

MILITARY ACTIVITIES IN THE EXCLUSIVE ECONOMIC ZONE: PREVENTING UNCERTAINTY AND DEFUSING CONFLICT*

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I. OVERVIEW

As globalization draws the community of nations more closely together, a body of law commonly referred to as the law of the sea represents an important mechanism for ensuring that the rule of law governs the relations between nations as they use the oceans for trade, for resource exploitation, for communications, and for many other activities. Much of what was once customary law governing the oceans has been codified by 1982 United Nations Convention on the Law of the Sea¹—and this international accord also codified evolving new regimes in the international law of the sea.

One of the new and evolving regimes codified by the 1982 United Nations Treaty is that of a relatively new juridical concept called the Exclusive Economic Zone (EEZ).² As defined by the Treaty, the EEZ “is an area be-

* The views expressed in this article are those of the authors and do not reflect the official policy or position of the Department of Defense, the Department of the Navy, or the U.S. Government.

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1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397, 21 I.L.M. 1261 (1982) (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

2. See generally, e.g., EDWARD D. BROWN, THE UN CONVENTION ON THE LAW OF THE SEA, 1982: A GUIDE FOR NATIONAL POLICY MAKING LEGISLATION AND ADMINISTRATION, BOOK 3, MARITIME ZONES UNDER THE UN CONVENTION II—EXCLUSIVE ECONOMIC ZONE, EXCLUSIVE FISHING ZONE AND CONTINENTAL SHELF (1991); FRANCISCO O. VICUNA, THE EXCLUSIVE ECONOMIC ZONE, REGIME AND LEGAL NATURE UNDER INTERNATIONAL LAW (1989); DAVID J. ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 1-67, 277-307 (1987); Satya N. Nandan, *The Exclusive Economic Zone: A historical perspective*, in THE LAW AND THE SEA: ESSAYS IN MEMORY OF JEAN CARROZ 171 (U. N. Food and Agricul-

yond and adjacent to the territorial sea,”³ which “shall not extend beyond 200 nautical miles from the baselines⁴ from which the breadth of the territorial sea is measured.”⁵ It is not a part of the high seas, although high-seas-like freedom exists there with respect to navigation.⁶ EEZ claims extract approximately 30 to 36 per cent of the world’s oceans from waters traditionally considered high seas.⁷ In the South Pacific, only pockets of the high seas remain. Enclosed seas, such as the Baltic, Black and South China seas, the Arabian Gulf, and the Sea of Okhotsk, are particularly affected.⁸

The EEZ is a zone of shared rights and responsibilities. Coastal States have the primary rights to the natural resources in the zone, while foreign States retain the freedom of navigation and overflight through this zone.⁹ As a relatively new regime in international law, the precise nature and full extent of coastal and other nations’ rights and responsibilities in the EEZ are still evolving.¹⁰ Often this evolution of rights and responsibilities has been orderly and peaceful, however, this evolution has sometimes become contentious and has the potential to become an area of conflict.

One of the areas least well addressed in the Law of the Sea Convention—as well as in prior customary international law—is the subject of military activities in the EEZ.¹¹ Prior to the Law of the Sea Conferences in the third quarter of the last century, this was not an issue because the EEZ regime had not fully developed as a recognized rule of customary international

ture Organization, 1987); James E. Bailey, Comment, *The Exclusive Economic Zone: Its Development and Future in International and Domestic Law*, 45 LA. L. REV. 1269 (1985); KEN BOOTH, LAW, FORCE AND DIPLOMACY AT SEA 5 (1985); Jorge Casteneda, *Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea*, in ESSAYS ON INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS 605 (1987).

3. UNCLOS art. 55.

4. The baseline is usually the coastline—the mean low watermark—but, can in some circumstances, such as that of a deeply indented coastline or line of fringing islands, be extended from the beach by means of drawing straight baselines. See UNCLOS arts. 4-14.

5. UNCLOS art 57.

6. See UNCLOS art 87. This is not itself an entirely uncontroversial statement, but reflects the generally held view of the Convention’s meaning. See, e.g., BROWN, *supra* note 2, at 130; VICUNA, *supra* note 2, at 19; ATTARD, *supra* note 2, at 63; Nandan, *supra* note 2, at 188; Casteneda, *supra* note 2, at 622.

7. See Boleslaw A. Boczek, *Peacetime Military Activities in the Exclusive Economic Zone of Third Countries*, 19 OCEAN DEV. & INT’L. L. 445, 447 (1988); Robert Nadelson, *The Exclusive Economic Zone—State Claims and the LOS Convention*, 16 MARINE POL’Y 463, at 464-65 (1992); BOOTH, *supra* note 2, at 137.

8. Boczek, *supra* note 7, at 447.

9. See UNCLOS arts. 55, 56, 57 & 58.

10. Cf. Hugo Caminos, *Harmonization of Pre-Existing 200-Mile Claims in the Latin American Region with the United Nations Convention on the Law of the Sea and its Exclusive Economic Zone*, 30 U. MIAMI INTER-AM. L. REV. 9 (1998).

11. See generally John C. Meyer, *The Impact of the Exclusive Economic Zone on Naval Operations*, 40 NAVAL L. REV. 241 (1992); Captain Stephen Rose, JAGC, USN, *Naval Activity in the EEZ—Troubled Waters Ahead?*, 39 NAVAL L. REV. 67 (1990); Boczek, *supra* note 7, at 445; Alan V. Lowe, *Some Legal Problems Arising from the Use of the Seas for Military Purposes*, 10 MARINE POL’Y 171 (1986); BOOTH, *supra* note 2, at 80-81.

law. After the final Law of the Sea Conference, it did not immediately become an issue because other activities in other regimes garnered more international attention.

Today, military activities by foreign nations in the Exclusive Economic Zones of other nations are becoming more and more frequent for a number of reasons: the accelerating pace of globalization; the tremendous increase in world trade; the rise in the size and quality of the navies of many nations; and technological advances that allow navies to exploit oceanic areas. Along with this increase in military activity has come increasing contention over the scope of rights to military activities within the EEZ. A small number of strategically placed countries interpret the Treaty to prohibit naval activities and maneuvers in the EEZ without their prior permission. Those countries include, for example, India, Malaysia, Brazil and Iran.¹² Others, such as Thailand, Italy, Germany, the Netherlands, the United Kingdom, and the United States, disagree.¹³ Whether and to what extent high seas freedoms of navigation and associated uses exist for warships and aircraft in the EEZ has been the subject of a fair amount of discussion in academic literature. Some have argued that it is difficult to conclusively determine just what the Treaty means with respect to naval activities in the EEZ—that it is vague and ambiguous.¹⁴ According to one commentator, “The uncertainty [in the Convention] is nowhere so striking as in the area of military uses of the EEZ.”¹⁵ Unfortunately, mechanisms to address these military activities and

12. See MARITIME CLAIMS REFERENCE MANUAL, Department of Defense 2005.1-M, at <http://www.dtic.mil.whs/directives/corres/20051m040201> (Apr. 2001). This manual provides a general reference concerning the maritime claims of all coastal nations. According to its forward:

The maritime claims references in this Manual represent claims made by the coastal nations. Some of the claims are inconsistent with international law. The United States does not recognize those maritime claims that are not in conformity with customary international law, as reflected in the 1982 U.N. Law of the Sea Convention. Examples include excessive straight baseline claims, territorial sea claims in excess of 12 nautical miles, and other claims that unlawfully impede freedom of navigation and overflight. This Manual notes many instances in which the United States has protested excessive claims and conducted operational assertions against such excessive claims under the Freedom of Navigation Program. Failure to categorize any maritime claim as excessive within this Manual does not indicate U.S. acceptance of excessive claims.

Id.

13. For a brief discussion of this issue, see Michel Boubonier & Louis Haeck, *Military Aircraft and International Law: Chicago Opus 3*, 66 J. AIR L. & COM. 885, 958 (2001). For the declarations and statements made upon ratification, accession or succession with respect to the Convention, see THE LAW OF THE SEA: DECLARATIONS AND STATEMENTS WITH RESPECT TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND TO THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, U.N. Sales No. E.97.V.3 (1997), available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.

14. See generally *infra* notes 120 to 133 and accompanying text.

15. Boczek, *supra* note 7, at 458.

means to resolve concomitant disputes arising from them are not as well developed as they might be.

This article examines the issue of military activities in the Exclusive Economic Zone from various perspectives: from the perspective of customary international law versus the United Nations Convention on the Law of the Sea; and from the perspective of coastal nations versus maritime nations. This article suggests that to depend only on the dispute resolution mechanisms of the Law of the Sea Convention is to invite ongoing strife as these mechanisms cannot adequately address military activities in the EEZ. It argues for continued international dialogue as a primary means to resolve these issues and suggests that the maritime nations, especially the United States, focus more intently on developing useful modalities to better establish that the balance of rights in the EEZ encompasses military activities in the EEZs of coastal States.

II. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The concept of the EEZ, as we know it today, developed largely from the negotiations that ultimately resulted in the 1982 United Nations Convention on the Law of the Sea. The Convention took over a decade to produce and was the final result of the largest single international negotiating project undertaken, before or since.¹⁶ One hundred and fifty-nine States and other entities signed this comprehensive document containing 320 articles and nine annexes, and over 130 nations have since ratified this Convention, which covers virtually every aspect of the conduct of nations in the oceans environment.¹⁷ In many ways, the Convention is much more than a piece of paper—to the majority of the community of nations it represents a commitment to the rule of law and a basis for the conduct of affairs among nations.

It is difficult to overstate the extent to which this Convention has become more than a Treaty and has become, instead, an international state of mind. It created new international law, codifying much of what had become customary law of the sea, and established new norms in the negotiation of multilateral, international treaty agreements. For many emerging nations, it was the first major international treaty negotiation that they had ever participated in. According to former United Nations Secretary-General Javier Perez de Cuellar, the 1982 United Nations Convention on the Law of the Sea em-

16. See generally JAMES B. MORELL, *THE LAW OF THE SEA, THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES* 22-95 (1992). The first session of the Conference was attended by approximately 5000 delegates, representing 148 states, 10 United Nations agencies, 10 intergovernmental organizations, and 33 non-governmental organizations. *Id.* at 52.

17. As of Feb. 6, 2002, 157 States have signed UNCLOS and 138 States have ratified the treaty. Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, available at <http://www.un.org/depts/los/referencefiles/status2002.pdf> (last visited Feb. 15, 2002).

bodies the will of an overwhelming majority of nations from all parts of the world, at different levels of development, and having diverse geographical characteristics.¹⁸

As in any major international negotiation, some issues were dealt with extensively—while others received less intensive attention. Some of the most compelling and intensive issues addressed by the thousands of delegates to the Third Conference on the Law of the Sea included issues such as the width of the territorial sea, the creation of a formal regime for passage through straits used for international navigation, the right of transit passage through these straits as well as passage through archipelagoes, the mining of minerals on the ocean's floor, and a number of other contentious issues.

Many of these considerations became issues because they attempted to codify imperfect understandings that had grown from customary international law. One such issue, which became the subject of particularly intense negotiations, was the regime of the Exclusive Economic Zone (EEZ). In order to understand how this issue became the subject of such controversy, it is important to understand the development of this issue over the course of the twentieth century.

III. THE DEVELOPMENT OF THE EXCLUSIVE ECONOMIC ZONE IN CUSTOMARY INTERNATIONAL LAW

A. The Battle for Control of the Sea

Like the transformation of a river's fresh flowing water into that of the salty sea, the transition from territorial seas to high seas is not abrupt. There is no clear and bright line, but rather a region where the sea absorbs and dilutes the silty residue of sovereign ground, gradually replacing its fresh, muddy, provincial brown with salt and clear blue water freedom. Currents carrying elements of coastal State sovereignty and jurisdiction converge and combine in the EEZ with those containing freedoms of navigation and associated uses in favor of all States, swirling and twisting in sometimes competing directions. The EEZ is, in a juridical sense, brackish, murky and treacherous water; a 188 mile-wide band of turbulent ocean separating the territorial sea from the high seas in which competing desires for control and use meet, mix and merge. The EEZ is a zone of tension between coastal State control and maritime State use of the sea. The battle for control defines the exclusive economic zone. In the battle for control, it is a demilitarized zone, where neither coastal State nor maritime State rights prevail, yet both, in varying degrees, exist.

To understand the law of the EEZ, one must answer the following questions: What is the relationship of coastal State sovereignty to its rights in the

18. Shruti Ravikumar, *Adrift at Sea: U.S. Interests and the Law of the Sea*, 22 HARV. INT'L REV. 38, 38 (2000).

EEZ? How great and of what nature is coastal State control of the EEZ? To what extent do maritime nations enjoy high seas freedoms, therefore freedom from coastal State interference, in the EEZ? To what extent may a warship lawfully use the seas of a foreign EEZ during peacetime?

B. Historical Development of the EEZ

To learn the answers, that is, to grasp the juridical nature of the mixture of the water constituting the EEZ, requires an understanding of the historical development of the EEZ in customary international law.¹⁹ Its very name reflects an extension of an exclusionary regime,²⁰ which implies something of a victory for coastal States. It therefore seems ironic that it is in the act of a great maritime power that we find its genesis.²¹ In its two proclamations of September 28, 1945, the United States of America declared control over marine resources and coastal fisheries beyond its territorial sea,²² and opened the floodgates for claims of State sovereignty over the high seas. Until these proclamations (generally referred to collectively as the "Truman Proclamation"), the well established rule of customary international law provided that the coastal State exercised its sovereignty only over its three mile territorial sea.²³ "No State was allowed to extend its exclusive jurisdiction to the area

19. See generally VICUNA, *supra* note 2, at 3-9, 228-56; ATTARD, *supra* note 2, at 1-67, 277-307; and Bailey, *supra* note 2.

20. But see BROWN, *supra* note 2, at 131 ("It may be less obvious, but it is nonetheless the case, that the *sovereign rights* of the coastal state over the economic resources of the zone are by no means as *exclusive* as the name of the zone might suggest.") (emphasis in original).

21. ATTARD, *supra* note 2, at 2 ("Ironically, it was the United States, one of the staunchest supporters of the 3-n.m. territorial sea doctrine, that opened an era of extensive maritime claims.") (citation omitted).

22. Presidential Proclamation No. 2667, *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea-Bed of the Continental Shelf*, 10 Fed. Reg. 12303 (Sept 28, 1945) (President Harry S. Truman); Presidential Proclamation No. 2668, *Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas*, 10 Fed. Reg. 12304 (Sept 28, 1945) (President Harry S. Truman). In Proclamation No. 2667, the United States declared,

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, subject to its jurisdiction and control.

In Proclamation No. 2668:

In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States.

23. UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF

beyond that limit, which remained the high seas, where all States enjoyed the freedom to exploit living and non-living resources.”²⁴ The Truman Proclamation is generally viewed as the “first important assertion . . . of exclusive jurisdiction beyond the territorial sea.”²⁵

While both statements added that neither the legal character of the ocean as high seas nor freedom of navigation would be affected, the Truman Proclamation had a “profound impact on the practice of States.”²⁶ To some States, the United States appeared to claim some sort of sovereign control beyond the territorial sea.²⁷ Other States followed.²⁸ Two years later, in 1947, Chile and Peru declared authority over ocean zones extending 200 miles from their coasts.²⁹ Both States, like the United States, based their assertion of control on the protection of natural resources and fisheries.³⁰ From

LEGAL AFFAIRS, THE LAW OF THE SEA, EXCLUSIVE ECONOMIC ZONE, LEGISLATIVE HISTORY OF ARTICLES 56, 58 AND 59 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1 (1992)[hereinafter LEGISLATIVE HISTORY].

24. *Id.*

25. Nandan, *supra* note 2, at 174. “An earlier document, ‘The Submarine Areas of the Gulf of Paria (Annexation) Order’ was issued in 1942 by the United Kingdom. . . . However, the Truman Proclamation contained a rationale for the continental shelf and must be considered to be the most important, if not the first, legal instrument dealing with the subject.” *Id.* at 175 n.4. *See also* LEGISLATIVE HISTORY, *supra* note 23, at 1; ATTARD, *supra* note 2, at 1. *But see* VICUNA, *supra* note 2, at 3 (“The maritime zone which today is known as the exclusive economic zone originates in the proclamation by the President of Chile in 1947, which claimed sovereignty over the continental shelf and the adjacent seas up to a distance of 200 miles.”).

26. LEGISLATIVE HISTORY, *supra* note 23, at 2.

27. Bailey, *supra* note 2, at 1291 n.157.

The first Truman Declaration claimed the resources of the continental shelf. The second Truman Declaration made no resource claims, but simply announced that the United States had the right to make international agreements concerning fishing off its coasts. Unfortunately, the simultaneous release of the first declaration and the confusing wording of the second declaration so confused other nations that many felt they were simply following suit when they claimed a 200-mile resource zone or patrimonial sea.

