Exclusive Economic Zone

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A. Introduction

1 It was at the Third United Nations Conference on the Law of the Sea (‘UNCLOS III’; → Conferences on the Law of the Sea) that the concept of the exclusive economic zone (‘EEZ’) was introduced into the international → law of the sea. The EEZ can briefly be defined as a maritime zone beyond and adjacent to the → territorial sea extending up to 200 nautical miles (‘nm’) from the baseline of a coastal State where the coastal State has sovereign rights over the living and non-living resources of the superjacent waters and its seabed and subsoil—rights of an essentially economic nature—whereas in that zone other States enjoy the freedoms of navigation and → overflight (see Art. 56 UN Convention on the Law of the Sea ; → Baselines; → Navigation, Freedom of)

B. Genesis of the Concept

1. Initial Development

2 Claims to maritime zones beyond the territorial sea, then usually of 3 nm in breadth, began with the Truman Proclamations. On 24 September 1945 United States of America (‘US’) President Truman issued two proclamations: Proclamation No 2667 relating to the natural resources of the seabed and subsoil of the → continental shelf and Proclamation No 2668 with respect to coastal fisheries in certain areas of the → high seas (→ Fisheries, Coastal). Proclamation No 2667 is of particular significance. It stated, inter alia, that:
Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control (Proclamation No 2667).

This proclamation made clear that ‘[t]he character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected’ (ibid). These proclamations, especially Proclamation No 2667 concerning the continental shelf, constituted the fons et origo of the extensive maritime claims which have been such a distinctive feature of the latter part of the 20th century.

Several coastal States took similar actions. However certain States, particularly some Latin American States, went further than the US in that they claimed sovereignty not only over the continental shelf but also over the waters above the continental shelf: the so-called epicontinental sea. The Argentine Republic's Presidential Declaration Proclaiming Sovereignty over the Epicontinental Sea and the Continental Shelf ([issued 9 October 1946] 1947 41 AJIL Supp 11) provided an instance of this type of claim.

A few Latin American States which possessed little or no continental shelf sought to make good this deficiency by claiming to exercise ‘protection and control’ in the seas adjacent to their coasts to a distance of 200 nm: the Republic of Chile ('Chile') by the Presidential Declaration Concerning Continental Shelf of 23 June 1947, the Republic of Peru ('Peru') by Presidential Decree No 781 concerning Submerged Continental or Insular Shelf of 1 August 1947, the Republic of Costa Rica ('Costa Rica') by Law No 116 (27 July 1948), and the Republic of El Salvador ('El Salvador') under then Art. 7 Constitution of the Republic of El Salvador (1950). It has been stated that the distance of 200 miles claimed by the Latin American States had not been chosen arbitrarily: it corresponded to the outer limit of the Peruvian (Humboldt) current, which had a decisive influence on the living resources of the sea areas affected. These claims expressly recognized the freedom of navigation. However, as was to be expected, they attracted vigorous protests from the maritime States (→ Protest).

In 1952 at the first conference on the exploitation and conservation of the marine wealth of the Southern Pacific, Chile, the Republic of Ecuador ('Ecuador') and Peru adopted the Declaration on the Maritime Zone, which later became known as the Declaration of Santiago ([signed and entered into force 18 August 1952] 1006 UNTS 323). This seminal instrument has been considered ‘the manifesto of the new trend in the law of the sea’, perhaps as significant a milestone as the Truman Proclamations. These republics proclaimed as a principle of their international maritime policy that each possessed sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country, and extending not less than 200 nm from the coast (→ Maritime Jurisdiction). It is of some significance that the Declaration of Santiago preserved only the right of ‘innocent and inoffensive passage of vessels of all nations through the zone’—a right, which is in fact identified with the territorial sea (at 326; → Innocent Passage; → Transit Passage).

The spread of these extensive maritime claims was not arrested by the adoption of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas ('Living Resources Convention'), as might have been hoped. Though it was conceded that the recognition that ‘[a] coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea’, was to be welcomed, the general view among these States was that the restrictions imposed on these rights rendered them almost illusory (Art. 6 Living Resources Convention ). The effort to halt these claims therefore failed.

2. Regional Conferences

In 1970 two more Latin American conferences took place: the first at Montevideo and the second at Lima. These conferences revealed a divergence among Latin American States with regard to the juridical status of the 200 nm zone. Both the Declaration of Montevideo on the Law of the Sea ('Montevideo Declaration') and the Declaration of Latin American States on the Law of the Sea ('Lima Declaration') purported to preserve the freedom of navigation and overflight for other States in that zone. However, there were some States, eg the Federative Republic of Brazil ('Brazil'), Republic of Panama, Republic of Nicaragua and Ecuador, which expressed reservations in that they adopted what was to be called a territorialist approach to the maritime area within the 200 nm limit. This divergence was to play a crucial role in the evolution of the concept of the EEZ.

As UNCLOS III approached, further regional developments took place. In 1972 the Caribbean States met in Santo Domingo where the Declaration of Santo Domingo was adopted. This instrument in fact contained the lineaments of the concept of the EEZ. The Declaration of Santo Domingo gave a coastal State ‘sovereign rights over the renewable and non-renewable natural resources, which are found in the waters, in the seabed … adjacent to the territorial sea
called the patrimonial sea' (at 892). It established a 12 nm territorial sea limit and stated that the whole of the area of both the territorial sea and the patrimonial sea, taking into account geographical circumstances, should not exceed a maximum of 200 nm.

In this zone ships and aircraft of all States, whether coastal or not, should enjoy the right of freedom of navigation and overflight with no restrictions other than those resulting from the exercise by the Coastal State of its rights within the area. Subject only to these limitations, there will also be freedom for the laying of submarine cables and pipelines. (At 892; → Pipelines.)

The regional seminar which was held in the same year at Yaounde reached similar conclusions. These conclusions spoke of 'economic zone' rather than 'patrimonial sea'. No specific limit was established for the zone. Most importantly, these conclusions took into account the attempt to secure the interests of → land-locked States.

C. The Legal Regime of the Exclusive Economic Zone

The UN Convention on the Law of the Sea gives the coastal State in the EEZ:

[S]overeign 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 of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. (Art. 56 (1) (a); see → Conservation of Natural Resources; → Natural Resources, Permanent Sovereignty over.)

