1985, pp. 83-97.
350. Over-the-side sale involve the mooring of a foreign ship, usually a factory ship from the EEC in an EEZ for a period of time, within which local industrial or artisan

vessels supply it with fish.

- 351. Carroz, *op. cit.*, supra chapter 2 note 38, p. 49.
- 352. Carroz, *op. cit.*, note 347, p. 682; also Treves, *op. cit.*, supra Introduction note 3, p. 157.
- 353. See Economic Cooperation among Developing Countries in Marine Affairs. United Nations Publication, New York, 1987, p. 26.
- 354. Text in JORADP, No. 6, 1988, p. 149.
- 355. Text in Law of the Sea Bulletin, No. 21, 1992, p. 87.
- 356. See, for instance, Dinh, Daillier and Pellet, *op. cit.*, supra Introduction note 18, p. 992..
- 357. See chapter 3 note 159.
- 358. Fiji, *op. cit.*, supra note 290, section 11 (4) (a); New Zealand, *op. cit.*, supra note 131, section 13 (2) (a); Papua New Guinea, *op. cit.*, supra note 314, Art 4; Spain, *op. cit.*, supra note 138, Art 3 (2); and the USA, *op. cit.*, supra note 38.
- 359. See Phillips, *op. cit.*, supra chapter 2 note 233, p. 269.
- 360. See supra note 358.
- 361. Phillips, *op. cit.*, supra chapter 2 note 233, p. 269
- 362. See supra note 358.
- 363. See its declaration on signature, in The Law of the Sea : Status of the United Nations Convention on the Law of the Sea. United Nations, New York, 1985, p. 25 para. 5.
- 364. *Op. cit.*, supra note 38.
- 365. Burke, *op. cit.*, supra chapter 2 note 34, p. 38.
- 366. Peirce, *op. cit.*, supra Introduction note 18, p. 594.
- 367. Carroz, *op. cit.*, supra note 347, p. 684.
- 368. Cited by Mfodwo and others, *op. cit.*, supra chapter 2 note 28, p. 482 note 161.
- 369. See, for example, the following Agreements : USA/EEC Agreement Concerning Fisheries Off the the United States Coasts, February 15, 1977, in 16 ILM, 1977,

- p. 257; USA/Portugal Agreement Concerning Fisheries Off the Coasts of the United States with Annexes, October 16, 1980; cited by Carroz, *op. cit.*, *supra* note 347, p. 684.
370. For a good account of the Spanish practice, see Juan Prat Y Coll : "Some Considerations on the Adaptation of National Policy in a Distant Water Fishing Nation to the Recent Evolution of the Law of the Sea", in FAO Fisheries Report No. 293, 1983, pp. 89-94.
371. *Courier* No. 64 November-December, 1980, p. 73.
372. See Mfodwo and others, *op. cit.*, *supra* chapter 2 note 28, p. 482 note 162.
373. *Op. cit.*, *supra* chapter 1 note 190.
374. *Ibid.*, p. 30.
375. As explained in chapter 3 in more details, according to Article 297 of the LOS Convention the powers of the coastal state related to the determination of the TAC, its harvesting capacity, and access of other states to its EEZ are excluded from the scope of the compulsory settlement procedure.
376. These categories were introduced by the DWFSs in the Seabed Committee. See the Soviet Draft Articles on Fishing (A/AC. 138/SC. II/L. 6) July 25, 1972; also the US Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries (A/AC. 138/SC. II/L.9) July 1972, in Oda, *op. cit.*, *supra* chapter 2 note 55, pp. 213-215.
377. *Op. cit.*, *supra* note 131, section 13 (b).
378. For instance, Soviet Union/United States Agreement Concerning Fisheries Off the United States Coasts of 26 November 1977, in 16 ILM, 1977, p. 62; Japan/United States Exchange of Notes Concerning Fisheries Off the United States Coasts of 10 February 1977, in *ibid.*, p. 287.
379. *Op. cit.*, *supra* note 129.
380. *Op. cit.*, *supra* note 331, Art. 4.
381. *Op. cit.*, *supra* Introduction note 5, preamble para. 5.

382. Cited by Carroz, *op. cit.*, supra chapter 2 note 38, p. 49.
383. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 64 para. 4 (a) to (K).
384. See, for instance, Antigua and Barbuda, the Territorial Waters Act. No.18 of 1982, in Smith, *op. cit.*, supra chapter 2 note 173, p. 61 Art. 19 (1) (e); Barbados, *op. cit.*, supra note 232, Art. 6; Cuba, *op. cit.*, supra note 116, Art. 4; Fiji, *op. cit.*, supra note 290, Art. 12 (2); Grenada, *op. cit.*, supra note 169, Art. 6; and Guyana, *op. cit.*, supra note 119, Art. 17. See for more details, FAO Legislative Study No. 35, FAO, Rome, 1984, vol. 2.
385. See, for instance, Vanuatu's Maritime Zones Act of 1981, *op. cit.*, supra note 143, Part V.
386. For example, Tokelau's Territorial and Exclusive Economic Zone Act of 1977 provides that "the Governor-General may from time to time... make regulations prescribing conditions that shall be deemed to the implied licences". In Smith, *op. cit.*, supra chapter 2 note 173, p. 340 Art. 8 (1) (P).
387. Moore, *op. cit.*, supra note 289, p. 166.
388. Mexico/USA Fisheries Agreement, *op. cit.*, supra note 320.
389. Mauritania/Greece Agreement for Fishing Cooperation 1 April, 1977, cited by Mtango and Weiss, *op. cit.*, supra chapter 2 note 240, p. 9.
390. Chile/Spain Agreement on Cooperation in Fishing 7 June 1977. For more details, see, particularly Moore, *op. cit.*, supra note 289, pp. 166-67.
391. Kiribati/Japan Agreement on Fisheries, 1982, cited by Attard, *op. cit.*, supra Introduction note 4, p. 173.
392. See, for instance, the legislations of the following states: Barbados, *op. cit.*, supra note 232, Art. 12; Fiji, *op. cit.*, supra note 290, Art. 14; Grenada, *op. cit.*, supra note 169, Art. 12; Honduras, Decree Law No. 921 of June 13, 1980, in Smith, *op. cit.*, supra chapter 2, note 173, p. 205, Art. 4; Kenya, Presidential Proclamation of February 28, 1979, in *ibid.*, p. 243 section 2; and Tonga, *op. cit.*, supra note 141.

393. See, for example, Tonga's Territorial Sea and the Exclusive Economic Zone Act No. 30 of 1978, in *ibid.*, p. 441.
394. FAO Legislative Study No. 35, FAO, Rome, 1984, p. 17.
395. See, for instance, the Norwegian Royal Decree of December 17, 1976, *op. cit.*, *supra* note 331, para. 3.
396. *Ibid.*
397. See, for instance, New Zealand's Territorial Sea and Exclusive Economic Zone Act of 1977, in Smith, *supra* chapter 2 note 173, p. 309 section 15 (3) (o).
398. ST/LEG/SER. B/ 19, 1980, p. 33.
399. See The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, *op. cit.*, *supra* Introduction note 16, p. 46.
400. *Op. cit.*, *supra* note 355.
401. See, for instance, Senegal/Poland Convention Concerning Marine Fisheries, March 17, 1976, cited by Mtango and Weiss, *op. cit.*, *supra* chapter 2 note 240, p. 47 note 43.
402. Foreign Vessels Fishing Regulations of 23 December, 1976, in S. H. Lay, R. Churchill, and M. Nordquist, (eds.), *New directions in the Law of the Sea*, vol. 5, 1977, p. 72.
403. Fiji, Marine Spaces Act 1977, *op. cit.*, *supra* note 290, Art. 12 (3) (i); New Zealand, Territorial Sea and Exclusive Economic Zone Act. 1977, *op. cit.*, *supra* note 131, p. 309 Art. 15 (j).
404. All of these agreements are reproduced in FAO, Committee on Fisheries, Twelfth Session, Rome 6-12 June 1978, COFI/78/Inf. 8 May 1978, pp. 43-65.
405. E.g. USA/EEC Agreement Concerning Fisheries Off the United States Coast, 15 February 1977, *op. cit.*, *supra* note 369, Art. 3; Accord Cadre de Cooperation en Matière de Pêche Algérie/Mauritanie, 1987, *op. cit.*, *supra* note 180, Arts. 3, 4 and 5.

406. Fisheries Resources (Jurisdiction and Conservation) Act No. 13 of June 16, 1977. in ST/LEG/SER. B/19, 1980, p. 179 Art. 10 (4).
407. Fiji's Marine Space Act, op. cit., supra note 290, Art. 14 (3) (p); New Zealand's Territorial Sea and Exclusive Economic Zone Act, op. cit., supra note 131, Art. 15 (3) (p); Tonga's Territorial Sea and Exclusive Economic Zone Act, op. cit., supra note 141, Art. 14 (3) (p); Western Samoa, Exclusive Economic Zone Act, op. cit., supra note 146, Art. 5 (p).
408. Op. cit., supra note 142.
409. Ibid., section 28 (1). Similar powers are included in Brazil/Trinidad and Tobago Shrimp Fishing Agreement of 28 February 1975, and in Japan/USSR Agreement of 28 February Concerning Fisheries Off the Coast of Japan, August 4, 1977.
410. Ibid., section 28 (2).
411. E.g. Fiji, the Gambia, New Zealand, USA, and Poland. On the use of the defense forces for fisheries protection, see generally E. R. Fidell : "Fisheries Legislation : Naval Enforcement", 7 JMLC, 1976, pp. 351-363.
412. ST/LEG/SER. B/19, 1980, p. 377.
413. Ibid., Art. 52.
414. E. A. Sisco: "Hot Pursuit from a Contiguous Fisheries Zone, As Assault on the Freedom of the High Seas", 14 SCLR, 1977, pp. 656-680.
415. P. W. Birnie : "Contemporary Maritime Legal Problems", in Barston and Birnie, (eds.), op. cit., supra chapter 1 note 92, pp. 172-173.
416. Article 111 (3) provides that "the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state". See also the Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, op. cit., supra Introduction note 16, p. 16; and Brown, op. cit., supra Introduction note 18, p. 298.
417. E.g. The Bahamas, Fiji, New Zealand, Seychelles, Trinidad and Tobago, UK

- and USA; also G. Moore : "Coastal State Requirements for Foreign Fishing", FAO Legislative Study No. 21, rev. 3, Rome, 1988, in *International Organizations and the Law of the Sea : Documentary Yearbook*, vol. 4. Martinus Nijhoff, London / Dordrecht / Boston, 1988, p. 214.
418. See for details, D. Robb: "Access Conditions and Compliance Control", in FAO Fisheries Report No. 295, FAO, Rome, 1984, pp. 65-79.
419. For instance, in the Barbadian law the amount of fine is fixed at \$ 20.000, *op. cit.*, supra note 232, section 11(5); Mauritius law fixed it at 200 thousand rupees, *op. cit.*, supra note 127, section 12; and Cape Verde law provides that the violation of the provisions of Article 7 (2) shall be punishable by a fine up to 20.000 escudos, and violations of the provisions of Article 8 (2-3) shall be punishable by a fine of up to 35.000 escudos per ton of gross tonnage of the violating vessel. *op. cit.*, supra note 326, Art. 13.
420. Decree of the Presidium of the Supreme Soviet, *op. cit.*, supra note 109, Arts. 19, 21; Resolution of the Council of Ministers of the USSR on fixing compensation for the damage to living resources of the economic zone of the USSR and to the anadromous stocks, originating in the rivers of the USSR, beyond the limits of the economic zone of the USSR, 1986, cited by E.N. Nikitina and P. H. Pearse : "Conservation of Marine Resources in the Former Soviet Union : An Environmental Perspective", 23 ODIL, 1992, p. 380 note 22.
421. *Ibid.*, p. 376.
422. E.g. in Burma, Canada, the Gambia, Ghana, Guyana, Japan, Madagascar, Mauritius, New Zealand, Nigeria, Norway, Papua New Guinea, Portugal, Seychelles, Sri Lanka and USA.
423. See FAO Committee on Fisheries, *op. cit.*, supra note 404, pp. 11-12.
424. E.g. Guyana, New Zealand, Papua New Guinea and Seychelles.
425. E.g. The Bahamas, *op. cit.*, supra note 406, section 19 and 21; Cape Verde,

- op. cit., supra note 326, Art. 13; Guinea, Decree No.336/PRG/80, in Smith, op. cit., supra chapter 2 note 173, Art. 8; Jamaica, op. cit., supra note 99, Art. 7; Mauritius, op. cit., supra note 127, section 12 (1); Philippines, op. cit., supra note 134, section 5 (b); Seychelles, op. cit., supra note 136, Art. 12; and Tanzania, op. cit., supra note 95, section 10 (3).
426. Ibid.
427. Op. cit., supra note 425.
428. Fisheries Amendment Act No. 99 of 1978, in Churchill and others, op. cit., supra note 290, p. 74.
429. Ibid., p. 45.
430. USA/ Japan Agreement on Fisheries Off the United States Coasts, February 10, 1977, op. cit., supra note 378.
431. E.g. Canada, Fiji, Guinea, Mauritania, and New Zealand.
432. Op. cit., supra note 38, section 201.
433. Op. cit., supra note 406, Art. 10 (4) (c); also Treaty on Fisheries between Certain Pacific Island States and the United States, op. cit., supra note 180, p. 1048 Art. 5 (3); The Fourth ACP - EEC Convention of Lomé, op. cit., supra note 179, Art. 68; and the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, op. cit., supra note 180, Art. 4 (5).
434. E.g. Canada, Coastal Fisheries Protection Regulations, December 9, 1979 in 15 ILM, 1976, p. 1372; also Fisheries Agreement between Iceland and Belgium Relating to the Extension of the Icelandic Fishery limits to 200 Nautical Miles, November 28, 1975, in R. R. Churchill and M. Nordquist, (eds.), New Directions in the Law of the Sea, vol. 5 : Documents. Oceana Publications, Inc. Dobbs Ferry, New York, 1977, p. 33; and Niue Treaty, *ibid.*, Art. 4 (3).
435. Times (London), August 22, 1978. (The Master of the Soviet Trawler MPPT 10 was released due to lack of corroboration required by Scottish Law).

