LOSI Conference Papers, 2012

"Securing the Ocean for the Next Generation"

Papers from the Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, held in Seoul, Korea, May 2012

Proceedings edited by Prof. Harry N. Scheiber, LOSI
and Director Moon Sang Kwon, KIOST
Assistant Editor: Emily A. Gardner

The EEZ Regime: Reflections after 30 Years

Robert Beckman and Tara Davenport

Robert Beckman is the Director, Centre for International Law (CIL) and Associate Professor, Faculty of Law, National University of Singapore (NUS), Singapore; Tara Davenport is a Research Fellow, Centre for International Law (CIL), Faculty of Law, National University of Singapore (NUS), Singapore

All rights reserved by the authors.

This paper was presented at the tenth in a series of annual international conferences organized and sponsored or co-sponsored by the Law of the Sea Institute, School of Law, University of California, Berkeley, USA. The May 2012 conference was jointly sponsored and co-organized in collaboration with the Korea Institute of Ocean Science and Technology (KIOST, formerly KORDI), and hosted by KIOST on May 21-24, 2012 in Seoul, Korea. This was the third LOSI-KIOST collaboration in conferences and publications.

The EEZ Regime: Reflections after 30 Years

Robert Beckman and Tara Davenport[1]

Abstract:

This paper will analyze the "specific legal regime" in Part V of UNCLOS to determine whether it has created a certain and predictable regime which has withstood the test of time. It will first review the key provisions in the EEZ regime and how they balance the rights, jurisdiction and duties of coastal states with the rights and duties of other States. It will also examine the extent to which activities in the EEZ are governed by the high seas principles on jurisdiction. It will then examine some of the controversies which have arisen between coastal States and other States concerning activities in the EEZ regime, including the conduct of military activities and survey activities, the laying and repair of submarine cables and protection of the marine environment. The article will also examine whether there is evidence of "creeping jurisdiction" by coastal States in the EEZ. Finally, it will examine the extent to which issues relating to the interpretation or application of the provisions in the UNCLOS on the EEZ are subject to the system of compulsory binding dispute settlement in Part XV.

I. Introduction

The 1982 UN Convention on the Law of the Sea (UNCLOS)[2] was an extraordinary achievement in international treaty-making. The 320 articles and 9 annexes have been lauded as a constitution for the oceans[3] and addressed many of

[1] Robert Beckman is the Director, Centre for International Law (CIL) and Associate Professor, Faculty of Law, National University of Singapore (NUS), Singapore; Tara Davenport is a Research Fellow, Centre for International Law (CIL), Faculty of Law, National University of Singapore (NUS), Singapore.

[2] United Nations Convention on the Law of the Sea, adopted 10 December 1982, UNTS 1833 (entered into force 16 November 1994) ("UNCLOS").

[3] "A Constitution for the Oceans," Remarks by Tommy Koh of Singapore, President of the Third United Nations Conference of the Law, Adapted from Statements by the President on 6 and 11 December 1982 at the final session of the Conference at Montego Bay, the United Nations

the contentious issues that previous conferences on the law of the sea had been unable to settle. Negotiations took nine years and involved more than 140 States, six non-independent States, eight national liberation movements, twelve specialized agencies, nineteen intergovernmental organizations, and a number of quasi-autonomous units of the UN as well as a host of non-governmental organizations.[4] 119 countries from every region in the world signed the Convention on 10 December 1982, a record at the time. There are 165 parties to the Convention[5] indicating its widespread support as the prevailing legal order for the oceans.

The Exclusive Economic Zone (EEZ) was a significant innovation of UNCLOS. The negotiations were characterized by the traditional dichotomy between coastal States and the major maritime powers that has always shaped the law of the sea. The consensus ultimately reached reflects a carefully constructed balance which reflects both legal doctrine and political realities. However, it has been argued that thirty years on, the EEZ regime still does not adequately address the issues it intended to address nor is it capable of addressing new issues unanticipated at the negotiations. This Paper will examine the challenges facing the EEZ regime today and will discuss whether the EEZ regime has withstood the test of time. It will argue that the intention of the negotiators was to create a normative framework for the regulation of maritime spaces, but at the same time, allow for a certain degree of flexibility to accommodate emerging issues. Ultimately, this Paper hopes to show that UNCLOS still remains a relevant and sound framework for activities in the EEZ but that its effectiveness will depend on its implementation, application and interpretation by States.

II. Brief History of the EEZ Regime

The historical roots of the EEZ lie in the trend of coastal States after 1945 to assert rights and jurisdiction over an increasing area of seabed driven by a belief that an abundance of natural resources lay beneath.[6] The concept of the Exclusive

---

Division on Ocean Affairs and Law of the Sea Website *available at* http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf.

[4] For an excellent overview of the negotiating history of the UNCLOS, please see Tommy Koh and Shanmugam Jayakumar, "The Negotiating Process of the Third United Nations Conference on the Law of the Sea" *in* Myron Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume I*, (United States, 1985), 29 – 68.

[5] *See* United Nations Treaty Collection *available at* http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en

[6] This began with the 1945 Truman Declaration by President Truman of the USA that the "natural resources of the subsoil and seabed of the continental shelf beneath the high seas … as

Fishing Zone (EFZ) developed in tandem with continental shelf claims with many Latin American States and African States making claims to broad territorial seas and fishing zones, with the former calling for a "patrimonial sea" of up to 200 nm.[7] Attempts to merge claims to the water column and claims to seabed into "one resource zone concept" were inevitable, and in 1971, Kenya put forward the concept of the EEZ to the Asian-African Legal Consultative Committee and to the UN Sea-Bed Committee in 1972.[8] This new concept of the EEZ was largely supported by most developing States and indicated the desire of such States to have greater control over their economic resources, particularly fish stocks, which were felt to have been under increasing exploitation of distant-water fleets of developed States.[9]

When negotiations for the Third UN Conference commenced in 1973, the United States and the Soviet Union recognized that as the two preeminent naval powers, they had a common interest in ensuring that the evolving legal regime governing the oceans protected their global maritime and naval interests.[10] Previous efforts to agree on limits for territorial seas[11] as well as recognize the concept of archipelagic waters proposed by the Philippines and Indonesia[12] had failed at the First and Second Conferences of the Law of the Sea. However, at the Third Conference, the maritime powers were willing to recognize a coastal State's claims to extended rights and jurisdiction in waters off their coasts provided that access to the seas and freedom to use the seas were preserved to the greatest

---

appertaining to the United States," which was followed by similar claims by other States: See R.R Churchill and A.V Lowe, *The Law of the Sea*, 3rd ed. (United Kingdom, 1999) at 143–144. Background of the Truman Proclamation, in the US Government policy process throughout the period 1938-45, is discussed *in* Harry N. Scheiber, "Origins of the Abstention Doctrine in Ocean Law, 137-58," *Ecology Law Quarterly*, 16 (1989) 23, 33ff.; and, for later impact of the Proclamation on international oceans diplomacy, Scheiber, *Inter-Allied Conflicts and Ocean Law, 1945-53* (Taipei: Institute of European and American Studies, Academia Sinica, 2001).

[7] Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010), 83.

[8] Rothwell and Stephens, *International Law of the Sea*, 83.

[9] Churchill and Lowe, *The Law of the Sea*, 160 – 161.

[10] During the negotiations, France, Japan, United Kingdom, the United States and the USSR formed a special interest group of "the Great Maritime Powers" that wanted to ensure freedom of shipping and navigation: *See* Koh and Jayakumar, "The Negotiating Process of the Third United Nations Conference on the Law of the Sea," 79 – 80.

[11] *See* (generally) Rothwell and Stephens, *International Law of the Sea*, 6 – 10.

[12] *See* (generally) Rothwell and Stephens, *International Law of the Sea*, 173 – 179.

extent possible.[13] Therefore, they agreed that the breadth of the territorial sea could extend from 3 nm to 12 nm, provided that all ships and aircraft had the right of innocent passage in the territorial seas as well as an unimpeded and non-suspendable right of transit passage through and over straits used for international navigation.[14] They also agreed to recognize that archipelagic States could have sovereignty within their archipelagic waters, provided that ships and aircraft had an unimpeded and non-suspendable right of passage in and over the archipelagic waters on routes normally used for international navigation through the archipelago.[15]

With respect to an exclusive fishing zone or EEZ, the maritime powers recognized that coastal States, especially developing coastal States, constituted a majority at the conference and were not going to retract from claims to exclusive rights to the natural resources in the waters in a zone adjacent to their coast.[16] The maritime powers agreed to acknowledge this development, provided that the new zone was not under the sovereignty of the coastal State, and provided that the traditional freedoms of the high seas were preserved in the new zone.[17]

It should be noted the distance of 200 nm as the maximum breadth for the EEZ had "no general geographical, ecological or biological significance" and was accepted for pragmatic reasons that it represented the most extensive claims then in existence.[18] The establishment of 200 nm EEZs was estimated to embrace

---

[13] L. Dolliver M. Nelson, "Reflections on the 1982 Convention on the Law of the Sea" *in* David Freestone, Richard Barnes and David Ong, *The Law of the Sea: Progress and Prospects* (United States, 2006), 29.

[14] *See* Part II of UNCLOS.

[15] *See* Part IV of UNCLOS.

[16] Satya Nandan gives an excellent overview of the various statements and declarations made particularly by the Latin American, African and Asian States. He notes that the "evolution of the exclusive economic zone concept took place in the developing world. *See* Satya Nandan, *The Exclusive Economic Zone: A Historical Perspective*, FAO Website *available at* http://www.fao.org/docrep/s5280T/s5280t0p.htm.

[17] Article 58 expressly recognizes certain freedoms of other States in the EEZ.

