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REPORT OF THE

COMMITTEE ON LAW OF THE SEA

CHAIRMAN'S PREFACE

During the period 1978-1982, while the Third United Nations Conference on Law of the Sea was active, the Committee prepared three relatively substantial reports on the work in progress at the Conference. The last of these three reports issued just as the Conference completed its work and the United States voted against adoption of the resulting new Convention on Law of the Sea.

During the past two years, the Committee as a whole has not prepared any new report. However, some of its members have participated in an Ad Hoc Committee on the Exclusive Economic Zone, a topic that has been the focus of much interest and activity both before and since the completion of UNCLOS III.

This Ad Hoc committee was chaired by G. Winthrop Haight, until his death in the summer of 1983. Upon Mr. Haight's passing, Professor Thomas A. Clingan of the University of Miami Law School, who was serving as rapporteur, graciously took on the burdens of ensuring a fully coordinated final report. Professor Clingan's efforts to see this report to fruition testify to his continuing, self-effacing contributions as scholar and public servant.

The members of the Ad Hoc committee, in addition to Professor Clingan, are:

Professor William T. Burke
David Colson
Professor L.F.E. Goldie
RADM Bruce Harlow
Professor John Norton Moore
Professor B.H. Oxman
Professor L.B. Sohn

As chairman of the full Law of the Sea Committee, the undersigned followed the work of the Ad Hoc committee and is pleased to forward its report for publication in the proceedings of the American Branch.

The members of the Ad Hoc committee, joined by the membership of the full committee, have asked that the following statement be included in the proceedings:

> We wish to express our deep sense of loss and sadness at the passing of our colleague, G. Winthrop Haight. His qualifications as an international lawyer and scholar, and his qualities as a human being need no extolling. We shall miss him as a close and warm personal friend and sage adviser.

It bears emphasis that the following report is the product solely of the Ad Hoc committee. It does not necessarily express the views of any member of the American Branch's Law of the Sea Committee who was not also a member of the Ad Hoc committee.

June, 1984

Respectfully submitted

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REPORT OF THE AD HOC COMMITTEE ON THE EXCLUSIVE ECONOMIC ZONE

AMERICAN BRANCH, INTERNATIONAL LAW ASSOCIATION

General

The law related to the concept of the Exclusive Economic Zone is emerging at a rapid rate. This fact was recognized by the International Committee on the Exclusive Economic Zone (ILA) in its 1982 report:

> "The emerging consensus on a 200 mile Economic Zone at UNCLOS III has thus had a decisive impact on the development of the state claims and on the potential development of the customary law of the sea. The rules elaborated by the Conference in this respect have influenced the process of creating new legal regimes established by coastal state promulgations. It may be said that UNCLOS III has initiated this law-creating process."

In support of this proposition, it should be noted that as of December, 1983, 54 states claimed economic zones of 200 nautical miles, while 23 others claimed 200 mile fisheries zones.

There are other evidences of the trend toward broader jurisdictional zones. The Court of Justice of the European Community, for example, ruled in 1980 [No. 812/79: *Attorney General v. Burgoa*], that, at least in so far as fisheries were concerned, the Community's adoption of regulations for fisheries extending to 200 nautical miles must be "superimposed" upon the London Fisheries Convention of 1964, which established fisheries jurisdiction to a distance of 12 nautical miles. It concluded that a conviction in Ireland of a Spanish fisherman arrested 20 miles at sea for violation of Irish fishing regulations was not contrary to Community law. Implicit in this decision was the recognition of the legality of these zones under International Law.

Such factors may have influenced the Council of the American Law Institute when it concluded in an early tentative draft that "Except with respect to Part XI of the Draft Convention, this Restatement, in general, accepts the Draft Convention as codifying the customary law of the sea. . . ." In particular, the Council took the view that the practice of states, supported by the broad consensus reached by the Law of the Sea Conference, has effectively established both the con-

cept and the general principles governing the zone as customary law binding upon all states. It must be noted, however, that this position was promulgated in May of 1982, prior to the events surrounding the conclusion of the treaty. Before it can be said definitively that the treaty reflects customary law on the EEZ, not only with respect to the general concept of "sovereign rights over resources," but also with respect to its more detailed provisions, further inquiry relating to state practice and legislation will be required. Thus, while it does not seem likely that there would be major dispute that the general concept of the zone, in terms of resource jurisdiction satisfies requirements traditionally viewed as necessary for the creation of customary international law, it is much too early to say more.

The U.S. view on the subject is clear, as reflected in the proclamation of President Reagan of March 10, 1983. It declared: "... International law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over the natural resources and related jurisdiction." This seems to reflect the general view, but one must keep in mind that the term "related jurisdiction," as used in that proclamation, is yet to be defined by the U.S.

Nevertheless, the provisions of the treaty relating to the Exclusive Economic Zone seem to be so deeply related to the concept that they are at least persuasive as a source of law on the subject. For this reason, this report explores these provisions with a view to elaborating upon and clarifying their probable meaning and intent.

Legal Status of the Economic Zone

One of the most contested issues at the early stages of the law of the sea conference concerned the issue of whether the EEZ was to be characterized as "high seas" or as a "zone of national jurisdiction." This issue is not resolved by the treaty by any expressed characterization. Ambassador Aguilar, chairman of the second committee, however, avoided addressing that issue directly by referring in his reports to the zone as "*sui generis*," implying that the zone could be either or both, depending upon the nature of the precise use in question. The core issue was the nature of the precise balance between the rights and duties of the coastal state in the zone, and those of third states, principally the maritime powers. Most Latin American states had argued that the zone fell within the plenary jurisdiction of the coastal state except for specified limited purposes: i.e., the freedoms of navigation, overflight, and the laying of submarine cables

and pipelines. On the other hand, this limited concept was rejected by the maritime powers who took a much broader view of their rights within EEZs of coastal states. The treaty resolved this dispute in legal terms by the language of the texts themselves, to which we now turn.