Id.

28. *See* ATTARD, *supra* note 2, at 4, 5 (In 1945 and 1946, Mexico and Argentina proposed an “epicontinental sea” which claimed the seas over the continental shelf subject to national sovereignty. Panama followed in 1946, Nicaragua in 1947.).

29. Nandan, *supra* note 2, at 175 (citing Presidential Declaration Concerning Continental Shelf of 23 June 1947, EL MERCURIO, Santiago de Chile (June 29, 1947), and Presidential Decree No. 781 of 1 Aug 1947, 107 EL PERUANO: DIARIO OFICIAL, No. 1983, (Aug. 11, 1947)).

30. VICUNA, *supra* note 2, at 3 (“[S]aid zone did not have a territorial scope, but referred solely to the utilization of natural resources and related aspects.”). The Chilean statement declared:

sovereignty over submarine areas, regardless of their size and depth, as well as over the adjacent seas extending as far as necessary to preserve, protect, maintain, and utilize natural resources and wealth’. It further established the demarcation of ‘protection zones for whaling and deep sea fishery’ to extend 200 nautical miles from the coasts of Chilean territory.

1948 to 1951, other Latin American States made similar claims.³¹ In 1949, ten Arab States and emirates jumped on the bandwagon, unilaterally declaring sovereignty over petroleum resources on the continental shelf.³² Although none of these declarations purported to limit freedom of navigation,³³ an outward-bound movement of coastal State control of the sea had begun.

In 1952, the movement continued with the Santiago Declaration,³⁴ the first international instrument to declare a 200-mile limit.³⁵ The Declaration made a significant conceptual leap, however, asserting not merely jurisdiction for the purpose of managing natural resources and fisheries, but that each State (Chile, Ecuador and Peru) “possesses *sole sovereignty* and jurisdiction over the area of sea adjacent to its own country and extending not less than 200 nautical miles from the said coast.”³⁶ Freedom of navigation was restricted to “the innocent and inoffensive passage of vessels of all nations through the zone aforesaid.”³⁷ Although motivated by a desire “to ensure the conservation and protection of its natural resources,”³⁸ this declaration of sole sovereignty claimed control based on territorial ownership over a large area of what had, until then, been high seas.³⁹ Further, by permitting

Nandan, *supra* note 2, at 175 (quoting Presidential Declaration Concerning Continental Shelf of 23 June 1947, EL MERCURIO, Santiago de Chile June 29, 1947). Peru also established a 200-mile zone. *Id.* (citing Presidential Decree No. 781 of 1 Aug. 1947), 107 EL PERUANO: DIARIO OFICIAL, No. 1983, (Aug. 11, 1947)). The source of the “magic” 200 mile number apparently derives from a magazine article discussing the Panama Declaration of 1939 in which the United Kingdom and the United States established a security and neutrality zone around the American continents to prevent resupply of Axis ships in South American ports. The magazine article included a map showing the width of the neutrality zone to be 200 miles. Nandan, *supra* note 2, at 175. *See also* ATTARD, *supra* note 2, at 5. The irony continues: it was from an act of world’s two greatest maritime powers that the 200 mile territorial sea limit, anathema to both, derived.

31. ATTARD, *supra* note 2, at 5-6 (Costa Rica in 1948, modified in 1949. El Salvador in 1950, Honduras in 1951.).

32. Nandan, *supra* note 2, at 175.

33. *Id.*

34. Declaration on the Maritime Zone (the Santiago Declaration), adopted by Chile, Ecuador and Peru at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific on 18 August 1952, *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 3 [hereinafter the Santiago Declaration].

35. Nandan, *supra* note 2, at 176.

36. Santiago Declaration, *supra* note 34, at 3 (emphasis added).

37. *Id.* at 4. “It should be noted that [this], though it refers to ‘innocent and inoffensive passage of vessels’, has been interpreted to have the intention of confirming the freedom of navigation.” *Id.* (citing Edmund V. Carreno, *América Latina y los Problemas Contemporáneos del Derecho del Mar* 27-28 (Santiago, 1973)). *But see* Nandan, *supra* note 2, at 176 (“The Declaration . . . maintained the principle of innocent passage but not . . . freedom of navigation.”); VICUNA, *supra* note 2, at 5 (“[T]his did not prevent the use of the concept of innocent passage instead of that of freedom of navigation in the zone.”). The language unambiguously restricts rights associated with the freedom of navigation, paring them to the bare nub of innocent passage, and cannot reasonably be interpreted as confirming the full panoply of uses associated with freedom of navigation on the high seas.

38. Santiago Declaration, *supra* note 34, at 3.

39. *But see* VICUNA, *supra* note 2, at 5 (“[I]t could not be inferred that the Declaration of

only innocent passage, it limited rights of use associated with freedom of navigation, thus restricting maritime States when using these waters.

In 1958, the first United Nations Conference on the Law of the Sea produced four conventions codifying the customary law of the sea.⁴⁰ Although these conventions rejected the extended territorial sea claimed in the Santiago Declaration,⁴¹ the Convention on the Continental Shelf provided a small victory for those seeking extended coastal State control, recognizing “sovereign rights of coastal States on the soil and subsoil of the continental shelf, beyond the territorial sea.”⁴² Customary international law did not provide, however, for any further coastal State rights of exclusion beyond the territorial sea.⁴³ A second United Nations Conference on the Law of the Sea, held in 1959, formed no consensus on the reach of the territorial sea, although a majority favored extension beyond the then customary 3-mile limit.⁴⁴ Undeterred, a number of Latin American countries made unilateral claims to extended sovereignty over the sea; by 1970, eight countries claimed sovereignty to 200 miles.⁴⁵

In 1970, these Latin American States “somewhat solidified”⁴⁶ their position in two international agreements: the Montevideo Convention on the Law of the Sea,⁴⁷ and the Declaration of Latin American States on the Law of the Sea (Lima Declaration).⁴⁸ Both conventions expressed concern over “abusive” practices in the extraction of marine resources, and “disturbance” of ecological balance.⁴⁹ Both declared that coastal States had a right to estab-

Santiago establishes a territorial sea claim, since it does not embody the elements which would justify its typification in such terms.”)

40. Casteneda, *supra* note 2, at 605 (citing Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 459 U.N.T.S. 11; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285; Convention on the Continental Shelf, Apr. 29, 1958, 449 U.N.T.S. 311).

41. Nandan, *supra* note 2, at 176.

42. Casteneda, *supra* note 2, at 605.

43. *Id.*

44. *Id.* at 606.

45. Nandan, *supra* note 2, at 176. (Ecuador, Panama, Brazil, Chile, Peru, El Salvador, Argentina and Nicaragua claimed sovereignty to 200 miles). *See also* ATTARD, *supra* note 2, at 14, 15, 17, 19 (discussing claims of Nicaragua, Ecuador, Argentina, Panama, Uruguay, and Brazil).

46. Nandan, *supra* note 2, at 176.

47. Montevideo Declaration on the Law of the Sea, adopted on May 8, 1970 at the Montevideo Meeting on the Law of the Sea, *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 4 [hereinafter Montevideo Declaration]. Signatories were Ecuador, Panama, Brazil, Chile, Peru, El Salvador, Argentina and Nicaragua. Nandan, *supra* note 2, at 176, 177.

48. Declaration of the Latin American States on the Law of the Sea, adopted on 8 August 1970 at the Latin American Meeting on Aspects of the Law of the Sea, held at Lima from 4 to 8 August 1970, *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 6 [hereinafter Lima Convention]. The signatories to the Lima convention included Colombia, the Dominican Republic, Guatemala, Honduras and Mexico, in addition to the signatories of the Montevideo convention. Nandan, *supra* note 2, at 177.

49. Montevideo Declaration, *supra* note 47; Lima Convention, *supra* note 48.

lish the limits of maritime sovereignty or jurisdiction as each deemed necessary to protect national interests in the preservation of the marine environment.⁵⁰ The conventions contemplated a reasonable relationship between the limits of sovereignty and the need to control and preserve natural resources. The underlying purpose for asserting sovereignty was to gain control of the waters to apply regulatory measures for these purposes.⁵¹ These regulatory measures were to be “without prejudice to freedom of navigation and overflight in transit of ships and aircraft, without distinction as to flag.”⁵²

A clear theme had emerged. These coastal States did not purport to seek sovereignty for its own sake, for the sake of pure territorial expansion, or for defense of the nation from a military threat.⁵³ They rationalized their need for sovereignty as needed to protect and utilize the natural resources of their marine environment. Their interests were economic and environmental in nature. It followed, therefore, that uses associated with the exercise of freedom of navigation, to the extent that they did not intrude upon or harm these interests, were not at issue. The control they claimed to seek was of a limited nature; so, the exclusion required could be limited to that necessary to preserve and protect the stated environmental and economic interests. The claim of sovereignty, with its associated rights of total territorial ownership, con-

50. Montevideo Declaration, *supra* note 47; Lima Convention, *supra* note 48.

51. Montevideo Declaration *supra* note 47, ¶¶ 1-5, at 5; Lima Convention, *supra* note 48, ¶¶ 1-6, at 7.

52. Lima Convention, *supra* note 48, ¶ 3, at 7; Montevideo Declaration *supra* note 47, ¶ 6, at 5. The language in the two is not identical. The earlier Montevideo Convention states “without prejudice to freedom of navigation by ships and overflying by aircraft of any flag.” The Lima Convention, perhaps significantly, says “without prejudice to freedom of navigation and flight *in transit* of ships and aircraft, without distinction as to flag.” (emphasis added). This latter language appears to limit the freedom to a right of pass through, and does not permit a vessel to tarry—perhaps a version of innocent passage, though not explicitly stated. Indeed, as to the Montevideo Convention, five signatories attached to the Declaration a restrictive interpretation, equating it with innocent passage. Similarly, at the Lima Convention, “most states” made reservations to the effect that the language providing freedom of navigation did not apply to them. ATTARD, *supra* note 2, at 18, 19. The Lima Convention did, however, explicitly recognize that scientific research might occur in its waters, and did not seek to prohibit it as a matter of sovereign right; instead asserting a right to “authorize, supervise and participate.” Lima Convention, *supra* note 48, ¶ 5, at 7. The Lima Convention also asserted a right “to prevent contamination of the waters and other dangerous and harmful effects that may result from the use, exploration or exploitation of the area adjacent to its coasts.” *Id.* ¶ 4. These provisions with respect to scientific research and contamination resulting from use appear to imply or assume that the sovereignty declared would not be completely exclusive of uses traditionally enjoyed by maritime nations on the high seas in the exercise of freedom of navigation. Thus, although the quantity of water claimed expanded, the quality of the claim relaxed—from total exclusion to a slightly more permissive, though regulated, regime.

53. See ATTARD, *supra* note 2, at 7 (“[T]hey claimed sovereignty over areas of the high seas with the purpose of exercising only certain functions of this sovereignty, primarily the exclusive control over fishing.”). But see VICUNA, *supra* note 2, at 6 (“[Some Latin American] countries preferred a restrictive approach to navigation through the zone . . . aim[ed] at the safeguarding of their concepts of security or simply their desire for territorial expansion in marine space.”).

trol and exclusion, was a blunt instrument with which to accomplish this limited purpose. The operation required a tool of more precise and circumscribed application, so as to leave intact traditional uses of the sea associated with freedom of the high seas (which includes freedom of navigation for warships), while cutting away, for coastal State control, those uses associated with protecting, preserving and using the marine environment and its natural resources.

A regional group of Asian-African States recognized this subtlety, suggesting at its Colombo meeting in 1971 that an extension of the territorial sea (i.e. coastal State sovereignty) beyond 12 miles was inappropriate, but at the same time recognizing a coastal State right to "claim exclusive rights to economic exploitation of the resources in the waters adjacent to the territorial sea in a zone the maximum breadth of which should be subject to negotiation."⁵⁴ In January 1972, the Asian-African group developed a working paper on the "Exclusive Economic Zone Concept."⁵⁵ This paper, presented by Kenya, drew the battle lines over sovereignty between the developed countries and those in the developing process. It stated, "the present regime of the high seas benefits only the developed countries. . . ."⁵⁶ In defining the conflict, however, the Kenyans recognized that extending sovereignty was a clumsy means to the desired end. Instead, they suggested giving the coastal State sovereign rights and exclusive jurisdiction, not over the sea itself, but instead over living and non-living resources in and beneath the sea, and over the prevention and control of pollution in a zone of ocean up to 200 miles from the coast.⁵⁷

A number of Caribbean States took a consistent view, suggesting that sovereignty over the sea itself might be inappropriate, but that beyond the

54. Report of the Subcommittee on the Law of the Sea of the Asian-African Legal Consultative Committee, adopted by the Committee at its twelfth session, held at Colombo, 18-27 January 1971, *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 7.

55. Nandan, *supra* note 2, at 178.

56. *Id.* (quoting Report of the Thirteenth Session of the Asian-African Consultative Committee, Lagos, 18-25 January 1972). As described by Satya N. Nandan, the United Nations Under Secretary General, Special Representative of the Secretary General for the Law of the Sea:

The developed countries, because of their advanced technologies, were able to engage in distant-water fishing activities wherever and whenever they chose to do so. At the same time, developing countries were often incapable of exploiting the resources in waters closely adjacent to their own coasts, much less in waters great distances away. Therefore, a tendency had grown among developing countries to extend their territorial seas up to 200 miles in an effort to compensate for their technologically disadvantaged position. This tendency, in turn, created a concern among the major maritime nations that extensions of sovereignty would have a negative effect on traditional freedoms of navigation and overflight. The exclusive economic zone concept was put forward as a compromise solution to these conflicting concerns.

Id. at 178-79.

57. *Id.* at 179.

territorial sea, coastal States should have “sovereign rights over renewable and non-renewable natural resources, which are found in the waters, in the sea-bed and in the subsoil. . . .” They named this region of limited resource sovereignty beyond the territorial sea the “patrimonial sea.”⁵⁸ To the extent permitted by the exercise of coastal State sovereignty over the resources (not the sea), “ships and aircraft of all States . . . should enjoy the right of freedom of navigation and overflight with no restrictions . . . there will also be freedom for the laying of submarine cables and pipelines.”⁵⁹ At almost the same time, an African regional group of sixteen States made a similar declaration, claiming “the right to establish beyond the territorial sea an economic zone over which they will have exclusive jurisdiction for the purpose of control, regulation and national exploitation of the living resources of the sea . . . and for the purpose of the prevention and control of pollution.”⁶⁰ The subsequent African Unity Declaration⁶¹ gave “further authority” to this position.⁶²

This exclusive zone concept, “initiated by a few Latin American States, refined by Caribbean States, and defined explicitly by African States,”⁶³ immediately became a subject of discussion in the United Nations Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction (Sea-bed Committee).⁶⁴ In this forum, the maritime powers, notably the United States and the Soviet Union,⁶⁵ sought to “ensure that the strategic use of the zone was in no way curtailed and that the traditional freedoms of the high seas for non-resource related activities were preserved.”⁶⁶ Strategic use of the sea was closely connected to naval presence.

58. Declaration of Santo Domingo, approved 9 June 1972 at the Specialized Conference of the Caribbean Countries on Problems of the Sea, Santo Domingo, 31 May - 9 June 1972, reprinted in LEGISLATIVE HISTORY, *supra* note 23 at 8, 9 [hereinafter Santo Domingo Declaration]. The Declaration also provided for coastal state regulation of marine research as well as the right to adopt necessary measures to “prevent marine pollution and to ensure its sovereignty over the resources of the area.” *Id.* at 9. Fifteen Caribbean states attended the conference: Barbados, Colombia, Costa Rica, Dominican Republic, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, and Venezuela; El Salvador and Guyana attended as observers. Nandan, *supra* note 2, at 177.

59. Santo Domingo Declaration, *supra* note 58, ¶ 5, at 9.

60. Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, June 20-30, 1972, reprinted in LEGISLATIVE HISTORY, *supra* note 23, at 9, 10.

61. Organization of African Unity Declaration on the Issues of the Law of the Sea, adopted by the Council of Ministers at its Twenty First Ordinary Session, May 17- 24, 1973; reprinted in LEGISLATIVE HISTORY, *supra* note 23, at 11.

62. Nandan, *supra* note 2, at 179.

63. *Id.* at 180.