436. E.g. Papua New Guinea, Gambia, Seychelles, and the USA.
437. The Gambian Fisheries Act No. 14 of 1977, section 5 (1).
438. *Op. cit.*, supra note 38, section 202 (9) (5).
439. *Op. cit.*, supra note 144.
440. *Ibid.*, Art. 7 (1).
441. 21 ILM, 1982, p. 33.
442. 91 RGDIP, 1987, p. 1115, Art.2; see also, generally D. Ruzie : "Une Experience Originale de Cooperation : La Mise en Valeur des Ressources Halieutiques du Golf de Guinee", 3 JDI, 1984, pp 848 - 867; and Edeson, *op. cit.*, supra note 346, pp. 162-63.
443. The NAFO was set up in 1978 to replace the previous ICNAF as a result of the establishment by Canada and the USA of their respective 200 miles fishery zone. The text of the Convention establishing the new organization is reproduced in OJEC, 1978, No. L/378/16; see also FAO Circulaire sur les Pêches No. 835, Rev. 1, FAO, Rome, Janvier 1992, p. 8; and M. Hayashi : " The Management of Transboundary Fish Stocks under the LOS Convention", 8 IJMCL, 1993, pp. 252 - 257.
444. For instance, cod, whiting, shrimp, and anchovy. These fish species are usually found in the waters above the continental shelf and are therefore largely contained within the 200 miles EEZ, but often mix across the EEZ / high seas boundary. See *caddy*, *op. cit.*, supra chapter 2 note 67, pp. 29-30; also Hannesson, *op. cit.*, supra chapter 2 note 74, p. 371 note 1.
445. See, for instance, the Chilean Law No. 19, 079 of 12 August 1991, amending Act No. 18. 892, in Official Journal of the Republic of Chile, September 6, 1991, Art. 154; the Peruvian Decree Law No. 25977 of December 7, 1992, cited in Pfirter, *op. cit.*, supra chapter 2 note 82, p. 137 note 81; Declaration Conjunta Chile - Brazil, made during the visit to Chile by the Minister of Foreign Affairs of Brazil, from March 23 to 27, 1993, cited in *ibid*; also J. G. Dalton : "The Chilean Mar Presencial :

- A Harmless Concept or a Dangerous Precedent ?", 8 IJMCL, 1993, p. 398;
- F. O. Vicuna : "The 'Presential Sea' : Defining Coastal States' Special Interests in High Seas Fisheries and other Activities", 35 GYIL, 1992, pp. 265-269;
- E. Meltzer : " Global Overview of Straddling and Highly Migratory Fish Stocks : The Non-sustainable Nature of High Seas Fisheries", 25 ODIL, 1994, pp. 269-272.
446. Ibid.
447. Pfirter, *op. cit.* supra chapter 2 note 82, p. 136.
448. See General Assembly Resolutions 44/225 (1989), 45/197 (1990), 46/215 (1991) and General Assembly Decision 47/433 (1992) imposing a moratorium on large scale high seas driftnet fishing; also G. J. Hewison : "The Legally Binding Nature of the Moratorium on Large - Scale High Seas Driftnet Fishing", 25 JMLC, 1994/4, pp. 557-578.
449. See F. O. Vicuna : "Trends and Issues in the Law of the Sea as Applied in Latin America", 26 ODIL, 1995/2, p. 99.
450. *Op. cit.*, supra note 443, Art. XI (9).
451. FAO Circulaire, *op. cit.*, supra note 443, p. 53. For an analysis of this Agreement, see specially W. Edeson and J. F Pulvenis : *The Legal Regime of Fisheries in the Caribbean Region*. Springer Verlag, Berlin, 1983, p. 93.
452. Text in Law of the Sea Bulletin, No. 19, 1991, p. 33.
453. Edeson and Pulvenis, *op. cit.*, supra note 451, p. 52. It is noteworthy that the number of member-states has increased recently to reach thirty seven states, including Japan and Russia the main Whaling states. However, like most fisheries organizations, the IWC does not have the power to make binding decisions on conservation measures. It can only make recommendations which become binding after a period of 90 days on any member that does not present objections to such recommendations, *ibid.*
454. Senegal, Law 76 - 89 of July 1976, Art. 16; Guinea, Marine Fisheries Code, Art 32,

United States, Marine Mammals Protection Act 1972.

455. FAO Circulaire, *op. cit.* supra note 443, p. 52. For more details, see Brown, *op. cit.*, supra Introduction note 18, pp. 230-231.

456. *Ibid.*

457. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 66 (1).

458. *Ibid.*, Art. 66 (2).

459. For more details, see Mc Dorman, *op. cit.*, supra chapter 2 note 72, p. 553.

460. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 66 (3) (a).

461. *Op. cit.*, supra note 38.

462. *Op. cit.*, supra note 54; also the Chilean Law No. 19.079 of 12 August, 1991, *op. cit.*, supra note 445.

463. US FMCA of 1976, section 1812 (2); Japanese Law No. 31/77, Art. 12.

464. Agreement between the USA and the USSR of 31 May 1988 on Mutual Fisheries Relations, cited by Fleischer, *op. cit.*, supra chapter 1 note 193, p. 153. The Preamble states that the two parties have sovereign rights within zones they have established, extending 200 nautical miles from their coasts. It further states that they have "authority for management of anadromous species of their respective origin beyond their respective zones, except when found in the equivalent zone or territorial sea of another state".

465. FAO Circulaire sur les Pêches No. 807, FAO, Rome, Avril 1987, p. 9.

466. For English text, see 28 Japanese Annual of International Law, 1985, p. 297.

467. Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, done at Moscow, 11 February 1992, text in Law of the Sea Bulletin, No. 22, 1993, p. 21.

468. See Hewison, *op. cit.*, supra note 448, p. 563.

469. Fleischer, *op. cit.*, supra chapter 1 note 193, p. 152.

470. See FAO Yearbook of Fishery Statistics 1980, vol. 50, p. 92.

471. LOS Convention, *op. cit.*, supra Introduction note 2, Art 64 (1).
472. *Ibid.*, Art 64 (2).
473. T.W. Burke : "Highly Migratory Species in the New Law of the Sea", 14 ODIL, 1984, pp. 273 - 314.
474. E. g. Antigua and Barbuda, *op. cit.*, supra note 384, section 10; Barbados, *op. cit.*, supra note 331, section 5; Cuba, *op. cit.*, supra note 314, Art. 2; Guatemala, *op. cit.*, supra note 149, Art 3; Indonesia, *op. cit.*, supra note 122, Art. 4; and Mauritius, *op. cit.*, supra note 127, section 7.
475. *Op. cit.*, supra note 131, section 22 (j).
476. For more details, see Phillips, *op. cit.*, supra chapter 2 note 233. pp. 270 - 271.
477. Texts in The Law of the Sea : Status of the United Nations Convention on the Law of the Sea. United Nations Publication, New York, 1985, pp.14 and 24 respectively.
478. *Op. cit.*, supra note 109.
479. Burke, *Op. cit.*, supra note 473, pp. 273-314.
480. *Op. cit.*, supra note 433.
481. *Op. cit.*, supra chapter 2 note 117.
482. Among the very few national instruments that have referred to cooperation are the Portugese Law No. 33/77, *op. cit.* supra note 150, Art. 6; the Declaration of Sao Tomé and Principe made upon signature of the LOS Convention, *op. cit.*, supra note 477; and the Act Establishing an Exclusive Economic Zone Along the Coasts of the Mainland and Islands of the Republic of Venezuela, *op. cit.* supra note 144, Art. 5 (2).
483. *Op. cit.*, supra note 445, Art. 154.
484. See Act No. 23, 968 on Maritime Areas of 14 August 1991, in Law of the Sea Bulletin, No. 20, 1992, p. 20.
485. See Appendix A of this thesis.
486. Fleischer, *op. cit.*, *op. cit.*, supra chapter 2 note 6, p. 256.

487. *Op. cit.*, supra note 433.
488. *Ibid.*, Arts. 3, 4 and 5.
489. For text, see Compendium of Basic Texts Concerning International Management and Development of Tuna Fisheries, FAO Fisheries Circular, No. 842. FAO, Rome, 1992, pp. 113-120; also J. F. Pulvenis : "Vers une Emprise des Etats Riverains sur la Haute Mer au Titre des Grands Migrateurs : Le Regime International de la Pêche au Thon dans le Pacific Oriental", 35 AFDI, 1989, pp. 784-790.
490. *Ibid.*
491. Text in Law of the Sea Bulletin, No. 16, 1990, p. 57. The following African states were represented at the Second Ministerial Conference : Burundi, Kenya, Malawi, Mozambique, Seychelles, Somalia, Sudan, Uganda the United Republic of Tanzania, Zambia and Zimbabwe.
492. *Ibid.*, preamble paragraph 1.
493. See The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, *op. cit.*, supra Introduction note 16, p. 78.
494. E. g. the Japanese Law No. 31 of 2 May 1977 on Provisional Measures Relating to the Fisheries Zone as amended by Law No. 83 of 29 November 1977, *op. cit.*, supra note 54, Art. 9; and Nauru, Marine Resources Act. No. 8 of 1978, Art. 13; also Alfred H. A. Soons : "The Developing Regime of Marine Scientific Research : Recent European Experience and State Practice", in Alexander and others, *op. cit.*, supra note 279, pp. 293-307; W. Plesman and V. Röben : "Marine Scientific Research : State Practice versus Law of the Sea" in R. Wolfrum, (ed.), Law of the Sea at the Crossroads : The Continuing Search for a Universally Accepted Regime. Duncker and Humblot, Berlin, 1991, pp. 273-392; and Soons, *op. cit.*, supra chapter 2 note 28, pp. 268-272.
495. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 246 (3).

496. The Territorial Waters Act No. 18 of 1982, in Smith, *op. cit.*, supra chapter 2 note 173, p. 62 Art. 15 (f).
497. *Op. cit.*, supra note 331, section 5 (a) (iii).
498. *Op. cit.*, supra note 216, section 18 (c).
499. *Op. cit.*, supra note 215, Art. 8.
500. *Op. cit.*, supra note 169, Art. 5 (a) (ii).
501. *Op. cit.*, supra note 121, section 7 (4) (c).
502. *Op. cit.*, supra note 122, section 2 (b) (2).
503. *Op. cit.*, supra note 189, section 1 (c) (ii).
504. *Op. cit.*, supra note 126.
505. *Op. cit.*, supra note 128, Art. 4 (IV) (b).
506. *Op. cit.*, supra note 135, Art. 4 (4) (b).
507. *Op. cit.*, supra note 139, section 5 (3) (b).
508. E. g. Bangladesh, *op. cit.*, supra note 337; Comoros, *op. cit.*, supra note 197; France, *op. cit.*, supra note 205; and Mozambique, *op. cit.*, supra note 130.
509. *Ibid.*, section 9 (2) (a).
510. W. S. Scholz : "Oceanic Research : International Law and National Legislation", 4 MP, 1980, 116.
511. For a review of the regulations of certain states, see *ibid.*, p. 117.
512. Iceland, *op. cit.*, supra note 120; Venezuela, *op. cit.*, supra note 144.
513. *Ibid.*, Art. 9 (1).
514. *Ibid.*, Art. 9 (2).
515. *Op. cit.*, supra note 109.
516. Statement by the President, March 10, 1983, in Smith, *op. cit.*, supra chapter 2 note 173, p. 468.
517. *Ibid.*
518. Cited by Mc Laughlin, *op. cit.*, supra chapter 2 note 196, p. 12; see also the

explanation made by Mr John Negroponte the successor of Mr Malone at the State Department, in *ibid.*, p. 13.

519. W. T. Burke : "Scientific Research", in L. Juda, (ed.), *The United States Without the Law of the Sea Treaty : Opportunities and Costs*. University of Rhode Island, Center for Ocean Management Studies, Kingston, 1983, pp. 113-115; also *soons*, *op. cit.*, *supra* chapter 2 note 28, p. 262.

520. See *supra* note 184.

521. E. g. Colombia, Law No. 10 of 1978, in Smith, *op. cit.*, *supra* chapter 2 note 173, p. 99; Comoros, Ordinance No. 76-038/CE of 1976, in *ibid.*, p. 103; and France, Law No. 76-655 of 1976, in *ibid.*, p. 147.

522. E. g. Comoros.

523. LOS Convention, *op. cit.* *supra* Introduction note 2, Art. 60 (1) (b).

524. *Ibid.*, Art. 60 (1) (c); also Brown, *op. cit.*, *supra* chapter 3 note 3, p. 124.

