PART THREE:
THE MODERN PERIOD: THE RISE OF 200-MILE ZONES OF SPECIAL JURISDICTION
"The law of the sea, despite major codification conferences in 1930, 1958 and 1960, remains in a state of turmoil because it represents a political and economic reality for all States. Any changes in the law of the sea will have major repercussions on the existing allocation of economic, and consequently political, resources of States. The renovation of the law of the sea, therefore, constitutes the first genuinely substantive international legal confrontation of the post-1945 international community.

It is, furthermore, a confrontation in which there is an unusual degree of real as opposed to formal equality among States by virtue of the fact that the sea is one frontier on which territorial or jurisdictional claims may be asserted without necessarily possessing the power normally required for territorial aggrandizements. This peculiarity of the sea in international relations is of fundamental importance to an understanding of the emerging law of the sea since it permits and encourages a free play of national interests expressed through unilateral acts."

Ralph Zacklin

I. Introduction

It had been universally acknowledged in 1958 that the Fisheries Convention constituted progressive development rather than codification of international law. As such, it would only apply between the various parties thereto. Nevertheless, treaty norms may subsequently become binding as customary international law. As the International Court of Justice observed in its North Sea Continental Shelf Judgments, "[t]here is no doubt that this process is a perfectly possible one and does from time to time occur; it consti-

1 Zacklin, supra Ch 6, n 6, 59. See also nn 94 and 170 infra.

2 559 UNTS 285. See Ch 7, n 192 supra.

3 See, eg, Ch 7, nn 240 and 251 and accompanying text supra.

4 See Article 34, Vienna Convention on the Law of Treaties (United Nations Conference on the Law of Treaties - First and Second Sessions - Official Documents (UN publication, sales no E.70.V.5)).
tutes indeed one of the recognized methods by which new rules of customary international law may be formed."

This process may be completed over a short period of time, the Court explained, if there was "a very widespread and representative participation in the Convention..., provided it included that of States whose interests were specially affected".

Despite the Convention's significance in the development of the law relating to fisheries, it was the last of the four Geneva Conventions to enter into force, and was never ratified by a sufficient number of States 'whose interests were specially affected' for the regime it contained to be binding on other than the Parties inter se.

Of the non-Parties, important distant-water fishing States were unwilling to recognize the 'special interest' of coastal States in adjacent fisheries lest they jeopardise their own fishery interests. In addition, the Soviet Union and other Eastern European States refused to accept what others considered to be a key feature of the Convention, namely, the dispute settlement provisions.

> ICJ Reports 1969, p 3 at 41

Ibid 42. For a general discussion of this process, see, eg, R Baxter, "Treaties and custom"(1970) 129 RDC 31, 57-74.

The Convention on the High Seas (450 UNTS 11) entered into force on 30 September 1962; the Convention on the Continental Shelf (499 UNTS 311), on 10 June 1964; the Convention on the Territorial Sea and Contiguous Zone (516 UNTS 205), on 10 September 1964; and the Fisheries Convention, on 20 March 1966. Of the major fishing nations, only South Africa, the UK and the US became Parties.

For opposite reasons many coastal States also rejected the Convention, fearing that participation would hinder their attempts to gain international recognition for broad coastal fishery jurisdiction.

Even had the Fisheries Convention enjoyed widespread ratification, however, it suffered from debilitating congenital defects precluding its effective operation as a conservation mechanism. First, observes Professor James Crutchfield, the Convention's definition of 'conservation' fails to reflect important economic realities of the modern international fishery; that is, "the inevitable tendency toward overcapacity and inefficiency in a common property resource open to all".10

While the 'macro' problem is one thing, John Gulland observes that at sea level the reality is perceived somewhat differently: "[n]ext year's catches depend on how much is

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9 Cf Herrington, supra n 8, ibid

10 J Crutchfield, "The Convention on Fishing and Living Resources of the High Seas" (1968) 1 Natural Resources Lawyer 114, 119. Elsewhere (ibid 117), he elaborates:

Since no one owns high seas fishery resources in the critical sense of being able to relate the effects of today's fishing activity on the availability and size of fish that is to be taken in later periods, there is an inherent tendency to use too much capital and labor in any operation involving the exploitation of valuable marine resources. In short, effort will always be pushed to the point where total cost of the operation and total revenues received are approximately equal (including in total cost a reasonable rate of return to capital). Any increase in the price of the end products or decrease in costs of production will induce more fishing effort even after the point has been reached where further effort produces no increase in output and may actually reduce the catch.

In short, wrote Garret Hardin in his seminal 1968 article on the subject ("The tragedy of the commons" (Dec, 1968) 162 Science 1243, 1244), "[f]reedom in a commons brings ruin to all". Instances abound of inefficient fishing operations. Sidney Holt ("The food resources of the sea" (1969) 221 Scientific American 178, 193), for example, pointed out in 1969 that the then catch of cod, valued at $350 million pa, could have been taken with only half the effort expended, with annual savings in fishing effort of $150 million or more. Cf F Christy Jr, "Fisheries and the new conventions on the law of the sea" (1970) 7 SDLR 455, 466-467; and Koers, supra n 8, 61.
taken this year, but in the open sea the individual fisherman can do little to ensure better fishing for himself next year -- if he does not catch fish while he can, someone else will".\textsuperscript{11}

The problem became even more pronounced in the 1960s with the growing number of fishing vessels operating in fleets, often centered on a factory ship used to process the catch at sea. Such fleets are able to quickly concentrate harvesting capacity on a single area or stock of fish until the resource is drastically reduced in size and then just as quickly move to another area or stock. Depending on the nature of the stock, it may or may not recover quickly. The smaller, less mobile, coastal fishing vessels would be left to suffer the consequences.\textsuperscript{12}

That situation had important legal implications, as Sidney Holt explains: "[t]he tighter the squeeze on the natural resources, the greater the suspicion of fishermen that 'the others' are not abiding by the regulations, and the greater the incentive to flout the regulations oneself".\textsuperscript{13}

\textsuperscript{11} J Gulland et al. The State of World Fisheries (FAO, 1968) 4; \textit{cf}, Koers, \textit{supra} n 8, 63

\textsuperscript{12} Herrington, \textit{supra} n 8, 63; \textit{cf}, Christy, \textit{supra} n 10, 463, 465; Holt, \textit{supra} n 10, 187, 189, 191; Koers, \textit{supra} n 8, 52; D McKernan, "International fishery regimes -- current and future" in \textit{The Law of the Sea: National Policy Recommendations} (1970) 336, 343. Dr Wilbert Chapman ("The theory and practice of international fishery development-management" (1970) 7 \textit{SDLR} 408, 414-415) lists other factors, including the introduction of freezing capacity on ships and improved harvesting technology which has also contributed to the increased catches. \textit{Cf} M Koulouris, \textit{Les Nouvelles tendances depuis 1962 dans le r\^egime international des p\^eches maritimes} (1973) 54-56. That same improved harvesting technology, however, sometimes had a disastrous effect on incidentally-harvested species (\textit{ibid} 45-46).

\textsuperscript{13} Holt, \textit{supra} n 10, 190. On this point, Chapman (\textit{supra} Ch 7, n 93, 44) observes that from the viewpoint of the individual fisherman,

Opposing conservation was, and is, the same as opposing motherhood and being in favor of sin. ...Very few fishermen think the rules applying to overfishing and sinning should applied to his case, but the public posi-
Making the matter even worse was the lack of enforcement mechanisms in the Fisheries Convention to prevent overfishing. Even if the States concerned were willing to fully implement the terms of the Convention and agreed on conservation measures, Holt observes,

the effective supervision of a fishing fleet is an enormously difficult undertaking. Even to know where the vessels are going, let alone what they are catching, is quite a problem. ...[H]ow to ensure compliance with minimum landing-size regulations when increasing quantities of the catch are being processed at sea? With factory ships roaming the entire ocean, even the statistics reporting catches by species and area can become more rather than less difficult to obtain.\footnote{Holt, supra n 10, 193; \textit{cf}, Herrington, \textit{supra} n 8, 64}

Furthermore, while, as we have seen, negotiators made valiant attempts to eliminate delays in the imposition of conservation measures and coastal States were even permitted to take unilateral action, the provisions were inadequate to cope with the nature of modern fishing. Although a great improvement over preceding fishery agreements, commented William Herrington in 1967, the Convention probably would assure a speed of decision-making generally adequate for fishery developments of ten years ago. However, the tempo of fishery development and exploitation has accelerated since then, and with increased attention directed to utilization of the ocean's resources, the acceleration is likely to continue.\footnote{\textit{Ibid} (emphasis added). Gulland (\textit{supra} n 11, 1) points out that while the 1949 UN Scientific Conference on the Conservation and Utilization of Resources produced a map showing some 30 stocks then believed to be underfished, by 1968 over half were in need of proper management. \textit{Cf} Holt, \textit{supra} n 10, 187, 190; and Koulouris, \textit{supra} n 12, 67-69. The conservation provisions of the Fisheries Convention were outdated in at least one other respect. Article 2 provides, \textit{inter alia}, that "[c]onservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption (see Ch 7, n 150). However, the trend in international fisheries in the post-war period has been for less of the catch to be used directly as human food and for more to be reduced to meal for animal feed, leading Koers (\textit{supra} n 8, 31) to doubt in 1973 whether such a preference in favour of food could be maintained. Holt}
The increased harvesting activity in the post-World War II period is clearly revealed in Table 3.

Besides the defects relating to conservation per se, the Convention had a second basic weakness: the lack of a mechanism for allocating resources among States, including new entrants to a fishery if management measures are introduced. The result is inequitable and inefficient patterns of distribution. "Since these are the crucial issues that lead to conflict", predicted Professor Crutchfield in 1968, "the admirable mechanism of the Convention is not likely to get much use".16

Simply put, from the perspective of high seas resources, the question remaining unanswered by the Fisheries Convention was, "within the limitation of maximum sustainable yield, who gets the fish?"17 This deficiency was accentuated by the simultaneous failure of the Territorial Sea Convention to specify the limits of coastal States' exclusive fishery jurisdiction. The inability of the 1958 and 1960 Conferences to settle those issues, coupled with the growing pressures on living marine resources themselves, triggered an eruption of unilateral claims, bilateral and multilateral agreements, and declarations whereby States sought to both protect their fishery interests and endorse and develop applicable legal principles.

(supra n 10, 178) notes that immediately after the war less than 10% of world catch was used for meal; by 1967 the proportion had climbed to 50%. Crutchfield (supra n 10, 118) adds that,"[t]aken literally, the provisions of Article 2 would virtually wipe out the [Peruvian anchovetta] fishery, since the market for anchovetta as a food fish would take only a tiny fraction of the readily available yield".

16 Crutchfield, supra n 10, 119

17 Schaefer, supra n 8, 375; cf, Chapman, supra n 12, 413-414. Crutchfield (supra n 10, 122) makes the useful observation that the Convention suggests procedures rather than principles in allocating fishing effort among States participating in an international fishery.
The most important early developments were, in fact, initiated by, on the one hand, States seeking to protect coastal populations highly dependent on offshore fisheries, and, on the other, the United Kingdom, one of the principal supporters of the traditional law of the sea and a major fishing nation in the region.

Immediately following UNCLOS I, for example, Iceland enacted regulations establishing a 12-mile EFZ measured from specially-designated baselines.\textsuperscript{19} Although the United Kingdom immediately protested, the failure of UNCLOS II to resolve the question of fishery limits prompted the two Governments to negotiate an Exchange of Notes in 1961, whereby it was agreed that the United Kingdom would no longer object to an Icelandic 12-mile EFZ, while Iceland would not object for a period of three years to British vessels fishing within the outer six miles of certain parts of the zone during certain times of the year.\textsuperscript{20}

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\(^1\) Regulations No 70/1958, 30 June 1958, concerning Conservation of Fisheries off the Icelandic Coasts for the purpose of Implementing Law No 44, 5 April 1948; in 8 UNLS, supra Ch 6, n 3, 11-12

\(^2\) Exchange of Notes constituting an Agreement between Iceland and the United Kingdom of Great Britain and Northern Ireland settling the fisheries dispute between the Government of Iceland and the Government of the United Kingdom of Great Britain and Northern Ireland, Reykjavik, 11 March 1961, in 15 UNLS, supra Ch 2, n 72, 898-900. The Notes also provided that Iceland would continue to work for the implementation of the Icelandic Parliament's 1959 resolution regarding the extension of fishery jurisdiction around Iceland, but would give the UK six months notice of any such extension and disputes relating thereto would, at the request of either party, be referred to the ICJ.
Having regard to British fishing activities in the area, Denmark would not object to the former continuing to fish between six and 12 miles from shore. However, "in view of the exceptional dependence of the Faroese economy on fisheries", certain restrictions on fishing in the outer zone were also agreed to, and both Governments undertook to consult on future conservation measures that might be adopted.

Less than a month after UNCLOS II ended, the Norwegian Government announced that it would proclaim a 12-mile EFZ, arguing that the latter was valid under customary international law, at least for countries whose coastal population was highly dependent upon fisheries. The validity of such zones was evidenced by State practice, Norway asserted. Furthermore, voting at UNCLOS II had indicated that an extension of the Norwegian fishery limit to 12 miles, "from the de lege ferenda point of view might be accepted by all countries".

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21 Exchange of Notes between the Government of Denmark and the Government of the United Kingdom of Great Britain and Northern Ireland modifying the Convention of June 24, 1901, as later amended, concerning the regulation of fishing around the Faroe Islands, 27 April 1959, in 15 UNLS, supra Ch 2, n 72, 879-881

22 Ibid. The Agreement also contained provision for either its modification or termination should a general convention relating to the breadth of the territorial sea and fishery limits not have entered into force by 27 October 1961. Following UNCLOS II, Denmark gave notice of her intention to terminate the 1959 Agreement. While the UK sought a revision of the latter, negotiations failed. In 1963 Denmark declared a 12-mile EFZ for both the Faroe Islands and Greenland (Order No 156, of 24 April 1963, amending the Order on the Supervision of Fisheries in the Sea surrounding the Faroe Islands; and, Notice No 192 of 27 May 1963 on Commercial Trapping, Fishing and Hunting in Greenland, as amended by Notice No 340 of 23 September 1966, in 15 UNLS, supra Ch 2, n 72, 619-621).

Following her proclamation, Norway signed an Agreement "to stabilise fishery relations" with the United Kingdom. It was agreed that those relations should be based on the joint American-Canadian proposal of UNCLOS II, and not contemplate excluding foreign vessels from any area beyond the limits of the fishery zone referred to in that proposal. It was also agreed that the United Kingdom would not object to exclusion of her nationals from maritime waters within six miles of the coast, while Norway would not object to British registered vessels continuing to fish between six and 12 miles from Norway's shores until 31 October 1970.

While certain resource-rich areas were being steadily closed off to British fishermen, foreign vessels continued to exploit the coastal fisheries of the United Kingdom. Finally, in 1963, the British Government realized that the old marine order could no longer be maintained intact. Addressing the Parliament, the Lord Privy Seal conceded in a carefully-worded statement that "in the present state of international law, we would be justified in no longer denying to British fishermen some extension of their exclusive rights in their own coastal waters". Announcing the decision of the British Government to terminate its participation in the 1882 North Sea Fisheries Convention, he called for a con-

24 Fishery Agreement between the Government of the Kingdom of Norway and the Government of the United Kingdom of Great Britain and Northern Ireland, signed at Oslo, on 17 November 1960; in 15 UNLS, supra Ch 2, n 72, 895-898

25 See Ch 7, n 210 and accompanying text supra.

26 The Agreement made no reference to 'fishing zones', 'fishery limits' etc owing to disagreements on the applicable law. Whereas Norway acknowledged the validity of EFZs, the UK did not (Fleischer, supra n 22, 98; cf, D Johnson, "Developments since the Geneva Conferences of 1958 and 1960: Anglo-Scandinavian Agreements concerning the territorial sea and fishing limits"(1961) 10 ICLQ 587, 591).

27 Cited in D Johnson, "European fishery limits" in Developments, supra n 23, 48, 52
ference of European States to consider all fishery-related problems.

That Conference was held in London between December 1963 and March 1964. It was noteworthy in producing a Convention\(^2\) that, by making no reference to the territorial sea, severed forever the link between the latter and marine fishery limits for a number of major fishing States, amongst which were the strongest supporters of the traditional law of the sea.\(^3\)

Based largely on the '6+6' formula proposed by Canada and the United States at UNCLOS II,\(^2\) the Convention recognized the right of each Party to establish a 12-mile fishery zone and to prohibit foreign fishing within six miles of its coasts. Foreign fishermen which had habitually fished inside the six-mile limit would be given "a transitional period" to be negotiated between the States concerned in which

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\(^2\) The 1882 Convention it will be recalled, provided for a three-mile territorial sea (see Ch 2, n 58 and accompanying text supra).

\(^3\) See Final Act of the European Fisheries Conference (Cmd 2355, 1964). Attending the Conference were Austria, Belgium, Denmark, France, FRG, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and UK. For a detailed review of the Conference see D Vignes, "La Conference europeenne sur la peche et le droit de la mer" (1964) 10 AFDI 670; and for the Convention see J De Breucker, "La Convention de Londres sur la Peche du 9 mars 1964" (1966) 2 RBDI 142. See Johnson, supra n 27, 55-61, for a discussion of three resolutions adopted at the Conference relating to fisheries policy, conservation and access of fish products to markets.

\(^3\) Cf M-M van der Essen, "L'évolution du droit de la mer depuis 1958" (1970) 23 Chronique de politique étrangère 657, 674, 683. The Convention entered into force on 15 March 1966, the Parties being Belgium, Denmark, France, FRG, Italy, Netherlands, Poland (which, although not attending the Conference, acceded to the Convention when it was ratified on 7 June 1966), Portugal, Spain, Sweden and UK. Iceland and Norway chose not to become Parties as they could not accept the continuation of foreign fishing within their zones for 20 years or even longer (Fleischer, supra n 23, 107; Vignes, supra n 29, 680).

\(^3\) See Ch 7, n 210 and accompanying text supra.
to phase out their fishing. While having the right to regulate fisheries and enforce non-discriminatory regulations in the outer six miles of the zone, the coastal State shall permit other Parties "the fishing vessels of which have habitually fished in that belt between 1st January, 1953 and 31st December, 1962" to continue fishing in such areas for those stocks habitually exploited.32

A number of the Parties enacted domestic legislation subsequent to the Convention's signing, giving it effect and establishing 12-mile EFZs enforceable generally.33 Agreements were also concluded with other European States in accordance with the terms of the Convention.34 Non-party States similarly concluded amongst themselves agreements based on the concept of the 12-mile EFZ35 and enacted domestic legislation establishing such zones, without, however, recognizing historic fishing rights.36 The 12-mile EFZ steadily became the norm rather than the exception throughout Western Europe.

32 Vignes (supra n 29, 679) observes that the time period seems to have been chosen so as to exclude Eastern European States from automatically qualifying to fish in the coastal zones.

33 See, eg, the French Décret No 67-451 du 7 juin 1967 portant extension de la zone interdite aux navires étrangers, in 15 UNLS, supra Ch 2, n 72, 636; and the British Fishery Limits Act 1964 (Chapter 72)(31 July 1964), in ibid 676. For discussions of the legislation of selected contracting Parties see Johnson, supra n 27, 66-72; and F Monconduit, "L'Extension des zones de pêche réservées aux pêcheurs français: application de la Convention de Londres du 9 mars 1964"(1964) 13 AFDI 685.

34 See, eg, that between Denmark and Norway, dated 19 December 1966, in 15 UNLS, supra Ch 2, n 72, 919-920.

35 See, eg, the Agreement on Fishing between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics, signed at Moscow, on 16 April 1962, in ibid 900-905.

36 See, eg, Turkey's Act concerning the Territorial Sea (Law No 476 of 15 May 1964), in ibid 674.
That trend did not basically conflict with the position in Eastern Europe. Writing in 1963, A Volkov, a Russian jurist, while observing that there was no single opinion among Soviet and foreign experts about the concept of the fishing zone, concluded that the total width of the territorial waters and fishing zone should not exceed 12 miles. A number of Eastern European States, including the Soviet Union, had much earlier established 12-mile territorial seas comprehending, naturally, exclusive fishery jurisdiction and negotiated access agreements on that basis.

Beyond the 12-mile limit, the North-East Atlantic Fisheries Commission (NEAFC), established in 1963, had the power to make recommendations concerning exploitation but not allocation, and as a result overcapitalization of the fishery led to serious overfishing of some stocks.

B. North America

The 1960s saw both Canada and later the United States accept the concept of the 12-mile EFZ as a legal reality. With coastal fishery resources threatened by increased foreign fishing activity in the early post-World War II period and the failure of UNCLOS II to resolve the question of fishery limits, Canada in 1964 proclaimed an EFZ regime, the zones extending nine miles in breadth from the outer limits

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37 A A Volkov, "Legal regime of fishing zones" (1963) SYIL 218

38 See, eg, Regulations of 10 August 1964 concerning the Conservation of Fishery Resources and the Regulation of Fishing in the Waters of the USSR, in 6 UNLS, supra Ch 2, n 81, 577; and Agreement cited supra n 35.

39 Chapman, supra n 12, 419; D Cushing, "The Atlantic fisheries commissions" (1977) 1 Marine Policy 230, 232-233; and Koers, supra n 8, 90-92. Members of the NEAFC immediately prior to UNCLOS III were Belgium, Denmark, France, FRG, Iceland, Ireland, Netherlands, Norway, Poland, Portugal, Spain, Sweden, UK and USSR. NEAFC was established by the North-East Atlantic Fisheries Convention, signed 24 January 1959, which entered into force on 27 June 1973 (486 UNTS 158).
of her three-mile territorial sea. The latter would henceforth be measured from extensive straight baselines drawn, in Canada's view, in accordance with criteria set by the ICJ in the 1951 Fisheries case.

In announcing the zones, Canada's Secretary of State for External Affairs explained that negotiations would be held with States whose nationals had long fished in the area with a view to negotiating a phasing-out period so as to avoid economic hardships. Thereafter, all foreign fishermen would be excluded from the zone. As Professor Morin commented at the time, "[e]n ce temps où domine la tendance à l'extension de la souveraineté maritime [les droits acquis] doivent graduellement céder la place, dans les zones de

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40 Territorial Sea and Fishing Zone Act (16 July 1964), in 15 UNLS, supra Ch 2, n 72, 52-54. See A Gotlieb, "The Canadian contribution to the concept of a fishing zone in international law" (1964) 2 CYIL 55, 60; and J-Y Morin, "La zone de pêche exclusive du Canada" in ibid 77, 78, for details of the increase in foreign fishing during the period. Although Canadian trawlers had been legally restrained since 1911 from fishing within 12 miles of parts of the country's Atlantic coasts so as not to interfere with in-shore fishermen, the law did not apply to foreign trawlers (RSC 1952, c.119, amended 1960 - 1 Eliz II c 23).

After the failure of UNCLOS II, Canada unsuccessfully attempted for two years to gain international support for a multilateral convention on fishery limits. According to Morin (supra this n, 78) this was "dû notamment à l'attitude des Etats-Unis, qui avaient repris leur liberté d'action à la suite du vote de Genève" (cf, Gotlieb, supra this n, 74; Foreign Policy, supra Ch 4, n 26, 161).

41 See Ch 5, nn 53ff and accompanying text supra.

42 Bilateral phasing out agreements were subsequently concluded between Canada and Norway on 15 July 1971 (National Legislation and Treaties Relating to the Law of the Sea (UN doc ST/LEG/SER.B/16)[volume hereafter cited '16 UNLS'] 566-567), Denmark on 27 March 1972 (ibid 567-569), France on 27 March 1972 (ibid 570-572), Portugal on 27 March 1972 (ibid 572-574), the UK on 27 March 1972 (ibid 575-577), and Spain on 18 December 1972 (National Legislation and Treaties Relating to the Law of the Sea (UN doc ST/LEG/SER.B/ 18)[volume hereafter cited '18 UNLS'] 577-570).
pêche exclusives, aux droits des États riverains; c'est la technique du 'phasing out'".

In the early 1960s, the United States denied the validity of 12-mile EFZs and, in fact, protested against the 1964 Canadian legislation. However, pressures generated by the build-up of foreign fishing off American coasts stimulated calls by domestic in-shore fishermen for the establishment of extended fishing zones; and, in 1966, the State Department, in response to a request from Congress for comments on such a move, advised that in light of recent State practice the establishment of an EFZ extending nine miles beyond the American three-mile territorial sea would not be contrary to international law. Furthermore, the Department concluded optimistically, American 12-mile EFZ legislation would reinforce contemporary State practice, and "make it difficult, from the standpoint of international law, to extend the zone beyond 12 miles in the future".

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43 Morin, supra n 40, 104

44 See, eg, Foreign Policy, supra Ch 4, n 26, 172, and a US State Department letter dated 13 July 1962 (reprinted in (1963) 57 AJIL 404) concluding that "in the present state of international law, there is no valid basis for the assertion by a coastal State of a twelve-mile exclusive fisheries zone". For a detailed discussion of American-Canadian relations on law of the sea matters during the post-UNCLOS II period see A Hollick, "Canadian-American relations: law of the sea"(1974) 28 International Organization 755.

45 See Foreign Policy, supra Ch 4, n 26, 176-178; L Moreau, "International Law -- Restriction of Freedom of the High Seas -- Maritime Boundaries -- Nine Mile United State [sic] Fishery Zone Established in Contiguous Zone Adjacent to Territorial Waters -- an Act to Establish a Contiguous Fishery Zone Beyond the Territorial Sea of the United States, 80 Stat. 908(1966)" (1967) 8 HILJ 156, 160-161; and L Nomura, "Fisheries jurisdiction beyond the territorial sea -- with special reference to the policy of the United States"(1968) 44 WLR 307, 314. Nomura (ibid 320) points out that while there was increased foreign fishing off American coasts, little, if any, was actually carried on within 12 miles of the shore.

46 In (1966) 60 AJIL 831-833
Legislation was enacted in 1966 establishing a nine-mile EFZ beyond the three-mile territorial sea, albeit subject to the continuation of such traditional foreign fishing as the United States might recognize.\textsuperscript{47} By that Act, the United States formally abandoned its long-held position that beyond the territorial sea freedom of the high seas comprehended freedom of fishing.

At the same time, Congress passed a number of measures to protect the interests of the American distant-water fish-

\textsuperscript{47} Act Establishing a Fisheries Zone contiguous to the Territorial Sea of the United States, 14 October 1966, in 15 UNLS, \textit{supra} Ch 2, n 72, 701-702. Moreau (\textit{supra} n 45, 166) reports that before acting unilaterally the US met with the Soviet Union in July 1966 attempting to resolve the problem of intense Soviet fishing activities off American coasts. It was agreed that Soviet fleets would remain beyond 12 miles and that American observers would be allowed on board Soviet vessels to inspect catches and fishing equipment. By October of that year, neither provision had been satisfactorily implemented.

Nomura observes (\textit{supra} n 45, 320-321) that Canada was apparently the only country that might have qualified for recognition as having engaged in 'traditional' fishing in the zone and the provision was considered in some quarters as a 'bargaining tool' to obtain similar concessions from Canada and other States. Whether that was the case, that is what in fact happened. See, \textit{eg}, the Agreement between the Government of the United States of American and the Government of Canada on Reciprocal Fishing Privileges in Certain Areas off their Coasts, signed at Ottawa on 24 April 1970, in 16 UNLS, \textit{supra} n 42, 524-526.

Although tuna and shrimp fishermen protested that such a zone would derogate from American obligations under the 1958 Fisheries Convention and would inhibit the securing of a maximum supply of food and other marine products (Nomura, \textit{supra} n 45, 317), they were not successful. Nomura (\textit{ibid} 49) comments that those assertions, except possibly that relating to catch possibilities, "were probably not the real motivation for the objections of the far seas fishing industry. Realistically, the reciprocal and retaliatory actions of the coastal nations were probably the basis of the objections."
ing fleet against other States intent upon extending their fishery jurisdiction beyond narrow coastal zones.48

The legal situation remained unchanged until 1970, when Canada extended her territorial sea to 12 miles, integrating the latter with the previously more limited EFZ. She also created three new 'adjacent' EFZs beyond 12 miles on the Atlantic and Pacific coasts, delimiting them by 'fisheries closing lines'(see map).49

The United States immediately protested that the Canadian claim was contrary to international law and suggested that the matter be submitted to the ICJ.50

Canada, in reply, argued that the 12-mile territorial sea was well supported in State practice and international law. Invoking her right to determine how best to protect her vital interests, Canada observed that neither existing customary international law nor conventional law were adequate to protect coastal marine resources and she would take all measures necessary for that purpose. It was anticipated that other States would do likewise.51 As for recourse to

48 See Foreign Policy, supra Ch 4, n 26, 163-166; Hjer­tonnson, supra Ch 6, n 6, 39-40; and Szekely, supra Ch 2, n 69, i, 189-191.

49 Territorial Sea and Fishing Zone Act of 16 July 1964, as amended by Act of 1970, in 16 UNLS, supra n 42, 4-6. See generally J-Y Morin, "Canada" in New Directions, supra Ch 6, n 3, iii, 243; and by the same author, "Le Progrès technique, la pollution et l'évolution récente du droit de la mer au Canada, particulièrement à l'égard de l'Arctique"(1970) 8 CYIL 158. Morin (ibid 195) points out that while the expression 'fisheries closing lines' does not appear in the legislation, "il est hors de doute qu'elle sera couramment utilisée dans la pratique pour désigner la limite externe des régions en cause, car il ne s'agit evidemment pas d'une 'ligne de base'".


51 See Canadian note of 16 April 1970 to the US, in ibid 289-294. Speaking in Parliament, the Canadian Secretary of State for External Affairs explained that the EFZs were established "only where Canada's primary interests relate to fisheries, and in areas where Canada has historic claims"(statement reprinted in ibid 286).
Source: Canadian Foreign Policy and the Law of the Sea (1977) p. ix
the ICJ, the Canadian Secretary of State for External Affairs explained that Canada was

not prepared to litigate with other states on vital issues concerning which the law is
either inadequate, non-existent or irrelevant to the kind of situation Canada faces
.... It is no service to the [ICJ] or to the development of international law to at-
ttempt to resolve by adjudication questions on which the law does not provide a firm
basis for decision. 52

At an impasse bilaterally, their differences would have to be resolved within the larger context of the UN Sea-Bed Committee to be discussed below.

Beyond EFZs on the North American Atlantic coasts the International Commission for the Northwest Atlantic Fisheries (ICNAF), established in 1950, 53 had the power to reccomend regulatory measures to achieve the MSY for certain stocks. As such measures were insufficient in the face of intense fishing activities of the Soviet Union and other nations, overfishing of some species resulted, generating in turn, conflicts between Canada and the United States, on the one hand, and several fishing nations operating off the former's coasts, on the other.

In 1970, ICNAF was empowered to establish catch quotas, and the following year a sliding scale of allocation was introduced, according greater shares to countries with special needs, such as Canada in respect of fishermen of her maritime provinces. The Commission subsequently experienced problems controlling harvesting, due to, inter alia, con-

52 Ibid 285. The question of fishery limits was only one of a number of law of the sea issues upon which by 1970 there was a fundamental disagreement between the two countries. Other issues included the Canadian territorial sea boundary and pollution safety zones, particularly in the Arctic. As Hollick (supra n 44, 765) observes, the US and Canada "emerged from [1970] with law of the sea attitudes and policies pointing in different directions".

53 International Convention for the Northwest Atlantic Fisheries, signed 8 February 1949, and entered into force on 3 July 1950 (157 UNTS 158). Members of ICNAF immediately prior to UNCLOS III were Canada, Denmark, France, FRG, Iceland, Italy, Japan, Norway, Poland, Portugal, Romania, Spain, UK, US, and USSR.
flicts between North American inspectors and East European fleets, the former believing that quotas were being ig-

gored.  

On the North American west coast, a number of fishery Agreements applied beyond the 12-mile limit. In 1952, for example, Canada, Japan and the United States signed the International Convention for the High Seas Fisheries of the North Pacific, the "practical thrust" of which, notes Chapman, was to exclude Japanese fishermen from high seas fisheries of both halibut and salmon originating in North America by invoking the 'abstention principle' although it had been rejected at UNCLOS I and its validity denied by Japan. When the Convention expired in 1962, Japan advised that she wished to renegotiate the terms. No new agreement was concluded during the period, however, due largely to American insistence of the validity of the above principle and problems concerning new entrants (especially South Korea and the Soviet Union) into the fishery.  

C. Asia and the Pacific

Beginning in the late 1950s, there was a widespread move by States in the Asian-Pacific region to extend their limits of exclusive fishery jurisdiction to 12 miles, and a number of significant bilateral Agreements were concluded recognizing that limit, at least on a de facto basis.

One of the staunchest supporters of the traditional law of the sea, Japan, for example, entered into three fishing agreements involving the 12-mile limit. The first, with the

54 Chapman, supra n 12, 434-436; Cushing, supra n 39, 234; B Johnson, "Canadian foreign policy and fisheries" in Canadian Foreign Policy and the Law of the Sea (1977; B Johnson and M Zacker, eds)[volume hereafter cited 'Canadian Foreign Policy'] 52, 78; and Koers, supra n 8, 92-95

55 208 UNTS 80

56 Chapman, supra n 12, 439

57 Ibid 438-439; Koers, supra n 8, 97-100
Republic of Korea in 1965, brought to an end a long-running fishery dispute by each mutually recognizing the right of the other to establish a 12-mile EFZ.\footnote{Agreement on Fisheries between Japan and the Republic of Korea, signed at Tokyo, on 22 June 1965; in 15 UNLS, supra Ch 2, n 72, 912-919. The dispute originated with a 1952 Korean claim to "national sovereignty over the seas adjacent to the coasts...to reserve, protect, conserve and utilize the resources..." (Presidential Proclamation of Sovereignty over Adjacent Seas, 18 January 1952, in 6 UNLS, supra Ch 2, n 81, 30-31) that was exercised up to 200 miles from the coast. Although Japan protested the claim, the latter was strictly enforced for more than a decade. With 12-mile zones becoming increasing common after UNCLOS II, however, negotiations shifted from disagreement respecting the legal validity of the claim to the establishment of an equitable arrangement for fishery regulation \textit{inter se} (H Takabayashi, "Normalization of relations between Japan and the Republic of Korea: Agreement on fisheries" (1966) 10 JAIL 16, 17). In addition to the 12-mile fishing zone, the Agreement also provided for a "joint regulation zone" outside the Korean EFZ wherein specified regulatory measures would be enforced by each State upon its own nationals until such time as "conservation measures necessary for the maintenance of the maximum sustained productivity of fishery resources are implemented on the basis of sufficient scientific surveys". For an historical review of the dispute see also Oda, supra Ch 7, n 93, 26-28.}

In Japan's view, the Agreement with Korea did not constitute recognition of the legal validity of the 12-mile EFZ, but rather was a purely bilateral arrangement and other States were free to fish as ever up to three miles from Japanese coasts.\footnote{Takabayashi, supra n 58, 21; cf, T Kuribayashi, "The new ocean regime and Japan"(1982) 11 ODILA 95, 107-108} Nevertheless, within the next few years Japan was forced to enter into agreements with other States, including New Zealand and Australia, the main countries of the region extending their fishery jurisdiction to 12 miles while maintaining their traditional three-mile territorial seas.

The 1965 New Zealand claim, contained in an enactment based on British, Canadian and European precedents, was designed not so much to protect fisheries from imminent threat
as to guard against possible future overexploitation and to stimulate the local fishing industry.60

Japan immediately protested against the New Zealand action and suggested submitted the dispute to the ICJ. New Zealand declined, as her Prime Minister explained, because of the cost, the time taken might have exceeded that agreed to through negotiations for phasing out of Japanese fishing, and the probability that the Court would have required New Zealand not to implement the zone until the decision was handed down. At the same time, he added, although"[t]here is no history, no international convention, covering [EFZs], and so no international law,...we felt we were on quite strong ground [because of other similar claims], otherwise we would not have passed the legislation".61

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60 Territorial Sea and Fishing Zone Act 1965, in 15 UNLS, supra Ch 2, n 72, 653. For an explanation of the reasons for enacting the legislation see the statement by the Prime Minister in HR (NZ) Deb, 11 August 1965, p 1842; and for a discussion of the Act see G Barton, "Territorial Sea and Fishing Zone Act 1965 and Continental Shelf Act 1964"(1967) 2 NZULR 81.

No provision was made in the Act for 'phasing out' of foreign fishing since, explained the NZ Prime Minister, no other country had established traditional fishing rights in coastal waters (HR (NZ) Deb, 11 August 1965, p 1842). William Foster ("New Zealand's coastal jurisdiction"(1970) 1 CWILJ 13, 21) suggests that the lack of any reference to such a period in the legislation was an 'oversight' on the part of the Government. In a statement of 21 December 1965, however, the NZ Prime Minister explained ((Dec, 1965) 15(12) NZEAR 21) that he had discussed the legislation with the Japanese Prime Minister when the former was in Japan the previous July and

it had always been the intention that after the passing of the Bill (establishing the zone) and before it came into operation, we would carry out further discussions...with the Japanese...[on] the practical problems arising from the application and the operation of the zone.

For a general discussion of the New Zealand and Australian actions and their negotiations with Japan see J Leyser, "Fisheries zones in the South-West Pacific"(1969) 14 Archiv des Völkerrechts 145.

61 HR (NZ) Deb, 16 August 1967, p 2354
In 1967, New Zealand and Japan did conclude a phasing-out agreement permitting a limited number of Japanese vessels to operate under certain conditions in the outer half of the zone until 31 December 1970. While formally denying any Japanese claim to traditional fishing rights, the New Zealand Prime Minister came very close to doing just that in explaining that "[i]t was agreed that fishing for a period of three years was justified by the previous Japanese fishing in [New Zealand] waters over the short period of years" before the passage of the legislation and that New Zealand was making the provisions "for Japan alone in recognition of the brief record she had of fishing in this area".

In 1967, Australia followed New Zealand in claiming a 12-mile EFZ. Introducing implementing legislation into Parliament, the Minister for Primary Industry explained that in light of recent State practice the action taken was in accordance with international law. At the same time, he added,

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62 Agreement on Fisheries between New Zealand and Japan, signed at Wellington on 12 July 1967; in 15 UNLS, supra Ch 2, n 72, 928-929. For a discussion of the Agreement see W Foster, "Agreement on Fisheries between New Zealand and Japan" (1968-1969) 3 NZULR 102; and of the relevant domestic legislation see D McRae, "Fisheries (Agreement with Japan) Act 1967; Fisheries Amendment Act 1967" in ibid 98. For a discussion of the terms of various phasing-out agreements negotiated during the period, including those between Japan and New Zealand and Australia (the latter to be discussed infra) see D Windley, "International practice regarding traditional fishing privileges of foreign fishermen in zones of extended maritime jurisdiction" (1969) 63 AJIL 490.

63 HR (NZ) Deb, 16 August 1967, p 2355. There is little doubt but that a major factor in the New Zealand position was her strong desire to maintain the important, broader economic relationship then developing with Japan. See, eg, statement by the NZ Minister of Justice on this point (ibid 2344).

where it can be established that operations by foreign vessels have been carried on for a number of years in the zone that will be protected by the legislation [ie, between 3 and 12 miles], the practice of permitting a phasing out period adopted by overseas countries should be applied.

The following year, Australia and Japan concluded an Agreement permitting the latter's nationals to continue fishing for seven years in waters between three and 12 miles from the coast where their activities would not conflict with those of local fishermen. Australia negotiated the Agreement, explained the Minister for Primary Industry, "as a matter of international comity". In response to Opposition criticism that the seven-year period was too long, he observed that "[t]he international law regarding the 12-mile exclusive fishing zone has not resolved where countries have traditionally for a good number of years been fishing within the 12 to 3-mile fishing area". Had Australia refused to negotiate, he explained, Japan might have taken the dispute to the ICJ, which might have rendered a decision less favourable to Australia. With that in mind, he concluded, the Agreement represented a "fair compromise".

In contrast to New Zealand and Australia, beginning in 1958 many States of the Asia-Pacific region chose not to claim a contiguous fishing zone, but rather extended the li-

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65 HR (Aust) Deb, 24 October 1967, p 2162

66 Agreement on Fisheries between the Commonwealth of Australia and Japan, signed at Canberra, on 27 November 1968; in 16 UNLS, supra n 42, 506-510. As in the case of New Zealand’s Agreement with Japan (see n 62 supra), there was no mention of 'fishing zones' etc; the expression used in the Australian-Japanese Agreement being "waters contiguous to the territorial seas of Australia".

67 HR (Aust) Deb, 27 November 1968, p 3305. It appears that, as in the case of New Zealand, the desire of Australia to maintain good relations with Japan in other areas was a factor in her decision to negotiate. See, eg, ibid 3306.

68 Ibid 3308

69 Ibid
mit of their territorial seas to 12 miles. These included Nauru, the People's Republic of China, Cambodia, Malaysia, Thailand, Burma, Iraq, the Yemen Arab Republic and the People's Democratic Republic of Yemen.\textsuperscript{70}

While proclaiming 12-mile territorial seas, some States specifically excluded from such a limitation their fishery rights, without, at the same time, detailing other limits. Typical in this regard was the 1959 legislation of Iran, which provided that "[f]ishing...rights of Iran beyond the limits of its territorial sea, shall remain unaffected" by the declaration of the 12-mile limit.\textsuperscript{71}


\textsuperscript{71} Act of 12 April 1959 amending the Act of 15 July 1934 on the territorial waters and the contiguous zone of Iran, in \textit{ibid} 10-11; \textit{cf}, Royal Decree concerning the territorial waters of the Kingdom of Saudi Arabia (Royal Decree No 33 of 16 February 1958) in 15 UNLS, supra Ch 2, n 72, 114-116; and Fisheries Protection Act 1972, of Western Samoa, in 18 UNLS supra n 42, 375-77, which defined Western Samoan waters as comprising "the territorial sea of Western Samoa and any other waters in which Western Samoa for the time being has the right to control fishing".
More explicit and expansive, however, were claims of other States. India, Pakistan and Sri Lanka, for example, asserted the right to establish fishery conservation zones "in areas of the high seas adjacent to the territorial waters... but within a distance of one hundred nautical miles from the outer limits of those waters". The right to establish such zones was based on "a special interest" derived from the coastal population having fished in the region "from time immemorial" and the dependence of large sections of the nation on the resources in question.

Presidential Proclamation of 29 November 1956 on Conservation Zones [of India], in 16 UNLS, supra n 42, 303-304 [hereafter cited 'Indian Proclamation']. The claims of Sri Lanka and Pakistan had very similar wording. See Proclamation of 19 December 1957 by the Governor-General [of Ceylon] on the rights over the continental shelf and conservation zones, in ibid 318-319; and Proclamation by the President of Pakistan dealing with fishing rights in areas of the high seas adjacent to the territorial waters of Pakistan, dated 19 February 1966, in 15 waters of Pakistan, dated 19 February 1966, in 15 UNLS, supra Ch 2, n 72, 661.

Indian Proclamation, supra n 72. Subsequent to the above South Asian claims the Sultanate of Oman in 1972 proclaimed an EFZ extending 38 miles seaward from the outer limit of her 12-mile territorial sea (Decree of 17 July 1972 concerning the territorial sea, continental shelf and exclusive fishing zones of the Sultanate of Oman, in 16 UNLS, supra n 42, 23-24); while in the same year the RVN extended her sovereignty over fishery resources to 53 miles (Décret du 26 décembre 1972, noted in D Bardonnet and J Carroz, "Les Etats de l'Afrique de l'ouest et le droit international des pêches maritimes"(1973) 19 AFDI 837, 841, n 9).

Also noteworthy during the period were the archipelagic claims of several States, including the Philippines (Note of 12 December 1955 received [by the UN] from the Ministry of Foreign Affairs of the Philippines, in 6 UNLS, supra Ch 2, n 81, 39-40) and Indonesia ("Announcement on the Territorial Waters" in Nordquist and Park, supra n 70, Indonesian booklet, 5-15) in which extensive straight baselines were drawn around their various islands in part to shelter fishery resources found within the 'archipelagic waters' against foreign fishing. This led to a large increase in the size of maritime areas closed to foreign vessels. In the case of the Philippines, for example, territorial waters extended to more than 145 nautical miles in some sections and internal waters encompassed an area of about 884,400 square nautical miles (M Santiago, "The
III. The Two-Hundred Mile Claims

Dissatisfaction with the traditional regime governing marine fisheries evidenced in State practice reviewed above was generally mild compared with that in Latin America and the Caribbean and Africa during the same period. From both regions emanated increasingly common claims to, or declarations in support of, 200-mile economic zones wherein the coastal State would have preeminent, if not exclusive, fishery rights.

A. Latin America and the Caribbean

1. National Legislation

Throughout the 1960s and early 1970s, the domestic legislation of Latin American and Caribbean States was characterized by "manifest heterogeneity" and vague and sometimes contradictory terminology. Nevertheless, for present purposes it may be divided into two broad groups.

archipelago concept in the law of the sea: problems and perspectives" (1974) 49 PLJ 315, 358. Although the claims were met with immediate protests from a number of States, they were not renounced and disputes continued throughout the decade.

A comprehensive review of the development of the concept of archipelagos in international law is beyond the scope of the present work. See in this regard, eg, D O'Connell, "Mid-ocean archipelagos in international law" (1971) 45 BYIL 1. For a discussion of the Philippines' claim in particular see ibid 25-38, and Santiago, supra this n, 357-371. For the Indonesian claim see O'Connell, supra this n, 38-42; Santiago, supra this n, 371-374; and J Syatauw, supra Introduction n 32, 168-205.

74 Zacklin, supra Ch 6, n 6

75 In this respect, it was similar to that of the early post-war period. See Ch 6, nn 59-61 and accompanying
The first group comprised eleven States\textsuperscript{76} bordering on the Caribbean which maintained territorial seas 12 miles or less in extent with no claims to exclusive fishery jurisdiction beyond that distance. Of those, the Dominican Republic claimed a six-mile territorial sea and a six-mile "contiguous zone" in which she would exercise jurisdiction for, \textit{inter alia}, fishery conservation purposes.\textsuperscript{77}

Cuba, while having in 1936 declared a three-mile territorial sea for fishery purposes, in 1955 decreed the right to take such measures as may be necessary for the protection and conservation of marine resources in high seas areas contiguous to her territorial sea.\textsuperscript{78}

The following year, Venezuela enacted legislation establishing a 12-mile territorial sea and three-mile contiguous zone, as well as claiming the right to establish "maritime zones" beyond 15 miles in which she would exercise her

\textsuperscript{76} Barbados, Colombia, Cuba, Dominican Republic, Guatemala, Guyana, Haiti, Jamaica, Mexico, Trinidad and Tobago, and Venezuela

\textsuperscript{77} Act No 186 of 6 September 1967 on the territorial sea, the contiguous zone and the continental shelf, in 15 UNLS, \textit{supra} Ch 2, n 72, 76-78

\textsuperscript{78} Legislative Decree No 1948, dated 25 January 1955, in Szekely, \textit{supra} Ch 2, n 69, ii, booklet 7, 33
"authority and vigilance, in order to ensure the develop-
ment, conservation and rational exploitation of the living
resources therein, wheter [sic] they are utilized by Vene-
zuelan [sic] or by foreigners".79

Whereas only the CEP States and a scattering of others
in Central America had passed legislation establishing 200-
mile zones in the early post-war period,80 forces of nation-
alism and tendencies toward regional integration intensified
in the 1960s, and by the early 1970s the number of States
declaring varying degrees of maritime sovereignty or juris-
diction to 200 miles had swollen to 11.81 They may be di-
vided into two sub-groups.

In the first, and larger, category, six States estab-
lished 200-mile zones and restricted fishing within certain
parts thereof to their own nationals. Argentina, Costa
Rica, El Salvador, Honduras and Uruguay prohibited foreign
fishing within 12 miles of the coast;82 while Brazil permit-

79 Act concerning the territorial sea, continental shelf,
fishery protection and air space, dated 27 July 1956,
in ibid, booklet 20, 16-18

80 See Ch 6 supra.

81 Hjertonnson, supra Ch 6, n 6, 34-36

82 In 1966, Argentina declared her sovereignty over marine
waters up to 200 miles from the coast (Law No 17,094-
M24, dated 29 December 1966; in Szekely, supra Ch 2, n
69, ii, booklet 2, 20-21) and the following year reserved
waters within 12 miles of the coast to national
vessels. Foreigner fishermen would be permitted to
fish in the outer zone, although parts thereof would be
set aside each year for national fishermen (Law No
17,500, dated 25 September 1967, in ibid 24-25). The
action was taken at least in part because of the prob-
lems then being caused by foreign fishermen (see an Of-
icial Communication of the Argentine Foreign Minister
in (1967) 6 ILM 664).

In 1948, Costa Rica had declared her "national so-
vereignty" over waters up to 200 miles from the coast
(Decree Law No 116, dated 27 July 1948; in Szekely,
supra Ch 2, n 69, ii, booklet 6, 7-10) and the follow-
ing year limited fishing activities in the zone to na-
tionals and licensed foreign vessels (Decree No 426
amending Decree No 190 of 28 September 1948, dated 8
March 1949, in ibid 13-14). On 10 February 1972, she
declared a 12-mile territorial sea, citing, *inter alia*, "the need to ensure to its nationals a zone of exclusive fishing", the lack of support for the three-mile limit, and contemporary State practice which revealed that the broader limit corresponded to "an accepted principle of international law" (Decree No 2203, in *ibid* 27-29). That same day, she proclaimed the first 200-mile 'patrimonial sea' in which she would exercise "a special jurisdiction...necessary to protect, conserve and utilize, for the exclusive benefit of the development of its people, the resources and natural wealth" of the zone, and in which foreign vessels would be able to fish beyond 12 miles (Decree No 2204 concerning the Patrimonial Sea, in *ibid* 30-33).

In her 1950 and 1952 Political Constitutions (*ibid* booklet 10, 9-10, 15-16), El Salvador established a 200-mile 'territorial sea', and in 1958 restricted fishing within 12 miles of the coast to her nationals (Maritime Hunting and Fishing Act, dated 25 October 1958 in *ibid* 11-12).

Honduras declared her maritime rights of "protection and control" up to 200 miles in the Atlantic in 1950 (Presidential Decree No 96, dated 28 January 1950; in *ibid* booklet 12, 19-21); set 12-mile limits to her territorial sea in 1965 (Constitution of the Republic, 1965, in *ibid* 37-38); and 4 years later restricted commercial fishing within 12 miles to her own nationals (Decree No 154, Law of Fisheries, dated 7 June 1969; in *ibid* 39-40).

In 1969, Uruguay declared a 200-mile territorial sea in which licensed foreign fishing was permitted beyond 12 miles (Presidential Declaration D. 604/969, dated 3 December 1969; in *ibid* booklet 19, 17-20).

See generally regarding the above H Espiell, "La mer territoriale dans l'Atlantique Sud-Americain" (1970) 16 *AFDI* 743.

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Decree Law 1098 of 25 March 1970 altering the limits of the Territorial Sea; and Decree 68,459, of 1 April 1971, in 16 *UNLS*, *supra* n 42, 3-4 and 271-273, respectively. Although Brazil's policy regarding maritime jurisdiction was moderate and cautious until 1970 (as witnessed by her attempt to negotiate a compromise at UNCLOS II - see Ch 7 n 222 and accompanying text *supra*) when she became one of a group of States, the 'territorialists', advancing claims aimed at maximizing coastal State maritime jurisdiction. According to Michael Morris ("Brazilian ocean policy in historical perspective" (1978-1979) 10 *JMLC* 349, 387; and "The domestic context of Brazilian maritime policy" (1977) 4 *ODILA* 143, 152-160) the change in policy was mainly in response to domestic political pressures. Cf Hjerttonnson, *supra* Ch 6, n 6, 60.
In contrast to the above, the CEP States, Nicaragua and Panama all claimed 200-mile zones without reference to fishing areas restricted to nationals. In 1966, Ecuador went beyond her earlier claim in enacting legislation proclaiming a full 200-mile territorial sea. This was in response to strong public reaction to the discovery that the previous government had secretly concluded an Agreement with the United States not to fully enforce its 1955 Decree establishing a 200-mile fishery conservation zone.

2. Fishing Disputes and Negotiations

In the decade following UNCLOS II, over 250 foreign vessels, mostly American, were seized for unlicensed fishing in Latin American zones, primarily by Ecuador and Peru.

In 1967, the United States proposed to the CEP States that the issue be submitted to either the ICJ or to arbitra-

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See Nicaragua's Decree No 31 delimiting the national fishing zone to 200 nautical miles, dated 5 April 1965, in Szekely, supra Ch 2, n 69, ii, booklet 15, 31-32; and Panama's Decree No 49 regulating fishing in the national territory, dated 12 March 1965, in ibid booklet 16, 13-14.

See Ch 6 for a brief survey of earlier Latin American claims, focusing on the CEP States.

Civil Code as amended by Decree No 1542 of 10 November 1966, in 15 UNLS, supra Ch 2, n 72, 78.

See Brown, supra Ch 6, n 6, 258-259; Hjertonnson, supra Ch 6, n 6, 35; and Szekely, supra Ch 2, n 69, i, 100-101. Reviewing the various pieces of Ecuadorian legislation relating to fisheries, Hjertonnson (supra Ch 6, n 6, 54) concludes that "contradictions in legislation demonstrate that Ecuador during the decade following the Santiago negotiations of 1955 [see Ch 6, n 32 and accompanying text supra] did not have a firm policy as to its jurisdiction over the 200 miles". The situation changed dramatically with the discovery noted in the text accompanying this note.

Foreign Policy, supra Ch 4, n 26, 163; Smetherman, supra Ch 6, n 24, 952; Szekely, supra Ch 2, n 69, ii, 180, 182. Chile, the other CEP State, only seized one American vessel between 1947 and 1971, mainly because there were few foreign vessels operating in her waters (ibid).
tion, or that a special conference be held. As before, the Latin American States refused the first option, but in 1968 agreed to consider a conference. Before final arrangements could be made, however, Peru seized more American vessels. The United States responded by terminating military cooperation. Peru retaliated by expelling the American military mission and the CEP States advised the United States that they would not negotiate the fishery dispute while the suspension against Peru was in effect.

In June 1969, the United States lifted their suspensions and the conference took place that month. The United States proposed the establishment of a regional fishery body of the four States to promote and regulate fishing, and offered to collect the license fees set by the CEP States on their behalf. The latter offer, Karin Hjertonnson observes, was remarkable in revealing American willingness to recognize some kind of coastal State jurisdiction over the 200-mile zone. However, aware of the increased support for their position in the United Nations Sea-Bed Committee (see Chapter 10 infra), and viewing the American proposal as a diminution of their sovereign rights, the CEP States declined the American offer and no agreement was reached. In the dozen or so years since their last serious multilateral negotiations with the United States, the growing international support for the concept of 200-mile resource zones had hardened their position considerably.

The imposition of American economic sanctions was no more successful than negotiations in convincing the CEP States to compromise. When Ecuador began seizing American fishing vessels in 1971, for example, the United States suspended the sale of military weapons as well as all credits and financial guarantees. Economic assistance proposals

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99 See Ch 6, n 32 supra.

90 Hjertonnson, supra Ch 6, n 6, 38

91 See Ch 6, n 32 and accompanying text supra.
were put "under review". Ecuador immediately brought the matter before the OAS, accusing the United States of coercion, in violation of the OAS Charter. By a vote of 22 in favour to none against, with the United States abstaining, the OAS agreed to consider the matter. It was finally resolved that both parties should avoid aggravating the conflict and negotiate their differences. No settlement was reached in the immediately succeeding years.

Overall, the American Government was reluctant to fully implement the various sanctions available in existing legislation against the Latin American States to defend the

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92 Szekely, supra Ch 2, n 69, i, 191; Hjertonnson, supra Ch 6, n 6, 40
93 Ibid 40-41
94 See text accompanying n 48 supra. There were even suggestions to use military force to change the views of the Latin American States. As Szekely observes (supra Ch 2, n 69, i, 190), however,

The reason why military action was not used by the United States can be found in the nature of the changing relationships between that country and the Latin American States. The American-sponsored overthrow of the Government of President Arbenz of Guatemala in 1954, the invasion of the Cuban Bay of Pigs in 1961, the invasion of the Dominican Republic in 1965, the assassination of Che Guevara in the mountains of Bolivia by the Green Berets in 1967, combined with the disastrous military intervention in Vietnam, were enough to make U.S. intervention in Latin America (at least an overt military one) a less than popular issue in the United States. When President Belaunde Terry was overthrown and the new pseudo-progressive Peruvian Government expropriated the International Petroleum Company in 1968, the United States found itself in no position to send in the marines, an action which up to the time of the Good Neighbour Policy was a commonly-used instrument for protecting American investors in the region.

Cf K Swygard, "Implications for the future distribution of the sea resources if present regimes continue in force" in Future of the Sea's Resources, supra n 8, 65, 67; and Henkin (supra Ch 6, n 76, 4), who observes generally that

Military power means -- and has always meant -- military power effectively applicable; but, [for the purposes of the law of the sea], the military power of the truly mighty is often not effectively applicable. The use of force is illegal and usually, also otherwise impolitic. The threshold of perceived national interest that would lead a big Power to
former's fishery interests, preferring instead to maintain good overall relations with their southern neighbours. In its broader implications, however, the message was clear. As Hjertonnson observes, "the United States was virtually paralyzed. Ecuador and Peru had proved that expansion of jurisdiction over the high seas was possible, even though it clashed with the interests of the United States."

As a result of the failure of the United States to protect the interests of American fishermen, in the years immediately leading up to UNCLOS III some fishermen negotiated private agreements, others registered their vessels in Latin America, while still others continued to risk seizures and fines. The various States involved hoped the forthcoming Law of the Sea Conference would provide a way out of the dilemma.

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use force against a small one is much higher than it used to be; and few issues in the law of the sea are likely to rise to that threshold.

Cf Hollick, supra Ch 6, text accompanying n 159; Zacklin, supra text accompanying n 1; and Koers, who agrees (supra n 8, 33) that "[w]ith few exceptions, fishing is no longer essential to the national economy. This explains why nations are no longer willing to risk war or violence in fishery disputes." For an important exception see Ch 9 infra.

Szekely (supra Ch 2, n 69, i, 202, n 73) cites other factors, including:
(a) the relatively unimportant impact of fines liable to be paid under American legislation on Latin American States;
(b) sympathetic views of the US Department of the Interior and elements of the American public interested in having the US make a similar claim; and
(c) the fact that, despite their complaints, American fishermen working in Latin American waters were doing quite well financially.

Hjertonnson, supra Ch 6, n 6, 41

Bath, supra Ch 6, n 64, 70; Foreign Policy, supra Ch 4, n 26, 270; L Nelson, "The patrimonial sea" (1973) 22 ICLQ 668, 682, n 81; "Recent developments in the law of the sea" (1974) 11 SDLR 699. The US was not alone in being unable to defend her nationals against Latin American States intent on enforcing their claims. Nelson (supra this n, ibid) notes that in 1973 Peru grant-
3. **Regional Initiatives**

In the early 1970s three important Latin American Conferences dealt with law of the sea issues. The deliberations and results reveal an evolving regional position on the future law and had a profound impact on developments elsewhere, including in the United Nations Sea-Bed Committee and UNCLOS III itself.

a) **The Montevideo Conference**

Prompted by rapidly unfolding events within the United Nations relating to the law of the sea as well as proposals circulated by the Soviet Union and the United States for the convening of an international conference to sanction a 12-mile limit to the territorial sea and fishery jurisdiction, Uruguay in 1970 invited all Latin American States with 200-mile zones to meet to adopt a common law of the sea policy and a single position concerning future multilateral negotiations.

From the 1970 Conference emanated the Declaration of Montevideo, setting out a number of principles considered to be those "emerging from the new trends oriented towards the structuring of an International Law obviously in process of progressive evolution" and which "continue to gain increasing support from the international community". They in-

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ed licenses to fleets from Canada, Costa Rica, Ecuador, France, Japan, Mexico, Panama and Spain.

Espliel, *supra* n 82, 748-749; Hjertonnson, *supra* Ch 6, n 6, 68; and Szekely, *supra* Ch 2, n 69, i, 253. See Ch 10 *infra* for the origins of UNCLOS III.

Declaration of Montevideo on the Law of the Sea, adopted on 8 May 1970, in Szekely, *supra* Ch 2, n 69, i, B, doc 29. The Conference also adopted three resolutions. The first concerned consultations with the UN Secretary General regarding a third law of the sea conference. It was agreed that such a conference should be held, providing that it included in its agenda a broad range of maritime legal issues (see Ch 10, nn 14-17 and accompanying text *infra*). The second resolution rejected the limitation of the future law of the sea conference to topics proposed by the Soviet Union and the US. And the third called for co-ordinating measures among the
cluded the right of coastal States to exercise control over marine resources in littoral waters "in order to achieve the maximum development of their economy and to raise the living standards of their peoples"; the right to delimit their maritime sovereignty and jurisdiction in conformity with their individual geographic and geological situation "and consonant with factors that condition the existence of marine resources and the need for rational exploitation"; the right "to explore, conserve and exploit" living resources in adjacent seas and to enact and implement regulatory measures in relation thereto without prejudice to freedom of navigation and overflight.\footnote{Montevideo Declaration, supra n 99. Quènèudec (supra n 18, 41) observes that the Declaration was basically an extensive application of the principle of permanent sovereignty over natural resources adopted by the UNGA in 1962. For a discussion of the development of the resolution and the text see (1962) YUN 498-504.}

It is clear that States at the Conference were not prepared to abandon their individual positions on rights to be exercised in the 200-mile zone for the sake of a common policy. Nowhere in the Declaration, for example, was there mention of the territorial sea, fishing zones, or even the 200-mile limit;\footnote{Szekely, supra Ch 2, n 69, i, 283, n 150} and, as Professor Edward Brown observes, participants at the Montevideo Conference and among all Latin American countries to obtain support for the Montevideo Declaration, to create a Latin American group concerning the law of the sea at the UN, and calling for a conference of all Latin American countries on the law of the sea that same year (Szekely, supra Ch 2, n 69, 283, n 147).

Attending the Montevideo Conference were Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru and, of course, Uruguay. Costa Rica, the only other Latin American State with a 200-mile zone did not attend owing to a change of government at the time (Szekely, supra Ch 2, n 69, 253-254).
"maritime sovereignty and jurisdiction [is] a conveniently ambiguous term which would cover any type of claim".102

b) The Lima Conference 1970

That tendency was similarly evidenced in the Lima Declaration adopted at the follow-up Conference of 20 Latin American States that same year.103 No specific reference

102 Brown, supra Ch 6, n 6, 252. More generally, he suggests (ibid) that

in order to draft a text acceptable to all the signatories, so many elements had to be avoided that, in the end, there was room for little but the invocation of the vague natural law arguments customarily resorted to in defense of claims for which evidence is lacking in the current law.

... Natural law thinking is, of course, still much favoured among Latin American international lawyers. This is hardly surprising when the objective is to encourage the development of new norms of international customary law by the promulgation, constant reiteration, and implementation of doctrines which were originally clearly contrary to the established law. Nevertheless, these principles are stated at such a high level of abstraction that it is difficult to see what limits at all they place on maritime claims.

But see also the wording used in the Truman Proclamations (supra Ch 4, nn 48 and 49 and accompanying text supra). In this regard, suggests Queneudec (supra n 18, 34-35)

Lorsque le Président Truman...émit sa déclaration sur le plateau continental, il estimait qu'il était 'juste' et 'raisonnable' de proclamer la juridiction des États-Unis sur ce qui pouvait être considéré comme 'un prolongement de la masse terrestre de l'État riverain, lui appartenant ainsi naturellement'. Si la nature, la justice et la raison permettaient aux États-Unis d'agir unilatéralement en tant qu'État riverain, il ne faut pas s'étonner de voir les autres riverains invoquer aujourd'hui les mêmes raisons supérieures pour affirmer des droits identiques.

Cf Henkin, supra Ch 6, n 76, 5-6. See in this regard as well, Ch 6, nn 64 and 105 and accompanying text supra.