Article 56(1) must be viewed as the key provision for the establishment of the rights of coastal states. This article speaks of "sovereign rights" for the exploration and exploitation of the living and nonliving resources of the zone, as well as other economic activities, such as the production of energy. Rights of an economic nature, therefore, clearly are attributed to the coastal state, and furthermore, such rights are exclusive to it. Other coastal state rights such as those pertaining to marine scientific research, pollution control, or artificial islands, installations and structures, are also allocated to the coastal state, although article 56(1)(b) is a limited grant of powers. These rights are established under, and qualified by, other provisions of the treaty. The rights of the coastal state in these respects are further defined as "jurisdictions" as opposed to "sovereign rights."

The significance of this distinction may be debated, but it seems clear, at least, as the EEZ Committee of the ILA noted, the concept of "sovereign rights" "suggests a stronger position of the coastal state and a more secure basis in general international law than mere 'jurisdiction'." The ILA committee suggested, as a fruitful avenue of exploration, that the terms "sovereign rights" and "jurisdiction" be examined in other contexts, such as other agreements, with a view to ascertaining their meaning with more precision. In this regard, we should note that the concept of "sovereign rights" over resources also appears in article 2(1) of the 1958 Convention on the Continental Shelf, from which the term was drawn, and it is explained in articles 2(2) and 2(3). This explanation is repeated, with a minor exception, in article 77 of the Law of the Sea Convention. With respect to the EEZ, article 56 itself seems to lend credence to the conclusion that the coastal state was intended to have plenary powers within the zone regarding resources and other related activities referred to in subparagraph (a). These plenary powers are explained in more detail in other provisions of the treaty, however. For example, coastal state rights and duties with regard to fisheries are explained in articles 61 and 62, and related articles. The coastal state powers referred to in subparagraph (b) are clearly qualified by the relevant provisions of the convention. Subparagraph (c) restricts what coastal states may do in the zone by reference to "other rights and duties provided for in the Convention," including, *inter alia*, those related to conservation and the protection of the environment.

In juxtaposition to article 56, article 58 refers to the rights and freedoms of other states in the EEZ. The basic rights enumerated are the freedoms referred to in article 87 of navigation and overflight, and of the laying of submarine cables and pipelines. These freedoms are qualitatively the same as when exercised in the area seaward of the zone, with certain reservations. First, the freedoms enumerated are stated to be "subject to" the relevant provisions of the Convention. Thus, in exercising the freedoms within the economic zone, states must accommodate themselves to certain coastal state interests. Laying of submarine cables and pipelines is a freedom that is nonetheless subject to the provisions of article 79. Freedom of navigation must be conducted with due regard to coastal state interests in resource management. Thus, for example, the freedoms can not be conducted with the zone in a manner unreasonably jeopardizing a coastal state's legitimate fisheries concerns and management schemes. The converse, of course, is also true. Both coastal states and other states must exercise their rights with due regard to the rights of the other. And, as on the high seas, the exercise of article 58 freedoms must not constitute an "abuse of rights" prohibited by article 300, any more than coastal states may act in contravention of that article in the exercise of their own rights.

Article 58(1) also contains a compatibility provision, as does paragraph (2). The former requires compatibility with other provisions of the convention, while the latter states that articles 88 to 115 apply to the EEZ insofar as they are not incompatible with the economic zone chapter. It has been argued that the "subject to" qualification, discussed above, applies to the basic freedoms, while the compatibility clause applies to the phrase "other internationally lawful uses of the sea related to (the basic) freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines." This argument is based on the way the clauses are set out by commas. It is also argued plausibly that both the "subject to" and the compatibility clauses apply to all enumerated uses. The awkward use of the two phrases is not explained.

Assuming for the sake of discussion the broader interpretation, the "subject to" clause appears to refer to the rights themselves while, under one interpretation, the compatibility clause refers to the manner in which they must be exercised. Thus viewed, the compatibility provisions are designed to preserve the balance of the EEZ chapter. Some high seas rights referred to in articles 88 to 115 can easily be applied in the zone without conflict. Provisions concerning piracy, the nationality of ships, or the provision against subjecting any part

of the high seas to sovereignty are examples. Other provisions, however, if applied in the zone could pose partial or complete incompatibility with the exercise of coastal state rights. One example is article 110 which sets out the circumstances in which ships on the high seas may be approached and visited. The EEZ chapter, however, provides for additional boarding rights for fisheries not encompassed by article 110. Article 58 assures that this and similarly specified coastal state rights cannot be reduced by the cross-reference to high seas articles.

Article 58(3) provides that a state exercising its rights in the economic zone must comply with coastal state laws and regulations enacted in conformity with the Convention. This is not a limitation on the scope of the rights to be enjoyed by other states in the zone, but rather a limitation upon the manner in which those rights are to be exercised. For example, article 211(5) permits the coastal state to adopt laws and regulations for the prevention, reduction and control of pollution in the economic zone. Enforcement, however, is circumscribed to specific instances. Article 200 limits enforcement to cases involving major damage or threats of major damage; article 218 limits enforcement to occasions when a vessel is voluntarily within a port or an off-shore terminal, etc. Thus the limitations are designed to place a burden of reasonable conduct upon vessels in the economic zone, but not a burden upon the basic freedoms elaborated.

A central problem facing the law of the sea negotiators with respect to article 58 was the manner in which certain uses of the economic zone, related to the basic freedoms, should be protected. The compromise solution involved the inclusion of the reference to "other internationally lawful uses of the sea related to" the basic freedoms "such as those associated with the operation of ships, aircraft and submarine cables and pipelines." This is not language that appears in the Geneva Conventions, because those conventions did not embrace the economic zone concept. The addition of this language into the new treaty is significant for the interpretation of rights that may be exercised in the zone. The simplest way to have handled this problem would, of course, have been to incorporate article 87 of the high seas chapter by reference. Obviously this could not be done. For one thing, fishing, an enumerated freedom of the high seas is not a freedom of the economic zone. In addition, the listing of freedoms in article 87 is not exclusive, as is made clear by the use of the term "*inter alia*." Thus to incorporate the entire article into article 58 would have constituted a broader declaration of rights within the zone than could have been politically acceptable to coastal states. On the other

hand, a reference only to the enumerated freedoms in article 58 would have been too restrictive. The new phrase was added, therefore, to make clear that while coastal states were entitled to unspecified residual rights in connection with their rights specified in article 56, other states were likewise entitled to unspecified rights related to the basic enumerated freedoms.