[18] Churchill and Lowe, *The Law of the Sea*, 163. The 1952 Santiago Declaration by Chile, Ecuador and Peru was the first international instrument to proclaim a 200-mile zone whereby each of these countries "possesses sole sovereignty and jurisdiction over the areas of sea adjacent to the coast of its own country:" *See* Declaration on the Maritime Zone, *United Nations Legislative Series*, ST/LEG/SER.B/6 (United Nations, New York, 1957). Churchill and Lowe note that the reason why Chile, the first State to claim a 200 nm EEZ, chose the limit of 200 nm was "something of an accident." Chile's whaling industry initially wanted only a fifty mile zone and to justify the establishment of such a zone, relied upon the 1939 Declaration of Panama. The 1939 Declaration of Panama was wrongly thought to have been 200 nm in breadth, when it was nowhere less than 300 nm (*See* Churchill and Lowe, *The Law of the Sea*, 163). Nandan explains that the 1939 Panama Declaration issued by the United Kingdom and the United States established a zone of

about thirty-six per cent of the total area of the sea, which was said to contain about ninety per cent of fish stocks, eighty-seven per cent of the world's oil and gas deposits and about ten per cent of polymettalic nodules.[19] Further, the majority of the world's shipping routes would pass through this new zone. The nature of the legal regime ultimately established was therefore critical.[20]

However, agreeing on the nature of the legal regime proved difficult during negotiations. The coastal States, particularly the Latin American States, wanted to make the zone subject to the sovereignty of coastal States, but provide that other States had the right to exercise rights and freedoms within the zone. Under this argument, the EEZ would have a residual territorial sea character such that any activity not falling within the clearly defined rights of non-coastal States would come under the jurisdiction of the coastal State. The maritime powers on the other hand, wanted the zone to be part of the high seas, but provide that coastal States had the sovereign right to explore and exploit the natural resources in the zone. Any activity not falling within the clearly defined rights of the coastal State would be governed by the principles governing the high seas, that is freedom of use for all States, with regulation by flag States. The debate was important because of its implications for any matters not expressly provided for. The compromise was to reject both options, and create a *sui generis* legal regime.

III. Key Elements of the EEZ Regime

Specific Legal Regime

The key provision in UNCLOS on the EEZ is Article 55. It makes it clear that the EEZ is a regime that is neither under the sovereignty of the coastal State nor part of the high seas, but a special, *sui generis* regime. It provides as follows:

> Article 55: *Specific Legal Regime of the Exclusive Economic Zone*. 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.

---

security and neutrality around the American continents in order to prevent the resupplying of Axis ships in South American ports. The map showed the width of the neutrality zone off the Chilean coast to be about 200 nm, which eventually became the basis for the Santiago Declaration. *See* Nandan, *The Exclusive Economic Zone: A Historical Perspective*.

[19] Churchill and Lowe, *The Law of the Sea*, 162.

[20] Churchill and Lowe, *The Law of the Sea*, 162.

Rights, Jurisdiction and Obligations of Coastal States in the EEZ

The coastal State has rights and jurisdiction as set out in Part V of UNCLOS, and supplemented by other provisions in UNCLOS. Article 56 is the key provision. It provides that the coastal State has "sovereign rights" to explore and exploit the natural resources in the EEZ as well as other "activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds".[21] The phrase "sovereign rights" suggests its rights are exclusive, not preferential. It is the same terminology used in relation to the continental shelf regime and was used to make it clear that the coastal State did not have sovereignty over the EEZ but had all other rights necessary for and connected with the exploration and exploitation of its natural resources.[22]

The EEZ regime gives coastal States sovereign rights over three main resources, (1) non-living resources on the seabed, subsoil and superjacent waters, (2) living resources of the seabed, subsoil and superjacent waters and (3) other

[21] Article 56 (1) (a), UNCLOS.

[22] The nature of a coastal State's rights over the continental shelf was greatly debated during the sessions of the International Law Commission (ILC) in its efforts to codify the law of the sea and the Second UN Conference on the Law of the Sea. Article 2 of the 1951 ILC Draft Articles referred to the continental shelf as "subject to the exercise by the coastal State of *control and jurisdiction* for the purpose of exploring it and exploiting its natural resources," following the nomenclature used in the Truman Proclamation: *See Report of the International Law Commission on its Third Session*, 16 May to 27 July 1951, Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858) at 142. In order to reconcile the desire of some countries for 'sovereignty' over the continental shelf with the fear of other countries that sovereignty over the continental shelf would soon expand into sovereignty over the waters above, the 1956 ILC Draft Articles on the Law of the Sea adopted a formula of "*sovereign rights* for the purpose of exploring and exploiting its natural resources". The ILC commentary stated:

> The Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely the safeguarding of the principle of the full freedom of the superjacent sea and the airspace above it. Hence, it was unwilling to accept the sovereignty of the coastal State over the seabed and subsoil of the continental shelf. On the other hand, the text now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf. Such rights include jurisdiction in connection with the prevention and punishment of violations of the law.

See 1956 ILC Draft Articles concerning the Law of the Sea with Commentaries, *Yearbook of the International Law Commission, Volume II*, UN Doc. A/3159 (1956) at 297.

economic activities related to the economic exploitation and exploration of the zone.[23]

With regard to living resources, the coastal State has sovereign rights to explore and exploit them but it also has certain obligations with respect to the management of conservation of the living resources in its EEZ. With respect to the utilization of the living resources of the EEZ, UNCLOS imposes an obligation on coastal States to promote the optimum utilization of the living resources.[24] It also imposes an obligation on the coastal State to determine the allowable catch of the living resources in its EEZ[25] and its own capacity to harvest the living resources.[26] If the allowable catch exceeds its own capacity to harvest the living resources, the coastal State is obliged to give other States access to any surplus.[27] However, the coastal State is given very broad discretion to decide on which States get access to any surplus.[28] There is no obligation on the coastal State to give access to States who have traditionally fished in what is now its EEZ. All UNCLOS provides is that in giving access to any surplus, the coastal State shall take into account all relevant factors. One of several factors it must take into account is "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone".[29] Simply stated, there is no recognition of historic fishing rights in the EEZ. Land-locked States and geographically disadvantaged States may be given access to the surplus of living resources under certain conditions, but UNCLOS does not provide that they have *a right* to the surplus.[30]

---

[23] *See* Article 56 (1) (a), UNCLOS.

[24] Article 62 (1), UNCLOS.

[25] Article 61 (1), UNCLOS.

[26] Article 62 (2), UNCLOS.

[27] Article 62 (2), UNCLOS.

[28] It is within the coastal State's discretion to determine when it does not have the capacity to harvest the living resources of the EEZ (See Article 62 (2)). UNCLOS provides that in giving access to living resources to other States in its EEZ, the coastal State shall take into account all relevant factors, including, *inter alia*, "the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 (rights of land-locked States) and 70 (rights of geographically disadvantaged States), the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks:" *See* Article 62 (3) of UNCLOS.

[29] Article 62 (3) of UNCLOS.

[30] Article 62 (3) of UNCLOS.

With regard to non-living resources, while the rights given to the coastal State are for the purpose of "exploring and exploiting, conserving and managing…non-living resources," UNCLOS contains no further provisions relating to the conservation or management of non-living resources. This is in contrast to the conservation and management obligations placed on the coastal State in relation to living resources described above.[31] Further, under Article 56 (3), coastal State rights over non-living resources must be exercised in accordance with Part VI of UNCLOS on the continental shelf regime. The continental shelf regime therefore clearly applies to seabed resources in the EEZ. This provision was included in to provide a level of harmonization between the two regimes.[32]

Article 56 also provides that the coastal State has sovereign rights "with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds."[33] This provision was obviously intended to make it clear the rights of the coastal State in the EEZ would extend to all economic activities, including those not anticipated at the time of its drafting.

Article 56 also sets out the extent of the jurisdiction of the coastal State in its EEZ. Since the EEZ is not subject to its sovereignty, the right of the coastal State to regulate activities in its EEZ is expressly provided for in this article. It states that the coastal State has jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures [Arts. 60, 80, 87, 147, 208, 214, 246, 259]; (ii) marine scientific research [Arts 87, 238-265, 297]; and (iii) the protection and preservation of the marine environment [Arts 192-237].[34]

It should be noted that Article 56 expressly provides that the jurisdiction of the coastal State over these matters in its EEZ is "as provided in the relevant provisions of the Convention".[35] The relevant provisions of UNCLOS are set out in other parts of UNCLOS, including Part V on the EEZ, Part VI on the Continental Shelf, Part XII on Protection and Preservation of the Marine Environment, and Part XIII on Marine Scientific Research. The key point is that the coastal State has no residual jurisdiction to regulate matters in its EEZ. Since the EEZ is not subject to its sovereignty, its jurisdiction is limited to that set out in the provisions in UNCLOS.

---

[31] *See* Articles 61 and 62 of UNCLOS, which as mentioned above, address the "conservation of the living resources" and "utilization of the living resources."

[32] Malcolm Evans, *Relevant Circumstances and Maritime Delimitation* (Clarendon Press, Oxford, 1989) 36.

[33] Article 56 (1) (a), UNCLOS.

[34] Article 56 (1) (b), UNCLOS.

[35] Article 56 (1) (b), UNCLOS.

Article 56 (1) (c) also recognizes that the coastal State has other rights and duties in the EEZ as provided for in this Convention. This refers to the rights that the coastal State has in the contiguous zone provided for in Article 33, as this zone overlaps with the first twelve miles of the EEZ,[36] as well as the coastal State right of hot pursuit in Article 111 for violations in its EEZ.[37]

The general obligations of the coastal State in its EEZ are set out in paragraph 2 of Article 56. First, in exercising its rights and performing its duties in the EEZ, the coastal State shall have "due regard" to the rights and duties of other States. Second, coastal States must act in a manner compatible with the provision of UNCLOS.

Rights and Duties of Other States in the EEZ

The rights and duties of other States in the EEZ are set out in Article 58 of UNCLOS. Of the four high seas freedoms specifically mentioned in the 1958 High Seas Convention, fishing now comes within the jurisdiction of the coastal State. The remaining freedoms of navigation, overflight and laying of submarine cables and pipelines are recognized in the EEZ, although subject to greater limitations than the high sea freedoms. Article 58 provides that in the EEZ all States enjoy:

> the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, 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, and compatible with the other provisions of this Convention [emphasis added]

The phrase beginning with "other internationally lawful uses of the sea" was subject to much negotiation at the Third United Nations Conference leading to the adoption of UNCLOS. Like article 87, it does not expressly mention military activities or survey activities, but the naval powers maintain that the language was intended to ensure that traditional freedoms of the seas in article 87 were

[36] Article 33 (2) provides that the contiguous zone may not extend beyond 24 nm from the baselines from which the breadth of the territorial sea is measured.

[37] *See* Churchill and Lowe, *The Law of the Sea*, 169.

preserved in the EEZ.[38] As will be explained later, this language has been the source of some controversy between China and the United States.

Paragraph 3 of article 58 provides that other States have two duties when exercising their rights in the EEZ. First, they have a "due regard" obligation similar to that of coastal States. In exercising their rights in the EEZ, other States must have due regard to the *rights and duties* of the coastal State in the EEZ. They need not have due regard to the *interests* of the coastal State, only to the rights and duties, which as explained above, are limited to rights to the natural resources and other economic activities. Thus, there is no obligation on other States to give due regard to the security interests of the coastal State in its EEZ.