525. Antigua and Barbuda, *op. cit.*, *supra* note 496; Barbados, *op. cit.*, *supra* note 232; Belize, *op. cit.*, *supra* note 96; Djibouti, Law 52/An/78 of 1979, in Smith, *op. cit.*, *supra* chapter 2 note 173, p. 11; Dominica, *op. cit.*, *supra* note 197; Egypt, *supra* note 300; Saint Christopher and Nevis, Maritime Areas Act of 1984, in Smith, *ibid.*, p. 381; Saint Lucia, Maritime Areas Act of 1984, in *ibid.*, p. 383; the United States, *op. cit.*, *supra* note 109; and Venezuela, *op. cit.*, *supra* note 144.

526. The Dominican Republic, *op. cit.*, *supra* note 118, Art. 5; Guatemala, *op. cit.*, *supra* note 149, Art. 3 (b); Guyana, *op. cit.*, *supra* note 119, Art. 16 (b); Honduras , *op. cit.*, *supra* note 392, Art. 1 (b); Ivory Coast, *op. cit.*, *supra* note 123, Art. 3 (3); and Sao Tomé and Principe, *op. cit.*, *supra* note 135, Art. 4 (2).

527. *Ibid.*

528. *Op. cit.*, *supra* note 526.

529. Argentina, *op. cit.*, *supra* note 23; Burma, *op. cit.*, *supra* note 216; India, *op. cit.*, *supra* note 121; Kenya, *op. cit.*, *supra* note 189; Mauritania, *op. cit.*, *supra* note 303;

Mauritius, *op. cit.*, supra note 127; Pakistan, *op. cit.*, supra note 133; Seychelles, *op. cit.*, supra note 136; Sri Lanka, *op. cit.*, note 139; and Vanuatu, *op. cit.*, supra note 143.

530. *Ibid.*, Art. (4) (b).

531. See *The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, *op. cit.*, supra Introduction note 16, p. 17.

532. Bangladesh, *op. cit.*, supra note 508; Guyana, *op. cit.*, supra note 119; India, *op. cit.*, supra note 121; Ivory Coast, *op. cit.*, supra note 123; Malaysia, *op. cit.*, supra note 126; Mauritius, *op. cit.*, supra note 127; Pakistan, *op. cit.*, supra note 133; Seychelles, *op. cit.*, supra note 136; and Spain, *op. cit.*, note 138.

533. *Ibid.*, Art. 1 (2) (b).

534. *Ibid.*, Art. 1 (2) (c).

535. LOS Convention, *op. cit.*, supra Introduction note 2, Art. 211 (5).

536. *Ibid.*, Art. 211 (6).

537. *Ibid.*, Art. 220 (1).

538. *Ibid.*, Art. 220 (6).

539. Comoros, Ordinance 76 - 038/CE of 1976, in Smith, *op. cit.*, supra chapter 2 note 173, p. 104 Art. 7 (b); Egypt, *op. cit.*, supra note 3; Ghana, Maritime Zones Law of 1986, in *The Law of the Sea : Current Development in State Practice*. United Nations Publication, New York, 1987, p. 33 section 5 (2) (b) (iii); Guatemala, *op. cit.*, supra note 149, Art. 3 (d); Kenya, *op. cit.*, supra note 189, section 1 (c) (i); Madagascar, *op. cit.*, supra note 125, Art. 2; Mexico, *op. cit.*, supra note 128, Art. 4 (IV) (a); Sao Tomé and Príncipe, *op. cit.*, supra note 135, Art. 4 (4) (a); The United Republic of Tanzania, *op. cit.*, supra note 195, section 9 (2) (iii); and Venezuela, *op. cit.*, supra note 144, Art. 3 (b) (iii).

540. *Op. cit.*, supra note 160.

541. *Op. cit.*, supra note 109.

542. See Nikitina and Pearse, *op. cit.*, supra note 420, p. 378.

543. Text in Law of the Sea Bulletin, No. 8, 1986, p. 17.

544. *Op. cit.*, supra note 160.

545. *Op. cit.*, supra 205, Art. 4.

546. Cape Verde, *op. cit.*, supra note 326, Art. 12 (a); Fiji, *op. cit.*, supra note 290, section 11 (c); Norway, Act No. 91 of 17 December 1976 Relating to the Economic Zone of Norway, in Smith, *op. cit.*, supra chapter 2 note 173, p. 351 para. 7; Portugal, *op. cit.*, supra note 150, Art. 7 (a); and United States, *op. cit.*, supra note 109.

CHAPTER FIVE

THE PRESENT SITUATION OF THE CONCEPT AND REGIME OF THE EEZ IN CUSTOMARY LAW

Introduction

As the preceding chapter on state practice relating to the EEZ indicates, coastal states have been increasingly implementing the LOS Convention's EEZ provisions in their relations with the other states. However, the result has been a 'pick and mix', selective approach to the LOS Convention's EEZ regime in which certain powers and duties have been specifically claimed but others ignored. Therefore, the aim of this last chapter is to attempt, first, to give a short review of the prerequisites for the emergence of a rule of international customary law and apply them to the 200 miles EEZ; secondly, to establish with precision the scope of the EEZ general concept in customary international law and; thirdly, to determine the specific details of this general rule, if there are any, that have already passed into the general corpus of international law.

Section I : Prerequisites for the Emergence of a Rule of International Custom and their Application to the 200 Miles EEZ

Introduction

Authors differ as to the precise definition of the prerequisites for a state practice to be recognized as law. There is little agreement both on the relative importance of particular elements in the definition and even on the necessity of specific elements¹. However, the elements which are traditionally viewed as necessary for the creation of customary international law have been identified in the decisions of the ICJ and by one of its former judges, Manley O. Hudson² as: (A) generality and uniformity of the practice³; (B) continuation or repetition of the practice over a considerable period of time⁴; (C)

conception that the practice is required by, or consistent with, prevailing international law⁵; and (D) lack of protest and general acquiescence in the practice by other states⁶.

It must be made clear, however, that the present author has no intention to delve into a very detailed discussion of the above mentioned prerequisites, for they have been extensively dealt with in legal literature. Therefore, this section will give a brief reexamination of these prerequisites in turn, and will attempt to apply them to existing coastal states claims to 200 miles EEZ.

A. Generality and Uniformity of the Practice

In the North Sea Continental Shelf Cases, the ICJ insisted on "a very widespread and representative participation;... state practice, including that of states whose interests are especially affected, should have been extensive and virtually uniform"⁷. Judge Lachs in his Separate Dissenting Opinion in that case, clarifying the expression widespread and representative character, noted that "states with different political, economic and legal systems, states of all continents should participate in this process"⁸. In the Continental Shelf (Tunisia v. Libya) Case, Judge D'Arechaga, in his Separate Opinion said that "the proclamation by 86 coastal states of economic zones, fishery zones or fishery conservation zones... constitutes a widespread practice of states..."⁹. According to Kunz, "the practice must be general not universal,... the practice must have been applied by the overwhelming majority of states which hitherto has an opportunity of applying it"¹⁰. Corbett spoke of "general approval"¹¹. Tunkin referred to general practice that does not necessarily mean the practice of all states¹². Similarly, Brownlie observed that, "certainly universality is not required"¹³.

Uniformity and consistency of the practice is essential¹⁴. In this context, in the Asylum Case, the ICJ said that "the Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the states in

question"¹⁵. According to Lauterpacht, there should be "concordant international practice"¹⁶. The essential point is that there should not be much "uncertainty and contradiction so much fluctuation and discrepancy" in the practice of states¹⁷. A small amount of inconsistency does not prevent the establishment of a customary rule. In this context, the ICJ emphasized in the Nicargua v. United States Case¹⁸ that it was not necessary that the practice in question had to be "in absolute rigorous conformity" with the purported customary rule. The Court went saying that :

"In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule"¹⁹.

As explained earlier in chapter four, in the period between 1975 and 1978 forty seven coastal states established their own 200 miles jurisdictional zones with regard to fisheries and certain other related matters such as MSR and preservation of the marine environment²⁰. Sixteen other EEZ claims were made between 1978 and 1981²¹ bringing the total to sixty-three claims. During the same period, some other coastal states established their own 200 miles EFZ instead of a full EEZ²².

It is perhaps worth recalling at this stage that international law publicists who have argued against the binding nature of the EEZ under general customary law have principally relied upon two main arguments. These arguments are, first, the partial nature and the provisional character of certain 200 miles EEZ claims; secondly, the 'package deal' as ruling out any selective, e.g. only with respect to the EEZ, application of the LOS Convention.

As far as the first argument is concerned, it has been asserted that the fact that some coastal states have claimed a 200 miles EFZ only together with the fact that some of

these claims have only a provisional character make the practice on the 200 miles jurisdictional zone not uniform. In this connection, Zakharov has said that :

" If we ... look at state practice and we try to analyze the acts adopted by governments, we must come to the conclusion that all of them differ greatly. For example, if we look at the act of the USSR, adopted in 1976, we note that this act will be in force until the date of the entry into force of the Convention, and that it said nothing about establishing the exclusive economic zone. So if we analyze all the acts adopted by different states, we find that there is no reason to say that we have a generally recognized practice. For this reason, we cannot say that the exclusive economic zone is a norm of customary law²³."

However, in the author's opinion, this argument may be refuted by simply referring to the fact that the fishery regime is the central element of the EEZ concept and that the desire to exploit and conserve the fisheries resources found in adjacent seas has been, since the 1940s, the principal incentive for the establishment of the 200 miles EEZ. Therefore, any claim which is restricted to an exclusive fishery zone strengthens the concept of exclusive economic zone²⁴.

Moreover, it appears plausible to invoke here the argument of gradual implementation of the EEZ in state practice as evidenced, for instance, by the approach of those coastal states which proclaimed merely exclusive fishery zones. In a long-term perspective, it may well be anticipated that the EEZ will replace all existing exclusive fishery zones. This appears to be confirmed by the transformation of an existing 200 miles EFZ into an EEZ which was effected by the United States in 1983²⁵, the Soviet Union in 1984²⁶, Poland in 1991²⁷, Sweden²⁸ in 1993 and Australia²⁹ in 1994.

In so far as the package deal argument is concerned, certain publicists, mostly from the former Soviet Union³⁰, have contended that the fact that UNCLOS III solved all the problems of the sea (including the regime of the territorial sea, EEZ, international

straits, the high seas, continental shelf and international sea-bed area) in one package has an important impact on the future effectiveness of rules and principles included in the LOS Convention³¹. One of the principal consequences thereof is the acceptance that the LOS Convention as a treaty forming a package deal may be a source of customary law only in its entirety and not with respect to particular elements of its package, e.g. the EEZ. This argument has been advanced by several authors especially in the years following the adoption of the LOS Convention as an essential argument against the internationally binding nature of the EEZ³².

However, despite the fact that the package deal argument appears to be attractive from the point of view of the manifestation of the important role of the debates and of conventional norms, in the present author's view, it remains a feeble argument. This is because it fails to appreciate the particular role played by state practice in the elaboration of rules of customary law, an aspect which forms a basic principle of international law³³. This could lead to the extreme stand of nullifying the legal effect of customary law by way of this conventional exclusiveness, thus threatening to destabilize international law³⁴.

Moreover, the majority of authors from Eastern Europe, developing states, and Western States do not invoke the 'package deal' argument against the binding character of the EEZ³⁵. Indeed, many Western international law publicists consider the 'package deal' as only a procedural device designed to further the achievement of consensus by UNCLOS III, which as such has no continuing merit whatsoever³⁶. Moreover, they regard state practice as the principal test as to whether third states may enjoy rights stipulated in treaties. In this context, Lee, for instance, has correctly said :

"Even if the intent of the negotiators of the law of the sea Convention was to limit the benefits of all its provisions to the signatories as parties to a so called package deal, non-party states may enjoy the same benefits if the

particular provision of the Convention... has since acquired the status of customary rule through widespread acceptance as law and confirmation by state practice"³⁷.

Furthermore, a Chamber of the International Court of Justice in the Gulf of Maine Case observed that :

" ... The Chamber notes in the first place that the Convention ...has not yet come into force and that a number of States do not appear inclined to ratify it. This, however, in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention, concerning the ... exclusive economic zone, ... were adopted without any objections ... In the Chamber's opinion, these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption , may nevertheless be regarded as consonant at present with general international law on the question"³⁸.

Thus, taking into account the number of states that have enacted unilateral legislation creating EEZs and EFZs up to a breadth of 200 miles, it seems reasonable to say that state practice is extensive and virtually uniform³⁹. Furthermore, the states whose interests are vitally affected, that is the coastal states, participate fully in this regard, have inaugurated the process of incorporation almost simultaneously with the formulation of the concept and its insertion into the early negotiating texts.

B. Continuation or Repetition of the Practice over a Considerable Period of Time

According to Kelsen, "custom by which a norm of general international law is created" is a "long-established practice of states"⁴⁰. Similarly, in a working paper concerning Article 24 of the ILC Statute, Hudson required "continuation or repetition of

the practice over a considerable period of time"⁴¹. However, while in the classical theory the passage of time was held relevant to consolidate practice, this requirement is held to be less stringent today. In this context, in the North Sea Continental Shelf Cases, the ICJ pointed out that it is not necessary to prove that the practice has been followed for any particular length of time⁴². Therefore, the idea of a 'long-established' or 'immemorial' practice is no longer required as this would exclude the possibility of creation of new customary norms even on the basis of 'a complete uniform and universal practice'⁴³.

State practice concerning the 200 miles EEZ has been extremely rapid. This phenomenon has prompted Judge Oda to remark that "throughout the history of international law, scarcely any other major concept has ever stood at the threshold of acceptance within such a short period"⁴⁴.

C. Conception that the Practice is Required by Prevailing International Law (*Opinio Juris*)

This criterion also referred to as 'psychological component' and 'recognition' is generally regarded as a necessary element in the formation of a custom⁴⁵. It refers to the belief by the acting state that its conduct comports with internationally accepted principles of law⁴⁶.