The coastal State then has a resource-oriented functional competence in the zone. It is of some importance to point out that the coastal State possesses sovereign rights and not sovereignty in the EEZ (cf Art. 2 (1) Convention on the Continental Shelf ). At the heart of the concept of the EEZ is the fact that the coastal State exercises sovereign rights in the EEZ for economic purposes.

The coastal State also has jurisdiction (→ Jurisdiction of States), as provided for in Art. 56 (1) (b) UN Convention on the Law of the Sea , 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.

The informal negotiating texts gave coastal States exclusive jurisdiction with respect to such matters. The change from 'exclusive jurisdiction' to 'jurisdiction' came in 1977 with the appearance of the Informal Composite Negotiating Text ('ICNT'). Hence, States which had based their legislation on the language of the pre-1977 negotiating texts used the term 'exclusive jurisdiction' in regard to such matters, which in certain cases was retained even after the adoption of the UN Convention on the Law of the Sea (see para. 88 below). This provision also makes clear that the substance of these matters—ie the establishment and use of → artificial islands, installations and structures, → marine scientific research, and the protection and preservation of the marine environment—are developed elsewhere in the UN Convention on the Law of the Sea (see → Marine Environment, International Protection). Under Art. 57 UN Convention on the Law of the Sea , the EEZ cannot extend beyond 200 nm, thus enshrining early Latin American → State practice.

In the EEZ other States enjoy the freedoms referred to in Art. 87 UN Convention on the Law of the Sea , of navigation and overflight, and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines. During the negotiations of the text an earlier version used the expression 'and other internationally lawful uses of the sea related to navigation and communication' (Art. 47 (1) Informal Single Negotiating Text ['ISNT']). This was replaced by the present version:

[A]nd other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention (Art. 58 (1)).
The acceptance of this amendment, it has been said, represented a serious effort of compromise by maritime powers, which favoured the wider formulation ‘other lawful uses of the sea’, without any qualification.

14 The UN Convention on the Law of the Sea in particular declares that the EEZ is subject to ‘a specific legal regime’ (Art. 55). In the light of Art. 55 it seems difficult to maintain the thesis that the EEZ is part of the high seas. It is sui generis, with the important consequence that it is neither the territorial sea nor the high seas but partakes of the characteristics of both regimes.

15 There are other provisions which concern the relationship between the EEZ and the high seas. By the operation of Art. 58 (2) UN Convention on the Law of the Sea, almost all the high seas provisions (Arts 88–115 UN Convention on the Law of the Sea) apply to the EEZ, save those relating naturally enough to the conservation and management of the living resources of the high seas (→ Marine Living Resources, International Protection). Several of these provisions (Arts 91–96 UN Convention on the Law of the Sea) deal with the regime of ships and are of general application. Others deal with matters which are the concern of the international community, such as the prohibition of transport of slaves, → piracy, traffic in drugs and unauthorized broadcasting (Arts 99–109 UN Convention on the Law of the Sea) and must necessarily apply to the EEZ (see also → Pirate Broadcasting; → Slavery).

16 Arts 88 and 89 UN Convention on the Law of the Sea are of some significance for the regime of the EEZ. Art. 88 UN Convention on the Law of the Sea stipulates that ‘the high seas shall be reserved for peaceful purposes’. According to the terms of Art. 89 UN Convention on the Law of the Sea, States are prohibited from subjecting any part of the high seas to their sovereignty. None of the above-mentioned provisions has the effect of rendering the EEZ part of the high seas.

1. Residual Rights

17 With respect to the EEZ, do uses of the sea which are not mentioned or covered by the relevant provisions of the UN Convention on the Law of the Sea, including future uses of the sea—the so-called residual rights—remain with the → international community, or do they fall within the competence of the coastal State? This issue has been considered as having special significance with regard to military activities in the EEZ. It is a crucial question which has always been difficult to resolve and one which is still of abiding importance.

18 The response of the UN Convention on the Law of the Sea to this problem lies in Art. 59 which reads as follows:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, 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.

19 It is generally acknowledged that this formula does not provide a dispute settlement mechanism (→ Law of the Sea, Settlement of Disputes). It must be regarded as embodying substantial guidelines for obtaining a solution to the problem. Where no rights have been granted either to the coastal State or to third States, that lacuna must be filled, under Art. 59 UN Convention on the Law of the Sea, by the application of equity ‘taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole’, balancing the interests of the parties involved as well as those of the international community (→ Equity in International Law). As Castañeda, the author of this provision, has stated:

Precisely, because the zone was defined as a sui generis zone, which was neither territorial sea nor high seas, it was indispensable to rely on some guideline or criterion to settle disputes that might arise out of concurrent uses of the sea within the exclusive economic zone, that is by the presence of competitive rights between the coastal State and the other States (at 615).

20 Resolution of the problem of residual rights seems to lie with the evolving State practice as well as the jurisprudence of → international courts and tribunals (→ Judicial Settlement of International Disputes).

2. The Exclusive Economic Zone and the Continental Shelf

21 Art. 56 (3) UN Convention on the Law of the Sea states that the rights set out in this article with respect to the seabed and subsoil of the EEZ shall be exercised in accordance with Part VI ‘Continental Shelf’ UN Convention on the Law of
the Sea. This provision preserved the separateness of the two regimes, the EEZ and the continental shelf, at least as far as the sebed and subsoil of the economic zone is concerned, thus avoiding the continental shelf being subsumed within the EEZ.

22 There were States, particularly the land-locked and → geographically disadvantaged States, which desired that the continental shelf should be absorbed within a 200 nm EEZ. The broad-margin States could not accept this view. They envisaged a continuous continental shelf regime from the territorial sea to the outer edge of the continental margin. This view prevailed.

23 In the first place, the right of a coastal State over its continental shelf, whether it applies to the sebed and subsoil within or outside the zone, need not be proclaimed. These rights are exclusive and exist ipso facto and ab initio. On the other hand, the rights of the coastal State over the superjacent waters of its EEZ are not inherent but will have to be declared and this has been the practice of States in this matter.