This analysis is consistent with the fact that we find no definition of "high seas," as was the case in the 1958 Geneva Convention. Instead, article 86 states that the provisions contained in Part VII do not apply in the exclusive economic zone, but that the article does not entail any abridgment of the freedoms enjoyed by all states in the EEZ in accordance with article 58.

Article 59, also, adds further weight to the analysis. It provides that where the convention does not attribute rights or jurisdiction to the coastal state or other states, the conflict should be resolved on the basis of equity. This underscores the basic dichotomy and balance sketched out in articles 56 and 58 by recognizing a possible third category of unspecified uses which are related neither to resource jurisdiction nor to the freedoms of article 58, and it provides for their accommodation.

The committee concludes that the economic zone chapter deals in an effective and balanced way with the protection of the rights of coastal states in the exclusive economic zone, as well as the rights and freedoms of other states in the same area.

Functional Uses of the Exclusive Economic Zone

(1) Fisheries

(a) "Coastal" fisheries

The term "coastal fisheries" as used herein is defined as all fisheries conducted within the EEZ that are not governed by articles other than 61 and 62 (and their related provisions). Article 56 is obviously the governing cornerstone of the fisheries management powers of the coastal state for these species. It emphasizes that these powers are "sovereign rights" and hence that the coastal state has broad and exclusive discretion with regard to management and conservation questions. All other provisions dealing with fisheries should be construed in the light of this basic jurisdictional fact.

With that in mind, the right of the coastal state to determine the allowable catch of fish in the zone established in article 61 must be viewed as an act within the almost total competence of the coastal state. Article 61 further provides a standard for setting total allowable catch. That standard is: "maximum sustainable yield, as qualified by relevant environmental and economic factors." This is a very flexible standard. While the biological yield of a stock is the basis upon which to build, the coastal state may exceed or fall below that level where environmental or economic factors so dictate. This gives the fishery manager considerable flexibility which includes setting permissible catch levels by reference to criteria other than biological maximization. One limitation in the discretion of the coastal state, however, appears in article 61(2). This imposes upon the coastal state the obligation to ensure that the maintenance of the living resources in the EEZ "is not endangered by over-exploitation." This particular obligation is subject to supervision by conciliation conducted in accordance with article 297(b)(i).

Article 62 places an obligation upon the coastal state to promote optimum utilization of fish stocks without prejudice to article 61. This provision contains two important thoughts. First, the use of the word "optimum" means that the treaty rejects the concept of "full" utilization, substituting therefor a more flexible management concept. Second, by cross-referencing article 61, this article underscores the fact that the obligation to promote optimum utilization does not override the basic management discretion allocated to the coastal state under article 61. Article 62 also permits the coastal state to determine its own catch capacity which, when subtracted from the total catch, determines the amount of surplus to be made available to foreign fishing. This would appear, on first reading, to mandate some access for foreign fleets, but that would be a misleading interpretation if applied to every case. That interpretation could prevent a coastal state from setting aside reserves for its own industry and would suggest that that state could not consider factors other than purely biological ones in deciding whether to admit foreign fishing in its zone. The coastal state also would be prevented by this interpretation from considering, for example, the degree to which a foreign state assists the coastal state in conservation matters, or whether the foregoing state will be willing to make certain trade concessions in return for fishing rights. This conclusion would appear to fly in the face of the sovereign rights of the coastal state set forth in article 56.

Furthermore, article 62 permits the coastal state to take into account, when allocating stocks, the significance of the living resources of the zone to coastal communities and their economies, and "other national interests." The protection of a domestic fishing industry is obviously such a national interest. This is confirmed by the fact that the phrase was attacked, unsuccessfully, during the law of the sea conference by distant water-fishing states, who feared it would be too broadly interpreted.

It should be noted that article 62 requires the coastal state, in making allocations, to take into account the need to minimize economic dislocation of states whose nationals have habitually fished in its zone. But this "accounting" also falls within the discretion of the coastal state. This requirement could not be read in a way to override the coastal state's own national interests. Given the strength of these interests, it is clear that no agreement would have been reached during the conference if it had been perceived that such interests would be subordinated to the fishing rights of foreign fleets.

The dispute settlement provisions of the treaty further support this analysis. Article 297(3)(a) states that a coastal state cannot be obligated to submit a fishery dispute arising within the zone to compulsory settlement when it involves the sovereign rights of that state, or calls into question its discretionary powers with respect to the determination of allowable catch, harvesting capacity, or the allocation of a surplus. A state, under the treaty, may be forced to compulsory *conciliation* only if it has *manifestly* failed to comply with its conservation obligations, has *arbitrarily* refused to determine its catch capacity, or has *arbitrarily* refused to allocate the surplus it has declared to exist. As previously mentioned, this article permits compulsory *conciliation* where there is a manifest showing of failure to protect stocks against over-exploitation. With respect to other management considerations, however, only arbitrary conduct may be challenged. In sum, it must be concluded that the drafters intended broad discretionary powers for the coastal state with respect to the allocation of stocks, a discretion almost impossible to challenge, but lesser discretion involving matters of conservation.

Some fishes in the economic zone fall into the category of shared stocks; that is, stocks that migrate between economic zones or from those zones to the high seas. These are stocks that ordinarily fall within the province of articles 61 and 62. The living resource management problem of the coastal state is exacerbated to the degree that this issue cannot be handled. Article 63 was written to address this

problem. The economic-zone-to-high-seas issue is often labeled the "straddling stocks" question. Article 63 places a burden upon the coastal state and states fishing those stocks on the high seas to seek, and through international agreements, to agree upon appropriate conservation measures. While article 116 states that fishing beyond 200 miles is a freedom of the high seas, it also subjects the exercise of that freedom to the provisions of article 63; thus, it would appear that if a foreign state persisted in fishing outside the zone to the detriment of the conservation measures of the coastal state, it would be subject to dispute settlement. In such a case, the limitations that apply to dispute settlement within the zone, previously described, would not apply and the coastal state would have every expectation that its rights would be protected.