64. LEGISLATIVE HISTORY, *supra* note 23, at 14-15.

65. Casteneda, *supra* note 2, at 606.

66. Nandan, *supra* note 2, at 180. This negotiating position had its origin in the so-called “package deal,” when the United States and the Soviet Union agreed to promote a 12-mile territorial sea (extended from the then existing 3 mile limit) with guaranteed free navigation through straits combined with a preferential fishing rights regime for coastal states beyond the 12 mile territorial sea. See JAMES C.F. WANG, HANDBOOK ON OCEAN POLITICS & LAW 465 (1992); ANNE L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA (1981). See also RICHARD M. NIXON, DEP’T STATE. BULL 62, No. 1602, U.S. FOREIGN POLICY FOR THE 1970’S

To preserve naval presence as a matter of right required a rule of inclusion—that is, unconditional rights of use—such as traditionally existed on the high seas. Sovereignty, even of a limited nature, implied rights of exclusion held by coastal States. Maritime powers perceived an exclusive regime based upon sovereign rights as a threat to their ability to use the sea by potentially denying them a legal right to be there.⁶⁷ Nevertheless, acquiescing to the inevitable, they accepted the exclusive zone concept in principle.⁶⁸ In an effort to avoid any assertion of sovereignty beyond the territorial sea, however, and using fishing rights as a vehicle to carry their underlying strategic concerns,⁶⁹ maritime powers suggested a regime of preferential fishing rights as an alternative to sovereign resource rights.⁷⁰

Conversely, some of the Latin American States insisted upon a 200-mile territorial sea, “including all its characteristics.”⁷¹ Brazil, Ecuador, Peru, Uruguay, and, to a degree, Argentina, all zealously maintained their territorial position.⁷² In draft articles on the exclusive zone submitted to the Sea-Bed Committee in 1973,⁷³ Ecuador, Panama and Peru contended that the coastal State’s right to regulate and exploit the living resources in the zone was “a consequence of the exercise of its sovereignty, from which it could not be disassociated.”⁷⁴ Of course, both the Kenyan exclusive economic zone concept and the Caribbean patrimonial sea suggestion had demonstrated the very conceptual disassociation these Latin American States denied.⁷⁵ Rights to resources, like easements in property, can, at least in theory, be separated from other rights, and need not be held inseparable from the right of posses-

329-30 (March 9, 1970); JOHN R. STEVENSON, DEP’T STATE. BULL. 62, No. 1603, INTERNATIONAL LAW AND THE OCEANS 339-43 (March 16, 1970) (public pronouncements that the United States would accept a 12 mile territorial sea provided that free transit through straits was assured).

67. See Nandan, *supra* note 2, at 178, 179.

68. Castaneda, *supra* note 2, at 606.

From the start, it seemed obvious to them . . . that if such a goal were to be attained, it was indispensable to give some sort of satisfaction to a great number of coastal States, probably a majority, who claimed an effective way of checking excessive and abusive fishing by maritime powers in front of their coasts, which risked a substantial decrease of their living resources.

Id. See also ATTARD, *supra* note 2, at 29 (“By agreeing to the inevitable [the United States and the Soviet Union] hoped to induce other states to act favorably with regard to their main interest, freedom of navigation.”).

69. See Nandan, *supra* note 2, at 178, 179.

70. See *id.* at 180-83 “The reaction of the major fishing nations was to impose obligations through resource management schemes, rather than to challenge the concept itself.” *Id.* at 181; Castaneda, *supra* note 2, at 607, 608.

71. Castaneda, *supra* note 2, at 608.

72. *Id.* at 609

73. Nandan, *supra* note 2, at 183 (citing U.N. GAOR, Sea-Bed Comm., Vol. III, 28th Sess., Supp. No. 21, at 107-09, U.N. Doc. A/9021 (1970)).

74. *Id.* at 184.

75. See *supra* notes 55 to 62 and related discussion.

sion associated with sovereignty over the territory.⁷⁶ The intransigence of these Latin American States in a logically insupportable position gives grounds to infer that their motivation extended beyond the claimed interest in protection and use of the marine environment and its natural resources. It was a vehicle to carry their underlying interest in territorial expansion.⁷⁷ It would establish control of an expanded territorial sea by a regime of legal exclusion, just as the maritime powers sought to use concepts of preferential fishing rights as their vehicle to preserve access by retaining a regime of legal inclusion. Moreover, any construct that permitted maritime powers to be present on these seas as a matter of right effectively conceded control of the seas to those States, at least whenever they cared to be present upon them,⁷⁸ and so would be unacceptable to these "territorialist" States.

As United Nations negotiations progressed, however, "it became clear that the territorialist trend would not prosper,"⁷⁹ at least not through the international forum.⁸⁰ When the Third United Nations Conference on the Law of the Sea (Conference) held its second session in Caracas in 1974, approximately 100 of 118 conference participants spoke in favor of an exclusive economic zone.⁸¹ Although the idea of a resource related exclusive economic zone was by this time not controversial,⁸² the exact legal nature of the regime became the subject of intense debate.⁸³ The legal character of the zone would determine, by implication, whether it would be inclusive in nature, thus potentially committing control of these seas to maritime powers, or exclusive, thus committing control to coastal States. Maritime powers, therefore, sought to characterize the zone as part of the high seas. Resource rights

76. Cf. VICUNA, *supra* note 2, at 8 ("Considering this problem in retrospect, the linking of the discussion on fishing rights to the question of the breadth of the territorial sea appears to have been an erroneous way of approaching the matter.")

77. See *id.* at 6 ("[Some Latin American] countries preferred a restrictive approach to navigation through the zone . . . aimed at the safeguarding of their concepts of security or simply their desire for territorial expansion in marine space.")

78. Cf. Nandan, *supra* note 2, at 178, 179 ("The developed countries, because of their advanced technologies, were able to engage in distant water fishing activities wherever and whenever they chose to do so.")

79. Castaneda, *supra* note 2, at 608.

80. See Bailey, *supra* note 2, at 1218 ("[G]randiose 'territorial' claims were made for domestic consumption, while more modest claims to economic resources were presented for international scrutiny."). In the late 1960s and early 1970s an "ever-more inflationary trend in coastal State claims" of 200-mile territorial seas became apparent. Between 1965 and 1979 twelve such claims were made. BROWN, *supra* note 2, at 124.

81. ATTARD, *supra* note 2, at 29. See LEGISLATIVE HISTORY, *supra* note 23, at 60-72 (quoting the comments of a number of delegations).

82. BROWN, *supra* note 2, at 124.

83. ROBERT W. SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS, AN ANALYSIS AND PRIMARY DOCUMENTS 27 (1986) ("Intense debates arose regarding the characterization of the legal nature of coastal state rights in the EEZ and their relationship to rights of other states in the zone."); ATTARD, *supra* note 2, at 39 (quoting A/CONF. 62/WP. 10/Add. 1. at 10) ("[T]he question of the EEZ's juridical nature remained 'one of the most controversial issues facing the Conference.'")

would be in the nature of easements in favor of the adjacent coastal State. In the event of doubt as to whether unassigned or unforeseen rights belonged to the coastal State or to a foreign user State, the legally inclusive high seas regime would favor the foreign user State. Conversely, developing coastal States sought to characterize the zone as a territorial sea, with navigational and related rights granted to foreign user States, again in the nature of an easement.⁸⁴ In the event of dispute or doubt as to particular uses not explicitly listed or foreseen (residual rights), the legally exclusive territorial nature of the zone would result in favor to the coastal State.⁸⁵

84. Characterization of the debate at the Conference as between coastal states and maritime powers is something of an oversimplification engaged in here for ease of discussion of the EEZ issue. In fact, the issues were more sophisticated and the competing politics and interests significantly more complex. See Table: Competing Groups, Politics, and Interests at the Third United Nations Law of the Sea Conference, *infra*, for an illustration. For discussions of the politics at the Conference, see WANG, *supra* note 66, at 447-81; HOLLICK, *supra* note 66; Edward L. Miles, *The Structure and Effects of the Decision Process in the Seabed Committee and the Third United Nations Conference on the Law of the Sea*, 31 INT'L ORG. 159, 162-66 (1977).

85. See generally Castaneda, *supra* note 2, at 608 (“[B]ig fishing powers persisted in the need of widening the scope of third States’ rights in the exclusive economic zone, as well as in identifying the zone as part of the high seas. Coastal States objected systematically, especially the latter attempt. . . .”); BROWN, *supra* note 2, at 128, 129; SMITH, *supra* note 83, at 27.

COMPETING GROUPS, POLITICS, AND INTERESTS AT THE THIRD UNITED NATIONS LAW OF THE SEA CONFERENCE⁸⁶

GROUP/ COUNTRY	GEOGRAPHIC DESCRIPTION	STATES INCLUDED	GOAL/INTERESTS
Archipelagic States	Oceanic/Island	Fiji, Indonesia, Mauritius, Philippines	Archipelagic waters by straight baseline and 200 mile economic zone
Group of 77	Africa, Asia and Latin America	120 developing nations in 1980, including Argentina, Brazil, Cuba, Burma, Syria, Thailand, Egypt, Iraq, Iran, Kenya, Malta, Saudi Arabia, and others	International Regime for seabed mining; common heritage, production limits and price control on seabed mining
Japan	N/A	N/A	Opposed to expanded claims on territorial seas and fishery zone; access to deep seabed mining
Landlocked & Geographically Disadvantaged States	All regions	48 states, including Czechoslovakia, East Germany, Hungary, Mongolia, Poland	Revenue sharing; living and non-living resource exploitation; right to participate in research; 12 mile territorial sea
Patrimonialist & Territorialist	Caribbean & Latin American	Colombia, Haiti, Jamaica, Mexico, Trinidad, Venezuela, Chile, Ecuador, Peru, Panama	200 mile zone over renewable resources and/or 200 mile territorial sea
USA	N/A	N/A	Free navigation; guaranteed free transit through straits; free access to deep seabed mining
Soviet East European Bloc	East Europe	Albania, Hungary, Czechoslovakia, Poland, Romania, Yugoslavia	Seabed mining, 200 mile EEZ; continental shelf; territorial sea; fisheries transit
Western Europe (EEC) & Group of 11	European Community, plus Scandinavians	EEC and Scandinavians, plus Australia, Austria, Canada, Ireland, New Zealand	Coastal jurisdiction over fisheries; free access to deep seabed mining.

86. This table is copied, with minor modifications, from WANG, *supra* note 66, at 448 (citing HOLLICK, *supra* note 66, at 250-56 and Miles, *supra* note 84, 162-66).

C. Intense Conference Committee Negotiation and Development

Because of the breadth, scope and complexity of the issues under consideration at the Conference, as well as the sheer number of people in attendance, it had, at its first session, divided itself into three Committees, each assigned a group of issues to consider.⁸⁷ EEZ issues, among others relating to offshore jurisdiction, were assigned to Committee II.⁸⁸ In addition, an informal working group of juridical experts, chaired by Minister Jens Evensen of Norway, was created to consider a number of difficult issues arising in Committees II and III.⁸⁹ In like manner, Committee II, itself, established a number of informal consultative groups, each open to participation by all members of the Committee.⁹⁰ Ambassador Satya Nandan of Fiji chaired the group dealing with the EEZ.⁹¹ One other negotiating group of significance to EEZ issues was a private one formed by Ambassadors Castaneda of Mexico and Vindenes of Norway.⁹² Known as the Castaneda-Vindenes group, it consisted of representatives from Australia, Brazil, Bulgaria, Canada, Egypt, India, Kenya, Mexico, Nigeria, Norway, Peru, Singapore, the Soviet Union, the United Kingdom, the United Republic of Tanzania, the United States, and Venezuela.⁹³ It was in these informal "sub-committees" that the competing politics and interests of various States and groups of States with respect to the EEZ and other issues were resolved, and a text prepared for adoption by the Conference and inclusion in the Convention.⁹⁴ The various negotiating positions of States and groups of States that sought expression in these various working sub-committees were interrelated, overlapping, and sometimes conflicting, but in general, developing coastal States, represented by the Group of 77, sought greater coastal State control in the EEZ; maritime powers lined up in opposition.⁹⁵ The table above provides a schematic summary of the loose alliances and groups, and of their goals.⁹⁶

87. See LEGISLATIVE HISTORY, *supra* note 23, at 60. For a thorough discussion of the preparations for the Conference, see generally MORELL, *supra* note 16.

88. See LEGISLATIVE HISTORY, *supra* note 23, at 60.

89. See MORELL, *supra* note 16, at 55; LEGISLATIVE HISTORY, *supra* note 23, at 88. Committee III considered protection of the marine environment and the conduct of scientific research. Committee I worked on a regime for deep seabed mining. *Id.* at 51-55.

90. LEGISLATIVE HISTORY, *supra* note 23, at 88.

91. *Id.*

92. *Id.* at 113 n.174.

93. *Id.*

94. *Id.* at 88-94.

95. MORELL, *supra* note 16, at 47-48.

96. At the Second Session, in Caracas in 1974, eight different texts on the EEZ were submitted by various delegations. One proposal was submitted by a group including Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway. One by Nicaragua, one from Nigeria, another from a group including Bulgaria, the Byelorussian Soviet Socialist Republic, the German Democratic Republic, the Ukrainian Soviet Socialist Republic, and the Union of Soviet Socialist Republics, one by the United States, one by El Salvador, and one by a group including Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, the Lib-

In 1975, the Evensen Group developed the regime that became the core of the EEZ construct ultimately adopted by the Conference.⁹⁷ This group proposed a rule in which the exclusive economic zone would be neither territorial sea nor high seas, but a zone “with a new regime in the Law of the Sea.”⁹⁸ In this *sui generis* zone, the coastal State owned “sovereign rights” for exploration, exploitation and conservation of resources, but did not exercise sovereignty over the sea itself.⁹⁹ Nevertheless, coastal States perceived this formulation as a

considerable success . . . since it implied the rejection of the thesis defended, up to that [sic] moment, by maritime powers, that is, the recognition of nothing more than preferential rights to the coastal State for the exploitation of some resources. . . . On the other hand, there is no mention of ‘rights of sovereignty over the zone,’ thus avoiding its assimilation to the territorial sea.¹⁰⁰

In this scheme there could be no presumption in favor of either coastal States or maritime States with respect to disputes over residual rights. To solve this potential dispute problem with the exercise of “concurrent incompatible rights within the exclusive economic zone,” the Mexican delegation later suggested a rule for dispute settlement, which ultimately became a part of the Convention.¹⁰¹

yan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, the United Republic of Cameroon, the United Republic of Tanzania, and Zaire. For the full text of these proposals, see LEGISLATIVE HISTORY, *supra* note 23, at 72-82. These proposals were combined by the Committee Chairman and other officers into a “main trends” working paper. See *id.* at 82-87 (text relevant to the EEZ). At the Third Session of the Conference, at Geneva in 1975, a number of informal papers containing draft articles were submitted, including working papers by the Evenson Group and by the Chairman of the Group of 77. The Committee Chairman used these papers and proposals to prepare a “Single Negotiating Text,” which became the basis of further negotiation and revision. See *id.* at 88-91 (full EEZ text); *id.* at 91-93 (full EEZ text of the subsequent “Revised Single Negotiating Text”). See generally WANG, *supra* note 66, at 447-81 (discussing the roles played by individual nations and caucusing groups at the Conference).

97. LEGISLATIVE HISTORY, *supra* note 23, at 88; Nandan, *supra* note 2, at 184; Castaneda, *supra* note 2, at 611.

98. Castaneda, *supra* note 2, at 612 (“[T]he zone was not a territorial sea with exceptions in favor of third states, nor high seas with exceptions in favor of the coastal State. . .”).

99. *Id.* at 613.

100. *Id.* at 613-14.

101. *Id.* at 615-16. For rights not explicitly attributed by the Convention to either the coastal state or the maritime state, the following provision would apply:

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 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.

Id. This language became Article 59 of UNCLOS. *Id.*

Maritime powers disliked this regime. Although it prevented any further extension of the territorial sea, it sliced away a huge sector of water from the comfortably and traditionally inclusive high seas. It left them uncertain of their legal ability to use the seas for military and strategic purposes.¹⁰² Without having to explicitly list their military use rights within the exclusive economic zone in the language of the Convention, the maritime powers wanted to ensure that the new regime would not by definition preclude naval operations in the zone.¹⁰³ In 1977, the Casteneda-Vindenes Group began work to resolve this problem.¹⁰⁴ The work focused on Article 46 of the Revised Single Negotiating Text, which stated, in part:

In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the present Convention, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and *other internationally lawful uses of the sea related to navigation and communication.*¹⁰⁵

The maritime powers felt that limiting uses to those “related to navigation and communication” was too restrictive. The United States representative, Ambassador Elliot Richardson, proposed this alternative: “Other internationally lawful uses of the sea related to these freedoms, such as those

102. *Id.* at 620-21. “Maritime powers maintained that the meaning and scope of the freedoms and other uses of the sea enjoyed by all states in the exclusive economic zone were too restrictive. The United States held that rights of third States had both quantitatively and qualitatively diminished.” *Id.* The limits upon other uses of the sea and the due regard provision on the exercise of the few listed uses appeared to favor coastal States. “Maritime powers considered that these restrictions, together with the exclusion of the exclusive economic zone from the definition of high seas, represented a serious threat to their security and military interests.” *Id.*

103. VICUNA, *supra* note 2, at 38, 108 (Many delegations preferred not to make any express statement about the problem of military uses in the exclusive economic zone, but it was implicitly present behind many of the provisions of the exclusive economic zone.). See also Nandan, *supra* note 2, at 186 (“The issue of ‘residual rights’ not attributed specifically to the coastal state or to a third state needed to be certified in order to take into account future activities, such as uses of the sea not yet discovered, or certain strategic uses not yet contemplated in the convention but traditionally practiced as high seas freedoms.”); Casteneda, *supra* note 2, at 620.