Second, other States must comply with the laws and regulations adopted by the coastal State, but only such laws that are in accordance with the provisions of the Convention and other rules of international law, and only in so far as they are not incompatible with the UNCLOS provisions on the EEZ. Therefore, if a coastal State adopts laws and regulations on matters over which it does not have jurisdiction under UNCLOS, there is no obligation on other States to comply with such laws and regulations.

Jurisdiction over Other Matters in the EEZ

As explained above, the jurisdiction of the coastal State in the EEZ is specifically provided for in Article 56 and other provisions of the convention, and it is limited to the jurisdiction as provided in the Convention with respect to economic activities, marine scientific research and protection and preservation of the marine environment.

In all other respects, the rules on jurisdiction in the EEZ are the same as those on the high seas. This is the effect of Article 58(2), which stipulates 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 Part V of UNCLOS on the EEZ. Accordingly, the high seas provisions on jurisdiction apply in the EEZ. They include Article 92 on the exclusive jurisdiction of the flag State, Article 94 on the duties of flag States, Article 95 on the immunity of warships, Article 97 on collisions, Article 98 on the duty to render assistance, and Articles 100 to 107 on piracy. This means in effect, that except for the express provisions in UNCLOS giving coastal States jurisdiction over specific matters in the EEZ (such as enforcement jurisdiction in relation to fisheries regulations under Article 73 and enforcement jurisdiction over ship-source pollution under Article 220), the

[38] George V. Galdorisi and Alan Kaufman, "Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict," *California Western International Law Journal* 32 (2001-2002): 253 – 302, 272.

rules on jurisdiction in the EEZ are the same as those on jurisdiction on the high seas.

Unattributed Rights and Jurisdiction in the EEZ (Residual Rights)

Article 59 addresses matters not specifically attributed to coastal States or other States:

> Article 59. *Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone*.
>
> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Several points should be noted about this provision. First, it acknowledges that there may be rights or jurisdiction in the EEZ attributed to neither the coastal State or other States in the EEZ. Second, it reinforces the *sui generis* nature of the EEZ regime. If there are rights that are not covered by the rights of either the coastal State or the rights of other States, there is no presumption in favour of either the coastal State or other States.[39] Each case will have to be decided in view of the circumstances of the case and taking into account the criteria in Article 59.[40] Third, the Article does not refer to any specific procedure for resolution of the conflict, however, it has been suggested that it includes both negotiations as well as recourse to the dispute settlement procedures in Part XV.[41]

---

[39] *See* Churchill and Lowe, *The Law of the Sea*, 176.

[40] The *Virginia Commentary* states that "Given the functional nature of the exclusive economic zone, where economic interests are the principal concern, this formula would favour the coastal State. On issues not involving the exploration for and exploitation of resources, where conflicts arise, the interests of other States or of the international community as a whole are to be taken into consideration:" *See* Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II* (United States, 1993), 569.

[41] Churchill and Lowe note that essentially, Article 59 "means that there must first be an attempt at settlement by consensual means: if this is unsuccessful, the dispute must be referred to one of the judicial bodies listed in article 287, unless the dispute relates to military activities and one of the parties has made a declaration under article 298 exempting itself and settling such disputes by

The Due Regard Obligation

As mentioned above, both coastal States and other States have mutual obligations of due regard in the exercise of their rights and duties in the EEZ. The due regard obligation was first articulated in relation to the freedoms of the high seas in the 1958 High Sea Convention as "reasonable regard" to the interests of other States in the exercise of the freedoms of the high seas.[42]

The concept of "reasonable regard" was then considered in the 1974 Fisheries Jurisdiction Case[43] where the International Court of Justice held that Iceland, by unilaterally extending its exclusive fisheries limits and enforcing such limits against UK fishermen, had infringed the principle of reasonable regard in the 1958 High Seas Convention.[44] The ICJ went on to say that Iceland's preferential fishing rights (as a State especially dependent on coastal fisheries) and UK's historic or traditional fishing rights must be "reconciled," and must continue to co-exist.[45] Neither of these rights were absolute [46]and "both States have an obligation to take full account of each other's rights and of any fishery conservation measures the necessity of which is shown to exist in those waters."[47] The Court also found that the most appropriate method for the solution of the dispute was negotiation[48] and that they should conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal right of the

---

compulsory third-party means:" *See* Churchill and Low, *The Law of the Sea*, 176. Similarly, the *Virginia Commentary* also notes that the stipulation in Article 59 for conflicts on the rights and jurisdiction of States in the EEZ to be resolved on the basis of equity and in light of all relevant circumstances "serves as a guide for the diplomatic settlement of 'conflicts' as much as for the judicial settlement of disputes." *See* Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II*, 569.

[42] *See* Article 2 of the 1958 High Seas Convention. McDougal and Burke note that while "the injunction to be reasonable might, thus, have been supplemented by more specific factors to be taken into account in determining reasonableness in a particular context," the reciprocal obligation of reasonable regard generally "serves the common interest." Myres S. McDougal and William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven, 1962), 77.

[43] *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), [1974] ICJ Rep. 3.

[44] *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), at paragraph 67.

[45] *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), at paragraph 69.

[46] *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), at paragraph 71.

[47] *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), at paragraph 72.

[48] *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), at paragraph 73.

other, to the facts of the particular situation and the interests of other States with established fishing rights in the area.[49]

UNCLOS adopted the formulation of "due regard" in relation to competing uses in the high seas, the Area and the EEZ instead of "reasonable regard" referred to in the Fisheries Jurisdiction case[50] but the differences are purely semantic.[51] It is said that the due regard obligation is a procedural obligation.[52] It "is an express recognition of the general need for the accommodation of uses"[53] and "involves a balancing of the rights, jurisdiction and duties of the coastal State with the rights and duties of other States in the EEZ."[54] However, other than the Fisheries Jurisdiction Case, there has been no jurisprudence on what this obligation entails.

Dispute Settlement Provisions

UNCLOS also established a comprehensive dispute settlement framework in Part XV, which contains several specific provisions concerning the EEZ. First, Article 297(1) provides that disputes concerning the interpretation or application of the provisions of UNCLOS with regard to the exercise by a coastal State of its sovereign rights or jurisdiction shall be subject to the compulsory binding dispute settlement system in section 2 of Part XV in the following cases:

- when it is alleged that the coastal State has acted in contravention of the provisions of the Convention with regard to the freedoms and rights of other States in the EEZ as set out in article 58(1).[55]
- when it is alleged that another State, when exercising its rights under article 58(1) has acted in contravention of the Convention or in

[49] *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), at paragraph 78.

[50] The term "reasonable regard" was changed to "due consideration" before agreement on "due regard" was reached: *See* Myron Nordquist, Neil Grandy, Satya Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume III (*Leiden: 1995), 80.

[51] For example, the United States treats "due regard" and "reasonable regard" as essentially the same: *See* James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations and World Politics* (New York, 2011), 262.

[52] James Kraska, *Maritime Power and the Law of the Sea*, 267.

[53] McDougal and Burke, *The Public Order of the Oceans*, 77.

[54] Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II*, 543.

[55] Article 297 (1) (a), UNCLOS.

> contravention of laws and regulations adopted by a coastal State in conformity with the Convention.[56]

The effect of these provisions is to expressly provide that disputes concerning the interpretation or application of article 58 will be subject to the system of compulsory binding dispute settlement in section 2 of Part XV. This provision ensures that major maritime States can challenge any laws and regulations of the coastal State which interfere with the freedom of navigation or other freedoms set out in Article 58 if such laws and regulations are not specifically authorized in article 56 or other provisions of the Convention. At the same time, it also specifically provides that coastal States can challenge the actions of maritime powers when exercising the freedoms set out in article 58 if they contravene the provisions of the Convention or laws and regulations of the coastal State adopted in conformity with the Convention.

Article 297(2) and 297(3) impose limits on the system of compulsory binding dispute settlement in section 2 of Part XV of UNCLOS. These Articles in effect make it exceedingly difficult for States to challenge the discretionary decisions of the coastal State with respect to marine scientific research and the utilization of fisheries in its EEZ.

IV. Challenges to the EEZ Regime

It has been thirty years since the adoption of UNCLOS and questions as to whether it is still an effective regime for the regulation of the oceans continue to arise. As mentioned above, it has been argued that the EEZ regime does not adequately address either some issues that were foreseen during negotiations or new issues that have emerged in light of developments in technology and understanding of the marine environment. There is no doubt that there are certain issues which have put a strain on the carefully constructed compromises in the EEZ. The issue is whether these issues necessitate a change in the regime. These issues can be generally categorized into four (non-exhaustive) categories:

1. Regulation of Express EEZ Freedoms in Contravention of UNCLOS.
2. Deliberate or Constructive Ambiguity or Lack of Definitions of Key Terms;
3. Lack of Detailed Regulation on Certain Obligations;
4. Developments Not Foreseen by UNCLOS.

[56] Article 297 (1) (b), UNCLOS.

The purpose of this Paper is to demonstrate that the EEZ regime in UNCLOS does not need to be modified or altered. It was the intention of the drafters of UNCLOS provisions on the EEZ to create a normative framework and not to deal comprehensively with all issues of ocean governance. They were cognizant of the fact that circumstances would change and evolve and that the regime needed sufficient flexibility in order to accommodate such developments. Accordingly, UNCLOS contains several mechanisms or tools that can effectively address existing or new issues and enable the progressive development of the EEZ regime. The next four sections will give examples of supposed challenges to the EEZ regime and will then demonstrate how UNCLOS can be used to address these challenges.

V. Regulation of Express EEZ Freedoms in Contravention of UNCLOS

The fundamental essence of the EEZ is the substantive balance between coastal State rights and the rights of other States. However, this balance is arguably being challenged by the tendency of coastal States to adopt national legislation either enhancing the competences and jurisdiction of the coastal State and/or restricting the freedoms recognized in the EEZ 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."[57] This has been described as "creeping jurisdiction" or the "territorialisation" of the EEZ.[58] However, this trend is hardly surprising or unpredictable. The EEZ has always been perceived in "quasi-territorial terms."[59] Indeed, UNCLOS and its predecessors were largely motivated by the need to limit the expanding nature of coastal State jurisdiction over areas which were traditionally perceived as high seas. However, the drafters of UNCLOS recognized this possibility and put in place mechanisms to resolve this issue and maintain this carefully constructed balance. This will be illustrated in the context of (1) navigational freedoms in the EEZ and (2) the freedom to lay submarine cables and pipelines.