24 Secondly, sedentary species do not form part of the natural resources of the EEZ:

[T]hat is to say, organisms which, at the harvestable stage, either are immobile on or under the sebed or are unable to move except in constant physical contact with the sebed or the subsoil (Art. 77 UN Convention on the Law of the Sea).

These fall under the regime of the continental shelf. As a consequence the elaborate provisions on the management and conservation of the living resources in the EEZ do not apply to sedentary species (→ Fisheries, Sedentary). Thus there is no duty to give access to these resources.

25 The UN Convention on the Law of the Sea grants other States, inter alia, the freedom to lay submarine cables and pipelines on the sebed and subsoil of the EEZ (Art. 58 (1)). By the operation of Arts 56 (3) and 58 (2) UN Convention on the Law of the Sea, the laying of such cables and pipelines is regulated by the regime established for the continental shelf. This regime can be found in the cluster of articles dealing with the protection of submarine cables and pipelines (Arts 112–115 UN Convention on the Law of the Sea). The delineation of the course of pipelines in the EEZ is subject to the → consent of the coastal State.

3. Artificial Islands, Installations and Structures

26 The coastal State exercises exclusive jurisdiction in the EEZ over artificial → islands and installations for the purposes provided for in Art. 56 UN Convention on the Law of the Sea and other economic purposes and installations and structures which may interfere with the exercise of the rights of the coastal State in the EEZ. Installations and structures which are not established for economic purposes remain outside the ambit of coastal State jurisdiction. Not all types of installations and structures in the EEZ are within the competence of the coastal State (see para. 88 below). This limitation throws into relief the notion that the coastal State essentially possesses a resource-oriented competence in the EEZ. It is important to note that in the EEZ the coastal State is empowered to apply its custom, fiscal, health, safety and immigration laws and regulations in respect of such artificial islands, installations and structures. (see M/V 'SAIGA' [No 2] Case [Saint Vincent and the Grenadines v Guinea] [Merts] ITLOS Case No 2 [1 July 1999] at 54).

4. Marine Scientific Research

27 Coastal States have the right to regulate, authorize, and conduct marine scientific research in their EEZ and on the continental shelf. The principle of consent is made the cornerstone of the provisions dealing with marine scientific research. Marine scientific research in the EEZ and on the continental shelf must be conducted with the consent of the coastal State. Such consent must in normal circumstances be granted when such research is carried out exclusively for → peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind. Coastal States are required to establish rules and procedures to ensure that consent shall not be denied or delayed unreasonably (Art. 246 UN Convention on the Law of the Sea ; → Reasonableness in International Law).

28 However, the coastal State is entitled to withhold its consent if the marine scientific research:
(a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;

(b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;

(c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80;

(d) contains information communicated pursuant to article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international organization has outstanding obligations to the coastal State from a prior research project. (Art. 246 (5) UN Convention on the Law of the Sea.)

29 Coastal States may not exercise their discretion to withhold consent in respect of projects to be undertaken beyond the 200-nm limit, ie on the outer continental shelf:

Outside of those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focussed on those areas are occurring or will occur within a reasonable period of time (Art. 246 (6) UN Convention on the Law of the Sea.)

30 The consent of the coastal State shall be implied unless the coastal State within four months of the receipt of the communication containing information about a research project, informs the researching State that it is withholding its consent or that the information given by the researching State does not conform to the manifestly evident facts, or that it requires supplementary information or outstanding objections exist in respect to a previous research project.

31 The UN Convention on the Law of the Sea sets out specific conditions with which States and international organizations, when undertaking marine scientific research in the EEZ and on the continental shelf, must comply. They are, inter alia:

(a) ensure the right of the coastal State, if it so desires, to participate or be represented in the marine scientific research project …;

(b) provide the coastal State, at its request, with preliminary reports …;

(c) undertake to provide access for the coastal State, at its request, to all data and an assessment of such data …;

(f) inform the coastal State immediately of any major change in the research programme;

(g) unless otherwise agreed, remove the scientific research installations or equipment once the research is completed. (Art. 249 (1) UN Convention on the Law of the Sea.)

The UN Convention on the Law of the Sea also contains provisions regarding suspension or cessation of research activities, the rights of neighbouring land-locked and geographically disadvantaged States, measures to facilitate marine scientific research and assistance to research vessels.

32 The term ‘marine scientific research’ is not defined in the UN Convention on the Law of the Sea. It is therefore not surprising that this lack of a definition has given rise to the question: what constitutes such research? There is controversy for instance as to whether activities such as hydrographic surveying—the purpose of which is to obtain information for the making of navigational charts and the collection of information that is to be used for military purposes—constitutes marine scientific research under the UN Convention on the Law of the Sea. States such as the US and the United Kingdom of Great Britain and Northern Ireland (‘UK’) maintain that States have the right to engage in military data-gathering anywhere outside foreign territorial seas or archipelagic waters. This raises the whole question of military activities in the EEZ (see paras 85–87 below).
5. The Protection and Preservation of the Marine Environment

(a) Vessel-source Pollution

Coastal States have, for the purpose of enforcement, the right to adopt laws and regulations with respect to pollution from foreign vessels in their economic zones ‘conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference’ (Art. 211 UN Convention on the Law of the Sea; → Marine Pollution from Ships, Prevention of and Responses to). It is generally agreed that the international organization referred to here is the → International Maritime Organization (IMO). This requirement ensures that national legislation embodying national standards should not exceed or be at variance with international standards (Art. 211 (5) UN Convention on the Law of the Sea). There is no such requirement for the enactment of such legislation in the territorial sea where the coastal State enjoys sovereignty (Art. 211 (4) UN Convention on the Law of the Sea).

A coastal State may adopt ‘special mandatory measures for the prevention of pollution from vessels’ in certain ‘special areas’ of its EEZ where there exist, inter alia, certain ‘oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic …’ (Art. 211 (6) (a) UN Convention on the Law of the Sea). Such measures require IMO’s approval. The ‘special areas’ as used in the UN Convention on the Law of the Sea must be distinguished from MARPOL 73/78 special areas (see International Convention for the Prevention of Pollution from Ships, 1973; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973) which apply to → enclosed or semi-enclosed seas, including often the high seas.