Perhaps, the main arena in which *opinio juris* with regard to the EEZ is to be sought is the declarations, draft proposals and statements made at UNCLOS III, in particular at the 1974 Caracas Session. At this gathering almost all states spoke in favor of the 200 miles EEZ⁴⁷. Other circumstances in which *opinio juris* on the legal character of the EEZ can be inferred or identified include official statements accompanying proclamation of national legislation, signature or ratification of the LOS Convention, and national legislation, fishing and delimitation agreements with regard to 200 miles zones,

and case law⁴⁸. In all these fields, and through these media, the 200 miles EEZ has been well recognized and indeed appears to be the principal area of the negotiations on which there was a definitive consensus.

D. Protest and Acquiescence

Protest is the opposite of acquiescence⁴⁹. These two elements are also held relevant to determining the existence of a virtually uniform and extensive practice⁵⁰. Thus, when a pattern of state practice is emerging, some states may opt to dissent from such a practice preventing it of becoming a general customary rule. One way which a state can use to show its dissent is protest⁵¹. In this connection, in the Fisheries Jurisdiction Case 1974, several judges observed that EFZs exceeding 12 miles did not create norms because of strong protests by other states⁵².

However, in certain cases states do nothing *vis-a-vis* a known practice but remain silent. In such cases, the problem to be faced is whether such a silence should be understood as indicating the dissatisfaction with the emerging state practice or that the silent state have acquiesced in it. When the ICJ was confronted with a similar problem in the Temple of Preah Vihear Case, the Court construed the long continued silence on the part of Thailand on a boundary line drawn over a map prepared on behalf of Cambodia as constituting acquiescence⁵³. The Court further emphasized that acquiescence can be construed if there is "a failure to react... on an occasion that called for a reaction in order to affirm or preserve [claim] in the face of an obvious rival claim"⁵⁴.

A propos of the EEZ, more than seventy states had established EEZs or EFZs between 1974 and 1981⁵⁵. The circumstances required protests from other interested states when Mexico first enacted a law based on the RSNT with its date of enforcement was fixed for 6 June 1976⁵⁶ one month after the Fifth Session of UNCLOS III ended in

New York on 7 May 1976. Neither LLSs and GDSs nor the big maritime states protested the EEZ concept. In fact, the former states had merely sought to preserve some rights within that concept for themselves⁵⁷, and the latter states had shown a willingness to accept the concept provided that the exercise of non-economic rights within the zone would remain open for all states. Perhaps, if there had been a generality of protests, Mexico would have abrogated its law.

Acquiescence cannot be presumed unless a state has an actual knowledge of the claim being made. In the prevailing circumstances, it appears unreasonable to say that the participating states in the Fifth Session of UNCLOS III knew nothing about the Mexican claim. Indeed, the Mexican action was soon followed by numerous other coastal states. Furthermore, protesting states in the very early seventies were principally Japan, West Germany and the United Kingdom. All these states have subsequently established their own 200 miles EFZs. In the present author's opinion, the cessation of protests by these states, combined with the fact that each one of them has subsequently established its own EFZ, represents a modification in the position of these states and provides strong evidence of their submission to the new customary rule concerning the 200 miles EEZ.

On the basis of the above discussion, it seems very safe to conclude that claims to 200 miles EEZ have satisfied the prerequisites required by international law for state practice to be regarded as customary international law. Therefore, the realistic and correct view seems to be that, as has been repeatedly expressed in several judicial decisions delivered recently by the ICJ and arbitration panels⁵⁸, and has been maintained by many international law publicists⁵⁹, the 200 miles EEZ is without any doubt part of current general customary law. Consequently, the view held by Iguechi⁶⁰ and Zakharov⁶¹, as well as by several other lawyers against the binding nature of the EEZ under general customary law, appears nowadays to be absolutely not founded.

Section II : The Scope of the EEZ General Concept in Customary International Law

This section is concerned with the inquiry into the main component parts of the EEZ that have been incorporated into customary law. The importance of such inquiry stems from the fact that a number of lawyers, especially in Western Europe, have expressed strong doubts as to whether the rights of coastal states other than those with regard to living resources have also been taken into the new rule of customary law concerning the 200 miles EEZ⁶². In this connection, Professor Fleischer, for instance, has said :

"In state practice, it is the right to 200 miles for fisheries which commands the largest measure of general international acceptance, while the right to a full EEZ under contemporary customary law may be more questionable"⁶³.

This section, however, demonstrates that the new established customary rule is not confined to the right to assert 200 miles for fisheries, but has taken in the more comprehensive concept of the EEZ. The majority of national legislation, proclamations and decrees establishing EEZs confirm this verdict. This view is also stressed in the recent jurisprudence of the ICJ and expressed with different types of reasoning by many international law publicists.

A. National Practice

With regard to the component parts of the EEZ, the ideas of UNCLOS III have played an extremely important role by being adopted into national instruments in their different forms (legislation, proclamations and decrees), and thereby appearing as principal elements of the relevant state practice.

Thus, as has already been explained in more details in chapter 4 of this thesis, when EEZ national claims are checked in relation to their general component parts, it is

easy to observe the existence of a significant consistency with the EEZ concept enshrined in Article 56 of the LOS Convention, or occasionally with some of the negotiating texts which led to this eventual formulation.

A propos the assertion of sovereign rights for the purposes of exploration and exploitation of the EEZ's living and non-living resources and with regard to other economic activities related to the EEZ as cited in Article 56 (1) (a) of the LOS Convention, there exists at the national level a consensus which can possibly be described as almost absolute. Thus, with the exception of a very few EEZ claims, which omit referring to sovereign rights with regard to other activities related to other economic uses of the EEZ, all other EEZ claims have copied the general principle of the sovereign rights of the coastal state with respect to the resources of the zone, which is included in Article 56 (1) (a) almost literally⁶⁴.

Moreover, with the exception of the small number of EEZ claims⁶⁵ and a very few EEZ claims, all the rest of EEZ claims contain a specific assertion relating to the jurisdiction of the coastal state over artificial islands, installations and structures and with regard to the conduct of MSR within the EEZ, as well as in respect of the protection of the marine environment. In this connection, of the 87 claims to the EEZ which are included in Smith's compilation, 57 states assert jurisdiction over artificial islands, installations and structures within the EEZ⁶⁶; 63 states include jurisdiction over MSR⁶⁷; and over 80 states assert jurisdiction over environmental protection within their EEZs⁶⁸. While it is true that the extent of the jurisdiction claimed in respect of the above activities appears to vary from one claim to another, in the author's opinion those variations do not seem to constitute a significant discrepancy in relation to the fundamental components of the EEZ concept enumerated in Article 56 (1) (b) of LOS Convention, as they more relate to the specific regimes governing activities falling under them.

Furthermore, the EEZ is a package deal entity that comprises the rights of coastal

states and their corresponding duties as well as the rights and duties of third states. The rights and the duties of each of these groups of states go hand in hand in the EEZ concept.

As has been discussed in chapter 4 dealing with state practice, an overwhelming majority of EEZ claims have either explicitly or implicitly referred to the basic rights contained in Article 58 (1) of the LOS Convention, which belong to third states in the EEZ, namely the freedom of navigation, overflight, and the laying of submarine cables and pipelines. The intensity with which national practice has been manifested in this field has been described by one lawyer in the following terms:

"As a general rule, the freedoms of navigation, overflight, and the laying of submarine cables and pipelines as well as other associated freedoms, are recognized at the conceptual level"⁶⁹.

Moreover, in its Decision of 10 June 1992 in the Case Concerning the Delimitation of the Maritime Areas between Canada and the French Republic, the Arbitral Tribunal observed that "the principle of freedom of navigation through the 200 mile zone is guaranteed by Article 58 of the 1982 Convention, a provision that undoubtedly represents customary international law as much as the institution of the 200 mile zone itself"⁷⁰.

B. Recent Jurisprudence of the ICJ

Besides the state practice argument, the recent jurisprudence of the ICJ lends further support to the view that the new international custom concerning the 200 miles jurisdictional zone has picked up the more comprehensive concept of the EEZ. In this context, in the Continental Shelf (Tunisia v. Libya) Case, the EEZ was referred to by the ICJ as a concept "which may be regarded as part of modern international law"⁷¹. There, Judge Oda, in a lengthy dissent largely devoted to the interrelation between the continental shelf and the EEZ, came to the same conclusion⁷². As several authors have already

indicated, this opinion is similar to the conclusion reached by the ICJ in the 1969 North Sea Continental Shelf Cases, wherein the Court had stated that the legal status of the continental shelf had partly become customary law prior to the 1958 Geneva Convention on the Continental Shelf⁷³.

Moreover, in its 1984 Judgement concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. USA) Case, the Court explicitly acknowledged that the delimitation of a maritime boundary between these two states, by which both established their 200 miles zones (Canada-exclusive fishery, and the USA-economic zone):

"... [R]elates to a delimitation between the different forms of partial jurisdiction, i.e. the "sovereign rights" which, under current international law, both treaty-law and general law, coastal state are recognized to have in the marine and submarine areas lying outside the outer limit of their respective territorial seas, up to defined limits"⁷⁴.

In a subsequent paragraph of the Judgement, the Chamber of the Court further stated that certain EEZ provisions of the LOS Convention may be regarded "as consonant at present with general international law"⁷⁵.

Finally, one should also refer here to the judgement of the ICJ in the Case Concerning the Continental Shelf (Libyan Arab Jamahyria v. Malta), according to which:

"It is in the Court's view incontestable that... the institution of the exclusive economic zone with its rule on entitlement by reason of distance, is shown by the practice of states to have become a part of customary law"⁷⁶.

C. Opinions of Publicists

On the level of the opinions of publicists, it is easy to discern that many publicists

have, with different types of reasoning, contended that the basic EEZ concept comprising diversified functional competences is now part and parcel of general customary international law. In this connection, in his comments on the US Proclamation concerning the exclusive economic zone of the United States, Professor Queneudec has correctly said:

"Il n'en demeure pas moins que cette Proclamation peut avoir pour effet de renforcer encore davantage l'institution coutumière de la zone économique dans l'ordre international, eu égard à la qualité et la situation des Etats Unies. D'autant plus que, en énumérant les droits et pouvoirs revendiqués à l'intérieur de leur zone économique exclusive, la Proclamation Reagan reprend presque mot par mot la formulation de l'Article 56 (1), de la Convention de 1982 ..."⁷⁷.

According to Professor Jennings, "the principle, if not the details of the EEZ, are new law, assuredly"⁷⁸.

Professor Vicuna has correctly noted that :

"Because the majority of national claims referred in the beginning to the exploitation of living resources the doubt arose as to whether only the restricted modality of an exclusive fishing zone had been incorporated into customary Law or also the broader concept of the Exclusive Economic Zone... It was national practice itself that resolved this doubt in favor of the exclusive economic zone concept, since most of the fishing zones have evolved towards this other more complete modality..."⁷⁹.

In the opinion of Professor Kwiatkowska, "under general customary law, every coastal state may establish a 200 miles economic zone in which it exercises sovereign rights over all natural resources and jurisdiction with regard to scientific research and marine pollution, and in which all states enjoy freedom of communication"⁸⁰.

Moreover, Professor Charney has observed that, "while the general international

law of the sea has evolved toward the regimes of the LOS Convention, entry into force of the Convention with widespread participation will stabilize and clarify a number of existing international regimes of the oceans. These regimes include : the twelve - nautical mile territorial sea; .. the new 200-nautical mile exclusive economic zone (EEZ), giving principal legislative authority to the coastal state over living and non-living resources and environmental protection in the zone; traditional navigation and overflight freedoms in the EEZ; the laying of cables and pipelines ..."⁸¹.

On the basis of the above discussion, it seems safe to conclude that the new customary rule related to the 200 miles jurisdictional zone has taken in the broader concept of the EEZ entitling coastal states to exercise diversified functional competences within the 200 miles zone. Consequently, the contention that this new rule has been confined to the more restricted concept of the EFZ seems to be, today, not correct. Nonetheless, it must be recalled here that, while the EEZ concept encompasses numerous component parts, the fisheries component remains the central one. Thus, if a coastal state chooses to assert only a partial jurisdiction, it would be entitled to do so, for the simple reason that a state which is entitled to claim jurisdiction with regard to a set of specific aspects, would also be allowed to assert jurisdiction in respect of only one of those specific aspects. It ensues that the contention that an EFZ concept forms nowadays a part of customary law is also absolutely correct.

Section III : The Situation of the EEZ Specific Regime in Customary International Law

Opinions of publicists who have dealt with the question of the situation of the LOS Convention's EEZ specific regime in customary international law are divided. According to one point of view, the detailed EEZ regime of the LOS Convention has been taken in the new customary rule relating to the EEZ as a whole⁸². In another opposite

view, the new established customary rule, in this field, has been restricted to the principal elements that characterize the EEZ⁸³. With regard to the latter view, Judge Oda, in his dissent in the Continental Shelf (Tunisia v. Libya) Case, for instance, has this to say :

"The Court need have no qualms in acknowledging the concept of the EEZ as having entered the realm of customary international law".

He further emphasized that :

"Quite apart from the treaty-making process, the sui-generis regime of the exclusive economic zone is going to require much more careful examination before the rules so far adumbrated may be viewed as susceptible of adoption into existing international law"⁸⁴.