[57] *See* Sophia Kopela, "The 'Territorialisation' of the Exclusive Economic Zone: Implications for Maritime Jurisdiction," paper presented at the 20th Anniversary Conference of the International Boundaries Research Unit on the State of Sovereignty, Durham University, United Kingdom, 1 – 3 April 2009, 3.

[58] Sophia Kopela, "The 'Territorialisation' of the Exclusive Economic Zone," 3.

[59] Bernard Oxman, "The Territorial Temptation: A Siren Song at Sea," *American Journal of International Law* 100 (October 2006): 830 – 851, 839.

Navigational Rights

Navigational freedoms have always been an "essential" part of the law of the sea.[60] Freedom of navigation on the high seas embodies the idea that ships of all States can sail through any part of the high seas without interference from other ships except under limited exceptions recognized under international law.[61] Accordingly, Article 87 of UNCLOS explicitly recognizes the freedom of navigation as a high seas freedom.[62]

Article 58 (1) imports the high seas freedom of navigation into the EEZ, although this freedom must "be compatible with other provisions in the Convention" and hence, is subject to the rights and jurisdiction afforded to the coastal State in the EEZ.[63] For example, Article 73 specifically empowers coastal States to board, inspect and arrest vessels for violations of their fisheries law.[64] Another example is the requirement that all ships respect safety zones established by the coastal State around artificial islands, installations and structures.[65] However, it has been argued that navigational rights are being subject to restriction in a manner inconsistent with the EEZ regime under UNCLOS in two areas, first, the protection of the marine environment from ship-source pollution and second, matters relating to maritime security. As noted by Oxman, because both reflect important values that should be advanced, they present a serious challenge to the EEZ regime.[66]

Regulations Relating to Ship Source Pollution

Part XII provisions on ship-source pollution were subject to one of the most contentious debates during negotiations and the agreement reached has been

---

[60] *See* Jon M. Van Dyke, "The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone," *Marine Policy,* 29 (2005): 107 – 121, 107.

[61] *See* (for example) Article 90 of UNCLOS.

[62] Article 87 (1) (a), UNCLOS.

[63] It is noted in the Virginia Commentary that "[i]n theory, the freedoms exercised in the exclusive economic zone by other States are the same as those incorporated from article 87, provided they are compatible with the other provisions of the Convention. The difference is that these freedoms are subject to measures relating to the sovereign rights of the coastal State in the zone, and they are not subject to such measures or those rights beyond the zone." *See* Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II*, 565.

[64] Article 73 (1), UNCLOS.

[65] Article 60 (6), UNCLOS.

[66] Bernard Oxman, "The Territorial Temptation: A Siren Song at Sea," 840.

described as "the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."[67] Part of its strength is that it employs several mechanisms to maintain the balance between the navigational rights of other States with the rights and jurisdiction of the coastal State for the protection of the marine environment. For example, the coastal State may adopt legislation which regulates pollution from foreign vessels but only to the extent that its laws conform to and give effect to generally accepted international rules and standards adopted by the competent international organization, which in this case is the International Maritime Organization (IMO).[68] In other words, coastal States are limited to adopting laws and regulations which conform to and give effect to the *International Convention for the Prevention of Pollution From Ships* 1973, as modified by the Protocol of 1978 (MARPOL 73/78) and its annexes.

Similarly, with regard to enforcement, coastal State jurisdiction is much more limited and incorporates a graduated range of enforcement measures depending on the severity of the violation and the certainty of evidence.[69] This ranges from requests for information (if there are clear grounds to believe that a vessel has committed a violation of international standards) to inspection (when there is substantial discharge causing or threatening significant pollution) to detention (where there the vessel has committed a violation resulting in a discharge causing major damage or threat of major damage to a coastal State in its EEZ). Further UNCLOS only permits the application of monetary penalties for violations of national laws or international standards related to vessel-source pollution which occur beyond the territorial sea.[70]

Another notable feature is Article 211 (6) of UNCLOS which allows coastal States, after appropriate consultations with the competent international organization, to adopt stricter laws and regulations in special areas of their EEZs for "recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic." It is generally agreed that this Article provides authority for the designation of an area in the EEZ by the IMO as a Particularly Sensitive Sea Areas (PSSAs).[71] A PSSA is defined as a marine area that "needs

[67] John R Stevensen & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AJIL 488, 496 (1994)

[68] Article 211 (5), UNCLOS.

[69] *See* (generally) Article 220, UNCLOS.

[70] Article 230, UNCLOS.

[71] *See* (generally) "Comments made by the Division for Ocean Affairs and the Law of the Sea of the United Nations (DOALOS) in connection with Issues Raised in Document LEG 87/16/1," IMO LEG 87/WP 3, 13 October 2003; Julian Roberts, *Marine Environment Protection and*

special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities."[72] Such PSSAs allow the IMO to adopt "Associate Protective Measures" relating to navigation, and this includes routeing measures, reporting systems and other forms of navigation assistance.[73] The intention of the PSSA is to balance the interests of international shipping and the interests in protecting specific and well-defined vulnerable ecosystems as sanctioned by IMO (as opposed to unilaterally by coastal States). It is completely consistent with UNCLOS.

Several States have gone beyond what is allowed under the marine environment protection regime. For example, several States require prior authorization before the entry of all foreign vessels into their EEZs[74] or have designated specific areas in their EEZs where they can regulate the entry and passage of foreign ships,[75] motivated by concerns for the marine environment. Another example is the decrees that emerged from European States such as France and Spain after the Prestige oil spill in 2002. In a knee-jerk response to the catastrophic oil pollution that followed the sinking of the Prestige, France and Spain issued decrees requiring that all oil tankers traveling through their EEZs provide advance notice to these coastal States about their cargo, destination, flag and operators, with all single hulled tankers more than 15 years old having to be subject to spot inspections by maritime authorities.[76] This culminated in the 2005 EU Directive on ship-source pollution which, *inter alia,* imposes criminal liability for discharges from foreign ships in the EEZ independently from MARPOL. This has been widely criticized by the shipping industry as being grossly inconsistent with UNCLOS.[77]

Biodiversity Conservation: The Application and Future Development of the IMO's Particularly Sensitive Sea Area Concept (Germany, 2010), 100.

[72] "Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas," adopted by IMO Assembly Resolution A.982 (24), 1 December 2005.

[73] *See* Aldo Chircop, "The Designation of Particularly Sensitive Sea Areas: A New Layer in the Regime for Marine Environmental Protection from International Shipping" *in* Aldo Chircop, Ted McDorman and Susan Rolston (eds)., *The Future of Ocean Regime-Building*: *Essays in Tribute to Douglas M. Johnston* (Leiden, 2009), 603 – 603.

[74] *See* (for example) Maritime Zones of Maldives Act No. 6/96

[75] *See* (for example) Guyana's legislation (Act No. 10 of 30 June 1977); India's legislation (Act No. 80 of 28 May 1976); Pakistan (Act of 22 December 1976).

[76] Jon M. Van Dyke, "The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone," 109.

[77] The Directive was challenged in the English High Court of Justice by a coalition of the shipping industry, and was referred to the European Court of Justice: *See The Queen on the Application of*

Another issue affecting navigational rights in the EEZ is the transport of ultra-hazardous radioactive materials. Several States have either protested such transport or enacted legislation requiring prior consent before passage of vessels carrying highly radioactive substances in their EEZs.[78] Some States, such as Chile, have also been prepared to use force in order to prevent vessels carrying radioactive materials from entering their EEZs.[79]

Unilateral action by coastal States which restricts navigational rights will only undermine the regime and the global protection it seeks to enhance whereas UNCLOS has mechanisms in place to maintain the balance between coastal State rights and the rights of other States. Article 194 (4) provides that such measures to prevent pollution shall not result in unjustifiable interference with activities carried out by other States in the exercise of their rights exercised in conformity with UNCLOS. Article 297 (1) (c) also provides for compulsory dispute settlement in cases where it is alleged that a coastal State has acted in contravention of international rules and standards for the protection and preservation of the marine environment applicable to the coastal State and which have been established through a competent international organization or a diplomatic conference.

Maritime Security

Maritime security is not comprehensively dealt with in UNCLOS[80] although it sets out a clear jurisdictional framework for enforcement against crimes at sea. In the EEZ, the high seas rules on jurisdiction are preserved by Article 58 (2). The general principle is that the flag State has exclusive jurisdiction over vessels in the EEZ, with certain limited exceptions. For example, all States have the power to arrest and prosecute vessels suspected of engaging in piracy.[81] Similarly, all States also have the right to board vessels if there are reasonable grounds for

---

INTERTANKO, INTERCARGO, The Greek Shipping Cooperation Committee, Lloyds Register, the International Salvage Union v. The Secretary of State for Transport [2006] EWHC 1577 (Admin) and Intertanko and Others v. Secretary of State for Transport, ECJ Case C-308/06, 3 June 2008.

[78] The passage of the Akatsuki Maru in 1992, Pacific Pintail in 1995 and Pacific Teal in 1997 was subject to protests from many States including Argentina, Brazil, Chile, Uruguay, Portugal, South Africa, the Caribbean states, Malaysia, Nauru and Critibati: *See* (generally) J.M Van Dyke, "Applying the Precautionary Principle to Ocean Shipments of Radioactive Maters," *Ocean Development and International Law* 27 (1996) 379- 397.

[79] This was in response to the passage of the Pacific Pintail in 1995.

[80] Natalie Klein, *Maritime Security and the Law of the Sea* (United States, 2011), 9.

[81] Article 105, UNCLOS.

suspecting, *inter alia*, that the ship is engaged in piracy, the slave trade, unauthorized broadcasting or that the ship does not have a nationality.[82]

A potential threat to navigation in the EEZ arose after the September 11th attacks on the United States. The ability to board and inspect vessels traversing in the EEZ was perceived to be an important tool in the suppression of marine terrorism including the carriage of weapons of mass destruction. There were a series of new measures adopted by the IMO, including the 2002 amendments to the International Convention on the Safety of Life at Sea. In addition, Protocols were adopted in 2005 to update the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention), and its Platforms Protocol, in light of the threat of maritime terrorism. The Proliferation Security Initiative (PSI) was an initiative by the US to mobilize "like-minded States" to participate in naval interception operations designed to inspect ships carrying weapons of mass destruction particularly from rogue States such as North Korea.[83]

However, none of these developments appeared to have posed any challenge to the EEZ regime. The high seas rules on jurisdiction continue to apply to ships in the EEZ. The 2005 Protocol to the 1988 SUA Convention contains new provisions on the boarding of suspect vessels, but the boarding provisions are completely consistent with UNCLOS. Suspect ships can only be boarded seaward of the territorial sea (i.e., in the EEZ or on the high seas), and only with the consent of the flag State, consistent with the jurisdictional principles recognized in UNCLOS.[84] Similarly, the PSI did not change rules of boarding and inspection within the EEZ. It is therefore accurate to say that the navigational rights in the EEZ regime appears to have met the maritime security challenges which have emerged since 2001.