[C]onsensus [on the EEZ] seemed impossible due to the importance attached by the great powers to the satisfaction of their interests, mainly of a military and strategic character. Therefore, they insisted on the assimilation of the exclusive economic zone to the high seas and on the expansion of third States’ rights in the zone. . . . The central problem was still the ‘residual rights’ not attributed specifically by the Convention either to Coastal States of [sic] to third States. These rights could refer to future activities, such as uses of the sea not yet discovered or certain military uses not contemplated in the draft Convention, but traditionally practiced without any restriction by military powers in the high seas.

Cf. Boczek, *supra* note 7, at 449 (1988) (“[T]he issue of naval maneuvers was never explicitly raised by maritime powers.”).

104. Nandan, *supra* note 2, at 186; LEGISLATIVE HISTORY, *supra* note 23, at 96.

105. LEGISLATIVE HISTORY, *supra* note 23, at 92 (emphasis added).

associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of the convention.”¹⁰⁶ Rather than permitting only uses related to navigation and communication, this new provision permitted uses related to *freedoms of navigation and overflight*, that is, related to freedoms and not just to navigation, arguably a broader set of uses. It perhaps further broadened the set by citing, as an apparently non-exclusive example, uses *associated with the operation* of ships, aircraft and submarine cables and pipelines.¹⁰⁷ Customary international law historically considered military maneuvers a lawful use of the high seas associated with the operation of warships exercising freedom of navigation.¹⁰⁸ Given this background, and recognizing that the language was *intended* to preserve maritime nations’ military use rights in the zone, this language would lead to the inescapable conclusion that naval operations were to be included in the set of “other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships.”¹⁰⁹ This would have retained an inclusive regime in the exclusive economic zone, and, therefore, strategic control for maritime nations.

In exchange for the broader Richardson use provision, however, coastal States extracted several provisions that were intended to “re-establish the balance.”¹¹⁰ Most important were provisions that unambiguously established the exclusive economic zone as neither part of the territorial sea nor part of

106. Castaneda, *supra* note 2, at 622.

107. See VICUNA, *supra* note 2, at 29 (emphasis added).

Although the actual formula broadens the subjects referred to by other uses, it is not as far reaching as desired by some maritime powers, who sought an unconditional reference to other legal uses of the sea. This provision is directly related to the discussion on the military uses of the exclusive economic zone.

Castaneda, *supra* note 2, at 615, 622.

108. See Edward D. Brown, *Freedom of the Sea Versus the Common Heritage of Mankind: Fundamental Principles in Conflict*, 20 SAN DIEGO L. REV. 521, 533 (1983).

[F]reedom of use of the high seas. . . was described by Professor Schwarzenberger in his Hague Lectures in 1955: ‘Under international customary law, the right of use of the high seas, the air space above them and the seabed may be exercised for any purposes not expressly prohibited by international law as, for instance, for sea and air navigation, fishing, laying of cables and pipelines, *naval exercises and wartime operations*.

(quoting Georg Schwarzenberger, *The Fundamental Principles of International Law*, 87 RECUEIL DES COURS 195, 360 (1955) (emphasis added). See also ATTARD, *supra* note 2, at 86.

Before the Conference, it was generally accepted that freedoms of movement and communication included activities that were ancillary to said freedoms. Thus not only was freedom of navigation of warships recognized, but so were other related activities such as the holding of military exercises. There is no evidence that this position under customary law has changed.

Id.

109. Alan V. Lowe, *Rejoinder*, 11 MARINE POL’Y 250, 251 (1987).

110. Castaneda, *supra* note 2, at 622.

the high seas.¹¹¹ This was important because the Richardson proviso did *not* say internationally lawful uses of the *high seas* exist in the EEZ. As discussed above, this can be argued to include military operations. It said lawful uses *of the sea*, and the sea in question, under this balanced regime, was *not* the high seas, but a *sui generis* belt of water called the exclusive economic zone.¹¹² The proper question then, would *not* be whether military operations are internationally lawful uses of the high seas, which customary international law answers in the affirmative; it would be whether military operations are lawful uses of the exclusive economic zone.

This left the important question of residual rights in the air. If the EEZ were to be considered fundamentally coastal waters to which some rights were reserved for other States, then any rights unassigned, or residual, might well be considered as belonging to coastal States. Thus, in any dispute, the presumption might be in favor of the coastal State. Conversely, if the EEZ were considered as essentially high seas, with a certain described set of rights and jurisdictions assigned to the coastal State, then any rights not explicitly assigned to the coastal State might belong to all States, as part of the pre-existing residual rights associated with freedoms of navigation on, in and over the high seas, out of which the EEZ had been carved. Military activities, permissible in the high seas, would have been included in that set of residual rights. As agreed upon, however, with residual rights unassigned and the issue left in the balance, and with each side required to exercise its rights in the EEZ with due regard for the rights of the other, the regime appeared ambiguous. These provisions left any undefined rights unassigned, and gave no hint as to how to weigh the balance in settling any dispute over such assignment. Moreover, these provisions, while requiring "due regard," did not define just what regard is due, leaving that difficult and dangerous question on the table, with the answer very much dependent upon the eye of the beholder.

111. *Id.* ("This . . . meant a considerable success for the Coastal States Group. . . ." *Id.* at 621. Article 55 established the exclusive economic zone as a new regime not part of the territorial sea, while Article 86 established, conversely, that the exclusive economic zone was likewise not a part of the high seas. UNCLOS art. 55 states:

The exclusive economic zone is an *area beyond and adjacent to the territorial sea*, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

UNCLOS art. 86 states:

The provisions of this Part [covering the high seas] apply to all *parts of the sea that are not included in the exclusive economic zone*, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

Id. (emphasis added).

112. See generally VICUNA, *supra* note 2, at 16-90.

D. Ambiguity

Perhaps in an effort to resolve this question, the phrase “referred to in article 87” was inserted into the phrase “freedoms of navigation and overflight,” so that what became Article 58 of the Convention now says, “freedoms referred to in Article 87 of navigation and overflight.”¹¹³ The freedoms referred to in Article 87 include *high seas* freedoms of navigation and overflight.¹¹⁴ Internationally lawful uses of the sea related to *high seas* freedoms of navigation and overflight historically included military operations, as discussed above.¹¹⁵ The vast weight of authority confirms that this is the

113. LEGISLATIVE HISTORY, *supra* note 23, at 97.

114. Article 87, Freedom of the High Seas, states:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Id.

115. See BARBARA KWIATKOWSKA, *THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA* 198-235 (1989); Barbara Kwiatkowska, *Military Uses in the EEZ—a reply*, 11 *MARINE POL’Y* 249 (1987) [hereinafter *Kwiatkowska-Military Uses*]; Boczek, *supra* note 7, at 450; ATTARD, *supra* note 2, at 63 (“[T]he drafters intended to equate the quality of [the freedoms of navigation and overflight in the exclusive economic zone] with those enjoyed under Article 87 on the high seas.”; “This vague proviso is intended to facilitate the freedoms of navigation and communication particularly where naval maneuvers are involved.” *Id.* at 74); VICUNA, *supra* note 2, at 28 (“[T]his reference to Article 87 was introduced in 1977 with the express intention of identifying the freedoms that all States enjoy in the exclusive economic zone with the same freedoms that they enjoy in the high seas. . . .”). *But see* Lowe, *supra* note 109, at 250-51 (“[W]e differ only in our assessment of how well [the understanding that military activities are permitted in the EEZ] was translated into a convention provision.”).

UNCLOS art. 58, Rights and Duties of Other States in the Exclusive Economic Zone, states:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of 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

proper interpretation.¹¹⁶ For dissenters, however, Article 58 also has the effect of reserving the exclusive economic zone for peaceful purposes. Article 58 states, in part, that “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.”¹¹⁷ Article 88 of the Convention states: “The high seas shall be reserved for peaceful purposes.”¹¹⁸ Thus, the interplay of these two Articles reserves the exclusive economic zone, like the high seas, for peaceful purposes. The question then becomes: Does the reservation of the *sui generis* exclusive economic zone for peaceful purposes prohibit previously lawful naval maneuvers and operations in these waters? As to this question, the Convention is silent. Some suggest that this may re-inject the ambiguity Richardson’s language¹¹⁹ sought to remove.¹²⁰

Although it is clear that maritime powers intended—and some say it was the “general understanding” of the Convention—to permit, as a matter of right, military uses in the exclusive economic zone,¹²¹ some coastal States persistently objected to that view. Brazil, for example, like the United States, was part of the Casteneda-Vindenes Group.¹²² In a declaration made upon

and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Id.

116. See, e.g., *infra* note 133.

117. UNCLOS art. 58.

118. *Id.* art. 88.

119. Casteneda, *supra* note 2, at 622 (“Other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft . . . and compatible with other provisions of the convention.”).

120. See ATTARD, *supra* note 2, at 66 (“The drafters of the UNCLOS III EEZ regime have created a delicate, intricate, and sometimes ambiguous mechanism. . . .”); BOOTH, *supra* note 2, at 80-81 (“[A] creative ambiguity would have arisen because of this *sui generis* character of the EEZ.”); Boczek, *supra* note 7, at 451 (“The wording of article 58, however, is ambiguous enough for the promoters of coastal state jurisdiction to claim . . . that certain foreign military activities in their respective economic zones could not be accommodated under article 58 as internationally ‘lawful uses of the sea. . . .’”); Michele Wallace, *The Right of Warships to Operate in the Exclusive Economic Zone as Perceived by Delegates to the Third United Nations Law of the Sea Convention, in INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD?* 345, 345 (Jon M. Van Dyke et al. eds, 1988) (“The resolution of this conflict in the text of the Convention is to a large extent ambiguous.”).

121. Wallace, *supra* note 120, at 345 (citing Ambassador Tommy T.B. Koh of Singapore, in *SENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 303-04* (John M. Van Dyke ed., 1985)).

122. LEGISLATIVE HISTORY, *supra* note 23, at 113 n.174. The group included Australia, Brazil, Bulgaria, Canada, Egypt, India, Kenya, Mexico, Nigeria, Norway, Peru, Singapore, the Soviet Union, the United Kingdom, the United Republic of Tanzania, the United States,

signing the Convention, Brazil insisted that “the provisions of the convention do not authorize other States to carry out military exercises or manoeuvres within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent of the coastal State.”¹²³ Recent Brazilian domestic law implements this view.¹²⁴ Although this is best understood as the fading cry of a lone dissenter, carried away by the current but refusing submission to the inevitable, this objection, along with those of Uruguay and Cape Verde, is sometimes cited as evidence of ambiguity concerning the legal status of military operations in the exclusive economic zone.¹²⁵ Furthermore, these dissenters can argue that the issue of military uses was never formally discussed at the Conference, despite efforts of a number of countries to bring it to the surface.¹²⁶ Indeed, it was the United States which foreclosed explicit discussions on “[a]ny specific limitation on military activities,” arguing that “such a complex task could quickly bring to an end current efforts to negotiate a law of the sea convention.”¹²⁷ While contending that the term “peaceful purposes”¹²⁸ did not preclude military activities generally, the United States suggested “[limitations] on military activities would require the negotiation of a detailed arms control agreement.”¹²⁹ The apparent exclusion of the subject from formal negotiations, combined with the “remarkable”¹³⁰ silence of the Convention “on legal questions connected with military uses”¹³¹ (a silence that might logically follow from exclusion of the subject in negotia-

and Venezuela.

123. LEGISLATIVE HISTORY, *supra* note 23, at 102.

124. Law No. 8617 of 4 January 1993, On the Territorial Sea, The Contiguous Zone, The Exclusive Economic Zone and the Continental Shelf, *reprinted in* U.N. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, U.N. LAW OF THE SEA BULLETIN NO. 23 at 17, 19 (1993).

125. *See, e.g.*, Lowe, *supra* note 109, at 251. *See also* Wallace, *supra* note 120, at 346-48; Boczek, *supra* note 7, at 451; Lowe, *supra* note 11, at 179; ATTARD, *supra* note 2, at 68; BROWN, *supra* note 2, at 171-72.

126. *See generally* Wallace, *supra* note 120 (discussing proposals to limit the uses of the seas to peaceful purposes by Egypt, Bulgaria, the Congo, Bangladesh, Peru, Brazil, Albania, the Khmer Republic, Costa Rica, Ecuador, El Salvador, Pakistan, the Philippines, Portugal, Senegal, Somalia, Uruguay, and China). *See also* VICUNA, *supra* note 2, at 108.

127. *Peaceful Uses of Ocean Space: Zones of Peace and Security (Continued)*, 5 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, 4th Sess., 67th Mtg. at 62, U.N. Doc. A/CONF.62/SR.57-70, U.N. Sales No. E.76.V.8 (1976) (Comments of U.S. Delegate, T. Vincent Learson in a plenary session) [hereinafter 5 OFFICIAL RECORDS].

128. UNCLOS art. 88 states: “The high seas shall be reserved for peaceful purposes.” The United States view was that this did not prohibit previously lawful naval maneuvers and operations in these waters. Wallace, *supra* note 120, at 347. “The term ‘peaceful purposes’ did not, of course, preclude military activities generally. The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with principles of international law.” 5 OFFICIAL RECORDS, *supra* note 127, at 62. (comments of U.S. Delegate, T. Vincent Learson in a plenary session).

129. 5 OFFICIAL RECORDS, *supra* note 127, at 62; VICUNA, *supra* note 2, at 108 n.61.

130. ATTARD, *supra* note 2, at 68.

131. *Id.*

tions), render suspect, to some, the conclusion that military uses were intended to be permitted under the Convention regime.¹³² This slippery issue has generated something of an undercurrent of academic discussion over the question of just precisely what military uses, if any, are permitted in the zone by right.¹³³

The Third United Nations Conference on the Law of the Sea completed its work in 1982, and the Convention opened for signature on December 10th of that year.¹³⁴ It was signed by 117 nations.¹³⁵ In terms of the battle for

132. Cf. BROWN, *supra* note 2, at 177 (discussing the Casteneda-Vintendes Group negotiations, and dismissing the “anecdotal evidence” of their general understanding as “hardly qualifying as *travaux préparatoires*.”). Compare BOOTH, *supra* note 2, at 80-81 (“[T]he silence of the document on military matters hides a number of rights for navies, such as the right to deploy weapons, to conduct naval exercises and to hold weapons tests within the EEZs of other states.”), with WANG, *supra* note 66, at 370 (“The issue of military uses of the ocean has been neglected at the United Nations Law of the Sea Conferences.”).

133. See, e.g., Boubonnier & Haeck, *supra* note 13, at 958 (“Concerning Article 33, an interpretive polemic arises over possible restrictions to military exercise, and possibly military training overflights, occurring over the exclusive economic zone.” *Id.* at 958. “[A] controversy exists in the interpretation of the U.N. Convention on the Law of the Sea pertaining to the legitimacy of aerial military maneuvers over the exclusive economic zone, which could be an exception to the freedom of overflight edict with Article 3 of the Chicago Convention.” *Id.* at 896 n.40.); ATTARD, *supra* note 2, at 67-69, 85 (“[T]he proviso . . . is intended to facilitate military navigation and overflight. However, this vague proviso is bound to lead to problems.”); VICUNA, *supra* note 2, at 112-20; BROWN, *supra* note 2, at 171, 173-89 (“Opinions differ as to whether such military use of the EEZ is a freedom or lawful use attributed to other States in Article 58 of the UN Convention or an unattributed or residual use under Article 59.”); Kwiatkowska-*Military Uses*, *supra* note 115, at 250 (The Casteneda-Vintendes Group compromises “were accepted and subsequently incorporated . . . as sufficiently evidencing that the navigational and other communications freedoms, including the related military uses, remained—despite the *sui generis* character of the EEZ—to be governed by the freedom of the high seas . . . in view of the legislative history . . . military uses associated with the operation of ships and aircraft such as naval maneuvers are clearly the ‘internationally lawful uses’ of the sea governed by freedom of navigation and overflight.” *Id.*); Lowe, *supra* note 109, at 250 (“[I] share [Kwiatkowska’s] view of the general understanding in UNCLOS III that military activities in the EEZ be permitted. . . .”); BOOTH, *supra* note 2, at 80-81; Meyer, *supra* note 11; Rose, *supra* note 11; Boczek, *supra* note 7; Lowe, *supra* note 11. See also Dale G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT’L L.J. 283, 290-91 (1999).