However, in the author's opinion, these two views are not convincing for they do not appear to coincide with the actual state of state practice relating to the EEZ. Thus, in this section, the author suggests that a middle view acknowledging the incorporation into custom of certain other provisions of the LOS Convention's EEZ specific regime besides the conceptual elements, especially in relation to fisheries, seems to be the view that finds sufficient corroboration in state practice as well as in several recent opinions of publicists.

A. The LOS Convention's EEZ Provisions Concerning Fisheries

The protection and rational management and utilization of fisheries resources found in the water column of adjacent seas was the principal reason for the institution of the 200 miles EEZ. It is, therefore, not surprising that the largest part of the EEZ specific regime included in Part V of the LOS Convention concerns fisheries. Likewise, there is no wonder that this specific regime occupies a leading place in state practice. As has been discussed in chapter 4, Article 61 of the LOS Convention contains the detailed regime on conservation of the EEZ living resources. The specific coastal state's conservation

objectives in the EEZ have been identified as: (i) the determination of the TAC of living resources; (ii) the prevention of over-exploitation; (iii) the production of the maximum sustainable yield; and (iv) the maintenance of associated or dependant species above levels at which their reproduction becomes seriously threatened. All these objectives acquired large support in the early stages of UNCLOS III, and remained intact since their first inclusion in the ISNT⁸⁵ in 1975. This consistency resulted in the emergence of a widespread reflection of these objectives, albeit without all the ramifications required⁸⁶, in state practice well before the conclusion of the LOS Convention in 1982. It seems, thus, safe to say that the conservation objectives enshrined in Article 61 of the LOS Convention have been also taken into custom.

Similarly, the coastal state's obligation to secure optimum utilization of the EEZ living resources contained in Article 62 (1) was first inserted in the ISNT⁸⁷ and had since then suffered no crucial changes. This stability has generated a uniform and consistent practice conforming with the said provision⁸⁸. Therefore, it seems reasonable to say that, under current international customary law, coastal states are bound to promote the optimum utilization of the living resources found in their EEZs. This view finds sufficient corroboration in state practice concerning the EEZ and EFZ that has been analysed earlier in chapter 4, and also in several opinions of law publicists⁸⁹.

It is to be noted that Professor Burke has asserted that :

"In particular state practice provides no basis for inferring general acceptance of any customary law concerning the... determination of harvesting capacity, access to a surplus..."⁹⁰.

However, it seems difficult to agree with Burke's view. Indeed, it is possible to identify a growing trend of coastal states acknowledging access of third states to fish in the 200 miles EEZ or EFZ. In this connection, Moore correctly described the situation in the following terms:

"All countries that have extended their jurisdiction to 200 mile, however, make provision for foreign fishing in those waters, and establish the conditions for such fishing. In general many of these conditions cover at least in part, the same ground as the examples set out in Art. 62 (4) of the ICNT"⁹¹.

Indeed, recognition of the obligation placed upon coastal states to give access to the surplus of the TAC of fisheries within their EEZs or EFZs finds further support in a large number of agreements or other arrangements entered into by states to allow for foreign fishing within the 200 jurisdictional zone. Thus, between 1975 and 1985 alone, more than 250 intergovernmental agreements were concluded, enabling access to the coastal fisheries by foreign fishermen⁹². Some of these fishery agreements have explicitly referred to the regard given to the debates at UNCLOS III concerning coastal fisheries⁹³.

It is perhaps worth mentioning here that it has been observed that the large existing number of fisheries agreements have possibly sprung from reasons of politico-economical expediency rather than from legal obligation⁹⁴. While it is probable that certain agreements may have resulted from some other considerations, e.g. source of income⁹⁵, there exist evident references in many of these agreements to that due to the institution of the 200 miles EEZ or EFZ, there is a duty to allow access to the surplus of the TAC. In this context, the Mexican-USA Fisheries Agreement of November 24, 1976 has stated in its preamble that, "considering further that the Government of Mexico will promote the objective of optimum utilization of the living resources in the zone... and shall give access to foreign vessels to the surplus...". The same words are contained into Mexico/Cuba Fishery Agreement of July 26, 1976. Moreover, the preamble of the 1987 Agreement on Cooperation in Fisheries Matters between Algeria and Mauritania states that, "conformément de la Convention des Nations Unies sur le Droit de la Mer, notamment ses Articles 61, 62, 70 et 71"⁹⁶.

The point of view that the provision of Article 62 (2) relating to the coastal state duty to determine its harvesting capacity and to give other states access to the surplus of the TAC has been also taken into custom appears to find strong additional backing in the UNCLOS III negotiating history. During the whole period of negotiations at UNCLOS III there was a general understanding that the recognition of access to the surplus was vital to the widespread recognition of the 200 miles EEZ. Moreover, the provision of Article 62 (2) appeared first in 1975 ISNT, and has suffered no crucial changes since that time.

On the basis of the above discussion, it seems fair to conclude that the provision of Article 62 (2) of the LOS Convention that casts an obligation upon EEZs claimant states to give access to the surplus catch to foreign fishing vessels has passed into the corpus of customary law.

Moreover, the conditions of access adopted in state practice are generally concordant with those found in Article 62 (4). On the other hand, state practice concerning EEZs and EFZs shows that there is only a very few states which provide for an explicit indication of the criteria to be considered in the allocation of quotas of the surplus available to foreign fishing. However, the practice of states addressing this matter reveals the exclusive coastal state decision-making based on its own interests, and thus confirm the view that the order of the criteria of access included in Article 62 (3) of the LOS Convention does not constitute a priority list to which the states with a fishery surplus must strictly adhere.

As regards the enforcement provisions contained in Article 73 of the LOS Convention, it must be noted that, although Article 73 (3) provides that violations may not be punished by imprisonment or any form of corporal punishment, in the absence of contrary agreements, some coastal states still provide for imprisonment as a penalty for the violation of fishing laws⁹⁷. However, as already indicated in chapter 4 of this thesis, state practice relating to enforcement is generally developing in line with the LOS Convention's

provisions. Moreover, the work of the FAO demonstrates that Article 73 provides the main basis for the practice of states in the matter of enforcement⁹⁸. It seems, therefore, reasonable to conclude that Article 73 has passed into the corpus of customary law.

Finally, Articles 63, 64, 65, 66 and 67 contain special regimes relating to specific species. In short, the LOS Convention calls for international cooperation through appropriate international organizations in regard to stocks within the EEZ shared by two or more coastal states, stocks occurring within the EEZ and beyond and adjacent to the EEZ, HMSs, and marine mammals⁹⁹. The management and conservation of anadromous and catadromous stocks are also provided for in the LOS Convention with the coastal state acknowledged as having the primary interest in and the responsibility for establishment of appropriate regulatory measures within the EEZ where all fishing with limited exceptions, is to take place for such species¹⁰⁰.

In a very recent article entitled "The Implications of the Exclusive Economic Zone and EEZ Management for Bermuda, a Small Midocean Island Commonwealth Territory", Kawaley has asserted that "highly migratory species, anadromous species, marine mammals, and possibly sedentary species ... are afforded distinct treatment by the LOSC and, arguably, under customary international law"¹⁰¹. However, in the present author's opinion, while it is true that the LOS Convention affords distinct treatment to those species, with the exception of sedentary species, the contention that current customary law also affords distinct treatment to highly migratory species, anadromous species and marine mammals seems to be untenable. Indeed, assessment of state practice relating to the LOS Convention's specific regimes concerning these species has resulted in the manifestation of restrictive opinions in terms of its impact on international custom. Thus, in the opinion of Wolfrum, "most states simply assert that their management authority in the exclusive economic zone embraces living resources of that zone without reflecting on Article 64 CLOS on highly migratory species"¹⁰². Professor Fleischer observed that "it may be

doubtful whether the specific systems provided for in Article 66 and 67 can be said to conform to general, non-conventional law"¹⁰³. Professor Burke has arrived at an even more evident and comprehensive conclusion with regard to the status of the specific regimes enshrined in Articles 63, 64, 65, and 67. In this connection, he has contended that state practice does not provide a basis for inferring general acceptance of any customary law with regard to :

"... prohibiting the initiation of a high seas fishery on anadromous species, a requirement that high seas fishing states recognize or defer to coastal states rights, duties, and interests concerning highly migratory species or straddling stocks, or a requirement that coastal states cooperate with high seas fishing states in utilization and conservation of highly migratory species within a coastal state's EEZ. Nor can one find national legislation that recognizes obligations regarding LL/GDSs"¹⁰⁴.

Thus, it is clear from these opinions that the special regimes relating to the specific species contained in Articles 63, 64, 65, 66 and 67 of the LOS Convention have not been taken into custom, simply because they do not have sufficient backing in state practice. The present author's assessment of state practice undertaken in chapter 4 corroborates this view.

B. The LOS Convention's Specific Regimes Concerning the Coastal State's Non-Economic Rights and Duties in the EEZ

As has been explained earlier in chapter 2 in detail¹⁰⁵, the other rights that coastal states can exercise in the EEZ are purely jurisdictional as opposed to sovereign character. They relate to artificial islands, installations and structures, the full regime for which is set out in Article 60; MSR which is stipulated in Part XIII of the LOS Convention, especially Articles 246-254; and protection of the marine environment, which is contained in

Articles 208, 210, 211, 214, 216 and 220 of Part XII.

Surveys of national practice from the point of view of the detailed regimes relating to the above indicated matters which have been effected so far have led to the manifestation of concordant opinions that, beyond the conceptual elements, the relevant specific regimes have not been well reflected in the practice of states. In this context, Charney has concluded that, if MSR, marine environment, artificial islands, installations and structures that are matters in which coastal states can exercise functional jurisdiction according to the LOS Convention are examined, it can be seen that beyond conceptual elements their specific regimes do not seem to have sufficient support in the practice of states¹⁰⁶. In the opinion of Kwiatkowska, there exist substantial discrepancies in national practice relating to the regime of artificial islands, MSR, and protection of the EEZ marine environment¹⁰⁷. Moreover, Soons has said that "although it can be concluded from surveys of state practice that the main elements of UNCLOS's regime for marine scientific research have become part of customary international law, certainly not all its detailed provisions have"¹⁰⁸.

It is evident from the above opinions that the details set out in the LOS Convention concerning MSR, artificial islands, installations and structures, and protection of environment, have not been incorporated into customary international law, since they have not yet become an established part of state practice. The present author's analysis of national practice contained in chapter 4, section B, confirms this view.

C. The Provision of Article 59 Concerning Residual Rights

As has been already said in chapter 3, the provision enshrined in Article 59 appeared first in the ISNT in 1975¹⁰⁹ and has been retained intact in all subsequent texts of UNCLOS III. Nonetheless, there has not yet been significant state practice on this matter. Moreover, there exist substantial variations in the positions of coastal states which have expressly dealt with the subject in their national instruments¹¹⁰. For instance, upon

signature of the LOS Convention, Cape Verde¹¹¹ and Uruguay¹¹² have both asserted that residual rights in the EEZ fall within the competence of the coastal state. The Ivory Coast asserts residual right with respect specifically to environmental protection in the EEZ¹¹³. Amongst the developed maritime powers, Italy has stated in its Declaration upon signature of the LOS Convention that it does not recognize the residual rights as inhering in the coastal state¹¹⁴. Thus, it remains to be seen whether states will resort, in the future, to employ the guidelines enshrined in Article 59 as a basis for resolving disputes concerning EEZ residual rights.

Chapter Five

Notes and References.

1. E. g. Kelsen states that "custom by which a norm of general international law is created" is a " long established practice of state".H. Kelsen: Principles of International Law. New York , 1952, p. 445; for Cheng, "not only is it unnecessary that the usage should be prolonged but there need also be no usage at all in the sense of repeated practice, provided that the opinio juris of the states concerned can be clearly established. Consequently, international customary law has in reality only one constitutive element, the opinio juris. Where there is opinio juris, there is a rule of customary international law". Bin Cheng:"United Nations Resolutions on Outer Space 'Instant' International Customary Law", 5 IJIL, 1965, pp. 106 - 107; see also Brown, op. cit., supra Introduction note 18, p. 3.
2. See Working Paper on Article 24 of the Statute of the International Law Commission, II YBILC, 1950, UN Doc. A /CN.U/ SER. A/ 1950/ Add. 1, p. 5.
3. This element is also identified by the ICJ in the Asylum Case (Colombia v. Peru), ICJ Reports, 1950, p. 266; and in the Anglo-Norwegian Fisheries Case (United Kingdom v. Norway), ICJ. Reports, 1951, 116.
4. The temporal element is noted in the North Sea Continental Shelf Cases, op. cit., supra chapter 1 note 81, p. 74.
5. In the Lotus Case, the Permanent Court noted that, in determining the motivation of a state abstaining from action , "only if such abstentions were based on their being conscious of a duty to abstain would it be possible to speak of an international custom". Case of the S.S. "Lotus" (France v. Turkey), PCIJ, 1927, Series A, No. 10, p. 28; See also North Sea Continental Shelf Cases, op. cit., supra chapter 1 note 81, pp. 41-44.
6. See Temple of Preah Vihear Case, (Cambodia v. Thailand), ICJ Reports, 1962,

- pp. 25-27 and 29-30; see also. Lauterpacht, op. cit., supra chapter 1 note 45, p. 116.
7. ICJ Reports, op. cit., supra chapter 1 note 81, pp. 42-43.
 8. Ibid., p.227.
 9. Op. cit., supra Introduction note 15, p. 115 para. 54.
 10. J.L. Kunz : "The Nature of Customary International Law,"47 AJIL, 1953, p. 666.
 11. P. E. Corbett : "The Consent of States and the Sources of the Law of Nations", 6 BYIL, 1925, pp. 24 - 25.
 12. G.I. Tunkin: Theory of International Law. Translated by W.A. Butler, George Allen and Unwin Ltd, London, 1974, p. 124.
 13. Op. cit, supra Introduction note 18, p 7. In the Anglo/Norwegian Fisheries Case, the ICJ observed that it is not necessary for a customary norm to pass the test of "universal acceptance", op. cit., supra note 3, p. 128.
 14. Brownlie, op. cit., supra Introduction note 18, pp. 6 - 7.
 15. Op. cit., supra note 3, p. 276. The Court reaffirmed its view two years later in the Rights of Nationals of the United States in Morocco Case (United States v. France), ICJ. Reports, 1952, p.200.
 16. H. Lauterpacht : The Development of International Law by the International Court. London, 1958, p. 378. In the Wimbledon Case (France, Italy, Japan and the United Kingdom v. Germany), 1923, the Court referred to "consistent international practice". PCIJ Ser. A, No. 1, pp. 26-28.
 17. Asylum Case, op. cit, supra note 3, p. 15.
 18. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, June 27th, 1986, ICJ Reports, 1986, p. 14; also Anglo Norwegian Fisheries Case, op. cit., supra note 3, p. 128.
 19. Ibid., p. 98.
 20. Supra chapter 4 note 85.
 21. Ibid., note 93.