Laying and Repair of Submarine Cables and Pipelines

The EEZ regime specifically incorporates the high seas freedom referred to in article 87 of "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."[85] It should be noted that while repair of cables is not explicitly mentioned, the repair of cables would be considered "other internationally lawful uses of the sea" related to the

[82] Article 110, UNCLOS.

[83] *See* (generally) Natalie Klein, *Maritime Security and the Law of the Sea*, 193 – 207.

[84] Natalie Klein, *Maritime Security and the Law of the S*ea, 173 – 184.

[85] Article 58 (1), UNCLOS.

freedom to lay cables including those associated with the operation of submarine cables.[86]

The continental regime in Part VI is also relevant as it governs the same geographical area of seabed as the EEZ regime.[87] Article 79 is the applicable provision governing submarine cables and pipelines. It recognizes that all States are entitled to lay submarine cables and pipelines on the seabed in accordance with this article and sets out the extent to which the coastal State can regulate such activities. Although UNCLOS covers submarine cables and pipelines in the same article, it makes clear distinctions on the rights of coastal States over pipelines and submarine cables. With regard to cables, the coastal State can only subject the laying or maintenance of cables to "reasonable measures" for the exploration of the continental shelf and the exploitation of its natural resources.[88] With regard to pipelines, Article 79(2) provides that the coastal State may take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources *as well as* the prevention, reduction and control of pollution from pipelines. There are no similar provisions for cables. Further, UNCLOS also provides in article 79(3) that the delineation of the course for the laying of pipelines on the continental shelf (and in the EEZ) is subject to the consent of the coastal State but there is no equivalent requirement for cables. The difference is likely attributable to the fact that cables are relatively benign to the environment[89] whereas pipelines can carry noxious substances.

The freedom to lay and repair submarine cables is being increasingly regulated by certain coastal States in a manner that is inconsistent with UNCLOS. First, national legislation often treats cables and pipelines the same and have required consent for the delineation of cables (not just pipelines), which is contrary to the express wording and intention of UNCLOS. [90] Second, coastal

---

[86] Robert Beckman, "Submarine Cables – A Critically Important but Neglected Area of the Law of the Sea," paper presented at the 7th International Conference of the International Society of International Law on Legal Regimes of Sea, Air, Space and Antarctica, New Delhi, 15 – 17 January 2010, at 16, *available at* http://cil.nus.edu.sg/wp/wp-content/uploads/2010/01/Beckman-PDF-ISIL-Submarine-Cables-rev-8-Jan-10.pdf.

[87] Article 56 (3) of UNCLOS states that the rights given to the coastal State in the EEZ in relation to the seabed and subsoil shall be exercised in accordance with Part VI of UNCLOS.

[88] Article 79 (2), UNCLOS.

[89] *See* Lionel Carter, Douglas Burnett, Stephen Drew, Graham Marle, Lonnie Hagadorn, Deborah Bartlett-McNeil and Nigel Irvine, "Submarine Cables and the Oceans: Connecting the World," *UNEP-WCMC Biodiversity Series* No. 31 (United Kingdom, 2009), 9 *available at* http://www.iscpc.org/publications/ICPC-UNEP_Report.pdf..

[90] Examples of states that subject the delineation of cable routes to their consent include China, Provisions Governing the Laying of Submarine Cables and Pipelines, Article 4, Decree No. 27 of the State Council of the People's Republic of China, 15 February 1989, available at Law Info

States have adopted laws and regulations in relation to submarine cables which cannot be considered "reasonable measures" for the exploration and exploitation of resources. These include imposing a tax for cables which transit continental shelves,[91] as well as imposing requirements for permits to undertake laying and repair activities on the continental shelf. [92] Such permits, particularly for the repair of cables, cause unnecessary delay which affects the quality of broadband transmissions to all users along the international cable route.[93] This is becoming an increasing problem in light of the world's increasing reliance on submarine cables for communications, with current estimates suggesting that up to 95 % of the world's data communications is provided by submarine cables.[94]

How can the provisions of UNCLOS meet this challenge? The first course of action would be a good faith observance (required by Article 300) of the mutual obligations of "due regard" in the EEZ. From a practical perspective, this should involve procedural steps of consultation, notification and co-operation to minimize interference with each other's legitimate rights in the EEZ. For example, the cable ship should inform the coastal State (but not be subject to permit requirements or consent of the coastal State) of its activities including its location. This would enable the coastal State to manage or regulate resource exploitation activities under its jurisdiction which are taking place in the vicinity of the laying or repair activities. The cable ship could also assure the coastal State

---

China Web site (for subscribers only); India, Indian Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, Act No. 80 of 28 May 1976, Article 7(8), UN Division of Ocean Affairs and Law of the Sea (DOALOS), *available at* www.un.org/Depts/los/LEGISLATIONANDTREATIES. ; Malaysia, Exclusive Economic Zone Act 1984, Act No. 311, section 22, DOALOS, *available at* www.un.org/Depts/los/LEGISLATIONANDTREATIES. ; Saint Lucia, Maritime Areas Act, Act No. 8 of July 18, 1984, Section 13(2), DOALOS, *available at* www.un.org/Depts/los/LEGISLATIONANDTREATIES. ; and Uruguay, Act No. 17,033, 20 November 1998, Article 12, DOALOS, *available at* www.un.org/Depts/los/LEGISLATIONANDTREATIES.

[91] Malta imposes an annual fee to lay and maintain foreign-owned submarine telecommunications cables on Malta's continental shelf even for those cables not entering waters under Malta's sovereignty: *See* J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims, Third Edition* (Leiden, 2012), 461.

[92] For example, China, Cyprus, Guyana, India, Malaysia, Mauritius, Pakistan, Portugal, Russia, Saint Lucia, the United States and Uruguay require consent to be soughtfor the laying of submarine cables in their EEZs or on their continental shelves: *See* Roach and Smith, *Excessive Maritime Claims, Third Edition,* 461.

[93] *See* (generally) Tara Davenport, "Submarine Communications Cables and Law of the Sea: Problems in Law and Practice," *Ocean Development and International Law* 43 (3) (2012), 201 – 242, 212.

[94] Carter *et al*, *Submarine Cables and the Oceans: Connecting the World*, 8.

that the activities of the cable ship are not prejudicial to its rights and duties with respect to resources.

Second, as mentioned above, Article 297 (1) (a) allows States to refer a dispute to compulsory binding dispute settlement if it is alleged that the coastal State has acted in contravention of the provisions on the freedom of laying submarine cables and pipelines. Unfortunately, no State has decided that it has a sufficient interest in the issue to invoke the compulsory binding dispute settlement system in UNCLOS to challenge the legality of such domestic regulations. The cable industry is attempting to deal with the issue through education and by encouraging States to develop best practices with regard to the laying and repair of submarine cables.[95]

VI. Deliberate Ambiguity and Lack of Definitions of Key Terms

The second category of challenges to the EEZ regime can be attributed to a deliberate ambiguity in certain freedoms in the EEZ, particularly caused by the use of the phrase of "other internationally lawful uses of the sea" as well as a lack of definition in key terms.

Military Activities

The freedom of navigation recognized in the EEZ also includes the freedom of warships to traverse through the EEZ.[96] However, the issue of the right of other States to conduct military activities in the EEZ is a source of tension between the major maritime powers and coastal States.[97] The most controversial military activities are those which involve military manoeuvres and live firing exercises, military reconnaissance, especially reconnaissance activities which test the electronic defenses of coastal States, and military surveys (military surveys will be discussed under 'Survey Activities' below).

The controversy over military activities stems from the disagreement over whether such activities are included in the "freedoms of navigation and overflight and other internationally lawful uses of the sea associated with these freedoms" under Article 58. This is, to a large extent, attributable to the compromises reached during negotiations on UNCLOS. Military activities or uses in the EEZ were not explicitly mentioned during official negotiations, due to the belief of many States, including the US, that this would quickly derail any efforts for a

[95] Tara Davenport, *Submarine Communications Cables and Law of the Sea: Problems in Law and Practice*, 224.

[96] Rothwell and Stephens, *International Law of the Sea*, 228.

[97] Natalie Klein, "Maritime Security and the Law of the Sea," 47.

convention.[98] However, there was no doubt that preserving the traditional high seas freedoms of military operations and activities in the EEZ was a high priority for the US.[99] During negotiations, the US and other maritime powers had objected to the phrase "other internationally lawful uses of the sea related to navigation and communications" because it was too restrictive.[100] The final compromise language in article 58(1) was proposed by the representative of the United States, Ambassador Elliot Richardson. It reads as follows:

> 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 and pipelines, and compatible with the other provisions of this Convention.*[101]

To the US, the intention behind "other internationally lawful uses of the sea related to these freedoms such as those associated with the operation of ships," was to preserve traditional high seas freedoms such as the freedom to conduct a large range of military activities.[102]

However, it is also fair to say that some coastal States such as Brazil persistently objected to this interpretation.[103] For example, Brazil's declaration on the signing of the Convention expressly stated 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." [104] Such States also

[98] Galdorisi and Kaufman, "Military Activities in the Exclusive Economic Zone," 271.

[99] Galdorisi and Kaufman, "Military Activities in the Exclusive Economic Zone," 271.

[100] Jorge Casteneda, "Negotiations on the Exclusive Economic Zone at the Third UN Conference on the Law of the Sea," in *Essays on International Law in Honour of Judge Manfred Lachs* (1987), 622. *See also* Nandan and Rosenne, *The United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II*, 651 – 562.

[101] Castaneda, "Negotiations on the Exclusive Economic Zone," 622.

[102] Galdorisi and Kaufman, "Military Activities in the EEZ," 272.

[103] Galdorisi and Kaufman, "Military Activities in the EEZ," 275.