(b) Anadromous species

Article 66 goes quite far in the direction of supporting the position long held by states in whose waters anadromous species spawn: that there should be no "high seas" fishing. In the context of the LOS convention, the term "high seas" means fishing beyond the exclusive economic zone. Within 200 miles the coastal state has the appropriate management competence. Article 66 makes clear that fishing for anadromous species may be conducted only in waters landward of the outer limits of the exclusive economic zone, with a single exception: where a ban would cause economic dislocation to the fishing state. In this regard, two points are important. First, article 66 does not prohibit economic dislocation. It is only to be minimized. The minimization requirement is not inconsistent with a phased reduction and eventual elimination of all high seas fishing of anadromous stocks. Secondly, the economic dislocation formula is flexible, permitting reduction in each year's effort below that of the last, further advancing the point of final exclusion of the high seas fishery.

It is sometimes alleged that article 66 prohibits the state of origin to set allowable catches or the level of fishing without consultation with the fishing state. While true, this requirement would not seem to pose an impossible burden upon the state of origin, since rational management in any event would envision consultation. The obligation to consult is not an obligation to capitulate to the foreign fishing state, and it could be a useful mechanism to avoid misunderstandings and to facilitate accommodations. Accommodation, in turn, enhances the likelihood of compliance with agreed conservation measures. Article 116 grants all states the right to conduct high seas fisheries

without discrimination. But, once again, that article is expressly subject to article 66 and thus subject to the primary interests of the state of origin in the management of anadromous species.

One weakness in article 66 is the lack of specific state of origin enforcement powers. It may be argued, however, that in any case enforcement could not be completely effective without agreement among the states concerned. In seeking that agreement, the coastal state has considerable leverage because of its almost plenary powers in the economic zone. Normally, a foreign state seeking to fish salmon also desires to fish species subject to coastal state control and allocation powers within the zone.

In sum, then, article 66 seems to provide amply for the protection of the state of origin in the management of anadromous species both within and without the zone, and guarantees against new entries into the fishery.

(c) Highly migratory species

Article 64 has been the subject of varying interpretations. The position of the U.S. delegation at the Law of the Sea Conference was that regulation of tunas in waters beyond the territorial sea can only be effectively regulated by rules developed through an appropriate international organization, and, lacking such agreement, a coastal state could not exercise unilateral jurisdiction to regulate tunas within its economic zone. This position, however, seems impossible of reconciliation with U.S. legislation which asserts exclusive fishery management authority over all highly migratory species of fish *except* tuna. This position is more in keeping with the argument of other coastal states having an interest in tuna. They place emphasis on paragraph 2 of article 64 which states that the provisions of the first paragraph (concerning international cooperation and the establishment of international organizations) "apply in addition to the other provisions of this Part." Those "other provisions" would include articles 56, 61 and 62 dealing with the sovereign rights of coastal states over fisheries within the exclusive economic zone. The Convention does not distinguish between tunas and other highly migratory species. It is impossible, therefore, to reconcile U.S. national laws with the Convention in this regard. Nor is there anything in customary law that would justify excluding tuna from national jurisdiction while at the same time exerting jurisdiction over, for example, billfish.

The Congress of the United States, having spoken on the issue, would seem to have undercut the ability of the U.S. on the diplomatic level to adhere to its LOS negotiating position. Furthermore, it does not seem possible to understand how the coastal state interest in migratory species (tuna) differs basically from its interest in straddling stocks or stocks of a coastal variety that migrate between economic zones.

There remains a need, therefore, for cooperative international agreements. Tuna, unlike salmon, represent species in which no single state has a primary interest. In addition, article 64 requires the insurance of conservation and the promotion of optimum utilization of these species through the region, both within and without the EEZ. For these reasons, international cooperation could be greatly enhanced if the U.S. would modify its isolated tuna position.

It should be noted that, as with other stocks, high seas fishing under article 116 also refers to article 64.

(d) Marine mammals

While not fishes, marine mammals fall into the category of living resources found both within and beyond the exclusive economic zone. Many problems connected with marine mammals (in particular the cetaceans) are associated with areas outside the zone; yet management of these species within the zone is contemplated by the treaty. Article 65 states that the coastal state is not prohibited from limiting or regulating the exploitation of marine mammals more strictly than provided for in Part V. This relieves the coastal state from any obligation to maximize utilization of these animals and the coastal state may prohibit any harvesting within the EEZ. Article 65 mandates state cooperation in appropriate international organizations for the conservation, management and study of marine mammals. The thrust of the article is toward protection and away from exploitation. One could, and probably should, conclude that the rules provided for by these international organizations, including the IWC or its successor, at least as to member states, represent a floor below which the coastal state should not go. For non-member states, articles 61 and 62 represent that floor.

Reference should here be made to Annex 1 of the Convention which contains in its listing certain marine mammals. This annex has been in some cases utilized to attempt a link between the management of highly migratory species and marine mammals. However, Annex

I was negotiated at a time when articles 64 and 65 were integrated into a single article. Subsequently, they were separated into two articles to demonstrate that marine mammals were expected to receive special treatment. Article 64 incorporates Annex I, which is then overridden by the more stringent provisions of article 65. In addition, viewing the contents of Annex I, it cannot be considered more than exemplary of the kinds of mammals over which an international organization might take jurisdiction. The final decision on this matter must be taken by the organizations themselves.

(e) Landlocked and geographically disadvantaged states

A brief word should be said with regard to this special problem, although a more substantial analysis would be desirable. Articles 69 and 70 are the principal articles dealing with the subject. They were agreed to only after intensive negotiations and compromise. They accord to landlocked and geographically disadvantaged states a legal right to participate, on an equitable basis, in the exploitation of the living resources of the zones of coastal states of the same region or subregion. This right, however, is highly circumscribed. First, paragraph 1 mandates that the participation of these states must take into account the relevant economic and geographical circumstances of all states concerned. Paragraph 2 of article 69 and paragraph 3 of article 70 call for the terms and modalities of participation to be established through agreement between the concerned parties. The rights of developed landlocked or geographically disadvantaged states are limited to the economic zones of other developed states. Any rights acquired under these articles are not transferable to third states.