The UN Convention on the Law of the Sea empowers a coastal State to take enforcement measures to combat vessel-source pollution in its EEZ. The coastal State is entitled to require a vessel to give information where there are clear grounds for believing that a vessel navigating in the EEZ or the territorial sea has committed violations in the EEZ of national and international standards relating to pollution (Art. 220 (3) UN Convention on the Law of the Sea). Such information is required to discover whether a violation has in fact occurred.

The coastal State can take further action if the pollution violation in the EEZ results ‘in a substantial discharge causing or threatening significant pollution of the marine environment’ (Art. 220 (5) UN Convention on the Law of the Sea). In such cases it can ‘undertake a physical inspection of the vessel’ under certain specific circumstances (ibid; → Ships, Visit and Search). If the pollution violation in the EEZ causes ‘major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone’, the response of the coastal State can be stepped up (Art. 220 (6) UN Convention on the Law of the Sea). It has the power to institute proceedings ‘including detention of the vessel’ (ibid; see → Ships, Diverting and Ordering into Port).

The UN Convention on the Law of the Sea sets out a series of safeguards designed to preserve the rights of flag States (→ Flag of Ships). These procedural or other safeguards seek to curb any abuse in the exercise of enforcement power by the coastal State. These safeguards relate, inter alia, to measures to facilitate proceedings involving foreign witnesses and admission of evidence submitted by another State (Art. 223 UN Convention on the Law of the Sea); the investigation of foreign vessels (Art. 222 UN Convention on the Law of the Sea); non-discrimination with respect to foreign vessels (Art. 229 UN Convention on the Law of the Sea); and the suspension and restrictions on institution of proceedings (Art. 228 UN Convention on the Law of the Sea) when the flag State can under certain specific circumstances pre-empt prosecution for violation beyond the territorial sea (Art. 228 UN Convention on the Law of the Sea).

Art. 226 (1) (b) UN Convention on the Law of the Sea expressly provides for the prompt release of a ship ‘subject to reasonable procedures such as bonding or other appropriate financial security’ (→ Prompt Release of Vessels and Crews). The procedure for prompt release embodied in Art. 292 UN Convention on the Law of the Sea is therefore applicable to this provision, as is Art. 220 UN Convention on the Law of the Sea.

The safeguard clauses attempt to strike a balance between the need to preserve the marine environment from vessel-source pollution and the necessity to protect freedom of navigation and trade. This notion of balance is the quintessential feature of the EEZ.

(b) Ice-Covered Areas

Coastal States are entitled to take certain non-discriminatory measures to combat vessel-source pollution in ice-covered areas within the limits of the EEZ. Such measures can be taken where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and
pollution of the marine environment could cause major harm to, or irreversible disturbance of, the ecological balance (Art. 234 UN Convention on the Law of the Sea). They must have due regard to navigation and the protection and preservation of the marine environment based on the best scientific evidence.

41 This provision, Art. 234 UN Convention on the Law of the Sea, was the product of negotiations among Canada, the US and the Union of Soviet Socialist Republics ('USSR'), coastal States with direct concern in protecting the marine environment of the Arctic, and was submitted by these States to UNCLOS III. It has been observed that:

The purpose of Art. 234, which was negotiated directly among the key states concerned (Canada, the United States and the Soviet Union), is to provide the basis for implementing the provisions applicable to commercial and private vessels found in the 1970 Canadian Arctic Waters Pollution Prevention Act. (—— ‘Commentary – the 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI’ [February 1995] vol 6 supp 1 United States Department of State Dispatch 5; see also Arctic Waters Pollution Prevention Act (1970) 9 ILM 543.)

This provision therefore seems to apply to a specific maritime area in the Arctic.

6. Fisheries

42 The EEZ was designed primarily to give coastal States sovereign rights over the resources of the zone, in particular the coastal State 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 of the seabed and its subsoil’. (Art. 56 (1) (a) UN Convention on the Law of the Sea). It is within the sole prerogative of the coastal State both to determine the allowable catch of the living resources in its EEZ (Art. 61 UN Convention on the Law of the Sea) and to determine its own capacity to harvest those resources (Art. 62 UN Convention on the Law of the Sea; → Fish Stocks; → Fishery Zones and Limits). The coastal State is under an obligation to ensure that the maintenance of the living resources in the EEZ is not endangered by over-exploitation (Art. 61 (2) UN Convention on the Law of the Sea). To this end the coastal State has to adopt proper conservation and management measures:

Such measures shall also 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 coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global. (Art. 61 (3) UN Convention on the Law of the Sea).

43 To this may be added through the operation of the 1995 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 ('Fish Stocks Agreement'), the duty to apply the precautionary approach and the general principles for the conservation and management of straddling fish stocks and highly migratory fish stocks such as the duty to apply biodiversity in the marine environment and to ensure compatibility of conservation and management measures for straddling fish stocks in the EEZ with such measures taken for the high seas (Arts 3, 5, 6 Fish Stocks Agreement; → Straddling and Highly Migratory Fish Stocks).

(a) Access to Resources

44 Where the coastal State does not have the capacity to harvest the entire allowable catch, it has the duty to give other States access to the surplus of the allowable catch. It should be noted that access is not automatic since it operates through the mechanism of agreements and arrangements in accordance with Art. 62 UN Convention on the Law of the Sea, and more importantly it depends on the existence of a surplus, a surplus which exists only where the coastal State does not have the capacity to harvest the entire allowable catch (→ Fisheries Agreements).

45 The coastal State, in giving access to other States, has to take into account all relevant factors. They include factors such as the significance of the living resources of the area to the economy of the coastal State; its other national interests; the provisions of Arts 69 and 70 UN Convention on the Law of the Sea; the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the EEZ or which have made substantial efforts in research and identification of stocks (Art. 62 (3) UN Convention on the Law of the Sea). The fact that the coastal State can take factors such as its ‘other national interests’ into account gives it fairly wide discretion with regard to access by other States to the living resources of the EEZ with the result that the right of other States to the surplus is in fact quite circumscribed.
(b) Land-locked and Geographically Disadvantaged States

One of the more difficult problems facing UNCLOS III concerned the right of access of land-locked and geographically disadvantaged States to the living resources of the EEZ of coastal States. It was one of the 'hard-core issues' for which a negotiating group was specifically established.