22. Ibid., note 37.
23. Anatoly J. Zakharov : "Comment to Article by C. A. Fleischer, the Exclusive Economic Zone under the Convention Regime and in State Practice", in Koers & Oxman, op. cit., supra chapter 2 note 6, p. 364; also the comments of I. Kolosovski, in ibid., p. 367; A. Kolodkin & A. Zakharov : "Some Aspects of Soviet State Practice on the Development of Ocean Resources", in Van Dyke, op. cit., supra chapter 2 note 103, p. 214; and Extavour, op. cit., supra Introduction note 4, p. 304.
24. P. Sreenivasa Rao : "Public Order of Oceans : Problems and Prospects", 17 IJIL, 1977, p. 222.
25. See supra chapter four note 109.
26. Ibid.
27. Ibid., note 110.
28. Ibid., note 111.
29. Ibid., note 112.
30. B. Kwiatkowska : "Exclusive Ecomic Zone: General Evaluation", in Budislav Vukas, (ed.), Essays on the New Law of the Sea. Birotehnika, Zegreb, 1985, p. 110.
31. See e.g. M. Lazarev : "The Sea Economic Zone : An Important Problem of the 'Package'", 17 IJIL, 1977, pp. 209-215.
32. See, for instance, Zakharov and Kolosovski, op. cit., supra note 23.
33. T. Iguechi : "The Law of the Sea : Conventional Rules and Customary Norms", Paper presented at the Annual Meeting of the American Society of International Law, Boston, Massachusetts, 9 April 1987 (mimeograph), p. 5.
34. Ibid., pp. 5-6.
35. As regards the views of the authors from Eastern European States, see for instance, comment by J. Symonides, in R.J. Dupuy, (ed.), The Management of Humanity's Resources : The Law of the Sea Workshop, The Hague, 29-31 Oct. 1981. Martinus Nijhoff Publishers, 1982, p. 298. As regards the views of the writers from developing

- states, see e.g. Anand, *op. cit.*, supra chapter 1 note 29, pp. 282-283; also the comment of H. Djalal, in Clingan, *op. cit.*, supra chapter 1 note 149, p. 513. As regards the views of Western writers, see e.g. A. W. Koers : "The United Nations Convention on the Law of the Sea : An Overview", in E. Hey and A. W. Koers, (eds.), *The International Law of the Sea, Issues of Implementation in Indonesia, Proceedings of a Seminar at Jakarta on 22-27 August- 1983*, Law of the Sea Institute, 1984, pp. 23-25; L. T. Lee : " The Law of the Sea Convention and Third States", 77 *AJIL*, 1983, pp. 566-567; and J. L. Malone : "Freedom and Opportunity : Foundation for a Dynamic Oceans Policy", 84 *Dept. Of State Bull. No. 2093*, 1984, p. 77.
36. E.g. Malone, *ibid.*, and Lee, *ibid.*
37. Lee, *ibid.*, p. 568; also Koers, *op. cit.*, supra note 35, p. 23; and Guy de Lacharriere : "La Reforme du Droit de la Mer et le Role de la Conference des Nations Unies", in D. Bardonnet and M. Virally, (eds.), *Le Nouveau Droit International de la Mer*. Editions A. Pedone, Paris, 1983, pp. 27-32.
38. *Op. cit.*, supra chapter 2 note 169, p. 246 para. 94.
39. Kwiatkowska, *op. cit.*, supra chapter 1 note 80, p. 43.
40. *Op. cit.*, supra note 1, p. 445.
41. *Op. cit.*, supra note 2, pp. 24 and 26.
42. *Op. cit.*, supra chapter 1 note 81, p. 43; see also the opinion of Professor Bin Cheng, in *op. cit.*, supra note 1.
43. R. R. Baxter : "Treaties and Custom", 129 *RCADI*, 1970, pp. 61 - 62.
44. The Continental shelf (Tunisia v. Libya) Case, 1982, Dissenting Opinion, ICJ Reports, 1982, p. 228 para. 120.
45. "[I]nternational legal doctrine of other countries, with rare exceptions, considers, recognition or *opinio juris* a necessary and decisive element for the creation of a customary norm of international law." Tunkin, *op. cit.*, supra note 12, p. 119.
46. Hudson, *op. cit.*, supra Introduction note 4, p. 682.

47. Extravours, *op. cit.*, supra Introduction note 4, pp. 171-176.
48. See, e.g. Convention Relative au Developement des Pêches dans le Golfe de Guinee, done at Libreville, 21 June 1984, Article 1, in 91 RGDIP, 1987, p. 1115; Convention sur la Protection des Ressources Naturelle et de l'Environement de la Region du Pacifique Sud Noumea, 25 November 1986, Article 2, In 92 RGDIP, 1988, p. 776; the preamble to the Treaty on Fisheries between the Government of Certain Pacific Island States and the Government of the United States of America, *op. cit.*, supra chapter 4 note 180; the preamble to the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, 9 une 1992, in 32 ILM, 1993, p. 136; also Procureur de la République v. J. Crujeiras Tomé, 1981, in RGDIP, 1983, p. 465.
49. Akehurst, *op. cit.*, supra chapter 1 note 81, p. 24.
50. I.C. Mac Gibbon: "The Scope of Acquiescence in International Law", 31 BYIL, 1954, p.143; see also for the same author", Customary International Law and Acquiescence", 33 BYIL, 1956, p. 130.
51. The dissenting state can also show its dissent by means of an express statement or vote against a particular rule. See M. E. Villigers: Customary International Law and Treaties : A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties. Martinus Nijhoff/ Dordrecht/ Boston/ Lancaster, 1985, p.15.
52. *Op. cit.*, supra chapter 1 note 102, pp. 47, 58, and 161. Judge Dillard also emphasized the absence of protests against assertions that did not exceed 12 miles, *ibid.*, p. 58.
53. *Op. cit.*, supra note 6, pp. 25-27 and 29-30.
54. *Ibid.*, p. 29.
55. See supra chapter 4 notes 37, 85 and 93.
56. *Op. cit.*, supra chapter 4 note 128.

57. L.D.M. Nelson : " The Emerging New Law of the Sea", 42 MLR, 1979, p.54.
58. E.g. Continental Shelf (Tunisia v. Libya) Case, ICJ, Reports, 1982, p. 70 para. 100; the Gulf of Maine Area (Canada v. United States) Case, op. cit., supra chapter 2 note 169, p. 265 para. 19; and the Case Concerning the Delimitation of Maritime Areas between Canada and the French Republic, op. cit., supra chapter 2 note 171, p. 175, para. 88.
59. E.g. R.Y. Jennings : "What is International Law, and How Do We Tell it When We See it", 37 Swiss YIL, 1981, p. 82; Anand, op. cit., supra chapter 1 note 29 p. 283; Harris, op. cit., supra Introduction note 18, p. 442; Paolillo, op. cit., supra Introduction note 15, p. 107; and Charney, op. cit. supra chapter 2 note 215, pp. 383 - 385.
60. Op. cit., supra note 33, p. 7.
61. Op. cit., supra note 23; see also Kolodkin & Zakharov, op. cit., supra note 23, p. 214; and the comments of G. Pontecorvo, in Koers, op. cit., supra note 23, p. 364.
62. E.g. M. Akehurst : A Modern Introduction to International Law, 3rd ed., London, 1982, pp. 270-272; the comment of A. Beesly, in Koers and Oxman, op. cit., supra chapter 2 note 6, p. 368; B. Fleming : "Customary International Law and the Law of the Sea : A New Dynamic", in Clingan, op. cit., supra chapter 1 note 149, p. 499; J. Grolin : "The Future of the Law of the Sea : Consequences of a Non Treaty or Non-Universal Treaty Situation", 13 ODIL, 1983, pp. 8-9; Bernhardt; op. cit., supra Introduction note 18, p. 296; Attard, op. cit., supra Introduction note 4, p. 306; Pfirter, op. cit., supra chapter 2 note 82, p. 143; and Brown, op. cit., supra Introduction note 18, pp. 226 and 245.
63. Fleischer, op. cit., supra chapter 2 note 6, p. 250.
64. See The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, op. cit., supra Introduction note 16, p. 10.

65. It is important to note that in actual practice several EFZ claimant states exercise some type of jurisdiction over MSR in their own EFZs. See, for instance, Note from the Permanent Mission of Japan to the United Nations on Provisional Procedures for a Request to Conduct Marine Scientific Research by foreign Research Vessels in the Territorial Sea, on the Continental Shelf or in the Fishing Zone of Japan, 28 July 1988, in *The Law of the Sea : National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction*. United Nations, New York, 1989, p. 143; and Note to the United Nations on Regulations Governing Scientific Research in Waters under Belgian Jurisdiction, November 1, 1988, in *ibid.*, p. 33; see also for more details, Soons, *op. cit.*, *supra* chapter 2 note 28, pp. 267 - 271.
66. *Op. cit.*, *supra* chapter 2, note 173, p. 34.
67. *Ibid.*, p. 38.
68. *Ibid.*, pp. 35-37 table 7; also *The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, *op. cit.*, *supra* Introduction note 16, p. 17.
69. Vicuna, *op. cit.*, *supra* chapter 2 note 240, p. 149.
70. *Op. cit.*, *supra* chapter 2 note 171.
71. *Op. cit.*, *supra* note 58.
72. *Ibid.*, pp. 157- 230.
73. S.A. Riesenfeld, : "Comment to Article by T.B. Koh, the Third United Nations Conference on the Law of the Sea : What was Accomplished?", 46 LCP, 1983, pp. 14-15.
74. *Op. cit.*, *supra* chapter 2 note 169, p. 165 para. 19. It is worth noting that this is the first case where delimitation relates both to the continental shelf and the exclusive fishery zone, with the delimitation being by a single boundary. See *ibid.*, p. 267 para. 26.

75. Ibid., p. 294 para. 94.
76. ICJ Reports, 1985, p. 33 para. 34.
77. J. P. Queneudec : "La Proclamation Reagan sur la Zone Economique des Etats Unies", AFDI, 1983, p. 712.
78. Op. cit., supra note 59.
79. Vicuna, op. cit., supra chapter 2 note 240, p. 235.
80. Op. cit., supra chapter 1 note 80, p. 38.
81. Op. cit., supra chapter 2 note 215, pp. 383 - 385. For similar opinions, see Anand, op. cit., supra chapter 1 note 29 p. 283; T.L. Mc Dorman , M. Saunders & L. Vander Zwaag : "The Gulf of Maine Boundary : Dropping Anchor or Setting a Course?" 9 MP, 1985, p. 94.
82. E.g. J. N. Moore: "Customary International Law after the Convention", in R.B. Krueger and S.A. Riesenfeld (eds.), *The Developing Order of the Oceans*, 1985, p. 47.
83. E.g. Charney, op. cit., supra Introduction note 18, p. 239; also Vicuna, op. cit., supra chapter 2 note 73, p. 83.
84. Op. cit., supra note 58, p. 229 para. 123.
85. Op. cit., supra Introduction note 6, Art. 50.
86. See Mfodwo and others, op. cit., supra chapter 2 note 28, p. 453; and Wolfrum, op. cit., supra chapter 2, note 188, p. 135; also *The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, op. cit., supra Introduction note 16, p. 11; Kawaley, op. cit., supra Introduction note 2, p. 245.
87. Op. cit., supra Introduction note 6, Art. 51.
88. See *The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, op. cit., supra Introduction note 16 , p. 11.