Unlike some States, western nations generally recognize that foreign naval vessels may transit through this zone in the “normal mode” and may even conduct military exercises within a foreign State’s EEZ, bound only by the obligation to have “due regard” to the legitimate resource rights of the coastal State and, of course, other State users. Such an interpretation is mildly contentious, given the requirement for “peaceful uses” of this zone mandated by Article 58 of the LOSC, though it is quite ambitious to conclude, as some publicists do, that reference to ‘peaceful uses’ of the high seas within Article 88 of the Convention necessarily prohibits all naval/military activity within international waters. Such an interpretation is certainly not a preferred one adopted by more measured considerations.

Id. (citations omitted).

134. Bernardo Zuleta, *Introduction to THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: WITH INDEX AND FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA* at xix, xxiv, U.N. Sales No. E.83.V.5 (1983).

use of the seas for military and strategic purposes, the maritime powers obtained in the Convention, at best, a draw—perhaps stalemate or standoff better describes the situation, since the forces had not left the field. The history of the battle for control through the signing of the Convention in 1982 is reminiscent of the opening stages of World War I: a series of flanking movements ending in stalemate and stand off when the opposing forces ran out of room to maneuver. Developing coastal States attacked with extended sovereignty, but were outflanked by maritime powers' preferential fishing rights proposals. Developing coastal States wheeled to the flank once again, attacking with sovereign rights and jurisdiction in a *sui generis* natural resources zone, only to find themselves facing maritime powers armed with a regime of high seas freedoms. Again moving to a flank attack, developing coastal States proposed limits under the peaceful purposes provisions, but maritime powers again fought them off. Unable to maneuver further, both sides declared victory and rested, staring thoughtfully across no man's land at an undefeated foe, each considering other ways to continue the battle.

What can be said about the nature of this stand off? The Convention established a regime in the EEZ that is neither totally inclusive, nor totally exclusive. Coastal States did not gain control as a matter of sovereignty, but did gain certain sovereign rights and some jurisdiction to regulate activities in their EEZ. These coastal State preferences are justified primarily by concerns for ecological and environmental preservation. Maritime nations must condition their activities in foreign EEZs upon due regard for these coastal State preferences. Articles 55 and 86 of the Convention establish that the exclusive economic zone is unique, neither part of the territorial sea nor part of the high seas.¹³⁶ Articles 56 and 58, however, create a balance between the rights of coastal States and those of foreign maritime States.

Article 56 awards coastal States "sovereign rights" to manage and conserve the natural resources in the zone, and "with regard to other activities for [the zone's] economic exploitation and exploration." The article also assigns coastal States "jurisdiction" with regard to artificial islands, installations and structures, marine scientific research, and the preservation of the marine environment.¹³⁷ These competencies, however, do not grant sovereignty over the zone itself,¹³⁸ nor are they absolutely exclusive.¹³⁹ The "sov-

135. *Id.*

136. In describing the high seas, UNCLOS art. 86 excludes the exclusive economic zone from the high seas, stating, "The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone. . . ." UNCLOS art. 55 excludes the exclusive economic zone from the territorial sea by stating, "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime. . . ." *Id.*

137. UNCLOS art. 56.

138. UNCLOS art. 58(2) states: "Articles 88 to 115 . . . apply to the [EEZ] in so far as they are not incompatible with this part." Therefore, Article 89 applies to the EEZ. Article 89 states, "Invalidity of claims of sovereignty over the high seas—No State may validly purport to subject any part of the high seas to its sovereignty." Thus, no State may subject any part of the EEZ to its sovereignty.

oreign rights” are limited in many cases by a duty to share with other States.¹⁴⁰ “Jurisdiction” is provided for in—and limited by—related provisions of the Convention.¹⁴¹ Moreover, “in exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.”¹⁴²

For maritime States seeking presence in and use of the EEZ, Article 58 explicitly preserves the freedom of navigation and overflight and of 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. . .”¹⁴³ Like coastal States’ sovereign rights and jurisdiction, however, these rights must be exercised with “due regard to the rights and duties of the coastal State,”¹⁴⁴ and foreign maritime States “shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with [Part V of the Convention].”¹⁴⁵

The ability of maritime powers to engage in naval activities is therefore not unqualified. The effect upon coastal State claims and interests—that is, upon natural resources and the environment—must be considered before deciding upon the nature and scope of a naval operation in a foreign EEZ. Thus, absence of legal challenge to naval activities is by no means assured. Whether and to what extent unilateral naval operations in a foreign EEZ are permitted by the Convention remains a subject of academic discussion, and in some cases, affected by domestic law claims of coastal States that reflect differing interpretations of the Convention’s meaning.¹⁴⁶

139. BROWN, *supra* note 2, at 131, 181; ATTARD, *supra* note 2, at 47-50; VICUNA, *supra* note 2, at 43-48.

140. BROWN, *supra* note 2, at 131, 181; ATTARD, *supra* note 2, at 47-50.

141. See BROWN, *supra* note 2, at 182 (arguing that “to describe the zone as exclusive” is not accurate in relation to the jurisdiction granted coastal states by Article 56); ATTARD, *supra* note 2, at 48-50. UNCLOS Art. 56 states, in pertinent part, “[J]urisdiction as provided for in the relevant provisions of this Convention with regard to:

- (i) the establishment and use of artificial islands, installations and structures;
- (ii) marine scientific research;
- (iii) the protection and preservation of the marine environment. . .

Id.

142. UNCLOS art. 56.

143. *Id.*

144. *Id.* art. 58

145. *Id.*

146. For discussions of the variations among coastal state EEZ claims, see Hugo Caminos, *Harmonization of Pre-Existing 200-Mile Claims in the Latin American Region with the United Nations Convention on the Law of the Sea and its Exclusive Economic Zone*, 30 U. MIAMI INTER-AM. L. REV. 9 (1998); Nadelson, *supra* note 7, at 464-65; Barbara Kwiatkowska, *Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea*

It is fair to say that the Convention's guidance on the question of military activities in EEZs is less than definitive. It is as true today as it was when the words were written, that "even when the Convention enters into effect, its gaps and ambiguities will not prevent conflicts between coastal and other states regarding the rights to military uses in the EEZ."¹⁴⁷

IV. THE UNITED STATES' VIEW

Paying this academic discussion no more mind than it pays proponents of the minority dissenting view, the United States has stated that the customary international law of the sea, as codified in the Law of the Sea Convention, is clear on the issue of military activities in EEZs. The United States has not yet ratified the Convention, which entered into force on November 16, 1994,¹⁴⁸ but takes the view that, except for provisions concerning deep seabed mining, it accurately states customary international law.¹⁴⁹ The United States interpretation of the Convention is this:

[A]ll States continue to enjoy in the [EEZ] traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone.¹⁵⁰

Quite naturally, the United States Navy adopts this position in *The Commander's Handbook on the Law of Naval Operations*,¹⁵¹ which provides

Convention and State Practice, 22 OCEAN DEV & INT'L L. 153 (1991); and Francisco O. Vicuna, *State Practice and National Legislation Relating to the Exclusive Economic Zone, the Continental Shelf and Straits Used for International Navigation: Basic Trends*, in LAW OF THE SEA AT THE CROSSROADS: THE CONTINUING SEARCH FOR A UNIVERSALLY ACCEPTED REGIME 350, 359 (Rüdiger Wolfrum, ed., 1990) ("Military uses of the exclusive economic zone represent one of the discrepant interpretations.").

147. Boczek, *supra* note 7, at 458.

148. Under UNCLOS Art. 308, the convention "shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession." As of November 16, 1993, the 60th ratification or accession was deposited with the Secretary General. U.N. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, U.N. LAW OF THE SEA BULLETIN NO. 24 at 1 (1993).

149. See U.S. Oceans Policy, Statement by the President, Mar. 10, 1983, 19 WEEKLY COMP. PRES. DOC. 384 (1983).

150. Warren Christopher, United States of America Statement in Right of Reply (Mar. 8, 1983) 17 THIRD CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 244, U.N. Sales No. E.83.V.3 (1984) reprinted in ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M/MCWP5-2.1/COMDTPUB 5800.1) at 1-25, 1-27 to 1-28 (1997) [hereinafter ANNOTATED SUPPLEMENT].

151. THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS NWP 9/FMFM (Rev. A 1989), reprinted in 64 INT'L LAW STUDIES: THE LAW OF NAVAL OPERATIONS 385, 411 (Horace B. Robertson ed., 1991). For an updated and annotated version of the COMMANDERS

operational guidance to its personnel. It is therefore consistent for readers to view *The Commander's Handbook* as containing "an exposition of the United States' view of international law."¹⁵² *The Commander's Handbook* states that "[W]arships and military aircraft enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms, in and over [the EEZ]. . . ."¹⁵³ It further states that "[T]he existence of an exclusive economic zone in an area of naval operations need not, of itself, be of operational concern to the naval commander."¹⁵⁴ Although called, in general, "resoundingly successful in explaining the intricacies of the law,"¹⁵⁵ *The Commander's Handbook* has been criticized as containing "controversial pronouncements" regarding certain unsettled areas.¹⁵⁶ The EEZ is one such area. As has been discussed, the problem of naval activities in the EEZ is somewhat more contentious than *The Commander's Handbook* might lead one to believe.¹⁵⁷ On both the strategic and operational level, the existence of an EEZ should be a matter of conscious concern and careful consideration for the naval commander, just as should the possibility of coastal State objection to naval activities within it.¹⁵⁸

Some commentators opine that the Convention explicitly limits warship operation in the EEZ by the obligation to have due regard to the rights and duties of the coastal State.¹⁵⁹ In its EEZ, the coastal State has certain "sovereign rights" with respect to natural resources, and "jurisdiction" over the establishment and use of artificial islands, installations and structures, over marine scientific research, and over the protection and preservation of the

HANDBOOK, see ANNOTATED SUPPLEMENT, *supra* note 150.

152. Alan V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea* in 64 INTERNATIONAL LAW STUDIES: THE LAW OF NAVAL OPERATIONS 109, 109 (Horace B. Robertson ed., 1991).

153. ANNOTATED SUPPLEMENT, *supra* note 150, at 2-20, § 2.4.2.

154. *Id.*

155. Lowe, *supra* note 152, at 109.

156. *Id.* Cf. Bernard H. Oxman, *International Law and Naval and Air Operations at Sea*, in 64 INTERNATIONAL LAW STUDIES: THE LAW OF NAVAL OPERATIONS 19, 34 (Horace B. Robertson ed., 1991).

157. See Lowe, *supra* note 152, at 112-13. ANNOTATED SUPPLEMENT, *supra* note 150, at 2-20, § 2.4.2 n.58 (explaining that "A few nations explicitly claim the right to regulate the navigation of foreign vessels in their EEZ beyond that authorized by customary international law reflected in the LOS Convention: Brazil, Guyana, India, Maldives, Mauritius, Nigeria, Pakistan, and the Seychelles. . . . The United States rejects those claims.").

158. Warship operation in a foreign EEZ is, at a minimum, subject to the following rules: "(1) Refrain from the unlawful threat or use of force; (2) exercise due regard for the rights of other nations to use the sea; (3) exercise due regard for the rights of the coastal state in the EEZ; and (4) observe the rules of international law and obligations under other treaties." Meyer, *supra* note 11, at 244 (citing Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 837-38 (1984)).

159. See UNCLOS art. 56; Bernard H. Oxman, *The Regime of Warships under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 837-38 (1984); Boczek, *supra* note 7, at 450.

marine environment.¹⁶⁰ These provisions might preclude naval activities that potentially interfere with or harm these coastal State interests.¹⁶¹ A frequently cited example is that of a weapons exercise, test or placement, such as the use of mines, that might potentially harm a natural resource.¹⁶² Discussion, likewise, obscures the issue of emplacement of military devices, such as detection devices, in the EEZ.¹⁶³ It is unsurprising then, to find that the United States view of the law is not universally accepted. Uruguay, for example, takes the position that the Convention does not explicitly permit the same range of uses associated with warship operation in the EEZ as are permitted on the high seas.¹⁶⁴ Brazil has enacted domestic legislation that states: "In the exclusive economic zone, military manoeuvres, in particular those involving the use of weapons or explosives, may only be carried out by other States with the consent of the Brazilian Government."¹⁶⁵ By legislation

160. UNCLOS art. 56.

161. Oxman, *supra* note 65, at 838-43; Boczek, *supra* note 7, at 450-54; J. Ashley Roach, *The Hague Peace Conferences: The Law of Naval Warfare at the Turn of the Century*, 94 AM. J. INT'L L. 64, 67 (2000) ("[I]nternational recognition of the exclusive economic zone (EEZ) and the continental shelf now requires belligerents to have due regard for the rights of coastal states in those zones when conducting hostilities in sea areas between the territorial sea and the high seas and on the continental shelf."); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 14 (Louise Doswald-Beck ed., 1995).

162. See, e.g., John Astley & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119, 137 (1997) ("[W]hile a naval exercise permissible in the EEZ, it must not significantly interfere with coastal state fishing activities in the area."); Oxman, *supra* note 65, at 838; Lowe, *supra* note 152, at 113; Boczek, *supra* note 7, at 451; SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, *supra* note 153, at 108.

If a belligerent considers it necessary to lay mines in the exclusive economic zone . . . of a neutral state, the belligerent . . . shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral state. Due regard shall also be given to the protection and preservation of the marine environment.

Id.

163. See Boczek, *supra* note 7, at 452-55, 458; Lowe, *supra* note 11, at 179 n.27 (citing Tullio Treves, *Military Installations, Structures and Devices on the Seabed*, 74 AM J. INT'L L. 808 (1981)).

164. Lowe, *supra* note 152, at 113 n.22 (citing Letter from the Ambassador of the Oriental Republic of Uruguay, London, August 18, 1987). Under Uruguay's view, rights to conduct military operations in the EEZ are not awarded to either the foreign state or to the coastal state. They are residual rights, and conflicts over their exercise must be resolved per Article 59 of the Convention, "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." UNCLOS art. 59. Such conflict resolution might well favor the coastal state. See generally Lowe, *supra* note 152, at 179; Barbara Kwiatkowska-Military Uses, *supra* note 115, at 249; Lowe, *supra* note 109, at 251.

165. Law No. 8617 of 4 January 1993, On the Territorial Sea, The Contiguous Zone, The Exclusive Economic Zone and the Continental Shelf, reprinted in LAW OF THE SEA BULLETIN NO. 23, *supra* note 124, at 17, 19 (1993). The Brazilian position, as well as that of Uruguay, are distinctly minority views, and have been rejected by most states and by "the overwhelming majority of commentators." Lowe, *supra* note 152, at 114. See also BROWN, *supra* note 2,

enacted on May 2, 1993, Iran flatly prohibited "foreign military activities and practices" within its EEZ.¹⁶⁶ Similarly, India, Malaysia, and Pakistan have all made claims that would restrict naval activities in their EEZs without prior permission.¹⁶⁷ Although the Convention may express a general rule with respect to the existence of the basic EEZ concept in customary international law, some believe "it cannot be considered that the exact scope of the rights that a State can exercise in the exclusive economic zone is an issue settled in international law."¹⁶⁸ Moreover, the Convention is not the last and final word on the customary law of the sea in this area. The years since its completion have seen significant coastal State domestic legislation, a practice that demonstrates the importance of the EEZ to these nations.

Measures to protect the marine environment raise an additional potential basis for efforts to limit naval activities in coastal waters. Although the Convention immunizes warships from the provisions of its environmental preservation and pollution control regime,¹⁶⁹ concern over nuclear contamination may nevertheless provide a basis for some coastal States to attempt to restrict the operation of some warships. One commentator predicted in 1983, "The passage of 'potential polluters,' such as nuclear-powered vessels, vessels carrying nuclear or other 'hazardous' cargoes, and ammunition ships, through the EEZs of some coastal States may in time be jeopardized, treaty or no treaty."¹⁷⁰ Another has stated that the Convention may justify a coastal State in "prohibiting a military activity which caused ecological harm."¹⁷¹ Giving a ring of truth to these prophesies—perhaps only distant and faint, but nevertheless distinctly audible—Malta, in its 1993 declaration made upon ratification of the Convention, stated:

Malta is of the view that the sovereign immunity contemplated in [the Convention] Article 236 does not exonerate a State from such obligation, moral or otherwise, in accepting responsibility and liability for compensation and relief in respect of damage caused by pollution of the marine environment by any warship, naval auxiliary, other vessels or aircraft owned or operated by the State and used on government non-commercial service.¹⁷²

at 175 ("Brazil's understanding of the Convention is unsound in so far as it requires the coastal State's consent for the conduct of military exercises or manoeuvres.").

166. Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and Oman Sea (May 2, 1993), *reprinted in* LAW OF THE SEA BULLETIN No. 24, *supra* note 148, at 10-15.

167. MARITIME CLAIMS REFERENCE MANUAL, *supra* note 12.

168. VICUNA, *supra* note 2, at 244 (citing Jonathan I. Charney, *The Exclusive Economic Zone and Public International Law*, 15 OCEAN DEV. & INT'L L. 233, 239 (1985)).

169. UNCLOS art. 236.

170. Lewis M. Alexander, *The Ocean Enclosure Movement: Inventory and Prospect*, 20 SAN DIEGO L. REV. 561, 586 (1983).

171. ATTARD, *supra* note 2, at 68 (citing Arthur H. Westing, *Military Impact on Ocean Ecology*, 1 OCEAN YEARBOOK 436 (1978)).

172. Declaration of Malta upon Ratification, *reprinted in* LAW OF THE SEA BULLETIN NO.

Malta's declaration indicates a conviction that its national interest in environmental protection conditions a foreign State's interest in navigating in Maltese coastal waters, thus potentially restricting foreign warship operations.

Chile has gone even farther, declaring a legal interest in the high seas adjacent to its EEZ, calling these waters a "presential sea."¹⁷³ In this regime, Chile asserts three special interests in a vast area of the high seas beyond the EEZ.¹⁷⁴ These special interests are driven by a concern for environmental protection of its coastal seas, which, Chile believes, requires its involvement in management of the marine ecosystem beyond its EEZ.¹⁷⁵ The three special interests include "first, the participation in and surveillance of the activities undertaken by other States in the high seas areas of interest. . . ."¹⁷⁶ This would not exclude other States, but would require Chilean inclusion in foreign State activities.¹⁷⁷ Second, an interest in economic activities in the presential sea, to promote national economic development, and to ensure that foreign State activities do not harm Chilean development.¹⁷⁸ This could have jurisdictional implications, as it could provide a justification for Chilean regulatory efforts in regards to conservation of fisheries.¹⁷⁹ As noted above with respect to the EEZ, this also might inhibit weapons testing that potentially damage living natural resources. Third, establishment of the presential sea has a national security motivation—"not in a strict military sense but in terms of protection of the national interest, including the economic dimension . . . with particular reference to the Exclusive Economic Zone and the territorial sea."¹⁸⁰

The idea is that, to protect natural resources in its EEZ, Chile must prevent damage to natural resources in the bordering high seas, in order to avoid a spillover effect. As a part of this effort, the presential sea concept mandates Chilean inclusion, and therefore implies Chilean involvement in all foreign

23, *supra* note 124, at 7.

173. Francisco O. Vicuna, *Toward an Effective Management of High Seas Fisheries and the Settlement of Pending Issues of the Law of the Sea*, 24 OCEAN DEV. & INT'L L. 81 (1993)[hereinafter Vicuna, *Presential Sea*] (citing Jorge Martinez Busch, *La gran tarea de esta generacion es la ocupacion efectiva de nuestra mar* (Clase Magistral dictada por el Comandante en Jefe de la Armada de Chile, Valparaiso, May 4, 1990) and Chile, Law No. 19.079, *Official Journal*, Sept. 6, 1991).

174. Chile's presential sea includes 19,967,337 square kilometers, extending from the western edge of the continental shelf of Easter Island to the South Pole. Thomas A. Klingan, Jr., *Mar Presencial (The Presential Sea): Deja Vu All Over Again?—A Response to Francisco Orrego Vicuna*, 24 OCEAN DEV & INT'L L. 93 at 94 (1993) ("[I]t constitutes one of the largest areas of hegemony in existence."). Admittedly, Chile's assertion is not accepted by the larger international community.

175. Vicuna, *Presential Sea*, *supra* note 173, at 88.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

nation naval maneuvers in these waters. Exclusion of foreign navies is not necessarily required, but the requirement of Chilean inclusion may, as a practical matter, have that effect. It is not difficult to imagine circumstances in which the United States Navy, for example, might wish to conduct naval exercises without foreign nation inclusion or observation. Under the Chilean regime, were it to be accepted and affirmatively enforced, a large area of the Southern Pacific might be eliminated from use for those purposes. Chile's presential sea, based in principle upon concerns for environmental protection, potentially imposes conditions and limits on foreign warship operation in the claimed area.

Since the Conference closed in 1982, the Convention's general EEZ concept—that coastal States are entitled to claim and exercise sovereign rights over natural resources in and under the sea within 200 miles of their coast—has become accepted as part of customary international law,¹⁸¹ but without clarification of the specific problem of naval operations discussed above. International tribunals, including the International Court of Justice, and United States domestic courts, have provided little guidance, although acknowledging the existence of the EEZ in international law in a general sense.¹⁸² State declaratory practice is equally nondispositive, although as of June 1993, 89 of 143 coastal States claimed 200 mile EEZs.¹⁸³ Although these domestic claims follow the Convention's EEZ regime as a basic guideline, they contain significant differences in specific implementation.¹⁸⁴ In the words of Orrego Vicuna, "[T]he detailed mechanisms of the Convention in reference to the exclusive economic zone, unlike its concept and basic elements, would not have been incorporated into customary international law, since they do not have sufficient support in national practice and legislation."¹⁸⁵ National practice and legislation is varied and inconsistent in the implementation of the detailed EEZ mechanisms, and so does not provide a rule for naval operations. State declaratory practice, while not providing a

181. Caminos, *supra* note 10, at 17; Boczek, *supra* note 7, at 458; BROWN, *supra* note 2, at 141, 182; VICUNA, *supra* note 2, at 246, 256; ATTARD, *supra* note 2, at 308; SMITH, *supra* note 83, at 30; BUREAU OF OCEANS AND INTERNATIONAL AND SCIENTIFIC AFFAIRS, U.S. DEPT. OF STATE, LIMITS IN THE SEAS NO. 112, UNITED STATES RESPONSE TO EXCESSIVE NATIONAL MARITIME CLAIMS 37 (1992) [hereinafter LIMITS IN THE SEAS NO. 112].

182. International cases include Continental Shelf Tunisia Libya Judgment (Tunisia v. Libyan Arab Jamahiriva) 1982 I.C.J. 18 (Feb. 24); Delimitation of Maritime Boundary in the Gulf of Maine (Canada v. U.S.) 1984 I.C.J. 246 (Oct. 12); Continental Shelf (Libyan Arab Jamahiriva v. Malta) 1985 I.C.J. 13 (Jun. 3); Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, 25 I.L.M. 251 (1986). For a general discussion of these cases as they relate to the development of the EEZ in customary international law, see ATTARD, *supra* note 2, at 301-03. The U.S. cases include Koru North America v. United States, 701 F. Supp. 229, 232 n.6 (1988) and United States v. Rioseco, 845 F.2d 299, 301 n.1 (1988).

183. LAW OF THE SEA BULLETIN NO. 23, *supra* note 124, at 79.

184. See VICUNA, *supra* note 2, at 143-54; ATTARD, *supra* note 2, at 49-54; BROWN, *supra* note 2, at 143-45, 163-68.

185. VICUNA, *supra* note 2, at 246.

rule of law, does reflect a common theme—and the theme hints that unilateral foreign naval activities in a coastal State's EEZ will, in an increasing number of cases, be viewed with disfavor. Coastal States are waging the battle for control of their coastal waters outside of the language of the Convention, using domestic regulation to extend their ability to exclude other States from these waters.

State declaratory practice reflects a continuing effort by coastal States to retain control of coastal waters by legal exclusion—whether by claims of sovereignty, or extensive regulatory jurisdiction, or some combination amounting to quasi-sovereignty.¹⁸⁶ Robert Nadelson, in a 1992 analysis of differences between State EEZ claims and the Convention, divided coastal State claims into four analytical categories: territorial, jurisdictional, functional, and extra-legal differences from the Convention.¹⁸⁷ These categories reflect different means to obtain similar ends; the legislation in each category manifests the coastal State's effort to control its EEZ by excluding others to the extent deemed necessary to its national interests, however defined.¹⁸⁸

In the territorial category, the most obvious examples of the coastal State desire for extended exclusion and control are the eleven current claims of 200-mile territorial seas.¹⁸⁹ Other States, however, expand territorial control by reserving a right to create designated areas and limit freedom of navi-

186. See Nadelson, *supra* note 7, at 486-87; LEWIS M. ALEXANDER, *NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT, GEOGRAPHICAL IMPLICATIONS FOR THE UNITED STATES* 77 (1986).

As the number of states claiming an EEZ continues to grow, law of the sea experts are becoming increasingly aware of differences in state practice, as evidenced by domestic legislation. . . . There are two general categories of these differences or 'inconsistencies' with the Convention. One is the failure on the part of certain states, in their legislation, to specify international community rights that are guaranteed in the Convention; a second is a deliberate revocation of those rights.

Id.

See also *id.* at 91, Tble. 11 (listing 47 states whose EEZ proclamations and/or national laws appear inconsistent with the UNCLOS provisions regarding freedoms of navigation and overflight, *reprinted in* ANNOTATED SUPPLEMENT, *supra* note 150, tbl. A2-7). *But see* Caminos, *supra* note 10, at 10 (discussing Latin American states: "Recent trends demonstrate that harmonization of domestic law with international law will be a reality in the near future.")

187. Nadelson, *supra* note 7, at 479.

188. For discussions concerning defining national interests, see, e.g., Robert Blackwill, *A Taxonomy for Defining U.S. National Security Interests in the 1990's and Beyond*, in *EUROPE IN GLOBAL CHANGE* 100 (Wermer Weidenfeld & Josef Janning, eds., 1993); ELMER PLISCHKE, *FOREIGN RELATIONS, ANALYSIS OF ITS ANATOMY* 9-49 (1988); Thomas W. Robinson, *A National Interest Analysis of Sino Soviet Relations*, 11 *INT'L STUD. Q.* 135 (1967) *reprinted in* *INT'L POL. AND FOREIGN POL'Y* 182 (James N. Rosenau, ed., 1969); Hans J. Morgenthau, *Another "Great Debate": The National Interest of the United States*, *XLVI AM. POL. SCI. REV.* 961 (1952).

189. Benin, Congo, Ecuador, El Salvador, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia, Uruguay claim 200 mile territorial seas. Sierra Leone, Uruguay and Somalia, curiously enough, have also ratified the Convention, placing their domestic law at odds with a potential international obligation. *U.N. LAW OF THE SEA BULLETIN* NO. 23, *supra* note 124, at 67-77.

gation within them.¹⁹⁰ These States seek control by legal exclusion of foreign vessels from designated coastal waters areas as may be deemed necessary.¹⁹¹ India's traffic control schemes are one example;¹⁹² Brazil's EEZ legislation, which denies foreign warships entry into the Brazilian EEZ without prior permission, is the paradigmatic example of extended territoriality under the EEZ regime.¹⁹³ In the jurisdictional category, some coastal States seek exclusion and control by claiming national security as a basis for jurisdiction over their EEZ.¹⁹⁴ Although coastal State security jurisdiction in the EEZ is not contemplated by the Convention, these States claim a legal right to limit freedom of navigation in their EEZ on security grounds.¹⁹⁵ North Korea's 50 nautical mile military maritime zone, which is coincident with its EEZ in the Yellow Sea,¹⁹⁶ is the most extreme example of this jurisdictionally based quasi-sovereignty. North Korea permits navigation and overflight in this zone only with prior consent "to reliably safeguard the economic sea zone of [North Korea] and firmly defend militarily the national interests and sovereignty [sic] of the country."¹⁹⁷ Other States seem prepared to assert extended control over coastal waters in a functional manner, omitting from their EEZ declarations any guarantee of the fundamental freedom of navigation in their EEZs.¹⁹⁸ This omission, which in at least some cases must be knowing and

190. See Nadelson, *supra* note 7, at 475. Examples include Guyana, India, Mauritius, Pakistan, and the Seychelles. *Id.* at 475 n.39 (citing Guyana: Maritime Boundaries Act No. 10/77, Pt. III § 18(B); Mauritius: Maritime Zones Act No. 13(77), Art. 9(b); Pakistan: Territorial Waters and Maritime Zones Act (1976), § 6; Seychelles: Maritime Zones Act N 15/1977, art. 9(b) (vi)). For the actual texts to these Maritime Acts and others, see SMITH, *supra* note 83. For other discussions of extended territoriality, see BROWN, *supra* note 2, at 163-64, and Kwiatkoska, *supra* note 98.

191. See Nadelson, *supra* note 7, at 475.

192. See BROWN, *supra* note 2, at 165 (citing Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976).

193. Law No. 8617 of 4 January 1993, on the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf, *reprinted in* LAW OF THE SEA BULLETIN NO. 23, *supra* note 124, at 17, 19.

194. Nadelson, *supra* note 7, at 475. "Bangladesh, Burma, Cambodia, Haiti, India, Pakistan, Sri Lanka, Vietnam, Yemen (Aden) all make security a basis of jurisdiction in their EEZ." *Id.* at 475 n.41 (citing Bangladesh: Act 26/1974, Article 4(2) (a); Burma: Territorial Sea and Maritime Zones Law 3/1977, Ch 3(11) (a); Cambodia: Ministry of Foreign Affairs Statement, 31 July 1982, Article 4; Haiti: Decree No. 38/1977, Article 4; India: Maritime Zones Act 1976, sec. 1/5/4(a); Pakistan: Territorial Waters and Maritime Zones Act, 1976, Article 4(2) (a); Sri Lanka: Maritime Zones Law 22/1976, Article 4(2) (a); Vietnam: Statement, 12 May 1977, sec 2; Yemen (Aden): Act 45/1977, Article 12). See also BROWN, *supra* note 2, at 165-67 (discussing legislation of Guyana, India, Mauritius, Pakistan, and the Seychelles).

195. See VICUNA, *supra* note 2, at 151.

196. Nadelson, *supra* note 7, at 476. The North Korean claim is discussed in ANNOTATED SUPPLEMENT, *supra* note 150, at § 1.5.4 and n. 54 (1997).

197. NORTH AMERICA AND ASIA-PACIFIC AND THE DEVELOPMENT OF THE LAW OF THE SEA: TREATIES AND NATIONAL LEGISLATION (Myron H. Nordquist & Choon H. Park, eds., 1981). See also J.R.V. PRESCOTT, MARITIME JURISDICTION IN EAST ASIAN SEAS 64-69 (1987) (discussing the North Korean claim as well as a similar claim made by China).

198. Nadelson, *supra* note 7, at 483. Nadelson lists in the functional category Bangla-

deliberate, indicates that these coastal States do not find their resource rights in equal balance with foreign States' freedoms of navigation and associated uses. Instead, they would give greater weight to their sovereign rights over resources than to the rights of foreign States to the exercise of high seas freedoms; in the event of conflict, the coastal State preferences would take priority at the expense of the navigational rights of other states.¹⁹⁹

Although not every coastal State has used domestic legislation to claim greater legal control over its EEZ than contemplated by the Convention,²⁰⁰ some States have done so, in one way or another. Indeed, one commentator finds even the United States itself to have hinted that it would find its EEZ rights outweigh foreign State freedoms of navigation and overflight in the event of conflict.²⁰¹ Some coastal States are using strong domestic laws to turn their EEZ from a zone of resource regulation to a "zone of absolute State control: in effect, an area of sovereignty."²⁰² It is often the less developed countries that make the strongest claims, seeking to use the law to achieve the exclusion and control they cannot yet ensure with weapons and technology.²⁰³ Many States thus use domestic EEZ legislation as a convenient vehicle to assert their perceived underlying national interests, whether in territorial expansion, self-defense and national security, economic well-being, or environmental protection and resource preservation.²⁰⁴ They do so, as Nadelson concludes, because the Convention's EEZ regime "is not sufficiently responsive to coastal State needs . . . much of the problem with the

desh, Cape Verde, Colombia, Comoros, Cook Islands, France, Guiana-Bissau, Haiti, Iceland, Malaysia, Mozambique, New Zealand, Nigeria, Western Samoa, Sri Lanka, Togo and Vietnam. *Id.* at 483 n.66. See also ATTARD, *supra* note 2, at 81-83 (discussing and listing coastal state claims that do not refer to freedoms of movement and communication).

199. See Nadelson, *supra* note 7, at 483.

200. See ATTARD, *supra* note 2, at 149 (Cuba, Mexico, Norway, Portugal, and Thailand explicitly recognize freedoms of other states in their EEZ).