The ICNT gave land-locked States ‘the right to participate in the exploitation of the living resources of the exclusive economic zones of adjoining coastal States on an equitable basis’ (Art. 69 ICNT). This provision applied to both developing and developed land-locked States, with the proviso that developed land-locked States could only exercise their rights in the EEZ of adjoining developed coastal States (ibid). With respect to geographically disadvantaged States only developing geographically disadvantaged States—then defined as developing coastal States which are situated in a subregion or region whose geographical peculiarities make such States particularly dependent for the satisfaction of the nutritional needs of their populations upon the exploitation of the living resources in the exclusive economic zones of their neighbouring States and developing coastal States which can claim no exclusive economic zones of their own were granted the right to participate on an equitable basis in the exploitation of the living resources in the EEZ of other States in a region or subregion (Art. 70 ICNT).

Both Arts 69 and 70 ICNT were subject to Arts 61 and 62 ICNT (Art. 69 (2), 70 (3) ICNT). Thus as the text then stood, the right of the land-locked and geographically disadvantaged States to participate in the exploitation of the living resources of the EEZ was limited to the surplus of the allowable catch. If there were no surplus the right would in fact be without purpose. Moreover these provisions gave these States no preferential status vis-à-vis other third States seeking access.

It was through the mechanism of Negotiating Group 4 that a compromise formula emerged, now embodied in the text of the UN Convention on the Law of the Sea, which was generally acceptable to both the coastal States and the land-locked and geographically disadvantaged States. The UN Convention on the Law of the Sea accords to land-locked and geographically disadvantaged States, both developing and developed:

[T]he right to participate, 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 subregion or region (Arts 69 (1), 70 (1)).

On the issue of access to the surplus Art. 69 (3) UN Convention on the Law of the Sea states that:

When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall co-operate in the establishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing land-locked States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 2 shall also be taken into account.

This provision is repeated mutatis mutandis in Art. 70 (3) UN Convention on the Law of the Sea, and provides a device, perhaps the best that could have been produced within the context of UNCLOS III, for dealing with the difficult problem raised by the fact that access for the land-locked and geographically disadvantaged States to the living resources of the EEZ was limited to the surplus.

As noted above in granting access to the surplus the coastal State has to have ‘particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein’ (Art. 62 (2) UN Convention on the Law of the Sea). This phrase was introduced into the text as a result of the work of the negotiating group. It gives these States some kind of status in the process, though not necessarily the preferential one which they desired. In contradistinction to the ICNT the UN Convention on the Law of the Sea does not disregard the existence of developed geographically disadvantaged States since these States are now entitled to participate in the exploitation of the living resources in the EEZ of developed coastal States.

It was difficult to produce a generally acceptable definition of the term ‘geographically disadvantaged States’, though a definition of the term as used in Part V UN Convention on the Law of the Sea is now contained in Art. 70 (2). For
a long time there was great reluctance among some coastal States to accept the use of the term ‘geographically disadvantaged States’ in Part V UN Convention on the Law of the Sea. The Drafting Committee itself had noted that two expressions appeared in the negotiating texts—‘geographically disadvantaged States’ and ‘States with special geographical characteristics’—but was, however, unable to harmonize the use of the terms. Almost at the close of UNCLOS III at the resumed 11th session, the use of the term ‘geographically disadvantaged States’ in Arts 69 and 70 UN Convention on the Law of the Sea was accepted for the purposes of Part V.

Where a State is overwhelmingly dependent on the exploitation of the living resources of its EEZ, Arts 69 and 70 UN Convention on the Law of the Sea do not apply (Art. 71). In addition the UN Convention on the Law of the Sea places restrictions on the transfer of rights to exploit living resources to other States (Art. 70).

(c) Straddling Stocks

The UN Convention on the Law of the Sea requires States to take measures in order to co-ordinate and ensure the conservation and development of stocks where ‘the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States’ (Art. 63 (1)). In cases where such stocks occur both within the EEZ and in an area adjacent to it, provision is made for both the coastal States and the States fishing such stocks to take measures to conserve these stocks in the ‘adjacent areas’. These areas would of course fall under the regime of the high seas. In both situations, States may utilize appropriate subregional or regional organizations in seeking to agree upon the measures to be taken (Regional Co-operation).

There was a proposal at the 11th session of UNCLOS III to amend Art. 63 UN Convention on the Law of the Sea, in particular para. 2, which envisaged invoking the dispute settlement mechanism of the UN Convention on the Law of the Sea to determine the measures to be applied in ‘the adjacent areas’ for the conservation of these stocks where no agreement on such measures could be reached by the parties concerned. This amendment was not pressed to a vote and was thus withdrawn.

(d) Highly Migratory Species

Art. 64 UN Convention on the Law of the Sea responds to the fact that the conservation of highly migratory species requires a high degree of international co-operation (see Co-operation, International Law of). The coastal State and other States whose nationals fish for highly migratory species both within and beyond the EEZ are under a duty to co-operate to ensure conservation and also promote the objective of optimum utilization of such species. Such co-operation is to take place either directly or through appropriate international organizations. In addition, States are obliged to co-operate in establishing such organizations ‘in regions for which no appropriate international organization exists’ (Art. 64 UN Convention on the Law of the Sea). As was to be expected, a clear role is thus envisaged for appropriate international organizations and the UN Convention on the Law of the Sea rightly places emphasis on the role of such organizations (Fisheries, Commissions and Organizations). Relevant organizations dealing with highly migratory species are: Inter-American Tropical Tuna Commission, International Commission for the Conservation of Atlantic Tunas, Indian Ocean Tuna Commission, Western Indian Ocean Tuna Organization, and the Commission for the Conservation of the Southern Bluefin Tuna.

Art. 64 (2) UN Convention on the Law of the Sea states that the provision of para. 2 applies in addition to the other provisions of this Part. It may be argued that the formulation of this paragraph simply lays emphasis on the necessity for international co-operation. However, it was not intended that Art. 64 (2) UN Convention on the Law of the Sea should override the provisions contained in articles such as Arts 56, 61 and 62 UN Convention on the Law of the Sea.