103 The Declaration of Latin American States on the Law of the Sea (the 'Lima Declaration') and six resolutions are all in (1971) 10 ILM 207-214. The Conference was called in line with the third resolution adopted at the Montevideo Conference (supra n 99) and was attended by Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela. Observers were present from Canada, Iceland, India, Sene-
was made to either the 200-mile limit or maritime zones. It did, however, explicitly acknowledge "the plurality of existing legal regimes on maritime sovereignty or jurisdiction in Latin American countries". The distinction made between 'sovereignty' and 'jurisdiction' highlighted that plurality and the difference of views among participants as to the nature of the rights that could, or should, be claimed by coastal States over adjacent maritime areas.

Besides geographical and other factors impacting on the right of coastal States to establish maritime limits, the Lima Declaration went beyond its predecessor in adding the criterion of 'reasonableness', thus bringing it into line with the criteria set out in the Principles of Mexico adopted years before.

In a further development, the Declaration also affirmed the coastal State's right "to authorise, supervise and participate in all scientific research activities which may be carried out in the maritime zones subject to its sovereignty or jurisdiction, and to be informed of the findings and the results of such research".

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104 Lima Declaration, in (1971) 10 ILM 208

105 It was further emphasized by the various statements relating to the Declaration's interpretation made after its adoption by Argentina, Chile, El Salvador, Brazil, Colombia, Dominican Republic, Ecuador, Honduras, Mexico, Nicaragua, Panama and Peru (Szekely, supra Ch 2, n 69, i, 284, n 158). Mexico, for example, (ibid doc 44) stated that she interpreted the right of the coastal State to establish the limits of its maritime sovereignty in accordance with reasonable criteria to mean that "such limits may not extend beyond the distance of 12 miles".

106 See Ch 6, n 45 and accompanying text supra.

107 Lima Declaration, supra n 104. The Declaration also asserted (ibid) the right of the coastal State "to prevent contamination of the waters and other dangerous and harmful effects that might arise from the use, exploration or exploitation of the area adjacent to its coasts". As explained in an accompanying resolution
Despite the Declaration's generality, it failed to receive the unanimous endorsement of Conference participants. While 14 States voted in favour, three opposed (Bolivia, Paraguay and Venezuela), and Trinidad and Tobago abstained. Barbados and Jamaica, explains Szekely, "chose to be absent during the voting". Indicative of varying interests that would subsequently appear in full force at UNCLOS III, Bolivia and Paraguay opposed the Declaration as it made no reference to the position of land-locked States. Venezuela did likewise as she could not accept any extension of the territorial sea which would diminish her existing rights. And finally, the decision of Barbados, Jamaica and Trinidad and Tobago not to express a definite view on the Declaration's principles appears to have been largely determined by their shelf-locked positions in the Caribbean.

c) The Santo Domingo Conference 1972

The third, and most fruitful, conference from the perspective of the law governing fisheries was the Specialized Conference of the Caribbean States on Problems of the Sea, (No 3 on the problem of the contamination of the marine environment, in (1971) 10 ILM 211-212), certain activities then being conducted in marine areas -- particularly nuclear weapons testing -- threatened or destroyed important living resources and seriously disrupted the ocean's ecological balance.

Szekely, supra Ch 2, n 69, i, 258


Hjertonnson (supra Ch 6, n 6, 73) points out that Venezuela was the only Latin American country to ratify all four Geneva conventions on the law of the sea and her interests were best served by the norms contained in them, particularly given her maritime disputes with her neighbours. See, however, n 129 infra.

Hjertonnson, supra Ch 6, n 6, 254; and Szekely, supra Ch 2, n 69, i, 258. See also nn 131 and accompanying text infra.
held in the Dominican Republic in June 1972. The Conference adopted the Declaration of Santo Domingo, in which principles relating to fisheries were incorporated into a larger concept making its first appearance in an international instrument -- the patrimonial sea.

Barbados, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago and Venezuela attended the Conference as full participants. All other Latin American States (except Cuba) were invited to attend as observers. Argentina, Brazil, the CEP States and Uruguay accepted the invitation (Szekely, supra Ch 2, n 69, i, 287, n 206).

In 1971, an informal meeting of Caribbean Governments was called on a Venezuelan initiative to discuss Caribbean matters including the law of the sea. It was decided at the meeting to convene the Specialized Conference on the Law of the Sea, to be preceded by a meeting of a preparatory commission. The latter was held in Colombia in February, 1972, with little concrete result (ibid 265-266).

The concept of the patrimonial sea had its origins in the CEP claims of the early post-WWII era (see Ch 6 supra). While a detailed discussion of its development is beyond the scope of the current work and has been well-analyzed elsewhere (see, eg, J Vargas, "The legal nature of the patrimonial sea: a first step towards the definition of the exclusive economic zone" (1979) 22 GYIL 142; Nelson, supra n 97; and J Castañeda, "The concept of patrimonial sea in international law" (1972) 12 IJIL 535), it is nevertheless useful to note that the first reference to the concept was made by Vargas Carreno at the 1970 Law of the Sea Institute Conference (The United Nations and Ocean Management (1970; L Alexander, ed) 348) and a year later in a report to the Inter-American Juridical Committee, in which he stated (as cited in Vargas, supra this n, 153-154) that

Upon the basis of the 1970 Lima declaration, the patrimonial sea is...the maritime space in which the coastal state has the exclusive right to explore, conserve and exploit the natural resources of the sea adjacent to its coasts, its seabed and subsoil thereof, including the continental shelf and its subsoil up to the limit determined by such state according to reasonable criteria, and paying attention to its geographic, geologic and biologic characteristics and to the needs posed by the rational utilization of its resources. ... The purpose of this maritime space is...to promote the maximum development of the coastal states' economies and, consequently, to elevate the living standards of their peoples. Thus the name proposed: the patrimonial sea.
As Brown notes, the Santo Domingo Declaration differed from its predecessors in two main respects. First, it eschewed the emotive language and rhetorical natural law arguments of the Montevideo and Lima Declarations, emphasizing instead the desirability of defining "through universal norms, the nature and scope of the rights of States, as well as their obligations and responsibilities relating to the various oceanic zones"; the contribution of the renewable and nonrenewable marine resources to improving the standard of living of the developing countries and stimulating and accelerating their progress; the exhaustibility of marine resources "since even the living species may be depleted or extinguished as a consequence of irrational exploitation or pollution"; and "[t]hat the law of the sea should harmonize the needs and interests of States and those of the international community".113

Secondly, continues Brown, the Declaration "attained a new level of precision, moderation and negotiability which was previously lacking".116 This is found in the balanced set of principles based on a 12-mile territorial sea and an adjacent patrimonial sea in which the coastal State had "sovereign rights" over fisheries. In addition, the coastal State had specific rights and duties with respect to marine scientific research and protection of the marine environment.117

It was shortly thereafter advanced by Venezuela before the UN Sea-Bed Committee and by Colombia in her proposals to the Preparatory Commission for the Santo Domingo Conference (ibid 155-156).

114 Brown supra Ch 6, n 6, 255

115 Declaration of Santo Domingo, 9 June 1972, in 16 UNLS, supra n 42, 599-601

116 Brown, supra Ch 6, n 6, 255

117 Declaration of Santo Domingo, supra n 115. Commenting on the Declaration in the UN Sea-Bed Committee (see Ch 10 infra), Venezuela explained (A/AC.138/SR.78, p 13) that "the term 'sovereign rights' had been used precisely in order to indicate that the coastal State would, in respect to the resources of the belt, enjoy
The breadth of the territorial sea, asserts the Declaration, "should be the subject of an international agree-
ment, preferably of a worldwide scope", although the total
area of both the territorial and patrimonial seas, "taking
into account geographical circumstances", should not exceed
200 nautical miles.\textsuperscript{118} Within the patrimonial sea, all
States should enjoy freedom of navigation and overflight,
with no restrictions "other than those resulting from the
exercise by the coastal State of its rights within the
area".\textsuperscript{119}

In the only other reference to fisheries, the Declara-
tion affirmed that fishing on the high seas "should be nei-
ther unrestricted nor indiscriminate and should be the sub-
ject of adequate international regulation, preferably of
worldwide scope and general acceptance".\textsuperscript{120}

Commenting shortly after the Conference, Jorge Casta-
ñeda explained that the patrimonial sea was "an economic
jurisdictional area and not a sovereignty zone".\textsuperscript{121} There,
the coastal State "only exercises 'sovereign rights' over
the resources...and not over the zone itself. The purpose
of establishing it is thus purely economic and not political
or strategic."\textsuperscript{122}

He discounted the oft-voiced complaint that recognition
of the patrimonial sea might lead to under-exploitation of
fishery resources, concluding that coastal States without
sufficient harvesting capacities would no doubt be inter-

\textsuperscript{118} Declaration of Santo Domingo, \textit{supra} n 115

\textsuperscript{119} Ibid

\textsuperscript{120} Ibid 601. In addition to the provisions referred to in
the text, the Declaration also set out detailed arti-
cles relating to various aspects of the territorial
sea, the continental shelf, marine pollution and re-
gional cooperation.

\textsuperscript{121} Castañeda, \textit{supra} n 113, 539

\textsuperscript{122} Ibid
ested in issuing licenses under reasonable terms and conditions. In any case, he suggested, it should be possible to incorporate such an obligation into the future law of the sea conventions.\textsuperscript{123}

More generally, Castañeda observed, it was necessary to relate fishery issues to the broader law of the sea:

The modern law of the sea must reconcile regional and universal aspects. The wide variety of...conditions in different parts of the world make it extremely difficult to apply uniform legal rules governing fisheries. In contrast, rules designed to facilitate communications among nations, especially those regarding free navigation and overflight, by their very nature must be applied universally and uniformly. The law of the sea as a whole must integrate and reconcile those two aspects: one a universal element represented by a narrow coastal band over which the coastal State exercises full sovereignty, that is, a territorial sea with a practically uniform breadth of 12 miles all over the world, and two, a regional element represented by the areas of special jurisdiction, varying in breadth in accordance with regional or even local needs.\textsuperscript{124}

For that reason, he explained, the Declaration contained "not mandatory but permissive legal rules, in the sense that they authorize all States to exercise certain legal competences with valid international effects and scope".\textsuperscript{125} At the same time, however, Castañeda concluded, the Declaration was not a regional agreement, but rather an attempt to formulate "a universal legal frame within which local conditions and solutions could fit",\textsuperscript{126} and, he explained elsewhere, "a proposal for one aspect of a worldwide legal regime. That is to say, a proposal for the U.N. law of the sea conference."\textsuperscript{127}

The 'patrimonialist' orientation of the Santo Domingo Declaration was more compromising than the 'territorialist' bent of its two predecessors. Thus, the proposed principles

\begin{itemize}
\item \textsuperscript{123} Ibid 540; cf, Nelson, supra 97, 682
\item \textsuperscript{124} Castañeda, supra n 113, 541
\item \textsuperscript{125} Ibid 542
\item \textsuperscript{126} Ibid
\item \textsuperscript{127} J Castañeda, "Statement on the Caribbean" in Proceedings of the IV Pacem in Maribus Convocation, Malta, 23-26 June 1973 (International Ocean Institute) 115
\end{itemize}
constituted a better base from which to negotiate a regime acceptable to the broader international community -- particularly the major maritime Powers.\textsuperscript{129} It is therefore noteworthy that while abandoning aspects of earlier proposals unlikely to garner the widespread support of other States, it maintained in an overall package those key tenets establishing the coastal State's exclusive fishery rights within the 200-mile limit. This would prove a most significant contribution to the development of the law.

That being acknowledged, it is simultaneously necessary to observe that the Declaration did not receive the unanimous endorsement of the Conference. While 10 States voted in its favour, five others abstained.\textsuperscript{129} El Salvador and Panama declined to sign the Declaration as the latter's provision on the breadth of the territorial sea was seen as conflicting with their national legislation establishing 200-mile territorial seas.\textsuperscript{130} Barbados and Jamaica similar-

\begin{flushleft}
\textsuperscript{129} Cf Nelson, supra n 97, 677; Vargas, supra n 113, 158-159

\textsuperscript{129} Declaration of Santo Domingo, supra n 115, 599, note a. Although Venezuela did not vote for the Lima Declaration (see n 110 and accompanying text supra), it did endorse the Santo Domingo Declaration. According to Kaldone Nweihed ("Venezuela's contribution to the contemporary law of the sea" (1974) 11 SDLR 603, 628),

That lone stand at Lima, typical of a conservative attitude towards the law of the sea, might have been necessary at that time, but it did not help to stress the image of Latin American cooperation and solidarity. Venezuela's role as the nation that led South America to political independence in the early nineteenth century would not be compatible with an ocean policy that might be interpreted in elusive and individual terms, even if it were perfectly valid from a legal point of view. But the same circumstances which stemmed from the objective geographical facts regarding the closeness of other jurisdictions on islands off Venezuela's Caribbean coast demanded a vigorous, pragmatic and positive ocean policy that would fall in line with the undeniable trend registered in Latin America without precipitating unnecessary conflicts with friendly Caribbean neighbours.

\textsuperscript{130} Cf I Paul, "Venezuela: the country in the Caribbean" in Western Hemisphere Perspectives, supra Ch 6, n 6, 125, 129.

\textsuperscript{130} Szekely, supra Ch 2, n 69, i, 269
ly declined to endorse the Declaration for basically the opposite reason. Owing to geographical factors, a 200-mile patrimonial sea would have detrimental effects on their fishery rights under the traditional law of the sea.\textsuperscript{131} And finally, the Guyanese decision not to support the Declaration was probably due to her sensitive boundary dispute with Venezuela and her desire not to disrupt their sensitive bilateral relations by seeming to endorse an expanded claim to maritime jurisdiction over the adjacent continental shelf.\textsuperscript{132}

The fact that States from the same sub-region could hold such widely diverging views on the law of the sea revealed need for more time, patience and good faith negotiations if a generally acceptable regime was to be realised.

B. Africa

Commercial fishing in the waters washing the African continent developed in stages. Southern European fishermen, of course, had exploited commercially the resources of North African Mediterranean waters for hundreds of years. In the decades preceding WWII, their activities beyond the Pillars of Hercules were restricted to Atlantic waters in the regions of Morocco and the Spanish Sahara in the north, and the (then) Union of South Africa in the very south. Following the war, they began expanding their operations towards

\textsuperscript{131} Ibid. See, eg, statement by the Jamaican delegate to the UN Sea-Bed Committee (A/AC.138/SR.79, 25-26). The disadvantages of the patrimonial sea concept led Jamaica to advance the 'matrimonial sea' concept, providing for regional sharing of resources. On this point see, eg, Ch 10, n 106 and accompanying text infra, and G Brocard, Le Statut Juridique de la Mer des Caraïbes (1979) 233-268.

\textsuperscript{132} Hjertønsson, \textit{supra} Ch 6, n 6, 64-65; \textit{cf}, Brown, \textit{supra} Ch 6, n 6, 256. If that was indeed the reason, it is interesting to note that apparently for other reasons, Venezuela \textit{did} support the Declaration (see n 129 supra).
the lower latitudes and into the resource-rich Gulf of Guinea. In the succeeding years they were followed by fleets from Northern and Eastern Europe, the Soviet Union, the Republic of Korea, Taiwan, Japan and the Americas. Commercial fishing along Africa's eastern seaboard only developed significantly at a later date.\textsuperscript{133}

As African colonies gained independence in the late 1950s and 1960s, more and more began looking to adjacent marine fisheries as an important feature of their development programmes. Because of the intensified efforts by foreign fleets off their coasts, however, by 1960 some significant stocks were overexploited while others were coming under serious threat.\textsuperscript{134} Furthermore, the proportion of the catch taken by African States bordering the Atlantic was steadily decreasing compared to foreign fleets.\textsuperscript{135} African States increasingly felt the need to take action. "Manquant de

\textsuperscript{133} See generally, Bardonnet and Carroz, \textit{supra} n 73, 841, n 9; F Doumenge, "L'essor de la pêche maritime dans les mers tropicales"(1960) 13 \textit{Les Cahiers d'outre mer} 133, 161-174, 194-196; and J-C Douence ("Droit de la mer et développement économique sur la côte occidentale d'Afrique"(1967) 71 \textit{RGDIP} 110, 117) who observes that in the mid-1960s

\textit{L'Océan Indien ne bénéficie pas de conditions aussi favorables et sa richesses biologique est bien moindre [de l'Océan Atlantique]. Il se trouve d'autre part trop éloigné de l'Europe, centre d'araeient et de consommation. Les flottes japonaises sont seules actives dans cette région et les efforts des pays riverains pour implanter chez eux une industries de la pêche restent limités, sauf peut-être en Somalie. L'opposition entre les deux côtes d'Afrique est très nette: les problèmes actuels de l'Afrique occidentale restent virtuels en Afrique orientale.}

For a discussion of the various economic and technological factors leading to the expansion of fishing into tropical waters (including refrigeration and improvements in harvesting equipment and air transport, the latter allowing easier access to distant markets for high-value catches) see \textit{ibid} 117-119, and Doumenge, \textit{supra} this n, 141-152.

\textsuperscript{134} Bardonnet and Carroz, \textit{supra} n 73, 839; Douence, \textit{supra} n 133, 112, 132; and Doumenge, \textit{supra} n 133, 197

\textsuperscript{135} Bardonnet and Carroz (\textit{supra} n 73, 837) report, \textit{eg}, that while in 1964 the catch secured by the Atlantic African States equally that taken by foreign fleets, by 1972 it was no more than half.
puissance industrielle," observes Evelyne Peyroux, "ils ont cherché, comme les autres pays en voie de développement, aide et protection dans le droit international de la mer en utilisant les règles au profit de leurs intérêts".\textsuperscript{136} The law to which they turned, however, was not the traditional regime governing resource exploitation, or even the Fisheries Convention of UNCLOS I. That, in the African view, did not protect their interests.\textsuperscript{137} Rather, they looked to the law as it was then developing elsewhere and began revising their own domestic legislation accordingly.

1. **National Legislation**

The laws relating to fishery and maritime jurisdiction inherited by the new African States from their former colonial masters reflected, on the one hand, the latter's desire to protect their own mercantile, security and fishery interests by preserving the sanctity of the freedom of the sea principle and, on the other hand, "une grande indifférence ... à l'égard des problèmes que pose le droit de la mer et des pêches dans leurs dépendances africaines".\textsuperscript{138} To rectify the situation, African States on gaining independence began extending the limits of their maritime jurisdiction.

\begin{itemize}
\item \textsuperscript{136} E Peyroux, "Les Etats africains face aux questions actuelles du droit de la mer" (1974) 78 RGDIP 623, 625
\item \textsuperscript{137} Ibid 631; and Gilles Chouraqui ("L'Afrique et le droit de la mer" (1977) 31 Revue juridique et politique, indépendance et coopération 1129, 1131) who writes that C'est, en effet, cette prise de conscience du fait que le droit traditionnel (de la mer) ne préservait pas leurs intérêts nationaux dans le domaine de la pêche qui constitue la raison essentielle de la contestation par l'Afrique de ce droit.
\item \textsuperscript{138} Douence, supra n 133, 115-116. He goes on to add (ibid) that this was the case largely because commercial fishing had not been developed in the colonies. Typical of such legislation is the Fisheries Ordinance, 16 March 1934, of the Somaliland Protectorate in 6 UNLS, supra Ch 2, n 81, 53, which regulated fishing within 3 miles of the coast. For a discussion of legislation in Spanish and Portuguese colonies in the 1960s see Bardonnet and Carroz, supra n 73, 852, n 72.
\end{itemize}
Although as Daniel Bardonnet and Jean Carroz point out, State practice in this regard reveals "à la fois une grande mobilité et une extrême hétérogénéité", two broad groups of claims were advanced, each generally confined to distinct time periods.

Although African States had played no great role in the deliberations of the first two law of the sea conferences (see Table 2 supra) and only a small minority actually became parties to the 1958 Territorial Sea or Fisheries Conventions, legislation enacted during the 1960s was generally modest and reflected proposals that had received substantial support at those Conferences. While a number of States advanced expanded jurisdictional claims in the early 1970s, over half maintained 12-mile limits, awaiting the results of the forthcoming law of the sea conference.

Of States in the latter category, three claimed a six-mile territorial sea and an adjacent six-mile fishery zone. In the latter, South Africa and Tunisia claimed exclusive jurisdiction, while the Ivory Coast asserted simply the right to regulate fishing activities. Most of the States

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139 Ibid 852

140 Kenya, Madagascar, Nigeria, Senegal, Sierra Leone and South Africa are the African coastal States that became parties to both Conventions. No other such State became a party to only one of the Conventions (Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1984 (United Nations, 1985)).

141 Territorial Waters Act, 1963 (Act No 87 of 1963) of South Africa, in 15 UNLS, supra Ch 2, n 72, 117-119; Loi no 62-35 du octobre 1962 (18 Joumada I 1382), modifiant le décret du 26 juillet 1951 (22 Chaoual 1370), portant refonte de la législation de la police de la pêche maritime et delimitation des eaux territoriales de la République tunisienne, in ibid 127-128; and Décret no 67-334 de 1er août 1967 portant limitation de la mer territoriale en Côte d'Ivoire, in ibid 95. The relative modesty of Ivory Coast's claim may be explained by the fact that she was developing her local fishing industry and was not prepared to extend her jurisdiction further for fear of being excluded from similar waters of neighbouring States (Bardonnet and Carroz, supra n 73, 853-854).
continuing to exercise jurisdiction to 12 miles, however, claimed full territorial seas over that entire breadth for security reasons and to emphasize their maritime sovereignty. 142

As noted above, the early 1970s saw a number of African States expand their maritime jurisdiction beyond 12 miles.

142 Writing in 1967, Douence (supra n 133, 131) explained that the 1958 Territorial Sea Convention solemnly affirmed the sovereignty of the State over its territorial sea and gave it a juridical value:

Tous les États africains reprennent bien entendu ce principe qui satisfait agréablement leur fierté nationale....

[Àujourd'hui de la lettre des textes législatifs, il s'agit d'affirmer dans ce domaine précis comme dans d'autres une indépendance nationale encore fragile. C'est pourquoi la plupart des États préfèrent visiblement la notion de la mer territoriale fondée sur le principe simple de souveraineté aux autres notions plus élaborées mais moins parlantes de droit international.

On the security reasons for declaring a full 12-mile territorial sea see, eg, Chouraqui, supra n 137, 1131; and Peyroux, supra n 136, 628.

In a few instances, the 12-mile limits within which the State exercised exclusive fishing rights were expanded by proclaiming baselines from which the distance was measured other than those conforming to the 1958 Territorial Seas Convention. Kenya, eg, in 1969 declared Ungwana (Formosa) Bay “a historic bay constituting internal waters” so as to safeguard the vital economic interests of the coastal population (Proclamation of 6 June 1969 by the President of the Republic of Kenya concerning the territorial sea and the contiguous zone of the Republic of Kenya, in 15 UNLS, supra Ch 2, n 72, 95-96). Elsewhere along the coast, the Proclamation (ibid) declared simply that the distance of 12 miles would be measured from “appropriate baselines”.

Bardonnet and Carroz (supra n 73, 844) comment in regard to baseline delimitation most African Atlantic States in the early 1970s remained
stimulated in large measure by similar claims advanced else­where, increased support for proposals along such lines in the UN Sea-Bed Committee then meeting, and the growing need to take unilateral action to protect coastal fisheries.

Of those States, it appears that only Guinea and Sierra Leone asserted claims to 200-mile zones. Within that li­mit, various distances were selected and they were some­times altered more than once during the 1960s and early 1970s.

In 1964, Guinea declared a 130-mile territorial sea, extending primarily from one straight baseline, itself 120 miles long drawn between 2 islands off the coast (Décret no 224/PRG du 3 juin 1964 portant limitation des eaux territoriales de la République de Guinée; in 15 UNLS, supra Ch 2, n 72, 87). The following year, the limit was extended a further 70 miles (National Legislation and Treaties Relating to the Law of the Sea (UN doc ST/LEG/SER.B/19)[hereafter cited '19 UNLS'] 32-33). Douence (supra n 133, 129) commented in 1967 that Guinea's extension was 'excessive', universally ignor­ed, and "illustre bien la volonté d'affirmation de certains États nouveaux en dehors de toute considéra­tion pratique".

Sierra Leone extended her territorial sea to 12 miles in 1964 (Fisheries (Amendment) Act 1964 (Act No 58 of 1964) in 15 UNLS, supra Ch 2, n 72, 117), and seven years later, to 200 miles (Bardonnet and Carroz, supra n 73, 857).

Cameroon, for example, claimed an 18-mile territorial sea in 1967 (Loi no 67/LF/25 du 3 novembre 1967 modifi­ant l'article 5 du code de la marine marchande camer­ounaise, in 15 UNLS, supra Ch 2, n 72, 51); the Congo, a 30-mile territorial sea in 1970 (Journal officiel de la République populaire du Congo, 1er août 1970, p 428); Ghana, a 30-mile territorial sea and an adjacent 100-mile fishery conservation zone (Territorial Waters and Continental Shelf Decree, 1973, in 18 UNLS, supra n 42, 23-24); and Gambia, a 50-mile territorial sea in 1971 (Bardonnet and Carroz, supra n 73, 857, n 111).

Gabon extended her territorial sea on more occasions between the second and third law of the sea conferences than any other African State. Independent in 1960, she extended her territorial sea from 3 to 12 miles in 1963; from 12 to 25 miles in 1970; from 25 to 30 miles in 1972; and, finally, to 100 miles that same year (Renseignements concernant l'extension de la limite des eaux territoriales, in 16 UNLS, supra n 42, 10).
2. The Search for a Common Position

Throughout the 1960s there was no concerted effort by African States to harmonize their divergent positions on the law of the sea in general or fishery issues in particular. According to Jean-Claude Douence,

Le refus des accords régionaux s'explique par un souci jaloux de conserver intacte sa souveraineté, de garder les mains libres. Il s'y ajoute la crainte de porter atteinte au principe de l'égalité souveraine des États : tout accord de réciprocité aboutirait à avantager les États qui sont déjà le plus en avance.\(^{146}\)

As the decade wore on, however, the multifarious claims generated numerous disputes between African coastal States and non-African States as well as immediate neighbours.\(^{147}\) Facing both the risk of regional anarchy and the likelihood of a new law of the sea conference, African States in the early 1970s set out to define a common position on the key issues.\(^{148}\)

In 1971, the Organization of African Unity (OAU) Council of Ministers adopted resolutions on Permanent Sovereignty over Natural Resources and Fisheries. In the latter, it was observed that foreign fishing of scarce, urgently-required resources presented "a lasting burden and a serious threat" to African development programmes, and that as international law recognized State sovereignty over continental shelf resources, the extension of such sovereignty to cover living resources constituted "a justifiable rectification" of international law.\(^{149}\)

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\(^{146}\) Douence, supra n 133, 127  

\(^{147}\) See, eg, (1967) 71 RGDIP 1070; and Bardonnet and Carroz, supra n 73, 853, 855. Some of the disputes were settled through the negotiation of bilateral fishing agreements. See, eg, ibid 870-874; and Douence, supra n 133, 134-137.  

\(^{148}\) See generally, Chouraqui, supra n 137, 1134-1137; C Odidi Okidi, "The role of the OAU member States in the evolution of the concept of the exclusive economic zone in the law of the sea: the first phase"(1982) 7 Dalhousie L J 39; and Peyroux, supra n 136, 633-645.
On the above basis, the Council confirmed the "inalienable rights" of African States to fishery resources above their continental shelves, and urged governments to proceed rapidly "to extend their sovereignty over the natural resources of the high seas adjacent to their territorial waters and up to the limits of the continental shelf" as well as to cooperate in the development of fisheries with a view to increasing the participation of African States in the exploitation of marine resources surrounding the continent.  

After the above meeting the regional position on the law of the sea developed rapidly. In November, 1971, the Scientific Committee for Africa recommended extension of territorial waters up to 200 miles and establishment beyond that limit of a 12-mile contiguous zone. The entire area should be declared a restricted fishery and pollution control zone. Jettisoned was the absolute link between the continental shelf and superjacent waters, the emphasis being shifted to the waters themselves. The recommendation marked the first adoption by African States or officials of the

\[149\] Resolution on Fisheries, in S Oda, The International Law of the Sea: Basic Documents (1972) i, 362-363. The recommendations were actually made in reaction to a recommendation made the previous month by a small panel of experts held in Casablanca that African coastal States establish EFZs up to the 600-meter isobath where territorial sea limits did not already extend to that limit (Odidi Okidi, supra n 148, 46; N Rembe, Africa and the International Law of the Sea: a Study of the Contribution of the African States to the Third United Nations Conference on the Law of the Sea (1980) 119).

\[150\] Resolution on Fisheries, supra n 149. Brown (supra Ch 6, n 3, 168) on this same subject comments that developing coastal States find it a little difficult to understand the equity of a law which allows a coastal State to exploit the mineral resources of the natural prolongation of its territory into and under the sea, but forbids a similar monopoly situation in regard to the living resources of the superjacent waters.

See also in the above regard, Ch 6, nn 108ff and accompanying text supra.
200-mile limit for exclusive maritime resource jurisdiction.\textsuperscript{151}

In June 1972, a regional seminar held in Yaoundé, Cameroon, to discuss law of the sea matters recommended a number of principles providing for a 12-mile territorial sea and an adjacent "economic zone" over which African States would exercise "an exclusive jurisdiction for the purpose of control, regulation and national exploitation of the living resources of the sea and their reservation for the primary benefit of their peoples and their respective economies ...".\textsuperscript{152} The limits of the zone would be fixed "in accordance with regional considerations taking duly into account the resources of the region and the rights and interests of the land-locked and near land-locked States...", and those States "should" be permitted to participate in the exploitation of fishery resources.\textsuperscript{153}

The Yaoundé recommendations constituted the premier attempt by African States to formulate a comprehensive position on the law of the sea.\textsuperscript{154} As such, they bore a strong resemblance to the principles enunciated in the Santo Domingo Declaration adopted by Caribbean States a fortnight earlier.\textsuperscript{155} In fact, African States had adopted a basic approach to the norms governing the law of the sea similar to

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\textsuperscript{151} Odidi Okidi, \textit{supra} n 148, 49-50

\textsuperscript{152} Conclusions of the African States Regional Seminar on the Law of the Sea, Yaoundé, 1972, in Rembe, \textit{supra} n 149, 217-218

\textsuperscript{153} \textit{Ibid.} As well, seminar participants recommended to African States that the latter "extend their sovereignty over all the resources of the high seas adjacent to their Territorial Sea within an economic zone to be established and which will include at least the continental shelf"; uphold the principle of the extension at the forthcoming law of the sea conference; promote a policy of cooperation for the development of fisheries; and take all necessary measures to prevent marine pollution (\textit{ibid} 219).

\textsuperscript{154} Cf Rembe, \textit{supra} 149, 120

\textsuperscript{155} See nn 113ff and accompanying text \textit{supra}.
\end{flushleft}
that long typical of Latin American States. As Dr Nasila Rembe observes,

The legal basis and justification of the claims made by African States is not always fully and consistently analyzed, if at all. Rather, each individual State or region assumed the competence to restate or make the law. In the absence of a universally accepted and observed law of the sea, States have presented their claims as rights already vested in them under, or allowed by, international law. However, the claims made by the African States, and the law sought, are new. Their justification has not been advanced on purely legal principles; it has been infused with moral arguments, economic, political and scientific factors.156

While similar to the Santo Domingo Declaration, the Yaoundé recommendations differed in two main respects. First, the latter made no reference to 200 miles as a jurisdictional outer limit. This left the actual parameters of the recommendation somewhat unclear and open to varying interpretations.157 And secondly, the recommendations contained the first explicit, albeit general, acknowledgment of rights of land-locked and (a new category of States) 'near land-locked' States concerning the exploitation of fishery resources.158

Meeting in Addis Ababa in May, 1973, the OAU Council of Ministers built upon the above recommendations in adopting the Declaration on Issues of the Law of the Sea, the last major pronouncement on the subject by the Council prior to the opening of UNCLOS III.159 Repeating arguments made in their earlier Declaration,160 Ministers went beyond the above earlier statements in specifying that the exclusive

156 Rembe, supra n 149, 120
157 Cf Odidi Okidi, supra n 148, 56
158 The exact scope of those rights was left unspecified, perhaps owing to differing views among participants and the absence of land-locked States from the Seminar (ibid).
160 See n 149 and accompanying text supra.
economic zone (EEZ) may not exceed 200 miles measured from the applicable baselines.161

In addition, the position of land-locked and (now termed) "other disadvantaged" States was enhanced by their being entitled to share in the exploitation of fishery resources in the neighbouring coastal States' zone "on an equal basis as nationals of coastal States on bases of African solidarity and under such regional or bilateral agreements as may be worked out".162

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161 Somewhat surprisingly, the Council did not specify any limit for the territorial sea, preferring instead simply to state (ibid 1202) that

Pending the successful negotiation and general adoption of a new regime to be established in these areas by the forthcoming law of the sea Conference, this position prejudices neither the limits of the territorial sea of any State nor the existing rights of States.

This, Odidi Okidi suggests (supra n 148, 60) may be due to some States wanting a territorial sea greater in breadth than the 12 miles recommended by the Yaoundé Seminar. Cf Chouraqui, supra n 137, 1135. Other States apparently saw no need to even fix a limit (Peyroux, supra n 136, 635).

162 Declaration, supra n 159. In September, 1973, on the eve of UNCLOS III, the Fourth Summit Conference of Non-Aligned Countries adopted a resolution which, inter alia, stressed the need to establish "a preferential system for geographically handicapped developing countries, including land-locked countries" (Resolution concerning the Law of the Sea, in Oda, supra n 149, ii, 41-44, 42). The retreat from equal rights to some sort of preferential treatment for land-locked and geographically-disadvantaged States was noticeable, particularly given the numerical strength of the African States within the Group (Odidi Okidi, supra n 148, 62). Nevertheless, at the OAU Council of Ministers' 1974 meeting at Mogadishu, Somalia, prior to the Caracas session of UNCLOS III, the Addis Ababa Declaration was readopted as the agreed African position on the law of the sea (in S Oda, The International Law of Ocean Development: Basic Documents (1979) i, no III A 4).

In a further development to the Yaoundé recommendations the Declaration also stated that scientific research conducted in the EEZ should be subject to the jurisdiction of the coastal State. As well, there was for the first time an explicit statement that the principles being espoused might not be applicable universally, as the Council did not recognize "rights of ter-
The Declaration also broke new ground in recognizing that high seas fishing activities may have an effect on fishing within the EEZ and territorial sea. Accordingly, such activities must be regulated "especially having regard to the highly migratory and anadromous fish species". The Council recorded its support for the establishment of "an international sea fisheries regime or authority with sufficient powers to make States comply to widely accepted fisheries management principles" or else the strengthening of the fishery commissions of the FAO or other fisheries regulatory bodies towards that end.

It is clear that while the majority of African coastal States had not unilaterally moved to extend their maritime jurisdiction beyond 12 miles, there was nevertheless broad support for a regime the central feature of which would be a 200-mile economic zone comprehending exclusive fishery jurisdiction. In this, their general position was in harmony with a growing number of Latin American and Asian States. At the same time, however, a number of penumbral issues remained, chief of which were the rights African States were willing to accord land-locked, geographically disadvantaged and distant-water fishing States to fishery resources of the 200-mile zone, and the specific regime that would apply to the remaining high seas. Much negotiation would be required to satisfy the general interests of the international community.

163 Declaration, supra n 159

164 Ibid
IV. Conclusion

The spate of unilateral claims and regional and sub-regional declarations appearing in the 1960s and early 1970s clearly revealed both the uncertain state of the law as a result of the failure of the 1958 and 1960 Conferences to agree on the limits of national jurisdiction and the inability of the 1958 Fisheries Convention to respond adequately to either unprecedented conservation exigencies or increasing demands by many coastal States for a more equitable share of fishery resources in their own littoral waters.

As we have seen, those claims and declarations were made by States with a view to protecting their own parochial fishery and other maritime interests, and clustered themselves around two fundamental positions. On the one hand, economically-powerful maritime nations with diverse interests in the sea, moved to establish 12-mile territorial seas or EFZs so as to safeguard the interests of their local, inshore fishermen. In some cases, EFZs were even claimed by States long supporters of the traditional law of the sea and Parties to the 1958 High Seas Convention which declared that beyond the territorial sea the freedom of fishing principle applied. Their actions further served to highlight the inadequacies of the 1958 Conventions and the fact that the law governing marine fisheries was in a state of flux.165

Beyond the 12-mile distance, the above States generally did recognize the freedom of fishing principle as the basis for the allocation of fishery resources, as this allowed their own distant-water fleets to operate with minimal restrictions. The result, as noted, however, was often over-capitalization, overfishing of individual fisheries, and "a great deal of political confrontation among fishing nations".166

165 Cf Jennings, supra Ch 5, n 121, 36.
In some instances, agreements were concluded and commissions established to regulate fishing activities in particular high seas areas. Of the very few charged with allocating resources, most were limited in membership to two or three States and the problem of dealing with new entrants to the fishery was serious and likely to become worse as other States expanded their fishing capacities.¹⁶⁷

It had been hoped by the major fishing nations that their concessions of either a 12-mile territorial sea or EFZ would dissuade the broader international community from claiming wider expanses of ocean.¹⁶⁸ That hope was in vain, however, for throughout the 1960s and onwards a steadily swelling group of coastal States grew increasingly adamant that it was in their own individual interest to establish a 200-mile maritime zone in which they alone would exercise sovereign rights over the resources. Often newly-independent and economically weak, many of those States lacked the capacity to exploit the resources of distant waters. For them, therefore, a mere 12-mile zone was unsatisfactorily, particularly when abundant fishery resources in the waters just beyond that limit and within easy reach of their relatively modest, coastal fishing vessels, were being heavily exploited by foreign fleets. With little practical choice, States increasingly moved to expand their fishery jurisdiction in the national interest as being essential to the State's economic development and the betterment of national living conditions. Many more States, while not themselves making such a claim, indicated that they would be pushing for recognition of the 200-mile zone at the forthcoming law of the sea conference.

Whereas in the immediate post-war period the States espousing 200-mile zones of any description were few and their

¹⁶⁶ Koers, supra n 8, 209

¹⁶⁷ Ibid 209-210; Chapman, supra n 12, 445-446; and D McKernan, "International fisheries arrangements beyond the twelve mile limit" in International Rules, supra Ch 7, n 93, 255, 257

¹⁶⁸ See, eg, n 46 and accompanying text supra.
support limited, the situation in the years following UNCLOS II was vastly different.\textsuperscript{169} First, the broadening of the international community, particularly after 1960, meant that the number of States with maritime interests primarily focused on the exploitation of coastal resources increased dramatically, both in absolute terms and also relative to the number of major maritime States. Actions taken by the former States, therefore, had a potential impact on the development of customary international law greater than had ever been the case in the past.\textsuperscript{170}

That factor was all the more important with the failure of both the 1958 and 1960 Conferences to agree on key fishery issues. Although a number of maritime States reaffirmed their strict allegiance to the traditional law of the sea -- particularly the three-mile limit of maritime jurisdiction -- during the dying moments of UNCLOS II, their speedy volte-face in both recognizing and, in many cases, claiming a 12-mile EFZ based on the need to protect vital national interests meant that they could no longer oppose similar claims of other States. It also signalled their recognition that one of the central tenets of that traditional law, the link between the territorial sea and fishery limits was forever severed and that new conditions demanded new law. Given the growing conservation problem, uncertainties generated by a

\textsuperscript{169} See generally, Swygard, \textit{supra} n 94; and Koulouris, \textit{supra} n 12, 40-70.

\textsuperscript{170} Henkin (\textit{supra} Ch 6, n 76, 5) remarks that

Their numbers...give the poor nations power to shape the law of the sea. In principle, we know, new nations coming into international society are bound by the law as they find it. In fact, we know, law cannot survive if it is rejected by many States. In principle, we know, the laws of law-making are based on the equality of States and their unanimity: new law is binding on States only with their acquiescence, and cannot be imposed on dissenters. In fact, we know, majorities, focused at the United Nations or at multilateral conferences can press the few recalcitrant States -- even, or perhaps especially, if they are rich and powerful -- and make them accept something other than what they would really like.
galaxy of diverse national legislation, the universal refusal of States to submit their fishery claims to the scrutiny of international adjudication, the firm resolve (and ability) of coastal States to enforce their expanded claims, and the rising number of fishery disputes arising therefrom, a negotiated settlement of the entire problem became imperative. That settlement had not only to result in an arrangement satisfying the essential needs of both the two major groups noted above, but also the particular requirements of land-locked and other States with minimal access to the sea.

It was in the above context that the United Nations began its consideration of law of the sea issues and preparations for UNCLOS III. Before moving to that development, however, it is useful to turn our attention briefly to the 'theatre' of international dispute settlement and, in particular, the ICJ. Although, as noted above, States were not willing to jointly submit their fishery disputes to the Court for determination, the United Kingdom in the early 1970s did request the ICJ to settle her dispute with Iceland. As the Judgment was rendered on the eve of the Conference it may be briefly considered prior to turning attention to the Conference itself.
CHAPTER NINE
THE ICELANDIC FISHERIES CASE

"[A judgment] is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in the ultimate analysis respect enforced by Law for that feeling of just treatment which has been evolved through centuries of...history and civilization, [it] cannot be imprisoned within the treacherous limits of any formula. [It] is not a mechanical instrument....It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those...entrusted with the unfolding of the process.

Frankfurter J.1

I. Introduction

While the United Nations Sea-Bed Committee (SBC) was making final preparations for the forthcoming Law of the Sea Conference, the International Court of Justice (ICJ) was seized with a dispute between the United Kingdom and the Federal Republic of Germany (FRG), on the one hand, and Iceland, on the other, involving a number of the very fishery issues then being discussed by the Committee as well as in regional forums. Although a detailed analysis of the multifarious legal aspects of the particular disputes and the Court's handling of them is beyond the scope of the present work, it is nevertheless useful in assessing the extent and nature of the legal changes wrought at UNCLOS III, to consider briefly the Court's more general statements of the law before moving to a consideration of SBC and Conference deliberations.2

1 Joint Anti-Fascist Refugee Comm. v McGrath, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring)

2 For detailed expositions of the various procedural and substantive legal questions arising in the case see, eg, R Briney, "The Icelandic Fisheries dispute: a decision is finally rendered" (1975) 5 Georgia J of I & Comp L 248; R Churchill, "The Fisheries Jurisdiction cases: the contribution of the International Court of Justice to the debate on coastal States' fisheries rights" (1975) 24 ICLQ 82; L Favoreu, "Les Affaires de la com-
II. Background to the Dispute

As intimated in Chapter Seven, the opposing positions adopted and vigorously espoused by Iceland and the United Kingdom (and, to a much lesser extent, the FRG) at the first two Law of the Sea Conferences reflected both divergent views on the theoretical parameters of high seas fishing freedoms and the continuing dispute over the nature and limitations of Iceland's fishery jurisdiction in her adjacent waters.
As observed above, with the failure of UNCLOS I to reach agreement on a uniform breadth of the territorial sea, Iceland extended her fishery limits to 12 miles, drawing protests from several States, including the United Kingdom and the FRG. A number of incidents subsequently arose involving British fishing vessels, the Royal Navy, and Icelandic coastguard, as each State asserted her claim to fishery rights in the area.

Although Iceland negotiated fishery agreements with the United Kingdom and the FRG after UNCLOS II, on 14 July 1971, a new Icelandic Government declared its intention to extend fishery limits to 50 nautical miles, comprehending the entire continental shelf, and to establish a 100-mile pollution protection zone. Explaining the decision to the SBC three weeks later, Iceland's delegate argued that "the basic principle should be that coastal fisheries form part of the natural resources of the coastal State." There was no reason for the same limits to apply universally. In some cases, the coastal State might be satisfied with narrow fishing limits while in others, States' interests might range "from conservation and management zones or preferential zones to reasonably exclusive limits". Although the

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* See Ch 8, n 19 and accompanying text supra.
* British Pleadings, supra n 3, 4
* German Pleadings, supra n 3, 4
* See Ch 8, n 20. The FRG's agreement with Iceland was similar to that negotiated by the UK. In the latter, the British recognized the Icelandic nation's "exceptional dependence...upon coastal fisheries for their livelihood and economic development"(British Pleadings, supra n 3, 11-12); while the FRG was "mindful of the exceptional importance of coastal fisheries to the Icelandic economy"(German Pleadings, supra n 3, 14). The German Agent subsequently explained that the different wording had no legal significance nor was it meant to have such significance (ibid 480).
* British Pleadings, supra n 3, 6
* Ibid 62 (emphasis added)
Committee should ensure that valuable resources are not left unexploited behind fishery limits, he acknowledged, the basic principle was that "to the extent the coastal state is willing and able to utilize its coastal fishery resources it should be allowed to do so".\(^{11}\)

Iceland was capable of fully utilizing all resources over her continental shelf, she explained elsewhere, and her "policy" of permitting other States to fish there had become "excessively onerous and unacceptable" as well as harmful to the maintenance of the resources themselves and threatening to her vital interests.\(^{12}\) She rejected British assertions that the latter had any right to place the matter before the ICJ under the 1961 Agreement,\(^{13}\) arguing simply that "the object and purpose of the provision envisaged in [the latter] have been fully achieved".\(^{14}\)

With no prospect of negotiating their differences, both the United Kingdom and the FRG submitted their dispute with Iceland to the ICJ as provided for in their Agreements.\(^{15}\)

\(^{10}\) Ibid 63

\(^{11}\) Ibid (emphasis added)

\(^{12}\) Ibid 14

\(^{13}\) See Ch 8, n 20 supra.

\(^{14}\) British Pleadings, supra n 3, 14

\(^{15}\) The British Application was filed on 14 April 1972 (Fisheries Jurisdiction (United Kingdom v Iceland) Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, 4) and that of the FRG on 5 June 1972 (Fisheries Jurisdiction (Federal Republic of Germany v Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, 50). In August 1972, the Court directed that initial pleadings be addressed to the question of its jurisdiction to entertain the disputes (Fisheries Jurisdiction Case (United Kingdom v Iceland), I.C.J. Reports 1972, 181)(Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland), I.C.J. Reports 1972, 188). On 2 February 1973, the Court found it had jurisdiction to entertain the two Applications and to deal with the merits of the disputes (I.C.J. Reports 1973, 22, 66). In July 1972, both the UK and the FRG requested the Court to indicate interim measures of protection, and the latter were so indicated on 17 August 1972 (Fisheries Jurisdiction Case (United Kingdom v Iceland)
III. The Legal Proceedings

A. The British and German Arguments

Quidditatively, the United Kingdom and the FRG made four substantive submissions: (a) Iceland's claim to a 50-mile EFZ was contrary to international law; (b) Iceland was not entitled unilaterally to assert exclusive fishery jurisdiction against either Government beyond the 12-mile zone delimited in 1961; (c) Iceland was similarly not entitled to exclude or imposed restrictions on fishing vessels of either nationality beyond that zone; and (d) to the extent conservation was required, the three Governments were obliged to negotiate appropriate measures, either bilaterally or multilaterally, with appropriate regard to both Iceland's special dependence on the fisheries and the traditional rights of the United Kingdom and the FRG in the waters concerned.16

The Applicant States denied that Iceland had a unilateral right to determine the limits of her own fishery jurisdiction,17 citing the ICJ's 1951 dictum that "the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law".18

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16 British Pleadings, supra n 3, 380-381; German Pleadings, supra n 3, 265
17 British Pleadings, supra n 3, 458; German Pleadings, supra n 3, 230
18 I.C.J. Reports 1951, 116, 132. See Ch 5, n 51 and accompanying text Supra.
About the mid-1960s, they argued, a firm State practice had become established setting the limits of exclusive fishery jurisdiction at 12 miles. That practice, posited the United Kingdom, for example, was founded upon the "consensus" which had emerged at UNCLOS I and UNCLOS II and which had subsequently been expressed in numerous international agreements and domestic legislation. The latter, in turn, had met with the acquiescence of "the vast majority of States, even those which had hitherto been most conservative in their approach to the matter".19

While claims had been advanced since 1960 to broader limits, conceded the British, only some 26 of 114 coastal States had made them. Furthermore, the claims lacked uniformity and had been the subject of strong protest. In sum, "none of these wider claims had behind it the authority of the Geneva Conferences or any comparable expression of international opinion, nor the collaborating support of such a wide range of States making similar claims themselves".20 They thus did not satisfy the well-established criteria for the emergence of a rule of customary international law21 and were "no more than evidence of dissatisfaction with the existing law".22

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19 British Pleadings, supra n 3, 345. The consensus referred to related to the joint American-Canadian '6+6' proposal as amended by the proposal of Brazil, Cuba and Uruguay (ibid 338). See in this regard Ch 7, nn 210, 222, 234 and 235 and accompanying text supra.

20 British Pleadings, supra n 3, 345

21 They were cited (ibid 350) from (1950) 2 YILC 26 as follows:
(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
(b) continuation of repetition of the practice over a considerable period of time;
(c) conception that the practice is required by, or consistent with, prevailing international law; and
(d) general acquiescence in the practice by other States.

See also n 85 infra.
Similarly, patrimonial sea or 200-mile EEZ Declarations were merely proposals _de lege ferenda_ which would no doubt be submitted at the forthcoming Law of the Sea Conference. Whether they would commend themselves to the majority of States attending the Conference was "a matter of conjecture".\(^{23}\)

In that part of Iceland's 50-mile zone beyond 12 miles, contended the United Kingdom and the FRG, international law continued to recognize legitimate fishery interests of other States as well as the emergent concept of preferential fishing rights for coastal States in situations of special dependence on fisheries. The legal basis of that concept, they posited, lay in Article 2 of the 1958 High Seas Convention which, being declaratory of international law, provided, _inter alia_, that States exercise their freedom of fishing "with reasonable regard to the interests of other States".\(^{24}\) Traditionally, the coastal State had no special interest in high seas fisheries adjacent to its territorial sea, explained the United Kingdom and the FRG. However, commencing with the 1958 Resolution on Special Situations and the 1960 proposed amendment by Brazil, Cuba and Uruguay to the American-Canadian '6+6' proposal for a territorial sea and EFZ\(^{25}\) the concept of a coastal State's preferential fishery rights in certain circumstances began to emerge. While neither the Resolution nor the three-Power amendment were legally binding in themselves, the former, explained the United Kingdom, "pointed the way", while the latter was equally important in indicating the criteria for establishing the need for conservation, the means for establishing the existence of those criteria, and the machinery for settling disputes.\(^{26}\)

\(^{22}\) _British Pleadings_, supra n 3, 357

\(^{23}\) _Ibid_ 367

\(^{24}\) 450 _UNTS_ 11

\(^{25}\) See Ch 7, nn 199 and 222 and accompanying text _supra_.

\(^{26}\) _British Pleadings_, supra n 3, 484, 497; _cf_, _German Pleadings_, supra n 3, 356, 361-362
The crystallization process continued after the first two Law of the Sea Conferences, the Applicant States explained, with the concept of preferential rights finding expression in fishing agreements in the North Atlantic.27

The concept, the British Agent explained as follows:

where a need for conservation can be scientifically demonstrated in an area of the high seas adjacent to its territorial sea and extending further than the 12-mile exclusive fishery limit, a coastal State is not merely entitled to insist that conservation measures should be taken but it is also entitled to claim that in any scheme of limitation which is worked out account should be taken of the special needs of the coastal State. These needs of the coastal State find their expression in the form of a preferential share, it being understood that by 'preferential' is not meant necessarily either a majority share, or even a greater share than that of any other single State, but rather a share that is greater than would be justified merely by the historical performance of the coastal State; and [reference is made to] 'historical performance because that is the criterion which is principally applicable when considering the position of the non-coastal States. ...[A] coastal State will often have considerable historical performance to show as well. In that event, it will...usually be equitable that the share to which the coastal State is entitled on the basis of historical performance should be added to by a further allocation on the basis of its position as a coastal State. The result may well be to allow the coastal State an actual majority share, but the 'preferential' part of it is that part which was added to the share derived from historical performance by virtue of its position qua coastal State.28

Relating the above to Article 2 of the High Seas Convention, it was a question of applying equitable principles in determining appropriate shares of the resource for each

27 The British cited quotas fixed in 1972 by ICNAF whereby a special 10% of the total allowable catch was given to coastal States and 10% "in respect of special needs such as those [States with]...established fleets which were incapable of being diverted..." (British Pleadings, supra n 3, 501; see, eg, Ch 8, n 54 and accompanying text supra). In the North-East Atlantic, two fishery agreements had been concluded. One gave to the Faroe Islands a "very special preference...due to the admittedly high dependence of the Faroese on fishing" (ibid 503), while the other accorded the coastal State, Norway, a quota larger than those granted other States parties to the agreement (ibid 504).

As well, regulations of NEAFC contained provision for coastal State preference by exempting certain small coastal fisheries from the observance of some restrictions imposed for conservation purposes (German Pleadings, supra n 3, 365).

28 British Pleadings, supra n 3, 483-484; cf, German Pleadings, supra n 3, 362-363
State concerned. While the factors to be considered in the application of equitable principles were neither identical in each situation nor subject to numerical limitation, in the case of Iceland they included her special dependence on coastal fisheries; the need to accord her "such preferential share of the total catch as would be equitable, taking into account the economic dependence of all other States" concerned; the need to also consider "the established interests and acquired rights" of other States fishing in the area; the need to settle disputes through established machinery or by reference to arbitration or judicial settlement rather than by unilateral action; and the need to take into account "all relevant principles of international law which are of general application and which relate to the

29 British Pleadings, supra n 3, 498; German Pleadings, supra n 3, 362, 363. That procedure, recalled the British, had already been followed by the Court in the North Sea Continental Shelf cases (I.C.J. Reports 1969, 3, 49) when it ruled that

whenever the legal reasoning of a court of justice its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.

30 British Pleadings, supra n 3, 498; German Pleadings, supra n 3, 361-362, 363

31 British Pleadings, supra n 3, 374, 474; German Pleadings, supra n 3, 343, 477. In making this point, the UK referred to the ICJ's North Sea Continental Shelf Judgment (I.C.J. Reports 1969, 3, 50) in which the Court observed that

there is no legal limit to the considerations which States may take into account for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusive of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the cases.

32 British Pleadings, supra n 3, 374

33 Ibid
conservation of fishery resources, to preferential rights and to responsibility for good management".34

In determining the appropriate balance between a coastal State's preferential rights and the non-coastal State's historic rights, the United Kingdom opined that it was not possible to indicate in the abstract what would be equitable for there was no "easy or automatic formula".35 An equitable result depended entirely upon the circumstances of a given situation. While the United Kingdom did not suggest any apportionment that might be equitable under the circumstances, their Counsel admitted that "[i]t may be that to enable Iceland to maintain a reasonable rate of expansion she should be permitted to take a larger share of the demersal fishery than in the past".36 At the same time, however, he argued that to allow Iceland to exclude from the zone other States which had long fished in the area would be clearly inequitable.

The German Agent, for his part, explained that the preferential rights concept was designed to comprehend two situations:

First, the situation where the population makes a living out of the fisheries; this relates clearly to a situation where there exists already an economic dependence of some part of the population on the fisheries before the coast, and where a reduction of the possible catch would result in a deterioration of the living standard of that part of the population because they could not divert to other occupations.

Second, the situation where a continuation of the fisheries on the present scale is needed to safeguard the economic development of the country, and a reduction of the

34 Ibid. The final consideration was based on the British contention that the fishery resources beyond the 12-mile EFZ recognized in the 1961 Agreement were res communis, and that international law required the UK and Iceland to negotiate "not solely in consideration of their own interests but taking account of the fact that the resources about which they negotiate are part of a common heritage for which they have responsibilities as well as rights" (ibid 374).
35 Ibid 474, 500; cf, German Pleadings, supra n 3, 363, 365
36 British Pleadings, supra n 3, 457
possible catch might hamper the course of steady economic development, because the economic effort could not be diverted to other sectors.\(^{37}\)

With respect to the latter situation, the German Agent argued, any coastal State claiming dependence on its adjacent high sea fishery and a preferential right to expand its fishing effort at the expense of other States would necessarily be required to prove that its needs were "so outstanding and indispensable for its economic development" that its needs deserved special consideration in relation to vested interests of fishing States.\(^{38}\)

While acknowledging that some developing countries might meet such a test, the FRG opposed Icelandic assertions of the right to expand national fishing effort because, in the German view, Iceland had other, preferable options, and already harvested much of the catch in the area.\(^{39}\) In determining the degree of preference to be accorded Iceland in the allocation of fishery rights, therefore, the FRG suggested that the Court bear in mind a number of considerations,\(^{40}\) including the need to give priority to fishing for food and the satisfaction of present requirements of both Parties rather than an enlarged share for one; the fact that German vessels operated in areas other than those frequented by Icelandic fishermen and exploited species migrating beyond Iceland's zone for which Iceland could not "validly claim any specific preferential right to those fish stocks on the grounds that it had made special efforts or sacri-

\(^{37}\) German Pleadings, supra n 3, 478-479

\(^{38}\) Ibid 479

\(^{39}\) Ibid 343-344, 478, 479

\(^{40}\) Introducing the German points, her Agent referred to them as "considerations", but immediately after their enumeration referred to a judgment by the Court "on the basis of the just-mentioned or other equitable principles"(ibid 345; emphasis added), thereby apparently equating "considerations" and "equitable principles".
fices for the protection of such fish stocks”;[41] and the
historic rights of German fishing vessels.

Seeking the Court's direction on how best to produce a
just and equitable result,[42] both Applicant States endorsed
the concept of a coastal State's preferential rights in spe­
cial situations, particularly as the concept was reflected
in the three-Power UNCLOS II proposal.[43] While neither
State appeared prepared to accept that proposal as repre­
senting a comprehensive codification of the concept itself,
it was considered as useful for solving the dispute. Accord­
ing to the British Counsel, "the concept of preferential
fishing rights of coastal States and the spirit of the pro­
posals embodied in the three-Power Amendment are applicable,
are relevant, to the solution of the present dispute".[44]

The FRG, for her part, argued that although the three-
Power proposal at UNCLOS II was not inseparable from the
concept of the 12-mile EFZ which later became law through
concordant State practice, the fact that it was accepted and
not criticised in respect of equitableness and procedure
evidenced "its great value as a well-conceived method for
reconciling the interests of all States when conservation
measures become necessary".[45]

Consistent with her position that the Court lacked ju­
risdiction to deal with the dispute, Iceland took did no
part in the proceedings, although numerous documents con­

[41] Ibid
[42] British Pleadings, supra n 3, 474; German Pleadings, supra n 3, 345
[43] See Ch 7, n 222 and accompanying text supra.
[44] British Pleadings, supra n 3, 484 (emphasis added). In
making this point, the British Counsel referred to a
number of schemes whereby the preferential rights of
coastal States had been recognized, explaining that
"although in those schemes the proposals of the three-
Power amendment have not been followed in every detail,
yet these schemes have been arrived at in the spirit of
the three-Power proposals".
[45] German Pleadings, supra n 3, 356 (emphasis added)
taining expressions of her position on the various issues were included of documentation before the ICJ. 

B. The Decision of the Court

Citing its own dictum in the 1951 Fisheries case, the Court ruled that the instant disputes had to be settled in accordance with existing international legal norms. In

Probably the most relevant statement of the Government's position is that contained in the Icelandic Ministry of Foreign Affairs' 1972 booklet, *Fisheries Jurisdiction in Iceland.* According to Brown (supra Ch 6, n 3, 182-183), the substance of Iceland's position as set out in that publication was as follows:

1. 'Marine products constitute between 80 and 90 per cent. of the exports of the country.'
2. 'The coastal fisheries are the *conditio sine qua non* for the Icelandic economy; without them the country would not have been habitable. It is indeed as if Nature had intended to compensate for the barrenness of the country itself by surrounding it with rich fishing grounds.'
3. 'Already...[in 1948] the fundamental proposition was that the coastal fisheries formed a part of the natural resources of the country within reasonable distance from the coast in view of the relevant local considerations. Such considerations are evident in the case of Iceland. It is the continental shelf, the platform upon which the country rests, which provides the environment and the biological conditions required for the spawning areas, nursery grounds and food reservoirs for the fish stocks.' 'That environment is an integral part of the natural resources of the country.'
4. 'We consider that the submarine platform on which Iceland rests is a natural continuation of the country itself, and the right of exploiting the continental seabed by the coastal State has achieved recognition. It is our opinion that the seabed of the continental shelf and the waters above it, together with the country itself form one physical and organic unit...and we consider it unnatural that...[vessels of other nations] should be able without our permission to prosecute fishing in the sea above our continental shelf.'

See also in respect of Iceland's position nn 9-14 and accompanying text supra. The similarities between the Icelandic argument and those advanced by Latin American States (see sec III, Ch 6 supra) are obvious.

See text accompanying n 18 supra.

determining norms relevant to the dispute, the Court con­
cluded that after UNCLOS II

the law evolved through the practice of States on the basis of the debates and near­
agreements at the Conference. Two concepts have crystallized as customary law in re­
cent years arising out of the general consensus revealed at the Conference. The first
is the concept of the fishery zone, the area in which a State may claim exclusive
fishery jurisdiction independently of its territorial sea; the extension of that fish­
er zone up to a 12-mile limit from the baselines appears now to be generally accept­
ed. The second is the concept of preferential rights of fishing in adjacent waters in
favour of the coastal State in a situation of special dependence on its coastal fish­
eries, this preference operating in regard to other States concerned in the exploita­
tion of the same fisheries, and to be implemented in the way indicated [in the
Judgments].

Each of the concepts may be discussed in turn.

1. The Exclusive Fishing Zone

Beyond recognizing the existence in international law
of the concept of "a 12-mile fishery zone...as a tertium ge­
nus between the territorial sea and the high seas", relatively little was said by the Court about the zone. No ev­
idence was advanced supporting its conclusion, nor did the
Court discuss whether such zones beyond 12 miles were in­
valid erga omnes. Instead, the ICJ simply concluded that
Iceland's 50-mile zone was not opposable to the Applicant
States.

1974. As most references to general aspects of the law
relating to fishery rights in the British Decision find
equivalent expression in the German Decision, citations
in the present work will refer only to the former un­
less otherwise required.

49 British Decision, supra n 48, 23. For a discussion of
the meaning of 'consensus' in this context see n 112
infra.

50 Ibid 24

51 Ibid 29. The Judgment was decided by 10 votes to four
(ibid), Judges Gros, Ignacio-Pinto, Onyeama and Petren
dissenting. In response to a question posed by Judge
Dillard (British Pleadings, supra n 3, 451), a UK
spokesperson expressed the view that it was possible
for the Court to rule on submissions (b) and (c)(see
text accompanying n 16 supra) without ruling on sub­
mission (a),"it being of course understood and accepted
that submissions (b) and (c) are based on general in­
That a fishery zone broader than 12 miles was considered to be contrary to international law, however, appears implicit in a number of statements. Most important is the Court's finding that Iceland's extension of her fishery zone from 12 to 50 miles constituted an infringement of the principle enshrined in Article 2 of the High Seas Convention requiring all States, including coastal States, in exercising their freedom of fishing to pay reasonable regard to the interests of other States.52

This same conclusion may be drawn from other statements made by the Court about general developments in the international sphere. It recognized that a number of States had asserted "an extension of fishery limits" beyond the "generally accepted" distance of 12 miles and that UNCLOS III was then embarking upon efforts to achieve "the further codification and progressive development of this branch of the international law and are of course not confined merely to the effect of the Exchange of Notes [between the UK and Iceland]" (ibid 488).

Professor Gross ("Conclusions" in ICJ Future, supra n 2, 727, 757) suggests that this judgment may well come to be regarded as the first one in which the Court without pronouncing a non liquet actually declined to exercise its judicial function in disregard of its Statute and of the compromissory clause and in which it transformed itself from an organ of international law into an amiable compositeur.

Cf Goy, supra n 2, 468, 479; Langavant and Pirotte, supra n 2, 80; and Weil, supra n 2, 486.