89. E.g. Kwiatkowska, *op. cit.*, *supra* chapter 4 note 279, pp. 257-259; Vicuna, *op. cit.*, *supra* chapter 2 note 240, p. 246; and Kawaley, *op. cit.*, *supra* Introduction note 2, pp. 245 - 246.
90. W. T. Burke : "The Law of the Sea Convention and Fishing Practices of Nonsignatories, with Special Reference to the United States", in J.M. Van Dyke, (ed.), : *Consensus and Confrontation : The United States and the Law of the Sea Convention*. Law of the Sea Institute, University of Hawaii, Honolulu, 1985, pp. 322-333; also Brown, *op. cit.* *supra* Introduction note 18, p. 225.
91. *Op. cit.*, *supra* chapter 4 note 289, p. 164.
92. See *supra* chapter 4 section IV (2); also Fleischer, *op. cit.*, *supra* chapter 4 note 78, p. 100; and Edesson, *op. cit.*, *supra* chapter four note 346.
93. E.g. Spain /USA Agreement Concerning Fisheries off the Coasts of the United States, 16 February, 1977, *op. cit.*, *supra* chapter 4 note 320, preamble; and the USA / EEC Agreement Concerning Fisheries off the United States Coasts, *op. cit.*, *supra* chapter 4 note 369, preamble.
94. Fleischer, *op. cit.*, *supra* chapter 4 note 78, p. 100.
95. W. L. Black : "Soviet Fishery Agreements with Developing Countries", MP, 1983, p. 171.
96. *Op. cit.*, *supra* chapter 4 note 354.
97. Vicuna, *op. cit.*, *supra* chapter 4 note 449, p. 97.
98. See Report of the Expert Consultation on the Conditions of Access to the Fish Resources of the EEZ, FAO Fisheries Report No. 293, 1983, pp. 73 - 99.
99. LOS Convention, *op. cit.*, *supra* Introduction note 2, Arts. 63 (1), 63 (2), 64 (1), and 65 respectively.
100. *Ibid.*, Arts. 66 and 67.
101. *Op. cit.*, *supra* Introduction note 2, p. 254.
102. *Op. cit.*, *supra* chapter 2 note 188, p. 136.

103. Fleischer, *op. cit.*, supra chapter 1 note 193, p. 153.
104. *Op. cit.*, supra note 90.
105. See supra chapter 2, section 2.
106. *Op. cit.*, supra Introduction note 18, pp. 250-256.
107. *Op. cit.*, supra chapter 4 note 279, p. 262. See also for similar opinions, Wolfrum, *op. cit.*, supra chapter 2 note 188, pp. 136-139; Juda, *op. cit.*, supra Introduction, note 17, p. 41; Mfodwo and others, *op. cit.*, supra chapter 2 note 28, pp. 448-449; Brown, *op. cit.*, supra Introduction note 18, p. 245; and The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, *op. cit.*, supra Introduction note 16, pp. 12, 17 and 18.
108. Soons, *op. cit.*, supra chapter 2 note 28, p. 362.
109. *Op. cit.*, supra Introduction note 6, Art. 47 (3).
110. The Law of the Sea : Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, *op. cit.*, supra Introduction note 16, pp. 40 - 41.
111. See Declaration made upon signing the Convention, in Multilateral Treaties Deposited with the Secretary General, Status at 31 December 1992. United Nations, New York, 1993, p. 765.
112. Declaration made upon signing the Convention, in *ibid.*, p. 774.
113. Law No. 77 - 926 of 17 November 1977, in Smith, *op. cit.*, supra chapter 2 note 173, p. 95 Art. 6.
114. Declaration made upon signing the Convention, in Multilateral Treaties Deposited with the Secretary General, *op. cit.*, supra note 111, p. 770.

FINAL CONCLUSIONS

The author's research and study of the concept and regime of the Exclusive Economic Zone (EEZ) under the Law of the Sea Convention and in state practice has resulted in the following conclusions :

Prior to the Second World War, it was not possible for coastal states to make any claim to the seabed lying beneath the high seas or to the living resources found in the high seas water column. That was generally viewed as being unlawful.

The situation changed rapidly after World War II. Soon after the war, it became possible to fence the commons and individual coastal states commenced to do so. The series of assertions and state acts that led to the development of the theory of the continental shelf had put the process of development of the EEZ in motion, but it was the 1952 Santiago Declaration on the 200 Maritime Zone made by Peru, Ecuador and Chile whose object and purpose was to achieve the control of all resources off the coast up to 200 nautical miles, which laid the embryo of what is known today as the EEZ doctrine.

UNCLOS I started as an attempt to regulate the shelf jurisdiction and succeeded despite its partial failure to set a definite outer limit to coastal states jurisdiction over the resources of the shelf. Then, UNCLOS II moved to the superjacent waters. However, although the 200 miles resources zone figured in the outcome of UNCLOS II, it did not have sufficient support to make its adoption by the Conference a real possibility. Indeed, the Conference did not even agree on the right of coastal states to have contiguous fishing zones of more than six miles in width beyond a territorial sea of 6 miles, thereby leaving the question of a contiguous fishery zone well within the realm of customary international Law.

The period between UNCLOS II and UNCLOS III witnessed an intensified pressure for the recognition of the 200 miles contiguous resources zone, mainly as a result

of the political and technological changes that had occurred in this era. Nevertheless, until the commencement of negotiations at UNCLOS III, the 200 miles resources zone remained, principally, a phenomenon of Latin American and African practice in the law of the sea. Thus, while a number of Latin American and African states had made claims to extend and had effectively extended their fisheries jurisdiction to 200 miles, the majority of independent maritime states, whether developed or developing, distant water or not, confined their jurisdiction for fishery purposes to no more than 12 miles. Therefore, it seems justified to say that by 1974, it could not be contended objectively that the 200 miles resources zone had crystallized as a rule of customary international law since, although national practice had started to evolve, it was not marked by uniformity and had not satisfied the element of generality required in order to become a customary rule, even of regional extent.

However, the notorious progress which it had made in the stage of the preparatory work of UNCLOS III, the depredation of fishing resources that became apparent and acute in the very early seventies and, the desire of developing states to have new economic resources clearly allocated to them by the international community, combined together, had rendered the consideration of the 200 miles EEZ by the international community a matter of great urgency. UNCLOS III, aiming at the codification and progressive development of the law of the sea, provided the most appropriate forum wherein the conceptual content of the 200 miles zone and the detailed regime applicable to it were carefully clarified. The results were included in detailed form in UNCLOS III negotiating texts, especially the 1977 ICNT. The rules agreed upon in the latter text provided a very clear picture of the conventional legal regime that would govern the future EEZ. They remained almost intact until their inclusion in the LOS Convention. The stability they had enjoyed and the emerging consensus relating to the 200 miles EEZ, combined together, encouraged many coastal states to establish EEZs in line with, or

explicitly based on, the rules agreed upon, thus providing the material for the 200 miles EEZ to become a well established fact and rule of customary international law before the adoption of the LOS Convention.

In so far as the scope of the EEZ general concept in customary international law is concerned, it must be noted that in the early evolutionary stages of the EEZ concept at UNCLOS III, the restricted EFZ concept adhered to, especially by the big maritime states, had competed with the broader concept of the EEZ. But, as the work of UNCLOS III progressed and national legislation or proclamations relating to the 200 miles functional zone developed, the EEZ basic functional approach contained in Article 56 (1) of the LOS Convention comprising a series of quite separate types of jurisdictions, albeit related has prevailed in state practice. This legal shift has been depicted by Professor Scovazzi as follows :

"Owing to widespread acceptance, within a few years the 200 mile fishery zone acquired the status of a customary rule of international law and many coastal states, great maritime powers included, completed their shift towards extended marine jurisdiction by proclaiming exclusive economic zones. Such proclamations were made easier by the fact that the concept of the exclusive economic zone, at least as it appears from Part V of the Montego Bay Convention, does not encroach upon the traditional freedom of navigation"¹.

Thus, current state practice seems to give strong evidence that the right to claim a special functional jurisdiction up to a maximum limit of 200 miles from the baselines from which the breadth of the territorial sea is measured is firmly established in international customary law. However, if a coastal state chooses to assert an EEZ of less than 200 miles, its action remains consistent with international law as the precise width under both the LOS Convention and customary law is clearly facultative.

Moreover, the right in question applies on all parts of the coasts of a state. It is not restricted to states where there is a special need for measures to protect the resources of the interests of the fishery population, nor to such parts of a coastal state's coastline where there is specific evidence of such needs.

State practice seems also to suggest that, within the asserted 200 miles EEZ, the claimant state can invoke and claim all the general functional rights and jurisdictions specified in Article 56 (1) (a) and (b) of the LOS Convention. Such rights and jurisdictions can be invoked by a state party to the LOS Convention against any other party on the basis of treaty law, i. e. the basic rule of *pacta sunt servanda* applies², and against non-parties on the basis of general customary law. As provided in Article 38 of the 1969 Vienna Convention on the Law of Treaties :

"Nothing in article 34 to 37 [dealing with the problem of *pacta tertiis*] precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such".

It must, however, be made clear that, if a coastal state opts to assert only one of those basic rights, its action remains within the confines of public international law since, as one prominent author has correctly observed, states "are not required by international law to fully exercise all rights ... they acquire under customary international law"³. But, other states retain the possibilities they have had before the new customary rule relating to the 200 miles EEZ came into existence, because under both the LOS Convention and state practice the EEZ does not exist *ipso facto* as does the shelf, but has to be asserted.

Furthermore, state practice appears also to prove that the basic conventional rights of third states of freedom of overflight, of laying cables and pipelines and of navigation enshrined in Article 58 (1) of the LOS Convention have been received into the new international custom relating to the 200 miles EEZ, thus confirming the functional and *sui generis* character of the zone agreed upon at UNCLOS III. The EEZ has, therefore,

been kept in international customary law subject to the same rules, at least to those containing the most general principles regarding its essential features such as its *sui generis* nature, its breadth, the main rights of the coastal states, and the main rights of other states. Consequently, one of the most serious concerns relating to the EEZ in the post - UNCLOS III era - that is, the fear of its eventual territorialization by means of state practice - has thus far proven unwarranted.

As far as the status of the EEZ detailed conventional regime in customary international law is concerned, it may be said that, despite the existence of a general compliance with the EEZ basic provisions of the LOS Convention, in most cases the detailed provisions that develop each of the particular regimes are not followed in national legislation and practice with the same degree of accuracy. So far, it seems safe to conclude that state practice confirms that only the conservation goals of Article 61 and utilization principles in Article 62, as well as the enforcement provisions contained in Article 73, have been accepted as part of international customary law. It follows that the contention that all the non-seabed provisions of the LOS Convention already reflect norms of customary international law is not accurate.

Final Conclusions

Notes and References

1. T. Scovazzi : "Explaining Exclusive Fishery Jurisdiction", 9 MP, 1985, p. 125;
see also Dinh and others, op. cit., supra Introduction note 18, p. 994.
2. Vienna Convention on the Law of Treaties opened for signature May 23, 1969, Art. 26,
Text in 8 ILM, 1969, p. 679; aslo Anderson, op. cit., supra Introduction note 1,
pp. 319 - 321.
3. Soons, op. cit., supra chapter 2 note 28, p. 272.

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Appendix A

1 - STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA^{1/}

List of signatures, ratifications, accessions and succession^{2/}

<u>State/Entity</u>	<u>Date of signature</u> ^{3/}	<u>Date of ratification/ accession</u> ^{a/} <u>succession</u> ^{b/}
Afghanistan	18 March 1983	
Algeria	10 December 1982	22 January 1996
Angola	10 December 1982	5 December 1990
Antigua and Barbuda	7 February 1983	2 February 1989
Argentina	5 October 1984	1 December 1995
Australia	10 December 1982	5 October 1994
Austria	10 December 1982	14 July 1995
Bahamas	10 December 1982	29 July 1983
Bahrain	10 December 1982	30 May 1985
Bangladesh	10 December 1982	
Barbados	10 December 1982	12 October 1993
Belarus	10 December 1982	
Belgium	5 December 1984	
Belize	10 December 1982	13 August 1983
Benin	30 August 1983	
Bhutan	10 December 1982	
Bolivia	27 november 1984	28 April 1995
Bosnia and Herzegovina	12 January 1994	12 January 1994 ^{b/}
Botswana	5 December 1984	2 May 1990
Brazil	10 December 1982	22 December 1988
Brunei Darussalam	5 December 1984	
Bulgaria	10 December 1982	
Bukina Faso	10 December 1982	
Burundi	10 December 1982	
Cambodia	1 July 1983	

<u>State/Entity</u>	<u>Date of signature</u> ^{3/}	<u>Date of ratification/ accession</u> ^{a/} <u>succession</u> ^{b/}
Cameroon	10 December 1982	19 November 1985
Canada	10 December 1982	
Cape Verde	10 December 1982	10 August 1987
Central African Republic	4 December 1984	
Chad	10 December 1982	
Chile	10 December 1982	
China	10 December 1982	
Colombia	10 December 1982	
Comoros	6 December 1984	21 June 1994
Congo	10 December 1982	
Cook Islands	10 December 1982	15 February 1995
Costa Rica	10 December 1982	21 September 1992
Croatia	10 December 1982	5 April 1995 ^{b/}
Ivory Coast	10 December 1982	26 March 1984
Cuba	10 December 1982	15 August 1984
Cyprus	10 December 1982	12 December 1988
Czech Republic ^{4/}	10 December 1982	
Democratic People's Rep. of Korea	10 December 1982	
Denmark	10 December 1982	
Djibouti	10 December 1982	8 October 1991
Dominica	28 March 1983	24 October 1991
Dominican Republic	10 December 1982	
Egypt	10 December 1982	26 August 1983
El Salvador	5 December 1984	
Equatorial Guinea	30 January 1984	
Ethiopia	10 December 1982	