The question whether the coastal State has sovereign rights over highly migratory species in its EEZ has ceased to be controversial. The US, which was the principal proponent of the view that the coastal State did not have sovereign rights over these resources, has retreated from that position.

(e) The 1995 Fish Stocks Agreement

The 1995 Fish Stocks Agreement seeks to ensure that the conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. (Art. 7 (2) Fish Stocks Agreement)
Art. 7 Fish Stocks Agreement sets out a list of factors which are to be taken into account: the conservation and management measures adopted and applied in accordance with Art. 61 UN Convention on the Law of the Sea in respect of the same stocks by coastal States within areas under national jurisdiction and ensuring that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures; previously agreed measures established and applied in accordance with the UN Convention on the Law of the Sea in respect of the same stocks by a subregional or regional fisheries management organization or arrangement; and the biological unity and other biological characteristics of the stocks and relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction. Furthermore, Art. 7 Fish Stocks Agreement requires that States ensure that such measures do not result in harmful impact on the living marine resources as a whole.

This emphasis on the need for compatibility with respect to conservation and management measures between the two regimes reflected the simple truth that there exists a biological unity among most species to be found in both the EEZ and in the high seas. As a result the fisheries management regime for the EEZ and that for the high seas should necessarily be concordant.

(f) Marine Mammals

Marine mammals enjoy special protection under Art. 65 UN Convention on the Law of the Sea. It should be noted that successive versions of the relevant provision of the negotiating texts in fact progressively strengthened the protection accorded marine mammals. In the ISNT this article formed part of the general provision on highly migratory species (Art. 53 ISNT). When this text was revised, the provision appeared as an article on its own. The Revised Single Negotiating Text (‘RSNT’), as it then stood, allowed coastal States to ‘prohibit, regulate and limit the exploitation of marine mammals’ and also expressly obliged States to co-operate with appropriate international organizations ‘in the protection and management of marine mammals’ (Art. 54 RSNT).

Art. 65 UN Convention on the Law of the Sea reflects the modifications introduced into the text by a US proposal. Coastal States can ‘prohibit, limit or regulate the exploitation of marine mammals’ more strictly than is provided for in Part V UN Convention on the Law of the Sea. Cetaceans are especially singled out among the marine mammals requiring protection and management through the appropriate international organizations.

(g) Anadromous Stocks

With respect to anadromous stocks the UN Convention on the Law of the Sea adopts a type of ‘species approach’ in the sense that it has established a special regime for the fishing of anadromous stocks, salmon being the prime example. This regime is centred on the fact that the State of origin of anadromous stocks, ie the State in whose rivers anadromous stocks originate, enjoys a preferential status in that it has ‘the primary interest in and responsibility for such stocks’ (Art. 66 UN Convention on the Law of the Sea).

Fishing for anadromous stocks can only be conducted in waters landward of the outer limits of the EEZ, and it is naturally the State of origin which shall establish appropriate regulatory measures for fishing these stocks in the waters landward of its EEZ. It should be pointed out that the equivalent expression in the ISNT for ‘waters landward of the outer limits of the exclusive economic zone’ was ‘waters within its exclusive economic zone’ (Art. 54 ISNT). The intent of the change was, it seemed, to include both the territorial sea and the internal waters of the coastal State.

Where the restriction that fishing for anadromous stocks shall be conducted only in waters landward of the outer limits of EEZ causes economic dislocation to a State other than the State of origin, fishing for such stocks may be conducted beyond the outer limits of the EEZ. With respect to such fishing, Art. 66 (3) (a) UN Convention on the Law of the Sea goes on to state that the:

States concerned shall maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and the needs of the State of origin in respect of these stocks.

This provision further highlights the primary interest of the State of origin. It should be observed that the above provision was introduced in the first revision of the ICNT on the basis of a text agreed upon by Canada, the Kingdom of Denmark, Republic of Iceland, Ireland, Japan, the Kingdom of Norway, the USSR, the UK and the US.

This interest of the State of origin is to a certain extent also protected with respect to anadromous stocks migrating through the waters landwards of outer limits of the EEZ of a State other than the State of origin. In such cases the third State is under a duty to co-operate with the State of origin for the conservation and management of such stocks.
68 The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of Art. 66 UN Convention on the Law of the Sea through regional organizations. Relevant organizations are the Standing Commission for the Baltic Sea Salmon, the International Commission for the Fisheries of the Pacific Salmon, and the Organization for the Conservation of the North Atlantic Salmon.

69 The Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean ([signed 11 February 1992, entered into force 16 February 1993] 22 UN Law of the Sea Bulletin 21) to which Canada, Japan, the Russian Federation (→ Russia) and the US are parties, has prohibited the fishing of anadromous stocks in waters beyond the EEZ. It also established the North Pacific Commission for Anadromous Fish Stocks.

(h) Catadromous Species

70 The UN Convention on the Law of the Sea also adopts a ‘species approach’ to the management of catadromous species, a prominent example being the fresh water eel. There are three main issues concerning this regime. First, the responsibility for the management of catadromous species rests with the coastal State in whose waters these species spend the greater part of their life cycle. Second, harvesting of such species shall be conducted only in waters landward of the outer limits of the EEZ. Third, where such species migrate through the EEZ of another State, that State and the State which has responsibility for the species shall ensure the rational management and harvesting of the species through agreements (Art. 67 UN Convention on the Law of the Sea).

(i) Sedentary Species

71 As has been observed (see para. 24 above), these species are defined as ‘organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil’ (Art. 77 UN Convention on the Law of the Sea). This definition is based on Art. 2 (4) Convention on the Continental Shelf. It is important to note that sedentary species are not subject to the provisions of Part V UN Convention on the Law of the Sea dealing with the regime of the EEZ (Art. 68 UN Convention on the Law of the Sea). In particular Arts 61 and 62 UN Convention on the Law of the Sea do not apply. As a consequence there is no right of access as such for third States to these resources. These species fall under the regime of the continental shelf and thus form part of the ‘natural resources’ of the continental shelf.