The term "geographically disadvantaged" is defined in article 70(2) in a way that limits substantially the number of states that could qualify. The major limitation is the requirement that such states be dependent upon the exploitation of the living resources of the zones involved for the nutritional purposes of their populations, or that they can claim no exclusive economic zone of their own. These definitions themselves, of course, will require further elaboration through negotiations among the parties concerned.

The sum of these requirements shows that the coastal states made few concessions of value during the negotiations. The LL/GDS did, however, acquire a new legal right, and that is a positive gain for them. At the same time, this does little to offset the broad discretionary powers of coastal states to regulate living

resources in their zones. LL/GDS participation must still be on terms "satisfactory to all parties."

(f) Catadromous and sedentary species

Only a small number of states were concerned with the catadromous species problem, thus article 67 was not controversial. It appears to raise no special problems. Sedentary species had previously been dealt with by the 1958 Geneva Convention on the Continental Shelf, and, with such ambiguities as that convention contained, the same language was carried forward into article 77. These species, however they may be identified in the real world, remain the exclusive resource of the coastal state, whether exploited or not.

(g) Enforcement

Article 73 accords to coastal states the right to take such measures, including boarding inspection, arrest and juridical proceedings, as needed, to ensure compliance with its laws promulgated in conformity with the Convention. Two significant limitations are placed on this power. First, vessels and their crews must be promptly released upon the posting of a reasonable security, and, second, the coastal state may not impose the penalty of imprisonment for the violation of fisheries laws, nor impose any form of corporal punishment. Like other sections of the treaty, many words, such as "reasonable" leave unresolved questions for the future.

(2) Artificial islands, installations and structures in the Exclusive Economic Zone

Article 60 clarifies previous law on this subject. The 1958 Conventions on the law of the sea were silent with respect to artificial islands. The omission suggested that they were juridically different from natural islands. Questions were raised with regard to the right to construct them beyond the territorial sea and the right of a coastal state, if it were to construct them, to extend its law to reach conduct upon them. Article 60 clarifies both points in favor of the coastal state. It provides that in the Exclusive Economic Zone, the coastal state shall have exclusive right to construct such islands and that it shall have exclusive jurisdiction over them for all purposes.

Article 60 also deals, as did the Geneva Conventions, with the construction and regulation of installations and structures. Article

60(1)(b), however, limits coastal state rights regarding installations and structures to those established in the zone "for the purposes provided for in article 56 and other economic purposes." This unambiguous provision clearly eliminates coastal state jurisdiction over any installations other than these. While there has been some controversy over the scope of this article, a number of major states have clearly indicated the unacceptability of an interpretation that would place jurisdiction over all installations, regardless of their purpose, under the jurisdiction of coastal states.

Paragraph 3 of article 60 deals with the removal of abandoned installations and structures. The 1958 Geneva Convention called for "complete" removal. The formula adopted in the new convention reads as follows:

> "Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States."

IMO was perceived as being the appropriate organization referred to in this paragraph. Steps are being taken to seek implementation in that organization. The sponsors of the language of article 60(3) noted in committee two of the Law of the Sea Conference that this language envisioned expeditious establishment of binding standards by that organization.

It is notable that the word "entirely" that appears before "removed" in the 1958 Geneva Convention on the Continental Shelf has been deleted in the new treaty. This does not mean, however, that the basic obligation has changed, although it has been modified. Removal is required to the degree necessary to ensure surface and subsurface navigation. Standards to be established by IMO would be relevant guidelines in assisting states in determining when, where, and to what degree removal would be required. Such standards, should they be developed, would be indicators of reasonable conduct, and thus would be useful for states considering the question of potential operator or liability arising from the failure to remove. The absence of these standards would undoubtedly influence operators to err on the side of safety when making their decisions, but in no way would change the nature of the obligation to remove. In this regard, it should be noted that the standards need

only be taken into account by operators in the final decision. The primary objective of the article is safety of navigation, both surface and subsurface, but other factors, such as the protection of fishing and the marine environment, are considered relevant.

(3) Marine scientific research

Article 246 is the basic article dealing with the conduct of marine scientific research in the Exclusive Economic Zone. The coastal state is accorded the right to regulate MSR in its zone, and such research may be conducted only with the express consent of that state. In normal circumstances, such consent shall be granted for research conducted by states or competent international organizations in accordance with the relevant provisions of the Convention. If the coastal state fails to act upon a request for consent within the stated period of time after it has received all required documentation, article 252 permits the researcher to proceed.

The key paragraph in article 246 (para. 5) gives the coastal state complete discretion to withhold consent if the project is of direct significance for the exploration and exploitation of natural resources, if it involves drilling or the use of explosives, if it involves the construction of artificial islands, installations or structures, or if the communicated information concerning the project is inaccurate or if the researching state has failed to meet its obligations in the past. As a prerequisite to obtaining consent from the coastal state, the researching state must provide information as specified by the treaty, and must agree to fulfill certain obligations. These requirements are set forth in articles 248 and 249 which deal, among other things, with the nature and objectives of the research project, its timing, and other pertinent data, and with the commitment to make certain reports and provide certain data and samples. Furthermore, the coastal state has the right to suspend or to terminate research projects if it subsequently discovers discrepancies between the proposed research plan and the research actually being conducted.

The dispute settlement provisions of the Convention do not provide much comfort to the marine scientist. Article 297(2) provides for dispute settlement in the form of conciliation concerning the interpretation or application of the provisions of the convention with regard to MSR, but that the coastal state shall not be obliged to accept a challenge to the exercise of coastal state discretion under article 246 or any decision by the coastal state to order suspension or cessation of any project.

There are two problems. First, the scope of jurisdiction of the conciliation commission is quite narrow. If a coastal state refuses consent for the project, conciliation is for practical purposes limited to the question whether or not the proposed project does or does not raise issues reserved to coastal state discretion. If the answer is yes, the coastal state's exercise of that discretion cannot be challenged. Thus, one could request conciliation on the issue of whether a proposed research project has direct significance for the exploration and exploitation of natural resources to ascertain whether the coastal state has discretion to deny consent.