<u>State/Entity</u>	<u>Date of signature</u> ^{3/}	<u>Date of ratification/ accession</u> ^{a/} <u>succession</u> ^{b/}
European Economic Community	7 December 1984	
Fiji	10 December 1982	10 December 1982
Finland	10 December 1982	
France	10 December 1982	
Gabon	10 December 1982	
Gambia	10 December 1982	22 May 1984
Germany ^{5/}		14 October 1994 ^{a/}
Ghana	10 December 1982	7 June 1983
Greece	10 December 1982	21 July 1995
Grenada	10 December 1982	25 April 1991
Guatemala	8 July 1983	
Guinea	4 October 1984	6 September 1985
Guinea-Bissau	10 December 1982	25 August 1986
Guyana	10 December 1982	16 November 1993
Haiti	10 December 1982	
Honduras	10 December 1982	5 October 1993
Hungary	10 December 1982	
Iceland	10 December 1982	21 June 1985
India	10 December 1982	29 June 1995
Indonesia	10 December 1982	3 February 1986
Iran (Islamic Rep. of)	10 December 1982	
Irak	10 December 1982	30 July 1985
Ireland	10 December 1982	
Italy	7 December 1984	13 January 1995
Jamaica	10 December 1982	21 March 1983
Japan	7 February 1983	
Jordan		27 November 1995 ^{a/}

<u>State/Entity</u>	<u>Date of signature</u> ^{3/}	<u>Date of ratification/ accession</u> ^{a/} <u>succession</u> ^{b/}
Kenya	10 December 1982	2 March 1989
Kuwait	10 December 1982	2 May 1986
Laos People's Democratic Republic	10 December 1982	
Lebanon	7 December 1984	5 January 1995 ^{a/}
Lesotho	10 December 1982	
Liberia	10 December 1982	
Libyan Arab Jamahirya	3 December 1984	
Lienchstein	30 November 1984	
Luxembourg	5 December 1984	
Macedonia		19 August 1994 ^{b/}
Madagascar	25 February 1983	
Malawi	7 December 1984	
Malaysia	10 December 1982	
Maldives	10 December 1982	
Mali	19 October 1983	16 July 1985
Malta	10 December 1982	20 May 1993
Marshall Islands		9 August 1991 ^{a/}
Mauritania	10 December 1982	
Mauritius	10 December 1982	4 Novembre 1994
Mexico	10 December 1982	18 March 1983
Micronesia (Fed. States of)		29 April 1991 ^{a/}
Monaco	10 December 1982	
Mongolia	10 December 1982	
Morocco	10 December 1982	
Mozambique	10 December 1982	
Myanmar	10 December 1982	

<u>State/Entity</u>	<u>Date of signature</u> ^{3/}	<u>Date of ratification/ accession</u> ^{a/} <u>succession</u> ^{b/}
Namibia ^{6/}	10 December 1982	18 April 1983
Nauru	10 December 1982	
Nepal	10 December 1982	.
Netherlands	10 December 1982	
New Zealand	10 December 1982	
Nicaragua	9 December 1984	
Niue	5 December 1984	
Niger	10 December 1982	
Nigeria	10 December 1982	14 August 1986
Norway	10 December 1982	
Oman	1 July 1983	17 August 1989
Pakistan	10 December 1982	
Panama	10 December 1982	
Papua New Guinea	10 December 1982	
Paraguay	10 December 1982	26 September 1986
Philippines	10 December 1982	8 May 1984
Poland	10 December 1982	
Portugal	10 December 1982	
Quatar	27 November 1984	
Republic of Korea	14 March 1983	
Romania	10 December 1982	
Russian Federation	10 December 1982	
Rwanda	10 December 1982	
Saint Kitts and Nevis	7 December 1984	7 January 1993
Saint Lucia	10 December 1982	27 March 1985

<u>State/Entity</u>	<u>Date of signature</u> ^{3/}	<u>Date of ratification/ accession</u> ^{a/} <u>succession</u> ^{b/}
Saint Vincent and Grenadines	10 December 1982	1 October 1993
Samoa	28 September 1984	14 August
Sao Tome and Principe	13 July 1983	3.November 1987
Saudi Arabia	7 December 1984	
Senegal	10 December 1982	25 October 1984
Seychelles	10 December 1982	16 September 1991
Sierra Leone	10 December 1982	12 Decembre 1994
Singapore	10 December 1982	17 Novembre 1994
Slovinia		16 June 1995 ^{b/}
Solomon Islands	10 December 1982	
Somalia	10 December 1982	24 July 1989
South Africa	5 December 1984	
Spain	4 December 1984	
Sri Lanka	10 December 1982	19 July 1994
Sudan	10 December 1982	23 January 1985
Suriname	10 December 1982	
Swaziland	18 January 1984	
Sweden	10 December 1982	
Switzerland	17 October 1984	
Thailand	10 December 1982	
Togo	10 December 1982	16 April 1985
Tonga		2 August 1995 ^{a/}
Trinidad and Tobago	10 December 1982	25 April 1986
Tunisia	10 December 1982	24 April 1985
Tuvalu	10 December 1982	
Uganda	10 December 1982	9 November 1990
Ukraine	10 December 1982	

<u>State/Entity</u>	<u>Date of signature</u> ^{3/}	<u>Date of ratification/ accession</u> ^{a/} <u>succession</u> ^{b/}
United Arab Emirates	10 December 1982	
United Republic of Tanzania	10 December 1982	30 September 1985
Uruguay	10 December 1982	10 December 1992
Vanuatu	10 December 1982	
Viet Nam	10 December 1982	25 July 1994
Yemen ^{2/}	10 December 1982	21 July 1987
Yugoslavia	10 December 1982	5 May 1986
Zaire	22 August 1983	17 February 1989
Zambia	10 December 1982	7 March 1983
Zimbabwe	10 December 1982	24 February 1993

Notes

- 1/ The United Nations Convention on the Law of the Sea entered into force on 16 November 1994 in accordance with its Article 308.
- 2/ On the basis of information available as at January 22, 1996.
- 3/ As of 10 December 1984, 159 States or entities had signed the Convention, including the (former) German Democratic Republic and (former) Democratic Yemen.
- 4/ On 10 December 1992, the Permanent representative of the Czech and Slovak Federal Republic (former Czechoslovakia) informed the Secretary-General that the Czech and Slovak Federal Republic ceased to exist on 31 December 1992 and that the Czech Republic and the Slovak Republic will be its successor States. The Czech Republic succeeded to the signature of the United Nations Conventions on the the Law of the Sea on the 22 February 1993.
- 5/ Through accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the German States united to form one sovereign state. As from the date of unification the Federal Republic of Germany acted in the United Nations under the designation of "Germany".
- 6/ Namibia became an independent States as of 21 March 1990 and a member of the United Nations as of 23 April 1990. The instrument of ratification was deposited by the United Nations Council of Namibia on behalf of Namibia 18 April 1983.
- 7/ On 22 May 1990 People's Democratic Yemen Arab Republic merged to form a single State with the name "Yemen". All treaties and agreements concluded between either the Yemen Arab Republic or the People's Democratic Republic of Yemen and other States and international organisations in accordance with international law which are in force on 22 May 1990 will remain in effect.

Appendix B

Table of Claims to Territorial Seas, EEZs and EFZs*

States	Territorial sea (m m)	Exclusive economic zone (m m)	Fishery zone (m m)
Albania	12		32 and 52 ^{1/} 200
Algeria	12		
Angola	20		
Antigua and Barbuda	12	200	
Argentina	12	200	
Australia	12		200
Bahamas	3		200
Bahrain	12		
Bangladesh	12	200	
Barbados	12	200	
Belgium	12		Up to the median line with neighbouring States
Belize	3	200	
Benin	200		
Brazil	12	200	
Brunei Darussalam	12	200	
Bulgaria	12	200	
Cambodia	12	200	
Cameroon	50		
Canada	12		200
Cape Verde	12	200	
Chile	12	200	
China	12		
Colombia	12	200	
Comoros	12	200	
Congo	200		
Cook Islands	12	200	
Costa Rica	12	200	
Côte d'Ivoire	12	200	
Cuba	12	200	
Cyprus	12		
Dem. People's Rep. of Korea	12	200	
Denmark	3		200
Djibouti	12	200	
Dominica	12	200	
Dominican Republic	6	200	
Ecuador	200		
Egypt	12	Limits to be determined ^{2/}	
El Salvador	200		
Equatorial Guinea	12	200	

* On the basis of information available as at 16 November 1994.

1/ On 28 May 1994 Algeria established a fishery zone of 32 miles with regard to its western coast and 52 miles with respect to its eastern coast, to be measured from the baselines. Legislative Decree No. 94/13 of 16 June 1994, in JORADP No. 40, 1994, p. 5.

2/ To be established in accordance with the LOS Convention.

Eritrea ^{3/}	12	Limits to be determined ^{4/}	
Estonia	12		
Fiji	12	200	12
Finland	4		
France	12	200	
Gabon	12	200	
Gambia	12		200
Germany ^{5/}	3(12;16) ^{6/}		200
Ghana	12	200	
Greece	6/10 ^{7/}		
Grenada	12	200	
Guatemala	12	200	
Guinea	12	200	
Guinea-Bissau	12	200	
Guyana	12		200
Haiti	12	200	
Honduras	12	200	
Iceland	12	200	
India	12	200	
Indonesia	12	200	
Iran (Islamic Republic of)	12		
			up to a line determined by agreement or equidistance line
Iraq	12		200
Ireland	12		
Israel	12		
Italy	12		
Jamaica	12	200	200
Japan	12		
Jordan	3		
Kenya	12	200	
Kiribati	12	200	
Kuwait	12		
Latvia	12		
Lebanon	12		
Liberia	200		
Libyan Arab Jamahiriya	12		
Lithuania	12		
Madagascar	12	200	
Malaysia	12	200	

3/ Eritrea, which was previously part of Ethiopia, became a member of the United Nations on 28 May 1993. Ethiopia, is no longer a coastal state.

4/ Limits to be determined in accordance with neighbouring states.

5/ Through accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German states united to form one sovereign state as from the date of unification, the Federal Republic of Germany has acted in the United Nations under the designation "Germany".

6/ The 3 miles limit claimed by the former Federal Republic of Germany and the 12 miles limit claimed by the German Democratic Republic have not been changed after the unification. At one point in the German Bight the Territorial sea extends to 16 miles.

7/ The 10 miles limit applies for the purpose of regulating civil aviation.

Maldives	12	defined by coordinates	
Malta	12		25
Marchall Islands	12	200	
Mauritania	12	200	
Mauritius	12	200	
Mexico	12	200	
Micronesia (Federated States of)	12	200	
Monaco	12		
Morocco	12	200	
Mozambique	12	200	
Myanmar	12	200	
Namibia	12	200	
Nauru	12		200
Netherlands	12		200
New Zealand	12	200	
Nicaragua	200		
Nigeria	30	200	
Niue	12	200	
Norway	4	200	
Oman	12	200	
Pakistan	12	200	
Panama	200		
Papua New Guinea	12		200
Peru	200		
Philippines		200	
Pitcairn, Henderson, Ducie and Oeno Islands		200	
Poland	12	Up to a line to be determined by agreements	
Portugal	12	200	
Qatar	12		Up to median line or a line to be determined by agreements
Republic of Korea	12		
Romania	12	200	
Russian Federation	12	200	
Saint Kitts and Nevis	12	200	
Saint Lucia	12	200	
Saint Vincent and the Grenadines	12	200	
Samoa	12	200	
Sao Tome and Principe	12	200	
Saudi Arabia	12		
Senegal	12	200	
Seychelles	12	200	

Sierra Leone	200		
Singapore	3		
Soloman Islands	12	200	
Somalia	200		
South Africa	12		200
South Georgia and the South Sandwich Islands		200	
Spain	12	200	
Sri Lanka	12	200	
Sudan	12		
Suriname	12	200	
Sweden	12		Up to equidistance line with neighbouring states
Syrian Arab Republic	35		
Thailand	12	200	
Togo	30	200	
Tonga	12	200	
Trinidad and Tobago	12	200	
Tunisia	12		
Turkey	6(12) ^{8/}	200 ^{9/}	
Tuvalu	12	200	
Ukraine	12	200	
United Arab Emirates	12	200	
United Kingdom	12		200
United Republic of Tanzania	12	200	
United States of America	12	200	
Uruguay	200		
Vanuatu	12	200	
Venezuela	12	200	
Viet Nam	12	200	
Yemen ^{10/}	12	200	
Yugoslavia	12		
Zaire	12	Limits to be determined by agreemnts	

8/ The limit of 12 nautical miles applies in the Mediterranean Sea and the Black Sea.

9/ Claimed in the Black Sea.

10/ On 22 May 1990, Democratic Yemen and Yemen merged to form a single state. Since that date they have been represented at the United Nations as one member with the name "Yemen".

Appendix C

LAND - LOCKED STATES

AFRICA	LATIN AMERICA	ASIA	EUROPE
1 - Botswana	Bolivia	Afghanistan	Andorra
2 - Burkina Faso	Paraguay	Armenia*	Austria
3 - Burundi		Azerbaijan*	Belarus
4 - Central African Republic		Bhutan	Czech Republic**
5 - Chad		Kazakhstan*	Hungary
6 - Ethiopia ****		Kyrgyzstan*	Liechtenstein
7 - Lesotho**		Lao People's Democratic Rep.	Luxembourg
8 - Malawi		Mangolia	Republic of Macedonia*
9 - Mali		Nepal	Republic of Moldova*
10 - Niger		Tadjikistan*	San Marino***
11 - Rwanda		Turkmenistan*	Slovak Republic**
12 - Swaziland		Uzbekistan*	Switzerland
13 - Uganda			Vatican City State***
14 - Zambia			(Holy See)
15 - Zimbabwe			
15	02	12	13

* States acceded to independence in 1991 - 1992.

**/ States acceded to independence in 1993.

***/ States surrounded entirely by the territory of another state.

****/ A state which has become land-locked after accession of another state to independence (Eritrea, 1993).