52 British Decision, supra n 48, 29. This is the usual interpretation of the Court's statement (see, eg, Churchill, supra n 2, 90). However, a more restrictive interpretation is also possible. That is, given the ICJ's ruling that Iceland's claim to a 50-mile EFZ was not opposable to the UK and the FRG (see text accompanying n 51 supra), and that the matter of the 12-mile zone was "no longer in dispute between the Parties" (British Decision, supra n 48, 24; emphasis added), activities of the three States inter se in the area beyond 12 miles were subject to the above Article 2. This would continue to leave open the matter of limits insofar as it concerned relations among other States in a claim - counter-claim situation. In this regard see also nn 60 and 65 and accompanying text infra.
law". While the Court did not include in either Judgment an analysis of the legal import, if any, of the above assertions, it did state that proposals and preparatory documents for the Conference had necessarily to be regarded as "manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of the existing law". In such circumstances, concluded the Court, it could not "render judgment sub specie legis ferendae, or anticipate the law before the legislator has laid it down".

More explicit and detailed statements regarding the EFZ are found in the Individual Opinions. Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda, for example, were able to subscribe to the Court's Judgment because while the latter declared the Icelandic extension of fishery jurisdiction non-opposable to the Applicant's historic rights, it did not at the same time declare such an extension without legal foundation and therefore invalid erga omnes.

While it was correct to rule that States might claim 12-mile EFZs "without risk or challenge or objection", the Judges agreed, contemporary State practice supporting that limit was not sufficiently widespread and uniform as to justify the conclusion that the legal maximum breadth of such zones had been established at that distance. A "contin-

53 British Decision, supra n 48, 23
54 Ibid
55 Ibid 23-24
56 Joint Separate Opinion, in I.C.J. Reports 1974, 3, 45
57 Ibid 47. It was necessary, the five judges explained (ibid 46-47) to distinguish between two meanings that might be ascribed to the reference to 12 miles in the Judgment (see text accompanying n 49 supra):

(a) the 12-mile extension had obtained recognition to the point that even distant-water fishing States no longer objected to a coastal State extending its exclusive fisheries jurisdiction zone to 12 miles; or, on the other hand,
ually increasing" number of States in various parts of the world claiming fishery jurisdiction beyond 12 miles, they noted. Although the claims had been met with protests by major maritime nations and thus could not be considered as "generally accepted", a majority of States had not objected and, indeed, a considerable number of protesting States had made public pronouncements or formal proposals appearing inconsistent with such protests.

Although *de lege ferenda*, proposals formulated for UN-CLOS III were indeed pertinent, the Judges observed:

> the law on fishery limits has always been and must by its very essence be a compromise between the claims and counter-claims of coastal and distant-water fishing States. On a subject where practice is contradictory and lacks precision,...such declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law on fisheries jurisdiction and their *opinio juris* on a subject regulated by customary law.

While the fundamental principle of freedom of fishing on the high seas remained accepted, "a large number of coastal States contest or deny that such a principle applies automatically and without exception to adjacent waters in all parts of the world as soon as the 12-mile limit is reached", observed the Judges. Combining the 30 to 35 States already having extended their fishery jurisdiction beyond 12 miles with another 20 to 25 States having endorsed regional and other declarations in support of 200-mile economic zones, "more than half the maritime States are on record as not supporting in fact and by their conduct the alleged maximum obligatory 12-mile rule".

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(b) the 12-mile rule had come to mean that States could not validly extend their exclusive fishery zones beyond that limit.

Whereas the five judges were able to accept (a), they did not accept (b).

58 Ibid
59 Ibid 47
60 Ibid 48
61 Ibid
62 Ibid 49-50
As for the "essential requirement" that State practice must be common, consistent and concordant to generate customary law, the Judges noted that even maritime Powers claiming the 12-mile distance as a maximum limit of fishery jurisdiction sometimes offered "various countervailing advantages" to other States in order to gain recognition for the former's exclusive fishery jurisdiction beyond 12 miles from the coasts when it was to their benefit to do so.63

In sum, the five Judges concluded, the question of fishery limits was at that time uncertain and no firm rule could be deduced from State practice.64

Approaching the issue somewhat differently, Judges Sir Humphrey Waldock and Dillard argued that claims to fishery jurisdiction beyond 12 miles could not be considered in terms of their validity erga omnes, but rather as a product of the process of claim - counter-claim. Such claims would not be opposable to other States unless shown to have been accepted or acquiesced in by those States.65

Judges Sir Humphrey Waldock (Separate Opinion, in I.C.J. Reports 1974, 106, 120) writes,

In the absence of clearly established general rules, the legal issue has continued to present itself in terms of the opposability of the claim to each other State rather than of the absolute legality or illegality of the claim erga omnes; in other words, in terms of the acceptance or acquiescence of other States. ...[A]n extension of fisheries jurisdiction beyond 12 miles is not, in my opinion, opposable to another State unless shown to have been accepted or acquiesced in by that State.

Similarly, Judge Dillard (Separate Opinion, in ibid 54, 56) argues that

the very nature of the evolutionary character of customary international law...would deny that it can or should be captured in the classical formula of repetitive usage coupled with opinion juris, instead of recognizing that it is the product of a continuing process of claim and counter-claim in the context of specific disputes. This concept would render intellectually suspect any definitive pronouncement on the '12-mile rule' erga omnes, which, because of its too generalized nature, tended to ignore the many variables that give content to customary international law and condition its application.
The four dissenting judges left no doubt that they all considered claims to fishery jurisdiction beyond 12 miles illegal. Judge Petren, for example, argued that such claims failed to satisfy two essential criteria for the establishment of customary international law; that is, they were insufficient in number and were met with protests from States specially affected.

While concluding from post-1960 State practice that "the 12-mile rule [had] at no time been accepted in a general or universal way as fixing a maximum limit", Judge de Castro added that the result was not a legal vacuum. Although no mathematical rule existed, guidelines did exist for reaching an equitable delimitation based on reconciling both the special interest of Iceland in adjacent fisheries and the needs of her population with the historic interests or rights of the Applicants.

It was in the above context that the concept of preferential rights assumed center stage.

2. Preferential Fishing Rights
Noting both the 1961 Agreements recognizing the 12-mile EFZ and British and German acknowledgments of the relevance of the concept of preferential fishing rights, historic rights of fishing States, and principles of international law -- particularly as embodied in Article 2 of the

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Dissenting Opinion (Petren) in *ibid* 150, 161; cf, Dissenting Opinion (Gros), in *ibid* 126, 135; Declaration by Judge Ignacio-Pinto, in *ibid* 35, 36; and Dissenting Opinion (Onyeama), in *ibid* 164, 171

Separate Opinion (de Castro) in *ibid* 73, 91

*Ibid* 104. The Judge observed (*ibid* 96) that

It would, of course, be better for legal security if a mathematical rule existed. But law also has "safety valve" rules, which provide flexibility in the legal rules, and permit of more just solutions for individual cases to be found at the expense of legal security....

The flexibility of a rule is not a reason for denying its existence.

Failing a rule for the mathematical delimitation of the zones, 'there are still rules and principles of law to be applied'....

See n 7 and accompanying text and Ch 8, n 20 supra.
High Seas Convention\textsuperscript{70} -- it was a question of evaluating the Agreements and the Icelandic claim, the Court stated.\textsuperscript{71}

Turning to the concept of preferential fishing rights, the ICJ observed that State practice revealed "an increasing and widespread acceptance of the concept..., particularly in favour of countries or territories in a situation of special dependence on coastal fisheries".\textsuperscript{72} Such rights, it concluded, were to be implemented by agreement between all States concerned and subject to dispute settlement procedures as provided in the United Nations Charter.\textsuperscript{73}

Preferential rights only applied when there was an imperative need for conservation and the sharing of resources, the Court found, and that stage had been reached in Iceland’s fisheries.\textsuperscript{74} Reviewing the history of British and German activities in the area and the dependence of several communities in each State on those fisheries the Court explained, however, that while characterization of the coastal State rights as preferential implied a certain priority, it did not imply the extinction of the concurrent rights of other States, particularly States such as the Applicants, which had for many years fished in the waters in question and for which that activity was economically significant.\textsuperscript{75}

An equitable decision, then, depended upon reconciling the co-existing preferential rights of Iceland with the tradi-

\textsuperscript{70} With regard to Article 2 the Court observed (British Decision, supra n 48, 31) that

\begin{quote}
It is one of the advances in maritime international law resulting from the intensification of fishing, that the former \textit{laissez-faire} treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.
\end{quote}

\textsuperscript{71} Ibid 24
\textsuperscript{72} Ibid 26
\textsuperscript{73} Ibid 25-26
\textsuperscript{74} Ibid 27
\textsuperscript{75} Ibid 27-28
tional fishing rights of the Applicants, both rights, the Court observed, earlier recognized in the three-Power proposed amendment at UNCLOS II.\textsuperscript{76}

Although Iceland had no right to phase out foreign fishing in her zone beyond 12 miles, the ICJ noted, the concept of preferential rights was not a static one "in the sense that the degree of the coastal State's preference is to be considered as fixed for ever at some given moment".\textsuperscript{77} Rather, the rights were a function of the exceptional dependence of the coastal State on adjacent high seas fisheries and might vary as the dependence changed, both in terms of the livelihood of the coastal population and the nation's economic development. It was, in the Court's view, basically a matter of appraising the dependence of both the coastal State and fishing States on the resources in question and reconciling them as equitably as possible.\textsuperscript{78}

Implicit in the concept of preferential rights ever since Iceland's proposals at UNCLOS I\textsuperscript{79} was the requirement that States interested in a particular fishery must negotiate to define or delimit their respective rights. That obligation, the Court found, flowed from the very nature of the respective rights, and therefore to direct Iceland and

\begin{itemize}
\item \textsuperscript{76} Ibid 30
\item \textsuperscript{77} Ibid
\item \textsuperscript{78} Ibid. Judge Gros, in his Dissenting Opinion (\textit{supra} n 66, 147), however, argued that the situation of the fisheries around Iceland involves interests which are of their nature extremely diverse; to inject the concept of equity into a recommendation of negotiations is not sufficient to make it applicable, because of the circumstance, which is unique in the world, of the absolute economic dependence of a State on fisheries.

In support of this view he cited the Court's \textit{dictum} in the \textit{North Sea Continental Shelf} cases (\textit{I.C.J. Reports} 1969, 3, 50): "[e]quality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy".

\item \textsuperscript{79} See Ch 7, nn 166ff and accompanying text \textit{supra}.
\end{itemize}
the Applicant States to negotiate was a proper exercise of its judicial function.\textsuperscript{30}

Those negotiations would have as their objective settling such questions as catch limitations and share allocations, for which detailed scientific knowledge was required. As the latter lay primarily in the hands of the States concerned, the formulation of a precise scheme for equitably adjusting the rights involved was best left to those States, the ICJ decided.\textsuperscript{31} Nevertheless, it saw them as benefiting

\textsuperscript{30} British Decision, supra n 48, 34. The four dissenting Judges felt that the Court had exceeded its jurisdiction by imposing on the parties to the disputes a duty to negotiate. Judge Gros (supra n 66, 143), \textit{eg}, argued:

The source of the obligation to negotiate in this case is the legal nature of the fisheries regime which is the subject of the dispute, and that can only be actualized by means of negotiation among all the States concerned; it is there, solely, that the Court could have found the answer to the question it had chosen to ask itself and discovered that it could not incorporate it into its decision but at most give it a place in the reasoning of the judgment.

\textit{Cf} Dissenting Opinions of Judges Petren (supra n 66, 154) and Onyeama (supra n 66, 165, 171) and the Declaration of Judge Ignacio-Pinto (supra n 66 35-36).

Regardless of the above, however, none of the dissenting judges opposed the concept of preferential rights as a rule of customary international law. Ignacio-Pinto, in fact, indicated that had the Court not failed to answer the primordial question before it, he "would have all the more willingly endorsed the concept of preferential rights..."(ibid 35).

\textsuperscript{31} British Decision, supra n 48, 31-32. In his Separate Opinion (supra n 65, 71) Judge Dillard explained that the Court's capacity to decide a case in which, basically, elements of distributive justice intrude,

is not precluded by any theory of the judicial process involved in any dispute, marshalling all the supporting data, even of a highly sophisticated scientific character, and 'laying down the law' in terms of the establishment of a regime of allocation. But considerations of a practical, political and psychological character nature dictate that this function is best done at the outset by the parties themselves or better still by other bodies specially qualified to assess the conflicting interests, the relevant scientific factors, the values involved, and the continuing need for revising the regime in light of changing conditions. The Court's role is better limited to providing legal guidelines which may facilitate the establishment of the system and in the event of a subsequent dispute, to help redress disturbances to it. Meanwhile, the Court
from the Court's appraisal of their respective rights and some of the guidelines for defining the scope of those thereof. It was a question, concluded the Court, of finding an equitable solution from the applicable law.\textsuperscript{22}

IV. Observations

The fishery dispute between Iceland, on the one hand, and the FRG and the United Kingdom, on the other, was typical of those occurring during the period between coastal States and distant-water fishing nations. At the time, has consistently indulged in the assumption that the Parties will, in fact, negotiate in good faith.

\textsuperscript{22} British Decision, \textit{supra} n 48, 33. The Court held in para four of its \textit{dispositif} that during negotiation the parties were to take into account, \textit{inter alia}, (\textit{ibid} 34-35):

(a) that in the distribution of the fishing resources in [the disputed areas] Iceland is entitled to a preferential share to the extent of the special dependence of its people upon the fisheries in the seas around its coasts for their livelihood and economic development;
(b) that by reason of its fishing activities in [the disputed areas] the United Kingdom also has established rights in the fishery resources of the said areas on which elements of its people depend for their livelihood and economic well-being;
(c) the obligation to pay due regard to the interests of other States in the conservation and equitable exploitation of these resources;
(d) that the above-mentioned rights of Iceland and of the United Kingdom should each be given effect to the extent compatible with the conservation and development of the fishery resources in [the disputed areas] and with the interests of other States in their conservation and equitable exploitation; [and]
(e) their obligation to keep under review those resources and to examine together, in the light of scientific and other available information, such measures as may be required for the conservation and development, and equitable exploitation, of those resources, making use of the machinery established by [NEAFC], or such other means as may be agreed upon as a result of international negotiations.
therefore, it was thought that the cases would 'test' the general right of a coastal State to unilaterally claim those resources based on evolving customary law and justified in economic terms. As well, observed Professor Jean-Pierre Quéneudec in 1972, the Court's decision "permettra de savoir jusqu'à quel point peut aller le particularisme que des États peuvent introduire dans les règles juridiques internationales".

To what extent did the Judgments shed light on each of those issues in recognizing as customary international law the concepts of the EFZ and preferential rights for coastal States in situations of special dependence on their littoral living resources; and, more generally, to what extent did they contribute to the clarification and/or development of the general international law relating to marine fisheries? Those questions might be addressed by discussing each concept in turn.

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See, eg, R Goy, "La nouvelle affaire des pêcheries islandaises: la procedure devant la Cour" (1974) 101 RDI 279, 322; Foucheaux, supra n 2, 165; Langavant and Pirotte, supra n 2, 77; and Young, supra n 2, 192.

Quéneudec, supra Ch 8, n 18, 45

The following discussion may best be viewed in light of the traditionally-accepted principles governing the development and existence of customary international law. A convenient summary of those principles was provided by Judge de Castro in his Separate Opinion (supra n 67, 89-90) in the instant cases. According to communis opinio, he states, a customary international right comes into existence when a practice crystallizes having the following 'distinguishing marks':

(a) general or universal acceptance. There should be no doubt as to the attitude of States. The rule in question must be generally known and accepted expressly or tacitly. What has led to the view that international custom is binding is that it expresses a consensus tacitus generalis, if not as a sort of tacit agreement, at least as the expression of a general conviction. For an international custom to come into existence, the fact that a rule may be adopted by several States in their municipal legislation, in treaties and conventions, or may be applied in arbitral decisions is not sufficient, if other States adopt a different rule, and it will not be opposable to a State which still opposes its application (I.C.J. Reports 1951, p 131). The existence of a majority trend, and even its acceptance in an international convention, does not mean that
A. The Exclusive Fishery Zone

Those who had hoped that the Court would clearly delimit the general international regime governing the exercise of fishery jurisdiction were no doubt disappointed by the brevity of the Judgments. The latter's silence on the questions of how the concept crystallized as customary international law and what evidence there was for such a conclusion throws at least some doubt on the value of the Court's clarification and/or development of the law on the subject. Among those commenting on the Court's findings shortly after the Judgments were rendered, Robin Churchill observed, for example, that "with a concept which is of recent origin, and in its earliest stages, was a subject of some contention, some evidence of its being a rule of customary international law would have been more reassuring". 97

97 See nn 50 and 51 and accompanying text supra.

96 See nn 50 and 51 and accompanying text supra.
That is particularly true as not all those commenting on the Court's conclusion considered it to be correct. Donald Young, for instance, argued that "there is little evidence that the fishery zone was, [in 1974], customary international law", while Professor Khan suggested that the ICJ's statement regarding the 12-mile limit was "open to question".

What tests, in fact, did the Court apply in reaching its conclusion? Did it ignore the traditional principles and the 'distinguishing marks' of customary international law as some have suggested. If not, the problem, observed Daniel Foucheaux, "is in discovering where the Court has applied its classical formula of long-standing uniform State practice accompanied by an opinio juris sive necessitatis". A definitive reply to the above questions is precluded by the muted character of the Judgments, although dicta in the Separate Opinions indicate that judges continued to recognize the above 'marks' and bore them in mind when assessing whether a rule specifying an exact limit to such zones had indeed emerged. It would appear reasonable to assume, therefore, that the same search for the 'distinguishing marks' was undertaken with respect to the primary concept of the zone, within which the above rule would operate.

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88 Young, supra n 2, 191
89 Khan, supra n 2, 10
90 Foucheaux, supra n 2, 2, 167; cf, Raymond Goy (supra n 2, 479), who suggests that the Court "refuse d'invoquer et d'appliquer le droit classique et lui infligé ainsi une sorte de caducité".
91 See, eg, nn 57, 59, 60 and 85 and accompanying text supra.
92 That no explicit reference to such considerations was given in either the Judgments or the Separate Opinions may have been due, at least in part, to the Court having regarded the crystallization of the concept as having been so well established as not to require substantiation (cf, Churchill, supra n 2, 88) or the fact that the development had not been contested by either Applicant State (see text accompanying n 19 supra).
It is similarly difficult to be definite on the import beyond the instant cases of the recognition of the EFZ concept. First, although dicta in the Judgments suggest that zones beyond 12 miles were illegal, the strongly diverging views expressed in individual Opinions make such a conclusion seem unwarranted. By not setting specific geographical limits to the EFZ concept and not explaining the precise juridical meaning of "exclusivity" and "fisheries jurisdiction" in the present context, the Court presumably meant only that the fishing zone had become "a widely accepted spatial category in which certain rights of exploitation are recognized...", observed Foucheaux. Thus stated, he ar-

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See nn 64-67 and accompanying text supra.

In response to a question from the Court, the British Counsel observed (British Pleadings, supra n 3, 488) that

when a State claims an exclusive fisheries zone, it is sometimes difficult to determine whether the State is claiming either --
(a) the right totally to prevent all foreign nationals from fishing in the zone; or
(b) the right to exclude most foreign nationals from fishing in the zone, but subject to the duty upon it to permit certain foreign nationals to continue to fish there; or
(c) the exclusive right not to exclude but to regulate all fishing activities in the zone, subject to its duty, subject to its duty to permit some or perhaps all foreign nationals to continue to fish there.

See also in this regard, Churchill, supra n 2, 87-88.

Judge Nagendra Singh, considering the meaning of "fisheries jurisdiction" in his Declaration (I.C.J. Reports 1974, 38, 43), stated that

For purposes of administering the law of the sea and for proper understanding of matters pertaining to fisheries as well as to appreciate the facts of this case, it is of some importance to know the precise content of the expression 'fisheries jurisdiction' and for what it stands and means. The concept of fisheries jurisdiction does cover aspects such as enforcement of conservation measures, exercise of preferential rights and respect for historic rights since each one may involve an element of jurisdiction to implement them. Even the reference to 'extension' in relation to fisheries jurisdiction which occurs in the compromissory clause of the 1961 treaty could not be confined to mean merely the extension of a geographical boundary line or limit since an extension would be meaningless without a jurisdictional aspect which constitutes, as it were, its juridical content.

Foucheaux, supra n 2, 167
gued, the concept was neither "norm-creating" as the Court earlier thought necessary for the crystallization of customary international law from a treaty provision nor did it clearly define relationships between States in the context of specific disputes.

Foucheaux's criticism of the EFZ concept as not being "norm-creating" appears to ignore the Court's assertion that the concept was already international law in its own right. Furthermore, the Court clearly accepted that the proposals discussed at UNCLOS II relating to both the EFZ and preferential rights were "norm-creating" in the above sense.

Ibid; cf, P Manin, "Le juge international et la regle generale"(1976) 80 RGDIP 2, 53; and Young, supra n 2, 191. In the North Sea Continental Shelf cases (I.C.J. Reports 1969, 3), the ICJ was required to examine whether Article 6 of the 1958 Continental Shelf Convention providing for the principle of equidistance in the delimitation of the shelf had generated subsequently a new rule of customary international law. That process, the Court stated (ibid 41),

involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin has since passed into the general corpus of international law....

The Court explained (ibid 41-42) that "the provisions concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law". It found that the equidistance rule contained in Article 6 did not possess that character since its application was secondary to a primary obligation to effect delimitation by agreement and was subject to reservations and exceptions in special circumstances, the meaning and scope of which were "unresolved controversies"(ibid 42).

Ibid 41-42)

See text accompanying n 49 supra. Judge Jiménez de Aréchaga subsequently explained (supra Ch 5, n 102, 20), that whether a legal norm had been generated does not depend on the fate of a given proposal at the Law of the Sea Conference:

It depends on the nature of the provision itself, on whether it possesses or not a 'norm-creating character' and, above all, on whether State have or have not followed the provision or proposal as a model or guide for their subsequent and uniform conduct. ...[1]t did happen with the concept of the fishery zone beyond the territorial sea, accepted and recognized
That the concept of the EFZ did not clearly define inter-State relationships is true, and may have been the reason why the ICJ used the term 'concept' rather than 'rule' when discussing the zone; that is, its pronouncement referred to an element of international law lacking the specificity of a rule. This is possibly explained by the dilemma in which the Court may have seen itself. Having apparently determined that the 'distinguishing marks' of customary international law had appeared with respect to the concept, they might not have done so in respect of rules giving the concept detailed juridical content.

by all maritime States, and with the concept of preferential rights incorporated in various bilateral and multilateral agreements.

Schächter (supra Introduction, n 13, 758) explains that "[r]ules are norms that dictate a specific result. They either apply to a given set of facts or not." Cf Manin (supra n 96, 41), who states that

La règle de droit n'a pas seulement un contenu et une valeur dans l'abstrait; elle doit aussi permettre, par son application à une situation donnée, de définir avec précision les droits et obligations de chacun et de déterminer les responsabilités éventuelles.

Churchill apparently considers that the Court did not see any difference between 'concepts' and 'rules'. See text accompanying n 87 supra.

Foucheaux (supra n 2, 168) in one statement observes that "admittedly the Court is speaking of concepts and not norms" and that the ICJ "appears to assume that, in principle if not in particulars, there has been sufficient state acceptance and practice with regard to fishing zones to create customary law" (ibid 165-166). However, he does not specifically discuss the possible implications of any distinction between concepts and rules and at one point refers to the concept of preferential rights as a "rule" (ibid 166).

Cf Professor Raymond Goy (supra n 2, 472), who suggests that

La Cour, ayant défini le droit applicable, n'en définit pas le contenu sur la zone de pêche. Elle sent que le droit positif est peu consistant, avec ses lacunes et ses évolutions, et peut difficilement être dit erga omnes, eu égard à la diversité des facteurs en cause (lieux de pêche, espèces de poissons...) et à la complexité des problèmes....

This seems well-supported by Judge Dillard who, in his Separate Opinion (supra n 65, 61), observes that
In its Judgments, the Court did not explain how 'concepts' of customary international law should apply as distinct from 'rules'. Consistent with the above and dicta in the Separate Opinions, however, it would appear that the EFZ concept was envisaged to function not so as to dictate a specific result as would a rule, but rather as by means of an agreement negotiated on the basis of equitable principles and taking into consideration specific factors.\(^{100}\)

In sum, the Court appears to have recognized the EFZ concept as a legitimate right coastal States were entitled to invoke and be weighed against other principles and rights in a situation of claim and counter-claim.

Insofar as the above is an accurate assessment of the Court's meager pronouncements concerning the EFZ concept, its contribution to the clarification and/or development of the law relating to marine fisheries in that regard was rather minimal. It did affirm that the traditional law of the sea regime had been amended after UNCLOS II to include a new category -- the EFZ -- between the territorial sea and high seas, thus recognizing the important role functionalism played in the modern law of the sea.\(^{101}\) Not having discussed the broader aspects of the pronouncement, however, many questions remained unanswered, the most important of which was the legal status of the 12-mile limit.

Considered from a different perspective, however, the Court's assertion and even silence on important aspects of the EFZ concept highlighted the fact that as UNCLOS III opened there existed no clear rule governing the limits of a...
coastal State's fishery jurisdiction. While in some respects a negative contribution to the development of the law, it nevertheless put the deliberations of the Conference into focus in that respect.

B. Preferential Fishing Rights

As in the case of the EFZ concept, the Court's treatment of the concept of preferential rights was criticized on both methodological and substantive grounds.

Churchill, for example, observed that the ICJ did not analyze in detail the evidence of State practice as it had done in earlier cases, but merely asserted that acceptance of the concept was "increasing and widespread". Bearing in mind the meager practice quoted, its restriction to comparatively few States in a single area, and its relatively recent origin, he argued, the Court might well have concluded that the concept had not become law if such analysis had been undertaken.

See text accompanying n 72 supra.

Churchill, supra n 2, 94-95; cf, Foucheaux (supra n 2, 168), who observed that "the record of State practice which the Court presents is not entirely convincing". He made no reference to State practice mitigating against the Court's assertion. Weil (supra n 2, 482), however, without citing examples of State practice himself, argued that the Court failed to discuss the character of resistance to the preferential fishing rights "doctrine" and that, by not even discussing such opposition, so much as to dismiss its impact as de minimis or irrelevant, the Court engages in negligent craftsmanship. At worst, it creates law where state practice is not uniform enough to warrant it.

In this same regard, Goy (supra n 2, 510) stated that:

On peut...admettre que les droits préférentiels tendent de plus en plus à être admis dans leur principe par la coutume, mais que, dans le détail qu'en donne la Cour, ils relèvent encore largement du domaine de la lex ferenda et de l'anticipation.

Manin (supra n 96, 29) adds:
While it is true that the State practice cited by the Court involved only a few agreements and 21 States, that fact alone should not necessarily have precluded the Court from deducing that the concept had become law since -- as discussions at the first two Law of the Sea Conferences revealed -- preferential rights related only to "special situations" and, as the ICJ stated, could only be invoked when there was an important need for fishery conservation measures to be taken. It would be unlikely that claims by coastal States for preferential rights advanced in the context of specific arrangements for catch limitation on the high seas would be either plentiful or widespread.

In addition to the above 'quantitative' aspects of State practice, writers including Churchill, Fouch-
eaux, and O'Connell argued that the Court failed to mention *opinio juris* in the instant cases as an essential element in any customary legal norm. Although there was no explicit reference to *opinio juris* in the Judgments, several considerations intervene which indicate that the Court did not abandon its tradition position on the subject. First, as Professor Michael Akehurst points out, courts in many cases have concluded from State practice that a particular customary norm exists without requiring or finding any evidence of *opinio juris*. This, he suggests, "may simply represent an elision in judicial reasoning". In no instance, however, has a court ever expressly declared that *opinio juris* is unnecessary. Indeed, Separate Opinions did refer to the latter as one of the requirements for the emergence of customary law.

A second and related consideration supporting the ICJ's decision lay in the nature of the evidence of *opinio juris*. As Judge Jiménez de Aréchaga later explained, a large amount of what may be described as the material element of State practice, such as pleadings before international tribunals and statements in a plenipotentiary conference, contains in itself "an implicit subjective element, an indication of *opinio juris*". Viewed from that perspective, then, ref-

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106 Foucheaux, supra n 2, 168

107 O'Connell (supra Introduction, n 15, 34) writes that in the cases the ICJ "discarded the apparatus of *opinio juris* and...[yielded] to the normative force of fact".

108 See n 85 supra.

109 M Akehurst, "Custom as a source of international law" (1974-1975) 47 BYIL 1, 32. ICJ cases cited in support of his observation include the *Fisheries Jurisdiction* (supra n 48, 24-26) and *Nottebohm* (I.C.J. Reports 1955, 4, 21-23) Judgments.

110 See nn 60 and 85 and accompanying text supra.

111 Jiménez de Aréchaga, supra Ch 5, n 102, 24. In this regard, of course, it is important to note that the two Applicant States in the instant cases acknowledged that the concept of preferential rights had emerged as cus-
erence to opinio juris appears implicit in the Court's statement that the concepts of the EFZ and preferential rights arose from the "consensus" on the issues at UNCLOS II,112 and that the first two Law of the Sea Conferences showed "overwhelming support for the idea that in certain special situations it was fair to recognize that the coastal State had preferential fishing rights".113

tomary international law (see text accompanying n 24 supra). Considered from Judge Jimenez de Arechaga's perspective, the Court would clearly be entitled to place considerable weight on such testimony as evidence of opinio juris, particularly as both the FRG and the UK were specially affected by the concept and the latter State had played a central role in its evolution through negotiations at UNCLOS I and UNCLOS II.

112 See text accompanying n 49 supra. While the Court itself did not define "consensus", in response to its question as to what the UK meant by the term in her Memorial (see text accompanying n 19 supra), the British Counsel explained (British Pleadings, supra n 3, 495) that

at the 1958 Conference there began a process, continued at the 1960 Conference, which led to the emergence of the rule of the 12-mile fishery limit.

...[T]here resulted from the 1958 and 1960 Conferences a climate of opinion which increased the possibility of States on their own, and away from the multilateral conference table, doing one of two things -- either they could arrive at arrangements on their own in the matter of fishery limits, or they could draft their own national legislation on the latter in a way which would reflect the majority view that, as Her Majesty's Government sees it, had emerged at those Conferences....

To the same question, the German Agent responded that the FRG had used the term in her Memorial (that is, the post-1960 State practice concerning the 12-mile fishery zone "was founded upon the consensus which had emerged at the 1958 and 1960 Conferences...."(German Pleadings, supra n 3, 229)), "not in the sense of international agreement but rather in the sense of concordant legal convictions." In other words, the joint American-Canadian proposal at UNCLOS II expressed "the consensus or the concordant legal convictions [of States at the Conference] on the question of fishery limits"(ibid 360).

113 British Decision, supra n 48, 26. In this same regard, Manin (supra n 96, 27-28) in commenting on the Court's decision states that
Like the EFZ concept, the 1958 Resolution and 1960 three-Power proposed amendment were criticised as not being fundamentally norm-creating in character.\textsuperscript{114} An examination of the concept of preferential rights, however, reveals that the latter suffered none of the liabilities mentioned by the Court in its \textit{North Sea Continental Shelf} Judgments precluding its possessing such a character.\textsuperscript{115} That the three-Power proposed amendment in particular was considered by States at UNCLOS II as being fundamentally norm-creating and an appropriate base for a general rule of law appears well-supported by both the comments of States on the merits of the proposal and the substantial vote in its favour.\textsuperscript{116} Thus, in spite of the failure of the Conference to adopt a conventional preferential rights regime the Court did consider the proposals as subsequenting generating customary international law.\textsuperscript{117}

\textsuperscript{114} See, eg, Churchill, supra n 2, 95; and Foucheaux (supra n 2, 167), who argued that the concept of preferential rights was not norm-creating, without specifying either the 1958 Resolution or the 1960 three-Power proposed amendment.

\textsuperscript{115} See n 96 supra. An examination of the texts of both the 1958 Resolution and the 1960 three-Power proposed amendment (see Ch 7, nn 210 and 222 and accompanying text supra) shows that the concept of preferential rights was not meant as secondary to a primary norm but rather to be exercised concurrently with the legitimate rights of other States. Nor was the claim of preferential rights subject to exceptions. Although only to be invoked in special circumstances and at the option of the specially-affected State, there was no provision in either the above Resolution or amendment relating to exceptions. The third factor, that is, the provision for reservations is irrelevant as neither the Resolution nor the proposed amendment were included in a convention.

\textsuperscript{116} See Ch 7, nn 229 and 230 and accompanying text supra.

\textsuperscript{117} See text accompanying n 49 supra, and comment by Judge Jiménez de Aréchaga, supra n 97 above.
Although the Court detailed neither the evolution nor the justification of the concept as customary law in terms of the traditional 'marks', the above comments suggest that some additional arguments can be advanced supporting its conclusion. Even if part of customary law, however, the question remains: what was the import of the concept beyond the instant cases? Or, from a slightly different perspective, how did the Court's pronouncements on preferential fishing rights contribute to the clarification and/or development of international law? Generally speaking, it may be said that while the ICJ recognized the EFZ as a new *tertium genus* between the territorial and high seas, its recognition of preferential rights constituted judicial affirmation that on the high seas themselves the freedom of fishing principle and the corollary requirement to exercise that freedom "with reasonable regard to the interests of other States" had come to be defined in the early 1970s to favour certain coastal States in the actual exploitation of resources theretofore considered *res nullius* and available to all States on a first-come, first-served basis. At the same time, however, such preferential rights had necessarily to be exercised in accordance with conservation requirements and the needs of the broader international community.

More particularly, the Court moved beyond mere recognition of preferential rights as customary international law to advance principles and guidelines stating, in general terms, when such rights become operative; the need to simultaneously recognize historic fishing rights of other States; that the degree of preference may vary over time; the application of the criterion of "special dependence" to both developing countries and certain other States for which coastal fisheries were of great importance; and the duty to delimit those rights and obligations through negotiation in as equitable manner as possible. To that extent, the Court may be said to have clarified and developed the law.

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118 See n 52 and accompanying text *supra*. 
Nevertheless, being applied in an indirect fashion and by negotiation, the principles or guidelines relating to the concept's implementation were stated at such a high level of abstraction that the concept did not very clearly define inter-State relationships in concrete situations119 and as Professor Manin observes, "[l']arrêt est...bien loin d'apporter une réponse à toutes les questions que l'on se posait sur l'étendue des compétences de pêche au delà de la largeur de 12 milles".120 For instance, to what extent might preferential fishing rights be claimed by a State claiming an EFZ broader than 12 miles? How were the degree of "special dependence" of the coastal State and the value of historic rights of fishing States to be determined for allocation purposes? And what weight should be given to economic considerations in determining whether or not stocks were being overexploited? Similarly, the Court did not address certain propositions raised by the Applicant States, such as a possible duty to give priority to fishing for food or coastal State preferential rights to highly migratory species.121

Although it had been hoped that the Judgments would define the limits within which States might introduce legal particularisms into the general regime governing marine fisheries,122 the issue remained largely unsettled by the Court. Rather than set such limits, the ICJ simply stated fundamental principles and guidelines, leaving States to negotiate arrangements accordingly.

119 Cf Foucheaux, supra n 2, 167; and Manin (supra n 96, 42), who observes that "la Cour a dit quel était le droit applicable. Mais le contenu de ce droit est tel que son affirmation ne suffit pas à resoudre le litige."

120 Ibid 52

121 See nn 40 and 41 and accompanying text supra. On questions unanswered by the Court see, eg, Churchill, supra n 2, 97; Favoreu, supra n 2280, 282; Langavant and Pirotte, supra n 2, 93, 96; and Manin, supra n 96, 42.

122 See text accompanying n 84 supra.
The very flexibility of the concept, however, was not conducive to its use in producing stable, ordered, long-term relations among States exploiting the same fishery. As Jeffrey Weil observed in reference to the Icelandic situation,

Insofar as every negotiation is charged with its own unique sociological, economic and historical considerations relative to the parties in dispute, the practical result is that the doctrine of preferential rights produces a desultory pattern of legal relationships between Iceland and other states fishing off the Icelandic coast.\textsuperscript{23}

Furthermore, constantly changing social, economic, technical and other factors would necessitate frequent, if not continuous, negotiation of the particular rights and duties of all States exploiting a fishery. Because of the multiplicity of ever-varying factors, disputes would not be readily susceptible to judicial treatment. Besides, the lack of specific rules governing resource allocation would encourage States to ignore judicial decisions and ultimately act in accordance with what they themselves deemed to be equitable principles corresponding more closely to their own national interest.\textsuperscript{24}

It is in regard to the latter, of course, that the value of the preferential rights concept must be further assessed.\textsuperscript{25} Given the widespread move by coastal States to extend fishery jurisdiction there is little doubt but that the concept, including the duty to recognize historic fishing rights, would have no doubt satisfied the realistic aspirations of major fishing nations.\textsuperscript{26}

At the same time, however, the concept as enunciated by the Court was unlikely to entirely appeal to coastal States which were either able to harvest all fish stocks in littoral waters or were newly-independent and required those resources for economic development. While the latter States

\textsuperscript{23} Weil, \textit{supra} n 2, 483
\textsuperscript{24} \textit{Ibid}
\textsuperscript{25} \textit{Cf} De Visscher, \textit{supra} Introduction, n 24, 137
\textsuperscript{26} \textit{Cf} Churchill, \textit{supra} n 2, 100
were specifically recognized by the Court as having preferential rights over coastal fisheries, the simultaneous recognition of historic fishing rights of fishing States made the former rights infinitely less preferable than full exclusive rights over the same waters. Besides seeing historic rights as perpetuating past inequities, many developing coastal States had also witnessed foreign fleets vacuuming the fish stocks from local waters to the detriment of their own smaller, domestic vessels. Lacking the scientific personnel to produce the evidence of overfishing required to trigger the implementation of preferential rights; distrust ing the intentions or capacity of major fishing Powers to control their national vessels; and unable to compete with the latter technologically, the concept of preferential rights did not meet their needs.127

That having been said, it would nevertheless be unfair to dismiss the Court's advancement of the EFZ and preferential rights concepts as jurisprudentially valueless and rejected in toto by coastal States. While the latter no doubt had grave reservations about either recognizing historic rights of major fishing nations, at least on a permanent basis, or submitting disputes to judicial settlement, one can see in the concepts as expounded by the Court the inchoate framework for the future fishery regime. Beyond a relatively narrow band of littoral waters in which the coastal State would have absolute fishery rights would be another area in which it would have first call on the living resources, subject to obligations with respect to conservation and permitting access by other States to the allowable surplus. Basically, it would be a question of increasing the rights of the coastal State at the expense of the non-coastal State, while at the same time giving due recognition to the broader needs of the international community. Such a development was too substantive to be made by a judicial body, particu-

127 Cf ibid 102; cf. R Anand, "Iceland's fisheries dispute" (1976) 16 IJIL 43, 49-53
larly in the circumstances of the particular disputes under consideration.

V. Conclusion

The decision of the Court not to declare comprehensive, general and explicit rules governing fishery jurisdiction owed much to the unique circumstances surrounding the disputes. First, the ICJ was faced with a serious dilemma impacting directly upon its ability to determine the legal issues before it. As Judge Dillard explained,

the state of customary international law in 1972 with respect to unilateral extensions of fishery jurisdiction was so charged with uncertainty, viewed simply as a kind of 'head count' analysis of State practice, as to make tenuous any definitive pronouncement on this issue.128

As important as the above was the fact that at the very time the Judgments were being rendered, States were meeting in Caracas to negotiate a new, comprehensive law of the sea regime. While it is impossible to state categorically the reasons for the Court declining to consider the validity of Iceland's 50-mile EFZ *erga omnes* in favour of a more circumscribed decision focussed on the concept of preferential fishing rights beyond an (apparently) narrow EFZ, two interpretations have appeared. According to Judge Ignacio-Pinto, the ICJ seemed intent on "pointing the way" to those meeting in Caracas and indicating principles "on the basis of which

128 Separate Opinion (Dillard), *supra* n 65, 56; *cf*, Favoreu, *supra* n 2, 284; Goy, *supra* n 2, 507; and Langavant and Pirotte, *supra* n 2, 87. The uncertainty is reflected, in part, by statistics relating to State practice cited by the Applicant States and individual judges (see, eg, text accompanying nn 20 and 62 *supra*).
it would be desirable that a general international regulation of rights of fishing should be adopted".129

Adopting the opposite position, Judge Dillard suggested that the ICJ's reluctance to pronounce on the issue of a 'fixed' limit for the extension of fishery jurisdiction may have been due, inter alia, to the "inarticulated notion" that because of both the proceedings of UNCLOS III and the matter being "in a state of such acknowledged political and legal flux" it would have been "imprudent" to do so.130

Regardless of which interpretation is correct, the Court did declare both the concepts of the EFZ and preferential fishing rights to be part of customary international law and therefore valid erga omnes. It would be up to UNCLOS III to either build on those concepts and give them detailed juridical content or to reject them in favour of another approach. It is to the 'theatre' of conference law-making that we now turn for the reaction.

129 Declaration (Ignacio-Pinto), supra n 66, 37. This position appears to be shared by Churchill, who criticized "the extraordinary insensitivity of the timing of the Court's judgment"(supra n 2, 98). The Court's rendering of its decision while UNCLOS III was in session, he observed, "all too easily appears to be a clumsy attempt to influence an international legislative body" (ibid). Cf Louis Favoreu (supra n 2, 272-273), who writes that

On a le sentiment que la Cour devance ici le législateur et ceci d'autant plus qu'elle s'arrête longuement à définir (secs 59 a 72) ce que sont ces droits préférentiels et comment il convient de les concilier avec les 'droits historiques' ou 'traditionnels'. Ces longs développements sont en principe destinés à guider les parties lors de leurs négociations, mais on a plutôt l'impression qu'ils ont pour objet de guider les législateurs de la Troisième Conférence sur le droit de la mer.

130 Separate Opinion (Dillard), supra n 65, 56; cf, Foucheaux, supra n 2, 168-169; Weil, supra n 2, 488-489; Young, supra n 2, 191, 192; and Kearney (supra n 2, 696), who observes that UNCLOS III "was a complicating factor of immense proportions. With a chosen lawmaker in being the Court understandably and wisely avoided any attempt at judicial development of the law."
CHAPTER TEN

THE UNITED NATIONS SEA-BED COMMITTEE

"[L]e vent de l'histoire souffle actuellement de la terre vers la mer, en faveur de l'Etat riverain, au detriment du vent de mer, symbole de la liberté des mers pronéed par les grandes puissances maritimes.

R-J Dupuy and A Piquemal

I. Introduction

As indicated in the previous Chapter, the Fisheries Jurisdiction Judgments were rendered in a broader international environment in which important developments in the other two 'theatres', State practice and conference law-making, were simultaneously impacting one upon another to influence the evolution of norms governing marine fisheries. The various claims and declarations reviewed in Chapter Eight -- particularly those appearing in the early 1970s -- influenced, and were influenced by, for example, not only the ICJ's determination of the fishery disputes off Iceland but also United Nations law of the sea deliberations that began in 1967.

Consideration of law of the sea issues took place first in a United Nations special committee and then at the third law of the sea conference itself. Besides influencing State practice, the committee activities set the stage and, in several respects, the parameters for UNCLOS III fishery discussions. For a better understanding of the momentous events to follow, therefore, it is necessary to turn first to committee proceedings before considering the Conference. The following discussion will summarize the general committee proceedings, review various proposals relating to fisheries submitted to it, and conclude with some observations on the contribution of the committee to the development of the law.

R-J Dupuy and A Piquemal, "Les appropriations nationales des espaces maritimes" in Actualités, supra Ch 8, n 18, 109, 112
II. Sea-Bed Committee Deliberations

A. The Early Years

The seed from which grew the longest and most universal of all conferences in the history of international law -- the Third United Nations Conference on the Law of the Sea -- was sown on 17 August 1967, when Malta requested inclusion on the agenda of the 22nd session of the General Assembly of an item entitled

"Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."

In an historic address to the UNGA, Ambassador Arvid Pardo of Malta explained that recent developments in science and technology had made the exploitation of valuable deep sea-bed resources possible within a decade. Unless action was taken, there would be a scramble among technologically-advanced nations for their control, further widening the gap between rich and poor States and increasing international tension. As well, he pointed out, the problem of marine pollution through the dumping of radioactive and other wastes

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3 A/6695, Note Verbale of 17 August 1967 from Malta
demanded urgent attention. The solution lay ultimately in the creation of a special agency to assume jurisdiction over the sea-bed and to act as a trustee for all States, asserted Pardo. In the meantime, he urged the UNGA to adopt a resolution proclaiming, inter alia, that the sea-bed and ocean floor were the common heritage of mankind, and establishing a committee to consider in detail further steps that should be taken. Malta's broader, unstated goal was a thorough reconsideration of the traditional freedom of the seas principle.

With general agreement that Malta's proposal raised issues having important and far-reaching implications, the General Assembly that year established an ad hoc committee and, in 1968, its successor, the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (the Sea-Bed Committee (SBC)). Pardo's hoped-for revision was under way.

The difficulties of considering the sea-bed "beyond the limits of national jurisdiction" without determining those limits soon became clear to the Committee, and the idea was advanced that a conference be called for that purpose. Debate on such a conference focussed on its scope. Matters came to a head in 1970 when the Soviet Union and three other States proposed that the "[q]uestion of the breadth of the

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* For a summary of the Maltese argument see (1967) 21 YUN 41-43.

* See A Pardo, "Ocean space and mankind" (July 1984) 6 Third World Quarterly 559, 567.

* Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (UNGA Resolution 2340(XXII), adopted unanimously on 18 December 1967)

* UNGA Resolution 2467A(XXIII), adopted 112-0-7, on 21 December 1968

* Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. UNGAOR. 25th Session. Suppl. 21 (A/8021)
territorial sea and related matters" be referred not to the SBC but to the UN's Sixth (Legal) Committee, it being felt that merging of items dealing with the sea-bed and the territorial sea would not assist in settling the latter's limits.  

There was unanimous agreement that the proposal warranted urgent attention, the British representative, for example, observing that "it would be extremely advantageous to all States if an early settlement could be reached on the question of the breadth of the territorial sea and the related issues of international straits and coastal fisheries". At the same time, however, it was generally considered that the subject should be linked with the discussion of the sea-bed and not assigned to the Sixth Committee. As Ecuador's delegate explained, "it was [not] possible to separate the legal, political and scientific aspects of the problem". The UNGA subsequently agreed that the subject of the territorial sea and related matters be incorporated into that dealing with the sea-bed and the desirability of convening a law of the sea conference.

The scope of the proposed conference continued to be the subject of debate. On the one hand, some States maintained that the terms of reference should be restricted to limited, manageable packages. The great majority of

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9 A/8047 and Add.1 and Add.2/Rev.1; co-sponsored by Bulgaria, Hungary and Iraq


11 Ibid 12-13. Other States mentioning the importance of the relationship between the territorial sea, international straits and fisheries included Australia (UNGAOR. 25th Session. First Committee. 1778th Meeting (A/C.1/PV.1782) [hereafter references will only be made to the UN document number] 15), France (A/C.1/PV.1778, p 8); and the Soviet Union (see n 14 infra).

12 A/BUR/SR.187, p 13

13 Ibid 14
States, however, felt that the conference should be broader in scope, dealing with all aspects of the law of the sea of concern to the international community. This was particularly the position of new States, which had played no role in the formation of the traditional law of the sea regime.

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14 See, eg, comments by delegates of Austria (A/C.1/PV. 1730, p 5); New Zealand (A/C.1/PV.1786, pp 3-4); Sweden (A/C.1/PV. 1775, p 9); and the Soviet Union (A/C.1/ PV.1777, p 11), who argued that

...the holding of a conference can be justified only if it is convened to settle a restricted group of the most urgent and topical problems of the law of the sea, such as...the determination of the maximum breadth of the territorial sea and the related questions of transit through straits used for international navigation and of according coastal States certain special rights in respect of fisheries beyond the territorial sea, and the more precise definition of the outer limits of the continental shelf. This would allow States to concentrate their efforts to a maximum extent and would ensure success in resolving these urgent problems which, in turn, could break the ground and open up new avenues for international endeavours to solve other problems of the law of the sea.

15 See, eg, comments of the delegates of Chile (A/C.1/PV. 1775, p 4); Tanzania (A/C.1/PV.1777, p 2); and the US, which appears to have changed her position from the previous year (A/C.1/PV.1778, p 9). The American delegate explained to the SBC in 1971 (United Nations General Assembly. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. Summary Record of the Fifty-third Meeting (A/AC.138/SR.53)[hereafter references will only be to the UN document number] 76) that the US

has been persuaded by others that the various issues were so inter-connected that it would be better to resolve the important issues simultaneously and comprehensively rather than to have negotiations on one issue necessarily complicated by fears regarding the future resolution of another issue.

See also n 158 infra.

16 The representative of Trinidad and Tobago, for example, argued (A/C.1/PV.1778, p 5) that

...The issues that are matters of fundamental interest to the major maritime Powers are not necessarily matters of fundamental interest to the majority of countries in the United Nations, most of which did not take part in the United Nations Conferences on the Law of the Sea in 1958 and 1960. We can agree that rapidly developing technology and the political and economic realities of the last decade have accentuated the need for progressive development of the law of the sea. We must therefore review the whole of the law....
After prolonged negotiations the UNGA decided, inter alia, to convene in 1973 a law of the sea conference to deal with not only a sea-bed regime but also

a broad range of related issues including...the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment...and scientific research.17

The SBC was instructed, inter alia, to prepare a comprehensive list of subjects and issues on the law of the sea, and draft articles thereon, for consideration by the conference.

B. Substantive Fishery Discussions Begin (1971)

Much of the Committee's 1971 session was taken up with preliminary, wide-ranging discussions in which States set out their positions, although some detailed work also began

Cf, eg, statement by the Nigerian delegate, A/C.1/PV. 1780, p 4.

17 UNGA Resolution 2750C(XXV), adopted by 108 to 7, with 6 abstentions, on 17 December 1970. For reviews of the various proposed draft resolutions (with amendments) submitted to the First Committee and Plenary see Seabed Committee 1968-1973, supra n 2, 140-151, and (1970) 24 YUN 72-77.

Professor Edward Miles ("The structure and effects of the decision process in the Seabed Committee and the Third United Nations Conference on the Law of the Sea" (1977)31 International Organization 159, 173) comments that

In 1971 the unmanageability of [UNCLOS] III was clear to everyone but by then it was too late. By that time the Latin Americas had convinced both the Africans and the Asians that a new Conference should not have a restricted agenda and that the entire Law of the Sea should be reopened. This was a powerful argument among newly-independent states since the decisions of 1958 had been made without their participation and Pardo had stimulated their imaginations about the cornucopia lying at the bottom of the oceans. Rather than choosing to negotiate on the sequencing and packaging of issues over time, the major maritime countries chose to make a stand on the scope and agenda for a single Conference. The rhetoric and demands quickly escalated....The result of this confrontation was not only the defeat of the major maritime countries but very nearly the defeat for the Conference itself since it resulted in a package of such size and complexity as almost beyond human control.
in the Sub-Committee established to prepare the list and
draft articles.¹⁸

Positions taken on fishery issues may be conveniently
classified into several broad categories. In one category
were the major maritime nations -- led by the Soviet Union,
Japan and the United States -- all of which opposed greatly
expanded coastal State marine resource jurisdiction.

Both the Soviet Union¹⁹ and Japan²⁰ had embarked on a
vigorous development of their respective fishing fleets in
the early post-war period and were afraid that extension of
coastal State jurisdiction would have a deleterious effect
on their national vessels. Addressing the SBC in 1971, the
Soviet delegate argued that there was significant underex-
ploration of fishery resources and thus no need to radical-

¹⁸ Three sub-committees were established in 1971. The
first was charged with drafting treaty articles relat-
ing to the deep sea-bed; the second, with preparing a
comprehensive list of subjects and issues for the Con-
fereence and draft treaty articles on the traditional
law of the sea; and the third, with consideration of
the preservation of marine environment (including, in-
ter alia, prevention of pollution) and scientific re-
search, and the preparation of draft treaty articles
thereon. See, Report of the Committee on the Peaceful
Uses of the Sea-Bed and the Ocean Floor beyond the Lim-
its of National Jurisdiction. UNGAOR. 26th Session.
Suppl. 21 (A/8421), p 5. For a summary of the 1971
deliberations of the SBC see Seabed Committee 1968-

¹⁹ See, eg, W Butler, "Some recent developments in Soviet
maritime law" in The Law of the Sea: the United Nations
and Ocean Management (1970; L Alexander, ed)[volume
hereafter cited 'United Nations and Ocean Management']
375, 376; J Solecki, "A review of the U.S.S.R. fishing
industry"(1979) 5 Ocean Management 97; and Ch 12, n 10
and accompanying text infra.

²⁰ See, eg, H Esterly, "Japan's re-entry into pelagic
fisheries: from surrender to the North Pacific Fisher-
ies Convention, 1945-1952" in The Law of the Sea: the
Future of the Sea's Resources (1968; L Alexander, ed)
[hereafter cited 'Future of the Sea's Resources'] 151;
"Evolution des pêches japonaises depuis la seconde
guerre mondiale" (20 avril 1984) #1273 La Pêche mari-
time 213; and Ch 12, nn 9 and 11 and accompanying text
infra.
ly revise rules governing harvesting. If exclusive fishing rights for coastal States were admitted for extensive offshore waters, her delegate claimed, a large quantity of food resources would be lost as many States had insufficient harvesting capacity. If a 12-mile territorial sea were accepted, he suggested, certain "preferential rights" might be accorded coastal States in regard to fisheries in adjacent high seas areas.21

21 A/AC.138/SR.56, p 152; cf, statement by Polish delegate, A/AC.138/SC.II/SR.12, p 114. The operations of the Soviet fishing fleet brought the U.S.S.R. into conflict with a number of coastal States, including Argentina, Ghana and Senegal, and lead the Soviet Union to assert in 1967 that extension of territorial seas beyond 12 miles was inadmissible (Butler, supra n 19, 376; "Violations of freedom of the high seas -- a generally recognized principle of international law -- are inadmissible [U.S.S.R. Ministry of Fisheries article on freedom of high seas]"(1969) 8 ILM 896). This was a change to her position at UNCLOS I (see Ch 7, n 127 supra).

The growing impact of coastal State claims also led the Soviet Union and the United States to begin bilateral discussions in 1967, resulting in an understanding on a three-part law of the sea package, encompassing agreement on territorial sea, straits and fishery rules (Foreign Policy, supra Ch 4, n 26, 174-175, 196, 234). The US expressed her willingness to accept a 12-mile territorial sea provided that freedom of navigation and overflight through and over international straits affected by the extended limit was secured. On the third element of the package, provision for coastal State preferential fishing rights beyond the territorial sea, there was some difference of views between the US and the USSR. The former, with important coastal fishing interests, argued that the preferential rights to be accorded would have to be generous to coastal States in order to obtain their agreement on the other two parts. The US thus saw the fishery provision as a 'carrot' for coastal State concessions on the straits and territorial sea issues (ibid 266).

In contrast, the Soviet Union insisted that the vital interests of her distant water fleet could not be jeopardized by restrictive rules favouring coastal States. Ultimately, draft articles were agreed to by the two States and circulated to their respective allies, where the articles were subjected to considerable criticism. While no specific joint proposal on the three-part package was later submitted to either the SBC or UNCLOS III, the basic concept was widely re-
Due to the great importance of her offshore and distant-water fisheries, Japan recognized "the cold reality that it gains less from excluding others from its own coastal areas than it loses from being excluded from other countries' coastal areas". Accordingly, she advocated strengthening the authority of international or regional fishery bodies, while opposing the extension of coastal State fishery jurisdiction beyond narrow limits. The latter course, she argued, would not serve the interests of the international community and might, in fact, have a detrimental impact not only on States already engaged in distant-water fishing, but also on developing countries attempting to promote their own fishing industries.

While the American fishing fleet was large, it was concentrated in coastal waters and in the late 1960s American policy on coastal State fishery jurisdiction continued to be

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22 K Ouchi, "A perspective on Japan's struggle for its traditional rights on the oceans" (1978) 5 ODILA 107, 109. The Japanese fisheries may be conveniently classified into 3 broad categories (F Nagasaki, "Some Japanese far-sea fisheries" (1967-1968) 43 WLR 197). The first category comprises the distant-water fisheries, including the large-scale mothership-type bottomfish, salmon and kingcrab fisheries in the northern North Pacific, the bottomfish fishery in the Atlantic and the tuna fishery. The second, off-shore fisheries, included middle-size trawling, purse-seining and other net fishing in the off-shore waters around Japan. The third category includes smaller-scale, coastal fishing using various types of gear.

23 A/AC.138/SR.53, p 98; cf, statement by the Polish delegate, A/AC.138/SR.54, p 119

24 In 1972, eg, 82.5% of the American marine fishery catch by volume and 68.2% by value comprised coastal species (Senate Commerce Committee, Emergency Fisheries Protection Act of 1974. Report 93-1079, August 8 1974, p 15).
dictated basically by security considerations. There was a widespread concern that extended resource zones would result in 'creeping jurisdiction'; that is, coastal States steadily assuming increasing rights over broader maritime areas. That would, in turn, threaten the mobility of American naval fleets on the high seas, including the passage of military ships and planes through and over international straits. The 'species approach' was thus devised in an

F Laursen, *Superpower at Sea: U.S. Ocean Policy* (1983); and Quénéudec, *supra* Ch 8, n 18, 20. Hollick (*Foreign Policy, supra* Ch 4, n 26, 253) writes that "the perceived U.S. and Soviet maritime interests in maximizing high seas freedoms were virtually identical...". Butler (*supra* n 19, 386), however, qualifies that general remark as follows:

Marine developments of [the 1960s] have brought the United States and the Soviet Union closer together on many basic issues of maritime policy than at any time in the past. .... But proximity of interest is not identity. The paramount interest of the United States Navy in the freedom of the seas is not fully shared by the Soviet Navy. ....Soviet international lawyers associated with the Ministry of Defense seem less enthusiastic in defending the freedoms of the high seas than do their colleagues within the Soviet merchant marine and fisheries ministries.... Indeed, the USSR Ministry of Fisheries has emerged as the most vocal critic of claims to jurisdiction at sea beyond twelve miles....

See also in the latter regard n 21 supra.

See, eg, "Department [of State] discusses progress toward 1973 Conference on the Law of the Sea" (May 8, 1972) 66 *DOSB* 672, 676. The fear of 'creeping jurisdiction' was not limited to the United States. Malta's delegate, for example observed (A/AC.138/SC.II/ SR.71, p 15) that with the recognition of the EEZ up to 40% of ocean space would be brought under the coastal State's exclusive economic jurisdiction and it could only be a matter of time before that zone fell in practice under their sovereignty, since the practical exercise of exclusive economic jurisdiction inevitably entailed the gradual assertion of jurisdiction in matters other than resources exploration and exploitation.

R P Anand ("Interests of the developing countries in the developing law of the sea" (1973) *4 Annals of International Studies* 13, 21), on the other hand, argued at the time that "the fear of the so-called 'creeping jurisdiction' has no basis in history", and cited in support a 1971 report of the US Special Subcommittee on Interior and Insular Affairs, advising
attempt to protect American navigational interests, respond to the prevailing international trend toward resource zones, and reconcile the requirements of her coastal and distant-water fishing fleets.\footnote{27}

The American delegate on the SBC explained that the maximum breadth of the territorial sea should be 12 miles, provided there were special provision for free transit through and over international straits, as well as recognition of coastal State fishery rights beyond that limit based on the coastal State's economic interests in the fish stock associated with adjacent coastal waters rather than with a specific distance of the stock from shore.\footnote{28}

"Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries" were circulated, detailing the above position.\footnote{29} Beyond 12 miles, the coastal State would be entitled to harvest that part of the total allowable catch (hereafter 'TAC') of which it was capable, including anadromous stocks from its own waters but excluding certain highly migratory species (hereafter 'HMS'). "Owing to the mobility of [HMS] and the short period during which they appeared off the coast, any preference would be difficult to implement and coastal States could not develop economically viable fisheries" the American representative argued.\footnote{30} The percen-

\footnote{27} Laursen, supra n 25, 69; cf, Foreign Policy, supra Ch 4, n 26, 268-269

\footnote{28} A/AC.138/SR.51, p 78

\footnote{29} A/AC.138/SC.II/L.4 and Corr. 1, in A/8421, supra n 18, 241-245

that the Subcommittee found little evidence of 'creep-ing jurisdiction'. It went on the state that

The overwhelming majority of coastal nations which have become parties to the Continental Shelf Convention have limited their jurisdictional claims both qualitatively and quantitatively to the terms of that treaty. They have indeed honoured their commitments.

The answer to 'creeping jurisdiction', Anand suggested, lay in reaching international agreement on the limits of the territorial sea and EEZ. See also text accompanying n 78 infra.
tage of that TAC traditionally harvested by foreign fishermen would not be allocated to the coastal State. Fisheries would be regulated by international (including regional) fishery organizations (hereafter 'IFOs'), and non-discriminatory conservation measures would be aimed at setting a TAC "designed to maintain the [MSY] or restore it as soon as practicable, taking into account relevant environmental and economic factors".  

All States would be obliged to conform to the regulations established.

A second, much larger, group of States thought the answer to contemporary fishery problems lay not in greater international regulation of marine fisheries beyond the 12-mile limit but in extending coastal State jurisdiction over specific maritime zones. They accused the major maritime Powers of promoting the freedom of fishing principle for purely selfish interests and invoked in support of extended jurisdiction many of the arguments earlier advanced in declarations and in support of their own unilateral claims.

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30 A/AC.138/SC.II/SR.8, p 48. Later, the US representative amplified his remarks, commenting (A/AC.138/SC.II/SR.31, pp 106-107) that

highly migratory oceanic species could only be managed effectively through international organizations. Many such species migrated widely through the world's oceans, for example tuna and tuna-like fish. A single coastal State could not possibly control such species or their environment. Tuna were already the subject of effective international management arrangements under several international commissions. If jurisdiction to manage and conserve those species were delegated to coastal States, they would only regulate particular stocks within their jurisdiction for a short part of each year, during certain phases of the life cycle of the fish. When the stock was in mid-ocean, another regulatory mechanism would presumably apply. However, such a fragmented approach to the problem would make meaningful conservation measures impossible.

The Sub-Committee should also consider that a substantial economic fishery for tuna generally required a mobile fleet, because of the migratory nature of the stock. Thus, the very migration of those species provided a basis for accommodating the economic interests of distant-water and coastal fishing States in a manner that did not, in any practical sense, affect the development of coastal fisheries.

31 Ibid. See also n 63 infra.

32 See, eg, statements by the representatives of Peru (A/AC.138/SR.46, p 15); Iceland (A/AC.138/SC.II/SR.9, p 59); and India (A/AC.138/SC.II/SR.16, p 185). See also Chs 6 and 8 supra.
They also criticised the linking of the 12-mile limit of the territorial sea with the question of straits and fishery limits as being simply a ploy to satisfy political and strategic interests of the great Powers by an 'accommodation' recognising fishery and other rights already possessed by coastal States.\(^3\)

Other States, however, expressed more willingness to negotiate a compromise. The Mexican delegate, for example, in a statement foreshadowing what was finally accepted years later, suggested that agreement be reached that the territorial sea was just that and nothing more, as well as recognition that "fishery zones, whether conservation or exclusive or preferential fishing areas, were of genuine importance to

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\(^3\) See, eg, statement by the Ecuadorian delegate, A/AC.138/SR.56, p 144. Hjerttonsson (supra Ch 6, n 6, 42) reveals that in 1969 the three-part package worked out by the Soviet Union and the United States (see n 21 supra) was sent to governments throughout the world for their comments. A conference based on that package, she observes, would have constituted a threat to Latin American 200-mile zone claims as at that time many States had claimed a 12-mile territorial sea or fishery zone and a proposal recognizing that limit would probably have gained extensive support. Since Latin American claims had been based in part on their being a lack of international agreement on a specific limit, the American-Soviet proposal worked as a catalyst, spurring the Latin American States to meet and consolidate their position. See also in this regard Ch 8, nn 98-132 and accompanying text supra.