(j) Enforcement

72 In the exercise of its sovereign rights over the living resources in the EEZ, the coastal State is empowered to take a wide range of enforcement measures (Art. 73 UN Convention on the Law of the Sea). They include ‘boarding, inspection, arrest and judicial proceedings’ (ibid). In this respect the coastal State has certain obligations: a) to release arrested vessels and their crews promptly ‘upon the posting of reasonable bond or other security’ and b) penalties for violations of its fisheries laws and regulations may not include, in the absence of agreement, imprisonment or any other form of corporal punishment (ibid). The coastal State is also under a duty to notify the flag State of any action taken or penalty imposed in this matter.

73 The duty to release arrested vessels and their crews promptly upon the posting of a reasonable bond or other security has been invoked in a series of prompt release cases before the → International Tribunal for the Law of the Sea (ITLOS). ITLOS has a residual compulsory jurisdiction with respect to the prompt release of vessels (Art. 292 UN Convention on the Law of the Sea; → International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications). In the nine prompt release cases, Art. 73 UN Convention on the Law of the Sea was the relevant provision for the application of Art. 292 UN Convention on the Law of the Sea.

(k) Settlement of Disputes Arising in the Exclusive Economic Zone

74 Art. 286 UN Convention on the Law of the Sea reads as follows:

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Thus any dispute concerning the interpretation and application of the UN Convention on the Law of the Sea which is not excluded by the automatic limitations set out in Art. 297 UN Convention on the Law of the Sea or by the optional

75 There are three categories of disputes with regard to the exercise by a coastal State of its sovereign rights and jurisdiction which are subject to binding dispute settlement:

(a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;

(b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or

(c) of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention. (Art. 297 (1) UN Convention on the Law of the Sea).

It may be argued that the above categories of dispute are already covered by the terms of Art. 286 UN Convention on the Law of the Sea. However they form part of the delicate equilibrium which Art. 297 UN Convention on the Law of the Sea seeks to maintain with respect to the settlement of disputes arising in the EEZ.

76 With respect to disputes concerning marine scientific research and disputes concerning fisheries, especially with regard to the latter, UNCLOS III was faced with a clear divergence of views. The Chairman of Negotiating Group 5, which dealt with the question of the settlement of disputes relating to the exercise of the sovereign rights of the coastal States in the EEZ, summarized the two opposing views. He stated that on the one hand there were those who wanted all rights granted under the UN Convention on the Law of the Sea protected by effective dispute settlement provisions, on the other hand there were those who felt that sovereign rights and discretions would not be effectively exercised if they were to be harassed by an abuse of legal process and a proliferation of applications to dispute settlement procedures. Those delegates that feared an abuse of legal process were unwilling to accept compulsory adjudication, while those who desired an effective protection of all rights insisted upon it.

77 The compromise which emerged can be found in Art. 297 (2) and (3) UN Convention on the Law of the Sea. Disputes concerning marine scientific research shall be submitted to binding dispute settlement with the proviso that the coastal State is not obliged to accept the submission to such settlement of any dispute arising out of the exercise by the coastal State of a right or discretion in accordance with Art. 246 UN Convention on the Law of the Sea; or a decision by the coastal State to order suspension or cessation of a research project in accordance with Art. 253 UN Convention on the Law of the Sea.

78 Where a dispute arises that in the case of a specific project the coastal State ‘is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention’ such dispute shall be submitted to → conciliation (Art. 297 (2) (b) UN Convention on the Law of the Sea). The convention goes on to provide that the conciliation commission may not call in question the exercise of the discretion of the coastal State in such matters.

79 A compromise formula is also to be found with respect to disputes with regard to fisheries. Under the UN Convention on the Law of the Sea disputes with regard to fisheries are subject to binding dispute settlement. However, a coastal State is not obliged to submit to any form of compulsory settlement procedure:

[A]ny dispute relating to its sovereign rights with respect to the living resources in the EEZ or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations. (Art. 297 (3) (a) UN Convention on the Law of the Sea.)

80 At the request of any party a dispute shall be submitted to conciliation when it alleged that:
(i) obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

(ii) request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or

(iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist. (Art. 297 (3) (b) UN Convention on the Law of the Sea.)

As in the case of disputes relating to marine scientific research the conciliation commission may not substitute its discretion for that of the coastal State.

There are other provisions which are linked to Art. 297 UN Convention on the Law of the Sea in the sense that they were designed to curb the abuse of legal process. Under Art. 294 UN Convention on the Law of the Sea a court or tribunal may determine whether a claim with respect to a dispute referred to in Art. 297 UN Convention on the Law of the Sea constitutes an abuse of legal process or whether prima facie it is well-founded. Also of relevance here is Art. 300 UN Convention on the Law of the Sea, a general provision enjoining States to ‘exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right’.

The formula embodied in Art. 297 UN Convention on the Law of the Sea reflects the legal status of the EEZ. It protects the freedoms granted other States in the EEZ and throws into relief the notion that coastal States have sovereign rights over the resources of the EEZ.

Under the UN Convention on the Law of the Sea, as was noted, ‘disputes with regard to fisheries’ are subject to binding dispute settlement. However, disputes relating to a State's sovereign rights over living resources in its EEZ are not subject to binding settlement. In a sense the UN Convention on the Law of the Sea has created a kind of dichotomy with regard to the settlement of fisheries disputes. It may be noted here that the Fish Stocks Agreement itself contains important provisions on the settlement of disputes. In particular, it provides for the application of the dispute settlement provisions of the UN Convention on the Law of the Sea to disputes between States Parties to the Fish Stocks Agreement whether or not parties to the UN Convention on the Law of the Sea. Under the terms of Art. 32 Fish Stocks Agreement, Art. 297 (3) UN Convention on the Law of the Sea applies to the Fish Stocks Agreement. Thus the dichotomy created by Art. 297 (3) UN Convention on the Law of the Sea may present problems with respect to disputes arising under Art. 7 Fish Stocks Agreement since this provision in fact applies both to the EEZ and the high seas.