[104] *See* Brazil's Statement dated 10 December 1982 *available at* http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Brazil%20Upon%20signature. Also see for example, the Declarations of Bangladesh, Cape Verde, India,

emphasize Article 301 on peaceful purposes of the sea and the obligation to refrain from the threat or use of force against other States to reinforce the argument that military activities are not allowed in the EEZ. As noted by some writers, "the apparent exclusion of the subject from formal negotiations, combined with the 'remarkable' silence of the Convention 'on legal questions connected with military use' (a silence that might logically follow from exclusion of the subject in negotiations) render suspect, to some, the conclusion that military uses were intended to be permitted under the Convention regime."[105]

The question is how can such a divergence of views be resolved when it is attributable to a deliberate or constructive ambiguity that can be used to support two opposing arguments? First, as a starting point, both coastal States and other States should understand that if other States have a right to conduct military activities in the EEZ, there are certain limitations on this right and this may help alleviate the concerns of coastal States. Such lawful uses of the sea must be compatible with the other provisions of the Convention, including the provisions on peaceful purposes (article 88) and abuse of rights (article 300). Second, other States are under an obligation to have due regard to the rights and duties of the coastal State in the EEZ when exercising their rights. If it is accepted that the rights and duties of the coastal State are limited to the exploration and exploitation of the natural resources and other economic activities, the question is whether other States should notify and consult the coastal State to ensure that it does not unduly interfere with its rights and duties over resources and economic activities. This seems reasonable for certain types of military activities, such as those involving live firing exercises. However, this may not be reasonable for other military activities, such as reconnaissance on naval assets or coastal defenses.

Second, there is some support for military activities, or at least certain military activities, being regarded as an "unattributed right" subject to resolution of conflicts under Article 59 (i.e. it is a residual right not attributed to either other States or coastal States). Certain experts have indeed suggested this. For example, both Satya Nandan and Jorge Casteneda have opined that the issue of 'residual rights' not attributed specifically to either coastal States or third States "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 restriction by military powers in the high seas."[106]

Malaysia, Pakistan and Uruguay on their signature or ratification of UNCLOS. This was in turn protested by France, Italy, the Netherlands and the United Kingdom.

[105] Galdorisi and Kaufman, "Military Activities in the EEZ," 253.

[106] Satya N. Nandan, "The Exclusive Economic Zone: A historical perspective" *in The Law and the Sea: Essays in Memory of Jean Carroz* (Rome, 1987), 171.

One interesting issue is whether a dispute on the interpretation of the language in Article 58 is subject to the system of compulsory binding dispute settlement in section 2 of Part XV of UNCLOS. Several maritime powers, including China, opted out of the system of compulsory binding dispute settlement in section 2 for disputes "concerning military activities" by filing a declaration with the UN Secretary-General as permitted in article 298. If an issue arises on whether certain military activities are permitted in the EEZ because they are "internationally lawful uses of the sea . . ." within article 58(1), is it a dispute "concerning military activities" which is excluded under a 298 declaration, or is it a dispute on the interpretation of Article 58(1) which is not excluded by a 298 declaration?

The answer to these questions may depend upon whether a court or tribunal interprets the EEZ provisions in light of the object and purpose of the EEZ, which was to give the coastal State the sovereign right to resources and economic activities in the EEZ and such jurisdiction as is necessary to exercise its rights over the resources and economic activities. In other words, it was intended as a resource zone, not a zone in which the security interests of the coastal State were to be taken into account.

Survey Activities

Survey activities in the EEZ have also been the cause of some concern and debate on whether they are legally permissible in the EEZ.[107] This partly stems from a lack of definition of terms used in UNCLOS such as "surveys," "hydrographic surveys," "survey activities" and "marine scientific research." Admittedly, defining these terms may have proved too difficult a task given that there are a range of surveys for various purposes.[108] For example, there are hydrographic surveys for the purpose of producing navigation charts for navigation, hydrographic surveys for the purpose of delineating the route of cables and pipelines, seismic surveys for the purpose of exploration for oil and gas resources, as well as military surveys for the collection of marine data for military purposes, including "oceanographic, hydrographic, marine geological/geophysical, chemical, acoustic, biological, and related data."[109]

[107] Natalie Klein, "Maritime Security and the Law of the Sea," 219.

[108] For a more comprehensive explanation of the different types of surveys, *See* Roach and Smith, *Excessive Maritime Claims, Third Edition,* at 413 – 450.

[109] J. Ashley Roach, "Defining Scientific Research: Marine Data Collection," *in* Myron Nordquist, Ronan Long, Tomas Heidar and John Norton Moore (eds.), *Law, Science and Ocean Management* (Netherlands, 2007) at 544.

Some States have adopted laws and regulations requiring a permit for any survey activities in their EEZs.[110] In addition, States such as China have adopted very broad definitions of "marine scientific research" to include all survey activities and hence subject to coastal state regulation in the EEZ.[111] Other States such as the United States argue that the requirement for coastal State consent will depend on the purpose of the survey.[112] They argue that coastal State consent is not needed for hydrographic surveys or military surveys as these are part of the "other internationally lawful uses of the sea related to [high seas] freedoms, such as those associated with the operation of ships" given to other States in the EEZ.[113]

As a preliminary point, it is clear that hydrographic surveys and military surveys are *not* marine scientific research. Although there is no definition of marine scientific research in UNCLOS, marine scientific research is consistently distinguished from surveys.[114] The separate treatment given by UNCLOS to these two activities should be interpreted to mean that surveys are distinct from and therefore not subject to the marine scientific research regime.[115]

It is also clear that that surveys for navigational charts and for cable and pipeline routes are lawful uses of the sea related to the freedoms of navigation and the laying of pipelines and cables within Article 58(1). Conflicts between survey activities and coastal State activities can be alleviated through the implementation of the "due regard" obligation. While user States have a right to conduct such

---

[110] *See* (for example) the legislation of Barbados (Act of 3 February 1978); Belgium (Act of 22 April 1999); Grenada (Act No. 20 of 1 November 1978); India (Act No. 80 of 28 May 1976); Malaysia (Act No. 311 of 1984), Mauritius (Act No. 13 of 3 June 1977); Morocco (Act No. 1-81 of 18 December 1980); Pakistan (Act of 22 December 1976) and the Philippines (Presidential Decree No. 1599 of 11 June 1978).

[111] Zhang Haiwen, "Is it Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ?" *Chinese Journal of International Law* 9 (2010): 31 – 47, 43. *See also* Sam Bateman, "Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research," *Marine Policy* 29 (2005) 163 – 174.

[112] *See* J. A. Roach, "Defining Scientific Research: Marine Data Collection," *in* Myron Nordquist, Tommy Koh and John Norton Moore, *op. cit. (*Leiden, 2007), 541 – 542.

[113] *See* (for example) Raul Pete Pedrozo, "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone," *Chinese Journal of International Law* 9 (2010): 9 -29.

[114] For example, Article 19 (2) (j) of UNCLOS refers to "research or survey activities"; Article 21 (1) (g) refers to "marine scientific research and hydrographic surveys"; and Article 40 refers to "marine scientific research ships and hydrographic survey ships" and "research or survey activities."

[115] *See* Alfred Soons, *Marine Scientific Research and the Law of the Sea* (The Hague, 1982), 125.

surveys, they must have due regard to the rights and duties of the coastal State with regard to resources and economic activities. The coastal State arguably has a right to ensure that the information gathered by such activities is not utilized to compromise its rights and duties relating to resources and economic activities. Therefore, pursuant to this duty and given that information or data collected through such surveys are not confidential or security-sensitive, it would not be unreasonable for vessels conducting such surveys to consult with the coastal State with respect to its activities, and if requested, call in regularly to provide its location and provide a copy of its report to the coastal State.

Arguably, it is not as clear as to whether military surveys are "other internationally lawful uses of the sea related to [high seas] freedoms, such as those associated with the operation of ships." Military surveys for intelligence gathering or other purposes fall under the rubric of "military activities" and hence, are subject to the same controversy as the permissibility of military activities in the EEZ (discussed above). If one takes the view that military activities are permissible in the EEZ, then military surveys would likewise be permissible. However, apart from arguing that such military surveys are marine scientific research, some coastal States have also argued that military surveys for the purposes of intelligence-gathering are contrary to the "peaceful purposes" obligation in Article 301, and can be considered a use of force or threat of use of force against that State.[116] Resolution of this divergence in views is not as easily resolved as the difference in interpretations of military activities and other types of surveys described above. Implementation of the "due regard" obligation through notification or consultation (as was suggested above in relation to military activities) may not be a feasible solution particularly when it comes to intelligence-gathering survey activities. One way to deal with this issue is for the surveying State to assure the coastal State that the information being gathered is only for military purposes and that the information will not be made available to the public.

Operational Oceanography and Marine Scientific Research

In recent years, as science and technology have developed, the lack of definition of marine scientific research has exacerbated disagreements on whether certain types of activities are marine scientific research or operational oceanography. Operational oceanography has been defined as the "routine collection of ocean observations in all maritime zones, such as temperature, pressure, current, salinity, and wind" used for "monitoring and forecasting of weather (meteorology), climate prediction, and ocean state estimation (e.g. surface

[116] Ren Ziafeng and Cheng Xizhong, "A Chinese Perspective," *Marine Policy* 29 (2005) 139, 142.

currents and waves)."[117] While operational oceanography is not mentioned in UNCLOS, it was certainly a concern during the Third UN Conference on Law of the Sea and it was agreed by the Chairman of the Third Committee that the collection of marine meteorological data was not marine scientific research regulated by Part XIII of UNCLOS.[118] In recent years, the use of certain data collection instruments under the rubric of operational oceanography has attracted controversy. Argo floats are examples of such instruments. The Argo Project is the deployment of approximately 3000 active free-floating ocean monitoring devices which are used to "collect a large database of ocean signals related to climate change and provide in situ satellite observations of the Earth System as a whole, while protecting life and property, predicting climate variations and severe weather, collecting, storing, and distributing data and information freely to all interested users in near-real time."[119]

The majority of leading researching States, including the US, views the Argo Project as operational oceanography and not marine scientific research subject to coastal State consent,[120] while other States such as Peru and Argentina view operational oceanography as marine scientific research and subject to the consent regime.[121] The latter also wanted to ensure that this extensive network of instruments would not be gathering valuable information relating to natural resources.[122] An attempt to resolve this divergence in views was made by the Intergovernmental Oceanographic Commission (IOC)[123] when it requested that its

[117] J. A. Roach, "Defining Scientific Research: Marine Data Collection," 544 – 545.

[118] *See* Resolution 16 (Cg-VII) adopted by the World Meteorological Organization at its Eighth Congress in Geneva in April/May 1979 (UN Document A/CONF.62/80, 9 August 1979, Official Records of the Third United Nations Conference on the Law of the Sea, Volume XII, page 56 (1980); Oral Report of the Chairman of the Third Committee to the Third Committee at its 46th Meeting, 20 August 1980 (Official Records of the United Nations Third Conference on the Law of the Sea Volume XIV, pages 102 – 103, 1982), Report of the Chairman of the Third Committee (UN Document A/CONF. 62/L.61, 25 August 1980, Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV, pages 133 – 134, 1982).