An assessment of the international situation similar to that made by the Latin American States was made by Oda ("International law of the resources of the sea" (1969) 127 RDC 355, 400) who suggested that as soon as possible the United Nations endeavour to generalize the concept of the 12-mile fishery zone. Delay may have serious repercussions, since the claims of certain coastal States are year by year becoming more far-reaching. What may satisfy a majority this year may be unacceptable to the majority next year. Past experience at the 1958 and 1960 Geneva Conferences has brought us this lesson.

In order to halt an endless expansion of the respective claims by various coastal States to fishery jurisdiction, the immediate convocation of a world-wide convention on the 12-mile fishery zone seems mandated.
the coastal State and not just a phantom right". The coastal State rights embodied in the 1958 Fisheries Convention, he explained, were subject to such limitations as to make them illusory, resulting in a mushrooming of unilateral claims to special maritime jurisdiction. It was necessary for the Committee to arrive at a compromise between limits which would close arbitrarily some portion of the high seas, resulting in loss of food resources to the international community, and a limit which would deny the coastal State the right to reserve for its own fishermen resources when it was able to exploit them efficiently.

In a similar statement, Venezuela's delegate proposed a 12-mile territorial sea together with a 200-mile economic zone or patrimonial sea. In response to the argument that such an arrangement would lead to underexploitation of resources owing to the inability of many coastal States to harvest nearby fisheries effectively, he suggested that "in their own interests...such States would surely reach agreement with...other States for the utilization of these resources".

In a portent to significant future developments, Singapore's delegate emphasized that not only littoral and maritime States were interested in fisheries. He supported the recognition of exclusive or preferential fishing zones adjacent to territorial seas provided "adequate consideration was given to the fishing interests of developing land-locked

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34 A/AC.138/SR.58, p 188; cf, statement by New Zealand's delegate, A/AC.138/SR.62, pp 18-19

35 A/AC.138/SR.58, p 189; cf, statements by delegates of; Australia (A/AC.138/SC.II/SR.6, pp 12-13); Canada (A/AC.138/SC.II/SR.25, p 9); and New Zealand (A/AC.138/SR.62, p 19). For other statements indicating a willingness to negotiate a compromise see those of the representatives of Madagascar (A/AC.138/SR.64, p 51); Morocco (A/AC.138/SR.57, p 179); and Tanzania (A/AC.138/SC.II/SR.13, p 132).

36 A/AC.138/SR.64, p 43; cf, statements by representatives of Argentina (A/AC.138/SC.II/SR.12, p 120); Kenya (A/AC.138/SC.II/SR.11, p 99); and Nigeria (A/AC.138/SC.II/SR.8, p 56).
and shelf-locked States, which would not generally be able to enjoy such privileges".37

The only other written proposal submitted during the session, Malta's "Draft Ocean Space Treaty"38 posited a 200-mile zone in which the coastal State would be permitted to reserve to its nationals all natural resources. In recognition of that right, it would be obliged to observe certain conservation and management measures when required and to transfer to "International Ocean Space Institutions" to be established a portion of the revenue obtained from resource exploitation.39 Beyond 200 miles, fishery resources would be administered by the aforesaid Institutions "for the benefit of mankind as a whole, irrespective of the geographical location of States, whether landlocked or coastal, and taking into particular consideration the needs of developing countries".40

Few substantive comments were made on either the American or Maltese proposal. Mexico's representative, however, did observe that since Malta's 200 mile zone was subject to so many exceptions and fishing would be the only matter in which the coastal State would exercise its jurisdiction, it appeared more logical simply to accept a 12-mile territorial sea and a 200-mile fishery zone.41

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37 A/AC.138/SC.II/SR.16, p 182; cf, statement by the delegate of Nepal, A/AC.138/SC.II/SR.10, p 80. Singapore understood a 'shelf-locked' State to be a State "which either bordered on a very narrow sea or had a very narrow coastline"(A/AC.138/SC.II/SR.16, 181). Terminology describing States with the geographical features identified by Singapore varied throughout SBC and UNCLOS III deliberations, finally settling on 'geographically-disadvantaged States' in the Law of the Sea Convention. For convenience, the general term 'land-locked and geographically-disadvantaged States' or LLGDS will be used.

38 A/AC.138/53; in A/8421, supra n 18, 105-193

39 Articles 57-59, and 61

40 Article 71

41 A/AC.138/SC.II/SR.11, p 95
Peru's representative, without referring directly to the American submission, noted that "[c]ertain maritime powers proposed measures of conservation that would allow the coastal State to maintain their fisheries at their present level and to promote their further expansion provided that did not affect the interests of the developed nations".42 Such proposals, he argued, were unrealistic in an age when developing countries were determined to use fishery resources "in order to achieve progress in accordance with the needs and possibilities of their peoples and not in accordance with the conditions imposed by some major powers".43

Although the British delegate was more sympathetic to the American proposal, expressing support for a multilateral solution to fishery problems, he thought that the right of the coastal State to indefinitely expand its share was inequitable for fishing nations. Allocation, he claimed, "should be made on the basis of general criteria for relating to share to the needs and interests of the States concerned".44

C. Fisheries and the Exclusive Economic Zone (1972)
The 1972 SBC sessions featured a number of general statements by new members,45 several new fishery-related

42 A/AC.138/SC.II/SR.14, p 144
43 Ibid; cf, comment by Ecuador's delegate, A/AC.138/SC.II/SR.15, p 168
44 A/AC.138/SC.II/SR.14, p 142
45 The total membership of the Committee expanded from 35 in 1968 to 42 in 1969, 86 in 1971, and 91 in 1972 and 1973. The rapid growth in membership came largely as a result of the increasing appreciation on the part of the newly independent, developing States of the importance of marine resources. On this point see, eg, E Bello, "International equity and the law of the sea: new perspectives for developing countries"(1980) 13 Law and Politics in Africa, Asia and Latin America 201, 204.
proposals, and agreement on a list of subjects and issues to be considered at UNCLOS III.46

Following closely general positions enunciated in 1971, the proposals ranged across a broad spectrum. At one extreme were those of the Soviet Union and Japan. The former's "Draft article on fishing"47 would have permitted a developing coastal State to reserve for itself in high seas areas "directly adjacent" to its 12-mile territorial sea or fisheries zone that portion of the TAC (including that of anadromous species originating in its waters) it was capable of harvesting.48 Should no regulations be in effect in that area, the coastal State might establish non-discriminatory measures "on the basis of scientific findings" and in agreement with States fishing there.49 It might also "exercise control over the observance of the fishing regulatory measures initiated by it...", although consideration of infringement of regulations and punishment thereof would be effected by the flag-State concerned.50 Disputes would be settled by arbitration unless parties agreed on other peaceful means provided for in the UN Charter.


47 A/AC.138/SC.II/L.6, in A/8721, supra n 46, 158-161. The proposal followed closely the Declaration on Principles of Rational Exploitation of the Living Resources of the Sea in the Common Interests of all Peoples of the World, adopted by Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union in July 1972. The Declaration was circulated as A/AC.138/85, in ibid 78-80.

48 Para 2. An important component of the catch taken within the Soviet Union's local waters consisted of anadromous species, particularly salmon, caught on the Russian Pacific coast (see Table B-23, (1975) 40 YFS).

49 Para 5

50 Para 6
While admitting that "existing fishery commissions did suffer from certain weaknesses in ensuring effective conservation measures", the Japanese delegate stressed that distant-water fishing States as well as coastal States had interests and responsibilities concerning fishery resources. For that reason, Japan felt that international cooperation was necessary and that the above weaknesses could be overcome by specific improvements. In her "Proposals for a regime of fisheries on the high seas" Japan suggested that conservation measures binding on all States would be adopted and implemented along the lines of the 1958 Fisheries Convention. Although the coastal State would be able to control fishing activities in adjacent waters, vessels infringing regulations would be arrested and delivered to the flag-State concerned. She was also prepared to recognize "preferential fishing rights...for developed coastal States in terms of the minimum annual catch required for the continued operation on the existing scale of clearly and precisely defined small-scale coastal fisheries". Developing coastal States would be entitled to increase their share of a stock

51 A/AC.138/SC.II/SR.31, p 97. The main observations made concerning the ineffectiveness of IFOs related to: (1) the ability of participating States to object to conservation measures adopted, thus removing their obligation to adhere to them; (2) the delay in reaching agreement within the organizations on measures to be adopted; (3) the failure of such organizations to either recognize the coastal State's interest in the adjacent fishery resources, or deal adequately with the related problem of allocation; and (4) the difficulty of enforcing agreed conservation measures. See generally, Ch 8, nn 10-17 and accompanying text supra.

52 A/AC.138/SC.II/L.12, in A/8721, supra n 46, 188-196

53 A/AC.138/SC.II/SR.31, p 99. This slight change in policy (see nn 22 and 23 and accompanying text supra) was in response to criticism that there were many fisheries already being fully exploited by coastal States, both developing and developed, and which were vital to them. See, eg, statements by delegates of Australia (A/AC.138/SC.II/SR.6, p 14); Canada (A/AC.138/SC.II/SR.9, pp 63-64); Ceylon (A/AC.138/SC.II/SR.16, p 189); Iceland (A/AC.138/SC.II/SR.9, p 57); and Mauritania (A/AC.138/SC.II/SR.11, p 92).
harvested until they had developed the capacity to harvest "a major portion [e.g. approximately 50 per cent] of the allowable catch". Measures to implement the preferential rights would be determined among the States concerned on the basis of coastal State proposals, but those rights would not comprehend highly migratory or anadromous species. New entrants to a fishery where catch limitations were in force would not be allowed to fish until an agreement on allocation was negotiated among all States concerned.

Although endorsed by American distant-water fishermen, the 1971 United States proposal had not received the same favourable reception from her coastal fishermen, particularly those on the eastern seaboard. There, a number of species were being overfished by distant-water fishing fleets in the North Atlantic. Although coastal fishermen began clamoring for the United States to institute a 200-mile zone, the American SBC delegate reiterated that the United States "remained more than ever committed to the 'species approach'", and considered that conservation and utilization of fishery resources should be directly linked to the biology and distribution of the stocks at issue. Also reaffirmed was the

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54 Para 3.1(i)

55 Para 4.1. Tuna and salmon, the most commercially-important highly migratory and anadromous species, respectively, constituted important components of the Japanese catch (see Table D-4, (1975) 40 YFS). Unlike the Soviet Union, the United States and Canada, most of Japan's salmon catch was realised beyond her own coastal waters (Nagasaki, supra n 22, 199). Accordingly, she preferred international control of those species. See also in this regard, S Tanaka, "Japanese fisheries and the fishery resources in the Northwest Pacific" (1979) 6 ODILA 163, 176-180.

56 See nn 27-31 and accompanying text supra.

57 See in this regard, eg, W Sullivan Jr, "A warning -- the decline of international cooperative fisheries management looking particularly at the North Atlantic Ocean" in United Nations and Ocean Management, supra n 19, 43-48; "Remarks" by J Dykstra, in ibid 49-52; and Ch 8, n 54 and accompanying text supra.
American belief in the vital role to be played by IFOs in
the conservation and utilization of fisheries and the imple-
mentation of the fishery regime.

At the same time, however, the United States introduced
a "Revised draft fisheries article" permitting the coastal
State rather than an IFO to regulate all fish stocks off its
cost to the limit of their migratory range, while shared
coastal and anadromous stocks would be regulated by agree-
ment between the coastal States concerned. To assure maximum
utilization and equitable resource allocation, the coastal
State would permit access under reasonable conditions to the
surplus of the TAC on the basis of the following priorities:
States that had traditionally fished for the resource; other
regional States, including LLGDS with whom arrangements had
been made; and all States on a non-discriminatory basis.  

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59 A/AC.138/SC.II/SR.40, p 43. Earlier, the US spokesman
had explained (A/AC.138/SC.II/SR.31, pp 105-106) that
regulation of only a portion of the fishing effort, which would result if
the conservation regime were applied in an arbitrary zone not related to
the distribution of the stock, could be counter-productive, since fisher-
men in one area would be unfairly penalized, while fishermen in other ar-

Again, for equitable allocation of the yield, the regime should
also apply to the entire area in which the stock was fished. A prefer-
ence for coastal State fishermen would have little meaning if a large
part of the stock could be caught by other fishermen in waters outside
the area in which the preference rule applied, as would probably be the
case if it were applied in an arbitrary zone not related to the distribu-
tion and migratory habits of the stock.

Thus, for both biological and economic purposes, the management
regime should apply to the entire range of the fish stock involved. Nei-
ther purpose required application of the regime to waters beyond the
range of the fish stock. It would be wrong to apply the range unneces-
sarily, since the common purpose...was to create only necessary limita-
tions on the use of the seas. In virtually all cases, an arbitrary zone
would be either too narrow, and thus fail in its objective, or too broad,
and thus impose unnecessary limitations on the use of the seas.

According to Finn Laursen (supra n 25, 72), "the
fear of 'creeping jurisdiction' still had a decisive
influence on U.S. fishing policy in 1972". See also in
this regard n 26 supra and n 61 infra.

59 A/AC.138/SC.II/L.9, in A/8721, supra n 46, 175-179

60 Art V.B The reference to "reasonable conditions", the
US delegate later explained (A/AC.138/SC.II/SR.60, p
When conditions required States traditionally fishing a stock to decrease their catch, that reduction would be effected on a non-discriminatory basis by agreement among the States concerned. Coastal States would be allowed to charge fishing States reasonable fees to defray costs of regulation. They may also arrest, try and punish any vessel for violating regulations, provided that the flag-State had not established its own procedures in that regard.

The new articles, explained the American representative, resulted from an enhanced appreciation of the need to take prompt and effective action to ensure the management and conservation of coastal species and the fact that coastal fisheries "had important social and economic considerations often more important to the coastal State than the efficient production of raw protein". 61

Expanding on earlier references to MSY as an objective of fishery management, 62 an American delegate explained that the concept was subject to two qualifications. First, the lack of perfect, complete, scientific data was no ground for challenging the validity of an adopted conservation measure. Secondly, environmental and economic factors impacted upon the objective, ensuring that fishery management decisions were made "in the context of the real world". 63

181), "merely meant the the coastal State must provide access. It could establish rules to prevent abuse, but those rules must not so burden the right of access as to make it meaningless."

61 A/AC.138/SC.II/SR.60, p 176. Hollick (Foreign Policy, supra Ch 4, n 26, 257, 267) observes that as the 1970s wore on, there was a gradual decline of defense considerations in US oceans policy and that after 1971 fisheries policy evolved away from explicit links to territorial sea considerations and reflected the determination of the U.S. fishing community of its own best interest. What is striking about the result is that it continued to represent a balance between coastal and distant-water considerations, this time for purely domestic fisheries reasons.

62 See text accompanying n 31 supra.

63 A/AC.138/SC.II/SR.60, p 180. He explained (ibid 180-181) that
In stark contrast to the above proposals, Kenya submitted the first "Draft articles on [the] exclusive economic zone [EEZ] concept". The articles differed from others in concentrating almost entirely on the general rights of coastal States. Within a zone up to 200 miles in breadth the coastal State would have "exclusive jurisdiction for the purpose of control, regulation and exploitation of both living and non-living resources of the Zone and their preservation, and for the purpose of prevention and control of pollution". Other States might be given permission to exploit the zone's resources under conditions stipulated by the coastal State. The latter would, however, permit "neighbouring developing land-locked, near land-locked and countries with a small shelf" to exploit the zone's living resources. Neighbouring developing States would recognize

the fact that the effectiveness of a regulatory regime involving catch limitations would be reduced by temporary changes in the environment resulting in a temporary reduction in the productivity of a fish [for example,] was not necessarily grounds for the rejection of that type of regulatory regime. The [MSY] was to a large extent an average concept. Since environmental changes whose nature could not be foreseen would presumably occur, it was probable that any quota would occasionally result in catches above or below that average. A further example relating to the economic factors was that of a resource which for one reason or another was at a level below that which produced the [MSY]. While the general rule was that measures should be instituted to restore the resource to the optimum level as quickly as possible, that need not to be done immediately if such action would produce economic catastrophe for one or another of the parties involved. The recovery process might be extended over a longer period if there were compelling economic reasons. Further, the reference to relevant economic factors in [relation to MSY] emphasized the fact that decisions on management measures should be economically sound, serving to promote the health and efficiency of the world fisheries industry and to meet the ever-growing demand for low-cost food.

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64 A/AC.138/SC.II/L.10, in A/8721, supra n 46, 180-182. The proposal had been advanced by Kenya earlier that year to the Asian-African Legal Consultative Committee, which endorsed it (Asian-African Legal Consultative Committee, Report of the Thirteenth Session (1972) 201-211).

65 Article II

66 Art VI. That right would be conditional on the enterprises of those States being effectively controlled by their national capital and personnel. To enable them to exercise that right, the States would be given right
their existing historic rights and accord mutual preferen­ 
tial treatment in the exploitation of their respective 
zone's living resources.⁶⁷ Within that zone the freedoms of 
navigation, overflight and to lay submarine cables and 
pipelines would also be recognized.

Introducing her proposal, the Kenyan delegate explained 
that it had been "inspired by" the Santo Domingo Declaration 
and the Yaoundé recommendations,⁶⁸ and had been put forward 
to dispel certain misunderstandings concerning the EEZ con­ 
cept as well as to ensure that marine resources were fairly 
divided among developing countries without injuring the le­ 
gitimate interests of other States.⁶⁹

Although no agreement was reached on fishery articles 
in 1972, comments revealed little support for proposals ac­ 
cording coastal States only limited, preferential rights in 
fisheries and the management of resources beyond a 12-mile 
territorial sea by species, with an enhanced role for re­ 
gional organizations in conservation and allocation deci­ 
sions. Referring to the Soviet proposal, for example, the 
Norwegian and Icelandic delegates pointed out that the pro­ 
posal failed to recognize that not only developing but also 
some developed countries had a high dependence on fisher­ 
ies.⁷⁰ Colombia's representative judged it "completely 
unrealistic" and not being in the interest of developing 
countries.⁷¹

of access to the sea and transit, all rights being em­ 
bodied in agreements (ibid).

⁶⁷ Art IX. Kenya's proposal also provided that no terri­ 
tory under foreign domination and control would be en­ 
titled to establish an EEZ (Art XI) "since such a right 
would be recognized at the time of achieving indepen­ 
dence" (A/AC.138/SC.II/SR.42, p 55).

⁶⁸ See Ch 8, nn 113 and 152 and accompanying text supra.

⁶⁹ A/AC.138/SC.II/SR.42, p 54-55

⁷⁰ See statements by representatives of Norway (A/AC.138/ 
SC.II/SR.40, p 44) and Iceland (A/AC.138/SC.II/SR.35, p 68); 
In Sweden's view the American 'species approach' raised too many practical problems, as anadromous species, for example, often travelled over vast distances and through territorial seas and even internal waters of more than one State when returning to spawn. More fundamentally, asked Sweden's representative, "[w]as it really correct to let the parent coastal State be the regulatory authority throughout the migratory range of the species?" 72

Dismissing as irrelevant arguments that establishing limits beyond 12 miles would not solve fishing problems as fish did not acknowledge man-made boundaries but multiplied in accordance with natural laws, Peru's delegate pointed out that "the jurisdictional limits, including those which were contrary to the rules of nature had been proposed for observance not by fish but by fishing nations". 73

The SBC's reception of the Kenyan proposal contrasted sharply with the above. While some delegates such as that of Byelorussia did not support the EEZ concept "since it ran counter to existing international law relating to fishing in the high seas, and it also represented a threat to the economies of other countries, particularly the land-locked countries", 74 the reaction of numerous other States was more favourable. India's delegate, for example, considered the Kenyan proposal "a starting point for serious negotiation" and provided for a realistic revision of the law of the sea. 75

Speaking early in the session and before Kenya's proposal was introduced, both Nepal's and Singapore's delegates

71 A/AC.138/SR.82, p 46
72 A/AC.138/SC.II/SR.39, p 38; cf, statement by Norway's delegate, A/AC.138/SR.40, p 44
73 A/AC.138/SC.II/SR.27, p 40; cf, statement by China's representative, A/AC.138/SC.II/SR.28, p 50
74 A/AC.138/SC.II/SR.43, p 66
75 A/AC.138/SR.84, p 75; cf, statements by representatives of Canada (A/AC.138/SR.83, p 61); Mexico (A/AC.138/SR.84, p 76); Sri Lanka (A/AC.138/SR.85, p 90); Sudan (ibid 92); and France (A/AC.138/SC.II/SR.43, pp 59-60)
welcomed the Yaoundé recommendations upon which the proposal was in large part based as going far towards meeting the essential concerns of LLGDS.76

In response to the claim that recognition of a 200-mile resource zone might result in 'creeping jurisdiction',77 Iceland's delegate argued that if the coastal State's right to establish a zone in terms of natural resources was defined in a general law of the sea convention that right would necessarily be limited in scope to that agreed upon.78

The SBC did manage to finalize a list of subjects and issues for consideration at the forthcoming Conference. The result of long and intense negotiations, the compromise contained numerous references to fisheries and fishery-related issues.79 Submitting its Report to the UNGA, the SBC ex-

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See n 26 and accompanying text supra.

A/AC.138/SR.83, p 69

See A/8721, supra n 46, 5-8 for the complete list. The items relating to fishery subjects and issues were:

6. Exclusive economic zone beyond the territorial sea
   6.1 Nature and characteristics, including rights and jurisdiction of coastal States in relation to resources, pollution control and scientific research in the zone. Duties of States.
   6.2 Resources of the zone
   6.4 Regional arrangements
   6.5 Limits: applicable criteria
   6.6 Fisheries
   6.6.1 Exclusive fishery zone
   6.6.2 Preferential rights of coastal States
   6.6.3 Management and conservation
   6.6.4 Protection of coastal States' fisheries in enclosed and semi-enclosed seas
   6.6.5 Regime of islands under foreign domination control in relation to zones of exclusive fishery jurisdiction
   6.8 Prevention and control of pollution and other hazards to the marine environment
   6.8.1 Rights and responsibilities of coastal States
   6.9 Scientific research
plained that "sponsorship or acceptance of the list does not prejudice the position of any State or commit any State with respect to the items on it or to the order, form or classification according to which they are presented".\textsuperscript{80} Given the numerous references to fishery matters on the list, it was clear that the question of living marine resources would be a major focus of deliberations at the Conference.

The nature and timing of those deliberations were subjects of much discussion during the UNGA's consideration of the SBC's Report in 1972.\textsuperscript{81} The General Assembly finally decided to convene the first, organizational, session of UNCLOS III at the end of 1973 and the first substantive ses-

\begin{center}
7. Coastal State preferential rights or other non-exclusive jurisdiction over resources beyond the territorial sea
7.1 Nature, scope and characteristics
7.3 Fisheries
7.5 International co-operation in the study and rational exploitation of marine resources
7.6 Settlement of disputes
7.7 Other rights and obligations
8. High Seas
8.3 Question of the freedoms of the high seas and their regulation
8.4 Management and conservation of living resources
9. Land-locked States
9.4 Rights and interests of land-locked countries in regard to living resources of the sea
10 Rights and interests of shelf-locked States and States with narrow shelves or short coastlines
10.2 Fisheries
\end{center}

\textsuperscript{80} Ibid 4. Shigeru Oda ("New developments in the United Nations Seabed Committee" (1973) 7 JMLC 577, 588) explains that the preparation of the list was difficult and time-consuming due to the apprehension existing on the part of both developed and developing nations that once any item was included in the list of subjects and issues, this fact would in itself be interpreted as giving support to said items. The drafting of each item was also controversial. Although it was understood from the start, that the list would neither necessarily be exhaustive, nor would it determine the priority of discussion, and that acceptance of the list would not prejudice the position of the particular States toward each item on the list, apprehension prevailed. There was no trust between the developed and the developing nations.

\textsuperscript{81} See Seabed Committee 1968-1973, supra n 2, 224-230, and (1972) 26 YUN 34-37, for a discussion of those deliberations.
sion in 1974. The SBC was also requested to complete its preparatory work for the Conference.  

D. Fishery Proposals Proliferate (1973)

The 1973 SBC sessions witnessed the appearance of numerous 200-mile proposals building on that introduced by Kenya in 1972, as well as submissions concentrating on selected fishery issues.

1. Coastal State Proposals for 200-Mile Zones

The largest category of fishery-related proposals submitted in 1973 followed the Kenyan lead in advocating 200-mile resources zones for coastal States. While a few were very brief and did little more than advance the basic concept, most were more detailed. Of the latter, there was substantial support for the basic principles stated by Kenya, although in some cases alternative approaches were suggested and new draft articles added.

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82 UNGA Resolution 3029A(XXVII), adopted unanimously on 18 December 1972

83 For a general review of the 1973 activities of the SBC and the subsequent related discussions in the UNGA see Seabed Committee 1968-1973, supra n 2, 231-322, and (1973) 27 YUN 38-40.

84 See, eg, the Australian-Norwegian working paper "containing certain basic principles on an economic zone and on delimitation"(A/AC.138/Sc.II/L.36), in Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. UNGAOR. 28th session. Suppl. 21 (A/9021) iii, 77-78; Brazil's "draft articles containing basic provisions on the question of the maximum breadth of the territorial sea and other modalities or combinations of legal regimes of coastal State sovereignty, jurisdiction or specialized competences"(A/AC.138/SC. II/L.25), in ibid 29; Iceland's working paper, "Jurisdiction of coastal States over natural resources of the area adjacent to their territorial sea"(A/AC.138/SC.II/ L.23) in ibid 23; and Pakistan's paper, "breadth of the territorial sea and boundaries of the exclusive economic zone" (A/AC.138/SC.II/L.52) in ibid 106.

85 As might be expected given the regional consultations and negotiations concerning law of the sea issues (see Ch 8 nn 146ff and accompanying text supra), the "draft
Colombia, Mexico and Venezuela, for example, jointly proposed draft articles for a 12-mile territorial sea and an adjacent 200-mile "patrimonial sea" in which the coastal State had "sovereign rights" over fishery resources. That meant that coastal States "had the right to exploit such resources and, in principle, to exclude foreigners from exploiting them". The draft articles also stipulated that the coastal State had a special interest in maintaining the living resources in high seas areas adjacent to the patrimonial sea and that fishing in the high seas would be neither "unrestricted nor indiscriminate".

The articles on [the] exclusive economic zone"(A/AC.138/SC. II/L.40 and Corr.1-3), submitted by Algeria, Cameroon, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan and Tunisia (in ibid 87-89) followed the 1972 Kenyan proposal more closely than any other submission.

A/AC.138/SC.II/L.21, in ibid 19-22

Statement by the Mexican representative (A/AC.138/SC.II /SR.59, p 151). Other specific references to 'sovereign rights' over resources were to be found in the draft articles of Canada, India, Kenya, Madagascar, Senegal and Sri Lanka ("Draft articles on fisheries"(A/AC.138/ SC.II/L.38), in A/9021, supra n 84, 82-84); and Argentina ("draft articles"(A/AC.138/SC.II/L.37 and Corr.1 in ibid 78-81). According to the Chinese proposal ("sea area within the limits of national jurisdiction" (A/AC.138/SC.II/L.34, in ibid 71-74), the resources "are owned by the coastal State". The African submission declared that the coastal State had "sovereignty" and "exclusive jurisdiction" over the resources of the zone (see n 86 supra). Ecuador, Panama and Peru asserted in their proposal (A/AC.138/SC.II/L.27, in A/ 9021, supra n 84) that within the 200-mile limit natural resources "shall be subject to the sovereignty and jurisdiction of the coastal State". It appears that 'sovereign rights' made its first appearance as a law of the sea term of art in Article 2 of the 1958 Continental Shelf Convention (cf, Vargas, supra Ch 8, n 113, 163).

Arts 16 and 17. A similar approach was adopted in the proposal by Ecuador, Panama and Peru (see n 87 supra) providing that generally the freedom of fishing would be permitted beyond the 200-mile limit, subject to "regulations of a world-wide and regional nature" and fishing being conducted "by techniques and methods
Introducing the proposal, Mexico's delegate explained that it was a first attempt to set out in treaty form principles enunciated in the Declaration of Santo Domingo and that, in essence, there was no difference between the concepts of the EEZ and the patrimonial sea. There was no provision made for the settlement of disputes since "the traditional procedures available under international law could be applied". As for fishing beyond the patrimonial sea, he added, the question was of such a vast dimension that the sponsors had not wanted to advance specific proposals at that stage as there were many possible solutions.

Uruguay submitted her own draft treaty articles proposing a 200-mile territorial sea in which coastal States exercised sovereignty in order to, *inter alia*, "explore, conserve and exploit the natural resources of that sea and to ensure the rational utilization of those resources in order to promote the maximum development of their economy and to raise the level of living of their peoples". At the same time, they were required to accord neighbouring or subregional land-locked States (hereafter 'LLS') preferential treatment over third States with respect to fishing "in that area of their territorial sea which is not reserved exclusively for their nationals". Unlike the Kenyan proposal --

which do not jeopardise adequate conservation of the resources in question".

In contrast to the earlier Kenyan proposal, that of Colombia, Mexico and Venezuela provided that coastal States had not only the right to regulate scientific research in the 200-mile zone but also the duty to promote it (Art 6).

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See Ch 8, n 113 and accompanying text supra.

A/AC.138/SC.II/SR.59, p 151

"Draft treaty articles on the territorial sea" (A/AC. 138/SC.II/L.24), in A/9021, supra n 84, 23-28

Section VII. Other proposals recognizing the right of LLGDS to fishery resources in the 200-mile zone of regional coastal States included that of Ecuador, Panama and Peru (supra n 87); the African States, for developing States only (supra n 86); China (supra n 87); and
but in common with most other 200-mile proposals made in
1973 -- Uruguay made no distinction in the above regard
between developing and developed LLS. 93

None of the 200-mile zone proposals submitted to the
SBC by Latin American, African or Asian States obliged the
coastal State to allow other than its land-locked or other­
wise geographically-disadvantaged neighbours access to the
zone's fishery resources. Nor was the coastal State bound
to negotiate disputes arising with other States concerning
those resources. In sharp contrast, Malta submitted a re­
vised, highly-detailed proposal, 94 constituting probably the
most ambitious attempt to balance fishery interests of the
international community of any submission on the subject ei­
ther to the SBC or to UNCLOS III. 95 While the coastal State
retained the right to reserve to its nationals the exploita­
tion of some or all of the living resources in its 200-mile

Argentina (supra n 87), Article 8 of whose text went so
far as to state that

States in a particular region or subregion which for geographi­
cal or economic reasons do not see fit to extend their sovereign rights
to an exclusive maritime area adjacent to their territorial sea shall en­
joy a preferential regime for purposes of fishing in the exclusive mar­
time areas of other States belonging to the region or subregion, such
regime to be determined by bilateral agreements providing for a fair ad­
justment of their mutual interests.

The said regime shall be granted provided that the enterprises
of the State which wishes to exploit the resources in question are effec­
tively controlled by capital and nationals of that State and that the
ships which operate in the area fly the flag of that State.

93 Cf A/AC.138/SC.II/L.27, supra n 87; China's working
paper (supra n 87); and Argentina's "Draft articles
(supra n 87). The 1973 African proposal (supra n 86)
did, however, maintain the distinction earlier made by
Kenya (see text accompanying n 66 supra).

94 A/AC.138/SC.II/L.28, in A/9021, supra n 84, 35-70. For
the earlier proposal see nn 36-40 and accompanying text
supra.

95 Malta had no significant fishery interests of her own
to protect. Of all Mediterranean countries only Monaco
and Cyprus recorded lower fish catches during the pe­
riod. The very small scale of the Maltese fishing in­
dustry is reflected in the fact that in 1973 her nomi­
nal catch was 1,600 metric tons((1975)40 YFS Table E5).
zone in return for transferring to international ocean space institutions a proportion of the revenues received from that exploitation, both the obligations to be assumed by the coastal State and the rights of the wider international community were substantially expanded. The coastal State was responsible "in the first instance", for example, for formulating and implementing appropriate, non-discriminatory and effective conservation programmes for the zone's living resources, including biological management measures to maintain or increase the resource stock, and economic management measures to maintain fishing effort "at levels providing maximum net returns in relation to potential sustained catch". At the same time, it was obliged to consult with other States and the above institutions before undertaking or permitting any activity in the zone likely to substantially reduce living resources beyond 200 miles, and to cooperate with the institutions in formulating and implementing conservation programmes and with other regional coastal States when regional programmes were required.

Disputes would be settled by an International Maritime Court to be established, and every State would be required to ensure that violation of conservation programmes would be a punishable offence.

The coastal State was also obliged to provide adjacent LLS with access to its zone "on conditions similar to those applicable to its own nationals" and to exploit, or allow the exploitation of the living resources of its zone. Failure to do so would entail legal liability for damages. At the same time, it had the power to inspect foreign fishing vessels operating in its zone and to prosecute persons found

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96 Art 82. According to Malta's proposal, "conservation of living resources" meant "the aggregate of measures rendering possible the optimum sustainable yield from such research" (Art 81(1)), and conservation programmes should be formulated "with a view to securing in the first place a supply of food for human consumption" (Art 81(2)).

97 Art 88(4)
"gravely and intentionally" violating conservation programmes or fishing illegally. Appeals from the courts of the coastal State would lie to the above International Maritime Court.

While the 200-mile limit for coastal State jurisdiction was the most equitable from the standpoint of the international community, posited Malta's representative, most of the proposals before the SBC overemphasized sovereign rights of coastal States and failed, inter alia, to address the basic fact that no coastal State would control the entire stock of fish found under its jurisdiction. As freedom of the seas had led to increasingly serious abuses and "the ruthless destruction of living marine resources by certain fishing fleets", he continued,

The best course was to establish a new regime for the oceans...by introducing the element of international cooperation, emphasizing the need for peaceful settlement of disputes, for impartial and binding international judicial procedures if other peaceful means of settlement failed and, above all, for the creation of comprehensive international institutions for ocean space to hold the balance between the legitimate rights and interests of coastal States and the necessity for increased international cooperation as technology advanced and ocean exploitation intensified.\footnote{99}

2. Other Extended Economic Zone Proposals

The 1973 SBC sessions saw the first appearance of LLGDS submissions relating to fisheries. Three similar proposals were advanced with a view towards recognizing their rights in resources of extended zones of neighbouring States.

Afghanistan, Austria, Belgium, Bolivia, Nepal and Singapore proposed that LLGDS which could not or did not declare a 200-mile zone had the right to explore and exploit all resources in the zones of coastal States "on an equal and non-discriminatory basis".\footnote{100} In the zone, the coastal State

\footnote{99} A/AC.138/SC.II/SR.71, p 18

\footnote{100} Art II(1) of "Draft articles on resource jurisdiction of coastal States beyond the territorial sea" (A/AC.138/SC.II/L.39), in A/9021, supra n 84, 85-86
would be entitled to reserve for itself and those LLGDS that part of the TAC as determined by the relevant international organization corresponding to the harvesting capacity and needs of those States. Subject to payments determined "under equitable conditions" and coastal State regulations, other States would be entitled to exploit the surplus.\footnote{Art II(3)}

As well, developed coastal States would be required to contribute an unspecified portion of revenues derived from exploiting the zone's living resources to an international authority, such contributions being distributed "on the basis of equitable sharing criteria".\footnote{Art II(5). Singapore's representative explained (A/AC.138/SC.II/SR.67, p 15) that the provision relating to contributions was included in the proposal because the new law of the sea should be development-oriented and aimed at improving the economies of developing countries. The Austrian delegate explained (A/AC.138/SC.II/SR.68, p 9) that exceptions would have to be made for countries highly dependent on such resources in terms of employment and national income.}

The proposal had been formulated "[i]n the light of the new principle of equitable sharing of the resources of the sea," explained Singapore's delegate, that principle requiring that account be taken of the interests of LLGDS.\footnote{A/AC.138/SC.II/SR.67, p 13} The latter sought equal rather than special, preferential treatment with coastal States in the exploitation of fishery resources.

According to Jamaica's proposal, nationals of geographically-disadvantaged States (hereafter 'GDS') would have the right to exploit "on a reciprocal and preferential basis" living resources in extended maritime zones of other regional States "for the purpose of fostering the economic development of their fishing industry and satisfying the nutritional needs of the population".\footnote{Art I, "Draft articles on regional facilities for developing geographically disadvantaged coastal States", in A/9021, supra n 84, 110-111. The Jamaican delegate explained...} Her delegate explained...
that geographical and historical accidents had sometimes created a great interdependence between particular States and it would be intolerable if in certain regions situations were created which unduly disturbed traditional habits or economies of countries dependent on those waters for their existence.\textsuperscript{105} In Jamaica's view, such an area should be regarded as a 'matrimonial sea', forming part of the common heritage of mankind and in which living resources would be shared equally by the States concerned.\textsuperscript{106}

Two LLS, Uganda and Zambia, went even further, proposing recognition of 'regional or subregional economic zones' in which fisheries would be reserved for the exclusive use, exploration and exploitation by all States of that region or subregion.\textsuperscript{107} Speaking to the proposal, the Ugandan explained to the Committee (A/AC.138/SC.II/SR. 74, p 10) that

The reciprocal nature of the right set forth in article 1 might be thought surprising in connexion with geographically disadvantaged coastal States, particularly States that were disadvantaged in the sense of article 5(a)(i)\textsuperscript{[see below]}, in other words States whose waters were so impoverished that they would derive no substantial advantage from the extension of their maritime jurisdiction. However, [Jamaica] had wished to stress the idea of reciprocity to make it quite clear that the emphasis was on the right to exploit the resources of the sea and not on the availability of such resources. [Jamaica] felt sure that, since the States in question were developing ones, there would be no objection to such a right being granted on a preferential basis.

"Geographically disadvantaged States" were defined in the proposal (Art 5(a)) as developing States which for geographical, biological or ecological reasons
   (i) derive no substantial advantage from the extension of their maritime jurisdiction; or
   (ii) are adversely affected by the extension of maritime jurisdiction of other States; or
   (iii) have short coastlines and cannot extend uniformly their national jurisdiction.

\textsuperscript{105} A/AC.138/SR.95, p 9
\textsuperscript{106} A/AC.138/SC.II/SR.74, p 9
\textsuperscript{107} "Draft articles on the proposed economic zone"(A/AC.138/SC.II/L.41) in A/9021, supra n 84, 89-91. Odidi Okidi (supra Ch 8, n 148, 64) states that Uganda, Zambia and 11 non-African land-locked countries submitted a propo-
sentative stated that the former attempted to provide equitable treatment for both advantaged and disadvantaged States, and the establishment of 200-mile zones would be fair only if shared equitably by both groups.108

3. Specific Fishery Proposals

Two proposals focussing entirely on fishery matters were submitted to the Committee in 1973.

In the first, Canada, India, Kenya, Madagascar, Senegal and Sri Lanka advanced draft articles109 for incorporation within the EEZ concept recognizing the right of neighbouring developing States' nationals to fish in specified areas of the other's zones "on the basis of long and mutually recognized usage and economic dependence on exploitation of the resources of that area".110 Nationals of a developing LLS would "enjoy the privilege to fish in the neighbouring area" of the 200-mile zone of the adjoining coastal State "on the basis of equality" with the latter's nationals.111 As well,
the special interest of the coastal State in maintaining the productivity of the living resources in high seas areas adjacent to the 200-mile zone would be recognized, and the coastal State would have the right to take appropriate action to protect that interest. It would also enjoy preferential rights to resources of that area and be entitled to reserve for its nationals a portion of the allowable catch of those resources corresponding to its harvesting capacity.112

Regulations governing HMS beyond the 200-mile zone would be made by an international authority. The latter would also settle fishery disputes concerning activities in high seas areas, while disputes concerning activities in the zone would be settled by competent institutions of the coastal State.113

Commenting on the proposal, the Kenyan delegate argued that the special interest of the coastal State in the resources adjacent to its exclusive economic or fishery zone had been recognized in the 1958 Fisheries Convention114 as well as in a number of other SBC submissions. While an international authority would make regulations for HMS beyond national jurisdiction, he added, when they entered the EEZ such species would be subject to the zone's regime.115

Ecuador, Panama and Peru advanced a proposal similar in substance to the above. The coastal State was made specifically responsible for prescribing measures within the zone, "primarily for the purpose of ensuring the conservation and development of its fishing and related industries and the improvement of the nutritional levels of peoples".116

In fact that for LLS reciprocity could obviously not be required.

112 Art 8
113 Art 13
114 See Ch 7, n 244 and accompanying text supra.
reserving the exploitation of the zone's resources to its nationals, the coastal State was required to consider "the need to promote the efficient utilization of such resources, economic stability and maximum social benefits", while in adopting conservation measures it would endeavour to maintain species productivity and avoid harming resources beyond the zone. Regulations governing high seas fishery exploitation would ensure the conservation and rational exploitation of resources as well as "the equitable participation of all States in their exploitation, with due regard to the special needs of the developing countries, including those of the land-locked countries".

The proposal, explained Peru's representative, reflected the need to treat marine fisheries both within and beyond national jurisdiction. The establishment of a 200-mile limit didn't preclude recognition of the interests of the international community, but did enable the coastal State to rationally exploit resources within its zone.

4. The Special Case of Anadromous Species

The debate between Japan and, primarily, the United States regarding anadromous species featured prominently during 1973 SBC discussions. The former reaffirmed her strong opposition to any proposal either prohibiting high seas harvesting of such stocks or reserving for the spawning-river State exclusive rights to their management and exploitation. Japan argued that while anadromous species bred

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116 Art A, "Draft articles on fisheries in national and international zones of ocean space" (A/AC.138/SC.II/ L.54) in A/9021, supra n 84, 107-109. This proposal supplemented and in some cases modified the more general provisions found in their submission on the 200-mile zone made earlier in the session (see n 87 supra).

117 Art B

118 Art H(1)

119 A/AC.138/SC.II/SR.75, pp 14-18

120 See nn 30, 55 and 60 and accompanying text supra for references to anadromous species in their proposals.
and spent their early lives in rivers, much more time was spent in the open oceans where salmon, for example, gained most of its weight. While the coastal State incurred high costs maintaining a fishery, other States should be asked to share expenses rather than being excluded from the fishery. And finally, conservation and management problems of commercially important anadromous species affected only a small number of countries in the northern hemisphere and thus could best be dealt with through regional fishery commissions rather than in a general convention.\textsuperscript{121}

The United States, on the other hand, argued that anadromous species comprehended not only salmon but a number of other important species spread over some 25 countries, including many in southern and southeast Asia. Furthermore, various biological factors made high seas management and exploitation of salmon unsatisfactory.\textsuperscript{122}

Neither Japan nor the United States was prepared to shift its position during the session.

5. The General Debates

There was little substantive change in the basic position of States during the session. On the one hand, major fishing nations continued to argue against 200-mile resource zones while advocating the strengthening of IFOs and praising the virtues of managing living marine resources by species.\textsuperscript{123} Many coastal States, on the other hand, continued

\textsuperscript{121} See statement by the Japanese representative, A/AC.138/SC.II/SR.54, pp 76-77.

\textsuperscript{122} The American position was set out in its working paper "Special considerations regarding the management of anadromous fishes and highly migratory oceanic fishes" (A/AC.138/SC.II/L.20), in A/9021, supra n 84, 11-19

\textsuperscript{123} Typical in the latter regard was the American working paper, A/AC.138/SC.II/L.20 (supra n 122) which began with the observation that

The biological characteristics of fish species are critical in determining how they can most effectively be managed and economically exploited. The technical and economic characteristics of a fishery developed under the influence of the biological nature of the fish in turn are important
to see fishery issues from an entirely different perspective. Peru's delegate, for example, argued that the 'species approach' was

an unacceptable attempt by certain maritime Powers to continue to exploit, for their own benefit, the living resources located not only off their own coasts but off the coasts of other States, to the detriment of countries whose lesser degree of development prevented them from competing with them.124

Criticisms of the various SBC proposals flowed from those two, fundamentally opposing positions. Japan's delegate, for example, judged unacceptable the submission of Canada, India, Kenya, Madagascar, Senegal and Sri Lanka,125 for failing to consider interests of other States; not ensuring maximum resource utilization for the benefit of the wider international community; subordinating the rights and interests of other States "to the will and whim of the coastal State"; and differentiating developing and developed States concerning access to zones and resources.126 "Equity and logic", he argued, "would require that the idea of historic rights and economic dependence should also apply to developed coastal States...".127

In reply, coastal States criticized the unwillingness of major fishing nations to concede more than the 'special interest' or 'preferential rights' of coastal States to lit-

determinants for managing the fishery for conservation purposes and for regulating it for economic objectives.

124 A/AC.138/SC.II/SR.75, p 14. On this same theme, Sullivan (supra n 57, 48) in 1970 warned that many distant-water fisheries do not seem to realize that the dominant position of distant-water fisheries is a thing of the past; that they cannot move in suddenly on a resource on which a small fishery depends and deplete it before moving on to another part of the ocean. The ones who are creating the problems, both in the fisheries and in the Commissions, are the very ones who are forcing the world by their actions toward coastal State preferences or coastal State jurisdiction, and in the long run they are going to suffer most.

125 See nn 109-115 and accompanying text supra.

126 A/AC.138/SC.II/SR.74, p 16

127 Ibid
toral resources, and then under restrictive conditions. The representative of Peru, for example, argued that allowing a coastal State to reserve for itself only that part of the TAC it could harvest "was tantamount to requiring it to renounce the right to develop its own fishing industry or, pending such development, to agree to unrestricted fishing by the big Powers with the danger that its resources might be exhausted".\textsuperscript{128} The recognition of 'historic rights' of the major fishing nations, he added, would result in the coastal State continuing to tolerate "the unfair regime which had been practiced by the more advanced countries, even though it might be directly detrimental to the needs of its own people".\textsuperscript{129}

Assessing the achievements made by the Committee, the Mexican delegate expressed a commonly-held view that despite some concessions having been made on some issues, there had not been throughout the proceedings a genuine willingness by all States to negotiate.\textsuperscript{130} Although there were later misgivings in the UNGA that insufficient progress had been made to justify the Conference being held, it was decided to proceed and all SBC documentation was referred to the Conference for its consideration.\textsuperscript{131}

\textsuperscript{128} A/AC.138/SC.II/SR.75, p 15 (emphasis added)

\textsuperscript{129} Ibid

\textsuperscript{130} A/AC.138/SR.103, p 7; cf, statements by delegates of Canada (A/AC.138/SR.103, p 10); Chile (A/AC.138/SC.II/SR.74, p 2); Tanzania (A/AC.138/SR.101, p 5); and the Soviet Union (ibid 9). Miles (supra n 17, 176, 177-178) states that the Territorialist Group (Latin American States claiming 200-mile territorial seas: Brazil, Peru, Ecuador, Panama and Uruguay) successfully stalled proceedings between 1972 and 1973 as they sought to assure recognition of a 200-mile territorial sea. Major maritime States, on the other hand, attempted to manipulate issues so as to prevent the developing countries from forming a united coalition.

\textsuperscript{131} UNGA Resolution 3067(XXVIII), adopted 117-0-10, on 16 November 1973. In addition to the above proposals, the following anonymous Conference Room Paper (No 22/Add.2, in A/9021, supra n 84, iv, 148) was transmitted to UN-
III. Observations

Although the scope of the present work precludes a detailed analysis of every aspect of the SBC’s fishery discussions, it is possible to offer some general observations on fishery-related proposals advanced as well as on broader aspects of the law-formation process.

A. The Main Problem Areas of the Law

Very few of the proposals before the SBC were comprehensive in their treatment of fishery matters. It is therefore impossible to compare the views of all States or even groups of States on each and every issue. Nevertheless, it is useful to consider briefly positions adopted in terms of

CLOS III without having been officially introduced or discussed by the Committee:

1. Fisheries for catadromous fish shall be conducted only within the fishery [economic] zones of coastal states and subject to the terms, conditions and regulations that they may prescribe.
2. The coastal State in whose waters catadromous fish spend the greater part of their life cycle (hereinafter called the producing State) shall have the responsibility for the management of these stocks and their maintenance at optimum levels; in particular, the producing State shall ensure the ingress and egress of migrating fish. Such State shall have preferential rights in respect of the total harvest of the catadromous stocks concerned.
3. In circumstances where catadromous fish migrate through the fishery [economic] zone of another State or States, whether as juvenile or maturing fish, the management of such fisheries including harvesting shall be regulated by agreement between the producing State and the other State or States concerned, which agreement shall both ensure the maintenance of the stock at their optimum levels, and take into account the preferential rights of the producing State and its responsibility for the maintenance of such stocks.
six main problem areas of the law relating to marine fisheries. \textsuperscript{132}

1. Allocation

SBC proposals contrasted with those made earlier in the ILC and at the first two Law of the Sea Conferences in three important respects concerning the position of the coastal State. For the first time there was general agreement on a 12-mile limit to the territorial sea, and hence, as a minimum, the coastal State's fishery jurisdiction. In addition, reluctance to recognize even preferential rights of coastal States in waters adjacent to the territorial sea had dissipated by the early 1970s with universal acceptance that at least some coastal States had to be accorded augmented rights to littoral fishery resources if general agreement was to be secured on a new law of the sea treaty. \textsuperscript{133} In this respect, emphasis placed on the special position and needs of developing States was particularly significant. And thirdly, the SBC witnessed the first significant proposals advocating allocation of resources not on the basis of zones but rather by species.

Nevertheless, despite early agreement on the breadth of the territorial sea and the need to recognize the special position of the coastal State, there remained a wide gap between the polar positions of the major fishing nations and coastal States heavily dependent on littoral fishery resources for various needs. Between the two were the majority of

\textsuperscript{132} The discussion in this section follows A Koers, "Fishery proposals in the United Nations Seabed Committee: an evaluation" (1974) 5 JMLC 183. The author includes the issue of dispute settlement in the discussions of allocation, conservation, full utilization, economic efficiency and scientific research. For present purposes, however, it has been found useful to consider dispute settlement separately. Koers' article was based primarily on fishery proposals submitted to the Committee in 1971 and 1972 (\textit{ibid} n 2).

\textsuperscript{133} Cf. J Stevenson and B Oxman, "The preparations for the Law of the Sea Conference" (1974) 68 AJIL 1
States, almost all tending to favour a zonal approach to fisheries and increased rights for the coastal State.

On specific allocation issues, such as the weight to be given historic rights, the developing/developed State dichotomy, specific rights to particular species, and the position of LLGDS, differences were similarly significant.

What shifts in positions did occur during the SBC's deliberations were relatively slight and generally served to strengthen the position of the coastal State, although some proposals did incorporate provisions allowing for a better basis of negotiation. At one extreme, preferential rights were conceded not only for developing States but also some small-scale coastal fisheries of developed States. At the other, coastal State proposals moved beyond claims to 200-mile exclusive economic or fishery zones to include preferential rights to living resources in adjacent waters beyond. Between the two, proposals were advanced, particularly in 1973, at least obliquely recognizing that the coastal State was not entirely free to exclude foreign fishing vessels from its 'exclusive' economic or fishery zone.

2. Conservation

As with regard to allocation, national positions concerning conservation differed markedly. The 1958 Fisheries Convention considered conservation largely in terms of measures required to realise a MSY from the fishery in question. That position continued to be supported by certain States on the Committee, particularly those with important distant-water fishery interests. In an important development, however, other States began to argue that while the MSY objective might be acceptable in principle, it had necessarily to be qualified in practice by environmental, economic and even social factors.

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134 See Ch 7, n 95 and accompanying text supra.

135 See, eg, n 63 and accompanying text supra. Their position was buttressed by the conclusions of a 1973 conference of fishery experts, which agreed (Report of the Technical Conference on Fishery Management and Develop-
Similarly, differences arose on the methodological aspects of conservation. Major fishing nations preferred a conservation regime based on the 1958 Fisheries Convention, with measures based on scientific findings and adopted by international agreement of all States concerned. Although they were prepared to concede coastal States a degree of enforcement authority, violations would be dealt with by the flag-State. Coastal States, on the other hand, wanted greater freedom to formulate and enforce conservation measures, with some claiming their right to punish violators, regardless of nationality. Again, between the two positions were other proposals according the coastal State increased authority, with safeguards protecting the interests of other States.

While the above positions were maintained throughout the SBC's deliberations, a consensus did emerge on a number of fundamental principles. It was generally agreed, for example, that coastal States had the duty as well as the right

Fishery management should be considered in a wide context, involving socio-economic goals as well as yield -- in effect, this needs a 'bio-socio-economic' approach. The need for this has been accentuated by the increasing multi-purpose use of the ocean. Indeed, the concept of 'fisheries management' should be broadened to 'ocean management'.

Expanding on the above, the Conference further agreed (ibid 12-13) that

There is a complex of objectives for fishery management....The objectives vary from country to country and within countries in the light of changing circumstances. Allowance has to be made for social as well as economic factors. In various cases the aim may be to produce food as cheaply as possible, to increase earnings of foreign exchange by export, to maintain employment, to stabilise communities, or to keep a way of life.

Countries should weigh the usefulness of the various objectives for their own circumstances, because fisheries development must compete for resources of money and manpower with other sectors of the national economy....

In setting the objectives for management, the need was emphasis for integrated planning and development of the fishery within the national economy.

See also Annex I relating to evolving concepts of fishery management.
to implement conservation measures when required. States also accepted that HMS also needed international management -- at least in areas beyond national jurisdiction. Similarly, there was growing recognition of the intimate relationship between fishery activities in coastal fishery zones and the waters beyond, and the resultant need for co-operation in the formulation and adoption of conservation measures.

3. Full Utilization of Resources

Given the world's critical nutritional problems, "it must be deemed a task of the international law of marine fisheries to assist in bringing about [an] expansion of marine fisheries in order to ensure the full utilization of the sea's living resources" argued Professor Albert Koers in 1974.136 Unlike the subjects of allocation and conservation, however, that of full resource utilization was only incidentally mentioned, and then in the context of obliging coastal States to allow other States access to the surplus of the TAC. As developing coastal States were reluctant to recognize such an obligation -- at least to fishing fleets of developed States -- their proposals referred to the matter much more indirectly, if at all, and generally in terms of their maximizing social benefits to be realised from the resources in question.

4. Economic Efficiency

Although several proposals of both major fishing nations and developing coastal States referred to the need for economic efficiency in the conduct of fishing operations, there was almost no detailed consideration of how this might best be accomplished.

5. Marine Scientific Research

The formulation of solutions to fishery problems, particularly that of conservation, depends on scientific re-

136 Koers, supra n 132, 187
search. However, few proposals made more than passing reference to the subject of scientific research. There nevertheless appeared widespread acceptance of the basic principle that coastal States were responsible for conducting or at least promoting scientific research within their jurisdictional zones. Only a few proposals required the coastal State to grant access to other States or to institutions for the purpose of conducting research.

6. Dispute Settlement

States adopted positions on dispute settlement arrangements largely in line with their positions on the substantive fishery issues. Major maritime Powers favoured arrangements similar to those found in the 1958 Fisheries Convention. Coastal States, on the other hand, preferred that all fishery disputes within their jurisdictional zones be determined by national institutions, although those involving fisheries beyond 200 miles might be settled by some kind of international body. Between the opposing positions was a proposal according the coastal State the right to make the initial determination, with appeal possible to an international court.

B. The Committee and the Development of the Law of Marine Fisheries

Many legal scholars have observed that the primordial theme running throughout the entire history of the law of the sea has been the competition between two basic, opposing but complementary principles: territorial sovereignty and the freedom of the seas.137 O'Connell observes in this regard that

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137 See, eg, Brown, supra Ch 6, n 3, 157; J-P Beurier and P Cadenat, "Le contenu économique des normes juridiques dans le droit de la mer contemporain"(1974) 78 RGDIP 575, 587; and O'Connell, supra Introduction, n 15, 1.
When great powers have been in decline or have been unable to impose their wills upon smaller States, or when an equilibrium has been attained between a multiplicity of States, the emphasis has lain upon the protection and reservation of maritime resources, and consequently upon the assertion of local authority over the sea.  

What was, in fact, observed over the course of the Committee's fishery discussions was a manifestation of just such a general trend in the development of the law of the sea that had been under way since 1945.  

While it could not be said that the major maritime Powers were 'in decline' throughout the period, the modern restraints on the use of force drastically curtailed their ability to impose national marine resource policies on smaller States. But that was only a necessary condition permitting the coastal State movement to gather momentum after UNCLOS II. Consistent with O'Connell's general statement, modern developments in the law of the sea have been primarily influenced by increasingly important economic considerations. The primacy of economic considerations was above

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138 Ibid

139 See generally, G Apollis, L'Emprise maritime de l'Etat côtier (1981); Buzan, supra Ch 6, n 76; and E Gold, "The rise of the coastal State in the law of the sea" in Marine Policy and the Coastal Community (1976; D Johnston, ed) [volume hereafter cited 'Coastal Community'] 13.

140 See in this regard, eg, Anand, supra n 26, 27; R Falk, "Settling ocean fishing conflicts: the limits of 'law reform' in a horizontal legal order" in The Status of Law in International Society (1970) 540, 544; Henkin, supra Ch 6, n 76, 4-5, 6; Quéneudec, supra Ch 8, n 18, 34; and J S Nye ("Ocean rule making from a world politics perspective" (1976) 3 ODILA 29, 45-46), who adds two other factors impacting on the politics of ocean rule-making (ibid 41): that is, the increased role of international organizations in world politics and the decision by the US in the crucial period after WWII when it was the foremost maritime power not to choose a "hegemonial strategy" and only imperfectly attempted such a strategy subsequently. By "hegemonial strategy" Nye means a decision by a State "to use its capability to determine and maintain the essential rules by which relations in the issue area [ie, the oceans] are governed".
all evident with respect to living marine resources, observed Professor Quénéudec in 1973; so much so that, in certain respects, the problems of marine fisheries constituted the "centre de gravité" in the law of the sea.\textsuperscript{142}

The main problems regarding fisheries during the period, of course, concerned the increased threat of overexploitation if effective measures were not taken.\textsuperscript{143} "So long as ocean resources were seen as inexhaustible," notes Barry Buzan, "it did not matter who exploited them. As soon as they became finite, then the question of ownership became paramount...".\textsuperscript{144} Whereas one of the great \emph{leitmotifs} of UNCLOS I was imposition of non-discriminatory conservation measures by the coastal State, the deteriorating fishery situation in the succeeding years meant that the question of allocation had increased dramatically in importance, perhaps even surpassing -- at least among certain States -- that of conservation.\textsuperscript{145}

This was reflected in SBC proposals. Any positive impact on coastal States of proposals by major fishing nations to strengthen IFOs while retaining as much as possible the freedom of fishing principle was critically diminished both by the fact that most coastal States saw the distant-water fishing States as the main cause of the problem of overfish-

\begin{footnotes}
\item[141] See generally, Apollis, \textit{supra} n 139, 129; Beurier and Cadenat, \textit{supra} n 137, 583; Buzan, \textit{supra} Ch 6, n 76, 18; Dupuy and Piquemal, \textit{supra} n 1, 139; and Marffy, \textit{supra} n 2, 115.

\item[142] Quénéudec, \textit{supra} Ch 8, n 18, 15

\item[143] See eg, Ch 8, nn 10-15 and accompanying text \textit{supra}.

\item[144] Buzan, \textit{supra} Ch 6, n 76, 19; cf, Newton, \textit{supra} Ch 1, n 32, 416

\item[145] See in this regard the Mexican representative's statement, A/AC.138/SR.84. Marffy (\textit{supra} n 2, 169; emphasis added) writes that

\begin{quote}
Jusque vers les années 1962 [sic], l'accent portait sur l'idée de conservation qui constituait l'un des grandes thèmes de la Conférence de Genève de 1958; puis, grâce à l'essor rapide des techniques et à l'avènement d'un grand nombre d'États en quête d'une réalité économique propre à l'idée de conservation s'est ajoutée l'idée d'appropriation.
\end{quote}
\end{footnotes}
ing, as well as the inability of the latter States to point to relevant IFOs which had been strengthened in line with the proposals and which had a proven record of effective operation.\textsuperscript{146}

Although Cold War influences had served to defeat any attempt to significantly expand coastal State rights in 1958 and 1960, the situation had changed both quantitatively and qualitatively by the early 1970s. The ascendancy of economic factors as key determinants of national maritime policies won many converts to the coastal State cause, including some which had earlier been firm supporters of narrow fishery limits at the first two law of the sea conferences.\textsuperscript{147} Even more important in terms of numerical support, of course, was the inaugural appearance on the international stage throughout the 1960s and 1970s of a host of newly-independent States, many of which urgently required littoral marine resources for their economic development.\textsuperscript{148}

\textsuperscript{146} Cf Sullivan, supra n 124. As Barbara Johnson observes (supra Ch 8, n 54, 80), IFOs and their mainly distant-water members did make significant adjustments to coastal State demands in the early 1970s. However, she explains,

while the concessions may not have been too little, they certainly were too late. To have been effective, the changes would have had to be made in 1968 or 1969. As it was, concessions in no way altered the position of the coastal states as the opening of the law of the sea conference approached.

For changes within ICNAF, eg, see Ch 8, n 54 and accompanying text supra.

\textsuperscript{147} These included Australia, Canada and New Zealand. See generally, Gold, supra n 139, 29; Queneudec, supra Ch 8, n 18, 91; and Brown (supra n 21, 149) who remarks that the Australian and New Zealand support for the 200-mile limit was significant as neither was noted for "radical thinking" on law of the sea issues.

\textsuperscript{148} See Ch 8, nn 169 and 170 and accompanying text supra. That the new States intended to use their numerical superiority is clear from Christopher Pinto's statement ("Problems of developing States and their effects on decisions on law of the sea" in The Law of the Sea: Needs and Interests of Developing Countries (1972; L
With their increased numbers, the newly-independent States brought to SBC discussions an approach to the law of the sea reflected in only a minority of arguments at UNCLOS I and UNCLOS II; that is, law as an instrument for the transformation of international society and, in particular, for the economic development of its weaker members.\(^{149}\) The focal point of their criticism was the freedom of the seas principle which, it was argued, had been transformed into "a license to overfish" and which, in any case, only benefited States with advanced economic and technological capabilities.\(^{150}\)

In calling for restrictions on the freedom of the seas principle, developing States differed markedly from developed States, particularly major maritime nations, regarding the law-formation process. The latter States, while conceding the need for adaptation of some traditional norms in the light of changing circumstances, emphasized the fundamental merit of extant positive law and the need to formulate modifications thereto by agreement among all States concerned. During the United Nations' consideration of the 1970 SBC Report, for example, the French delegate decried the recent spate of unilateral claims. "Positive law can no doubt be modified", he agreed, "but only through the normal process

\(^{149}\) Alexander, 1972)[hereafter cited 'Needs and Interests'] 3, 5) that

Lacking the economic influence and military might associated with the creators of the previous phase of the law of the sea, developing states in this post-colonial period will tend to rely upon numerical strength, and the various forces and devices that tend to main that strength as an invincible voting weapon at any conference.

\(^{150}\) D Momtaz, "Vers un nouveau régime juridique de pêcheries adjacentes"(1979) 83 RGIDIP 228, 233; cf, Vargas, supra Ch 8, n 113, 162. On this theme generally, see, eg, B Boczek, "Ideology and the law of the sea: the challenge of the New International Economic Order" (1984) 7 BCICLR 1.

Anand, supra n 26, 16; cf, M Ajomo, "Third World expectations" in New Directions, supra Ch 6, n 3, 302, 309; A Aguilar, "The patrimonial sea" in Needs and Interests, supra n 148, 161, 162; and Beurier and Cadenat, supra n 137, 602
of international law, through agreement -- that is, through cooperation".\textsuperscript{151}

Developing States, on the other hand, adopted a contrasting position, one explicitly recognizing their weaker economic situation. If the freedom of fishing principle was being subjected to serious attack commented Guéneudec at the time,

c'est une grande partie parce que l'idée d'égalité des États qui lui sert de fondement n'est plus envisagée sous un angle purement juridique et formel. La prise en compte des inégalités économiques entre les différents États conduit à corriger la stricte application de la notion d'égalité en recourant à un principe d'égalité relative ou à la théorie des inégalités compensatrices.\textsuperscript{152}

This view was reflected in numerous proposals submitted to the SBC, as well as the following statement by Christopher Pinto:

Through tireless struggle within the United Nations and elsewhere, the developing countries have won for themselves the right to review the whole international law of the sea at a 'comprehensive conference' to analyze, question and remodel, destroy if need be, and create a new equitable and rational regime for the world's oceans....