201. See *id.* at 83, (noting that the United States' "1983 EEZ proclamation states that within the zone, freedoms of navigation and overflight are to be enjoyed 'without prejudice to the sovereign rights and jurisdiction of the United States....'" (quoting Presidential Proclamation No. 5030 (Mar. 10, 1983)). However, the complete quote is:

Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.

Presidential Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983). The President's Ocean Policy Statement of the same date states, "Within this Zone all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight." Statement by the President, U.S. Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383-85 (Mar 10, 1983), reprinted in 22 I.L.M. 464 (1983).

202. Nadelson, *supra* note 7, at 483.

203. See *id.*

204. Cf. Kwiatkowska, *supra* note 146, at 175 (arguing that the risk of gradual erosion of navigational and other communications freedoms in the 200 mile EEZ is, in part, exemplified by coastal State claims to sovereignty over the continental shelf).

EEZ results from the perceived threat to the coastal State posed by other States."²⁰⁵ The Convention does not assuage coastal State fears, and so some States act independently of it to protect themselves.

Thus, coastal States have by no means or measure declared legal acquiescence to the unilateral military presence in their coastal waters of foreign naval forces. One commentator, writing in 1990, noted that, "More than 30 nations currently claim extended jurisdiction of one sort or another that purports to restrict military activities in their 200 mile zones."²⁰⁶ Domestic declaratory EEZ practice continues to manifest a continuing interest in asserting some sort of sovereign control of coastal waters out to at least 200 miles,²⁰⁷ and suggests that some coastal states feel some degree of apprehension and distrust related to the unilateral activities of foreign naval powers in these waters. Like the history of the development of the EEZ, and the legislative history of the Convention, some domestic State practice suggests that coastal States perceive a strong national interest in controlling their coastal waters beyond the 12 mile territorial sea, and those believing themselves lacking the military power to protect that interest seek to maintain control by legal exclusion of foreign States.²⁰⁸

Notwithstanding some difference of opinion evident regarding naval activities in EEZs, the United States continues to aver its complete right to unilateral, unlimited naval operations in foreign EEZs (in accordance with its stated position as to interpretation of the law of the sea with respect to freedom of navigation in EEZs).²⁰⁹ "Under the Freedom of Navigation (FON) program, the United States undertakes diplomatic action at several levels to preserve its rights under international law. . . . When appropriate, the United States delivers formal diplomatic protests addressing specific maritime claims that are inconsistent with international law."²¹⁰ In addition, the United States conducts naval operations designed to assert rights with respect to freedom of navigation and operation of U.S. warships within foreign EEZs.²¹¹ Some naval operations have become highly publicized, such as the Black Sea bumping incident between U.S. and Soviet ships in 1988, and the

205. *Id.* at 486.

206. Rose, *supra* note 11, at 134.

207. Perhaps beyond 200 miles, as well. For discussions of coastal state control creeping beyond 200 miles, see Kwaitkowska, *supra* note 146; Vicuna, *supra* note 146.

208. See Felipe H. Paolillo, *The Exclusive Zone in Latin American Practice and Legislation*, 26 OCEAN DEV & INT'L LAW 105, 107-08 (1995). ("It should not be surprising, then, that coastal States tend to respond to the questions the Convention left unanswered or with respect to which participants at the Conference were forced to result to 'constructive ambiguity' by developing a practice that better meets their national interests."). See also Caminos, *supra* note 10, at 29.

209. For the U.S. position, see *supra* note 150

210. LIMITS IN THE SEAS NO. 112, *supra* note 181, at 1.

211. *Id.* at 1, 2.

shoot down of Libyan military jet aircraft by U.S. Navy warplanes in the Gulf of Sidra in 1986.²¹²

These assertions are designed to “exhibit U.S. determination not to acquiesce in excessive claims to maritime jurisdiction by other States.”²¹³ With respect to EEZs, the United States identifies the following kinds of claims as excessive:

- [C]laims to jurisdiction over maritime areas in excess of 12 miles, such as security zones, that purport to restrict non-resource related high seas freedoms;
- [E]xclusive economic zone (EEZ) claims inconsistent with Part V of the LOS Convention;
- [C]laims requiring advance notification or authorization for innocent passage of warships and naval auxiliaries through the territorial sea or EEZ or applying discriminatory requirements to such vessels. . . .²¹⁴

In 1982, the United States made diplomatic protests of seven EEZ claims it found overbroad and inconsistent with Part V of the Convention.²¹⁵ In 1983, the United States made one protest.²¹⁶ The United States protested the Iranian EEZ claim in 1994, the Pakistani EEZ claim in 1997, the Malaysian EEZ claim in 1998, and in 1999, the Indian EEZ claims.²¹⁷ The United

212. *Id.* See generally John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident, How “Innocent” Must Innocent Passage Be?*, 135 MIL. L. REV. 137 (1992), and Yehuda Z. Blum, *The Gulf of Sidra Incident*, 80 AM. J. INT’L L. 668 (1986) (discussing these incidents in light of international law).

213. LIMITS IN THE SEAS NO. 112, *supra* note 181, at 2. For a good discussion of the FON program, see Rolph, *supra* note 202, at 146-49.

The United States’ commitment to preserving and protecting maritime rights and freedoms is no better exemplified than in its Freedom of Navigation (FON) program. Recognizing that the many navigational rights it currently enjoys may be lost over time if not used, this program charts a steady course for actively asserting these freedoms globally to ensure their continued viability. Because the United States did not sign or ratify the UNCLOS III, but nevertheless accepts its navigational principles as customary international law, a continuing obligation exists to exercise these rights to preserve them. At the heart of customary international law is assertion and activism. In other words, ‘[t]o protect our navigational rights and freedoms we must exercise them.’ The Freedom of Navigation program accomplishes this by targeting and operationally challenging maritime claims that are in contravention of international law.

Id. at 146-49 (citations omitted).

214. LIMITS IN THE SEAS NO. 112, *supra* note 181, at 3

215. *Id.* at 38- 39. The U.S. sent diplomatic protests to Barbados, Burma, Grenada, Guyana, Mauritius, Pakistan, and Seychelles. *Id.*

216. *Id.* (protesting India).

217. MARITIME CLAIMS REFERENCE MANUAL, *supra* note 12 . The U.S. conducted protested claims in Iran in 1998, India twice in 1999, Pakistan in 1986, 1991 and 1998, Brazil in 1983 and 1988, and Malaysia in 1998, 1999, and 2000. *Id.*

States has frequently conducted operations asserting freedom of navigation in foreign EEZs to demonstrate its non-acquiescence to all of these claims.²¹⁸

Related protests include coastal States claims of national security interests in the region from the end of the territorial sea at 12 miles seaward to 24 miles (the contiguous zone), which is also part of the EEZ.²¹⁹ In 1982, the United States protested a Vietnamese decree, which requires advance notification, consent, and essentially innocent passage for military vessels in the Vietnamese contiguous zone.²²⁰ In 1989, "the United States protested Haiti's attempt to expand the competence of its contiguous zone to include protection of national security interests."²²¹ The United States has protested similar claims made by Bangladesh, Burma, Sri Lanka, Sudan, Syria, Venezuela, the Yemen Arab Republic, and the People's Democratic Republic of Yemen.²²² In 1990, the United States sent a diplomatic note to Namibia expressing "concern over Namibia's claim to establish control within the full extent of its 200-mile exclusive economic zone to prevent infringement of its fiscal, customs, immigration, and health laws."²²³

As discussed above, however, despite this diplomatic and operational activity, while some States have softened their claims, many have not yet done so.²²⁴ Indeed, the trend, as illustrated by the declarations of India, Pakistan, Malaysia, Iran, and Brazil, is one of coastal States claiming increasingly extended control over their EEZs and beyond.²²⁵ The importance

218. See LIMITS IN THE SEAS NO 112, *supra* note 181, at 2 ("U.S. military ships and aircraft have exercised their rights and freedom . . . against objectionable claims of more than 35 countries at the rate of some 30-40 per year.").

219. Compare UNCLOS art. 3 ([T]erritorial Sea . . . not exceeding 12 miles. . .) with UNCLOS art. 55 ("The [EEZ] is an area beyond and adjacent to the territorial sea . . .). See also UNCLOS art. 33 ("In a zone contiguous to its territorial sea . . . the coastal State may exercise the control necessary to . . . prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. . . . The contiguous zone may not extend beyond 24 nautical miles from the [coast].").

220. LIMITS IN THE SEAS NO 112, *supra* note 181, at 35 (citation omitted).

221. *Id.* at 34.

222. *Id.*

223. *Id.* at 35. The U.S. diplomatic protest stated:

As recognized in customary international law and as reflected in articles 33 and 56 of the 1982 United Nations Convention on the Law of the Sea, the right of a coastal state to prevent infringement of its fiscal, customs, immigration, and health laws within its territory or territorial sea does not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured.

Id. (citing Diplomatic Note No. 196, Dec. 24, 1990 from the American Embassy at Windhoek, and noting that Germany also protested the Namibian claim in October, 1990).

224. See *supra* notes 12, 13, 186-208 and accompanying text.

225. But see Caminos, *supra* note 10, at 23

As a result of these different forms in the domestic law and in the interpretative declarations under Article 310, there is a lack of uniformity in the [Latin American] region, especially with regard to certain rights and jurisdiction in the exclusive economic zone. . . . Noticeably, the current trend shows a clear decline of the territorialist approach.

coastal States place upon control of their EEZs is illustrated by the 116 countries that deploy patrol and coastal combatant ships primarily to police their EEZs.²²⁶ Moreover, of the 1,700 warships expected to be built during the next few years, a majority will be smaller, coastal patrol vessels and corvettes, suggesting even further coastal State emphasis on control of their EEZs.²²⁷ Pacific Rim nations are increasingly investing in these kinds of enhanced naval capabilities, and even France, Britain, and Italy are considering plans to enhance their capabilities for coastal defense.²²⁸ Some opine that developing countries are increasingly arming themselves with anti-ship missiles, apparently motivated by trends in the development of the international law of the sea.²²⁹

V. RECENT CONFLICTS WITHIN FOREIGN EEZS

A recent and telling illustration of a this trend and of the importance some coastal States place upon control of military activities in the EEZ occurred in April 2001, when a Chinese fighter jet intercepted and then collided with an American patrol aircraft over the Chinese EEZ near Hainan island.²³⁰ The collision was between a US EP-3E Aries II reconnaissance plane and a Chinese F-8 fighter jet some 60 miles southeast of China's Hainan Island.²³¹ The Chinese fighter crashed into the sea and its pilot died; the U.S. airplane made an emergency landing on a Chinese military airfield on Hainan Island. The PRC and the United States views on the law with respect to military activities in the Chinese EEZ differed.²³² China's Foreign Ministry spokesman Zhu Bangzao asserted that the U.S. aircraft violated the convention's principle of free overflight of the EEZ because it posed a serious threat to China's national security and did not respect China's rights.²³³

Id.

See also generally Bourbonnier & Haeck, *supra* note 13, at 958 ("Concerning Article 33, an interpretive polemic arises over possible restrictions to military exercises, and consequently military training overflights, occurring over the exclusive economic zone."). Italy, Germany and the Netherlands' EEZ declarations disagree with those of Brazil, India, Malaysia and Pakistan. *Id.* See also Caminos, *supra* note 10, at 25-29.

226. Frank Barnaby, *The Role of Navies in the 1990s and Beyond*, 10 OCEAN YEARBOOK 229, 237-38 (Elisabeth M. Borgese, et al. eds., 1993).

227. Robert Holzer, *Turning an Eye to Coasts*, NAVY TIMES, November 22, 1993, at 30 (citing AMI International as the source of the estimate on numbers of ships).

228. *Id.*

229. MORELL, *supra* note 16, at 195 (citing James A. Hazlatt, *Strait Shooting*, 108 U.S. NAVAL INSTITUTE PROCEEDINGS 70-73 (1982)).

230. Indira A.R. Lakshmanan, *Some See Double Standard in China Flap*, BOSTON GLOBE, Apr. 18, 2001, at A1.

231. *Id.*

232. *Id.* See also U.S. Seriously Violates International Law, Xinhua General News Service, Apr. 16, 2001, available at 2001 WL 19265374.

233. Edith M. Lederer, *China, U.S. Disagree on Law of Sea*, AP Online, Apr. 7, 2001, available at 2001 WL 17992570.

The United States disagreed. U.S. State Department spokesman Richard Boucher explained that, "because the aircraft was beyond the 12-mile air and sea limit of Chinese territory, under international law 'as reflected in the Law of the Sea Convention, it was entitled to operate in the location of the collision over international waters.'"²³⁴ He explained that traditional military activities are legally permissible in international airspace, and by implication defined the airspace above the EEZ as international airspace.²³⁵ He added that the U.S. activities "were conducted with due regard to China's rights and duties as a coastal state."²³⁶

At least one Chinese academic rejected the American argument, making the argument that the U.S. "abused" its right of overflight in the EEZ. Li Oin argued that because military reconnaissance flights by unarmed aircraft over the Chinese EEZ constitute threats to Chinese national security, they are a provocation to Chinese national sovereignty and are therefore without proper due regard for China's sovereign rights and jurisdiction in the EEZ.²³⁷ That

234. *Id.*

235. *See id.*

236. *Id.*

237. *U.S. Seriously Violates International Law*, *supra* note 232. This news report, from an official Chinese news agency, and therefore providing a good insight into the official Chinese position on the issue, discusses an article by Li Oin, entitled "A Look at Plane Collision Incident From Perspective of International Law." As discussed by Xinhua, Li Oin makes an argument badly mangling mainstream views of the law. He states:

In accordance with the current of international law, although foreign aircraft enjoy the freedom to fly over the exclusive economic zone of a certain country, such freedom is by no means unrestricted and foreign aircraft have to observe the relevant rules of the international law while enjoying the freedom of overflight. . . . According to Article 58 of the U.N. Convention on the Law of the Sea promulgated in 1982, foreign aircraft enjoy the freedom of overflight under the relevant provisions of the Convention. . . . Section Three of the article made it clear that foreign planes, while enjoying the freedom of overflight over an exclusive economic zone of other countries, "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this part." According to Article 56 of the Convention, the coastal country concerned not only has the right to exploit, utilize, maintain and administer natural resources in its exclusive economic zone, but also enjoys other rights concerning exclusive economic zones laid down by the Convention. . . . [T]he U.S. plane did not exercise a common flight over China's exclusive economic zone, but a reconnaissance mission. . . . These activities constitute threats to Chinese national security and peaceful order, and the provocation to Chinese national sovereignty. The U.S. act violates the fundamental principles of international law that stands for all states to respect sovereignty and territorial integrity of each other. . . . In accordance with Article 301 of the Convention, a certain country, while enjoying its rights or carrying out its duties stipulated by the Convention, "shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of United Nations". . . . [A] plane of a state, while it exercises freedom of overflight in the air over the exclusive economic zone of the other state, should respect the sovereignty and territorial integrity of the coastal state. It can't infringe upon na-

the Chinese legal argument is not well supported by the law of the sea²³⁸ is less important than is the Chinese decision that its national interest in control of its EEZ counsels that it be made. China apparently desires to expand its sovereign rights and jurisdiction in the EEZ beyond the scope contemplated by the Convention.

At about the same time, China also objected to military survey activities of a U.S. naval auxiliary vessel operating in the Chinese EEZ. According to an April 2001 story run by the *Herald Sun*, "A Chinese warship chased a United States Navy ship out of the waters of China's east coast nine days before the collision of a US spy plane and a Chinese jet."²³⁹ The newspaper further reported that a Chinese frigate intercepted the USNS Bowditch in international waters on the Yellow Sea on March 23. The Chinese warship forced the U.S. Navy survey ship to depart the Chinese EEZ.²⁴⁰

India has similarly objected to the conduct of military survey activities in its EEZ.²⁴¹ In March 2001, the Indian Defence Minister, George Fernandes, informed reporters that "India has protested to the governments of the United States and Britain that their warships were conducting unauthorized operations in our exclusive economic zone."²⁴² According to the report, a US navy survey vessel, again the USNS Bowditch, was detected 30 nautical miles from Nicobar Island, an Indian possession.²⁴³ The vessel "indicated it was carrying out oceanographic survey operations."²⁴⁴ Defense Minister Fernandes also objected to the conduct of a UK Royal Navy Vessel, HMS Scott, sighted 190 nautical miles off Diu and later near Porbadnar between

tional security and peaceful order of the coastal state, and any act ignoring the above rights of the coastal country will abuse the freedom of overflight

Id. For a thorough discussion of military aircraft and international law, see generally Bourbonnier & Haeck, *supra* note 13.