The second difficulty relates to the time required for the conciliation procedures. Since research projects are normally limited in time, a long period of dispute would offer little prospect for effective relief, and the project in many instances would have to be cancelled. It may be, however, that the mere existence of an available dispute settlement mechanism could influence the attitudes of coastal state bureaucracies, and, in that way, have a beneficial effect on the processing of MSR applications.

Criticisms leveled at this regime by researchers are well known. Scientists have pointed to the problems of financing, planning, and carrying out a major scientific research project in the economic zones of other countries in the light of uncertainty that the project will ever be approved, or, if approved, it might subsequently be suspended or terminated.

It is certainly clear that the restrictions on MSR are of a much greater magnitude than those contained in the 1958 Geneva Convention on the Continental Shelf in that they are not limited to research concerning the Shelf and conducted there. The conditions placed upon the conduct of MSR are not trivial, and they most certainly will be applied. It is possible, of course, that coastal states may choose to apply restrictions in the EEZ less onerous than those specified in the treaty. If this were the case, it could be argued that the MSR provisions constitute an overall gain for the scientists by heading off the more restrictive 1958 Continental Shelf regime in the Exclusive Economic Zone. What happens in practice remains to be seen. There are many ambiguities in the texts, such as the kind and degree of assessment of data that may be demanded by the coastal state upon completion of a project. What seems clear is that if the coastal state does not want the research to be done, it will not take place. If it does, the MSR provisions still create burdens upon the researcher. The costs will undoubtedly be higher than in pre-

treaty days, and this, alone, may be determinative of the future of MSR off foreign coasts. What should be borne in mind, however, is that the pre-treaty days are gone and that, absent the present treaty, given the increased awareness of coastal states, the costs might be even greater.

(4) Protection and preservation of the marine environment

The marine pollution provisions of the treaty have been viewed by many as a substantial contribution to the development of the law on the subject. This report confines itself to commenting upon those provisions related to the competence of a coastal state to prescribe and enforce rules for the prevention of vessel-source pollution in the Exclusive Economic Zone, without in any way seeking to denigrate those dealing with ocean dumping, land-based sources, or seabed pollution.

Article 211(5) gives the coastal state the right to adopt laws and regulations for the prevention, reduction and control of pollution from ships, but those rules must be in conformity with generally accepted international rules and standards established through the competent international organization (IMO) or through general diplomatic conferences. This provision guarantees the uniformity required by international shipping while providing protection to the coastal state in the economic zone. In order to assure that generally accepted rules are in fact established, states are enjoined by article 211 to work through appropriate organizations to that end. The standard for rules for vessel-source pollution may be contrasted with those for pollution from land-based sources in that in the latter case the convention requires only that states shall take generally agreed international rules into account, and that they need only endeavor to establish them.

Rules regarding enforcement fall under three headings: enforcement by flag states, enforcement by port states, and enforcement by coastal states. Flag state enforcement is a traditional concept carried forward into the new Convention. Port state enforcement, as articulated by this Convention, is new. This concept permits any state to take action against a vessel voluntarily within its ports for pollution violations occurring outside its economic zone, provided that if the violation occurred within the economic zone of another state, the port state should not institute proceedings without the state's request unless the violation causes or is likely to cause pollution in the economic zone of the port state.

Coastal state enforcement provisions are somewhat elaborate. First, if a vessel is voluntarily within a port or calling at an offshore terminal, the coastal state may institute proceedings for the violation of any laws or regulations adopted in accordance with the convention for violations occurring in the territorial sea or in the economic zone. Where there are "clear grounds" for believing that a vessel navigating the territorial sea has, during its passage therein, committed a violation, the coastal state, without prejudice to innocent passage, may institute appropriate proceedings. If an offense is committed in the economic zone, before a coastal state may institute proceedings there must be "clear objective evidence" that the vessel committed a violation "resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state." This burden provides adequate protection for shipping against arbitrary action by a coastal state through whose economic zone a vessel may be passing at the time of the alleged violation.

It is obvious that the regime for pollution control in the economic zone, to the degree it provides protection for navigation, could be completely negated by provisions applying in the territorial sea, since a large proportion of shipping in the EEZ is bound for ports of the nearest state. It is necessary, therefore, to complete the picture, to make some comments on that regime as well. The relation between the right of the coastal state to enact and enforce pollution laws in its territorial sea and the right of innocent passage guaranteed by article 19 is one that should be examined. Article 21 provides that a coastal state may adopt laws and regulations for the preservation of the environment and the control of pollution. Article 24, however, states that coastal states shall not hamper innocent passage, and in particular, shall not "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage." The prohibition against hampering innocent passage is also found in article 211(4). The question then becomes one of identifying the application of domestic laws that do and do not hamper innocent passage. First, it is clear that there is a level of conduct by vessels that is serious enough to deny it the right of innocent passage at all. Article 19(h) declares to be non-innocent any act of wilful and serious pollution contrary to the Convention. In such cases, vessels would not be entitled to the protections of article 19. Aside from that, the issue seems to revolve about whether the laws and regulations of a coastal state would be of such an encompassing nature as to prohibit passage of vessels as a class that otherwise would be seen to be in accord with the peace, good order

and security of the coastal state. Such sweeping regulations would go to the right of passage, and not to the conduct of individual vessels which may indeed be delayed by reason of failure to comply with laws enacted in accordance with the Convention. Laws which would discriminate against vessels by reason of their flag would be of such a sweeping nature, as would laws so stringent that they would have the effect of prohibiting any vessel from passing through the territorial sea, or depriving an entire class, regardless of individual characteristics, of that right. It is impossible to say with precision, however, where the line is to be drawn, except on a case by case basis.

Section 7 of Part XII of the Convention provides further safeguards for the protection of shipping. These articles include provisions for the release of foreign vessels, subject to a requirement that security be posted, and for the imposition of monetary penalties only for violations beyond the territorial sea.

The pollution provisions do not apply to warships or naval auxiliaries, although flag states of those vessels are enjoined to adopt appropriate measures consistent with operational capabilities to ensure that their warships act in a manner as consistent as far as possible with the Convention. Furthermore, states could be subjected to liability for the acts of their warships in violation of the pollution provisions, although there may be a problem in establishing such liability because of sovereign immunity.