...The interests of the international community will be paramount and decisive only where it is the affluent, industrialized, developed countries that are called upon to make sacrifices. It is a luxury which only they can afford.\textsuperscript{153}

Whatever may have been the conflicting views on, and approaches to, the law of the sea, it is clear that States had national self-interest foremost in mind when submitting their proposals to the SBC. With the exception of the idealistic Maltese proposal,\textsuperscript{154} the various submissions before

\textsuperscript{151} A/C.1/PV.1778, 1 December 1970, p 7 (emphasis added); cf, statements by representatives of the Soviet Union (A/C.1/PV.1777, 30 November 1970, p 8) and the UK (A/C.1/PV. 1775, 27 November 1970, p 5)

\textsuperscript{152} Guéneudec, supra Ch 8, n 18, 19-20. See generally, eg, A Yusuf, "Differential treatment as a dimension of the right to development" in The Right to Development at the International Level. (1980; R-J Dupuy, ed) 233.

\textsuperscript{153} C Pinto, supra n 148, 4-5

\textsuperscript{154} See nn 94ff and accompanying text supra. Oda (Seabed Committee 1968-1973, supra n 2, 273) writes that
the Committee were carefully crafted to accommodate perfectly the fishery and other interests of their sponsors.\textsuperscript{155} They therefore represented not the product of negotiations but rather the initial phase in the law-formation process.\textsuperscript{156} Nevertheless, the SBC discussions did provide in some cases clear indications of the nature of the negotiations yet to unfold as well as factors likely to make the successful conclusion of those negotiations difficult.

It was perhaps most obvious that the question of resource allocation would be the most important of all fishery problems to be discussed at UNCLOS III. At the same time, however, the parochial interests reflected in SBC proposals, as well as broader, diverging approaches to the law of the sea and the future of international society as a whole, meant that agreement would be the product of a difficult, complex bargaining process in which legal niceties had little place.\textsuperscript{157}

The negotiation process was further complicated by the comprehensive nature of the subjects being discussed by the SBC and slated for consideration at UNCLOS III, as well as

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Malta's approach "was probably too idealistic and did not receive the widespread approval of other States".
\end{flushright}

\textsuperscript{155} That it was so is hardly surprising for, as Judge de Lacharriere observes ("La négociation du droit international" (1982) Revue des Sciences Morales et politiques 307, 313), "[l]a négociation du droit international traduit une conception extrêmement réaliste des relations entre le droit et les politiques, dont nul ne doute quelles ne soient fondées sur les intérêts". In no area of international law, perhaps, is this more the case than with respect to the law of the sea. As Professor Laurent Lucchini and Michel Voelckel (Les États et la mer: le nationalisme maritime (1978) 9) point out, "[c]'est...une perspective essentiellement nationaliste que les États adoptent pour régler leurs attitudes et définir des normes nouvelles appelées à régir les mers".

\textsuperscript{156} See in this regard, comments by the Mexican representative to the SBC, A/AC.138/SR.103, pp 7-10

\textsuperscript{157} Koers, supra n 132, 195; cf, Beurier and Cadenat, supra n 137, 597. See also in this regard Ch 7, nn 247-249 and accompanying text supra.
the explicit importance given the concept of the 'package deal' in which one of many key constituents was that of fishery jurisdiction. As a result of the complex nature of the decision-making process, much of the 1971-1973 period allocated to preparations for UNCLOS III was actually taken up in efforts to aggregate interests, build coalitions and define positions rather than in negotiations between major interest groups.

Miles (supra n 17, 174) suggests two reasons why the US initially stressed the concept of 'package deal' (see n 15 and accompanying text supra), as well as the reasons for the latter's support by other States:

First, in 1958 the decision to split up the package into separate conventions allowed states to pick and choose which they would ratify. This had a destabilizing effect on the agreements reached. Since the [US Defense Department] now wished to put an end, once and for all to 'creeping jurisdiction' (see n 26 and accompanying text supra), states would have to buy the whole package in order to get anything. The second was merely the internal reflection of the same perception since undoubtedly the U.S. would be called upon to make concessions which various constituencies would consider unpleasant. The justification for these to the U.S. Senate would have to be in terms of the concessions which had been made elsewhere in the package to primary U.S. interests.

Looking at what happened in 1958, 1960, and afterwards, many delegates from the African group adopted the same position. The Latin Americans not only agreed with this but kept insisting that the entire package should be negotiated simultaneously rather than sequentially. Only in this way, they argued, could developing countries avoid making undue concessions which might render nugatory gains made elsewhere. For all these reasons the Conference was saddled not only with an agenda of enormous scope and complexity but one that had to be negotiated simultaneously.

Domestically, the major maritime States necessarily required time to formulate positions reconciling their multifarious global interests. While smaller States were spared that problem, they nevertheless had to determine their own maritime policies -- in some cases for the first time (cf, Bello, supra n 45, 204-205; Foreign Policy, supra Ch 4, n 26, 250). Of the latter group, the Latin American States, although generally more experienced than the newer States in law of the sea matters and already possessing definite resource policies, were not pressing for early decisions. In their view, premature study of the question of limiting coastal State jurisdiction would jeopardize the slow movement towards general recognition of the 200-mile zone concept (R Pohl, "Latin America's influence and role in the Third United Nations Conference on the Law of the Sea" (1979) 7 ODILA 65, 75; cf, Hjertonnson, su-
Given their numbers, it was obviously essential that any fishery regime had to be acceptable to developing countries. Despite efforts by major fishing States to attract support for the species approach as an alternative to the 200-mile zone, it became clear that an increasing number of States, particularly developing States, preferred the zonal approach.\textsuperscript{160}

That development was the ultimate result of continuous efforts within regional and other groups, particularly that of the developing countries as a whole (the Group of 77 (G77)) to formulate a policy position satisfying their own needs and interests.\textsuperscript{161} As not all coastal States were equally concerned with fishery interests, the progressive melding of fishery jurisdiction claims into a broader claim comprehending all coastal marine resources appears to have been at least partly the result of attempts to gain as much

\textsuperscript{160} The reasons for that preference were essentially two-fold. First, while countries like Canada and Argentina had broad shelves and abundant coastal species over which they would exercise exclusive jurisdiction under the species approach, other States had much narrower shelves and less bountiful stocks (see Johnson, \textit{supra} Ch 8, n 54, 76; and P Ferreira, "The role of African States in the development of the law of the sea at the Third United Nations Conference"(1979) 7 \textit{ODILA} 89, 94-95).

Secondly, HMS, particularly tuna, were more concentrated off developing than developed States, and were often the former's most important marine ichthyological resources. Thus, concludes Johnson (\textit{supra} Ch 8, n 54, 76),

there was every reason for developing country delegates to reject the species approach. Scientists from developed countries quite correctly pointed out that, from a biological standpoint, it was desirable for these stocks to remain under international control and management. Politically, however, this was an unfair distinction, and developing country delegates capitalized on the refusal of scientists from developed states to accept that management and allocation are ultimately inseparable.

\textsuperscript{161} A discussion of the development of specific interest groups is beyond the scope of the present work. See in this regard, \textit{eg}, Miles, \textit{supra} n 17, 161-165, 171-178; and \textit{Foreign Policy}, \textit{supra} Ch 4, n 26, 250-256.
international support as possible for the various individual claims.\textsuperscript{162}

In that light may be considered the special provisions granting LLGDS access to fishery resources. Constituting a sizeable proportion of the States likely to attend the forthcoming Conference, they would have the capacity to block agreement. During SBC discussions they gravitated towards the G77 coalition. But more than that, observes Hollick,

coastal developing countries made conscious efforts to keep the land-locked developing countries in the fold and away from a natural alliance with the maritime powers who were seeking to limit coastal-state jurisdiction. In the heat of the North-South confrontation, the developing LL/GDS were sensitive to accusations of being in the pockets of the developed countries.\textsuperscript{163}

But how long would that sensitivity last? By 1973, proposals had already been submitted for 'matrimonial seas' or regional resource zones that clearly revealed growing dissatisfaction with suggested fishery access arrangements.

All in all, the SBC deliberations revealed a wide range of positions on the law of the sea and how it should be modified to meet the realities of the modern fishery. Major maritime nations differed from coastal States. Coastal States differed from LLGDS and amongst themselves. Cutting across the various interests was the North-South debate. No wonder, then, that Ambassador John Stevenson and Professor Bernard Oxman concluded in 1974 that "the complexity of the fisheries problem is probably without parallel in the law of the sea negotiations".\textsuperscript{164}

\textsuperscript{162} Cf Ferreira, supra n 160, 104

\textsuperscript{163} Foreign Policy, supra Ch 4, n 26, 251

\textsuperscript{164} Stevenson and Oxman, supra n 133, 19
IV. Conclusion

Having spent seven years debating the law of the sea, including three considering multifarious aspects relating to fisheries, the SBC had set the stage for UNCLOS III. Transmitted to the Conference were the complete records of the Committee, including all proposals concerning fisheries. It was up to the Conference to carry the negotiation process to its conclusion, and it is to that task we now turn our attention.
CHAPTER ELEVEN

THE THIRD UNITED NATIONS CONFERENCE
ON THE LAW OF THE SEA

The efforts to reconcile the demands of the developed with those of the developing countries, and individual or group interests with those of the community, will take all the statesmanship of which our representatives are capable. Nothing will be achieved by treating the developing countries as incompetent, feckless eternal mendicants; as little will be achieved by treating the developed countries as power-hungry imperialists whose every action must arouse suspicion [sic]. For let us make no mistake, the one group can no longer ignore the other, and it will take both to make the system -- any system -- work. It is only through goodwill and patience on both sides and a genuine understanding of each others problems that we can hope to succeed.

Christopher Pinto¹

I. Introduction

The final report of the SBC² was considered by the UNGA in 1973. Although it was felt in some quarters that the Committee had not completed its task and should continue, the vast majority of States considered that preparations had gone as far as possible and serious negotiations should begin within the broader framework of a plenipotentiary conference. Accordingly, the General Assembly on 16 November formally decided to convene UNCLOS III the following month, its mandate being

...to adopt a convention dealing with all matters relating to the law of the sea, taking into account...the list of subjects and issues...formally approved...by the [SBC] and bearing in mind that the problems of ocean space are closely related and need to be considered as a whole.³

As an understanding of the UNCLOS III results with respect to fisheries demands an appreciation of the history of the negotiations over the life of the Conference, the following discussion will focus on the main fishery-related issues as they developed and were ultimately negotiated, at

¹ Pinto, supra Ch 10, n 148, 13
² A/9021, supra Ch 10, n 84
³ UNGA Resolution 3067(XXVIII), adopted 117-0-10; reproduced in (1973) 27 YUN 43-44
the same time placing those negotiations within the broader context of Conference activities as a whole. Observations will then be offered on the resultant treaty provisions, their parameters, context and implications for State practice and the development of positive international law concerning living marine resources.

II. Conference Proceedings

A. The First Session (1973)

The first of what were ultimately 11 sessions (see Table 5) was held in 1973 to deal with organizational matters. Besides Plenary and Drafting Committees, three main Committees were established to deal with substantive issues: the first (C.I) was primarily concerned with the deep seabed; the second (C.II), with a host of traditional law of the sea issues, including fisheries; and the third (C.III),
<table>
<thead>
<tr>
<th>Session</th>
<th>Part</th>
<th>Place</th>
<th>Dates</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td></td>
<td>New York</td>
<td>3 August - 17 September 1976</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>New York</td>
<td>23 May - 15 July 1977</td>
<td></td>
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</tbody>
</table>

**Signing Session:** Montego Bay Jamaica 6 - 10 December 1982
with preservation of the marine environment, scientific re-
search, and the development and transfer of technology.

B. The Second Session (1974)

It was not until the second session was underway that the Rules of Procedure were finally adopted. It was agreed that the Conference "should make every effort to reach agreement on substantive matters by way of consensus; [and] that there should be no voting on such matters until all ef-
forts at consensus have been exhausted". If voting was re-

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See generally: A/Conf.62/L.8/Rev.1, supra n 5, 96-99; J-P Beurier and P Cadenat, "Les résultats de la confé-
port on the Caracas of the UN Law of the Sea Confer-
cence" in 56th ILA Conference Report (1974) 389; K Knoke, "Law of the Sea Conference -- Caracas session" (1974) 25 Aussenpolitik 418; Rigaldies, supra n 5; 56-
80; J Stevenson and B Oxman, "The Third United Nations Conference on the Law of the Sea: the 1974 Caracas ses-

The text cited is the nexus of the so-called 'Gentle-
man's Agreement' (UN doc A/PV.2169, 16 November 1973, p 2) approved by the UNGA, and subsequently endorsed by the Conference on 27 June 1974 (UNCLOS:OR 1, 52). The concept of the 'Gentleman's Agreement' appears to have originated in an intervention before the UNGA of Ambassador Amerasinghe of Sri Lanka, the Chairman of the SBC. He expressed the view that the consensus ap-
proach followed by the Committee not be followed by the Conference, otherwise no agreement would be reached on a single text. He favoured the standard United Nations voting practice -- a two-thirds majority in plenary and a simple majority at the committee stage -- provided that it was understood that voting would only take place as a last resort. The rules would stand as the official text, black-letter law; the understanding or gentleman's agreement would operate on a political level to provide the basis on which States would agree to negotiate with one another. According to Amerasing-
he, the Gentleman's Agreement was "much more binding
quired, decisions on all matters of substance would be taken by a two-thirds majority of the representatives present and voting, provided that a majority must include a majority of States participating at that session.

With agreement on procedural rules finally achieved, the Conference began hearing general national statements and work commenced in the three main Committees.

than rules or laws, because rules or laws are not always gentlemanly"(A/C.1/PV.1928, at 51).

Daniel Vignes ("Will the Third United Nations Conference on the Law of the Sea work according to the consensus rule?"(1975) 69 AJIL 119, 124) writes that consensus does "not imply unanimity, but a very considerable convergence of opinions and the absence of any delegations in strong disagreement, however few in number".

Rule 39(1) in A/Conf.62/30/Rev.3. The question of voting was highly controversial. The major maritime Powers, in the minority at the Conference, did not want to be forced into voting on proposals against their interest and without serious negotiations having taken place to reach a compromise (see, eg, statements by the delegates of the Soviet Union (UNCLOS:OR i, 16) and the US (ibid 23)). Developing States, on the other hand, were unwilling to surrender their principal weapon, numerical superiority, in the negotiation process (see, eg, Ch 8, n 148 supra). Rule 39(1) was proposed as a compromise by Australia (A/Conf.62/9).

Commenting on the arrangement, Miles (supra Ch 10, n 17, 183) states that

The biggest surprise of this phase of the Conference certainly was the degree of success achieved by the US, the USSR, Japan and the EEC countries in changing the traditional Rules of Procedure. [At the first session], the hard line adopted by the Group of 77 amply demonstrated that its members knew their greatest and only strength lay in the size of their coalition and the stand taken by developed countries called for them to nullify much of this capability. On the other hand, the developed countries had recourse to a threat whose credibility was not in question: that they would refuse to sign a Convention about which they had serious reservations even if it was approved by a two-thirds majority of states present and voting. This, they pointed out, would be a Pyrrhic victory for the Group of 77.

1. General Statements in Plenary

As in the SBC deliberations, the common leitmotif of introductory Plenary statements was the urgent need to reach agreement on a new law of the sea; one responding to contemporary problems and reflecting modern realities. For both developed and developing States alike, the key to the negotiation of what the British described as "an effective convention which commanded such wide acceptance that it would be ratified quickly, if possible by every participating nation", was the 'package deal'. Often mentioned during SBC proceedings, two of the central components of the package were "all but formally agreed" at Caracas: a 12-mile territorial sea and a 200-mile economic zone.

Whereas a number of States, particularly the major maritime Powers, had opposed the concept of the economic zone in earlier discussions, only Japan and a handful of other

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7 UNCLOS:OR i, 111

10 See, eg, Ch 10, nn 14, 15, 21, 28 and 33 supra.

11 Stevenson and Oxman, supra n 6, 2. Professor Parzival Copes ("The impact of UNCLOS III on management of world fisheries"(1981) 5 Marine Policy 217, 220) observes in this regard that

The need for an authoritative regime for ocean fisheries was clear. The choice evidently lay between the creation of an international authority with mandatory powers over all potential fishery participants and the extension of the authority of coastal states over adjacent fish stocks. The former choice had considerable moral appeal and a potential for global efficiency. But it was widely considered to be unattainable, given the demonstrated unwillingness of sovereign states to submit to international authority and the related inability of international organizations to acquire effective enforcement powers. By the time UNCLOS III convened, relentless logic had led to the conclusion that the second-best solution of extended national jurisdiction would inevitably prevail. It remained only to determine the parameters of enlarged coastal-state powers over fisheries that would be acceptable internationally.

States continued their opposition during the Caracas session,\(^{13}\) repeating arguments earlier advanced before the SBC.\(^{14}\)

Reflecting the general view of other maritime nations, however, the American delegate indicated that the United States was prepared to accept

general agreement on a 12-mile outer limit for the territorial sea and a 200-mile outer limit for the economic zone, provided that that was part of an acceptable comprehensive package, including a satisfactory regime within and beyond the economic zone, and providing for unimpeded transit of straits used for international navigation.\(^{15}\)

While developing States also endorsed the package deal concept, the latter was viewed from a much different per-

\(^{12}\) See, eg, Ch 10, nn 19-31 and accompanying text supra.

\(^{13}\) Stevenson and Oxman (supra n 6, 26) state that "[o]ver 100 countries spoke in support of an economic zone extending to a limit of 200 nautical miles as part of an overall treaty settlement". Ouchi (supra Ch 10, n 22, 116) comments that during the session "[n]early 73% of the total number of independent states of the world supported the 200-mi [sic] principle, while only eight countries opposed it". Those countries were Belgium, Bhutan, Botswana, Italy, Japan, Luxembourg, Mali and Swaziland (ibid 133, n 21). Miles (supra Ch 10, n 17, 77-78) states that of the 120 positions indicated by 110 delegations at Caracas, 73 (61%) supported a comprehensive 200-mile economic zone, while 41 (34%) adopted positions which either erode or clearly oppose the concept of the economic zone.

Haruhiro Fukui ("How Japan handled UNCLOS issues: does Japan have an ocean policy?" in Japan and the New Ocean Regime (1984; R Friedheim et al., eds) 21, 46) observes that as far as the Japanese Ministry of Foreign Affairs was concerned, "the eventual adoption of a 200-mile exclusive zone by Japan and other nations of the world was a foregone conclusion by the spring of 1973, if not earlier". During 1974 and 1975 UNCLOS sessions, however, Japan continued its official opposition to the concept for domestic reasons.

\(^{14}\) See, eg, Ch 10, nn 21 and 23 and accompanying text supra.

\(^{15}\) UNCLOS:OR i, 160 (emphasis added); cf, eg, statements by British (ibid 112) and Soviet (ibid 69) delegates
spective. As the Pakistani representative explained, for example, his country "would accept, as a general rule, a breadth of 12 nautical miles for the territorial sea, subject to acceptance of an economic zone extending to 200 nautical miles...".  

Acceptance of the 200-mile economic zone concept was one thing; agreement on its precise juridical content, another one entirely. Whereas UNCLOS III debates and policy differences on such broad issues as those of decision-making and the overall approach to the revision of the law of the sea can be largely understood in North-South terms, the basic conflict between developing and developed countries latter proves insufficient to explain the attitudes adopted by States to the multifarious particular components of the law of the sea regime. Although traditional UN and other multilateral negotiating groups such as G77 were active at the Conference and displayed a unity of purpose on some issues such as the above, disparate national interests and priorities of the individual members reduced their effectiveness on others. As a consequence, special interest groups unique to the Conference formed to promote the shared positions of their respective members. Those groups were

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16 Ibid 146 (emphasis added); cf, statements by delegates of Barbados (ibid 63) and Western Samoa (ibid 84). Not only developing States adopted such a position. See, eg, statements by the delegates of Australia (ibid 87) and Iceland (ibid 123).

Not all States accepted the need for a 'package deal' approach to negotiations, however. China's representative, eg, "was firmly opposed to any attempts to bargain over a solution to the question of the exclusive economic zone" and stated that "no attempt to 'make a deal' at the expense of the sovereignty of other States could be tolerated" (ibid 183).

17 See, eg, B Buzan, "'United we stand...': informal negotiating groups at UNCLOS III" (1980) 4 Marine Policy 183; Koh and Jayakumar, supra n 4, 42-44, 68-69; Lévy, supra n 4, 76-77; and Miles, supra Ch 10, n 17, 161-166. For a general discussion of the multifarious factors giving rise to interest groups see, eg, M Bennouna, "Le caractère pluridimensionnel du nouveau droit de la mer" in Traité, supra n 4, 6-25.
particularly active in C.II where, for example, during Plenary sessions there were no less than 12 different positions taken at Caracas on coastal State rights in the 200-mile economic zone. Comments on fisheries also revealed varying views on substantive legal issues, views that became more explicit as attention turned to the main Committees.

2. Committee Deliberations

a) The Second Committee

The stated objective of initial discussions in C.II was to identify from the plethora of proposals "the main trends and to express these trends in generally acceptable formulae, in other words, to 'put the item on ice', without taking decisions, and to pass on to the following item" on the list.\textsuperscript{16}

\textsuperscript{16} E Miles, "An interpretation of the Caracas proceedings" in \textit{Law of the Sea: Caracas and Beyond} (1975; F Christy et al, ed) [volume hereafter cited 'Caracas and Beyond'] 39, 78

\textsuperscript{19} Statement by the C.II Chairman, Mr Andres Aguilar, at the first meeting (\textit{UNCLOS:OR} ii, 95). At the same time, however, private discussions were also held between delegations, during which they attempted to ascertain the flexibility of the other's negotiating position and, where positions coincided, produce negotiating texts on substantive issues. Miles (supra Ch 10, n 17, 185) observes that these discussions were of great importance

not because interests were immediately aggregated and compromises made but because it contributed to greater clarity and understanding of the respective positions adopted. Moreover, it provided delegations with better information on how far each would have to go in arriving at compromises ultimately and, in certain cases it provided the opportunity for delegations to offer glimpses of their minimal acceptable conditions on the issues regarded as being most vital.

Jean-Pierre Lévy ("Vers un nouveau droit de la mer: la politisation du processus de création juridiques"(1975) 79 \textit{RGDIP} 897, 906-907) divides the Caracas session into four phases. The first was devoted to procedural issues; the second, with general statements in plenary. The third phase, lasting just over two
Much of the Committee's fishery-related discussions focused on coastal State rights within the 200-mile economic zone. Three broad approaches were adopted. A number of both developed and developing States, especially those with distant-water fishing interests would have recognized the right of the coastal State to reserve for its nationals that part of the TAC they were capable of harvesting. At the same time, other States would have the right to harvest the remainder under reasonable conditions negotiated with the coastal State. In support of the latter right, several delegations cited the just-rendered ICJ's *Fisheries Jurisdiction* Judgments.

weeks, was characterized by 'blockage' in which delegates,

ayant précisé leurs positions premières de négociation, attendaient des autres, quels qu'ils fussent, qu'ils fassent le premier pas dans l'ordre des concessions. Au cours de cette phase, on a vu se multiplier les réunions de groupes et de sous-groupes tentant de s'entendre sur des documents de travail à soumettre aux 'Parties adverses'.

The 'blockage' generated a sense of frustration and in turn gave birth to the fourth phase, one of 'pre-negotiation' in which the beginnings of a dialogue began.


The FRG's delegate, for example, accepted (*UNCLOS:OR ii, 192*) that coastal States, in particular developing States, should have preferential rights regarding the exploitation of the resources off their coasts, but such rights must be reconciled with the rights of other States, in particular of those which have habitually fished in those fishing grounds.

*Cf, eg, comments by delegates of Belgium (ibid 206), Japan (ibid 217) and Thailand (ibid 193).*

See Ch 9 *supra*. See, *eg, comments of representatives of the German Democratic Republic(GDR)(*UNCLOS:OR ii, 173*), Israel (ibid 178) and Japan (ibid 218).*
Three major proposals embodied the essential elements of the above position (see Table 6(a)). Besides providing for preferential rights for the coastal State, each would have strengthened the role of IFOs and ranked other States in order of priority for access to that part of the TAC not harvested by the coastal State. In each case highest priority would have gone to States which had traditionally fished in the area. The proposals were thus 'preferential' in not one, but two, respects.

Numerous coastal States were absolutely opposed to the fundamental concept of preferential fishing rights. Expressing the sentiments of many, the representative of Barbados, for example, rejected the view of "neo-traditionalists" who, while paying lip-service to the EEZ concept, were intent on protecting the interests of traditional distant-water fishing States "which had enjoyed and sometimes abused the freedom of fishing in a region with which they had no geographical or economic connexion".  

Ecuador's representative was critical of American attempts to distinguish between coastal species and HMS. While the latter when beyond the 200-mile economic zone should come under the jurisdiction of an international authority, he conceded,

The fish in the zone were under the indisputable sovereignty of the coastal State and while international cooperation was necessary -- and indeed it was necessary for the conservation and development of species and their utilization first for the benefit of coastal States and then of third States in conformity with coastal State regulations - - it should not take precedence over or supersede sovereign rights.  

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23 Ibid 177; cf, statements by the delegates of Burma (ibid 224); Nigeria (ibid 232); and Tunisia (ibid 231), who described the concept of preferential fishing rights as "outmoded" and the proposal of West European States (A/Conf.62/C.2/L.40) as "smacking of neo-colonialism".

24 UNCLOS:OR ii, 299; cf, statement by the President of Mexico (ibid i, 196) who argued that

The coastal State exercised sovereign rights over all the living resources of the patrimonial sea, including any migratory species of fish that were found in that area. However, because of the special conditions on such fishing, regional agreements would be needed to regulate fishing for
### TABLE 6: UNCLOS III FISHERY PROPOSALS (CARACAS)

<table>
<thead>
<tr>
<th>Details</th>
<th>East European States (6)</th>
<th>E.E.C. States (8)</th>
<th>U.S.A.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proposal (1)</td>
<td>Description of Fishing Rights of coastal States (CSs) (2)</td>
<td>&quot;sovereign rights&quot; for the purposes of the &quot;preservation, exploration, and exploitation&quot; of the living resources</td>
<td>&quot;fishing rights&quot; as defined in the articles</td>
</tr>
<tr>
<td>Management Aspects</td>
<td>Goal (3)</td>
<td>max. allowable catch, considering economic and environmental factors; increasing food production</td>
<td>MSY, considering technical and economic factors; food for human consumption</td>
</tr>
<tr>
<td></td>
<td>Rule of International Fishery Organizations (IFOs) (4)</td>
<td>make recommendations for total allowable catches (TACs), the proportion to be allocated the CS, exploitation and conservation measures; establish rules for the conservation, exploitation and exploitation of living marine resources in the zone; CSs to act in accordance with those rules and recommendations</td>
<td>to consider TACs set by CSs and possibly reconvene States; set TACs on request of CSs concerned; determine procedures for applying conservation/management measures and basic principles of such measures; monitor fishery regulations in zone at request of CS</td>
</tr>
<tr>
<td></td>
<td>Formation and Membership of IFOs (5)</td>
<td>regional States and those States fishing in region</td>
<td>formation obligatory, either for region or species; CSs and fishing States shall become members</td>
</tr>
<tr>
<td></td>
<td>Highly Migratory Species (HMS); Anadromous (Ana.)/Catadromous (Cat.) Species (6)</td>
<td>CS of origin has sovereign rights over Ana. species inside zone and preferential rights beyond</td>
<td>IPOs to be established for tuna etc; functions as per other species (see column (4))</td>
</tr>
<tr>
<td></td>
<td>Enforcement (7)</td>
<td>CS</td>
<td>CS, unless flag State has established procedures</td>
</tr>
<tr>
<td>Allocation Aspects</td>
<td>Sharing Part of TAC not taken by the CS (8)</td>
<td>sharing mandatory; different conditions to apply regarding access to zone of a developing State; TACs to be set and proportion to be allocated in accordance with internationally agreed rules and recommendations of competent IPO; questions regarding license payments to be settled in accordance with, inter alia, recommendations of IFOs</td>
<td>sharing mandatory; CS to advise IPO of its proposed TAC in advance and other States may invoke dispute settlement provisions (see column (12))</td>
</tr>
<tr>
<td></td>
<td>Priorities among non-nationals (9)</td>
<td>1. traditional fishing States 2. developing States, LL/GDS, and States with few resources in own zones 3. all other States Neighbouring, developing States may allow each other access to their zones on basis of long, recognized usage</td>
<td>1. traditional fishing States 2. regional developing States which allow access to fish in their own zones 3. States with fishery-dependent economies 4. regional States with few resources in their own zones 5. LL/GDS Special allowance to be made where CS is developing or has fishery-dependent economy</td>
</tr>
<tr>
<td></td>
<td>Rights of LL/GDS (10)</td>
<td>Developing LL/GDS would have 'privilege' of fishing in zones of neighbouring CSs on basis of equality</td>
<td>not specified, apart from column (9)</td>
</tr>
<tr>
<td></td>
<td>HMS; Ana./Cat. species (11)</td>
<td>foreign States may fish for Ana. species with agreement of CS of origin; priority given to those former States contributing to resource development and those having traditionally fished for resource in question</td>
<td>not distinguished from other species</td>
</tr>
<tr>
<td>Scientific Research (12)</td>
<td>conducted with CS consent</td>
<td>IPOs shall coordinate national research programmes; States obliged compile and make data available</td>
<td>States obliged to contribute and exchange information</td>
</tr>
<tr>
<td>Dispute Settlement (13)</td>
<td>not stated</td>
<td>compulsory, specific provisions for fisheries disputes</td>
<td>compulsory; arrangements as provided generally in Convention</td>
</tr>
<tr>
<td>Details</td>
<td><strong>Nigeria</strong></td>
<td><strong>African States (18)</strong></td>
<td><strong>LL/GDS (22)</strong></td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>(1)</td>
<td>L.21</td>
<td>L.82</td>
<td>L.39</td>
</tr>
<tr>
<td>(2)</td>
<td>&quot;exclusive right to explore and exploit the renewable living resources&quot; of the zone and for their &quot;management, protection and conservation&quot;</td>
<td>&quot;sovereignty&quot; over living resources, and &quot;sovereign rights for the purpose of regulation, control, exploration, exploitation, protection and preservation&quot; of living resources of the zone</td>
<td>&quot;right to establish&quot; a zone for the purpose of &quot;exploring and exploiting&quot; the fishery resources &quot;subject to the provisions of [the] articles&quot;</td>
</tr>
<tr>
<td>(3)</td>
<td>not stated</td>
<td>not stated</td>
<td>not stated</td>
</tr>
<tr>
<td>(4)</td>
<td>IPOs may make recommendations concerning management, protection and conservation of fishery resources</td>
<td>&quot;regional or subregional arrangements&quot; may be established for developing and managing living resources</td>
<td>regional or subregional coastal and LL/GDS may make &quot;appropriate arrangements&quot; for &quot;facilitating the orderly development and rational exploitation&quot; of the fish resources of particular zones</td>
</tr>
<tr>
<td>(5)</td>
<td>not stated</td>
<td>States in a region</td>
<td>Coastal States and LL/GDS of a region or subregion</td>
</tr>
<tr>
<td>(6)</td>
<td>not stated</td>
<td>not stated</td>
<td>not stated</td>
</tr>
<tr>
<td>(7)</td>
<td>Coastal State, taking into account recommendations of appropriate IPOs</td>
<td>Coastal State</td>
<td>States concerned may decide upon appropriate arrangements to regulate the exploitation of the resources of the zone</td>
</tr>
<tr>
<td>(8)</td>
<td>All States may exploit an agreed level of fishery resources of the zone subject to appropriate bilateral or regional arrangements or agreements</td>
<td>not stated</td>
<td>not stated</td>
</tr>
<tr>
<td>(9)</td>
<td>not stated</td>
<td>not stated</td>
<td>not stated</td>
</tr>
<tr>
<td>(10)</td>
<td>LL/GDS shall have right to explore and exploit fishery resources in zones of neighbouring coastal States subject to appropriate bilateral or regional arrangements or agreements</td>
<td>developing LL/GDS have right to exploit fishing resources in zones of neighbouring States on basis of equality and subject to bilateral, subregional or regional arrangements, and have obligations corresponding to those of the coastal State</td>
<td>LL/GDS have right to participate in the exploration and exploitation of neighbouring coastal States' zones living resources &quot;on an equal and non-discriminatory basis&quot;</td>
</tr>
<tr>
<td>(11)</td>
<td>not stated</td>
<td>not stated</td>
<td>not stated</td>
</tr>
<tr>
<td>(12)</td>
<td>coastal States have exclusive jurisdiction for purpose of control, authorisation and regulation of scientific research generally</td>
<td>coastal State has exclusive jurisdiction for the purpose of controlling, authorising and regulating scientific research</td>
<td>not stated</td>
</tr>
<tr>
<td>(13)</td>
<td>not stated</td>
<td>States of a region or sub-region may establish arrangements</td>
<td>as provided for generally in the Convention</td>
</tr>
</tbody>
</table>
It was also argued that the concepts of preferential fishing rights and the EFZ constituted two successive stages in the development of the law of the sea, and that the ICJ in its *Fisheries Jurisdiction* Judgments was particularly anxious not to anticipate the conclusions of the Conference.25

Rather than preferential rights, numerous States advocated maximum coastal State rights over fisheries, with little, if any, obligation to allow access to that part of the TAC not harvested by coastal State nationals.26 Two African EEZ proposals were introduced strengthening the coastal State position concerning marine resources generally, while paying far less attention to fishery issues *per se*, including the role of IFOs, the general rights of other States to resources in the zone, and questions of enforcement (see Table 6(b)).27 This may be largely explained by the fact

pelagic species and the distribution of catches throughout the region on an equitable basis among the parties to such agreements.

25 See statement by Icelandic delegate (*ibid* ii, 228, 229) and Ch 9, n 55 and accompanying text *supra*.

26 Guyana’s representative, for example, "categorically rejected" an automatic right of other States to any living marine resources within the 200-mile zone (*UN-CLOS:OR* ii, 208). Cf, statements by delegates of Argentina (*ibid* 196); China (*ibid* 187); and Tanzania (*ibid* 183), who stated that

It had been said that the requirement of full utilization stemmed from the desire to prevent wastage of resources, but [Tanzania] could not accept the implication that developing countries intended to waste resources in the exclusive economic zone. Nor did they intend to hoard their resources, which was just as much of a crime. All they wanted was fair distribution and rational utilization of the living resources of the sea to satisfy the needs of mankind rather than to swell the pockets of a few. It had also been said repeatedly that fish could not be managed by boundaries. The 200-mile boundary would, however, not apply to the fish ...but to the fishermen.

Johnson (*supra* n 20, 294) observes that developing and other coastal States opposed the requirement to allow access as they fear that they would not be able to harvest themselves the optimum yield and so the existing system would be maintained.
that States espousing the latter position generally took the view that their resource rights in the zone must be essentially the same as in the territorial sea. For that reason, detailed fishery provisions were unnecessary.\footnote{For detailed reviews of the contribution of African States at UNCLOS III see Ferreira, supra Ch 10, n 160, and Rembe, supra Ch 8, n 149.}

While the above two sets of proposals in effect served to delimit the overall parameters within which fishery-related negotiations would subsequently unfold, C.II also witnessed several other important and related developments. First, a number of both developing and developed coastal States indicated a willingness to compromise on the key issues of exploitation and conservation of fishery resources in 200-mile zones.\footnote{Cf, Johnson, supra n 20, 292-293. See, eg, statement by Peru's delegate (UNCLOS:OR ii, 230) and text accompanying n 24 supra. There was virtually no mention of fishery issues in territorial sea discussions.}

A second development, and one increasing in significance since SBC deliberations, was the growth in size and cohesiveness of the LLGDS Group.\footnote{The Sri Lankan delegate, eg, while insisting that the coastal State should have "sovereign", not "preferential" rights over fishery resources in the zone as well as the "exclusive right" to make regulations ensuring the conservation, management and exploitation of the resources over which it had "sole proprietary rights" (ibid 186), at the same time observed that recognition of such rights did not preclude the possibility of neighbouring coastal States co-ordinating their systems for the above purposes, particularly with respect to HMS. Nor was the exclusiveness of the zone "incompatible with the possibility that the coastal State might allow other States to exploit the zone in order to ensure optimum utilization of its resources for the benefit of the international community as a whole"(ibid). Cf statements by delegates of Australia (ibid 204-205), Iceland (ibid 189), Nigeria (ibid 172) and Norway (ibid 232).}

Concerned with the im-

\footnote{Formed in 1971 during the SBC deliberations, its ranks swelled from an original 5 members (Afghanistan, Austria, Nepal, Singapore and Zambia) to some 55 States at UNCLOS III (see Koh and Jayakumar, supra n 4, 72-73). For a general discussion of the growth of the LLGDS in}
plications of the Conference endorsing the 200-mile economic zone concept, a number of LLGDS openly declared that while they were sympathetic to claims by coastal States for 200-mile zones, their *de jure* recognition of such claims was contingent upon simultaneous recognition of LLGDS rights in those zones.31 A proposal from 22 LLGDS submitted during the session (see Table 6(c)) would have recognized their right "to participate in the exploration and exploitation of the living resources of the...zone of neighbouring coastal States on an equal and non-discriminatory basis".32

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31 See, e.g., statements by representatives of Jamaica (UNCLOS:OR ii, 218), Laos (ibid 180) and Upper Volta (ibid 174). Writing in 1978, Professor Shamugam Jayakumar ("The issue of the rights of landlocked and geographically disadvantaged States in the living resources of the economic zone" (1978-1979) 18 VJIL 69, 72) explained that the establishment of EEZs by all coastal States would have the effect of converting large areas of existing high seas into national zones and reducing areas which LLGDS were entitled to exploit under existing international law. This could be mitigated, he observed, "by allowing the LL/GDS to participate in the exploitation of the living resources of the EEZ's of neighbouring countries". See also in this regard, e.g., T Franck, M El Barader and G Aron, "The new poor: land-locked, shelf-locked and other geographically disadvantaged States" (1974) 7 NYUJILP 33; and statements by delegates of Afghanistan (UNCLOS:OR i, 134), Hungary (ibid 142-143), Paraguay (ibid 161), Trinidad and Tobago (ibid 71) and Zambia (ibid 131).

32 Art 2, A/Conf.62/C.2/L.39, in UNCLOS:OR iii, 216-217; sponsored by Afghanistan, Austria, Belgium, Bhutan, Bolivia, Botswana, Finland, Iraq, Laos, Lesotho, Luxembourg, Mali, Nepal, Netherlands, Paraguay, Singapore, Swaziland, Sweden, Switzerland, Uganda, Upper Volta and Zambia. According to the sponsors, "neighbouring coastal States" referred to both States adjacent to each other and those "of a region situated within reasonable proximity" to a LLGDS (ibid 216, n 16). This was the first proposal submitted by LLGDS as a single group, although some had been submitted by smaller groups of...
Whether they actually accepted the justice of the LLGDS position or simply sought to garner the latter's support for their own particular proposals, or both, there was a generally professed willingness among other States to accommodate the interests, if not to recognize de jure rights, of the LLGDS. Even those most anxious to promote maximum coastal State rights in the economic zone were prepared to make an exception in the case of at least some LLGDS. Whether accommodation should involve equal or merely preferential rights, or be restricted only to developing LLGDS continued to be matters of dispute.

\[\text{LLGDS to the SBC (see Ch 10, n 100 and accompanying text supra).}\]

\[\text{Miles (supra n 30, 153) observes that} \]

As a group [the LLGDS] had only two basic strategies to play: (a) to seek at all times to control a blocking third of votes; and (b) to press at all times for the establishment of strong international control over the exploitation of marine resources and the distribution of income. This is expressed in phrases like the 'common heritage of mankind' and 'benefits for all regardless of geographical location'. On some issues the coalition could actually increase its size, since the interest of the Group relative to increasing the scope of international organizations occasionally coincided with the interests of the superpowers, Japan and the EECD, seeking to restrict the extension of coastal State authority.

\[\text{See particularly in this regard statements by the delegates of Algeria (UNCLOS:OR ii, 222) and the Ivory Coast (ibid 196).}\]

\[\text{African States, eg, firmly supported equal rights for LLGDS to living (but not non-living) resources of the 200-mile zone as had been endorsed by the OAU earlier that year (see Art 9 of the Declaration of the Organization of African Unity on the issues of the Law of the Sea (A/Conf.62/33), in ibid iii, 63-65). See, eg, statements by delegates of Kenya (ibid ii, 183) and Senegal (ibid 199).}\]

\[\text{Other States, particularly in Asia and Latin America, were more prepared to grant only preferential access to those resources (see, eg, statements by representatives of Ecuador (ibid 257), Iran (ibid 244) and Romania (ibid 257)).}\]

\[\text{Johnson (supra n 20, 297) suggests that the entire issue of access by LLS to living resources was of political rather than practical importance as "[m]any of the African coastal States who conceded rights in their zones did so with the full expectation that such states would never exploit them".}\]
Another development with much broader implications was the growing debate over the precise meaning and juridical content of terms used in proposals and statements, particularly those relating to coastal State rights over resources in the 200-mile zone. Some proposals, for example, merely referred to 'sovereign rights' for specific fishery-related purposes. In that regard, argued Ecuador's delegate, "a State could hardly exercise sovereign rights without possessing sovereignty", and that "[i]t would be difficult for the State to possess sovereignty over certain constituent

On one point there was widespread agreement among both coastal States and LLGDS; that is, the need to carefully define the term 'geographically disadvantaged States'. Although a joint Haitian-Jamaican proposal (A/Conf.62/C.2/L.35, in UNCLOS:OR iii, 213) defining the term largely in light of geographical, biological and ecological factors was considered by some States to offer a reasonable basis of negotiation (see, eg, statements by delegates of Algeria (ibid ii, 254) and Singapore (ibid 259)), others suggested widening the criteria to comprehend, eg, the level of a State's economic development (see, eg, statement by Ecuador's representative (ibid 257)) or its possession of land-based resources (see statement by delegate of Uruguay (ibid 256)). During the session Western Samoa was claimed to be a GDS because it was an oceanic island in the Pacific (ibid i, 84), while the Panamanian delegate claimed the same status for his own country because its access to the sea was difficult owing to its "colonial situation" (ibid ii, 247).

In a development closely-related to the special geographical situation of LLGDS, a number of States drew attention to the potential impact on fisheries of extended jurisdiction by States bordering enclosed and semi-enclosed seas. In such areas, fishermen could not be asked to restrict their activities to narrow maritime belts when they had been exploiting the entire marine areas as a whole for centuries. Regional arrangements were necessary and the Conference was urged by Sweden's delegate to make exceptions to the general regime "in all instances where the particular characteristics of enclosed or semi-enclosed seas warrant particular solutions" (ibid 275). Cf, statements by the delegates of Iran (ibid 273), Israel (ibid 274) and Thailand (ibid 275).

Their views were very similar to those of States advocating recognition of regional economic zones. They included LLGDS such as Bolivia (ibid 199) and Laos (ibid 180). A specific proposal for a regional economic zone (A/Conf.62/C.2/L.65) was sponsored by Bolivia and Paraguay.
parts of the zone, such as renewable...resources, but not over the zone itself". 36

The fishery implications of such a stance were indicated by the Canadian representative. The economic zone was not "an international zone within which the coastal State was allocated certain privileges", he argued, but "a zone of national jurisdiction" in which "[n]ew rules would be formulated with regard to exclusive coastal State management of the biological resources...and the participation of non-coastal States in the exploitation of those resources". 37 Thus, the coastal State should have the right to utilize and preserve adjacent marine resources since the survival or development of its people depended on those resources and because it was in the best position to regulate their rational exploitation. That necessarily entailed the acquisition of rights to protect those resources with regard to pollution and scientific research. 38

That position was vigorously opposed by other States however. Fearful of the EEZ concept growing into a territorial sea, the British delegate, for example, was prepared to discuss the coastal State EEZ rights only in terms of actual resources and not competence over pollution control and scientific research. In place of the term 'sovereign rights', the French representative suggested the term "exclusive competence", the latter permitting the coastal State either to exploit fisheries in its zone or allow others to do so. That competence would be subject to, inter alia, international agreements, conservation requirements and the duty to allow other States access to the surplus of the TAC. 39

It was in light of such statements that the Iranian delegate, amongst others, observed that while it was not

36 Ibid 214
37 Ibid 224
38 Ibid 225. This general argument was not original, of course, having been made since at least the 1930 Hague Conference (see Ch 3, text accompanying n 86 supra).
39 Ibid 185-186
difficult to follow the conceptual differences between the various proposals before C.II, it was difficult to understand the content of such terms as sovereignty, jurisdiction and competence. A number urged that the Convention define such terms as precisely as possible.\(^{40}\)

Compared with EEZ discussions, those relating to the high seas were very brief, occupying less than one meeting.\(^{41}\) In general statements, El Salvador's representative urged the adoption of effective international regulations, including those governing anadromous and catadromous species that were precise and effective under modern conditions;\(^{42}\) while the Tanzanian delegate severely criticized the ineffectiveness of some IFOs and demanded that they be strengthened and emphasis placed on conservation rather than exploitation.\(^{43}\)

The United States submitted a general proposal on high seas fishery management which would have obligated States to co-operate in the exploitation and conservation of resources and, where possible, enter into agreements and establish

\(^{40}\) Ibid 115; cf, statements of representatives of El Salvador (ibid 188), Indonesia (ibid 207) and Paraguay (ibid 117)

\(^{41}\) In contrast, no less than 10 C.II meetings focussed on the EEZ and coastal State preferential rights beyond the territorial sea. Johnson (supra n 20, 299) explained at the time that the much greater interest in the area within national jurisdiction leads to more proposals and more attempts to build common positions. Because the stakes are so much less in the area beyond 200-miles, the interest is correspondingly less. At the same time, though, there is much less scope for building common positions on high-seas fisheries, and very strong resistance to developing a general regime for the high seas.

See in the above regard n 256 infra.

\(^{42}\) UNCLOS:OR ii, 294. His reference, in passing, to catadromous species, was one of the few, if not the only one, made in formal statements to C.II.

\(^{43}\) Ibid 236; cf, statement by Senegal's representative (ibid 237)
IFOs for that purpose. Conservation measures would be designed,

on the best evidence available, to maintain or restore populations of harvested species at levels which can produce the [MSY], taking into account relevant environmental and economic factors, and any generally agreed global and regional minimum standards.\footnote{A/Conf.62/C.2/L.79, in ibid iii, 239}

Proposals concerning anadromous species emphasized either a national or international approach to the key issues.\footnote{For a general discussion of the proposals see Johnson, supra n 20, 302-305. Justifications for proposals were essentially those given during SBC discussions (see Ch 10, nn 120-122 and accompanying text supra).} On the one hand, Denmark and Japan called for conservation, management and allocation activities to be regulated among States concerned or via appropriate IFOs, with some recognition accorded the interests of States in which particular stocks originate.\footnote{According to the Danish proposal (A/Conf.62/C.2/L.37, in UNCLOS:OR iii, 214) all interested States would have equal rights to participate in such arrangements and IFOs, while the interests of the States in which particular stocks originated and those of other States would be taken into account. The Japanese proposal (A/Conf.62/C.2/L.46, in ibid 221) would have taken into account the "special interest" of the State of origin when formulating regulations.} On the other hand, Canada and the United States proposed greater recognition of the State of origin's position, without referring to possible roles for IFOs.\footnote{The American proposal (A/Conf.62/C.2/L.47, in ibid 221) would have prohibited harvesting seaward of the territorial sea without coastal State authorization; while Canada simply argued (A/Conf.62/C.2/L.84, in ibid 240) that salmon fishing beyond areas of national jurisdiction had to be curtailed and States through whose waters anadromous fish migrate had to co-operate in regulatory measures.} Between the two positions, an Irish proposal would have permitted exploitation of anadromous species only within waters under the jurisdiction of the State of origin or of other States and, in the latter case, har-
vesting would be regulated by agreement between States concerned and would take into account the State of origin's "special role" in the conservation of the species. 49

Proposals receiving more than minimal support were incorporated into C.II's 'Main Trends' Working Paper at the end of the session. 49 While the Paper did not itself indicate the degree of support for individual alternatives, observed the Chairman, "it was easy for anyone who had followed the Committee's work closely to discern the outline of the future convention". 50 The document, he explained, should serve as a reference and the basis for future work on unresolved issues, including coastal State duties in its EEZ regarding conservation, the full utilization of resources and dispute settlement; the regime governing anadromous species and HMS; the rights of LLGDS; and the need for urgent implementation of the fishery provisions of the Convention. 51

49 A/Conf.62/C.2/L.41, in ibid 220

49 A/Conf.62/C.2/WP.1, of 15 October 1974, included in A/Conf.62/L.8/Rev.1, supra n 6, 107-142. See also text accompanying n 19 supra.

50 UNCLOS:OR ii, 302

51 Cf G Taft, "The Third U.N. Law of the Sea Conference: major unresolved fisheries issues" (1975) 14 CJTL 112; and B Oxman and M West, "Issues to be resolved in the second substantive session of the Third United Nations Conference on the Law of the Sea" in ibid 87, 95-98, 100-101. Two proposals were submitted to the Committee on the relatively non-controversial issue of the right of hot pursuit from EEZs with respect to violations of laws and regulations applicable to the zone. A proposal by El Salvador (A/Conf.62/C.2/L.68, in UNCLOS:OR iii, 235) would not have permitted hot pursuit to continue into the economic zone or territorial sea of either the pursued ship's flag State or those of a third State. Although the other proposal (A/Conf.62/C.2/L.66, in ibid: sponsored by Argentina, Australia, Chile, Colombia, Mexico, New Zealand and the United States) was silent on the point, a New Zealand delegate argued that it was "logical and a practical necessity" that the right of hot pursuit be recognized from within the 200-mile limit into either the high seas or an adjacent economic zone (ibid ii, 236-237, 293).
b) **The Third Committee**

Fishery issues discussed within C.III were almost totally subsumed within the broader issue of marine scientific research (hereafter 'MSR'), and, in particular, research conducted in the EEZ. While general agreement was reached in informal working group discussions on fundamental principles relating to MSR and the obligation of States to cooperate in the conduct of such research, C.III was unable to agree on either a definition of MSR or the rights of the coastal State regarding such activities in its EEZ.

With respect to the latter, four major alternatives appeared. The first, claimed by the Colombian delegate to reflect the "consensus" of the G77, would have recognized the "exclusive right" of the coastal State "to conduct and regulate" MSR in its EEZ and "to authorize and regulate such research" conducted by other States. The latter States


See "Note by the Chairman of the informal meetings of the Third Committee on item 13 (marine scientific research) and item 14 (development and transfer of technology) to the Chairman of the Third Committee" (A/Conf.62/C.3/L.16), in *UNCLOS:OR* iii, 262. General principles included, eg, the obligation to conduct scientific research exclusively for peaceful purposes (Art A, item 2(a), "Texts on item 13 (marine scientific research) and item 14 (development and transfer of technology") (A/Conf.62/C.3/L.17), reproduced in *ibid* 263).

*UNCLOS:OR* ii, 378

Item 2(a), A/Conf.62/C.3/L.17, *supra* n 53. This control is important in relation to fishery access questions, as Bennouna (*supra* n 17, 13) observes:

La recherche scientifique est le moyen essentiel de la planification; elle fournit les données de base de la négociation interétatique visant à départager les revétantes des uns et des autres à l'accès aux ressources.
might only conduct such research with the "explicit consent" of the coastal State and under specific conditions.

For a more detailed consideration of this issue see, eg, A Simpson, "The role of research in fisheries development"(1978) 2 Marine Policy 212.

Item 2(b).1, A/Conf.62/C.3/L.17, supra n 53. The Colombian delegate argued (UNCLOS:OR ii, 378), inter alia, that while research was necessary for the rational management of living marine resources,"[t]he coastal State should...in order to defend its own resources and for reasons of security, regulate research with a view to reducing the technological gap between the developed and developing countries". While coastal States were unanimously in favour of MSR being conducted both in their EEZs and the international area beyond, one of the primary reasons for their stressing the right to control research in the former zone was the practical difficulty of distinguishing 'pure' from 'applied' or 'industrial' research and the possible attendant consequences. Typical in this regard was Madagascar, whose representative told C.III (ibid iii, 336) that

research should concentrate on increasing knowledge of the marine environment to enable the coastal State to benefit from local resources and to fulfill its obligations with respect to conservation and prevention of pollution. Foreign researchers did not always restrict themselves to pure research; usually their research was directed either towards discovering and exploiting new raw materials or was related to military or paramilitary considerations. There was no real difference between fundamental research, applied research and strategic military research. Accordingly, he could not accept any system in which foreign researchers would simply have to give prior notice to the State in whose waters they would carry on research, because the coastal State concerned was responsible for the area.


For a general discussion of the consent issue see, eg, P Mukherjee,"The consent regime of oceanic research in the new law of the sea"(1981) 5 Marine Policy 98; and T Treves, "Principe du consentement et nouveau régime juridique de la recherche scientific marine" in Le Nouveau droit international de la mer (1983; D Bardon-net and M Virally, eds)[volume hereafter cited 'Nouveau droit'] 269.
The second alternative would have permitted MSR in the EEZ "only...with the consent of the coastal State", but that consent would "not normally be withheld" when the researching State or international organization provided certain information and gave certain undertakings.\(^\text{57}\)

The third alternative, put forward as a separate proposal by 17 mostly LLGDS, would have recognized the right of all States and appropriate international organizations to conduct 'pure' research in the EEZ, subject to an obligation to notify the coastal State in question, fulfilling international requirements, and allowing the coastal State to participate in the activities. Specific provisions accorded favourable treatment to the interests of LLGDS.\(^\text{58}\)


\(^{58}\) A/Conf.62/C.3/L.19, in UNCLOS:OR iii, 266-267; sponsored by Austria, Belgium, Bolivia, Botswana, Denmark, FRG, Laos, Lesotho, Liberia, Luxembourg, Nepal, Netherlands, Paraguay, Singapore, Uganda, Upper Volta and Zambia. Singapore had sponsored the proposal, her delegate explained, because that advanced by Colombia (see n 54 and accompanying text supra) as that of the G77 in fact ignored the interests of LLGDS (ibid ii, 383; cf, statement by the delegate of Lesotho (ibid')). The Colombian proposal simply noted that it had not been possible due to time constraints to incorporate into the draft suggestions advanced by G77 LLGDS and others but that they would be considered subsequently.

Miles (supra n 18, 85) observes that the significance of the introduction of the proposal was largely symbolic in that it split both the G77 and the African Group. Heated exchanges ensued between coastal States (see, eg, statements by the delegates of Argentina, India and Kenya (UNCLOS:OR ii, 382)), on the one hand, and developing LLGDS on the other (see, eg, statements by the delegates of Lesotho and Singapore (ibid 383)).

The US advocated the same basic 'notification' approach as found in the above proposal. See the statement by the American delegate (ibid ii, 341).
The final alternative, contained in an informal paper circulated by several East European States including the Soviet Union, would have accorded all States the freedom to conduct MSR in the EEZ, except that research concerned with resource exploration and exploitation would be subject to coastal State consent.559

3. Dispute Settlement

Many delegations stressed the need for the Convention to contain appropriate dispute settlement mechanisms,60 and a working group was set up during the session to consider various aspects of the matter.61

For present purposes, two issues were of greatest importance: whether the whole or even part of the Convention's fishery regime would be subject to dispute settlement and, if so, whether the latter would be by a general regime or follow a functional approach formulated to deal with living

559 CRP/Sc.Res/15, dated 29 July 1974; sponsored by Bulgaria, Poland, the Soviet Union and the Ukrainian SSR; in Platzoder, supra n 57, 305. This constituted a change in the Soviet position, for as late as 19 July 1974, the USSR informed C.III that her position concerning MSR was as contained in her proposal to the SBC (A/AC. 138/SC.III/L.31), ie, consent of the coastal State was required only for MSR in territorial waters and on the continental shelf.

60 See, eg, statements by the delegates of France (UNCLOS: OR i, 155); FRG (ibid 128); Japan (ibid 182); UK (ibid 112); US (ibid ii, 291); and El Salvador (ibid i, 213), who stated that deliberations on dispute settlement should be based on four fundamental premises:

- first, the settlement of disputes by legal, effective means in order to avoid political and economic pressures; some uniformity in the interpretation of the future convention should be sought;
- thirdly, the recognition of the advantages offered by obligatory settlement of disputes, taking into account some exceptions which had to be determined with the greatest care;
- fourthly, the firm conviction that if the future convention was to be signed and ratified, then the system of the settlement of disputes must be an integral part and must constitute an essential element of that convention.

marine resources. Although no decisions were reached, a working paper was presented, including draft articles covering special procedures for dealing with particular types of disputes, fact-finding with respect to fishery disputes, and exemptions from settlement procedures of disputes "arising out of the normal exercise of regulatory or enforcement jurisdiction, except when gross or persistent violation of this Convention or abuse of power is alleged."  

4. Observations

It was widely felt that although no convention had been concluded during the Caracas session, essential preparations had been completed and the stage set. Central concepts had been all but confirmed as law; national positions had been clarified in many cases; and main alternatives identified. Expressing the view of many, the delegate from Cameroon thought that the following session "could and should be the last, since there was really nothing further that could be placed before the Conference, and a convention could be ready in 1975".  

In a distinct, albeit more realistic, minority was the Bulgarian delegate, who warned against the delusion that it would be possible, through redoubled efforts, to complete the drafting of the future convention in a relatively short space of time. In fact, negotiations were merely in the initial stage and many divergent viewpoints had to be reconciled. While it was true that a number of subjects had been covered in the First and Third Committees, many problems had still to be resolved, particularly as far as the legitimate

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62 A/Conf.62/L.7; sponsored by Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and the US; in UNCLOS:OR iii, 85-93

63 Ibid i, 230; cf, eg, statements by representatives of Algeria (ibid 233), Norway (ibid 230), Pakistan (ibid 233) and the UK (ibid 231). Miles (supra n 18, 45-46) notes that pressures began to emerge on various sides to make 1975 the cutoff date for UNCLOS III. The US Congress, eg, was pushing for unilateral action, while governments of some developing countries were concerned at the time and expense in sending delegations to UNCLOS III when they thought they could make the same gains by taking unilateral action. Cf comments by Joseph Warioba of the Tanzanian delegation to UNCLOS III in Caracas and Beyond, supra n 18, 18, 24-25.
claims of the land-locked countries were concerned. In any event, the negotiations would take time and would have to be followed by the final drafting of the future Convention."

It was in the above, cautiously optimistic emotional environment that it was decided to hold what was hoped to be the conclusive session of UNCLOS III in 1975.

C. The Third Session (1975)

From the commencement of the session it was accepted that the time for general debate had passed and the Conference quickly divided into its main Committees for substantive negotiations.

"UNCLOS:OR i, 231. Gold (supra n 6, 107-108) places the blame on the major maritime Powers for the failure of the session to realise concrete results:

In the obvious unwillingness and inability of the traditionalist maritime powers to negotiate seriously, the Conference witnessed a remarkable shift of the intellectual dialectic from the traditionalist basis to the Third World. The traditionalist States are for the first time at a voting disadvantage and are, as a consequence, seeking to impose their will on the majority or are engaging in delaying tactics. They do not seem to have 'done their homework' thoroughly and are groping to come to terms with the changes required from them in a new and modern era.

1. The Second Committee

a) Introduction

To encourage flexibility in the negotiation process it was decided early in the session to establish several open-ended, informal consultative groups and not to produce detailed summary records of discussions. Reviewing progress mid-way through the session, however, the Conference President reluctantly concluded that the review of the 'Main Trends' paper prepared the previous session had generated only a re-statement of positions and re-identification of outstanding issues. Because negotiations were primarily being conducted in small groups, he argued, it was imperative for the success of the Conference that a single text be prepared that would form the basis of negotiation involving all States.

For references to the decision not to produce detailed records of negotiations see Auger, supra n 65, 35; Bennouna, supra n 17, 8; and Koh and Jayakumar, supra n 4, 92. This procedure was subsequently followed generally by the other Committees. The lack of travaux préparatoires for interpretative purposes is discussed in Annex IV. See n 49 and accompanying text supra regarding the 'Main Trends' document.

UNCLOS:OR iv, 13. Fishery-related issues being discussed in informal or private negotiations were living resources of the EEZ; optimum use of the resources of the EEZ; conservation and management of such resources; fishing agreements with neighbouring States; LLGDS; HMS; and anadromous and catadromous species (ibid). Miles (supra n 65, 303-304) observes that the 'Main Trends' document was not in fact the primary referent for delegations and groups of delegations in their private negotiations. The informal consultations held within [C.II] therefore quickly came to be regarded as a meaningless and unproductive charade. In fact, one officer of [C.II] referred to them in private conversation as 'shadowboxing'. Another delegate referred to them as 'work for idle hands.' The assumption was that though they served no substantive purpose, the chairman would in fact use them as insulation for whatever consolidated texts of articles he might produce at the end of that session.

The real negotiations relating to the terms of reference of [C.II] were being conducted in a large number of regional and other special-interest groups participating in the Conference.

He also notes (ibid 190) that one of the distinguishing features of the Geneva session was the apparently un-
Although an unprecedented proposal, a widespread and growing air of despondency among delegates led to the decision that, taking into account formal and informal discussions, the chairmen of each main Committee should prepare by the end of the session an informal single negotiating text as a basis for further negotiations.

b) Fishery Proposals

To both assist the C.II Chairman prepare a single text and as far as possible influence the latter's specific content, States and groups of States forwarded to him informal proposals setting out their preferred formulations. Two submissions were particularly important.

(1) The Evensen Group

controlled proliferation within C.II of small groups representing primarily the meeting of like-minded delegates with no links across them.

On the lack of progress during the first part of the session, Barry Buzan (supra n 65, 42) explains that

By mid-April, because of the lack of progress towards stated objectives and the consequent unlikelihood of any satisfactory agreement coming out of the session, the Conference was faced with two closely-related problems. First, it had to review its method of work to see if other approaches might offer a way round the impasse. The problem here was that, while the method of working in small groups had proved useful for defining and clarifying various positions, it was not proving fruitful in generating the broader compromises necessary for agreement. No state or group was willing to be the first to abandon its favoured position, and consequently the Conference as a whole had reached a stalemate among all the various entrenched vested interests. The second problem facing the Conference was to find some way of putting an acceptable face on the Geneva session. The session was badly in need of a substantial achievement of some sort to give at least the appearance of real progress and thereby to maintain the credibility of the Conference as a method of creating a new law of the sea. The danger was that, if the Conference lost momentum, its credibility would decline and states would be tempted to take unilateral action and would, in turn, undermine the Conference even further.

Cf Auger, supra n 65, 36, and comment by Lévy, supra n 19.

** UNCLOS:OR iv, 26

See generally, eg, Lévy, supra n 4, 59-60.
On 24 April, Norway's Ambassador Jens Evensen forwarded to the Chairman an EEZ proposal based on discussions within a group of ambassadors and juridical experts (commonly known as the 'Evensen Group') "from all geographical regions and groups representing the main trends and tendencies of opinion in regard to the future law of the sea", of which he was chairman.

The Evensen Group proposal formed the nucleus of many of the articles subsequently enshrined in the text prepared

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Covering letter reproduced in Platzoder, supra n 57, iv, 209. Barry Buzan and Barbara Johnson ("Canada at the Third United Nations Conference on the Law of the Sea: strategy, tactics and policy" in Canadian Foreign Policy, supra Ch 8, n 54, 255, 280-281) state that the Evensen Group "emerged" in 1972 and representation in the Group by the end of the Geneva session was as follows:

<table>
<thead>
<tr>
<th>Group</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Old coastal-State group</td>
<td>14</td>
</tr>
<tr>
<td>Territorialist group</td>
<td>2</td>
</tr>
<tr>
<td>LLGDS group</td>
<td>5</td>
</tr>
<tr>
<td>Straits States</td>
<td>3</td>
</tr>
<tr>
<td>Maritime States group</td>
<td>5</td>
</tr>
<tr>
<td>Unaffiliated States*</td>
<td>8</td>
</tr>
<tr>
<td>Archipelagic States</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>38**</td>
</tr>
</tbody>
</table>

(* 3 of these belonged to the East European group and 5 were littoral States not belonging to issue-specific groups; ** 35 States were used in the above listing, but one is listed twice (LLGDS and straits) and one 3 times (coastal, archipelagic, straits)).