[119] Aurora Mateos and Montserrat Gorina-Ysern, "Climate Change and Guidelines for Argo Profiling Float Deployment on the High Seas," *American Society of International Law Insight,* Volume 14, Issue 8 (10 April 2010) *available at* http://www.asil.org/insights100408.cfm.

[120] J. A. Roach, "Defining Scientific Research: Marine Data Collection," 562.

[121] Mateos and Gorina-Ysern, "Climate Change and Guidelines for Argo Profiling Float Deployment on the High Seas."

[122] Mateos and Gorina-Ysern, "Climate Change and Guidelines for Argo Profiling Float Deployment on the High Seas."

[123] The Intergovernmental Oceanographic Commission (IOC) was established in 1960 and is the UN body for ocean science, ocean observatories, ocean data and information exchange. *See* IOC Website *available at* http://ioc-unesco.org/.

Advisory Body of Experts on the Law of the Sea (IOC/ABE-LOS) draft Guidelines.[124] The IOC/ABE-LOS accordingly drafted non-binding Guidelines for the legal regulation of Argo Profiling Float Deployments on the High Seas in 2008 which require prior notification if the Argo floats enter the EEZ of IOC Member States and which give coastal States some control over the public distribution of sensitive information.[125] However, the Guidelines may face issues in its implementation given that not all Member States agreed on the regime adopted in the Guidelines.[126] It would appear that the deployment of Argo Floats is an unattributed right, and is best addressed under Article 59. On this basis, there is strong argument that "in 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," that the Guidelines reached the right balance in taking into consideration the interests of coastal States and the common interest of all States.

VII. Obligations in UNCLOS Not Comprehensive Enough to Establish Effective Regulations

Over the years, our understanding of the importance of the marine environment and new threats to it as well as our awareness of the dangers of overexploitation of living resources have evolved, highlighting the need for a comprehensive regime. A common criticism of UNCLOS is that its provisions are vague, often hortatory and impose no concrete obligations, particularly in relation to the protection of the marine environment and conservation of living resources. However, given the breadth of the subjects considered at UNCLOS, it was not intended to be the forum for the development of detailed regulations of every single issue of oceans governance. Instead, it adopted specific mechanisms to facilitate the development of such regulations which included obligations to adopt international rules, regulations and standards by the competent international organization and incorporation by reference of international rules, regulations and standards into national legislation.

Protection of the Marine Environment in the EEZ

[124] IOC Assembly Res. XIX-19 (1997).

[125] Mateos and Gorina-Ysern, "Climate Change and Guidelines for Argo Profiling Float Deployment on the High Seas."

[126] Indeed, the Guidelines caused so much controversy that some recommended that this body be disbanded. *See* Mateos and Gorina-Ysern, "Climate Change and Guidelines for Argo Profiling Float Deployment on the High Seas."

UNCLOS was negotiated at a time when international environmental law was increasing in importance. The negotiations at the Third Conference on the Law of the Sea began in 1973, just one year after the 1972 UN Conference on the Human Environment in Stockholm. UNCLOS adopted a very wide definition of "pollution to the marine environment" and also placed both general and specific obligations in relation to the environment,[127] particularly addressing ship-source pollution, dumping, land-based pollution, seabed activities, activities in the Area and pollution from the atmosphere.[128] It was the first time that a treaty had so comprehensively dealt with substantive obligations to protect and preserve the marine environment. It also included enforcement provisions which gave enforcement powers to the port State, coastal State and flag State and provided for the application of dispute settlement provisions to violations of international rules on the protection of the marine environment.[129]

The primary way in which UNCLOS keeps pace with developments in international environmental law is through the "elaboration, or incorporation by reference, of international minimum standards for the prevention, reduction, and control of pollution of the marine environment from all sources."[130] First, there is a general obligation on States to cooperate on a global and regional basis in formulating rules and standards for the protection of the marine environment.[131] Second, such rules and standards provide the minimum benchmark for national legislation on prevention of pollution using a variety of formulas ranging from an obligation to "take into account" international standards for land-based and atmospheric sources of marine pollution[132] to an obligation to adopt "no less effective" standards for seabed activities, activities in the Area and dumping,[133] to the "at least have the same effect" obligation applicable to vessel-source pollution.[134]

These mechanisms have been utilized to varying degrees of success. For example, article 210 of UNCLOS imposes an obligation on States to adopt laws

[127] *See* Article 1 (4) of UNCLOS.

[128] *See* (generally) Part XII of UNCLOS, and Articles 207 – 212.

[129] Catherine Redgewell, "From Permission to Prohibition: The 1982 Convention on the Law of the Sea and Protection of the Marine Environment," *in* David Freestone, Richard Barnes, and David Ong (eds), *The Law of the Sea: Progress and Prospects* (United States, 2006), 181.

[130] *See* (generally) Catherine Redgewell, "From Permission to Prohibition," 181 – 183.

[131] Article 197, UNCLOS.

[132] *See* Article 207 (1) and 212 (1), UNCLOS.

[133] *See* Articles Article 208 (3), 209 (2) and 210 (6), UNCLOS.

[134] *See* Article 211 (2), UNCLOS.

and regulations to prevent, reduce and control pollution of the marine environment by dumping, and that such national laws and regulations shall be no less effective in preventing, reducing and controlling pollution from dumping than "the global rules and standards". This requires States Parties to UNCLOS to have rules on dumping which are at least as effective as the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (1972 London Convention). Further, once the 1996 Protocol to the London Convention becomes generally accepted, States parties will be required to have national laws and regulations that are at least as effective as the 1996 Protocol. This is also significant because the 1996 Protocol was updated to incorporate basic principles of international environmental law such as the precautionary approach which was first articulated at the 1992 UN Conference on the Environment and Development in Rio de Janeiro.

The regime for the protection of the marine environment from sea-bed activities under national jurisdiction has arguably been less successful. This is because, while Article 208(5) obligates States, acting especially through competent international organizations or diplomatic conference, to establish global rules, standards and recommended practices and procedures, States have not fulfilled this obligation. Therefore, this is a case where UNCLOS anticipated the need for global rules and standards and called for their adoption, but the international community has failed to take the action required.

Management and Conservation of Living Resources

UNCLOS gives coastal States the right to explore and exploit all the living resources within their 200 nm EEZs.[135] It also imposes an obligation on coastal States to preserve and manage the living resources in their EEZs.[136] However, the EEZ is a political boundary based on geographic considerations which fish stocks obviously cannot understand or follow. This usually requires States within the same region to cooperate to manage fish stocks. UNCLOS contains vague provisions in Articles 63 and 64 requiring cooperation to manage and conserve straddling stocks and highly migratory species. However, the international community found it necessary to supplement UNCLOS by adopting the 1995 Fish Stocks Agreement to implement the general obligations in Articles 63 and 64. In addition, the key to implementing the 1995 Fish Stocks Agreement is the establishment of regional fisheries management organizations (RFMOs).

However, an even greater problem for many countries which is proving a challenge for the fisheries regime established in the EEZ is illegal, unregulated

[135] Article 56 and 57, UNCLOS.

[136] *See* Articles 61 and 62 of UNCLOS.

and unreported (IUU) fishing. Many developing coastal States do not have the resources necessary to police their EEZs and prevent foreign fishing vessels from plundering their fishing resources. Some do not even have the capacity to police their own fishing fleet or sustainably manage their own fisheries resources. While the 1995 Fish Stocks Agreement envisages the establishment of RFMOS, this is proving difficult in regions such as Asia.

The international agency responsible for fishing is the Fisheries Division of the Food and Agricultural Organization. However, unlike the IMO in relation to ship-source pollution, it has no power under UNCLOS or any other treaty to make binding regulations or require the cooperation of States. It can only attempt to persuade States to adopt the agreements and codes it has drafted. However, it has made a significant contribution to soft law or non-binding instruments and has thus greatly supplemented the EEZ regime in UNCLOS. Such instruments include the 1975 *Code of Conduct on Responsible Fisheries,* the 2001 *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, and the *2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.* The capacity for such soft-law instruments to be interpreted in a manner equivalent to binding obligations should not be underestimated.[137] For example, international courts have taken into account soft-law principles in so far as they articulate general principles agreed by consensus.[138]

VIII. Issues not Covered by UNCLOS

While UNCLOS is an extensive treaty, it could not conceivably cover in great detail every issue, nor could it anticipate every issue relating to the uses of the oceans that would arise. However, as will be demonstrated below, UNCLOS still remains relevant to how these issues can be dealt with, even if not dealt with in UNCLOS itself.

Archaeological and Historic Objects / Underwater Cultural Heritage

An issue which has posed a challenge to the EEZ regime is the increasing concern for underwater cultural heritage. During the negotiations, some States wanted to extend, under certain conditions, the jurisdiction of the coastal State to the

[137] *See* Alan Boyle, "Further Development of the Law of the Sea Convention: Mechanisms for Change," *International and Comparative Law Quarterly* 54 (July 2005): 563 – 584, 572 – 574.

[138] *See* (for example) the *Gabcikovo Case* (1997) ICJ Reports 7, at paragraph 140.

underwater cultural heritage found on the continental shelf.[139] However, this was rejected because of the fear of creeping jurisdiction of coastal States.[140]

UNCLOS does have some provisions addressing underwater cultural heritage, although they have been criticized by some as being inadequate. Article 149 of UNCLOS governs archaeological and historical objects found in the Area, that is, the seabed beyond national jurisdiction. Article 303 provides that coastal States have a duty to protect objects of an archaeological and historical objects found at sea and to cooperate for such purpose. It further provides that coastal States may regulate the removal of such objects in their contiguous zones as well as in their territorial seas. However, UNCLOS is silent on the regulation of such objects in the EEZ.

UNCLOS gives coastal States the sovereign rights for the purpose of exploring and exploiting and conserving and managing the natural resources in their EEZs, as well as sovereign rights with respect to other activities for the economic exploitation and exploration of the zone. Archaeological and historical objects are clearly not natural resources. Arguably a coastal State can regulate the commercial salvage of archaeological and historic objects in its EEZ on the ground that it has a right to regulate economic activities. The right of coastal States to otherwise regulate archaeological and historic objects in the EEZ is not clear.