The Convention contains two special provisions in favor of coastal states. The first, found in article 211(6)(a), makes it possible for coastal states to exercise special powers in vulnerable areas, and establishes specific procedures for exercising them. The second is found in article 234 which gives coastal states the right, subject to safeguards for shipping, to establish and enforce rules and regulations with regard to ice-covered areas. The definition of ice-covered areas is so restrictive that it only applies to arctic waters.

Regarding dispute settlement, article 297 contains unique relief in cases involving pollution. The article requires compulsory dispute settlement when it is alleged that a coastal state has acted in contravention of international rules and regulations provided for in the treaty for the protection and preservation of the marine environment which are applicable to the coastal state. No other international instrument provides this protection for shipping, and it is in relation to this provision that the significance of signing and ratify-

ing the treaty is of particular relevance. These dispute settlement procedures may also be used when it has been alleged that the coastal state acted in contravention of provisions related to navigation or overflight. Absence adherence to the treaty, it would appear that a state would not have these protections unless alternative mechanisms could be devised and agreed to.

Other matters relevant to the Exclusive Economic Zone

(1) Delimitation of the Exclusive Economic Zone

This subject is in its infancy. While there are insights into law pertaining to the delimitation of exclusive economic zones between opposite or adjacent states, it should be noted that there are two important disputes pending, the resolution of which could significantly impact upon the development of law, and this causes us to exercise caution in the discussion of the issue. The first of these is the Libya/Malta dispute, and the second is the case between Canada and the U.S. The first deals with delimitation of the Shelf only, while the latter includes the EEZ. Either may reveal relevant elements of consideration. Until they are decided, one can, at best, speculate.

There exists substantial literature on the delimitation of the Continental Shelf between opposite or adjacent states and on the delimitation of territorial seas. The newness of the economic zone concept, however, raises the question of the relevance of that history to the resolution of disputes involving the EEZ. This history, at the very least, does indicate that certain elements have played prominent roles in resolving maritime boundary disputes. They include: agreement, special circumstances, and equitable principles. Agreement is not of the same character as the other elements. Those elements go to the manner in which the line should be drawn, while "agreement" speaks to the preferred means by which states should address the line-drawing question.

These elements, derived from Continental Shelf and territorial sea disputes, bear a relation to the economic zone. Further, the result in these disputes should not turn upon whether they are resolved by utilizing the "equidistance/special circumstances" rule (i.e., article 6 of the Geneva Convention on the Continental Shelf) or the "equitable principles" approach taken by the ICJ in the 1969 North Sea Continental Shelf Case. The latter rule, since not all parties to the dispute were signatories to the convention, was found in the

rules of custom. In the UK/French arbitration of 1977, the tribunal noted that while the case was controlled by article 6, "the rules of customary law lead to much the same result . . . ." The tribunal was of the view that the effect of applying or not applying article 6 should not make much, if any, practical difference to the actual course of the final boundary. It made a similar statement with regard to the text then emerging in the Law of the Sea Conference, noting that there was "no reason to suppose that, if they were applicable they would make any difference to the boundary in the present case . . . ." Thus it could be concluded that there is but a single set of principles, however evolved, and whatever their source, governing delimitation of the Continental Shelf.

The question remains whether these elements are equally applicable to the Exclusive Economic Zone. One view of this problem is found in the opinion of Judge Oda in the Tunisia/Libya case in 1982. He, in dissent, said that the:

> ". . . conclusion is that the principles and rules of international law applicable to the delimitation of the Continental Shelf will not be different from those applicable to the delimitation of the Exclusive Economic Zone."

Further, he observed that not each of the elements properly considered in one situation would necessarily be relevant in the determination of the other. If the observation is correct, there is a link between the two subjects, at least in principle. Certain fundamental considerations when dealing with the Shelf obviously differ from those appropriate to EEZ cases. In the former, the underlying proposition is the natural prolongation of the continental land mass, a geophysical phenomenon having less direct relevance to fisheries, pollution, or marine scientific research disputes involved in the EEZ. Factors relevant to fisheries may have less meaning than when dealing with pollution or MSR, etc.

But Judge Oda may be correct if he is pointing out that delimitation is an act of drawing boundaries relying for definition upon relevant features and conditions in place at the relevant time. As the ICJ noted in listing the factors for negotiation in the North Sea Case, the presence or absence of resources in disputed areas is a consideration. Likewise, it would seem that the location and concentration of fish stocks, as well as similar factors, would be relevant to EEZ disputes.

Until there is further jurisprudence on this subject, we make only these preliminary observations.

(2) U.S. views on the Exclusive Economic Zone

It would not be appropriate to conclude this report without brief mention of the March 10, 1983, U.S. presidential proclamation declaring for the U.S. an Exclusive Economic Zone of 200 nautical miles. As indicated earlier in the report, the proclamation declares that within its Exclusive Economic Zone, the U.S. has, to the extent permitted by international law, sovereign rights over the natural resources of the zone, as well as for other economic purposes, and that it has jurisdiction over artificial islands, installations and structures having economic purposes, and for the protection of the marine environment. It makes clear that the economic zone beyond the territorial sea is an area in which all states enjoy the freedoms and related uses previously discussed in this report.

The proclamation was accompanied by a fact sheet and a presidential policy statement. All three must be read together. The fact sheet explains that the President has decided not to assert jurisdiction over marine scientific research in the U.S. EEZ, and that the proclamation does not affect U.S. policies concerning the Continental Shelf, marine mammals, and fisheries (including tuna). The policy statement makes three basic points. First, the U.S. "is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight that is contained in the Convention." Second, the U.S. will exercise its navigation and overflight rights on a worldwide basis in a manner consistent with the balance of interests reflected in the Convention, but it will not acquiesce in unilateral acts that restrict these rights. And, third, the proclamation of the economic zone does not reduce high seas rights and freedoms of other nations that are not resource related.