D. State Practice with Respect to the Exclusive Economic Zone

The legislation and interpretative declarations of certain coastal States have thrown into relief some basic questions concerning the legal nature of the EEZ which, it can be argued, are still controversial today. One such question relates to the so-called residual rights, that is those uses of the seas which are not mentioned or covered by the relevant provisions of the UN Convention on the Law of the Sea. The Oriental Republic of Uruguay (‘Uruguay’), for instance, has declared that:

Regulation of the uses and activities not provided for expressly in the Convention (residual rights and obligations) relating to the rights of sovereignty and to the jurisdiction of the coastal State in its exclusive economic zone falls within the competence of that State, provided that such regulation does not prevent enjoyment of the freedom of international communication which is recognized to other States. (Declaration of the Oriental Republic of Uruguay Made Upon Signature of the UN Convention on the Law of the Sea [done 10 December 1982] 1 UN Law of the Sea Bulletin 22; see also Declaration of the Republic of Cape Verde Made Upon Signature of the UN Convention on the Law of the Sea [done 10 December 1982] 1 UN Law of the Sea Bulletin 22.)

On the other hand both the Italian Republic (‘Italy’) and the Federal Republic of Germany (‘Germany’) have stated in their declarations that:
According to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them. (Declaration of the Federal Republic of Germany Made Upon Accession to the UN Convention on the Law of the Sea [done 14 October 1994] 27 UN Law of the Sea Bulletin 6, 7; Declaration of the Italian Republic Made Upon Signature of the UN Convention on the Law of the Sea [done 7 December 1984] 4 UN Law of the Sea Bulletin 13.)

On the specific question of military manoeuvres in the EEZ of coastal States, Brazil made the following declaration:

The Brazilian Government understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone military exercises or manoeuvres, in particular those that imply the use of weapons or explosives, without the consent of the coastal State. (Declaration of the Federative Republic of Brazil Made Upon Signature of the UN Convention on the Law of the Sea [done 10 December 1982] 1 UN Law of the Sea Bulletin 21.)

It should be noted that several coastal States among them Republic of Cape Verde (‘Cape Verde’), Malaysia, the Islamic Republic of Pakistan, Republic of India, Uruguay and the People's Republic of Bangladesh made declarations or adopted legislation to the same effect.

As has been discussed (see para. 26 above), the installations and structures which have been established for non-economic purposes remain outside the exclusive jurisdiction of the coastal State, highlighting the functional and resource-oriented nature of the regime of the EEZ. Certain coastal States, however, for instance Brazil, Uruguay, and Cape Verde, make no such distinction and claim to have the exclusive right to regulate the establishment, operation and use of all types of artificial islands, installations and structures in the EEZ. Germany and Italy have raised objections to these claims.

These are matters for interpretation where international courts and tribunals may have a role in their resolution. However, it must be borne in mind that under Art. 298 UN Convention on the Law of the Sea certain categories of disputes which are especially relevant to this inquiry may be excluded from the compulsory dispute settlement procedures. States may exclude from mandatory procedures disputes, inter alia, concerning military activities which would include military manoeuvres in the EEZ and perhaps the deployment of listening and other security-related devices on the continental shelf of coastal States.

E. Conclusions

Several coastal States established EEZ or exclusive fishing zones during the course of UNCLOS III, in some cases long before the UN Convention on the Law of the Sea itself was adopted. The work of the ongoing UNCLOS III guided State practice. It can be said that it was the → consensus existing within UNCLOS III that determined the course of State practice especially with regard to the new concept of the EEZ. The provisions in the informal negotiating texts were subject to change and indeed were changed over the years. Thus the legislation of a number of coastal States did not reflect the changes made to these texts which are now incorporated in the UN Convention on the Law of the Sea. Many States have modified their legislation to conform to the relevant provisions of the UN Convention on the Law of the Sea and this process has been continuing.

As of 27 July 2007 the number of parties to the UN Convention on the Law of the Sea stood at 155, including the European Union. It has therefore to be recognized that these entities are bound by the terms of the UN Convention on the Law of the Sea. As a matter of law, parties to the UN Convention on the Law of the Sea are bound by the whole panoply of provisions relating to the EEZ.

However, there are a number of coastal States which have not ratified or acceded to the UN Convention on the Law of the Sea and therefore are not bound by the UN Convention on the Law of the Sea qua treaty. Such States may be bound by the norms of the UN Convention on the Law of the Sea, especially those relating to the EEZ by international customary law (→ Customary International Law). It will be remembered that in 1985 the → International Court of Justice (ICJ) had asserted in the Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) ([1985] ICJ Rep 13; → Continental Shelf Case [Libyan Arab Jamahiriya/Malta]) that:

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 (at 33; see also Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area [Canada/United States of America] [1984] ICJ Rep 246; Case Concerning Filleting within the
Thus judicial and arbitral jurisprudence even before the entry into force of the UN Convention on the Law of the Sea had treated the concept of the EEZ as forming part of general international law (→ General International Law [Principles, Rules and Standards]). Given the large number of States which have now ratified or acceded to the UN Convention on the Law of the Sea, the concept of the EEZ can fairly be considered a part of international customary law and in that sense binding on non-parties to the UN Convention on the Law of the Sea.

Nevertheless the integrity of the UN Convention on the Law of the Sea is being challenged, an instance of this is the Argentine Republic's Act No 23,968 of 14 August 1991 ([1991] 20 UN Law of the Sea Bulletin 20) which states that:

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 (Art. 5; see also Law No 19,079 of 12 August 1991 [Chile] [6 September 1991] 19,076–19,100 Decretos con Fuerza de Ley 13).

It may here be pointed out that the Fish Stocks Agreement may help in containing such challenges. As to the control of pollution, the Commission of the European Union in its Green Paper has made this important observation:

The legal system relating to oceans and seas based on UNCLOS needs to be developed to face new challenges. The UNCLOS regime for EEZ and international straits makes it harder for coastal states to exercise jurisdiction over transiting ships, despite the fact that any pollution incident in these zones presents an imminent risk for them. This makes it difficult to comply with the general obligations (themselves set up by UNCLOS) of coastal states, to protect their marine environment against pollution (at 42).

It must be admitted that the UN Convention on the Law of the Sea, and with it the EEZ regime, is not set in stone. However, any attempts to modify it should not be undertaken lightly and certainly not by unilateral measures (→ Unilateral Acts of States in International Law).

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