Several States in Asia have enacted national legislation which asserts the right to regulate underwater cultural heritage in their EEZs.[141] The situation is further complicated by the subsequent adoption of the 2001 Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention). The UNESCO Convention establishes a common framework and standard for the protection of underwater cultural heritage against looting and destruction. It also provides practical rules for the treatment and research of underwater cultural heritage. Article 10 of the Convention provides that the coastal State has the right to take all practicable measures to prevent immediate danger to the underwater cultural heritage and that it shall act as the coordinating State to implement measures of protection. The Convention also states that nothing in it shall

---

[139] *See* Informal Proposal by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia (UN doc/A/CONF.62/C.2/Informal Meeting/43/Rev 3 of 27 March 1980).

[140] *See* Tullio Scovazzi, "The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention," *in* David Freestone, Richard Barnes, and David Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford Univ. Press, 2006), 125.

[141] *See* (for example) the legislation of Australia (Australian Historic Shipwreck Act 1976); Ireland (National Monuments Act No. 17 of 1987); Portugal (Law Decree No. 117 of 14 May 1997); Spain (Law 16/1985); China (Underwater Cultural Relics Regulation 1989); Mauritius (Maritime Zones Act No. 2 of 2005); Morocco (Act No. 1-81 of 18 December 1980).

prejudice the rights, jurisdiction and duties of States under international law, including UNCLOS.[142] However, some States have expressed the concern that the provisions in the UNESCO Convention exceed the rights and jurisdiction of coastal States in the EEZ under UNCLOS.[143]

At present, the Convention has been ratified by only 42 countries, including only two from the Asia-Pacific region (Cambodia and Iran).[144] The present lack of widespread acceptance of this Convention highlights the importance of ensuring that any international convention adopted with the intention of developing State's rights and obligations under UNCLOS should be consistent with UNCLOS.

Arguably, the regulation of such objects in the EEZ falls within the provision on residual rights in Article 59. While some have argued that the regime established in the UNESCO Convention is an example of an application of Article 59,[145] it is debatable whether it can be said to be a resolution on the basis of equity taking into account the importance of the interests involved as well as to the international community, given its perceived bias in favour of the coastal States.

Protection of Marine Biological Diversity

Another challenge to UNCLOS is whether it can be interpreted and applied in order to protect marine biological diversity. The only provision in UNCLOS that relates to biodiversity or ecosystems is article 194(5), which provides that:

> The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

One of the major documents coming out the 1992 UN Conference on Environment and Development (UNCED) Conference in Rio which is directly relevant to protection and preservation of the marine environment is Chapter 17 of Agenda 21.[146] Chapter 15 calls for new approaches to protect and preserve the

---

[142] Article 3, UNESCO Convention.

[143] Tullio Scovazzi, *The Protection of Underwater Cultural Heritag*e, 134.

[144] *See* Status on the Convention on the Protection of Underwater Cultural Heritage *available at* http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha.

[145] L. Migliorino, "Submarine Antiquities and the Law of the Sea," (1982) 4 *Marine Policy Reports* 4.

[146] *See* Agenda 21, *available at* http://www.unep.org/Documents.Multilingual/Default.asp?documentid=52.

marine environment, but it also recognizes that UNCLOS provides the legal framework for fulfilling the proposed action plan on protection of the oceans. It specifically provides in paragraph 17.1 that:

> International law, as reflected in the provisions of the United Nations Convention on the Law of the Sea . . . sets forth rights and obligations of States and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources.

The other major document to come out of the 1992 UNCED Conference was the 1992 Convention on Biological Diversity (CBD). The protection of biological diversity, including marine biodiversity and marine genetic resources, is not covered in any way in UNCLOS, but it is covered in the CBD. However, the CBD also specifically recognizes that the UNCLOS establishes the legal framework for dealing with the marine environment. Article 22(2) states that:

> Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.

However, Article 22(1) of the Biodiversity Convention does leave some scope for challenging the legal regime in UNCLOS in certain circumstances. It provides that:

> The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

In summary, one of the challenges to UNCLOS is to interpret and apply its provisions in a manner that is consistent with subsequent developments in international environmental law on the conservation and sustainable development of marine living resources and on the protection of marine ecosystems and marine biological diversity.[147]

It can be argued that the provisions in UNCLOS should be read in light of the evolving principles of international environmental law, and that this is already

[147] *See* Alan Boyle, *Further Development of the Law of the Sea Convention*, 578 – 580.

being done. In both the *MOX Plant*[148] and the *Land Reclamation*[149] cases, ITLOS stated that neighbouring States sharing the same sea space had a duty to cooperate under Part XII of UNCLOS, and that duty included an obligation to consult the other State with respect to planned activities. In the MOX Plant case the court stated:

> the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.[150]

Although it was not mentioned in either judgment, this duty to cooperate seems to be taken from article 19 of the 1992 Rio Principles, which reads as follows:

> Principle 19. States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

The UNCLOS provisions on planned activities are much more limited than the duty to cooperate as set out in the cases. The closest equivalent in UNCLOS is article 206, but that provision does not require that the potentially affected States be notified and consulted on the planned activities that may have a significant adverse transboundary effect. It merely requires that such effects, as far as practicable, be assessed, and that reports of the assessments be communicated to the competent international organization. However, it was interpreted in a way in the *Land Reclamation Case* which imposed a duty of co-operation between States to notify and consult in relation to the marine environment. This illustrates that UNCLOS is a dynamic and living instrument.[151] It can and must be interpreted in light of other developments in international law, which is consistent with both the Vienna Convention on the Law of Treaties principles on interpretation and ICJ jurisprudence. It is not a static document frozen in 1982 and is capable of evolutionary treaty interpretation.

---

[148] *MOX Plant Case (Ireland v. United Kingdom)* (Provisional Measures), Order of 3 December 2001 (2002) 41 ILM 405

[149] *Land Reclamation Case by Singapore In and Around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures), Order of 8 December 2003

[150] *MOX Plant Case*, paragraph 82.

[151] Alan Boyle, *Further Development of the Law of the Sea Convention*, 567 – 571.

IX. Conclusions

It is fair to say that the EEZ has withstood the test of time fairly well. It is not a perfect regime and there will of course be areas which could have been addressed in a more comprehensive manner. Challenges or issues are inevitable but in many instances may be welcomed, as they highlight areas that should be supplemented and facilitate the progressive development of the law. As illustrated above, in most cases, UNCLOS has provided for mechanisms to meet such challenges. The problem often does not lie with the UNCLOS provisions themselves but with the failure or inability of States to implement or utilize these mechanisms or interpret UNCLOS in a manner that was intended. The type of mechanism/tool suitable to meet such challenges will depend on the nature of the challenge and the particular circumstances of the case.

For example, many of the disputes or controversies which have arisen with respect to activities in the EEZ could be avoided if both coastal States and user States exercise their "due regard obligations" in good faith. Coastal States should not pass laws requiring their consent in circumstances where they may not have jurisdiction under UNCLOS, especially where such laws may infringe the freedoms of other States in the EEZ. At the same time, user States should not unilaterally exercise their rights or freedoms in the EEZ when such exercise may infringe the rights and duties of the coastal State in its EEZ, without informing and consulting with the coastal State.

Article 59 on residual rights is arguably more difficult to apply as it does not specify a specific mechanism for resolving conflicts on residual rights and only identifies the criteria on which these disputes should be resolved. However, at the very least, it suggests that such issues should be negotiated between the relevant parties concerned.

Another critical mechanism to resolve challenges to the EEZ regime is the dispute settlement mechanism which is unfortunately underused. For example, in several of the categories described above, disputes could arise on the interpretation or application of provisions of UNCLOS, including articles 56, 58 and 59, which would be subject to the compulsory binding dispute settlement system section 2 of Part XV of UNCLOS. However, States parties to UNCLOS have shown a general reluctance to unilaterally invoke the dispute settlement system in UNCLOS to resolve these issues.

There may be many reasons why States are reluctant to unilaterally invoke the dispute settlement system in UNCLOS when it has a dispute with another State. First, it is costly. Second, a State may feel that it does not have enough at stake. Third, the other State may regard it as an unfriendly act and it could have a negative impact on the relations between the two States in other areas. Fourth, if it is a major power, it will generally prefer to negotiate a solution because it can use

its economic and political power to help resolve the dispute. Fifth, it may not be completely confident that the decision will be in its favour.

Sometimes there may be general agreement that a coastal State has adopted laws and regulations which exceed its jurisdictional powers under UNCLOS and which interfere with the rights and freedoms of other States, but no State feels it has a sufficient interest to challenge the coastal State. An example of this is the laws of certain States, such as India, concerning the repair of submarine cables in their EEZs. The submarine cable is laid by a company or a consortium of companies, not a State. If the coastal State demands the cable repair ship to obtain a permit and thereby incur substantial costs in order to repair a cable, the company is likely to incur the cost because time is money and it needs to repair the cable. Also, the flag State of the cable repair ship is not likely to seriously consider exercising the right of diplomatic protection and challenging the laws of the coastal State under UNCLOS. Neither is the State where the cable company is registered. Therefore, the laws and regulations go unchallenged.

It is the United States which is most likely to be carrying out military surveys, military exercises involving live firing or military reconnaissance in the EEZs of other countries. Since the US is not a party to UNCLOS, the dispute settlement system cannot be invoked against it and it cannot invoke the system against other States. Furthermore, most of the major powers, including China, have made declarations under article 298 opting out of the UNCLOS dispute settlement system for disputes concerning military activities. Therefore, the problems remain, and fester, unless the States concerned are able to work out a bilateral arrangement.

The final option which might be available to resolve some of the disputes concerning activities in the EEZ would be for concerned States to seek an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS). There is no provision in UNCLOS or in the Statute of ITLOS which permits States Parties or institutions created by UNCLOS to request an advisory opinion from ITLOS on legal questions. However, the Rules of the Tribunal, adopted in 1996 by the Tribunal pursuant to Article 16 of its Statute, give the Tribunal the authority to give advisory opinions in certain circumstances. The Tribunal's advisory jurisdiction is based on article 21 of the Statute of the Tribunal, which states that the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Article 138 reads as follows:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention

specifically provides for the submission to the Tribunal of a request for an advisory opinion.

2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

Under Article 138(1), the Tribunal can give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion. Three requirements must be met. First, there must be an agreement between States that is related to the purposes of the UNCLOS. Second, the agreement must specifically provide for the submission of a request for an advisory opinion from the Tribunal. Third, the advisory opinion must be on a legal question. This presumably would be a legal question relating to the Convention.

In conclusion, if greater certainty is required to clarify the fact that States sometimes interpret vague provisions to their advantage, it will be necessary for State to make greater use of the dispute settlement mechanisms in UNCLOS. Article 297(1) was inserted for this very purpose, but it has yet to be utilized.