According to Professor Daniel Vignes, the Group was formed in 1973 and composed of juridical experts or ambassadors participating in their personal capacities at the invitation of Evensen. Initially, they numbered 21, drawn from the following areas: Norway (the Chairman), Asia (5), Australia (1), Africa (3), America (6, including 4 from South America), the Soviet Union (1), Eastern Europe (1), France (1), the Netherlands (1) and the UK (1) ("Deux prolongemes du nouveau droit de la mer: le Texte unique de negociation du 7 mai 1975 et le Groupe nomme Evensen" (1975-1976) #5-6 RIRI 9, 19). In his covering letter, Evensen observed that some 40 or 50 representatives participated in the latter stages of the discussion of the proposal.

Koh and Jayakumar (supra n 4, 106) note that the Evensen Group was the first private group which cut across special interest groups, although some of the latter groups (eg LLGDS) thought they were underrepresented. See n 74 and accompanying text infra.
by C.II's Chairman (see Table 7). Although including individuals from States with widely diverging interests, the proposal broadly reflected the preferred fishery positions of coastal States.

On the question of HMS, the sixth revision of the proposal (ie, the one submitted to Chairman of C.II) simply noted that the article was "still under discussion". According to the fifth revision, however, IFOs would have had an important role in formulating standards and recommendations relating to, *inter alia*, TACs, equitable allocation and the issuance of permits. The draft, observes Professor Edward Miles, constituted a "last attempt" on the part of the USSR and the United States to secure a compromise. In the final event, it was strongly opposed by Group members from both distant-water fishing States and coastal States and so was withdrawn at the last minute.71

(2) The Group of 77

Within the G77, the Evensen Group proposal was criticized, on the one hand, by those coastal States feeling it did not go far enough in recognizing their EEZ rights and, on the other, by G77 States also members of the LLGDS Group thinking that it did not reflect their rights and interests. In fact, it was the latter issue that appeared to occupy much of the G77's attention during the session, as differences continued on the nature of the LLGDS resource rights to be recognized.72

71 Miles, *supra* n 65, 309-310. The Evensen Group proposal without the detailed HMS provision is found in Platzoder, *supra* n 57, iv, 210-217, while the proposal with the detailed provision is contained in Miles, *supra* n 65, 326-334.

72 See generally, Miles (*ibid* 313-317), who points out that pressures from LLGDS members of G77 were significant for three reasons:

1. African LLS were threatening to rupture the unity of the African Group.

2. The potential number of GDS in the Group had risen to about 48 during the session, thus providing the LLGDS with a blocking third.
After protracted negotiations, the G77 forwarded to the Chairman of C.II a working paper on the EEZ (see Table 7) which, it was explained, did not represent a consensus of the Group although it did reflect a cross-section of positions held by G77 States.\footnote{541} Because of the above differences, the proposal's provisions concerning LLGDS were only partly reflected in the paper.

(3) The LLGDS Group

Dissatisfied with both the Evensen and G77 Groups submissions,\footnote{544} the LLGDS transmitted their own "contribution" to the C.II Chairman.\footnote{545} The document was significant in being their first collective submission of draft articles.\footnote{546}

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3. Several African delegates had played leading roles in the Evensen Group and therefore had a substantial interest in arranging a compromise.

On the other hand, he also observes (ibid 304) that some individuals within the G77 were "privately incensed" at not being invited to participate in the Evensen Group's deliberations and therefore argued that the latter Group's draft had no official standing.

See also n 35 and accompanying text supra regarding different approaches to LLGDS resource rights.

The covering letter from Ambassador Kedadi of Tunisia, the then chairman of the G77, and the working paper are found in Platzoder, supra n 57, iv, 227-230.

The Heads of Delegations of the FRG, Nepal, Singapore and Zambia, in a letter to C.II's Chairman dated April 30 (in ibid 224), explained that not only were LLGDS under-represented in the Evensen Group but that the latter's draft articles as a whole were totally unacceptable as they neither adequately accommodated the needs of LLGDS nor met their "minimum irreducible interests". The four Heads, who had all participated in the Evensen Group deliberations, completely dissociated themselves from the proposal.

Buzan and Johnson (supra n 70, 281) observe that "[t]here was a consistent tendency within the Evensen Group to dismiss the [LLGDS] as a minor actor at the conference and to view its existence as a problem for the [G77] to work out internally".

The LLGDS 'Contribution' is found in Platzoder, supra n 57, iv, 234-238.

Jayakumar, supra n 31, 78
Their contribution differed from that submitted in 1974 by 22 LLGDS (see Table 6(c)) in three important respects. First, LLS would be entitled to participate in the exploration and exploitation of neighbouring States EEZ fishery resources "on an equal and non-discriminatory basis", while the participation of GDS would have been on "an equitable basis". Second, developed LLGDS might only participate in the economic zones of developed coastal States. And finally, addressing the concern of those coastal States worried that LLGDS might claim rights to participate in zones having only limited living resources, the proposal provided that where such a situation existed, the rights of participation would be negotiated, taking into account that the rights were to be "equitably distributed".

As it turned out, only that aspect of the proposal relating to rights of developed LLGDS found its way into the unified text.

c) The Informal Single Negotiating Text (ISNT)
The ISNT was released at the very end of the session. Although the Evensen Group and G77 proposals formed the nu-

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77 Ibid
78 Beurier and Cadenat ("La huitièmes session de la troisième Conférence sur le droit de la mer"(1980) 32 DMF 139, 142) note that, in practice, this provision affected only a very small number of countries, and instanced (the then) Rhodesia as a case in point.
79 Jayakumar, supra n 31, 78
80 Even in this instance, the same proposal was advanced by the G77 in the latter's draft Article 5 and so it could not be said definitively that the LLGDS proposal by itself was responsible for the provision in the single negotiating text.
81 A/Conf.62/WP.8, dated 7 May 1975; in UNCLOS:OR iv, 137-181. See generally, R Khan, "The fisheries regime of the exclusive economic zone: a comment on the Single Negotiating Text adopted by the III Law of the Sea Conference at Geneva, 1975" (1976) 16 IJIL 169. Buzan (supra n 65, 43) explains that the ISNT was not made pub-
cleus of the ICNT's EEZ fishery provisions (see Table 7), they often underwent modification during the incorporation process and were on occasion supplemented or even completely replaced by other articles considered by the C.II Chairman as more realistically reflecting the general mood of the Committee. While a detailed exegesis of the ISNT is beyond the scope of the present work, some comments may be advanced on the more significant elements of the text.

First and most generally, the ISNT was weighted heavily in favour of coastal States to the detriment of LLGDS and distant-water fishing States. The text recognized, *inter alia*, the coastal State's "sovereign right for the purpose of exploring and exploiting, conserving and managing" the EEZ's living resources82 and its "exclusive jurisdiction"

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82 In a critique of the ISNT, Khan (*supra* n 81, 172) suggested that references to the duty of coastal States to pay due regard to the rights of other States (Art 45 (2)) probably fit into the preferential rights framework as outlined by the ICJ in its *Fisheries Jurisdiction* Judgments (see Ch 9 *supra*) rather than into the EEZ concept as contained in the unified text. It was his view that "recognition of sovereign exclusive rights of coastal States over resources of the [EEZ] converts the 'rights' of others in the same area into *concessions* which the coastal State might choose to grant to others in special circumstances".

A contrary interpretation of the ISNT was made by Yaroslavstev in his review of the fourth session. He asserted ("UN Conference on the Law of the Sea" (August, 1976) *International Affairs* [Moscow] 88, 90; emphasis added) that with respect to the EEZ regime, "recognition was extended to the legitimate rights and interests of other States, particularly with regard to navigation and fishing" and that

Relative to fishing by foreign countries in the economic zone, the draft makes it *incumbent* upon the coastal state whose fishermen do not have the capacity to harvest the entire allowable catch to give other states 'access to to the surplus of the allowable catch'....This harmonises with the principle, formalised in the draft, of the optimum utilisation of the living resources in the exclusive economic zone. The draft contains balanced general provisions on the correlation of the rights and duties of the coastal state and the rights and duties of other countries in the economic zone. The draft declares that in exercising its rights and per-
<table>
<thead>
<tr>
<th>GROUP OF 77 PROPOSAL</th>
<th>INFORMAL SINGLE NEGOTIATING TEXT (ISNT)</th>
<th>EVENSEN GROUP PROPOSAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 1</td>
<td>Article 45</td>
<td>Article 1</td>
</tr>
<tr>
<td>Coastal States have the right to establish beyond and adjacent to their territorial sea an Exclusive Economic Zone which shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.</td>
<td>1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has: (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the sea-bed and subsoil.</td>
<td>1. The coastal State has in an area beyond and adjacent to its territorial sea, known as the exclusive economic zone; (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the seabed and subsoil and the superjacent waters;</td>
</tr>
<tr>
<td>Article 2</td>
<td>Article 45</td>
<td>Article 1</td>
</tr>
<tr>
<td>Coastal States exercise in and throughout the Exclusive Economic Zone: (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the water column, the sea-bed and subsoil.</td>
<td>(c) Exclusive jurisdiction with respect to authorization, regulation and control of scientific research.</td>
<td>(c) Jurisdiction as provided for in this Convention with regard to: (i) scientific research,</td>
</tr>
<tr>
<td>Article 4</td>
<td>Article 45</td>
<td>Article 1</td>
</tr>
<tr>
<td>In exercising their rights and their jurisdiction under this Convention and in making and enforcing regulations pertaining thereto the coastal State shall have due regard to the rights of other States in the Exclusive Economic Zone as specified in this Convention.</td>
<td>2. In exercising its rights and performing its duties under the present Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States.</td>
<td>2. In exercising its rights and performing its duties under this Convention in the economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.</td>
</tr>
<tr>
<td>Article 7</td>
<td>Article 45</td>
<td>Article 1</td>
</tr>
<tr>
<td>(II) In exercising their rights and performing their duties within the Exclusive Economic Zone under this convention, States shall have due regard to the rights and duties of the coastal State and in particular to its security interests in the Exclusive Economic Zone.</td>
<td>3. The rights set out in this article shall be without prejudice to the provisions of part IV.*</td>
<td>3. The rights in this article shall be without prejudice to the provisions of articles...of this Convention.*</td>
</tr>
<tr>
<td>Article 45</td>
<td>Article 45</td>
<td>Article 1</td>
</tr>
<tr>
<td>The exclusive economic zone shall not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.</td>
<td>The consent of the coastal State shall be obtained in respect of any research concerning the exclusive economic zone and undertaken there. Nevertheless, the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or be represented in the research, and that the results shall be published after consultation with the coastal State concerned.</td>
<td>The economic zone shall not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.</td>
</tr>
</tbody>
</table>
1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.

2. The coastal State, taking into account the best evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources of the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and relevant subregional, regional and global organizations shall cooperate to this end.

3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing countries, and taking into account the interdependence of stocks and any generally recommended subregional, regional or global minimum standards.

4. In establishing such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regional basis through subregional, regional and global organizations where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to the provisions of article 50.

2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch.

3. In granting access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including inter alia, the significance of the renewable resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 57 and 58, the requirements of developing countries in the 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.

1. In the exercise of its sovereign rights over the living resources in the economic zone the coastal State shall ensure by proper management and conservation measures that the maintenance of these resources is not endangered by over-exploitation. It shall cooperate as appropriate with regional and global organizations to this end. States participating in such organizations shall ensure to the extent possible that the organization concerned extends its cooperation to the coastal State in management and conservation matters.

2. In the exercise of its right to determine the allowable catch and establish other conservation measures for the living resources of the zone, the coastal State shall:
(a) adopt measures which are designed, on the best evidence available to the coastal State, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and as generally recommended regional, or global minimum standards.

(b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

3. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regional basis through regional and global organizations where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the economic zone.

1. The coastal State shall promote the objective of optimum utilization of the living resources in the economic zone as provided for in article 1 the coastal State shall promote the objective of optimum utilization of these resources without prejudice to the provisions of article 5.

2. The coastal State shall, through agreements or other arrangements and pursuant to the terms, conditions and regulations referred to in paragraph 4, give other States access to that part of the allowable catch which it does not have the capacity to harvest. The determination of the capacity of the coastal State in this respect shall rest with the coastal State.

3. In granting access to other States to its economic zone under this article, the coastal State shall take into account all relevant factors including inter alia, the significance of the renewable resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 8, 9 and 10, the requirements of developing countries in the region in harvesting part of the surplus and the need to minimize economic dislocation in States which have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.
4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the regulations of the coastal State regulations. These regulations shall be consistent with the provisions of the present Convention and may relate, inter alia, to the following:

(a) Licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate remuneration in the field of financing, equipment and technology relating to the fishing industry.

(b) Determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(c) Regulating seasons and areas of fishing, the types, sizes and amount of gear, and the numbers, sizes and types of fishing vessels that may be used;

(d) Fixing the age and size of fish and other species that may be caught;

(e) Specifying information required of fishing vessels, including catch and effort statistics and vessel and vessel position reports;

(f) Requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) The placing of observers or trainees on board such vessels by the coastal State;

(h) The landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) Terms and conditions relating to joint ventures or other co-operative arrangements;

(j) Requirements for training personnel and transfer of fisheries technology including enhancement of the coastal State's capability of undertaking fisheries research;

(k) Enforcement procedures.

5. Coastal States shall give due notice of conservation and management regulations.

Article 52

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek either directly or through appropriate subregional or regional organizations to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this part.

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek either directly or through appropriate subregional or regional organizations to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

4. Fishing by nationals of other States in the economic zone shall comply with the conservation measures and with the other terms and conditions established in the regulations of the coastal State regulations. These regulations shall be consistent with the provisions of this Convention and may relate, inter alia, to the following:

(a) Licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration; developing States in particular may require adequate compensation in the field of fishing industry financing, equipment and fisheries technology;

(b) Determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or complexes of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(c) Regulating times and areas of fishing, the types, sizes and amount of gear, and the numbers, sizes and types of fishing vessels that may be used;

(d) Fixing the age and size of fish and other species that may be caught;

(e) Specifying information required of fishing vessels, including catch and effort statistics and vessel and vessel position reports;

(f) Requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) The placing of observers or trainees on board such vessels by the coastal State;

(h) The landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) Terms and conditions relating to joint ventures or other co-operative arrangements;

(j) Requirements for training personnel and transfer of fisheries technology including enhancement of the coastal State's capability of undertaking fisheries research;

(k) Enforcement procedures.

Article 7

1. States shall co-operate, without prejudice to the provisions of articles 5 and 6, in seeking to elaborate standards and guidelines for conservation and rational utilization of the living resources in the economic zone, directly or within the framework of appropriate fisheries organizations, whether universal or regional.

2. Where the same stock or stocks of associated species occur within the economic zones of two or more coastal States, these States shall seek either directly or through appropriate regional or sub-regional organizations to agree upon the measures necessary to co-ordinate and ensure the conservation and equitable allocation of such stocks without prejudice to the other provisions of this Chapter.

3. Where the same stock or stocks of associated species occur both within the economic zone and in an area beyond and adjacent to the zone, the coastal State and States fishing for such stocks in the adjacent area shall seek either directly or through appropriate regional or sub-regional
<table>
<thead>
<tr>
<th>TABLE 7 (CON'T)</th>
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<tbody>
<tr>
<td>GROUP OF 77 PROPOSAL</td>
<td>INFORMAL SINGLE NEGOTIATING TEXT (ISNT)</td>
<td>EVENSEN GROUP PROPOSAL</td>
</tr>
<tr>
<td>Article 53</td>
<td>1. The provisions of paragraph 2 shall apply, in addition to the other provisions of this part, to the regulation by the coastal State in its exclusive economic zone of fishing for the highly migratory species listed in the annex.</td>
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<td></td>
<td>2. The coastal State and other States whose nationals fish highly migratory species in the region shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.</td>
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<td></td>
<td>3. Nothing in the present Convention shall restrict the right of a coastal State or international organization, as appropriate to prohibit, regulate and limit the exploitation of marine mammals. States shall co-operate either directly or through appropriate international organizations with a view to the protection and management of marine mammals.</td>
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<tr>
<td>Article 54</td>
<td>1. Coastal States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks.</td>
<td></td>
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<tr>
<td>Article 12**</td>
<td>1. In the exercise of its sovereign rights over the living resources in the economic zone, the coastal State shall regulate fishing for highly migratory species listed in Annex A, in accordance with this and other relevant articles of this chapter.</td>
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<td>2. The coastal State shall co-operate directly and through appropriate international organizations, with other States whose nationals fish for highly migratory species in the region, with a view to ensuring conservation and optimum utilization of such species. In regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region, shall establish such organization and participate in its work.</td>
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<td>3. On the basis of best scientific evidence available and other relevant information, the organization shall formulate standards with respect to highly migratory species that will ensure, throughout the region, both within and beyond the economic zone, conservation and optimum utilization. To this end the organizations concerned shall formulate standards or recommendations with regard to, inter alia, allowable catch, equitable allocation, issuance of permits, a uniform system of fees and penalties.</td>
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<td>4. In formulating such standards or recommendations the organization shall take into account all relevant circumstances including, inter alia, the effects on related and dependent species, the requirements of coastal States vessels which fish only within their respective zones, the harvesting capacity of coastal States of the region, the need to minimize economic dislocation and other relevant management and conservation criteria contained in articles 5 and 6.</td>
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<td>5. The adoption of standards and recommendations by the organization shall require, in the absence of agreement, a two-thirds majority, including the votes of all coastal States of the region present and voting.</td>
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<td>6. To achieve uniformity and effective conservation throughout the region, the States concerned shall ensure that their laws and regulations are in conformity with the standards formulated by the organization, and take into account its recommendations with regard to allocation, permits, fees and penalties.</td>
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<td>7. Within the economic zone, the coastal State shall adopt effective measures to ensure compliance by all vessels with the applicable standards and regulations, in accordance with article 15.</td>
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<td>8. Nothing in the Convention shall restrict the right of a coastal State or international organization, as appropriate, to prohibit, regulate and limit the exploitation of marine mammals. States shall co-operate either directly or through appropriate international organizations with a view to the protection and management of marine mammals.</td>
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<tr>
<td>Article 13</td>
<td>1. States have the primary interest in and responsibility for anadromous stocks originating in their rivers.</td>
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</table>
2. The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters within its exclusive economic zone and for fishing provided for in sub-paragraph 3(b). The State of origin may, after consultation with other States fishing these stocks, establish total allowable catches for stocks originating in its rivers.

3. (a) Fisheries for anadromous stocks shall be conducted only in the waters within exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin.

(b) The State of origin shall co-operate in minimizing economic dislocation in such cases by taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred.

(c) States referred to in subparagraph (b) participating by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.

(d) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.

4. In cases where anadromous stocks migrate into or through the waters within the exclusive economic zone of a State other than the State of origin, such State shall co-operate with the State of origin with regard to the conservation and management of such stocks.

5. The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations.

Article 55
1. A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the ingress and egress of migrating fish.

2. Harvesting of catadromous species shall be conducted only in waters in respect of which the State mentioned in paragraph 1 exercises sovereign rights over the living resources and, when conducted in the exclusive economic zone, shall be subject to the provisions of the present Convention concerning fishing in the zone.

3. In cases where catadromous fish migrate through the waters of another State or States, whether as juvenile or maturing fish, the management of such fish shall be regulated by agreement between the State mentioned in paragraph 1 and the State or States concerned. Such agreement shall ensure the rational management of the species and take into account the responsibilities of the State mentioned in paragraph 1 for the maintenance of these species.

Article 56
The provisions of this part shall not apply to sedentary species as defined in article 63, paragraph 4.
TABLE 7 (CON'T)

<table>
<thead>
<tr>
<th>Article 5</th>
<th>Article 57</th>
<th>Article 10</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i.a) Land-locked States and developing geographically disadvantaged States have the right to exploit the living resources of the exclusive economic zones of neighbouring coastal States in accordance with this article and shall bear the corresponding obligations. Developed land-locked and developed geographically disadvantaged States shall however only be entitled to exercise their rights within the exclusive economic zones of neighbouring developed coastal States.</td>
<td>1. Land-locked States shall have the right to participate in the exploitation of the living resources of the exclusive economic zones of adjoining coastal States on an equitable basis, taking into account the relevant economic and geographic circumstances of all the States concerned. The terms and conditions of such participation shall be determined by the States concerned through bilateral, sub-regional or regional agreements. Bilateral, sub-regional or regional agreements concerning the modalities of participation shall be negotiated.</td>
<td>1. Land-locked States shall have access to participate in the exploitation of the living resources of the economic zones or specified areas of the zone of adjoining coastal States on an equitable basis taking into account all relevant economic and geographic circumstances. Bilateral, sub-regional or regional agreements concerning the modalities of participation shall be negotiated.</td>
</tr>
<tr>
<td>b. In accordance with the provisions of paragraph (ii)b. below, nationals of neighbouring land-locked States shall enjoy equal rights as nationals of coastal States, or a right that will ensure a fair and equitable share of the living resources of the Exclusive Economic Zones, and bear similar but non-discriminatory obligations as nationals of the coastal State.</td>
<td>2. The provisions of this article are without prejudice to the provisions of articles 50 and 51.</td>
<td>2. The provision of paragraph 1 shall be without prejudice to arrangements agreed upon in regions where, due to particular circumstances, coastal States are prepared to grant land-locked States of the region equal or preferential rights for the exploitation of the living resources in the economic zones.***</td>
</tr>
<tr>
<td>(ii)b. Bilateral, subregional or regional arrangements shall be worked out for the purpose of ensuring the enjoyment of the rights and carrying out the obligations in paragraph (i) of this article including where appropriate, specifying the areas in the Exclusive Economic Zone where such rights would be exercised.**</td>
<td>Article 58</td>
<td></td>
</tr>
<tr>
<td>1. Developing coastal States which are situated in a subregion or region whose geographical peculiarities make such States particularly dependent for the satisfaction of the nutritional needs of their populations upon the exploitation of the living resources in the exclusive economic zones of their neighbouring States and developing coastal States which can claim no exclusive economic zones of their own shall have the right to participate, on an equitable basis, in the exploitation of living resources in the exclusive economic zones of other States in a subregion or region.</td>
<td>2. In cases where geographical peculiarities of a region or a sub-region make a developing State particularly dependent for the satisfaction of the nutritional needs of its population upon participation in the exploitation of the living resources of the economic zone of other States, the coastal States concerned shall negotiate with such State with a view to granting preferential rights as appropriate.</td>
<td>Article 9</td>
</tr>
<tr>
<td>(see Article 5 above and the following) Article 6</td>
<td>2. The provisions of this article are without prejudice to the provisions of articles 50 and 51.</td>
<td>2. In cases where geographical peculiarities of a region or a sub-region make a developing State particularly dependent for the satisfaction of the nutritional needs of its population upon participation in the exploitation of the living resources of the economic zone of other States, the coastal States concerned shall negotiate with such State with a view to granting preferential rights as appropriate.</td>
</tr>
<tr>
<td>(a) For the purpose of these articles 'developing geographically disadvantaged States' means developing coastal States which:</td>
<td>1. Developing coastal States which are situated in a subregion or region whose geographical peculiarities make such States particularly dependent for the satisfaction of the nutritional needs of their populations upon the exploitation of the living resources in the exclusive economic zones of their neighbouring States and developing coastal States which can claim no exclusive economic zones of their own shall have the right to participate, on an equitable basis, in the exploitation of living resources in the exclusive economic zones of other States in a subregion or region.</td>
<td>Article 58</td>
</tr>
<tr>
<td>(i) For geographical reasons cannot claim an exclusive economic zone, or (ii) for biological or ecological reasons, exclusively natural in character, derive no substantial economic advantage from exploiting the living resources of their exclusive economic zones and whose rights of access to living resources are adversely affected by the establishment of exclusive economic zones by other States.</td>
<td>2. The provisions of this article are without prejudice to the provisions of articles 50 and 51.</td>
<td>2. In cases where geographical peculiarities of a region or a sub-region make a developing State particularly dependent for the satisfaction of the nutritional needs of its population upon participation in the exploitation of the living resources of the economic zone of other States, the coastal States concerned shall negotiate with such State with a view to granting preferential rights as appropriate.</td>
</tr>
</tbody>
</table>
(b) For the purpose of article 5, a land-locked or geographically disadvantaged State is "neighbouring" a coastal State if:
(i) it shares a common border with the coastal State, or
(ii) it is adjacent to the coastal State, or
(iii) both it and the coastal State lie within or border a closed or semi-enclosed sea, or
(iv) it is situated within reasonable proximity of the coastal State, taking into account all the relevant geographical circumstances pertaining to the region.
(see Article 5(ii) above)

2. The terms and conditions of such participation shall be determined by the States concerned through bilateral, subregional or regional arrangements, taking into account the relevant economic and geographic circumstances of all the States concerned, including the need to avoid effects detrimental to the fishing communities or to the fishing industries of the States in whose zones the right of participation is exercised.

3. The provisions of this article are without prejudice to the provisions of articles 50 and 51.

<table>
<thead>
<tr>
<th>Article 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>(ii)a. The above-mentioned rights of nationals of land-locked or geographically disadvantaged States cannot be transferred to third parties by lease or licence, by establishing joint collaboration ventures, or by any other arrangements. The foregoing shall not however preclude land-locked States and developing geographically disadvantaged States from obtaining technical and financial assistance from third States or competent international organizations.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coastal States have the power to make and enforce regulations relating to the above rights and jurisdiction.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 11</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights to exploit the living resources granted under the provisions of articles 8, 9 and 10 cannot without the consent of the coastal State be transferred to third States or their nationals by lease or licence, by establishing joint collaboration ventures or by any other arrangement.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 60</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations enacted by it in conformity with the provisions of the present Convention.</td>
</tr>
<tr>
<td>2. Arrested vessels and their crew shall be promptly released upon the posting of reasonable bond or other security.</td>
</tr>
<tr>
<td>3. Coastal State penalties for violations of fisheries regulations in the exclusive economic zone may not include imprisonment, in the absence of agreement to the contrary by the States concerned, or any other form of corporal punishment.</td>
</tr>
<tr>
<td>4. In cases of arrest or detention of foreign vessels the coastal State shall promptly inform, through appropriate channels, the State of registry of the action taken and of any penalties subsequently imposed.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 15</th>
</tr>
</thead>
<tbody>
<tr>
<td>The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with its laws and regulations in accordance with the provisions of this Convention.</td>
</tr>
<tr>
<td>Arrested vessels and their crew shall be promptly released upon the posting of reasonable bond or other security.</td>
</tr>
<tr>
<td>Coastal State penalties for violation of fisheries regulations in the economic zone may not include imprisonment, in the absence of agreement to the contrary by the States concerned, or any other form of corporal punishment.</td>
</tr>
<tr>
<td>In cases of arrest or detention of foreign vessels the coastal State shall promptly inform through diplomatic or similar channels the State of registry of the action taken and of any penalties subsequently imposed.</td>
</tr>
</tbody>
</table>
### Table 7 (Cont'd)

<table>
<thead>
<tr>
<th>Group of 77 Proposal</th>
<th>Informal Single Negotiating Text (ISNT)</th>
<th>Evensten Group Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 133</td>
<td>For the purpose of this part, the term 'enclosed or semi-enclosed sea' means a gulf, basin, or sea surrounded by two or more States and connected to the open seas by a narrow outlet or consisting entirely or primarily of the territorial sea and exclusive economic zones of two or more coastal States.</td>
<td></td>
</tr>
</tbody>
</table>
| Article 134          | States bordering enclosed or semi-enclosed seas shall co-operate with each other in the exercise of their rights and duties under the present Convention. To this end they shall, directly or through an appropriate regional organization:  
(a) Co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;  
(c) Co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area; |
| Article 135          | The provisions of this part shall not affect the rights and duties of coastal or other States under other provisions of the present Convention, and shall be applied in a manner consistent with those provisions. |
| Article 136          | (a) The rights to resources recognized or established by the present Convention of a territory whose people have not yet attained either full independence or some other self-governing status recognized by the United Nations or a territory under foreign occupation or colonial domination or a United Nations Trust Territory or a territory administered by the United Nations shall be vested in the inhabitants of that territory, to be exercised by them for their own benefit and in accordance with their own needs and requirements.  
(b) Where a dispute exists with regard to a territory under foreign occupation or colonial domination such rights will not be exercised until and when the dispute with the colonial dominating power[as] has been definitely settled in accordance with the pertinent resolutions of the General Assembly of the United Nations which contemplate safeguarding of territorial integrity, the promotion of decolonization and the recovery of territory.  
(b) In no case may the rights referred to in paragraph 1 be exercised, profited or benefited from, directly or indirectly, or in any way infringed by a metropolitan or foreign power administering or occupying such territory or purporting to administer or occupy such territory. |
| Article 136          | 1. The rights recognized or established by the present Convention to the resources of a territory whose people have not attained either full independence or some other self-governing status recognized by the United Nations, or a territory under foreign occupation or colonial domination, or a United Nations Trust Territory, or a territory administered by the United Nations, shall be vested in the inhabitants of that territory, to be exercised by them for their own benefit and in accordance with their own needs and requirements. |
| Article 136          | 2. Where a dispute over the sovereignty of a territory under foreign occupation or colonial domination exists, the rights referred to in paragraph 1 shall not be exercised until such dispute is settled in accordance with the purposes and principles of the Charter of the United Nations. |
| Article 136          | 3. In no case may the rights referred to in paragraph 1 be exercised, profited or benefited from or in any way infringed by a metropolitan or foreign power administering or occupying such territory or purporting to administer or occupy such territory. |
### Table 7 (Con't)

<table>
<thead>
<tr>
<th>GROUP OF 77 PROPOSAL</th>
<th>INFORMAL SINGLE NEGOTIATING TEXT (ISNT)</th>
<th>EVENSEN GROUP PROPOSAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>(c) References in this article to a territory include continental and insular territories.</td>
<td>4. References in this article to a territory include continental and insular territories.</td>
<td>Article 8</td>
</tr>
<tr>
<td><strong>Annex</strong></td>
<td></td>
<td>1. Nothing in this Convention shall prejudice the right of the coastal State (to) permit nationals of other States to fish in its economic zone.</td>
</tr>
<tr>
<td>Highly Migratory species</td>
<td></td>
<td>2. Neighbouring States may through agreements or other arrangements, and pursuant to coastal State regulations, allow each other's nationals to fish in their respective economic zones on the basis of equitable principles and taking into account all relevant economic and geographic circumstances.</td>
</tr>
<tr>
<td>1. Albacore Tuna</td>
<td></td>
<td>3. The provisions of this article are without prejudice to the provisions of articles 5 and 6.</td>
</tr>
<tr>
<td>2. Bluefin Tuna</td>
<td></td>
<td><strong>Annex A</strong></td>
</tr>
<tr>
<td>3. Bigeye Tuna</td>
<td></td>
<td>Highly migratory species</td>
</tr>
<tr>
<td>4. Skipjack Tuna</td>
<td></td>
<td>1. Albacore Tuna</td>
</tr>
<tr>
<td>5. Yellowfin Tuna</td>
<td></td>
<td>2. Bluefin Tuna</td>
</tr>
<tr>
<td>7. Little Tuna</td>
<td></td>
<td>4. Skipjack Tuna</td>
</tr>
<tr>
<td>8. Frigate Mackerels</td>
<td></td>
<td>5. Yellowfin Tuna</td>
</tr>
<tr>
<td>10. Marlin</td>
<td></td>
<td>7. Little Tuna</td>
</tr>
<tr>
<td>11. Sailfishes</td>
<td></td>
<td>8. Frigate Mackerels</td>
</tr>
<tr>
<td>13. Sauries</td>
<td></td>
<td>10. Marlin</td>
</tr>
<tr>
<td>15. Oceanic Sharks</td>
<td></td>
<td>12. Swordfish</td>
</tr>
<tr>
<td>* This article is without prejudice to article ..., pertaining to the continental shelf.</td>
<td>* Part IV relates to the continental shelf.</td>
<td>* The basic articles concerning the continental shelf.</td>
</tr>
<tr>
<td>** Nothing in this article shall preclude States in a region or sub-region from entering into arrangements for regional or subregional exclusive economic zones for exploiting the resources therein.</td>
<td></td>
<td>** The draft articles submitted to the Chairman of C.II indicated simply that the articles was &quot;still under discussion&quot;. The article contained in this Table was deleted at the final meeting of the Group on the subject prior to the proposal's submission and has been included herein for comparative purposes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>*** One source indicates that provision was deleted from the proposal submitted by the Group to the Chairman of C.II. A second source indicates that the provision was contained in the proposal as submitted.</td>
</tr>
</tbody>
</table>

* Part IV relates to the continental shelf.
forming its duties...in the exclusive economic zone, the coastal state 'shall have due regard to the rights and duties of other states'.

In a more detailed jurisprudential analysis of the concept of 'sovereign rights' as it applies to EEZ resources, Professor Umesh Kumar ("Chinks in the Informal Composite Negotiating Text?: some preliminary observations on the sovereign right to living and non-living resources" (1976) 7 Eastern Africa L R 41, 50) explains that in Hohfeldian terms (W Hohfeld, Fundamental Legal Concepts as Applied in Judicial Reasoning (1923))

The coastal State has a privilege to exploit or not to exploit non-living resources of the Economic Zone, and no other State has a right to exploit such resources without coastal State's consent. It has a right to exploit them if it so wishes, and in that event, all other States are under a duty not to hamper or prevent the coastal State from doing so. It has a power to alienate its legal interest in the Zone to another through licence, lease or other contractual arrangements and it is immune from choosing such beneficiaries in accordance with any prescribed order or scheme of preference.

In the case of fisheries, on the other hand, he continues (ibid 54), the terms 'exclusive economic zone' and 'sovereign rights' are left-overs from the initial stage of UNCLOS III negotiations when States were advancing maximum claims (see, eg, n 26 and accompanying text supra). Through the subsequent bargaining process the juridical content of the terms had changed, although, he adds, "[p]erhaps they are politically too attractive to be jettisoned for more sober and exact expressions". In any case, asserts Kumar (ibid 54-55), the coastal State's 'sovereign rights' on a true understanding of the draft text amount no [sic] nothing more than a 'right' to a preferential jurisdiction to harvest the living resources in superfacent [sic] waters of its Economic Zone. ...The coastal State does not have a privilege to harvest the fish. We can use the denominator privilege only, [sic] when other States do not have a right to harvest the fish to the limit of its harvestable capacity but consistent with the overall objective of optimum utilisation of fish-resources [sic], and to that extent, all other States have a duty not to hamper or prevent the coastal State from doing so. Since the coastal State's right is limited by its harvestable [sic] capacity and appropriate conservation measures, the 'power' and 'immunity' components of the 'sovereign right' are entirely missing. It is because of these missing elements -- privilege, power and immunity -- and the circumscribed nature of the remainder (the right), that we [express] some reservations about calling it a 'sovereign right'.

with respect to MSR. While the coastal State had certain conservation obligations and was required to allow access by other States to the surplus of the TAC, it was for the

Insistence on characterization of the economic zone as 'exclusive' arose consistently in discussions on natural resource issues, particularly fisheries. In earlier years, it was regarded as a philosophical and tactical counter to proposals to give [IFOs] significant regulatory functions regarding coastal fisheries. In later years, it has been a counter to proposals by some [LLGs] for equal fishing rights in the zones of their neighbors or for regional administration in the zones [see n 32 and accompanying text supra]. No assertion has been made that coastal state jurisdiction is exclusive for all nonresource purposes.

Miles (supra n 65, 309) suggests that the addition of the word "exclusive" before "jurisdiction" reflected the desire of many G77 and other coastal States to allow no ambiguity regarding their prescriptive authority in the 200-mile zone. Cf T Clingan Jr, "Emerging law of the sea: the economic zone dilemma" (1976-1977) 14 SDLR 530, 540-541.

Miles argued at the time (supra n 65, 309) that by virtue of the ISNT "there is now nothing that coastal States may not do with respect to resources, and to scientific research concerning resources, in the zone". In their review of the session, however, Stevenson and Oxman (supra n 65, 776) point out that Art 45 of the ISNT failed to distinguish between statements intended to establish jurisdiction (eg, coastal State sovereign rights over resources) and those intended as a summary indication of the rights detailed elsewhere in the text (eg, MSR). By omitting the words, "as provided for in this Convention", when referring to coastal State jurisdiction with respect to, inter alia, MSR, they argued, the ISNT prejudged the outcome of issues and, in particular implied "comprehensive and unlimited subject-matter jurisdiction where this had not been agreed".

Whether Art 51(3) regarding allocation of the surplus among other States actually was intended to specify priorities was (at least in the beginning) a matter of some dispute. On the one hand, the US thought that in the ISNT "[t]here are no strict priorities of access for foreign States, but traditional fishing is one of the factors the coastal State must take into account" (US Reports, supra n 4, 104). Oxman (supra n 4, 169) writes in his review of the ISNT that 'l'Etat côtier est libre de décider quels pêcheurs étrangers seront admis à pêcher dans les limites du reliquat; selon le mot d'un délégué, cela equivaut à pouvoir 'épouser la plus belle dot'." Cf J Carroz, "Le nouveau droit des pêches et la notion d'excédent" (1978) 24 AFDI 851, 858.

Ambassador Karl Knoke, Head of the FRG's delegation at the session, on the other hand, expressed the
coastal State alone to determine both the TAC of the zone's resources and its capacity to harvest them.353

The rights and interests of coastal States were also emphasized in provisions dealing with particular species. In regard to HMS, for example, the ISNT failed to include the key provisions of the Evensen Group's earlier proposal detailed powers of IFOs,33 incorporating instead a more general article relating to co-operation among States that was based on a submission from the Oceanian Group.34

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personal view (supra n 65, 420-421 (emphasis added)) that according to the ISNT,

If the coastal State cannot harvest the [MSY] itself...it must, in accordance with a catalogue of priorities, grant access to the surplus to neighbouring land-locked countries, to neighbouring geographically disadvantaged developing countries of the region or subregion and, finally, in order to minimize economic dislocation, to states whose nationals have traditionally fished in the zone or have made a substantial contribution to research and identification of fish stocks (within the zone).

This seemed also the interpretation placed on the relevant Convention provisions after the Conference by Bennouna, supra n 17, 12 and 17. Kumar (supra n 82, 70), in commenting on an almost identical provision in a revised text produced in 1977, however, states that it was difficult to hazard a definitive opinion on priority access to the surplus of the TAC, and that "[i]f the object is to trammel the discretion of the coastal State in accordance with express guidelines, then they will have to be more specific". See also in this regard nn 270ff and accompanying text infra.

This provision would not apply, however, to resources of territories under foreign occupation or colonial domination. This Article had broader applications than at first might be thought, in that it might have been construed to apply to States such as France with overseas territories (see, eg, Beurier and Cadenat, supra n 65, 760; and Rigaldies, supra n 65, 302). See also nn 192 and 218 infra.

See n 71 and accompanying text supra.

Miles (supra n 65, 310) states that the proposal's sponsors were Australia, Fiji, Micronesia, New Zealand, Tonga and Western Samoa. There is no proposal from this Group in Platzoder, supra n 57.

As in the case of other provisions, differing interpretations were placed on that relating to HMS. According to Miles,"[t]here are...no restrictions on the authority of the coastal State to regulate tuna fisher-
In contrast to the EEZ fishery provisions, those relating to high seas areas received little attention during the session. A set of articles was incorporated into the ISNT based largely on the non-controversial articles found in the 1958 Fisheries and High Seas Conventions, and the American proposal submitted the previous year (see Table 8).

One major issue left unresolved in the Evensen Group and in the subsequent [ISNT] was the status of tunas and whales, the highly migratory stocks. Coastal states were unwilling to place them under a special regime; the distant-water tuna fishing states would not accept their inclusion with other fisheries under the coastal state. As a result, the [ISNT] (Article 53) set up an ambiguous system of shared authority between coastal states and the international fishery commissions.

According to the US report of the session (US Reports, supra n 4, 88),

No complete meeting of minds has yet been reached on [the issue of HMS (tuna)], although positions are closer. It seems that an organization which would establish mandatory conservation measures would be broadly acceptable, but there is still disagreement as to whether other measures adopted by an organization including allocation would be mandatory.

According to the "Statement on the work of Second Committee" during the session (A/Conf.62/C.2/L.89/Rev. 1, in UNCLLOS:OR iv, 195, 196), only 7 meetings of the informal consultative group on the high seas were held during the session and the question of living resources was deferred.

See n 44 and accompanying text supra. Both Article 75 dealing with freedom of the seas and that concerning hot pursuit (Art 97) were drawn mainly from the High Seas Convention. In the former, the freedom of fishing was relegated from second on the list of high seas freedoms (behind navigation) to fifth, reflecting perhaps the degree of qualification placed on the exercise of that freedom. While based largely on the American proposal, ISNT Article 106(1)(a) relating to conservation and exploitation went further than the former in specifying that measures aimed at maintaining or restoring particular stocks at levels which can produce the MSY would not merely take into account, inter alia, "economic factors", but were in fact qualified by, in-
**Table 8: Selected High Seas Fishery Provisions (Geneva)**

<table>
<thead>
<tr>
<th>High Seas Convention</th>
<th>Informal Single Negotiating Text (ISNT)</th>
<th>National Proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 75</td>
<td>1. The high seas being open to all nations, no State may validly pur-</td>
<td>The high seas being open to all nations, no State may validly pur-</td>
</tr>
<tr>
<td>Article 97</td>
<td>1. The hot pursuit of a foreign ship may be undertaken when the com-</td>
<td>port to subject any part of them to its sovereignty. Freedom of the high</td>
</tr>
<tr>
<td>El Salvador</td>
<td>2. The right of hot pursuit ceases as soon as the ship pursued enters</td>
<td>seas is exercised under the conditions laid down by these articles and</td>
</tr>
<tr>
<td>Article 2</td>
<td>2. The right of hot pursuit ceases as soon as the ship pursued enters</td>
<td>the other rules of international law. It comprises, inter alia, both</td>
</tr>
<tr>
<td></td>
<td>the territorial sea of its own country or of a third State.</td>
<td>for coastal and non-coastal States:</td>
</tr>
<tr>
<td></td>
<td>3. Hot pursuit is not deemed to have begun unless the pursuing ship</td>
<td>(a)—(d)...</td>
</tr>
<tr>
<td></td>
<td>has satisfied itself by such practicable means as may be available that</td>
<td>(e) Freedom of fishing, subject to the conditions laid down in section 2;</td>
</tr>
<tr>
<td></td>
<td>the ship pursued or one of its boats or other craft working as a team</td>
<td>...</td>
</tr>
<tr>
<td></td>
<td>using the ship pursued as a mother ship are within the limits of the</td>
<td>2. These freedoms shall be exercised by all States, with due consider-</td>
</tr>
<tr>
<td></td>
<td>territorial sea, or, as the case may be, within the contiguous zone of</td>
<td>ation for the interests of other States in their exercise of the fre-</td>
</tr>
<tr>
<td></td>
<td>the pursuing State, and may only be continued outside the territorial</td>
<td>dom of the high seas.</td>
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<tr>
<td></td>
<td>sea or the contiguous zone if the pursuit has not been interrupted. It</td>
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<td>is not necessary that, at the time when the foreign ship within the</td>
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<td></td>
<td>territorial sea or the contiguous zone is in order to stop, the ship</td>
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<td></td>
<td>giving the order should likewise be within the territorial sea or</td>
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<td></td>
<td>the contiguous zone. If the foreign ship is within a contiguous zone,</td>
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<td></td>
<td>as defined in article 24 of the Convention on the Territorial Sea and</td>
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<td></td>
<td>the Contiguous Zone, the pursuit may only be undertaken if there has</td>
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<td></td>
<td>been a violation of the rights for the protection of which the zone</td>
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<td></td>
<td>was established.</td>
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<tr>
<td></td>
<td>2. The right of hot pursuit ceases as soon as the ship pursued enters</td>
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<tr>
<td></td>
<td>the territorial sea of its own country or of a third State.</td>
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<td></td>
<td>3. Hot pursuit is not deemed to have begun unless the pursuing ship</td>
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<td></td>
<td>has satisfied itself by such practicable means as may be available that</td>
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<tr>
<td></td>
<td>the ship pursued or one of its boats or other craft working as a team</td>
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<td>using the ship pursued as a mother ship are within the limits of the</td>
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<td>territorial sea, or as the case may be, within the contiguous zone.</td>
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<td>The pursuit may only be commenced after a visual or auditory signal to</td>
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<td>stop has been given at a distance which enables it to be seen or heard</td>
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<td>by the foreign ship.</td>
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<td>4. Hot pursuit is not deemed to have begun unless the pursuing ship</td>
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<td>has satisfied itself by such practicable means as may be available that</td>
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<td>the ship pursued or one of its boats or other craft working as a team</td>
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<td>using the ship pursued as a mother ship are within the limits of the</td>
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<td>territorial sea, or, as the case may be, within the contiguous zone</td>
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<td>or the exclusive economic zone of the coastal State. The pursuit may</td>
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<td>only be commenced after a visual or auditory signal to stop has been</td>
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<td>given at a distance which enables it to be seen or heard by the foreign</td>
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<td>ship.</td>
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</table>

(a)—(d) — see above
<table>
<thead>
<tr>
<th>1958 CONVENTIONS</th>
<th>INFORMAL SINGLE NEGOTIATING TEXT (ISNT)</th>
<th>NATIONAL PROPOSALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service especially authorized to that effect.</td>
<td>5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and specially authorized to that effect.</td>
<td>Article...</td>
</tr>
<tr>
<td>5. Where hot pursuit is effected by an aircraft: (a) The provisions of paragraph 1 to 3 of this article shall apply mutatis mutandis; (b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption. 6. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an enquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary. 7. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.</td>
<td>(a) The provisions of paragraphs 1 to 4 shall apply mutatis mutandis; (b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption. 7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary. 8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.</td>
<td>All States have the right for their nationals to engage in fishing on the high seas.</td>
</tr>
<tr>
<td><strong>FISHERIES CONVENTION</strong>  <strong>Article 1</strong>  1. All States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the rights and duties as well as the interests of coastal States as provided for in this Convention, and (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas. 2. All States have the duty to adopt or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.</td>
<td><strong>SECTION 2</strong>  <strong>Article 103</strong>  All States have the right for their nationals to engage in fishing on the high seas subject to: (a) Their treaty obligations (b) The rights and duties as well as the interests of coastal States provided for, inter alia, in article 52, paragraph 2, and articles 53 and 54 [see Table 11-3]; and (c) the provisions of this section.  <strong>Article 104</strong>  All States have the duty to adopt, or to co-operate with other States in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.  <strong>Article 105</strong>  States shall co-operate with each other in the management and conservation of living resources in the areas of the high seas. States whose nationals exploit identical resources or different resources in the same area, shall enter into negotiations with a view to adopting the means necessary for the conservation of the living resources concerned. They shall, as appropriate, co-operate to establish subregional or regional fisheries organizations to this end.</td>
<td>United States  1. States shall co-operate with each other in the exploitation and conservation of living resources in areas beyond the economic zone of coastal States. States exploiting identical resources, or different resources located in the same area, shall enter into fisheries management agreements, and establish appropriate multilateral fisheries organizations, for the purpose of maintaining these resources. If such a body cannot be constituted among the concerned States, they may ask for the assistance of the Food and Agriculture Organization of the United Nations in establishing an appropriate regional or international regulatory body.</td>
</tr>
</tbody>
</table>
### TABLE 8 (CON’T)

<table>
<thead>
<tr>
<th>1958 CONVENTIONS</th>
<th>INFORMAL SINGLE NEGOTIATING TEXT (ISNT)</th>
<th>NATIONAL PROPOSALS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 106</strong></td>
<td>1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:</td>
<td>2. States, acting individually and through regional and international fisheries organizations, have the duty to apply the following conservation measures for such living resources:</td>
</tr>
<tr>
<td></td>
<td>(a) Adopt measures which are design-</td>
<td>(a) Allowable catch and other conservation measures shall be established which are designed, on the best evidence available, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and any generally recommended subregional, regional or global minimum standards.</td>
</tr>
<tr>
<td></td>
<td>ed, on the best evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and any generally recommended subregional, regional or global minimum standards.</td>
<td>(b) Such measures shall take into account effects on species associated with or dependent upon harvested species and at a minimum shall be designed to maintain or restore populations of such associated species above levels at which they may become threatened with extinction.</td>
</tr>
<tr>
<td></td>
<td>(b) Take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated species above levels at which their reproduction may become seriously threatened.</td>
<td>(c) For this purpose, scientific information, catch and fishing effort statistics and other relevant data shall be contributed and exchanged on a regular basis.</td>
</tr>
<tr>
<td></td>
<td>2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through subregional, regional and global organizations where appropriate and with participation by all States concerned.</td>
<td>(d) Conservation measures and their implementation shall not discriminate in form or in fact against any fishermen. Conservation measures shall remain in force pending the settlement in accordance with the provisions of chapter...of any disagreement as to their validity.</td>
</tr>
<tr>
<td></td>
<td>3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.</td>
<td>3. With respect to anadromous species and highly migratory species, the provisions of article...and article...respectively, shall apply.</td>
</tr>
</tbody>
</table>

**Article 107**

The provisions of article 53, paragraph 3 [see Table 11-3] shall also apply to the conservation and management of marine mammals in the high seas.
2. The Third Committee

Discussions in C.III continued to focus on fundamental issues, especially the freedom to conduct research in the EEZ, rights and obligations of both coastal and researching States, and the particular position of LLGDS. The G77 submitted a proposal maintaining their essential position that "explicit consent" was required for the conduct of MSR in the EEZ. It was accepted, however, that in considering requests by States to undertake research in the EEZ, coastal States would extend preferential treatment to developing, neighbouring LLGDS.

Insisting on recognition of their own rights and interests, LLGDS claimed it "morally wrong" to distinguish between developed and developing LLS and that the offer of preferential treatment constituted only "empty promises".

Socialist States introduced their own proposal, premised on the possibility of distinguishing 'pure' MSR from that connected with resource exploration and exploitation. The latter would require the consent of the coastal State.

Late in the session, the unity of the G77 on MSR was broken when four developing States proposed arrangements attempting to reconcile the 'consent' and 'notification' approaches. While there was difficulty in distinguishing ter alia, "the special requirements of developing countries" as well as take into account fishing patterns.

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\[93\] A/Conf.62/C.3/L.13/Rev.2, in *UNCLOS:OR* iv, 199-200. See also nn 54-56 and accompanying text *supra*.

\[94\] Statement by the Czechoslovak delegate, *UNCLOS:OR* iv, 105

\[95\] A/Conf.62/C.3/L.26; sponsored by Bulgaria, Byelorussian SSR, Czechoslovakia, GDR, Mongolia, Poland, Ukrainian SSR, and USSR; in *ibid* 92

\[96\] A/Conf.62/C.3/L.29, in *ibid* 216-218; sponsored by Colombia, El Salvador, Mexico and Nigeria.
'pure' from 'applied' MSR, conceded Mexico's representative, it could be done by scientists acting in good faith. Accordingly, resource-related research would demand coastal State consent. Where there was a dispute over the nature of the research, the matter would be referred to independent scientists for assistance in reaching agreement. If there was ultimately no agreement, the coastal State could withhold consent.9

Although the introduction of the latter proposal raised the ire of other G77 States,9® others saw in it a positive contribution to the search for a compromise.99 It, along with the Socialist States' proposal, formed the basis of the ISNT articles on MSR (see Table 9).

3. **Dispute Settlement**

During the session, three basic positions were espoused concerning compulsory dispute settlement in the EEZ: no reservations should be permitted; a limited range of issues should be excluded; and, given the sovereign rights of the coastal State in the zone, no disputes should be subject to compulsory settlement.100

The second position ultimately formed the basis of Part IV of the ISNT (that dealing specifically with the dispute settlement issue).101 Part IV provided that a State would

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97 *Ibid* 111-112; *cf*, statement by the Colombian delegate (*ibid* 112). See n 56 and accompanying text *supra* regarding the problem of distinguishing 'pure' from 'applied' research.

98 See, *eg*, statements by the delegates of Brazil (*UNCLOS: OR* iv, 114), India (*ibid*) and Kenya (*ibid* 113).

99 See, *eg*, comments by the delegates of France (*ibid* 113) and Italy (*ibid* 112).

100 A Adede, "Settlement of disputes arising under the Law of the Sea Convention" (1975) 69 *AJIL* 798, 814

101 A/Conf.WP.9, dated 21 July 1975, in *UNCLOS:OR* v, 111-122. Part IV was prepared by the Conference President and based largely on a detailed document (SD.Gp/2nd session/No.1/Rev.5, of 1 May 1975, in (1975) 14 *ILM*
<table>
<thead>
<tr>
<th>G77 PROPOSAL</th>
<th>SOCIALIST STATES PROPOSAL</th>
<th>INFORMAL SINGLE NEGOTIATING TEXT (ISNT)</th>
<th>LL/GDS PROPOSAL</th>
<th>FOUR-STATES PROPOSAL</th>
</tr>
</thead>
</table>
| L.13/Rev.2   | Article 1
'Marine scientific research' means any study of, or related experimental work in, the marine environment that is designed to increase man's knowledge and is conducted for peaceful purposes. | Article 1
'Marine scientific research' means any study or related experimental work designed to increase man's knowledge of the marine environment.* | Article 1
'Marine scientific research' means any study and related experimental work conducted in the marine environment designed to increase man's knowledge and conducted for peaceful purposes. | Article 1
States, irrespective of their geographical location, and competent international organizations have the right to engage in marine scientific research in the marine environment subject to the rights and obligations of coastal States and in accordance with the provisions of this Convention. |

|        | Article 2
3. Marine scientific research shall not form the legal basis for any claim whatsoever to any part of the marine environment or its resources. | Article 2
All States, whether coastal or land-locked, as well as appropriate international organizations, have the right to conduct marine scientific research subject to the provisions of this Convention. | Article 2
All States, whether coastal or land-locked, as well as appropriate international organizations, have the right to conduct marine scientific research subject to the provisions of this Convention. | Article 2
3. Marine scientific research activities shall not form the legal basis for any claim whatsoever to any part of the marine environment or its resources. |

|        | Article 4
1. Marine scientific research within the territorial sea established in accordance with this Convention may be conducted only with the consent of, and under the conditions laid down by the coastal State. Requests for such consent shall be submitted to the coastal State well in advance and shall be answered without undue delay. | Article 7
Marine scientific research activities shall not form the legal basis for any claim whatsoever to any part of the marine environment or its resources. | Article 13
Coastal States have the exclusive right to conduct and regulate marine scientific research in their territorial sea. Scientific research activities therein shall be conducted only with the explicit consent of, and under the conditions set forth by, the coastal State. Requests for such consent shall be submitted to the coastal State well in advance and shall be answered without undue delay. | Article 5
Marine scientific research within the territorial sea established in accordance with this Convention may be conducted only with the consent of the coastal State. Requests for such consent shall be submitted to the coastal State well in advance and answered without undue delay. |

| Item 2(a) | Article 2
4. Marine scientific research shall be conducted subject to the rights of coastal States as provided for in this Convention. | Article 14
Marine scientific research beyond the territorial sea, in the economic zone and on the continental shelf, shall be conducted by States as well as by appropriate international organizations in such a manner that the rights of the coastal State, as provided for in this Convention, are respected. | (see Article 6(1) below) |

*For the purpose of this Convention 'marine scientific research' means any study and related experimental work conducted in the marine environment designed to increase man's knowledge thereof. **
<table>
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<tr>
<th>G77 Proposal</th>
<th>Socialist States Proposal</th>
<th>ISNT</th>
<th>LL/GDS Proposal</th>
<th>Four-States Proposal</th>
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<td>Item 2(a)&lt;br&gt;1. Scientific research in the(...)&lt;br&gt;of a coastal State shall not be conducted without the explicit consent of that State.</td>
<td>Article 6&lt;br&gt;2. In the economic zone established in accordance with this Convention, marine scientific research unrelated to the exploitation and exploitation of the living and non-living resources of the zone shall be conducted after advance notification of the planned research to the coastal State.&lt;br&gt;3. The notification of the planned research mentioned in paragraph 2 above shall be transmitted to the coastal State at least two months in advance. The coastal State shall be given:&lt;br&gt;a. A detailed description of the research programme, including objectives, methods and instrumentation, locations and time schedule, and information on the institution conducting the research;&lt;br&gt;b. Information on any major changes in the research programme;&lt;br&gt;c. An opportunity to participate directly or indirectly in the research on board vessels at the expense of the State conducting the research but without payment of any remuneration to the scientists of the coastal State;&lt;br&gt;d. Access to all data and samples obtained in the course of the research, and in that connection the coastal States shall, at its request, be provided with such data and samples as can be copied or shared without harm to their scientific value;</td>
<td>Article 15&lt;br&gt;States and international organizations which intend to undertake scientific research in the economic zone or on the continental shelf of a coastal State shall provide that State with a full description of:&lt;br&gt;a. The nature and objectives of the research project;&lt;br&gt;b. The means to be used, including name, tonnage, type and class of vessels;&lt;br&gt;c. The precise geographical areas in which the activities are to be conducted; and&lt;br&gt;d. The expected date of first appearance and final departure of the research vessel or equipment as the case may be; and&lt;br&gt;e. The name of the sponsoring institution, its director and the scientists in charge of the expedition.</td>
<td>Article 6&lt;br&gt;1. Marine scientific research beyond the territorial sea, in areas where a coastal State enjoys certain rights over resources in accordance with this Convention, shall be conducted by States and international organizations in such a manner that these rights of coastal States are respected, for which purpose the coastal State shall:&lt;br&gt;a. Be given at least ninety days in advance notification of the proposed research project;&lt;br&gt;b. Be given as soon as possible a detailed description of the research project, including objectives, methods and instrumentation, locations and time schedule, and information on the research institution concerned and the scientific staff to be employed;&lt;br&gt;c. Be promptly informed of any major changes with regard to the description of the proposed research project;</td>
<td>Article 7&lt;br&gt;1. States and competent international organizations shall endeavour to facilitate the right to conduct marine scientific research in the economic zone and the continental shelf through bilateral, regional and multilateral agreements.\t</td>
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<tr>
<td><strong>G77 PROPOSAL</strong></td>
<td><strong>SOCIALIST STATES PROPOSAL</strong></td>
<td><strong>ISNT</strong></td>
<td><strong>II/GDS PROPOSAL</strong></td>
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<td>(ix) Assist the coastal State in assessing the implications of the said data and samples and the results thereof in such a manner as that State may request;</td>
<td>(e) Assistance, at its request, in the interpretation of the results of the research.</td>
<td>(c) Provide the coastal State with the final results and conclusions of the research project;</td>
<td>(f) Be given assistance, at its request, in the interpretation of the results of the research project.</td>
<td>(i) Ensure the right of the coastal State, if it so desires, to participate or to be represented in all phases of the research project;</td>
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<td>(x) Undertake that results of scientific research shall not be published without the explicit consent of the coastal State; and</td>
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<td>(d) Undertake to provide to the coastal State, on an agreed basis, raw and processed data and samples of materials;</td>
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<td>(ii) Provide an opportunity to participate directly in the research on board vessels at the expense of the State conducting the research but without payment of any remuneration to the scientist of the coastal State;</td>
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<tr>
<td>(xi) Undertake to comply with all applicable environmental standards and regulations of the coastal State, as well as international standards established or to be established by (insert name or names of appropriate organizations).</td>
<td></td>
<td>(e) If requested, assist the coastal State in assessing the said data and samples and the results thereof;</td>
<td></td>
<td>(iii) Provide the coastal State with the final results and conclusions of the research project;</td>
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<td>(f) Ensure that the research results are made internationally available through international data centres or through other appropriate international channels as soon as feasible;</td>
<td></td>
<td>(iv) Undertake to provide to the coastal State on an agreed basis raw and processed data and samples of material;</td>
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<td>(g) Inform the coastal State immediately of any major changes in the research programme; and</td>
<td></td>
<td>(v) If requested, assist the coastal State in assessing the said data and samples and the results thereof;</td>
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<td>(h) Comply with all relevant provisions of this Convention.</td>
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<td>(vi) Ensure that the research results are made internationally available through international data centres or through appropriate international channels as soon as feasible; and</td>
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<td></td>
<td>(vii) Comply with all relevant provisions of this Convention.</td>
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**Article 18**

1. States and international organizations which intend to undertake scientific research shall indicate in their communication to the coastal State whether they consider the research project to be of a fundamental nature or related to the resources of the economic area or continental shelf.
2. States shall seek to promote through competent international organizations the establishment of criteria and guidelines concerning the differentiation between research directly related to the exploration and exploitation of the living and non-living resources and fundamental research which is not directly related to exploration and exploitation of such resources.

Article 19
If the coastal State considers that the research project defined by the researching State as fundamental in not of such nature, it may object only on the ground that the said project would infringe on its rights as defined in this Convention over the natural resources of the economic zone, or continental shelf.

Article 20
Any dispute with respect to the determination of the nature of the research project, if not settled by negotiation between the parties concerned shall, at the request of any of the parties of the dispute, be submitted for settlement in accordance with the procedures set out in the relevant articles of this Convention.

Article 21
Any research project related to the living and non-living resources of the economic zone and the continental shelf shall be conducted only with the explicit consent of the coastal State. In this case the following conditions shall apply:
(a) The conditions specified in articles 15 and 16 with the exception of the condition contained in subparagraph (f) of article 16.
<table>
<thead>
<tr>
<th>G77 PROPOSAL</th>
<th>SOCIALIST STATES PROPOSAL</th>
<th>ISNT</th>
<th>LL/GDS PROPOSAL</th>
<th>FOUR STATES PROPOSAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item 2(b)</td>
<td>4. Coastal States in considering requests by States to undertake scientific research in their... shall extend preferential treatment to developing neighbouring land-locked States and other developing... by Article 7 above.</td>
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<td>States and competent international organizations conducting marine scientific research in the areas referred to in paragraph 2 of article 4 and in article 6 shall take into account the legitimate interests and rights of land-locked and other geographically disadvantaged States neighbouring the research area, as they may be defined in this Convention, notifying them of the proposed research and providing them, at their request, with the assistance and information specified in paragraphs 3(a), 3(b) and 3(e) of article 6. Where research facilities permit, such States shall be offered the opportunity to participate in the research under the conditions set forth in paragraph 3(c) of article 6.</td>
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<td>Article 7</td>
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<td>Article 22</td>
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<td>When the research is of a fundamental nature the coastal State may indicate within... days of the communication concerning the research projects its intent to participate in the different phases of the research on mutually agreed terms. In case the coastal State does not reply, the researching State or the international organization shall proceed with the realization of the research project in accordance with the conditions referred to in article 16.</td>
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<td>Article 23</td>
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<td></td>
<td>1. States and international organizations conducting marine scientific research in the economic zone of a coastal State shall take into account the interests and rights of the land-locked and other geographically disadvantaged States of the region, neighbouring to the research area, as provided for in this Convention, and shall notify these States of the proposed research project as well as provide, at their request, relevant information and assistance as specified in article 15 and in article 16, subparagraphs (e) and (g).</td>
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<td>2. Such neighbouring land-locked and other geographically disadvantaged States shall, at their request, be given the opportunity to participate, whenever feasible, in the proposed research project through qualified experts to be appointed by them.</td>
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<td>Article 6</td>
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<td></td>
<td>2(a) States and appropriate international organizations conducting marine scientific research in the areas referred to in paragraph 1 above shall take into account the interests and rights of the land-locked and other geographically disadvantaged States of the region, neighbouring to the research area, as provided for in this Convention, and shall notify these States of the proposed research project, as well as provide, as their request, relevant information and assistance as specified in paragraphs 1(b), (c) and (f) above.</td>
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<td>Article 4</td>
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<td></td>
<td>The interests and rights of neighbouring land-locked and other geographically disadvantaged States as provided for in this Convention shall be taken into account.</td>
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</table>
3. The coastal State shall have the right to supervise scientific research activities undertaken in the area referred to in paragraph 1 and suspend or terminate them if that State finds that these activities are not being carried out for the declared objective or purpose of the research or are not being carried out in accordance with the provisions of these articles.