At least two problems emerge from an examination of this package. The first is due to its vagueness and the second relates to certain internal inconsistencies. The first problem must, in large part, await specific implementation of proclamation principles before it can be resolved. The second raises questions of what the U.S. means when it announces that the non-seabed provision of the Law of the Sea Convention are generally acceptable. All three documents, for example, exempt highly migratory species of tuna from U.S. jurisdiction. It would appear that this exception is incon-

sisent with the Convention in that it reflects no change in the U.S. view that it may regulate highly migratory species other than tuna in its zone. The treaty draws no such distinction. And, when referring to delimitation of the EEZ, the proclamation states the U.S. intention to determine its boundaries by reference to equitable principles. It is not clear that the treaty says that. It merely refers to article 38 of the Statute of the ICJ and the desire to seek an equitable solution. The proclamation, thus, projects one possible interpretation of the Convention.

In his statement, the President announced that the policy of the U.S. will not affect the application of U.S. law concerning the high seas. Pre-existing U.S. law viewed the freedoms of the high seas, as set forth by the Geneva Convention, as being applicable beyond three nautical miles, a limit reasserted by the President for the U.S. Since the 1982 convention modifies the scope of high seas rights within the EEZ, it is not yet clear what the President intended when he spoke of applying U.S. law on the "high seas." "Because many important U.S. laws relate to the "high seas," this issue needs clarification.

These examples, among others that could be noted, raise questions of interpretation and of U.S. intentions regarding the implementation of the non-seabed provisions of the conventions.

How they will be clarified remains to be seen. Legislation has been drafted to augment the proclamation. The future of this legislation is not clear, but seems dim. Until further study is given, it is unlikely that it will progress. Another bill is pending that would establish an Oceans Policy Commission to review policy options for the U.S. In the light of this and other initiatives, both public and private, it would be premature to conclude that U.S. actions anticipated with regard to the economic zone do not conflict with the treaty in at least some aspects.

(3) Relationship of the Exclusive Economic Zone to the Continental Shelf

In a very real sense, the question whether, within 200 nautical miles of the coast, there is one or two separate legal regimes, is a very narrow one. In a purely legal sense, the LOS convention makes clear that there are two. The legal regime of the EEZ is established in Part V of the convention, and the legal regime of the Continental Shelf is established by Part VI. Article 56(1) establishes, for the

coastal state, sovereign rights over natural resources to the maximum limits specified in article 57. These rights specifically include the resources of the seabed and subsoil. Article 77 establishes sovereign rights over the Shelf, including the natural resources of the seabed and subsoil. In both cases, these rights are exclusive to the coastal state. But in terms of the rules and regulations the coastal state may promulgate with respect to these resources, it makes no difference upon which regime one relies, except in the case where the Continental Shelf, if it is defined other than by article 76, falls short of 200 nautical miles. In treaty terms, however, there is no difference. Article 76 defines the Shelf as extending to at least 200 nautical miles, and article 56(3) states that for purposes of resources, Part VI will apply. Under either theory, therefore, the coastal state has exclusive rights over the natural resources of the seabed and subsoil including sedentary species, and any minerals that may be located within 200 miles. The existence of two theoretical bases for Shelf regimes would have relevance, however, in case, if it exists, where a shelf-like structure existed within 200 miles of a coast, but was not legally a natural prolongation of the continental land mass. In such a case, the jurisdiction of the coastal state would have to be rested upon EEZ theory, and the submerged land rights would end at 200 miles.

There is another question, however, that is also raised by the relationship of the two regimes. It is posed by the hypothetical situation where the Continental Shelf of one state extends into the exclusive economic zone of an opposite or adjacent state which has no signficant continental shelf of its own. Here there would be a theoretical conflict, with one claimed based upon Part VI and the other upon Part V. This problem would not seem to raise any different kinds of questions, however, that would not arise in delimitation disputes in general, the only difference being that the dispute would be Shelf v. EEZ rather than Shelf v. Shelf, or EEZ v. EEZ. From a legal point of view, the problem should be handled as one of delimitation, and the issue becomes whether it is better to have a single line for both zone and shelf, or separate solutions for the two regimes. While this is complicated, it is not impossible to deal with.

Conclusion

The law relating to the Exclusive Economic Zone, whether viewed under the 1982 convention or as customary law, is obviously in a state of development. State practice, at this stage, is not sufficiently developed or uniform to predict the exact dimensions of the

ultimate solution. Perhaps the concept will necessarily remain fluid, without fixed parameters, but with certain limites, to admit of changing circumstances over the years. And perhaps this is an essential dimension of the concept. The concept itself was brought about by the inflexibility of more traditional concepts, and if it is to long survive, then a modicum of flexibility may be the only answer. One can say, at least, with reasonable certainty, that the concept of a zone as an area subject to coastal state resource jurisdiction is well established in international law. What could occur, if the treaty limits are not observed, is a further territorialization of increasingly broader areas of water. This would only lead to a further round of disputes, and, eventually, another round of negotiations in the attempt to curb the trend.

The legal status of the Zone has been set out in the treaty in some detail, although it defies simplistic formulation. State practice, if this fundamental building block is to be useful, must be directed at strengthening and reinforcing it. The concept is a unique one, painstakingly negotiated, and its value should not be underestimated.

The fisheries provisions of the treaty, as they apply to the economic zone, constitute an equally important part of the package. It seems clear that almost unfettered discretion has been accorded coastal states in the management of stocks under their jurisdiction, and this was, in the political climate of the conference, the only acceptable solution. There could have been no other that would have permitted the protection of navigation in the zone. The same may be said, to a much more limited extent, of science and pollution.

It must be emphasized that the treaty is but a charter. Throughout this report, analysis has indicated that much has been left to be negotiated through appropriate bilateral, regional, or subregional arrangements. But the basic balances and compromises emerge clearly from the new texts. The committee believes that the treaty provisions related to the exclusive economic zone thus represent the best guidelines for consolidating the gains that have been achieved, and for working toward uniform, detailed rules of implementation.

One subject touched upon but not sufficiently dealt with in this report, is the relationship of treaty provisions to customary international law. This subject takes on special importance in the light that the treaty has not been universally accepted, as had been hoped at the outset of the negotiations. The fact that this report has not dealt with this subject in any depth is a function of its complexity and the variety of other subjects covered. It does not in any way depreciate the importance of such an analysis. We merely draw attention to this important problem for further study, analysis, and elaboration.