238. John Temple Swing, a member of the U.S. delegation that helped draft UNCLOS, dismissed the Chinese claim. "If it was in territorial waters, then they would have a point," he said in an interview. "But it isn't and no lawyer—other than one paid by the Chinese government—would seriously dispute that." Lederer, *supra* note 233. According to Professor Ivan Shearer, Challis Professor of International Law, University of Sydney, Australia, the Chinese analysis is "based on a flawed understanding of the meaning of article 301 of the United Nations Convention on the Law of the Sea by which the writer inflates the meaning of article 58 to include security concerns. . . . Taken to its logical conclusion, the argument would exclude the operation of warships and military aircraft everywhere, even on the high seas." Ivan Shearer, *Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance*, Address at Asia-Pacific Centre for Military Law Conference in Melbourne, Australia (February 2002) (on file with the authors).

239. John Leicester, *Chinese Chase US Ship; Jet Crash Part of Spy Game*, HERALD SUN, Apr. 4, 2001, at 32.

240. *Id.*

241. See *Indian Government Considering Allowing 100% FDI in Power Trade*, ASIA PULSE, Mar. 2, 2001, available at 2001 WL 2759655.

242. *Id.*

243. *Id.*

244. *Id.*

January 12 and 16, 2001.²⁴⁵ HMS Scott indicated it was carrying out military survey and declined to furnish any further information.

The incident in India's EEZ highlights a further area of potential contention and confrontation. UNCLOS Article 56 provides that "the coastal state has . . . jurisdiction [in the EEZ] as provided for in the relevant provisions of this Convention with regard to . . . marine scientific research."²⁴⁶ Article 246 requires the consent of the coastal State for marine scientific research within the EEZ.²⁴⁷ The U.S. view, however, is that military survey activities are not marine scientific research, but rather are naval activities that may be conducted in the EEZ beyond the territorial sea, and are not subject to coastal State regulation. As stated in the U.S. Navy's *The Commander's Handbook on the Law of Military Operation*: "Although coastal nation consent must be obtained in order to conduct marine scientific research in its exclusive economic zone, the coastal nation cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities."²⁴⁸

Continued disagreement, confrontation, and dispute over naval and military activities in the EEZ are inevitable. How to best resolve that inevitable conflict is the question. The best answer is continued international dialogue of the type that settled a dispute between the United States and the former Soviet Union over the right of warships to conduct innocent passage in territorial seas without providing prior notice or seeking consent.²⁴⁹ That dispute began with the famous "Black Sea Bumping" incident mentioned earlier, and ended with a "Joint Statement by the United States of America and the Union of Soviet Socialist Republics."²⁵⁰ The Joint Statement included a "Uniform Interpretation of Rules of International Law Governing Innocent Passage," in which the United States and the Soviet Union agreed that "All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required."²⁵¹ This dispute over the law of the sea was handled

245. *Id.*

246. UNCLOS art. 56.

247. UNCLOS art. 246(2) ("Marine scientific research in the [EEZ] . . . shall be conducted with the consent of the coastal State.").

248. ANNOTATED SUPPLEMENT, *supra* note 150, at 2-20, §2.4.2.2. See generally U.N. OFFICE FOR OCEANS AFFAIRS AND THE LAW OF THE SEA, THE LAW OF THE SEA: MARINE SCIENTIFIC RESEARCH: A GUIDE TO THE IMPLEMENTATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1991); ALFRED H.A. SOONS, MARINE SCIENTIFIC RESEARCH AND THE LAW OF THE SEA 157 (1982).

249. Rolph, *supra* note 212, at 162-63.

250. Joint Statement by the United States of America and the Union of Soviet Socialist Republics with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, Sept. 23, 1989, reprinted in ANNOTATED SUPPLEMENT, *supra* note 150, at 2-47, Annex A2-2.

251. *Id.*

entirely outside of the dispute settlement regime of the UN Convention on the Law of the Sea, which was not in effect at that time.²⁵² Given the poor utility of the Treaty's dispute settlement mechanism's concerning disagreements over military activities, this provides a useful model for future use. Bilateral and multi-lateral dialogue and agreement will be the key to dispute resolution and dispute avoidance over military activities in EEZs in the post-Law of the Sea Treaty world, just as it was in the world before UNCLOS.

VI. RESOLVING CONFLICT IN THE EXCLUSIVE ECONOMIC ZONE

Among the notable accomplishments of the 1982 United Nations Convention on the Law of the Sea was the foresight of the Convention's drafters regarding the need for dispute resolution mechanisms for this detailed and complex international accord. Part XV of the Convention provides comprehensive details regarding the settlement of disputes on the basis of equity and equally comprehensive language regarding dispute resolution mechanisms.²⁵³ Annex VI of the Convention establishes The International Tribunal for the Law of the Sea as one body for dispute resolution between and among members.²⁵⁴

The conciliation procedures provided by various deliberative bodies, and especially by the Law of the Sea Tribunal, have been successfully utilized by a number of nations in order to peacefully settle their disputes on the oceans.²⁵⁵ Unfortunately, this dispute resolution mechanism is likely to be unavailable when issues of military activities in the exclusive economic zone arise between a coastal State and a flag State. Indeed, in his letter of submission recommending that the Convention be transmitted to the U.S. Senate for its advice and consent to accession and ratification, then Secretary of State Warren Christopher explained:

Subject to limited exceptions, the Convention excludes from binding dispute settlement disputes relating to the sovereign rights of coastal States

252. UNCLOS entered into force Nov. 16, 1994. *See supra* note 1.

253. UNCLOS arts. 277-99.

254. UNCLOS Annex VI.

255. *See, e.g.,* M/V. Saiga No. 2 Case (St. Vincent v. Guinea), 1999 ITLOS No. 2 (Jul. 1), 38 I.L.M. 1323 (1999); Grand Prince Case (Belize v. France) 2001 ITLOS No. 8 (Apr. 20). These cases and others can be found on the web site of the International Tribunal for the Law of the Sea at <http://www.itlos.org>. According to its Oct. 18, 2001 press release, available on its web site:

The Tribunal has delivered orders and judgments in eight cases. In its judgments the Tribunal has dealt with a wide variety of issues, involving the prompt release of vessels and crews, the prescription of legally binding provisional measures, and procedural and substantive issues relating to the registration of vessels, genuine link, exhaustion of local remedies, hot pursuit, use of force and reparation.

Press Release, ITLOS/Press 58, First Five Years of the Law of the Sea Tribunal, (Oct. 18, 2001) at <http://www.itlos.org>.

with respect to the living resources in their EEZs. In addition, the Convention permits a State to opt out of binding dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the United Nations Security Council is exercising the functions assigned to it by the Charter of the United Nations.²⁵⁶

Article 298 of the Convention, “Optional Exceptions to the Applicability of Compulsory Procedures Entailing Binding Decisions” states:

When signing, ratifying or acceding to the Convention *or at any time thereafter*, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to . . . disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal. . . .²⁵⁷

A number of States, in ratifying the Convention, have chosen to declare that they do not accept procedures for disputes concerning military activities. As of October 16, 2001, those States include Cape Verde, Chile, France, Italy, Portugal, the Russian Federation, Ukraine, and Tunisia.²⁵⁸ Others, such as India, Pakistan and The United Kingdom, have reserved judgment, perhaps waiting to make a declaration if and when the issue presents itself.²⁵⁹ Given the language of Article 298, and the concomitant proclivity on the part of maritime nations—especially the United States, which is not yet even a party to the Convention—to treat their naval vessels as sovereign entities exempt from the normal obligations of commercial vessels plying the seas, it is highly probable that these maritime nations would invoke Article 298 in every case.²⁶⁰ Thus, when disputes arise regarding the military activities of a flag State in the EEZ of a coastal State, it is extraordinarily unlikely that the

256. Warren Christopher, Letter of Submittal, Department of State, Washington, Sept. 23, 1994, reprinted in ANNOTATED SUPPLEMENT, *supra* note 150, at 1-31, Annex A1-2.

257. UNCLOS art. 298 (emphasis added).

258. THE LAW OF THE SEA: DECLARATIONS AND STATEMENTS WITH RESPECT TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND TO THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (United Nations Sales No. E.97.V.3) available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.

259. *Id.*

260. See Warren Christopher, Letter of Submittal, Department of State, Washington, Sept. 23, 1994, reprinted in ANNOTATED SUPPLEMENT, *supra* note 150, at 1-31, Annex A1-2. Secretary of State Christopher recommends that the United States make the following declaration: “The Government of the United States of America declares, in accordance with paragraph 1 Article 298, that it does not accept the procedures provided for in section 2 of Part XV with respect to the categories of disputes set forth in subparagraphs (a), (b), and (c) of that paragraph.” *Id.*

flag State would submit to the dispute resolution mechanisms of the Convention.

As has been suggested, even though military activities in the EEZ present a potentially highly charged issue without a concomitant means of arbitrating or litigating disputes, inevitable confrontation and conflict can be mitigated. In our view, the issues surrounding military activities in this zone must be vetted in the international community *before* such activities are conducted and allowed to result in confrontation and conflict.

In *Working with Other Nations*, a U.S. Navy strategy white-paper, Navy strategists suggest that multi-lateral, combined naval operations with friendly nations is the preferable way to further political, economic, and security objectives in an economically and politically interdependent world.²⁶¹ United States national security continues to require forward naval presence to ensure that information, capital, raw material, and manufactured goods flow freely across borders and oceans.²⁶² One way to secure forward naval presence in foreign EEZs without contention and confrontation is by "establishing relations with security partners in peacetime before the onset of a crisis."²⁶³ A useful legal tool in support of this strategy is to create consensus on the law through multi-lateral cooperation and agreement.²⁶⁴

The United States has followed such an approach to resolve a contentious issue in another area of international law, which, like the issue of naval activities in EEZs, involves a difference of opinion with developing States as to the legitimate rule of international law. The question of property rights and the international rule of law in cases of State expropriation of alien owned property has been vigorously contested.²⁶⁵ The United States has sought to establish consensus on the law through its foreign investment program.²⁶⁶ Using a bilateral investment treaty (BIT) program, investment protection provisions contained in bilateral treaties of Friendship, Commerce, and Navigation (FCN), and multilateral activity in the Organization for Economic Cooperation and Development and other multilateral trade negotiation fora (e.g. WTO), the United States seeks to ensure high international standards of protection for intellectual property, and to obtain international con-

261. John Burlage, *Making Friends and Influencing other Navies*, NAVY TIMES, Nov. 1, 1993, at 19 (citing WORKING WITH OTHER NATIONS).

262. *Id.*

263. *Id.*

264. *See, e.g.*, Rose, *supra* note 11, at 91 n.76 (noting that the U.S. is not just relying on the FON program, but also seeking regional and multi-lateral cooperation as a means to protect navigational rights in the EEZ).

265. *See generally* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 833-60 (1991) (excerpts and discussion of relevant international material).

266. *See* 89 FOREIGN DIRECT INVESTMENT IN A GLOBAL ECONOMY, DEP'T ST. BULL. 32 (June 1989). *See generally* DAVIS R. ROBINSON, 84 TREATY PROTECTION OF FOREIGN INVESTMENT, DEP'T ST. BULL. 60 (Jan. 1984); ROBERT R. WILSON, U.S. COMMERCIAL TREATIES AND INTERNATIONAL LAW 95-125 (1960); Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment*, 5 AM. J. COMP. L. 229 (1956).

sensus on a rule of international law requiring prompt, adequate and effective compensation for expropriated property.²⁶⁷ As of 1990, the United States had concluded BIT treaties with 10 developing nations, and had FCN treaties in force with most industrialized States.²⁶⁸ This is but one model for international cooperation.

Additionally, there are a number of existing fora available in which the groundwork for agreements with respect to naval and military activities in EEZs might be laid. One such forum is international conferences and symposia where issues such as military activities in the exclusive economic zone can be discussed in between and among the representatives of a number of nations in an open and collegial manner. The annual United States Pacific Command's Military Operations and Law Conference, which brings together the military, diplomatic and policy representatives from over two dozen Pacific Rim nations, is an ideal vehicle for socializing both coastal and maritime nations to the imperative of finding accommodation regarding military activities in the EEZ.

Another vehicle for defusing conflict regarding this issue is the conduct of multi-lateral naval exercises in the EEZ—specifically exercises including the coastal nation bordering that exclusive economic zone along with other nations. This would involve coastal states in conducting naval exercises in their own EEZs along with forces from other navies.²⁶⁹ This methodology has the benefit of taking the 'theory' of conducting military activities in the EEZ and putting it into day-to-day practice. The United States-sponsored bi-annual Rim of the Pacific (RIMPAC) exercise is one example of multi-national exercises where the practice of conducting military activities in the EEZ could be socialized in a way that diffuses potential contention. Another example is the series of bilateral Cooperation and Readiness Afloat (CARAT) exercises undertaken annual in the Western Pacific by United States Seventh Fleet units with Asian Pacific countries. Another more-proscribed forum might be the many bilateral and multi-lateral exercises held by the Association of Southeast Asian Nations (ASEAN) member States within the EEZs of member States.

267. See *International Investment*, DEP'T OF STATE DISPATCH (July 29 1991), available in LEXIS, INTLAW Library, DSTATE File.

268. CARTER & TRIMBLE, *supra* note 246, at 836. BIT treaties in force are with Bangladesh, Cameroon, Egypt, Granada, Haiti, Morocco, Panama, Senegal, Turkey, and Zaire. *Id.*

269. Some coastal States, such as Brazil, which purport to require prior permission for the conduct of naval exercises in their EEZ, might argue that their participation in such an activity in their own EEZ constitutes consent to the activity and therefore does not impeach their claim. Thus, these multi-lateral exercises would not in every case serve also as assertion of navigational rights against excessive claims. They would, however, help to establish the fundamentally peaceful nature of naval exercises and maneuvers, and de-sensitize objectors to the activity, which over time, might mitigate their concerns and obviate their objections regarding national security, which seem to be at the heart of most States' efforts to expand their maritime jurisdiction.

Beyond these exercises, bi-lateral naval talks, such as those ongoing between the United States and China under the auspices of the Military Maritime Consultative Agreement, as well as multi-lateral talks, such as the meetings of the Council for Security Cooperation in the Asia Pacific (CSCAP) Maritime Cooperation Working Group, create opportunities for maritime professionals to discuss the issues, understand differing viewpoints, and vet potential solutions before they become contentious issues at sea.

As coastal and maritime States refine their understanding of their respective rights and responsibilities within the EEZ under UNCLOS, the potential exists that many nations will find a balance that accommodates the concerns of the coastal States while preserving freedom of navigation. There will likely remain, however, some few States that may feel compelled to continue to take a more dogmatic approach regarding military activities in their EEZs.

In these cases, some sort of international, multi-lateral, ongoing freedom of navigation operations in these zones might be necessary to persuade those 'persistent objectors' that these activities in the EEZ do not pose a threat. Concurrently, it would be incumbent on those nations participating in freedom of navigation operations to conduct military activities in a manner that could not be perceived as a threat to the coastal nation. This issue can only be resolved through a balance of the right to conduct these activities and doing the right thing.

When all is said and done the salient fact remains that the EEZ is an important international area and that vast oceanic areas, that were once the high seas, are now included in the EEZ. Clearly, the past decade has sharpened the international focus on the EEZ and on military activities therein.

While a limited number of coastal States have attempted to exercise control of their EEZs by making what some maritime States consider egregious claims purporting to restrict military activities, some maritime States have continued to assert their rights in this zone to an extent that might appear to the coastal State with excessive claims to be an extreme infringement upon the coastal State's rights in this zone. The dispute resolution mechanisms of the 1982 United Nations Convention on the Law of the Sea are insufficient to successfully litigate such disputes. Therefore, the international community is left to make peaceful resolution of the contentious issues regarding military activities in the EEZ a matter of priority.

Most States share national interests in freedom of navigation for ocean going commerce, and in the promotion of world order through international law. These interests are related to, and mutually supportive of, a rule of international law that permits forward presence of naval forces in coastal waters around the world: in other words, naval activities in EEZs. A stable system of international law is good for trade, and a strong Navy, able to evenhandedly defend legal entitlements by its presence at sea, is good for a stable system of international law. The cooperative approach is the preferable approach.

To the extent the United States continues to have a need for unrestricted, legal access for its naval forces up to the territorial waters of all the countries of the world, we believe it should continue to use vehicles such as the Freedom of Navigation Program to assert these rights, but should also supplement this with other arrangements and understandings with foreign security partners. A sufficiently dense network of such arrangements and understandings, followed by consistent practice, will ensure the vitality of customary norms. In the end, it is our view that this is an approach that will ensure the best balance among an ongoing network of lawful naval and military activities, stable international law, freedom of navigation for ocean-going commerce, and is an approach that will protect interests common to all in an internationally interdependent world.