<table>
<thead>
<tr>
<th>G77 PROPOSAL</th>
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<tr>
<td>Item 2(b)</td>
<td></td>
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<td>Article 6</td>
<td>Article 7</td>
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<tr>
<td>3. The coastal State shall have the right to supervise scientific research activities undertaken in the area referred to in paragraph 1 and suspend or terminate them if that State finds that these activities are not being carried out for the declared objective or purpose of the research or are not being carried out in accordance with the provisions of these articles.</td>
<td></td>
<td>Article 5 Without prejudice to the provisions of article 6 below, all States, both coastal and land-locked on an equal footing and without any discrimination, as well as competent international organizations, shall enjoy freedom to conduct marine scientific research on the high seas.</td>
<td></td>
<td>5(a). If the coastal State has reasonable grounds to believe that the proposed research project is not in conformity with the provisions of this article or that the research State or organization has failed to fulfill prior obligations under this article with respect to the coastal State, it may inform the research State or organization at the earliest possible time, but in any event within...days after receipt of the notification. (b) Unless the parties otherwise agree each party shall, within...days after the information has been communicated, choose an expert from the members of a fully representative list of qualified experts in all fields of marine scientific research, established, after consultations with the executive heads of other appropriate international organizations, by the Director-General of UNESCO who shall appoint a third expert from the members of that list. (c) The experts shall assist the parties to reach agreement. If no agreement is reached, the experts shall, within...days of their appointment, either collectively or individually, give their opinions to the parties concerned. 6. If the parties have not reached agreement through the aforementioned procedure, the dispute shall, at the request of either party, be settled in accordance with the dispute settlement procedures set out in chapter...of this Convention.</td>
</tr>
</tbody>
</table>

* A decision on the precise term to be used here, such as economic zone, and which do not refer to the international area, shall be adopted in the light of the decisions on the definitions and nature of these terms in the Second Committee.

* A provision containing a definition of marine scientific research, together with all other definitions, could be included in a special introductory chapter of this Convention.
not be required to submit to settlement procedures any dispute arising out of the exercise of its exclusive jurisdiction under the Convention, except when it was claimed that the coastal State had violated its obligations by failing to apply specified, internationally-agreed standards or criteria. As well, a State when becoming party to the Convention might declare that it would not accept dispute settlement procedures for disputes "arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction" under the Convention.¹⁰²

Annexed to Part IV were sets of special procedures to govern disputes regarding, inter alia, fisheries and MSR.¹⁰³

Commenting on the above, the President stressed that it was not the exclusive jurisdiction that was meant to be questioned but rather the manner of its exercise.¹⁰⁴

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¹⁰² Adede (supra n 100, 815) explains that the provision attempts to protect coastal States from harassing court proceedings initiated by fishing States challenging the former's EEZ fishery jurisdiction.

According to the corresponding provision of the Working Group's document (see Art 17(3)(a)[emphasis added]; n 101 supra), the coastal State might exclude itself from disputes "arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under this Convention, except in cases involving an abuse of power". The reason for the deletion of the reference to abuse of power may lie in the obligation imposed on coastal States in the ISNT (Art 45(2)) to have due regard to the rights and interests of other States. See, however, nn 181, 189 and 201 and accompanying text infra concerning subsequent consideration by the Conference of the abuse of rights provision.

¹⁰³ Annex II.A, supra n 101. Where a fishery dispute was not settled by negotiation, a party might request the former to be submitted to a special committee of five fishery experts for binding decision, the experts being selected from a list established by the FAO. The committee would have the power to prescribe provisional measures, if necessary, as well as engage in fact-finding if the parties to the dispute so agreed.

¹⁰⁴ A/Conf.62/WP.9/Add.1, supra n 101, 124
4. Observations

The session was noteworthy in a number of respects. Looked at positively, the ISNT procedural device reduced to a minimum the multitude of proposals and texts before the Conference, focussing the attention of all States on the single draft. As well, significant advances were made on numerous issues and as Professor Jean-Pierre Lévy observes, "pour la première fois les Etats participants sont à même de voir un modèle de ce que pourrait être dans son ensemble un nouveau droit de la mer".105

As Lévy concedes, however, significant differences remained on a number of key fishery issues, including the regime governing HMS, MSR in the EEZ, the settlement of disputes, and -- perhaps most contentious of all -- the rights of LLGDS.

The session revealed that successful resolution of those issues would be difficult. Whereas C.I differences were usually cast in North-South terms, in C.II open splits developed during the session within the G77 and, at least temporarily, the LLGDS.106 C.I proceedings did, however, have an indirect but nevertheless important impact on C.II negotiations in that the Geneva session saw the first attempts to link important sea-bed issues and the demand for a New International Economic Order to the EEZ regime as the

105 Lévy, supra 19, 918; cf, Anderson, supra n 65, 114

106 Miles (supra n 65, 189, 317) observes that in response to informal threats from some developing LLGDS to form a blocking third at the Conference (see n 33 and accompanying text supra), some G77 coastal States pointed out that if the former brought about the failure of the Conference, they would forfeit all existing transit rights and stand no chance of gaining access to living resources in the 200-mile zones. Cf Ferreira (supra Ch 10, n 160, 114), who notes that African coastal States informally indicated to African LLGDS that "in the last resort the Eastern bloc disadvantaged would vote with the Soviet Union, the blocking third would be lost, and the African disadvantaged would be left with nothing". See also in this regard n 189 and accompanying text infra.
price major maritime Powers would have to pay for G77 concessions on such issues as the international straits regime.\(^{107}\)

In 1974 it had been widely anticipated that 1975 would see the end of substantive negotiations. By the end of the 1975 session, however, views were more varied. Some delegations continued to hold that a further one or two sessions would see the Conference conclude, and some went so far as to stress the need to complete negotiations so that the Convention not be overtaken by unilateral actions.\(^{108}\) Other

\(^{107}\) Miles (\textit{supra} n 65, 223, n 2) comments that

At Caracas very few delegations were talking privately about the possibility of trade-offs on items between Committees I and II. [Delegates usually explained] that the issues were too many, too technical and too complex and that delegations had enough trouble just trying to follow them. The implication was that making links across items and Committees would result in such complexity that it would be impossible to manage the negotiations. In Geneva, however, no vestige of the argument remained. In the corridors,...delegations from the [G77]...conversed confidently of trade-offs between the items in Committees I and II. Indeed, some of them even asserted that unless the developed countries realized the necessity for such trade-offs in Committee I, no deals could be made on their priority items in Committee II.

For a detailed discussion of this aspect of the proceedings see Miles, \textit{supra} Ch 10, n 17, 205-214. See also in the above regard nn 125 and 178 infra.

\(^{108}\) See, eg, statements by the delegates of Chile (\textit{UNCLOS: OR} iv, 46), New Zealand (\textit{ibid} 45), Turkey (\textit{ibid} 48), the US (\textit{ibid} 46) and Zaire (\textit{ibid} 47). Singapore's representative warned (\textit{ibid} 46) that an early Convention was required to ensure that the latter would not be overtaken by unilateral action. On the latter point, however, Buzan (\textit{supra} n 65, 43-44) wrote shortly after the session that there was

a new factor arising from the Geneva session -- a widespread change in expectations about the time-frame in which the Conference should operate. The Conference had acquired a formidable momentum, based on the years and years of intense effort it represents and, now that it has passed and survived the psychological deadline of 1975, it is under much less time pressure than it was before. The Conference has become a process of indeterminate length rather than a concentrated effort aimed at a specific time. This means that it has forfeited much of its power to act as a restraint on states that feel an urgent need for increased maritime jurisdiction, and it seems very likely that several states, including the United States and Canada, as well as Norway, Iceland and Britain, will extend their fisheries jurisdictions in the near future. Such actions
delegates at the same time felt it unlikely that a Convention could be concluded in 1976.\textsuperscript{109} In the final event, an American proposal that the UNGA give priority to the Conference "with a view to completing its work in 1976" was withdrawn as being perhaps premature.\textsuperscript{110}

D. The Fourth and Fifth Sessions (1976)\textsuperscript{111}

1. Introduction

Springtime, 1976, in New York saw the fourth session discuss in detail the ISNT and the issuance of a Revised

are unlikely to disrupt the international negotiations, partly because they will be framed in terms that will fall within the policy 'window' already generally accepted at the Conference and partly because so many developing countries have already taken similar action themselves.

Of much greater concern, he explained, were proposals regarding deep sea-bed mining. See also in this regard, eg, Lévy, supra n 19, 924-926.

\textsuperscript{109} See, eg, statements by the representatives of Iraq (UNCLOS:OR iv, 43) and the Soviet Union (ibid 46).

\textsuperscript{110} Ibid 50

Single Negotiating Text (RSNT), also informal. Despite serious reservations in many quarters, it was decided to convene a fifth session that same year in the hope of maintaining negotiating momentum. In his introductory remarks to the latter session, President Amerasinghe stressed that it would be "not only crucial but critical because, unless sufficient progress was made towards reaching general agreement on a generally acceptable treaty, a great opportunity
would be lost". The Conference immediately began consider-
eration of the outstanding six "key issues".

2. The Second Committee

Despite an agreed 'rule of silence' whereby delegates
would only intervene if they had amendments to propose, more
than 3,700 interventions were made during the fourth ses-

Writing at the end of the 4th session, however, James Storer, an American official, made clear that an early reconvening of the Conference was seen by the US as also advantageous from a fishery perspective ("Law of the Sea negotiations and extended jurisdiction" in Economic Impacts of Extended Fisheries Jurisdiction (1977; L Anderson, ed)[volume hereafter cited 'Economic Impacts'] 105, 110):

the fisheries articles have withstood the test of an open and full dis-
cussion and...they in effect represent the most generally acceptable com-
promise of the various interests that can be achieved. It is our desire,
therefore, that there be a follow-up session this summer to take advan-
tage of the momentum that has already been set in motion, and that at
this summer session a final effort be made at resolving those issues
which still require a compromise solution leading to a concluding session
of the conference in 1977. A failure at this point to carry on the ef-
fort during the remainder of the year would, I believe, be highly damag-
ing to any eventual prospect of a successful Law of the Sea Convention.
Rather I fear that a hiatus now in the negotiations would only lead to a
complete unraveling of the delicate fabric that has been woven during the
course of these sessions.

UNCLOS:OR vi, 3

These had been identified by the President ("Note by the President of the Conference"(A/Conf.62/L.12/Rev.1, dated 2 August 1976), in ibid 122-124) as follows:

1. matters relating to exploitation of the non-living resources of the
depth sea-bed;
2. interests of States which for geographical reasons might not derive
real benefit from the establishment of an EEL;
3. the juridical status of the EEL;
4. the regime to govern scientific research activities beyond the terri-
torial sea;
5. dispute settlement arrangements;
6. the formulation of final clauses.

Buzan and Johnson (supra n 70, 291) explain that the 'issue' approach was adopted because negotiations
in C.I had bogged down and it was not wished to again
produce separate revised texts.
sion's article-by-article review of the ISNT within its mandate and over 1,000 proposed amendments offered.\textsuperscript{110}

A feature of the proceedings was the increasingly strident debate between coastal States and LLGDS, the latter arguing that the ISNT failed to recognize their legitimate rights and interests regarding access to EEZ fishery resources.\textsuperscript{117} Not only were LLGDS proposals to rectify perceived deficiencies in the ISNT not reflected in the RSNT, their position was made worse by amendments restricting rights of developed LLS to zones of "adjoining" rather than "neighbouring" developed coastal States as in the ISNT, and providing that rights were no longer exercised "without preju-

\textsuperscript{116} Lévy, \textit{supra} n 4, 64; and Koh and Jayakumar, \textit{supra} n 4, 119-120

\textsuperscript{117} See letter dated 17 March 1976, from Ambassador Karl Wolf of Austria, the then Chairman of the LLGDS Group to the Conference President, in Platzoder, \textit{supra} n 57, iv, 253-254. Buzan and Johnson (\textit{supra} n 70, 290) report that in the early weeks of the fifth session some LLGDS were reputedly on the verge of leaving the Conference but there was some reconciliation of the coastal States - LLGDS by the end of the session. In the latter regard see n 123 and accompanying text \textit{supra}.

The LLGDS were particularly displeased with the following ISNT fishery provisions:

(i) LLS were given not equal rights but merely rights "on an equitable basis" and restricted to EEZs of "adjoining" coastal States (Art 57);
(ii) no specific was made to "geographically disadvantaged States" and criteria set out would not have comprehended many such States;
(iii) provisions relating to access by LLGDS to EEZ resources (Arts 57 and 58) were without prejudice to articles setting out the rights of coastal States (Arts 50 and 51), thus implying that LLGDS were only entitled to the surplus of the TAC; and
(iv) there was an unnecessarily broad provision that bilateral, regional or subregional agreements would not just regulate the exercise by LLGDS of the latter's rights in EEZs but would actually determine the "terms and conditions" of such rights (Jayakumar, \textit{supra} n 31, 80-81; cf, S Ferguson, "UNCLOS III: last chance for landlocked States?"(1976-1977) 14 \textit{SLDR} 637, 648-649).

\textsuperscript{118} See letters dated 8 and 15 April 1976 and attachments from Ambassador Wolf to the Acting Chairman of C.II, in Platzoder, \textit{supra} n 57, iv, 260-261, 263.
dice to" the rights of coastal States but were actually "subject to" the latter.\textsuperscript{119}

Excluding the above, there were few substantive changes to the ISNT fishery provisions.\textsuperscript{120}

\textsuperscript{119} RSNT Arts 58(1), 58(2) and 59(3). The two principal amendments objected to by the LLGDS were contained in an informal Revised Blue Paper dated 27 April 1976, circulated by Minister Evensen (in Platzoder, supra n 57, iv, 310-311). The Paper also contained what appears to be the first formulation of what ended up as Article 71 of the Convention.

Commenting on the above changes, Jayakumar (supra n 31, 86) wrote in 1977 that

In the 'without prejudice' wording of the [ISNT] articles, it was arguable whether the LL/GDS were entitled to the surplus only or to some of the allowable catch as well. By altering this to 'subject to', the RSNT now appeared to swing more categorically towards limiting LL/GDS rights to the surplus only.

At the same time, however, he pointed out (\textit{ibid}; emphasis added) the following statement by the C.II Chairman in the latter's introduction to Part II of the RSNT when referring to the provisions concerning LLGDS:

\begin{quote}
\textit{I made no major changes.} Despite the fact that a great amount of effort was devoted in the special interest group and in other informal groups dealing with the issue, I was offered no clear guidance on possible changes. No single proposal \textit{commanded significant support}. I consider that any major change in the relevant provisions could jeopardise any further negotiations which might take place.
\end{quote}

Although a new provision (Art 58(3)) would have allowed for special arrangements to be made in regions where coastal States agreed to grant regional LLS equal or preferential rights in the former's EEZs, it was insufficient to overcome what the LLGDS saw as the negative impact of the other amendments.

Swing (supra n 111, 742) writes that the hardening of position of the LLGDS had the effect of hardening also the position of coastal States, leading some to revert to their earlier position of endorsing a 200-mile territorial sea. Cf Ferreira, supra Ch 10, n 160, 120. See, \textit{eg}, Ch 10, n 91 and accompanying text supra.

\textsuperscript{120} Slight modifications were made to provisions relating to EEZ MSR bringing it more into line with those being negotiated in C.III; measures for high seas conservation were to be based on the best scientific evidence available rather than on the best evidence available; and States bordering semi-enclosed and enclosed seas were simply exhort to co-operate and to endeavour to co-ordinate their fishing activities rather than being
At the beginning of the fifth session, C.II established several negotiating groups to study in detail the "few particularly complex and controversial questions that had given rise to the most difficulties at the previous sessions", including State rights and duties regarding EEZ fisheries.\textsuperscript{121} Chaired by Fiji's Ambassador Satya Nandan, a 'Group of 21' (hereafter 'G21') was formed to discuss what was becoming increasingly seen as the critical issue of LLGDS access of EEZ fishery resources.\textsuperscript{122} On the basis of proposals from both LLGDS and Coastal State Groups, Nandan prepared a text for consideration at the sixth session.\textsuperscript{123}

In light of the above, C.II's Chairman was able to conclude at the end of the fifth session that although agree-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{121} Report of the Chairman of C.II (A/Conf.62/L.17), in UNCL\textsc{os}:\textsc{or} vi, 130
\item \textsuperscript{122} Ibid 137. See generally, Jayakumar, supra n 31, 102-106. Members of the Group were:
\begin{itemize}
\item **Chairman**: Fiji
\item **LLGDS**
\begin{itemize}
\item 1. Austria
\item 2. Czechoslovakia
\item 3. Iraq
\item 4. Jamaica
\item 5. Nepal
\item 6. Paraguay
\item 7. Poland
\item 8. Singapore
\item 9. Swaziland
\item 10. Uganda
\end{itemize}
\item **Coastal States**
\begin{itemize}
\item 1. Canada
\item 2. Chile
\item 3. Iceland
\item 4. Iran
\item 5. Norway
\item 6. Pakistan
\item 7. Peru
\item 8. Senegal
\item 9. Spain
\item 10. Tanzania
\end{itemize}
\item \textsuperscript{123} Jayakumar, supra n 31, 104-105
\end{itemize}
\end{itemize}
\end{footnotesize}

 Actually required to do so. Agreement was also reached on an article to govern catadromous species.

\vspace{0.5cm}

Lévy \textit{(supra n 4, 64-65)} explains that there are two main reasons why few changes were made to the ISNT. First, a number of the latter's provisions had already been the subject of virtual agreement ("quasi accord") within major groups such as the Evensen Group. Secondly, the 'rule of silence' (see text accompanying n 116 \textit{supra}) hindered individual or small groups of States from gaining acceptance for an amendment. Whereas in C.I there were two principal groups (the G77 and the major maritime Powers) confronting each other, in C.II there were many more smaller groups and the political alignment varied according to the issues.
ment had not been reached on the major outstanding issues, negotiations were well under way.\textsuperscript{124}

3. The Third Committee

Responding to G77 criticisms of ISNT provisions implying that coastal State consent would not be required for

\textsuperscript{124} UNCLOS:OR vi, 139. Storer (supra n 113, 107-108) reports that prior to the fourth session the US had met with Latin American States with a view to reaching an agreement concerning ISNT Art 53 dealing with HMS. Ecuador, for one, preferred a long, detailed article, feeling that such would better protect her interests. The US, seeing Art 53 as a "rather innocuous affair", was amenable to an article having greater specificity and detail. At the same time, she was afraid that if the article was too involved or specific it might not be applicable or flexible enough for application in diverse regions. As well, a long, complicated article might not gain the support of countries having only a general interest in the matter. Although some progress was made during the negotiations, it did not bear fruit when the session opened and there was insufficient time to conclude negotiations.

During the session's discussion of the ISNT Article, the EEC, Japan, US and USSR concentrated their efforts on strengthening the role of IFOs. Ecuador and some African countries, on the other hand, tried to get the entire Article deleted, unless its application was limited to areas beyond the EEZ. In the final event, no substantive textual change was made.

In a brief reference to HMS, the American report of the fifth session (US Reports, supra n 4, 151) noted that

the tuna article received some renewed attention but there was no widely displayed interest in amending the article. Principles were offered favoring a more coastally oriented article, and were supported by a limited number of States, several of whom may not have an interest in tuna, but did prefer the strengthening of the economic-zone concept.

The Australian report of the fifth session (supra n 4, 18, 19) notes that "[o]ther than a general reference to [HMS] there was no discussion of the [RSNT] Fisheries Articles" and

One important outcome of the Fifth session in relation to fisheries was the virtual absence of attack on Articles 50 and 51 which confer on the coastal States the power to manage the living resources of the EEZ. At the Fourth Session these Articles had led to vigorous and sometimes acrimonious debate.
certain types of MSR conducted in the EEZ and an apparent shift in the Soviet position on the subject, the Chairman of C.III incorporated revised articles into the RSNT. They provided that coastal State consent would be required for EEZ MSR bearing "substantially upon the exploration and exploitation of the living or non-living resources" or

\[ A/\text{Conf.62/WP.8/Rev.1/Part III, in} \ \text{UNCLOS:OR v, 173-185. For brief references to deliberations during the period see P Fricke, "Consent regime inevitable for marine research?"(1977) 1 Marine Policy 71; Miles, supra Ch 10, n 17, 219-220; Soons, supra n 52, 112-113, 161; and Buzan and Johnson (supra n 70, 301), who observe that "[t]here was...some evidence that a late shift in position by the Soviet Union was partly responsible for the alteration in the [ISNT] by the chairman of [C.III], Ambassador Yankov of Bulgaria". Cf Swing, supra n 111, 744-745.]

Miles (supra Ch 10, n 17, 219), for his part, reports that the US was "stunned" by the apparent shift in the Soviet position, noting as well a suggested explanation for the USSR's "dramatic reversal" in position. That is,

in the final analysis and for defense reasons the superpower coalition broke down on this issue because the Soviets were much more concerned with controlling all US research in their zone than they were about being excluded in portions of the rest of the world ocean.

\[ \text{Cf Buzan and Johnson, supra n 70, 301. It appears, however, that the US was also moving} \]

\[ \text{in the same direction. Fricke (supra this n, 72), eg, observes that in April, Henry Kissinger, the then American Secretary of State made a speech outside the Conference (see "The law of the sea: a test of international cooperation"(26 April 1976) 74 DOSB 533) linking the possibility of a consent regime relating to research bearing substantially upon resources with the rights of transit of vessels through international straits and private, commercial participation in the exploitation of the resources of the ocean floor. This speech...linked marine scientific research with other matters crucial to the US position and was widely viewed as a gesture towards a compromise package. The other developed nations followed suit, and the RSNT shows this change in attitude.} \]

\[ \text{Winner (supra n 52, 312) notes the ambiguity of this phrase in that if it is interpreted that coastal States would have the power of consent over research concerned with the exploration of resources not necessarily motivated by the goal of immediate exploitation -- certainly a plausible construction of the language -- a very broad range of research would be included.} \]
"[u]nduly interferes with economic activities performed by
the coastal State in accordance with its jurisdiction" under
the Convention.\textsuperscript{127} Under certain conditions, consent would
be implied and disputes, including those relating to fisher-
ies, would be subject to detailed settlement procedures.\textsuperscript{128}

In negotiations during the fifth session, the first of-
official confirmation was given that the Soviet Union was pre-
pared to support a coastal State consent regime for EEZ
MSR.\textsuperscript{129} This left only the United States and a few other
researching States advocating a partial consent regime, al-
though the former, at least, appeared to accept consent re-
quirements for resource-oriented research.\textsuperscript{130} As G77 States

If, on the other hand, he continues, the article
is interpreted eo as to grant consent powers only over
research concerned with exploration for resources nec-
essarily motivated by the goal of resource exploitation
("an only slightly more plausible interpretation"), a
coastal State's consent powers would be much less. Cf
Scotto, supra n 52, 158.

Wooster (supra n 56, 132) observes that "although
exploration has always been a key element in scientific
investigations, 'exploration and exploitation' have
been so inextricably intertwined by sea lawyers that
the utility of the word has been destroyed".

The above and other qualifications in the RSNT
were doubtless left intentionally ambiguous, concludes
Winner (supra n 52, 313), in order to encourage oppos-
ing sides to sign the Convention.

\textsuperscript{127} Article 60(2)

\textsuperscript{128} For more detailed discussion of the RSNT MSR regime
see, eg, Winner, supra n 52, 304-327.

\textsuperscript{129} \textit{UNCLOS}:OR vi, 95

\textsuperscript{130} See, eg, statement by the American delegate (\textit{ibid} 101);
Soons (supra n 52, 162); and \textit{US Reports}, supra n 4,
153-155. The opposition of the US and others to an ab-
solute consent regime was in part based on a desire to
prevent the EEZ regime from hardening into a full
territorial sea. See, eg, statements by delegates of
FRG (\textit{UNCLOS}:OR vi, 94) and the Netherlands (\textit{ibid} 97);
criticized the RSNT for overly restricting their rights to withhold consent, the session ended without agreement.\textsuperscript{131}

4. Dispute Settlement

Digesting a six-day pot-pourri of national positions expressed during the first general debate on the subject of dispute settlement, the President produced revised articles at the end of the fourth session. Substantially shifting his earlier position on exemptions,\textsuperscript{132} he amended the draft articles to stipulate that a coastal State refusing to apply specified international standards or criteria in the exercise of its exclusive jurisdiction in the EEZ would be required to submit to dispute settlement procedures only when those standards or criteria related to protection of the marine environment.\textsuperscript{133} Disputes relating to, \textit{inter alia}, fishery management and the conduct of MSR within the zone by the coastal State were automatically excluded from dispute settlement provisions unless the above and other non-fishery-related exceptions concerning the rights of other States applied.\textsuperscript{134}

The fifth session saw an article-by-article review of the revised dispute settlement regime, with widely differing views being maintained. Some delegations felt the above provisions should be deleted entirely, while others pressed for their retention with only minor amendments. It was also suggested that a specific clause be inserted, stating that the exceptions did not apply to determination of the TAC

\begin{enumerate}
\item Jenisch (\textit{supra} n 111, 431), Swing (\textit{supra} n 111, 741); and Yaroslavtsev's 1976 article (\textit{supra} n 111, 94).
\item See, \textit{eg}, statements by the delegates of Brazil (\textit{ibid} 93) and Tanzania (\textit{ibid} 92).
\item See nn 101 and 102 and accompanying text \textit{supra}.
\item Art 18(1)(c) in A/Conf.62/WP.9/Rev.1, dated 6 May 1976; in \textit{UNCLOS:OR} vi, 185, 190
\item Art 18(2) in \textit{ibid}. See in this regard, Adede, \textit{supra} n 61, 296. The exceptions stipulated in Art 18(1) related to claims concerning, \textit{inter alia}, freedom of navigation or overflight.
\end{enumerate}
within the EEZ.\textsuperscript{130} Debate also continued on the acceptability of functional arrangements for dispute settlement, and the relationship of the former to general procedures.\textsuperscript{136} No agreement was reached on the major outstanding issues.

5. Observations

An air of pessimism and frustration hung over the Conference at the end of the fifth session. Although agreement had been reached on a broad range of issues, the 'package deal' nature of the negotiations meant that delays in reaching agreement on one part of the Convention would result in delays concluding the treaty as a whole. There was an increasing danger, Canada's Ambassador to the Conference, Alan Beesley, observed at the time, that governments, owing to resource constraints, might withdraw support for multilateral-

\textsuperscript{130} See Adede, supra n 61, 279-309, and Beurier and Cade-nat, supra n 111, 141-142. According to the American report of the session (US Reports, supra n 4, 158), coastal States

strongly opposed dispute settlement for fisheries. The US and several maritime and distant-water fishing States sought to broaden the exceptions, especially with respect to fisheries. There was insufficient discussion of a possible compromise whereby obligatory dispute settlement would apply to fisheries disputes with protection for the coastal State from harassing actions arising from the exercise of its discretion in accordance with the Convention.

Yaroslavtsev, in his 1976 article (supra n 111, 95), wrote in a similar vein that

In considering the question of the regime of the economic zone...a large group of countries insists that the procedure for settling disputes to be envisaged in the Convention should not be applied to disputes arising from a coastal state invoking its rights and duties in the economic zone. The proponents of this view assert that the jurisdiction of the coastal state in the zone would be exclusive and that all disputes linked with its implementation could therefore be settled solely within this national jurisdiction, in other words, in the courts and other agencies of the coastal state. In practice this would signify that the rights of other countries in the economic zone of a coastal state, such as...fishing, would remain beyond the pale of international law in the sense of safeguarding these rights by the settlement procedures envisaged in the Convention.

\textsuperscript{136} Adede, supra n 61, 358-361. See also US Reports, supra n 4, 159-160.
al endeavours to formulate a new law of the sea in favour of unilateral action. Given the resultant legal uncertainty -- just what the Conference was established to overcome -- fishery and other disputes might break out across the globe. The next session of the Conference was likely to be the 'make or break' session, concluded the Ambassador, and the key was resolution of fundamental differences on the sea-bed regime. "If the basis for agreement is worked out on the [latter]", he thought, "there will be great pressure to conclude negotiations on other unresolved issues".137

In view of the above, the Conference decided at the end of the fifth session to focus on C.I issues.138 At the same time, however, the other Committees would continue their negotiations on outstanding issues. While much had been settled and negotiations on the above issues were progressing, much more remained to be finalized.

K. The Sixth Session (1977)139

The end of the sixth session saw the release of the Informal Composite Negotiating Text (ICNT), incorporating new

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137 A Beesley, "The Law of the Sea Conference and its aftermath [remarks]" (1977) 71 PASIL 111, 118-119; cf, Beurier and Cadenat, supra n 111, 133; Kimball, supra n 111, 80; and Yaroslavtsev's 1976 article, supra n 111, 94

138 UNCLOS:OR vi, 24

agreements.\(^\text{140}\) Like the previous texts, the ICNT was informal and meant as a procedural device for facilitating negotiations.

1. The Second Committee

The several C.II groups formed the previous session to deal with outstanding issues\(^\text{141}\) continued their discussions. Efforts to reach a compromise on the question of LLGDS fishery rights focussed largely on G21 discussion of the Nandan

\(^{140}\) The decision to prepare the ICNT was made in Plenary on 28 June 1977 (UNCLUS:OR vii, 11). For various reasons, including a 24-hour electricity black-out in New York at the very end of the session, the text was not available before the end of the session. Dated 15 July 1977, the ICNT (A/Conf.62/WP.10) is found in UNCLUS:OR viii, 1-63.

In an introductory memorandum to the ICNT (A/Conf. 62/WP.10/Add 1, dated 22 July 1977; in ibid 65), President Amerasinghe recorded the Conference’s understanding on how the revised text was prepared:

while the President would be free to proffer his own suggestions on the proposed provisions of any part of the composite text, in regard to any matter which fell within the exclusive domain of a particular chairman that chairman’s judgement as to the precise formulation to be incorporation in the text should prevail. The adoption of this procedure was a recognition of the fact that each chairman was in the best position to determine, having regard to the negotiations that had taken place, the extent to which changes in his [RSNT] should be made in order to reflect the progress achieved in the course of negotiations where, in the chairman’s opinion, such progress justified changes in the [RSNT] and also to decide, even where the negotiations had not resulted in substantial agreement, whether such progress as had been achieved warranted changes which would be conducive to the ultimate attainment of general agreement. It was also understood that, so far as issues on which negotiations had not taken place were concerned, there should be no departure from the [RSNT] unless it was of a consequential character. This understanding was scrupulously observed in the course of the preparation of the [ICNT]. There is no question, therefore of joint responsibility being assumed for the provisions of the text by the President and the chairmen of the three Committees. The chairman of each Committee bears the full responsibility for those provisions of the [ICNT] which are the exclusive and special concern of his Committee.

For a discussion of the negotiations leading to the decision on the method of revising the RSNT see Koh and Jayakumar, supra n 4, 121-124.

\(^{141}\) See n 121 and accompanying text supra.
proposal presented at the end of the last session.\textsuperscript{142} Five major issues remained unresolved: (1) should LLGDS have 'rights';\textsuperscript{143} (2) should such rights relate only to the surplus of the TAC;\textsuperscript{144} (3) should a distinction be made between

\textsuperscript{142} See n 123 and accompanying text supra. The following discussion is abbreviated from Jayakumar, supra n 31, 106–114.

\textsuperscript{143} Some coastal States argued that as the EEZ was not a proposal but a legal reality, comprehending an area in which they had 'sovereign rights', it would be juridically inconsistent for other States also to have 'rights' (see, eg, Khan's argument, supra n 82). LLGDS, in contrast, maintained that from the first, their acceptance of the EEZ concept had been predicated on simultaneous recognition of their 'rights', and that as the EEZ was one of the subjects being negotiated at UN-CLOS III, the latter was competent to recognize such rights (see n 31 and accompanying text supra).

\textsuperscript{144} Certain coastal States insisted that LLGDS should be restricted to the surplus, and to allow them rights when there was no surplus would be inconsistent with the concept of the EEZ and unfair to coastal State nationals. They attempted to convince LLGDS that in most cases there would always be a surplus, and suggested that LLGDS could be given priority access to the surplus. LLGDS, for their part, considered the issue fundamental, since rights only to a surplus could prove meaningless. During G21 negotiations, they indicated their willingness to consider rights only to the surplus on the condition that if no surplus existed they would have rights to the TAC.

Nandan's proposal (appended to Jayakumar, supra n 31, 117) related only to the surplus, in which case LLS and developing GDS would have preferential rights over third States. Where no surplus existed, the States concerned would "by cooperation, establish an equitable arrangement on a bilateral, subregional or regional basis to all for the participation of [the LLGDS] in the exploitation of the living resources" in the zone or zones, bearing in mind certain factors (Arts 58(3) and 59(3)). In the case of LLS, the latter were:

a) The nutritional needs of the populations of the respective States concerned and their capabilities for satisfying these needs;
b) The need to avoid effects detrimental to fishing communities or the fishing industries of the coastal State or part thereof;
c) The extent to which the [LLS] is participating or has the right to participate in the exploitation of the [EEZ] of other States;
d) The extent to which the coastal State is accommodating other LLS and the need to avoid over-burdening a particular coastal State or part thereof.
developing and developed LLGDS; (4) should the term 'geographically disadvantaged States' be employed; and (5) what should be the term's parameters?

Factors to be considered in the case of developing GDS were mutatis mutandis identical (Art 59(3)).

LLGDS argued that just as both developed and developing coastal States would be entitled to claim 200-mile resource zones, there should be no distinction between developing and developed LLGDS regarding access to the zone's resources. Several coastal States, especially developed European States, objected, particularly to rights being accorded developed GDS with advanced fishing capabilities.

Nandan's proposal would have recognized rights of both developed and developing LLGDS, although only developing GDS would have preferential rights over third States and benefit under the no-surplus arrangement (see n 144 supra). Developed GDS rights were restricted to EEZs of developed coastal States.

Several coastal States objected to the term as being too vague and incapable of precise definition. LLGDS, on the other hand, argued that the term had long been used, both in UNCLOS III and elsewhere, and should be retained for consistency.

The Nandan proposal opted for 'States with special characteristics' as the best means of overcoming definitional difficulties.

LLGDS held that all members of their Group should qualify, and urged support for the definition of GDS they had proposed during the fourth session (see n 118 and accompanying text supra), ie, coastal States

(a) which, for geographic reasons, cannot claim economic zones; or
(b) whose economic zones are less than 30 per cent of the areas they could have claimed if they were able to extend the limits of their economic zones up to the maximum breadth permitted by the Convention; or
(c) which, for geographic, biological or ecological reasons, exclusively natural in character, derive no substantial economic advantage from exploiting the living resources of their economic zones and whose rights of access to the living resources are adversely affected by the establishment of economic zones of other States.

Some coastal States objected that the definition was, inter alia, too broad and ignored the amount of marine resources available to the 'GDS'.

Nandan's proposal left much of the RSNT's Article 70 on the subject unaltered, substituting simply "geographical or marine biological or ecological characteristics" for the "geographical peculiarities" qualification.
The optimism of G21 members at the end of the fifth session quickly dissipated during the session as negotiations became increasingly intractable and difficult. LLGDS criticized coastal States for being too uncompromising; the latter States considered LLGDS unrealistic and over-demanding. Although negotiations continued, no agreement was reached.148

LLGDS submitted a revised proposal to Nandan during the session, softening their position in a number of respects, including recognition of the right of both LLS and GDS to participate in exploitation of EEZ fishery resources "on an equitable basis", and limiting rights of GDS to the surplus of the TAC.149 Exempted by the proposal from the obligation

On the above see also n 35 supra.

148 At least two factors appear to have impacted upon deliberations of G21. First, several coastal States had enacted EEZ legislation restricting their ability to compromise. And secondly, the pending production of the ICNT raised anxieties among both coastal States and LLGDS as to its possible impact on their positions. See Fleischer, supra n 139, 105; Jayakumar, supra n 31, 105; and the plenary statement by the Mexican delegate who, on 28 June 1977 (UNCLOS:OR vii, 7) explained that "a number of States had adopted legislation or other methods based on the [RSNT], and [Mexico] could not accept the proposition that those texts could be changed lightly or by any one person".

According to the Australian report of the session (supra n 4, 41),

Throughout the Sixth Session the most important development in fisheries matters was the noticeable change in attitude of those coastal States which had introduced 200 mile jurisdictions since the Fifth Session. These States have already had experience in dealing with distant-water fishers and their views on coastal State controls have hardened considerably.

Beurier and Cadenat (supra n 139, 644), writing in the same vein, observe that some delegations were hesitant about committing themselves to signing a Convention since, in the former's view, "la Conférence est déjà arrivée à mettre en evidence un certain nombres de règles issues de la pratique recente qui devraient s'imposer à la société internationale en tant que normes coutumières".

149 The proposal, submitted under a covering letter dated 28 June 1977 from the then Chairman of the LLGDS Group
to allow LLGDS access to their EEZ were States whose economy was "overwhelmingly dependent" on the fishery resources of the zone.  

While G21's intense negotiations meant that a possible compromise on the above was "within reach", observed the President at the end of the session, time had run out before a final solution could be found.

Similarly, C.II also witnessed continuing negotiations on HMS. Although useful in clarifying issues and offering indications of progress, no agreement was reached and the ICNT contained no new provisions on the subject.

In fact, apart from a few minor changes, the ICNT EEZ and high seas fishery provisions remained essentially the same as those in the RSNT.

to the Conference President is found in Platzoder, supra n 57, iv, 381-387.

Jayakumar (supra n 31, 91) suggests that the exemption was probably included in the proposal in response to any argument that it would be unfair to expect a coastal State in such a situation to share its fisheries with other States. Only Iceland was seen as being eligible for exemption. This provision had already been proposed the previous year by Ambassador Evensen (see n 119 supra).

A/Conf.62/WP.10/Add 1, supra n 140, 68

Australian Report: 6th Session, supra n 4, 41; US Reports, supra n 4, 175; and Mawhinney (supra n 139, 36) who, without providing any details, reports that

Progress was...mads on the question of [HMS] through the introduction and consideration of a new formula that aims at permitting regional and international co-operation and at balancing the rights and interests of the coastal states with those of other states that fish for [HMS], to ensure both conservation and optimum utilization of the stocks.

The US did introduce a proposal (dated 20 June 1977, in Platzoder, supra n 57, iv, 439) which would have left the original Article 53 substantially intact while strengthening the role of IFOs in the conservation and management of HMS. At the same time, the proposal specifically provided that "[u]nless the coastal State agrees on a different procedure, its consent will be required for the adoption of measures applicable to its [EEZ]", and that it would be up to the coastal State to insure the implementation of such measures within the zone.
2. The Third Committee

As a result of extensive, protracted negotiations, provisions relating to EEZ MSR and dispute settlement relating thereto were substantially revised.\textsuperscript{153}

Two significant changes enhanced the coastal State's control over MSR relating to fisheries in the EEZ.\textsuperscript{154} First, coastal States might "in their discretion" withhold consent if, \textit{inter alia}, the proposed project was "of direct significance for the exploration and exploitation of natural resources, whether living or non-living".\textsuperscript{155} And secondly, in a major departure from the RSNT -- and one reflecting changes elsewhere\textsuperscript{156} -- the ICNT contained a provision for

\textsuperscript{153} For a general discussion of the ICNT MSR provisions see Caflisch and Piccard, \textit{supra} n 52, 872-880, 887-889.

\textsuperscript{154} Caflisch and Piccard (\textit{ibid} 879) observe generally that

\begin{quote}
The ICNT is concerned almost exclusively with protecting the interests of coastal States as opposed to those of researching States. This is attested by the fact that the rights of coastal States are generally well-defined, while the ICNT becomes vague as soon as the rights of researching States are at stake. This vagueness is particularly conspicuous wherever the Text is dealing with the obligation of coastal States to permit certain types of research or with the judicial determination of this obligation.
\end{quote}

\textsuperscript{155} Article 247(4)(a). According to Art 247(5), research activities, when approved, were not to "unjustifiably interfere with activities undertaken by coastal States in accordance with their sovereign rights and jurisdiction" under the Convention. As with the case of the RSNT, the ICNT contained provision (Art 253) for implied consent to a research proposal. As well, a new provision (Art 248) was added, whereby a coastal State would be deemed to have consented to a research project being conducted by an international organization in its EEZ if that State approved of the project when the decision for its implementation was made or was willing to participate in it.

\textsuperscript{156} Koh and Jayakumar (\textit{supra} n 4, 108-109) recall that during the session a private group of the following 17 States was convened by the Chairman of the Mexican delegation, Ambassador Jorge Castañeda:

1. Australia  
2. Brazil  
3. Bulgaria  
4. Bulgaria  
5. China  
6. Costa Rica  
7. Kenya  
8. Mexico  
9. Nigeria  
10. North Korea  
11. Philippines  
12. Recognized Territories of the United States  
13. Tanzania  
14. United Kingdom  
15. United States
the first time exempting coastal States from the obligation to submit to dispute settlement procedures any dispute arising out of the exercise of their discretion in refusing consent to conduct fishery-related research in the EEZ.\textsuperscript{157}

The amendments, explained the President, were made appreciating the need to bring the MSR provisions into line with coastal State EEZ rights generally, and hence, "the coastal State must have the right to regulate, authorize and conduct" MSR in its zone.\textsuperscript{158}

6. India 12. Singapore

They negotiated on the status of the EEZ, rights and duties of coastal and other States in the EEZ, and the general outline for dispute settlement regarding fishing and MSR in the zone (see n 115 and accompanying text \textit{supra}). In the final week of the session, they presented a number of proposals, the final one of which (dated 12 July 1977, and found in Platzoder, \textit{supra} n 57, iv, 426-430) was largely reflected in the ICNT, including the provisions relating to MSR. For an account of the negotiation of the proposal itself see J Castañoeda, "Negotiations on the exclusive economic zone at the Third United Nations Conference on the Law of the Sea" in \textit{Essays in International Law in Honour of Judge Manfred Lachs} (1984; J Makarcyzk, ed)[volume hereafter cited 'Lachs Essays'] 605, 611-618, and by the same author, "The United Nations Conference on the Law of the Sea: Panel discussion at the Annual Meeting of the American Bar Association Section of International Law [remarks]" (1978) 12 \textit{The International Lawyer} [general reference hereafter cited 'ABA Panel'] 24, 30-31.

Professor Tullio Treves (\textit{supra} n 56, 272-273) writes that

\begin{quote}
la recherche scientifique fut la monnaie d'échange moyennant laquelle les États développés obtinrent un affermissement des libertés de la haute mer applicables à la zone économique. Le régime de la recherche scientifique qui en sortit consacre en effet le principe du consentement de l'État côtier, bien qu'avec certaines nuances et atténuations, seules concessions faites aux intérêts des États chercheurs.
\end{quote}

\textit{Cf} Australian Report: 6th Session, \textit{supra} n 4, 68; \textit{US Reports, supra n 4, 181-182}.

\textsuperscript{157} Art 265. The same Article further provided that the coastal State could demand cessation of research activities once begun if they were thought by the coastal State to be infringing their rights in the zone.
3. **Dispute Settlement**

The President's revised text released the previous session stipulated that disputes relating to the exercise by a coastal State of sovereign or exclusive rights or exclusive jurisdiction would only be subject to dispute settlement procedures when, *inter alia,*

> it is claimed that a coastal State has manifestly failed to comply with specified conditions established by the...Convention relating to the exercise of its rights or performance of its duties in respect of living resources, provided that in no case shall the sovereign rights of the coastal State be called into question.\(^{159}\)

General plenary discussions of the above, revealed an increasing desire to guard against possible abuse of power by coastal States and possible abuse of the latter's rights by others.\(^{160}\) In the final event, however, the ICNT appeared

\(^{158}\) A/Conf.62/WP.10/Add 1, *supra* n 140, 69

\(^{159}\) Art 17(1)(d), A/Conf.62/WP.9/Rev.2, dated 23 November 1976, in *UNCLOS:OR* vi, 144, 148. The text also witnessed the disappearance of sub-annexes containing special procedures for settlement of fishery and MSR disputes. Instead, subject to exceptions indicated in the text, disputes concerning the interpretation or application of the Convention articles relating to a number of subjects, including fisheries and MSR, might be settled following a single "special arbitration procedure" set out in an annex (see Art 9(1)(d) and Annex IV of A/Conf.62/WP.9/Rev.2, *supra* this n; as well as Adede, *supra* n 61, 360-361, for background to this development).

\(^{160}\) Coastal States, *eg,* urged the addition of a phrase making it clear that they could only be challenged when acting beyond discretionary limits. Other States, in contrast, thought the Article should be amended to apply to cases "when it is claimed that a coastal State has failed to perform its duties or to observe the conditions for the exercise of its rights in respect of living resources provided for in the...Convention, regardless of whether the sovereign rights of the coastal State were questioned"(*ibid* 316). See also Adede's earlier discussion of Part IV, Art 17 of the RSNT in "Law of the sea: the scope of third party, compulsory procedures for settlement of disputes"(1977) 71 *AJIL* 305; *Australian Report: 6th Session, supra* n 4, 77; and L Sohn, "Settlement of disputes relating to the Law of the Sea Convention"(1977) 3 *EPL* 98, 99.
to strengthen significantly the position of coastal States regarding fisheries in their EEZ: complaining States had first to establish before a court or tribunal that their claim was well founded, and the court or tribunal was not permitted to either question the exercise of coastal State discretion in regard to conservation or utilization matters or to substitute its own discretion for that of the coastal State. Nor, in any case, were the sovereign rights of the coastal State to be called into question.161

Introducing the above revisions, the President explained that they had been effected to maintain a close link with

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161 Art 296(4). While the ICNT dispute settlement provisions seemed to give more favourable consideration to coastal States, ambiguities in the text left key issues uncertain. The explicit reference in the text to Articles 61 and 62 (relating to conservation and utilization of EEZ living resources) together with omission from Art 296(4) of any specific reference to HMS, anadromous and catadromous species (Arts 64, 66 and 67, respectively, of the ICNT), for example, left unclear whether conservation and utilization measures taken by the coastal State in its EEZ regarding those species would be exempt from compulsory dispute settlement. For various tentative (and contrasting) assessments of the exact juridical significance of the provisions made shortly after their appearance see, eg, J P Bernhardt, "Compulsory dispute settlement in the law of the sea negotiations: a reassessment" (1978-1979) 17 VJIL 69, 90; Kumar, supra n 82, 62-63; F Mirvahabi, "Fishery dispute settlement and the Third United Nations Conference on the Law of the Sea" (1979) 57 RDI 45; and comments by Louis Sohn, ABA Panel, supra n 156, 51, 55.

In the view of a number of those directly involved in the Conference, a definitive interpretation of the provisions was impossible. According to Shabtai Rosenne, for example ("Settlement of fisheries disputes in the exclusive economic zone" (1979) 73 AJIL 89, 95), "the precise import of [Art 296(4)] is difficult to establish, thanks to the obscurities that characterize the text". Similarly, the American delegation commented at the time (US Reports, supra n 4, 213) that the ICNT provision "was so obscure as to defy interpretation, even by those familiar with its negotiating history". The ambiguities were clarified at the following session. See n 179 and accompanying text infra.
other relevant provisions of the ICNT and, by implication, to reflect tentative agreements in the main Committees.\textsuperscript{162}

4. Observations

In contrast to the previous session, the sixth concluded on a note of cautious optimism. Important progress had been made in a number of crucial areas; and where no breakthrough had been made, there was a widespread feeling that the ICNT would provide a sound base from which to at last forge the remaining compromises required. Although less had been accomplished regarding HMS and LLGDS fishery rights, negotiations were at least continuing, and they would no doubt increase in importance as other issues were settled.

F. The Seventh Session (1978)\textsuperscript{163}

During the session, seven negotiating groups (NGs) were established outside the formal Committee structure to deal with a number of "hard-core issues", including the right of access of LLGDS to EEZ fishery resources (NG4) and dispute settlement relating to the exercise of coastal State sovereign rights in that zone (NG5).\textsuperscript{164}

\textsuperscript{162} See n 158 and accompanying text supra.

Secondly, it was decided that modification or revision of the ICNT should emerge from the negotiations themselves and should not be introduced on the initiative of any single person, whether it be the President or a Chairman of a Committee, unless presented to the Plenary and found, from the widespread and substantial support prevailing in Plenary, to offer a substantially improved prospect of a consensus.\footnote{See A/Conf.62/62, dated 13 April 1978, in \textit{UNCLOS:OR x}, 6, 7. It was a measure of the differences still existing between coastal States and LLGDS that there was no agreement on how to formulate the "hard-core issue" considered by NG4. It was therefore stated in two forms: "right of access of landlocked and certain developing coastal States in a subregion or region to the living resources of the [EEZ]", as preferred by coastal States; and "rights of access of landlocked and geographically disadvantaged States to the living resources of the economic zone", as preferred by the LLGDS. The differences, of course, reflect use of the term 'geographically disadvantaged States' and the nature of coastal State rights in the 200-mile zone.}

Buzan (\textit{supra} n 8, 336) observes that in spite of the appearance of the ICNT, C.I was still "surrounded by controversy" and a new approach was required if the impasse was to be broken and the threat to the achievement of a comprehensive 'package deal' overcome. Part of the problem, he explains, lay in the complexity of the issues and political differences amongst States, while part also arose from the conduct of C.I's Chairman:

Many delegates felt that he was abusing his position by taking too large a part in the drafting of the texts -- to the point where he would alter negotiated compromises according to his own lights, which was undoing the bargaining process and undermining the utility of the process of incremental revision towards consensus.

\textit{Cf} Gold, \textit{supra} n 139, 65-66. As part of a two-pronged solution to the above problem, the NGs were established (see also n 165 and accompanying text infra). They largely replaced the three main Committees as the dominant formal working structures of the Conference during the 1978 and 1979 sessions.\footnote{A/Conf.62/62, \textit{supra} n 164, 8. Buzan (\textit{supra} n 8, 337) explains that the decision was the second part of a solution adopted by the Conference to overcome the impasse in negotiations (see n 164 \textit{supra}). It was clearly aimed at the chairman of C.I, but also had a most important formalizing effect on the ICNT, as he observes (\textit{ibid}): "[b]y making revision of the ICNT subject to highly restrictive conditions, the new rule effectively..."}
Although it had been originally agreed that the ICNT would be revised in early May,\(^\text{166}\) progress in the NGs was uneven and it was decided to resume the session in mid-year in the hope that the revision could be made at that time.\(^\text{167}\) While some progress continued to be made, a new negotiating text remained beyond reach. However, reports were prepared by the chairmen of the various Committees and NGs.\(^\text{168}\)

upgraded the text on its path from negotiating to negotiated status".

It was also agreed that revision of the ICNT was to be the "collective responsibility of the President and the Chairmen of the main Committees, acting together as a team headed by the President" (A/Conf.62/62, supra n 164, 8). Buzan (supra n 8, 337) explains that

The revision team, or "collegium" of the President and the three Committee Chairmen provided a central machinery not only for handling the work of the specialized negotiating groups, but also for coordinating the final stages of consensus building in relation to the remaining hard-core problems.

It may also be noted that following a change of government in Sri Lanka, Ambassador Amerasinghe was not accredited to the 7th session by the new Government, although the latter did not object to him continuing as President. Such a proposal met with strong opposition in some quarters, particularly among Latin American States. Despite concerted negotiations, no consensus was reached, and late on 5 April, African and Asian forced a vote. Amerasinghe was confirmed in his position, 75-18-13. Affirmative votes were cast by African, Asian and some Western States. European States, China and some English-speaking States in the Western Hemisphere either did not participate in the vote or abstained.

It was asserted in Kimball's 1978 review of the session (supra n 334) that in large part the dispute stemmed from the view of a few Latin American States that Amerasinghe "had been too favourably impressed" by the claims of LLGDS. Beurier and Cadenat (supra n 139, 645), for their part, write that the majority of Latin American States considered that Amerasinghe did not sufficiently defend the interests of developing countries.

\(^{166}\) A/Conf.62/62, supra n 164, 9

\(^{167}\) UNCLOS:OR ix, 94

\(^{168}\) UNCLOS:OR x
1. The Negotiating Groups

a) NG4

On the basis of NG4 discussions, its Chairman, Ambassador Nandan, formulated and twice revised a compromise proposal aimed at addressing the outstanding differences between LLGDS and coastal States earlier considered by the G21. His main submissions may be summarized as follows.

In giving access to the surplus of the TAC the coastal State "shall have particular regard to" provisions relating to LLGDS, especially developing members of the Group. The expression had the merit of avoiding contentious terms such as 'priority' or 'preference' while simultaneously accentuating the need to give special consideration to LLGDS.

Initially it was suggested that if the coastal State was itself able to harvest the entire TAC, LLGDS did not have a strong basis for insisting on participation. If, however, harvesting of the whole TAC was made possible through joint ventures or similar arrangements with third parties, exclusion of LLGDS would be inequitable. The coastal State would thus be obliged to take appropriate measures to enable LLGDS to have "adequate participation" in such ventures or arrangements on terms satisfying all parties.

See in this regard nn 142-147 and accompanying text supra. For an account of NG4's deliberations during the session see Sinjela, supra n 30, 304-311.

"Explanatory Memorandum on the Proposals (NG4/9/Rev.2) by the Chairman of Negotiating Group 4 -- Ambassador Satya Nandan (Fiji)"(NG4/10, dated 3 May 1978)[hereafter cited 'Nandan Memo']. The Memorandum was incorporated into one document containing all reports of committees and negotiating groups at the end of the first half of the seventh session (A/ Conf.62/RCNG/1, dated 19 May 1978, in UNCLORD x, 13-125).

The provision in the text accompanying this note was intended for incorporation in Art 62(2) of the ICNT. It remained unaltered in each of the three formulations of the proposal that appeared in the first half of the session. See n 171 infra.
stressed that the proposal provided for "a very special and limited situation and not all cases where the coastal State is able to harvest the entire allowable catch" and related only to developing LLGDS, particularly those "which have actually been fishing in the particular [EEZ] at the time when the situation arises".

Nandan Memo, *supra* n 170, 88-89. Although the title of the Memo indicates that the latter was intended to explain the 2nd revision of his proposal, the Memo actually preceded both the 1st and 2nd revisions, appearing on 3 May 1978 (in Platzoder, *supra* n 57, ix, 345). The 1st revision of the proposal (NG4/9/Rev.1, in *ibid* 338) is dated 9 May 1978; the 2nd (NG4/9/Rev.2, in *ibid* 341), 15 May 1978. The Memo in Platzoder appears to correctly indicate that it was intended to explain the original proposal (NG4/9), and not necessarily subsequent revisions -- at least where the latter varied significantly from the original Nandan proposal (see in this regard n 174 and accompanying text *infra*).

Explaining the reference to joint ventures and other arrangements in the text accompanying this note, the Nandan Memo refers to Arts 69(3) and 70(4) of the original NG4/9. Article 69(3) provided that

> Where a coastal State as a result of a joint ventures [sic] or other similar arrangements with third parties increases its capacity to harvest the living resources of its [EEZ] to the point of harvesting the entire allowable catch, it shall take appropriate measures to provide for developing [LLS], especially those which have fished in the zone, adequate participation in such joint ventures or other similar arrangements on terms satisfactory to the parties concerned.

According to the same provision in NG4/9/Rev.1,

> Where a coastal State as a result of joint ventures or other similar arrangements with third parties increases its capacity to harvest the living resources of its [EEZ] to the point of harvesting the entire allowable catch, it shall give an opportunity to developing [LLS] of the same subregion or region, especially those which are fishing in the zone, for adequate participation in such joint ventures or other similar arrangements on terms satisfactory to the parties concerned. In the implementation of this provision the factors mentioned in paragraphs 1 and 2 [for determining the terms and modalities of participation] shall also be taken into account.

A similar provision in each text applied, *mutatis mutandis*, to developing GDS.

Nandan Memo, *supra* n 170, 90

*Ibid*
In the second revision of the proposal, however, specific references to both joint ventures and similar arrangements and LLGDS fishing activities were deleted in favour of a basic provision that when a coastal State was approaching a point enabling it to harvest the entire TAC, it and other States concerned would "co-operate in the establishment of equitable principles" allowing the participation of developing LLGDS of the same subregion or region in the exploitation of fishery resources on terms satisfactory to all.\footnote{\textit{NG4/9/Rev.2, supra n 171.} In spite of the changes mentioned in the text accompanying this note, Oxman (\textit{supra n 163, 17}), \textit{eg}, appears to accept that the original conditions continued to apply without being explicitly stated. Professor William Burke (\textit{supra n 11, 325}) apparently shares the same view. In his oral report to Plenary at the end of the first half of the session (\textit{UNCLOS:OR} ix, 50), Nandan mentions only that as a result of discussions, he had been able to further improve on the first revision of his proposal "in one particular aspect of the original formulation" without stating what that was or its specific implications. That his Report of 3 May (see n 170 \textit{supra}) was not amended gives weight to Oxman's position. Kimball \textit{et al.} (\textit{supra n 163, 72}) note that coastal States continued to stress that the above provision referred only to the surplus and was not applicable if no surplus was available. They formally stated that no more concessions would be made to LLGDS on EEZ fishery matters. LLGDS, on the other hand, argued that the provisions did not refer to situations of surplus as the latter were already covered by previous provisions (see, \textit{eg}, text accompanying n 171 \textit{supra}). According to Arts 69(4) and 70(5) of NG4/9/Rev.2 (\textit{supra n 171}), developed LLGDS would only be entitled to participate in the exploitation of EEZ living resources of other developed subregional or regional States having regard to the extent to which the coastal State in giving access to other States to the living resources of its [EEZ] has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone. The implication, observes Oxman (\textit{supra n 163, 17}) is that situations may exist where a developed coastal State would be more justified in denying or limiting participation by developed LLGDS than of developing LLGDS in favour of traditional fishing.}
Given continuing strong differences regarding the use of the term 'geographically disadvantaged States' the expression 'States with special characteristics' as earlier recommended would be retained. It was also proposed to retain the term 'right' in relation to LLGDS access to EEZ fishery resources. If one analyzed the content and context of the term's use, it was argued, "there is no inconsistency in the use of the term in this context and the sovereign rights of the coastal State" over EEZ resources.

Despite reservations expressed in certain quarters, Nandan concluded at the end of the first half of the session that the second revision offered "a substantially improved prospect of a consensus" compared to existing ICNT provisions.

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See n 146 and accompanying text supra. Unable to secure agreement on additional criteria defining GDS, he reassured GDS at the Conference that they all qualified under the existing provision.

Nandan Memo, supra n 170, 90

"Report by the Chairman of Negotiating Group 4 (Ambassador Satya N. Nandan) to the Plenary on 15 September 1978"(NG4/11, incorporated into A/Conf.62/RCNG/2, dated 15 September 1978; in UNCLOS:OR x, 166, 167).

Although Nandan in his Report suggested that improvements to the text as well as other matters could be discussed during the second half of the session, little work was done as the timing was judged inappropriate. For one reason, note Kimball and Schneider (supra n 163, 149), there was some fear that if discussions resumed immediately, all 'agreed' provisions would be reopened to the detriment of what had already been achieved. In this respect, Nandan observed in his oral report to Plenary (UNCLOS:OR ix, 50) that coastal States still had particular reservations concerning the reference to 'rights' of LLGDS, while the latter States had their own reservations concerning the reference to 'surplus' in the new text.

More broadly, the decision not to enter into detailed negotiations in NG4 during the resumed session appears also due in large part to the comparative lack of progress in other NGs and the reluctance to give unqualified endorsement to one compromise when other issues were still being negotiated. While not disagreeing with Nandan's assessment that the new provisions worked out in NGs commanded widespread and substantial support, for example, Oxman (supra n 163, 18) in his
b) NG5

At the end of the first half of the session, Greece's Ambassador Constantin Stavropoulos, Chairman of NG5, reported the formulation of dispute settlement provisions relating to the exercise of coastal State sovereign rights in the EEZ that had received "widespread and substantial support amounting to a 'conditional consensus'; that is a consensus conditional upon an overall package deal".178

The compromise provided that a coastal State would not be subject to compulsory and binding adjudication for disputes relating to the exercise of its sovereign rights over EEZ living resources.179 However, it would be obliged to

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review of the session observed that a "significant number" of coastal States considered the issues being dealt with by NGs 4, 5 and 6 as a 'package', particularly those States with broad continental margins. This was also true, however, for LLGDS. During the session, eg, the Jamaican delegate indicated that while coastal State jurisdiction over the sea-bed should cease at 200 miles, his country was willing to accept jurisdiction beyond that limit if an acceptable and equitable system of revenue sharing were formulated and an acceptable compromise was arrived at in NGs (Kimball et al, supra n 163, 74).

Commenting on the session in general, Kimball et al (ibid 69) observe that

As delegates edged closer over the narrow distances separating them on a number of issues, they forged more and more links between the subject matter of the various issues as well. Debate on seabed issues was held hostage to debate on the rights of access of [LLGDS] in the EEZ and vice versa.

See in the above regard, eg, Australian Report: 7th Session, supra n 4, 59; Australian Report: Resumed 7th Session, supra n 4, 43-44; "Report to the Plenary by Ambassador Aguilar (Venezuela), Chairman of the Second Committee", in RCNG/1, supra n 170, 83, 85; and US Reports, supra n 4, 209-210, 241.

178 "Results of the work of the Negotiating Group on item (5) of document A/Conf.62/62: Report to the Plenary by the Chairman, Ambassador Constantin Stavropoulos (Greece)" (NG5/17, dated 16 May 1978). The Report (including the Annex containing the compromise provisions) was incorporated into RCNG/1, supra n 170, 117.
submit to compulsory conciliation, disputes in which it was alleged that it had not complied with certain obligations. The compromise was ultimately reflected in Article 297(3) of the Convention (see Table 10).

Art 296(3) of NG5's 'compromise formula', which adopted the wording proposed by the Castañeda group during the previous session, thereby significantly reducing ambiguities found in Art 296(4) of the ICNT (see n 161 supra). In so doing, notes Adede (supra n 61, 379), "the Convention has moved from the position of 'compulsory settlement' to that of 'compulsory exclusions'".

Art 296(3)(b) of NG5's 'compromise formula'. To emphasize the conciliation nature of the compulsory dispute settlement mechanism contained in the compromise formula, the latter's Art 296(3)(c) provided that the conciliation commission was not to substitute its discretion for that of the coastal State.

The approach adopted by NG5 was one that had been advocated a few years earlier by Sir Anthony Mason, a Judge on the Australian High Court, who remarked ("Developments at the U.N. Conference on the Law of the Sea" (1975) 5 Melanesian L J 46, 50) that

One criticism that might be made of the [RSNT] is that it too frequently attempts to convert political questions into legal questions with a view to making these questions susceptible of determination by a court or tribunal. It may be advisable to consider alternative procedures more suited to the resolution of political issues -- negotiation, mediation and conciliation, culminating perhaps in an advisory opinion by an authoritative tribunal as a last stage. It may be enough to secure an advisory opinion which will influence the parties directly or indirectly by its effect on world opinion, leaving the final outcome to be decided by the parties as a political question.

In the view of the American delegation (US Reports, supra n 4, 215-216), by requiring that violations be arbitrary or manifest, "the text ensures that a coastal State which exercises its powers responsibly cannot be harassed by disgruntled fishing States". According to the American Report (ibid 216), once the compromise was agreed to in a working group set up within NG5, it "sailed through" NG5 as a whole with relative ease. Art 296(4), concluded the Report on the first half of the session,

is one of the important successes of the Seventh Session. It is an even-handed and balanced solution to a very difficult problem and both legally and politically superior to the ICNT. The ICNT masked fundamental disagreement by obfuscation. It may have offered no compulsory settlement at all, or it may have offered too much. The clarity and relative certainty of the new text signals real agreement on mutually acceptable limits of compulsory settlement in the economic zone. It offers both sides
### TABLE 10: LAW OF THE SEA CONVENTION: SELECTED PROVISIONS

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<td><strong>PART V</strong></td>
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<td>ISNT (15/7/77)</td>
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<td>Article 5D</td>
<td>ISNT (15/7/75)</td>
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<td><strong>PART VII</strong></td>
<td><strong>CONSERVATION OF LIVING RESOURCES</strong></td>
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<td>1.</td>
<td>ISNT (7/5/75)*</td>
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Article First Substantive Appearance

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<tr>
<td>Article 41 Utilisation of the living resources</td>
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<tr>
<td>1. The coastal State shall promote the objective of optimum utilisation of the living resources in the exclusive economic zone without prejudice to its rights as fishery states.</td>
<td>ISNT (7/5/75)</td>
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<td>2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraphs 1 and 2, give other States access to a share of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States concerned.</td>
<td>ISNT (7/5/75)</td>
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<td>3. In giving access to other States to its exclusive economic zone under this Article, 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 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to maintain economic distinction in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.</td>
<td>ISNT (7/5/75)</td>
<td>ISNT/Rev.1(28/4/79): &quot;laws and regulations&quot; added in Draft Convention (28/8/81)</td>
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<td>4. National and other States fishing in the exclusive economic zone shall comply with the conservation measures and with the rates, terms and conditions established in the law and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, inter alia, to the following: (a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry; (b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period; (c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used; (d) fixing the age and size of fish and other species that may be caught; (e) specifying information required of fishing vessels, including catch and effort statistics and vessels position reports; (f) requiring, under the authorisation and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data; (g) the placing of observers or trainees on board such vessels by the coastal State; (h) the landing of all or any part of the catch by such vessels in the ports of the coastal State; (i) terms and conditions relating to joint ventures or other cooperative arrangements; (j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State’s capability of undertaking fisheries research; (k) enforcement procedures.</td>
<td>ISNT (7/5/75); &quot;laws and regulations&quot; added in Draft Convention (28/8/81)</td>
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### Table 10: (Cont’d)

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<th>Article</th>
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<tr>
<td>Article 44</td>
<td><strong>Highly migratory species</strong></td>
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<td>1. The coastal States and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to securing conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal States and other States whose nationals harvest such species in the region shall cooperate to establish such an organization and participate in its work.</td>
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<td>2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.</td>
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<td>Article 45</td>
<td><strong>Abundant stocks</strong></td>
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<tr>
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<td>1. States in whose rivers anadromous species originate shall have the primary interest in and responsibility for such stocks.</td>
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<td>2. The State or origin of anadromous species shall ensure their preservation by the establishment, through regulatory measures for fishing in all waters landward of the outer limits of its exclusive economic zone and for fishing provided for in paragraph 3(a). The State of origin may, after consultations with the other States referred to in paragraphs 1 and 2 fishing these stocks, establish total allowable catches for stocks originating in its rivers.</td>
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<td></td>
<td>3. (a) Fishermen for anadromous species shall be conducted only in waters landward of the outer limits of exclusive economic zones, except in cases where this provision would result in economic stagnation for a State other than the State of origin. With regard to such fishing beyond the outer limits of the exclusive economic zone, States concerned shall maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and the needs of the State of origin in respect of these stocks.</td>
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<td>(b) The State of origin shall cooperate in utilization economic distribution in such other States fishing these stocks, taking into account the normal catch and the needs of operations of such States, and all the areas in which such fishing has occurred.</td>
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<td>(c) States referred to in subparagraph (b) participating by agreement with the State of origin in measures to cease anadromous stocks, particularly by expenditure for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.</td>
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<td>(d) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.</td>
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<td>4. In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall cooperate with the State of origin with regard to the conservation and management of such stocks.</td>
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<td>5. The State of origin of anadromous species and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, more appropriate, through regional organizations.</td>
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<tr>
<td>Article 46</td>
<td><strong>Catadromous species</strong></td>
</tr>
<tr>
<td></td>
<td>1. A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the respect and exercise of migratory fish.</td>
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<td></td>
<td>2. Harvesting of catadromous species shall be conducted only in waters landward of the outer limits of exclusive economic zones. When conducted in exclusive economic zones, harvesting shall be subject to this article and the other provisions of this Convention concerning fishing in those zones.</td>
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<td>3. In cases where catadromous fish migrate through the exclusive economic zone of another State, whether as juveniles or returning fish, the management, including harvesting, of such fish shall be regulated by agreement between the States concerned in paragraph 1 and the other State concerned. Such agreement shall ensure the rational management of the species and take into account the responsibilities of the State concerned in paragraph 1 for the maintenance of these species.</td>
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<tr>
<td>Article 47</td>
<td><strong>Right of unexploited States</strong></td>
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<td></td>
<td>1. Land-locked States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of Articles 11 and 12.</td>
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<td>2. The terms and conditions of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account, inter alia:</td>
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<td>(a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal States;</td>
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<td>(b) the extent to which the land-locked State, in accordance with the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional or regional agreements in the exploitation of living resources of the exclusive economic zones of other coastal States;</td>
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**Notes:**
- ISMT (7/5/75)
- ISOT (7/5/75)
- ISNT (7/5/75)
- ISNT (6/5/76)
- ISNT (7/5/75)
- ISOT (15/7/77)
- ISNT (7/5/75)
TABLE 10: (CON’T)

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<tr>
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<tr>
<td>ICL/Rev.1 (28/4/79): “geographically disadvantaged States” substituted for “States with special geographical characteristics” in Convention (10/12/82)</td>
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<td><strong>RSN (6/5/76)</strong></td>
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<td><strong>ISMT (7/5/75): “the archipelagic waters” added in ISMT/Rev.2 11/4/80</strong></td>
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**TABLE 10: (CON’T)**

1. The following provision does not prejudice the States concerned from extending consular or judicial assistance from any State or international organization in order to facilitate the exercise of the rights pursuant to Articles 10 and 27, provided that it does not have the effect referred to in paragraph 1.

**ARTICLE 72**

**Infringement of laws and regulations of the coastal State**

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

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal States penalties for violations of discriminatory laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In case of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalty subsequently imposed.

**PART VII**

**SECTION II. GENERAL PROVISIONS**

**ARTICLE 80**

**Application of the provisions of this Part**

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the international waters of a State, or in the archipelago sea of an archipelagic State. This article does not entail any abrogation of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 11.

**ARTICLE 81**

**Freedom of the high seas**

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

   - freedom to pass through the territorial sea of the coastal States;
   - freedom to continue to exercise jurisdiction over the high seas;
   - freedom of navigation;
   - freedom from interference;
   - freedom of overflight;
   - freedom of scientific research; and
   - freedom to lay down in harbors.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in the exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in areas.
TABLE 10: (CON'T)

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<td>ISNT (7/5/75): “take” and “taking” substituted for “adopt” and “adopting” in Draft Convention (Informal Text) (22/9/80) as Article 117</td>
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<tr>
<td><strong>ARTICLE 118</strong></td>
<td>RSNT (6/5/76): “take” substituted for “adopt” in Draft Convention (28/8/81)</td>
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<td><strong>ARTICLE 119</strong></td>
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**SECTION II. CONSERVATION AND MANAGEMENT OF THE LIVING RESOURCES OF THE HIGH SEAS**

**ARTICLE 114**

Rights to fish on the high seas

All States have the right for their nationals to engage in fishing on the high seas subject to:

(a) their treaty obligations;

(b) the rights and duties as well as the interests of coastal States provided for in ISNT (7/5/75); Article 63, paragraph 2, and articles 64 to 67; and

(c) the provisions of this section.

**ARTICLE 117**

Date of States to agree with respect to their national measures for the conservation of the living resources of the high seas

All States have the duty to take, or to cooperate with other States in taking, such measures for their respective national measures as may be necessary for the conservation of the living resources of the high seas.

**ARTICLE 118**

Co-operation of States in the conservation and management of living resources

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, in appropriate cases, cooperate to establish subregional or regional fisheries organisations to this end.

**ARTICLE 119**

Conservation of the living resources of the high seas

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the spatial requirements of developing States, and taking into account fishing practices, the interdependence of stocks and any generally recommended international optimum standards, whether national, regional or global;

(b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their representation may become seriously threatened;

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organisations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

**PART II. ENCLOSED OR SEMI-ENCLOSED SEAS**

**ARTICLE 117**

Definitions

For the purposes of this Convention, an enclosed or semi-enclosed sea means a gulf, sea or the water surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

**ARTICLE 118**

Compensation of States adjoining enclosed or semi-enclosed seas

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through appropriate regional organisations:

(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the area;

(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organisations to cooperate with them in furtherance of the provisions of this article.
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**SECTION 1. GENERAL PROVISIONS**  
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| **Article 24** | ISNT (7/5/75) |
| **Article 25** | ISNT (6/5/76) |
| **Article 26** | ISNT (7/5/75) |
| **Article 27** | ICHT (15/7/77) |
| **Article 28** | ICHT (15/7/77) |
| **Article 29** | ICHT/Rev.2 (11/4/80) |
| **Article 30** | ICHT (15/7/77) |
| **Article 31** | Draft Convention (Informal Text): (22/9/80) |
## Table 10: (Con't)

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### Article 115:  
**Regulations**

States or competent international organisations may proceed with a marine scientific research project six months after the day upon which the information required pursuant to Article 114 was provided to the coastal State unless within four months of the receipt of the information concerning each scientific research project the coastal State has informed the State or organisation conducting the research that:

- Yes, it has withheld its consent under the provisions of Article 246, or
- The information given by that State or competent international organisation regarding the nature or objective of the project does not conform to the requirements set out in section 4 of
- It requests supplementary information relevant to conditions and the information provided for under articles 246 and 237; or
- States or competent international organisations conducting the research project are not in compliance with the provisions of Article 115 or Article 114 of any marine scientific research project carried out by that State or organisation, with respect to consent established in a scientific research project.

### Article 117:  
**Habitation or residence of non-marine scientific research personnel**

1. A coastal State shall have the right to require the habitation of any marine scientific research personnel in premises within its exclusive economic zone of or on its continental shelf. If:

- The research activities are being conducted in accordance with the information communicated in accordance with Article 246 upon which the consent of the coastal State was based or
- The State or competent international organisation conducting the research activities has not complied with the provisions of Article 115 concerning the rights of the coastal State with respect to the marine scientific research project.

2. A coastal State shall have the right to require the occupation of non-marine scientific research personnel in a part of any premises with the permission of Article 117 shall amount to a major change in the research project or the research activities.
3. A coastal State may also require retention of marine scientific research activities if any of the situations contemplated in paragraph 2 are not resolved within a reasonable period of time.

4. Following notification by the coastal State of its decision to order suspension of research, States of competent international organizations authorized to conduct marine scientific research activities shall terminate the research activities that are the subject of such a notification.

5. An order of suspension under paragraph 1 shall be lifted by the coastal State and the marine scientific research activity allowed to continue only if the following State or competent international organization has complied with the conditions required under articles 234 and 235.

ARTICLE 246
Rights of non-competing landlocked and geographically disadvantaged States

1. States and competent international organizations which have submitted a coastal State a project for underwater marine scientific research referred to in article 244, paragraph 3, shall give notice to the coastal State concerned and the geographically disadvantaged States of the proposed research project, and shall notify the coastal State thereof.

2. After the consent has been given for the proposed marine scientific research project by the coastal State concerned, in accordance with article 234 and other relevant provisions of this Convention, States and competent international organizations undertaking such a project shall provide to the neighboring landlocked and geographically disadvantaged States, at their request and when appropriate, relevant information as specified in article 234 and article 235, paragraph 1.

3. The neighboring landlocked and geographically disadvantaged States referred to in paragraph 2 shall, at their request, be given the opportunity to conduct marine scientific research in the water column beyond the limits of the exclusive economic zone.

SECTION 1. SETTLEMENT OF DISPUTES AND INTERNAL MEASURES

ARTICLE 247
Dispute concerning the interpretation or application of the provisions of this Convention concerning research beyond the limits of the exclusive economic zone

PART II
SETTLEMENT OF DISPUTES

SECTION 1. GENERAL PROVISIONS

ARTICLE 248
Jurisdiction of settlement of disputes by bilateral means

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by bilateral means in accordance with article 2, paragraph 1, of the Charter of the United Nations, and, in this case, shall take a decision by the means indicated in article 32, paragraph 1, of the Charter.

SECTION 2. COMPLIATORY PROCEDURES DETAILING AIMING AT RESOLUTION

ARTICLE 249
Application of procedures under this section

Subject to section 2, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by means of section 1, be submitted at the request of any party to the dispute to the Court of International Jurisdiction under this section.

SECTION 3. LIMITATIONS AND EXCEPTIONS TO APPLICABILITY OF SECTION 2

ARTICLE 250
Limitation on applicability of section 2

2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be entitled to accept the submission to such settlement of any dispute arising out of

(i) the exercise by the coastal State of a right or discretion in accordance with article 231; or

(ii) A decision by the coastal State to order suspension or cancellation of a research project in accordance with article 232.

(b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 234 and 235 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 1, provided that the conciliation commission shall not fail to mention the exercise by the coastal State of its discretion to designate certain areas as referred to in article 234, paragraph 6, or of the discretion to establish certain in accordance with article 234, paragraph 5.
TABLE 10: (CONT'T)

<table>
<thead>
<tr>
<th>Article</th>
<th>First Substantive Appearance</th>
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<tbody>
<tr>
<td>3. (a)</td>
<td>Draft Convention (Informal Text) (22/9/80)</td>
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<tr>
<td>(b)</td>
<td>ICNT/Rev.1 (28/4/79)</td>
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<tr>
<td>(c)</td>
<td>Draft Convention (Informal Text) (22/9/80)</td>
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<tr>
<td>(d)</td>
<td>ISNT (7/5/75), except for #7, inserted into ICNT/Rev.2 (11/4/80)</td>
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**PART XVI**

**GENERAL PROVISIONS**

Article 300

**GOOD FAITH AND MANNER OF RIGHTS**

States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and powers recognized in this Convention in a manner which would not constitute an abuse of rights.

**ANNEX 1. HIGHLY MAJORITY SPECIES**

1. *Albacore* tunas *Thunnus alalunga*.
2. *Bianfin* tunas *Thunnus indica*.
3. *Soupfin* tunas *Thunnus thynnus*.
4. *Sword* tunas *Thunnus thynnus*.
5. *Little* tunas *Thunnus alalunga*.
6. *Western* tunas *Thunnus alalunga*.
7. *Southern* bluefin tunas *Thunnus mackerel*.
8. *Western* sea* Scomberomorus*.
9. *Frigate* sea* Scomberomorus*.
10. *Northern* multipeaks sea* Scomberomorus*.
15. *Shortbill* sea* Scomberomorus*.
17. *Lancelet* sea* Scomberomorus*.
18. *Four-spine* sea* Scomberomorus*.

20. *Atlantic* sea* Scomberomorus*.
21. *Indian* sea* Scomberomorus*.
22. *Central* sea* Scomberomorus*.
23. *Southern* sea* Scomberomorus*.
24. *Northern* sea* Scomberomorus*.

*If no first substantive appearance is specified for a particular provision in an article, its appearance was as for the immediately preceding citation.*
Also included in NG5's compromise provisions were draft articles protecting coastal States against possible abuse of process and requiring all States to exercise their rights and jurisdictions under the Convention "in such a manner as not to harm unnecessarily or arbitrarily the rights of other States or the interests of the international community".  

Commenting on Art 296(3), Rosenne (supra n 161, 99) asserts, however, that

The introduction into this provision of qualifications such as 'manifestly,' 'seriously,' and 'arbitrarily,' with the openings they present for subjective interpretations, coupled with the prohibition on the conciliation commission from substituting its discretion for that of the coastal State..., may weaken the conciliation machinery's ability to come to grips with the merits of any such dispute brought before it; and it is doubtful if in this context such qualifications have much practical value either in helping to draw the line between permissible and prohibited activities by the coastal State, or as legally relevant or enforceable criteria for possible misuse of powers.

He concludes (ibid 99-100) that NG5's Art 296 substantially reduced the quantity of disputes relating to EEZ fishery resources that would be subject to compulsory dispute settlement procedures, either arbitral or conciliatory. Cf Bernhardt, supra n 161, 93-94.

According to the Chairman's Report (NG5/17, supra n 178, 123, n 6), the latter provision was to be included in an appropriate place in the Convention. To the US (US Reports, supra n 4, 217), however, the proposal was unacceptable in its present form as it, inter alia, prohibited only "unnecessary" abuses.

Bernhardt (supra n 161, 94-95) notes that negotiations clearly reveal that the 'abuse of rights' provision was meant to apply to fishery, EEZ and MSR disputes. However, he suggests, the provision would not bind States to compulsory dispute settlement procedures in that "unnecessary or arbitrarily" is not a clear normative standard and the draft article does not clearly apply to the complete Convention.

No detailed negotiations were held during the resumed 7th session. Although some distant-water fishing nations expressed dissatisfaction with the compromise text, Stavropoulos concluded that it could replace the existing ICNT provision and was one "on which the degree of support was so widespread and substantial as to offer a reasonable prospect of a consensus being reached"("Report to the Plenary by Ambassador Constantin Stavropoulos (Greece), Chairman of the Negotiating
2. The Committees

a) C.II

Discussions continued on that part of the Committee's mandate not under consideration by NGs. Tentative agreement was announced on draft articles on anadromous species worked out by those States particularly concerned.182


According to the Australian Report of the resumed session (supra n 4, 41-42), the latter opened with delegations with distant-water fishing interests formally stating their negative views on the Stavropoulos text. Several coastal States, on the other hand, objected to any reopening of the discussions, and one delegation even stated that if debate were reopened, the Coastal State Group would be likely to revert to its earlier position rejecting any form of third party settlement at all.

In his review of the session, Oxman (supra n 163, 19) observed that the reservations expressed during the resumed session appear to have stemmed, at least in part, from the existence of substantive or political relationships on various outstanding issues, particularly those in NGs 4, 5 and 6 (see n 177 supra).

182 "Report to the Plenary by Ambassador Aguilar (Venezuela), Chairman of the Second Committee", incorporated into RCNG/1 (supra n 170), in UNCLOS:OR x, 83. The agreed amendments appear in substantially the same form as final Convention Articles 66(2) and 66(3)(a)[see Table 10]. Delegations negotiating the agreed text were Canada, Denmark, Iceland, Ireland, Japan, Norway, UK, US, USSR.

According to the Australian Report of the first half of the session (supra n 164, 57) other fishery proposals discussed in C.II included the following:

(i) To ensure that the TAC of a species occurring in more than one EEZ was determined on a regional or sub-regional basis;
(ii) To give particular consideration to developing States of a region or subregion concerning utilization of the EEZ's living resources;
(iii) To add cephalopods, flying fish and sea turtles to the list of HMS;
(iv) To allow appropriate international organizations to determine the TAC of a species in any region where it considers a resource is being fully exploited; and
(v) To link marine mammals with HMS.

During the session, some 12 States endeavoured unsuccessfully to have a NG established to deal with en-
b) C.III

The Committee examined a number of key articles on MSR, focusing particularly on the consent regime for research in the EEZ. In his report of the session, C.III's Chairman noted the "overwhelming view" that the ICNT offered a good prospect for compromise on the overall package with regard to, inter alia, MSR, as well as "substantial support" for the position that "the delicate balance achieved so far had to be preserved and that there should be restraint on any attempt to reopen negotiations on fundamental issues", particularly concerning MSR in the EEZ. At the same time, however, there were numerous proposals for improving the text and as time proved insufficient, they were held over to the next session for further consideration.

See: (a) "Report to the Plenary by the Chairman of the Third Committee, Ambassador Alexander A. Yankov (Bulgaria)", incorporated into A/Conf.62/RCNG/1 (supra n 170), in UNCLOS:OR x, 96, 102-103; and (b) "Report by the Chairman of the Third Committee, Ambassador Alexander A Yankov (Bulgaria)"(C.3/Rep.1, dated 13 September 1978) incorporated into A/Conf.62/RCNG/2 (supra n 177), in UNCLOS:OR x, 173. For a review of discussions on the subject see Australian Report: 7th Session, supra n 4, 85-87; and Kimball et al, supra n 163, 75-76.

C.3/Rep.1, supra n 183, 176. In a similar vein, NG1's Chairman observed at the time, "it is more a question of finding a balance between the various interests than of reconciling radically opposed philosophies"(cited in Kimball et al, supra n 163, 69). Kimball et al comment generally (ibid) that "[i]f one word were to be selected to characterize the seventh session...it would have to be 'balance'".
3. Observations

The seventh session was marked by considerable progress towards resolution of two of the principal fishery issues still outstanding: the position of LLGDS and dispute settlement, both concerning the EEZ. That advance was qualified in two respects however. First, it was still a fragile balance of interests between coastal State, on the one hand, and the major maritime Powers and LLGDS, on the other. And secondly, the successful incorporation of the fishery compromises into a comprehensive Convention hinged to a great degree on the yet-to-be-realised compromises of at least a similar standard on other remaining key issues, especially those relating to the sea-bed regime.

Somewhat overshadowed by attention focussed on the above issues were other fishery matters still being discussed, including HMS, regional and subregional co-operation in conservation and management activities, and MSR.

It was in light of the above progress and recognition of the task remaining that the Conference agreed that the objective of the eighth session would be to conclude formal negotiations and revise the ICNT.185

185 "Report of the General Committee at the close of the seventh session" (A/Conf.62/69, dated 14 September 1978), in UNCLLOS:OR x, 11-12.
Divided into two parts, the session began with attention focussed on outstanding deep sea-bed issues, after which negotiations resumed in the other main Committees and NGs. Although it was not possible to formalize the ICNT, it was agreed to substantially revise the negotiating text as "a draft preparatory to...a final revision". The revised text and remaining unresolved issues were discussed during the resumed session.

1. The Negotiating Groups

There were almost no formal discussions held in either NG4 or NG5 during the session, although informal consultations did take place. It was widely agreed, however, that the tentative agreements of the previous year had a better chance of commanding a consensus than the existing

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187 UNCLOS:OR xi, 14. The revised ICNT was released on 28 April 1979 as A/Conf.62/WP.10/Rev.1.

188 At the only meeting of NG4 during the first half of the session, various suggestions were advanced for amending the compromise proposal negotiated the previous year (see n 177 and accompanying text supra). As a result, Nandan reported to C.II, "[i]t had become apparent...that there was no point in convening further meetings until intensive consultations had been held on the issues involved"(UNCLOS:OR xi, 57).

Similarly, NG5 met only briefly during the first half of the session and not at all during the resumed session.
ICNT provisions and they were therefore incorporated into the revised negotiating text.189

2. The Committees

During the resumed session, C.II considered several fishery-related proposals, none of which generated widespread support.190

189 UNCLES:OR xi, 67. The American report on the first part of the session (US Reports, supra n 4, 281) concluded that "[i]t is clear that the Nandan proposals embody the essence of the final compromise on the issue". Cf Lacharrière, supra n 186, 23.

Kimball et al (supra n 186, 166) commented in their review of the session that the LLGDS gained little from [the proposal] but the right of a negotiated participation in the exploitation of some economic zone resources. Yet many [LLGDS] seemed to accept this compromise having more to gain by the law of the sea convention than by insisting on more rights and destroying the negotiating process.

Cf Farin Mirvahabi ("The rights of landlocked and geographically disadvantaged States in exploitation of marine fisheries"(1976) 26 NILR 130, 150), who observed even before the 7th session that

The dilemma of the developing LL/GDS lies within the fact that if the Conference fails, they fail. The Conference considers that it has recognized them as the most deserving of the beneficiaries of the common heritage of mankind.

See in the latter regard, eg, Art 151(9) of the ICNT.

According to the Australian Report of the first half of the session (supra n 4, 6-7), the incorporation of compromise provisions worked out in NG4 and NGS the previous year into the revised ICNT was made possible by the production of a new text on the continental shelf, all issues being closely related in a negotiating package (see also n 177 and accompanying text supra).

On further reflection, NGS decided that its recommendation of a provision on abuse of rights was beyond its mandate and thus no such provision was included in the revised text, it being reserved for further consideration (US Reports, supra n 4, 281).

190 "Report of the Chairman of the Second Committee"(A/Conf.62/L.42, dated 24 August 1979), incorporated into A/Conf.62/91, dated 19 September 1979, in UNCLES:OR xii, 71, 92-93. Considered during the session, eg, was a proposal that where the same fish stock or associated
Within C.III, attention focussed on the applicability of dispute settlement procedures to MSR conducted in the EEZ. By the end of the resumed session, the Chairman was able to report "support in substance" for a compromise proposal that disputes arising from a claim by a researching State that a coastal State was not exercising its rights pursuant to the Convention would be submitted to compulsory conciliation procedures as set out in the text, provided that the exercise by a coastal State of its discretion to withhold consent would not be called into question.¹²¹

Species were found both within the EEZ and in an area beyond and adjacent to the zone, the coastal State and fishing States concerned would be obliged rather than simply exhorted to agree on measures to conserve and develop the stocks, and if no agreement was reached within a reasonable period of time, the latter States would have to abide by conservation measures imposed by the coastal State. See in this regard, eg, the Argentinian informal proposal, C.2/Informal Meeting/48, dated 20 August 1979, in Platzoder, supra n 57, v, 56. According to Professor José Luis Meseguer ("La régime juridique de l'exploitation de stocks communs de poissons au-delà des 200 milles"(1982) 28 AFDI 885, 895, n 38), among the States objecting to the proposal were (in order of number of interventions) Spain, Ukrainian SSR, Japan, Bulgaria, Cameroon, Poland, Portugal, Romania, Seychelles, USSR and Republic of Korea. Throughout the debate, he continues, Eastern European States and members of the EEC equally expressed their opposition to the proposal.

It would appear that, as in the previous session (see n 184 and accompanying text supra), delegates were extremely reluctant to upset carefully balanced provisions painstakingly negotiated over time by endorsing provisions seen as being in any way controversial, not vital to their national interest, and likely to provoke a spate of counter-proposals from opposing interest groups. Responding to demands by LLGDS for more favourable access to EEZ living resources, eg, Peru's delegate countered (UNCLOS:OR xi, 64) that

without wishing to re-open a lengthy debate..., he wished to point out that, if certain delegations insisted on their extreme position, other delegations would be compelled to revert to their initial position, in particular with respect to the 200-mile limit for the territorial sea.

As the Conference went on, therefore, it became increasingly more difficult to introduce into the negotiating texts new articles modifying existing provisions widely regarded as settled.
3. **Observations**

The fragile compromises carefully negotiated during the previous session on the principal outstanding fishery issues were found by the majority of delegations to be the best that could be hoped for. Although some delegations continued to insist on extreme positions, it was becoming increasingly clear that their efforts were to be in vain, and that if a general Convention was to be realized it would have to be based on the existing provisions. By the end of the session it was widely accepted that the general fishery regime had been 'settled' (see Table 10).

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191 "Report of the Chairman of the Third Committee" (A/Conf. 62/L.41, dated 23 August 1979), incorporated into A/Conf.62/91 (supra n 191), in **UNCLOS:OR** xii, 94-95.

There was also "support in substance" for a new provision clarifying conditions for the publication of research results, including requiring prior agreement for making internationally available results of direct significance for the exploration and exploitation of EEZ resources (*ibid*).

192 Oxman (*supra* n 186, 6-7) writes that at the end of the session the major outstanding substantive issues concerned deep sea-bed mining, the continental shelf and the delimitation of maritime boundaries.

During the session, there were also discussions on final clauses. Of relevance to fisheries was the so-called 'transitional provision' relating to resource rights of territories under colonial domination (see n 85 *supra* and 218 *infra*). While numerous G77 States urged that it be included in the Convention with the same status as other articles, France, the UK and the US were opposed to its inclusion, France even indicating that the inclusion of the provision would preclude her from signing the Convention. According to the French delegation, write Beurier and Cadenat (*supra* n 186, 141, n 7),

> il est anormal d'empêcher les territoires d'outre-mer de profiter des ressources marines qui se trouvent au large de leurs côtes alors même que l'ONU oblige les puissances administrantes à prendre toutes les mesures nécessaires pour que ces territoires accèdent au progrès économique.

See also in this matter, *Australian Report: Resumed 8th Session*, supra n 4, 12-13; Oxman, *supra* n 186, 42, 43-45; and *US Reports*, supra n 4, 348.
In light of the diminishing number of outstanding substantive issues, the Conference decided to hold a final session in 1980 with a view to completing negotiations and producing a draft Convention.193

H. The Ninth Session (1980)194

Again, the Conference session was divided into two parts. As it proved impossible to finalize negotiations, a newly-revised ICNT was released at the end of each part.195

1. The Second Committee

Consideration was given to numerous proposals, the most controversial being that of Argentina to require States concerned to agree on measures necessary for the conservation and development of stocks when the latter occur in more than one EEZ or in an EEZ and an area beyond and adjacent to the zone (so-called 'straddling stocks'). Where agreement was not reached in the second instance, an appropriate tribunal would determine measures to be taken, and, until it had done

193 UNCLOS:OR xii, 5.


so, the coastal State might apply measures provisionally. The amendment was necessary, explained Argentina's delegate, to achieve conservation objectives "threatened by the predatory activities of large fishing fleets".

Although quickly supported by some 30 other coastal States, it was opposed by other States -- a number with significant distant-water fishing interests -- which argued in general terms that the fragile balance in the draft text should not be upset, particularly those provisions relating to fisheries.

C.2/Informal Meeting/54, dated 19 March 1980, in Platzer, supra n 57, 59. This proposal was a revised version of one submitted the previous year (see n 190 supra). For one view on the genesis of Art 63 to which it relates see Meseguer, supra n 190, 888-890.

UNCLOS:OR xiii, 17

See, eg, statements by delegates of Canada (ibid 103), Chile (ibid 16) and Kenya (ibid 44).

See, eg, statements by the representatives of Italy (ibid 13), UK (ibid 25) and USSR (ibid 18). According to the American report of the first half of the session (US Reports, supra n 4, 356),

Unfortunately, the [C.II] debate...revealed a considerable tendency on the part of delegations to press amendments that would alter the basic jurisdictional balance in the text and an apparent willingness on the part of a large number of delegations to see such changes made without negotiations.

In the American view (ibid 441), the proposal caused difficulties for many States concerned about expanding coastal State jurisdiction, and any such expansion would have been unacceptable to the Conference as a whole. However, continued the American Report, there was merit in considering further the question of conforming the text of Art 63(2) with that of Art 117 relating to conservation of high seas living resources, both of which may apply to the same fishing activities.

During the resumed session, Argentina was joined by 14 other States in advancing a modified proposal (C.2/Informal Meeting/54/Rev.1, dated 14 August 1980, in Platzer, supra n 57, v, 60); sponsored by Argentina, Australia, Canada, Cape Verde, Colombia, Costa Rica, Guatemala, Iceland, New Zealand, Philippines, Portugal, São Tomé and Príncipe, Senegal, Sierra Leone and Uruguay). It continued to be opposed by States such as Japan, whose delegate argued against "any proposal
In light of continuing differences, no amendment to the text was made. Nor were changes made in response to continuing calls by LLGDS for more favourable access to EEZ fishery resources and by a number of States for clarification of terminology.200

which would result in the restriction of the freedom of the high seas" and considered that any arrangement for fishery conservation should be based on the voluntary agreement of the States concerned (UNCLOS:OR xiv, 63).

In a widely-supported decision, the southern blue-fin tuna was added to the list of HMS in annex I of the draft text ("Report of the Chairman of the Second Committee" (A/Conf.62/L.51), dated 29 March 1980, in UNCLOS:OR xiii, 82, 84).

200 LLGDS continuing to press for more favourable EEZ access included Bahrain (ibid 49), Bhutan (ibid iv, 34), Iraq (ibid xiii, 34) and Zaire (ibid xiii, 38). Some LLGDS, however, were in favour of not reopening the discussion. Niger's delegate, eg, considered the existing Articles to be "wishy-washy", but opposed further debate for fear of seeing diminished LLGDS' already modest gains (ibid xiv, 75).

In a general comment, Tanzania's representative observed that "since most of the negotiations of the Conference had been conducted in informal sessions, sometimes in very small private groups, the resulting texts were far from self-explanatory"(ibid 40). Part of the problem lie in there being no exact definition of such terms as 'geographically disadvantaged State' and 'region'. As for the former, Zaire's delegate (ibid 57) interpreted the definition of 'States with special geographical characteristics'(see nn 146 and 175 and accompanying text supra) as including States that had traditionally fished in what, under the Convention, would become an EEZ of a neighbouring State. That term, and the term 'geographically disadvantaged States' that had replaced it without being defined, in the remainder of the text must be harmonized in order to avoid differences of interpretation, he said.

The Polish delegate, for his part, while opposing a general reopening of C.II questions, said (ibid 52) that that did not exclude the need for agreed interpretation of definitions for certain unclear terms such as 'region'. Cf comments by Ecuador’s representative, ibid xi, 64-65.

The latter also raised the subject of clarification in regard to HMS (ibid xiv, 19):

Obviously, the coastal States must co-operate with the other States whose nationals fished for those species in the region and the competent international organizations must ensure the conservation and encourage optimum utilization of those species. But his delegation found it unacceptable
2. The Third Committee

Despite objections from several LLGDS that their rights were being further eroded, the Chairman announced during the session a compromise recognizing the right of LLGDS to participate in EEZ research projects of neighbouring coastal States only under certain conditions.201

that the organizations should be placed above States. The understanding should therefore be reaffirmed that article 64 of the convention could only apply if the other provisions governing the system of exploring and exploiting living resources, in particular articles 61 and 62 also applied. In that way, no decision affecting [HMS] within the 200-nautical-mile limit could be adopted without the consent of the coastal State concerned.

201 "Report of the Chairman of the Third Committee" (A/Conf. 62/L.50), dated 28 March 1980, in ibid xiii, 80. According to the new provision, only after consent had been given by the coastal State for the project to proceed would neighbouring LLGDS be provided with information. Experts appointed by the latter States would be able to participate in the project if they were not objected to by the coastal State, and the LLGDS concerned would be provided with research results subject to such terms as the coastal State may set for making the results internationally available. For statements by LLGDS against the proposed amendment see, eg, those of the Austrian (ibid 24) and Swiss (ibid 15) delegates. Singapore's representative, on the other hand, stated (ibid 11) that Singapore was prepared to accept the new provision on the understanding that, in accordance with the principle of good faith, the power given to the coastal State...to object to the appointment by a [LLGDS] of experts to participate in [MSR] should only be exercised on good and sufficient grounds and that the coastal State was not entitled to exercise that power capriciously.

In a related development, agreement was reached in Plenary on the inclusion within the final clauses of a provision covering good faith and abuse of rights (see "Reports of the President on the work of the informal plenary meetings of the Conference on general provisions" (A/ Conf.62/L.53/ and Add.1, dated 29 March and 1 April 1980) in UNCLOS:OR xiii, 87-88). For a brief discussion of the provision's relevance to fisheries see, eg, n 265 infra.
3. Observations

With the above compromise agreements made in relation to fisheries and incorporated into the revised negotiating texts, there were no major fishery-related issues thought to be outstanding. Nevertheless, the growing support for reconsideration of the provision governing straddling stocks meant that the matter would attract at least some interest during the forthcoming session, although attention would naturally focus on the few remaining unresolved problems.202

I. The Tenth Session (1981)203

All hope that the tenth session would at last see the culmination of more than a decade of multilateral law of the sea negotiations were dashed one week before the session opened, as the United States Reagan administration announced a policy review of the entire draft Convention and instructed its delegation to seek to ensure that the negotiations did not end until that review had been completed.204

In light of that development, it proved impossible to either resolve remaining differences or formalize the text

202 The major outstanding issues related to the Preparatory Commission for the establishment of the International Seabed Authority, protection of investments made in seabed mining prior to entry into force of the Convention, and participation in the Convention (see the procedural note by the President, A/Conf.62/Bur.13/Rev.1 (1980)).


204 Ibid 2
as planned, thereby allowing voting to take place. Neverthe­
less, several informal meetings were held, at the end of
which C.II's Chairman observed that there was "virtual con­
sensus" that it was neither desirable nor practical to re­
open discussions on basic C.II texts which, "while they do
not in all cases represent a consensus, are the formulae
that come closest to commanding general agreement". 205  As
well, he concluded,

Although some of the draft articles, as now worded, present difficulties of various
kinds for some delegations, the draft as a whole is acceptable to the great majority
of delegations. There are actually, in the view of a significant number of delega­
tions, very few questions that require further discussions and negotiation. 206

In Plenary, various delegations referred to fishery-related matters that they felt fell into the latter cate­
gory, principal among them being the questions of straddling stocks and the right of LLGDS to EEZ fishery resources. At
the same time, however, other delegates just as firmly main­
tained that C.II issues not be reopened. 207

Without amending the provisions relating to fisheries,
the negotiating text was upgraded at the end of the session
to an official 'Draft Convention on the Law of the Sea', al­
beit one still open to modification in light of subsequent

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205 "Report of the Chairman of the Second Committee"(A/
Conf.62/L.69, dated 15 April 1981) in UNCOLS:OR xv,
147, 148
206 Ibid
207 See ibid 17-24 for a summary of the discussions regard­
ing the Report of C.II's Chairman. Although there were
private discussions on the straddling stocks issue,
several delegations maintained that the fishery arti­
cles formed a 'package' which could not be reopened
(Australian Report: Resumed 10th Session, supra n 4,
37).

In a fit of great optimism, both Zambia (UNCLOS:OR
xv, 19) and Zimbabwe (ibid 21) urged support for sub­
regional or regional EEZs. In response, Peru's dele­
gate remarked (ibid 20) that "[s]uch suggestions now
seemed anachronistic, after all the negotiations that
had taken place and in view of the practice that had
been established among States over the past 10 years or
so".
It was decided to hold one last session, at which final decisions would be taken for the adoption of the Convention.

J. The Eleventh Session (1982)

Faced with the realization that time was fast running out, delegations attempted during the first few weeks of the session to secure acceptance for their positions. Again, conservation of straddling stocks and the position of LLGDS featured prominently in discussions. At the end of informal discussions, however, the Chairman of C.II concluded once more that there was a real consensus on the need to preserve the fundamental elements of the parts of the convention which are within the competence of [C.II] and that except for a very few issues the current text of this part of the draft convention constituted a satisfactory solution of compromise.

At the same time, he noted, active consultations were continuing with respect to straddling stocks.

In fact, discussions on the merits of a slightly revised coastal State proposal on straddling stocks continued

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208 A/Conf.62/L.78, dated 28 August 1981, in ibid 172

209 UNCLOS:OR xv, 48


211 "Report by the Chairman of the Second Committee" (A/Conf.62/L.87, dated 26 March 1982), in UNCLOS:OR xvi, 202

212 Ibid

213 A/Conf.62/L.114, dated 13 April 1982, in ibid 224; sponsored by Australia, Canada, Cape Verde, Iceland, Philippines, São Tomé and Principe, Senegal and Sierra
throughout the session. While coastal States argued the need to guard against foreign fishing fleets overfishing just outside their EEZs, major fishing nations steadfastly refused to concede coastal States further rights beyond the 200 miles. The Soviet representative, for example, asserted that the proposal would curtail fishing on the high seas and undermine existing compromises.

Whether more time and less emphasis on sea-bed issues would have enabled the States involved to arrive at a compromise regarding straddling stocks one will never know. In the final event, Conference pressures led to almost all proposed amendments being withdrawn -- including the above -- in the hope that the Convention might be adopted by consensus. That hope was in vain, however, for the United

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214 See, eg, statements by delegates of Argentina (ibid 31), Canada (ibid 115); and Somalia (ibid 98), who argued that although "a delicate balance had been achieved in the provisions relating to the [EEZ] and any subtle change would upset the mini-package agreed to after so many years of work", he nevertheless gave "unqualified support" to the proposed amendment. States such as Argentina and Canada have broad continental shelves extending beyond 200 miles, over which are to be found rich fishing grounds.

215 Ibid 102. Cf, eg, statements by the representatives of Japan (ibid 24), the Republic of Korea (ibid 64) and Bulgaria (ibid 111), who saw the proposal as "an attempt which would reopen the issue of the package on the [EEZ]". At the same time, however, he was prepared to support a Romanian proposal (A/Conf.62/L. 96, dated 13 April 1982, in ibid 216) "which represented an effort to provide greater access to fisheries, especially for land-locked countries". Ignoring the fact that the Romanian proposal referred to GDS and not LLS, the Bulgarian delegate did not explain how the proposal would give certain States greater access to fishery resources in the EEZ without opening the EEZ mini-package.

It appears that, like beauty, balance and the degree to which proposals would affect compromise agreements (see, eg, statement by the Somali delegate, supra n 214) were matters of very subjective assessment in which national interests played no small part!
States requested that a roll-call vote be taken on the final text. On 30 April 1982, the United Nations Convention on the Law of the Sea (LOSC) was adopted, 130-4-17.

Australian Report: 11th Session, supra n 4, i, 80. Cf Lévy, supra n 4, 130-131, and the American Report of the session (US Reports, supra n 4, 549) which added that although the proposal "received widespread support in [C.II], the possibility of consensus approval was blocked by Soviet Union objections on both procedural and substantive grounds".

Professor Giuseppe Barile ("Consensus and voting at the Third United Nations Conference on the Law of the Sea" (1980-1981) 5 Italian Yearbook of International Law 3, 22) observes that adopting the Convention according to the 'consensus rule' would have offered the future draft treaty on the law of the sea every chance of being transformed, by means of a great number of 'qualified' ratifications, into a truly effective legal instrument. It is in fact evident that these chances would have been considerably greater, and perhaps decisive, had the text of the treaty been adopted, not by a majority (even the majority required for international conferences in Article 9 of the Vienna Convention on the Law of Treaties), but almost unanimously (in other words by unanimous non-dissent) as expressed in the 'consensus' policy.

Moreover, 'consensus' in a universal conference such as the one on the law of the sea could create a stable and lasting equilibrium leading to the formation, in the international community's legal conscience, of new general rules. These rules could impose themselves on all members of this community independent of the stipulation of a treaty on the matter.

UNCLOS: OR xvi, 152, 154. According to the American Report of the session (US Reports, supra n 4, 537), the demand for a recorded vote was made because the changes made to the sea-bed mining provisions in the final text "failed to meet any of the US objectives".

UNCLOS: OR xvi, 154-155. Voting against the proposal were Israel, Turkey, the US and Venezuela. Abstaining were Belgium, Bulgaria, Byelorussian SSR, Czechoslovakia, FRG, GDR, Hungary, Italy, Luxembourg, Mongolia, Netherlands, Poland, Spain, Thailand, Ukrainian SSR, USSR, and UK. Adopted with the Convention were a number of resolutions, including the following compromise (annexed to the Final Act of the Conference (A/Conf.62/121, dated 27 October 1982) in ibid xvii, 139) designed to replace the 'transitional provision'(see nn 85 and 192 and accompanying text supra) that had appeared in the various negotiating texts:

In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and
K. The Conference Conclusion

In December 1982, 118 States plus the United Nations Council for Namibia, signed the Convention at a special cer-

interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.

During explanations of how they voted (or, in the case of Ecuador, not voted), several delegates referred to fishery issues. The Ecuadorian delegate (ibid xvi, 155) reiterated his earlier statement (see n 200 supra) that the EEZ regime governed HMS when the latter were within the zone. Thailand's representative explained (ibid 159) that his country had abstained largely because the fishery articles severely disadvantaged his country and the Convention would have to be closely examined before a final position could be taken on participation. Zaire's delegate (ibid 162) explained that although he had withdrawn his proposed amendments to Articles 62, 69, 70 and 71 of the Convention, Zaire would interpret the Articles in line with those amendments. The Zambian spokesman hoped that when States began to apply Articles 62 and 69, they would recognize that their intention was to secure LLS right of access to EEZ living resources, not dependent on the negotiation of bilateral agreements (ibid 163). And finally, the Romanian spokesman hoped that although his country's amendment to Article 70 had not been endorsed by the Conference, other countries would take Romania's situation into account in the negotiation of bilateral fishing agreements (ibid 158).
mony in Jamaica.\textsuperscript{219} When signing, a number made declara-
tions, several of which related to fisheries.\textsuperscript{220}

Despite the failure of the Conference to adopt the pro-
posal concerning straddling stocks that featured prominently

\textsuperscript{219} UNCLOS: OR xvii. Signing the Convention were: Algeria,
Angola, Australia, Austria, Bahamas, Bahrain, Bangla-
desh, Barbados, Belize, Bhutan, Brazil, Bulgaria, Bur-
ma, Burundi, Byelorussian SSR, Canada, Cape Verde,
Chad, Chile, China, Colombia, Congo, Costa Rica, Cuba,
Cyprus, Czechoslovakia, DPR of Korea, Democratic Yemen,
Djibouti, Dominican Republic, Egypt, Ethiopia, Fiji,
Finland, France, Gabon, Gambia, GDR, Ghana, Greece,
Grenada, Guinea-Bissau, Guyana, Haiti, Honduras, Hun-
gary, Iceland, India, Indonesia, Iran, Iraq, Ireland,
Ivory Coast, Jamaica, Kenya, Kuwait, Laos, Lesotho,
Liberia, Malaysia, Maldives, Malta, Mauritania, Mauri-
tius, Mexico, Monaco, Mongolia, Morocco, Mozambique,
Nauru, Nepal, Netherlands, New Zealand, Niger, Nigeria,
Norway, Pakistan, Panama, Papua New Guinea, Paraguay,
Philippines, Poland, Portugal, Romania, Rwanda, Saint
Lucia, Saint Vincent and the Grenadines, Senegal, Sey-
chelles, Sierra Leone, Singapore, Solomon Islands, So-
malia, Sri Lanka, Sudan, Suriname, Sweden, Thailand,
Togo, Trinidad and Tobago, Tunisia, Tuvalu, Uganda, Uk-
rainian SSR, USSR, United Arab Emirates, United Repub-
lic of Tanzania, Upper Volta, Uruguay, Vanuatu, Viet
Nam, Yemen, Yugoslavia, Zambia, Zimbabwe, the Cook
21 ILM 1477).

During the session, Fiji became the first State
also to ratify the Convention (UNCLOS: OR xvii, 132).

\textsuperscript{220} See generally, D Vignes, "Les Déclarations faites par
les Etats signataires de la Convention des Nations
Unies sur le Droit de la Mer, sur le base de l'Article
310 de cette Convention"(1983) 29 AFDI 715. Art 310 of
the Convention, and Art 309 to which it relates, read
as follows:

\textbf{Article 309. Reservations and Exceptions}

No reservations or exceptions may be made to this Convention unless ex-
pressly permitted by other articles of this Convention.

\textbf{Article 310. Declarations and statements}

Article 309 does not preclude a State, when signing, ratifying or acced-
ing to this Convention, from making declarations or statements, however
phrased or named, with a view, \textit{inter alia}, to the harmonization of its
laws and regulations with the provisions of this Convention, provided
that such declarations or statements do not purport to exclude or modify
the legal effect of the provisions of this Convention in their appli-
cation to that State.
in later sessions, representatives of Cape Verde, São Tomé and Príncipe and Uruguay all warned those States concerned that they were obligated to reach agreement on necessary conservation measures for those stocks.\textsuperscript{221}

Delegates of Costa Rica and Sao Tome and Principe both referred to HMS. The former insisted that domestic laws and regulations relating to foreign fishing in Costa Rica's EEZ applied equally to HMS and conformed to the Convention's fishery regime.\textsuperscript{222} São Tomé and Príncipe's representative reserved for his country the right to adopt laws and regulations so as to assure the conservation of HMS and to co-operate with States whose nationals fished those species in order to promote optimum utilization.\textsuperscript{223}

In response to the above, an American counter-declaration asserted that,

\textsuperscript{221} Relevant extracts of their declarations are annexed to Vignes (supra n 220, 737, 743 and 746). Vignes writes (ibid 731) that "[o]n peut se demander s'ils n'ajoutent pas ainsi un peu au text, mais on ne voit pas non plus ce qui se passera en cas de non-entente".

\textsuperscript{222} Ibid 738

\textsuperscript{223} The relevant section of the declaration as cited by Vignes (ibid 746) reads:

Le Gouvernement de la République démocratique de São Tomé-et-Principe, conformément aux dispositions pertinentes de la Convention, se réserve le droit d'adopter les lois et règlements afin d'assurer la conservation des grands migrateurs et de coopérer avec les États dont les ressortissants exploitent ces espèces pour promouvoir leur exploitation optimale.

Vignes suggests (ibid 731) that the declaration seems to contradict Art 64(1) of the Convention obliging States to co-operate

directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the [EEZ].

However, the declaration appears more of a classic reflection of the coastal State's interpretation of the rights and obligations accorded and imposed under Art 64 and in no way ignores the need to co-operate with other States. See in this regard, eg, n 24 and accompanying text supra.
the Convention, in codifying customary international law, recognizes the authority of the coastal State to control all fishing (except for the highly migratory tuna) in its [EEZ], subject only to the duty to maintain the living resources through proper conservation and management measures and to promote the objective of optimum utilization. Article 64 of the Convention adopted by the Conference recognizes the traditional position of the United States that [HMS] of tuna cannot be adequately conserved or managed by a single coastal State and that effective management can only be achieved through international co-operation.224

III. Observations

Any appreciation of the historical role of UNCLOS III in the evolution of the international law of marine fisheries can be made through numerous overlapping lenses, at various distances and using different time frames. While a comprehensive exegesis of all Convention provisions relating to fisheries is beyond the scope of the present work, it is useful to briefly consider key fishery articles as they evolved over the life of the Conference and their capacity to address the major international fishery concerns as reflected in the overall objectives set by the Conference.

A. General Remarks on the Convention

An objective consideration and realistic understanding of the fishery provisions demands that they initially be placed within the context of the broader Convention. The latter may be viewed, in turn, from two closely-related perspectives. Teleologically, States saw the LOSC as contributing to the realization of "a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land locked...".225 This was to be accomplished

by establishing through the Convention a new legal order which would, inter alia, "promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, [and] the conservation of their living resources...".226

Procedurally, it was recognized that the question of living marine resources was only one, albeit important, aspect of the new law of the sea, and that "the problems of ocean space are closely interrelated and need to be considered as a whole...".227 Given both the latter and the intended universal applicability of the Convention, however, it was impossible to formulate detailed regulations comprehending every conceivable situation that might arise on, in or under the seven seas sometime in the future. As a result, UNCLOS III produced a more general Convention, aptly described as a "comprehensive constitution"228 or "comprehensive framework"229 to govern mankind's activities in ocean space.

Setting out jural principles forming the basis of the new law of the sea, the LOSC simultaneously retained sufficient flexibility to cater for the myriad concrete relationships likely to develop. This was done, at least in part, by incorporating two features especially significant in relation to fishery issues: delegation of power and the duty to co-operate.

Philip Allott, in his perceptive critique of the LOSC, points out that it is "without parallel or precedent in the scale of its delegation of power".230 That delegation af-

225 Preamble to the LOSC. The official text of the Convention was published by the UN in 1983, sales no. E.83. V.5.

226 Ibid

227 Ibid

228 T Koh, "A constitution for the oceans" in Commentary, supra n 4, 11

fords individual States "an infinite number of discretionary choices of action and inaction. Outside that area [of discretion], action or inaction may be unlawful." 231 While the possessor of power benefits from the protection of discretionary choice, observes Allott, "[t]he burden of a power is respect for the interests of society as a whole, which con-fers the power on the holder as the agent of all its mem-
bers". 232

Similarly, Christopher Pinto writes that "[n]o potentially binding multilateral legal instrument contains as many undertakings to co-operate in such a variety of contexts" as does the LOSC. 233 Convention provisions referring

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230 P Allott, "Power sharing in the law of the sea"(1983) 77 AJIL 1, 10. This feature of the Convention, he ar-
gues, reflects contemporary changes in both interna-
tional law and international society as a whole. As for the former, Allott writes (ibid 24),

The current structural development of international law is involving
states more and more not only in the mystical composite personage of the
international legislator [at conferences such as UNCLOS III] but also in
performing the function of the executive branch of their own self-govern-
ment.

At the same time, he continues (ibid 26),

The story of the development of international society since 1945 is the
story of a progression from legal freedoms to legal powers. A freedom
implies the absence of legal control. A power implies the absence of un-
fettered discretion.

It is Allott’s conclusion (ibid 27) that

A change of perspective is required to see that...rights...in the LOS
Convention are in reality shared powers, shared between the holder of the
power and the community of states, in which regard for the interests of
other states and of all states is of the essence. There are no freedoms
from the law. There are no freedoms apart from the law. Freedoms are
powers conferred by and under the law. The sovereign of modern interna-
tional society is the same as the sovereign of the modern Western demo-
cratic tradition: systemic authority, the authority which flows from par-
ticipation in the system. It flows from the subjects of the system whose
participation legitimizes the system. It flows from the system whose
benefits the subject may not claim if he does not accept its burdens.

231 Ibid 10

232 Ibid 27
either explicitly or implicitly to the duty to co-operate necessarily entail the obligation to enter into negotiations in good faith at the request of any party "with a view to transforming a provision worded in general terms into specific units of obligation for the purpose of implementation susceptible of being monitored and, where necessary, subjected to dispute settlement procedures", he concludes. 234 A refusal to enter into negotiations or subsequent uncooperative conduct in the implementation of the agreement would constitute a violation of the LOSC itself and justify "appropriate remedial action" either under the Convention or general international law. 235

The point of departure of the above specific agreements would be the basic duty to co-operate already assumed under the LOSC. Their role would be to translate that duty into detailed provisions governing the prescribed actions, thus enabling implementation to take place and be monitored. 236

As will be seen, the above two general features of the LOSC weigh heavily on how the fishery rights and obligations enshrined in Convention principles are interpreted and applied in concrete situations . 237 Having considered briefly


234 Ibid 145. Cf William Burke ("Highly migratory species in the new law of the sea" (1984) 14 ODILA 273, 278), who interprets the obligation "to co-operate" in Art 64 of the Convention as meaning "to negotiate and actively take into account other state interests and to respond thereto". He continues (ibid 283),

Co-operation signifies that the parties not only communicate data and information, but also exchange concrete suggestions for action on specific issues. Co-operation might take other forms also, which do not depend on explicit advance agreement, but the requirements of a management regime seem necessarily to demand that the parties seek concrete and specific agreement on the contents of that regime.

235 Pinto, supra n 233, 145

236 Ibid 153
the fundamental approach adopted by UNCLOS III in formulating the LOSC, it is now left to consider fishery-related provisions themselves. This may be conveniently done in terms of the specific objectives set by the Conference.

B. The Convention Regime and Contemporary Fishery Problems

1. Conservation and Management

In a radical departure from the 1958 Fisheries Convention, the heart of the fishery regime was implanted by UNCLOS III into a newly-created body, the 200-mile EEZ. By 1976, it was all but formally recognized that within that resource-rich zone the coastal State would have 'sovereign rights' for, inter alia, conserving and managing living marine resources; while in the less fertile high seas beyond, those functions would be exercised by all States concerned on the basis of co-operation. To what extent does the new regime address contemporary problems and promote the conservation of living marine resources? The answer must be as yet somewhat equivocal.

237 For a general discussion of treaty interpretation in relation to the LOSC see Annex IV.

238 Estimates of fish catches outside and inside the 200-mile limit vary, although all authorities accept that the far greater proportion of catches are made within that limit. S Katz ("Consequences of the economic zone for catch opportunities of fishing nations" (1975) 2 MSM 144) estimates that between 6% and 15% of the world's catch is taken outside the 200 miles. J Carroz ("Les problèmes de la pêche dans la Convention sur le Droit de la Mer et la pratiques des Etats" in Nouveau droit, supra n 56, 177, 196), C Clark ("Bio-economics of the ocean" (1981) 31 BioScience 231), and J Gulland ("The new ocean regime: winners and losers" (July-August 1979) Ceres 19), all place that total at less than 1%. Holt (supra Ch 4, n 14, 78) notes that between 1970 and 1975 between 85% and 95% of the total catch was taken within 200 miles of land.

At the same time, however, S Balasubramanian, ("Fishery provisions of the ICNT" (Oct 1981 and Jan 1982) 5, 6 Marine Policy 313, 27, 32) points out that although the percentage of fish caught in the high seas is relatively small, in absolute terms it is nevertheless considerable (c.7-8 million tons).
On the one hand, numerous authorities observe that the LOSC is a great improvement over the 1958 Convention in that it establishes a framework having the potential to make conservation efforts more effective for at least most of the world's fisheries.239

At the same time, on the other hand, there are certain areas of potential difficulty that may either not promote or may indeed hinder rational conservation efforts. The LOSC, for instance, places no specific conservation obligations on coastal States with respect to important fishery resources in internal and archipelagic waters and the territorial sea.240 While it may have been felt that coastal States would institute appropriate conservation measures for those areas in their own interests, it is possibly not the case and there is a serious gap in the Convention.241

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239 Copes, eg, remarks (supra n 11, 220) that

The advent of the 200-mile limit signifies a dramatic reversal in the prospects for authoritative management of the world's fisheries, because it has moved the bulk of the commercial fish stocks from an unmanageable international resource to a set of national resources, which may now be brought under regimes of rational management.


240 Cf C de Klemm, "Conservation and the new Informal Composite Negotiating Text of the Law of the Sea Conference" (1978) 4 EPL 2; and A Pardo, "The Convention on the Law of the Sea: a preliminary appraisal" (1982-1983) 20 SDLR 489, 498, n 38. Lawrence Juda ("The exclusive economic zone and ocean management" (1987) 18 ODILA 305, 311) suggests that the reference in the LOSC Preamble to the problems of ocean space being closely interrelated and the necessity of treating them as a whole "appears to be based more in the recognition of the international political need to balance the varied national interests of different states at UNCLOS III rather than any advocacy of multi-use ocean management".

241 De Klemm, supra n 240, ibid
The first conservation and management provisions, in fact, appear in relation to the EEZ (see Table 10). The regime established has been criticized for its failure either to define clearly what is meant by conservation with regard to marine fisheries or to specify objectives relevant to modern conditions. With respect to the latter, for example, Dr Garcia and others point out that when the LOSC was taking shape in the early 1970s, MSY was generally considered the primary tool for fishery management. Subse-

See, eg, S Holt and L Talbot, "New principles for the conservation of wild living resources" (April, 1978) #59 Wildlife Monographs 1, 26-27; and de Klemm, supra n 240, 5.

Holt and Talbot (supra this n, 7) observe generally that the term 'conservation' is used with a great variety of meanings, and often without definition. In its broad definition, they explain (ibid 21), it includes management measures, and means the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations at some optimum level with respect to their habitat. Used in this way, conservation refers to the entire scope of activities that constitute a modern scientific research program, including but not limited to research, census, law enforcement, and habitat acquisition and improvement, and periodic or total protection as well as regulated taking.

Conservation may refer to a set of measures intended to maintain a resource in a desirable state, or to designate the process of attaining such a state. In a narrow context, conservation may refer to the application of measures that in some way restrain the otherwise free use of a resource in order to ensure that it retains certain desirable natural properties. Used in this way, conservation can be considered as one facet of rational resource management, which may also cover activities intended to improve the resource or ameliorate damage resulting from previous misuse of it.

For other similar (albeit briefer) definitions of conservation see, eg, de Klemm, supra n 240, 4; and Johnston, supra Introduction, n 19, 4.

As Holt and Talbot observe above, conservation as broadly defined may comprehend management measures. Nevertheless, Copes (supra n 11, 219) indicates that the latter may themselves be considered from four different perspectives: effectiveness of regulation, ecological soundness, economic efficiency, and equitable distribution of benefits. An evaluation of these four areas, he observes, "will necessarily overlap. They cannot avoid a degree of ambiguity, and they must reflect an element of subjective judgment."
quently, however, it was recognized as having a number of biological and economic weaknesses critically diminishing its value for that purpose.\textsuperscript{243}

The latter are not overcome by qualifying MSY by 'relevant environmental and economic factors', observe others. Burke, for example, points out that "'environmental' may refer not simply to biological or ecological concerns...but to all those factors that set the context within which the fishery operates".\textsuperscript{244} The result, notes Balasubramanian, is optimum sustainable yield (OSY), a variant of MSY that is so imprecise as to be useless for global fishery management purposes.\textsuperscript{245}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{243} S Garcia, J Gulland and E Miles, "The new law of the sea and the access to surplus fish resources: bioeconomic reality and scientific collaboration" (1986) 10 Marine Policy 192, 195-196; cf, Balasubramanian, supra n 238, 27-28; C Clark, Mathematical Bioeconomics: the Optimal Management of Renewable Resources (1977) 1; Holt and Talbot, supra n 242, 22-251; and de Klemm, supra n 240, 4. See also in this regard Annex I infra.
\item \textsuperscript{244} W Burke, "The Law of the Sea Convention provisions on conditions of access to fisheries subject to national jurisdiction" (1984) 63 Oregon L R 73, 80-81; cf, G Ulfstein, "200 mile zones and fisheries management" (1983) 52 NTIR 3, 15. Burke explains (supra this n, 82) that
\begin{itemize}
\item It would be inconsistent with the basic authority of the coastal State, as established in article 56, to read [environmental and economic factors] restrictively and exclude social or political concerns from management.
\end{itemize}
\item \textsuperscript{245} Balasubramanian, supra n 238, 28-29; cf, de Klemm, supra n 240, 5; and G Saetersdal ("Principles of determining allowable catches with particular reference to shared resources" in Selected Working Papers Submitted to the Ninth Session of ACMRR (FAO Fisheries Report no 206, Suppl.1, 1978) 5), who comments that the text "is
Given the above, some writers have concluded that the EEZ conservation regime imposes few specific duties and only insignificant burdens on the coastal State.\footnote{246}

Besides the latitude permitted coastal States, the formulation and implementation of 'proper' conservation and management measures may be hindered -- at least in the short term -- by a number of non-legal factors, including the paucity of data and effective techniques for dealing with conservation problems.\footnote{247} In addition, some States are either ambiguous and self-contradictory and would not seem to ensure conservation". Clark agrees on the latter, observing (\textit{supra} n 238, 235) in reference to economic factors qualifying MSY that "[i]f the term 'profits' is taken to mean the discounted present value of net economic returns, then conservation of a renewable resource is not always more profitable than its depletion". \textit{Cf} Balasubramanian, \textit{supra} n 238, 31-32.

That imprecision is compounded by other vague phrases such as "maintenance of the living resources", "endangered by over-exploitation". See, \textit{eg}, Burke, \textit{supra} n 11, 317; and Kenzo Kawakami ("The legal characteristics of the exclusive economic zone from the perspective of fisheries" in \textit{Exclusive Economic Zone}, (Proceedings of the 7th International Ocean Symposium, 1982) 35), who writes that because it is not clear precisely what conservation and management measures are 'proper' and what kind of situation would be regarded as 'over-exploitation'(Art 61(2)) "there is a fear that coastal States will, on the pretext of over-exploitation, use this provision to limit other States access to these EEZ".

\footnote{246}{See, \textit{eg}, T Loftas, "FAO's EEZ Programme"(1981) 5 \textit{Marine Policy} 229, 239, n 24; Ulfstein, \textit{supra} n 244, 15; and Burke (\textit{supra} n 244, 81 and 83) who suggests that "[t]o interpret the Convention properly means that the coastal State may maintain a level of population abundance, short of endangering the resources, that meets its interests as it determines those interests". Similarly, Professor Thomas Clingan Jr ("An overview of Second Committee negotiations in the Law of the Sea Conference"(1984) 63 \textit{Oregon L R} 53, 56) writes that by using the term 'sovereign rights', "the negotiators strongly established as a basic underlying principle, the discretionary right of the coastal State to manage resources in the zone"(see n 82 and accompanying text \textit{supra}).}

unable or unwilling to give priority to conservation needs. Nevertheless, safeguards concerning MSR in the LOSC may increase the possibility that gradually the dearth of data will be overcome and proper measures taken in light thereof.248

Many of the same misgivings also apply with respect to the high seas fishery regime, the effectiveness of which is not only impaired by the weaknesses referred to above, but

1, 1975) 105; Clark, supra n 238, 236; and U Lie, "Marine ecosystems: research and management" in Managing the Oceans (1985; J Richardson, ed) 311.

248 Cf, eg, Balasubramanian (supra n 238, 317), who writes that it can be expected that coastal States would allow the conduct of MSR in their EEZs. While, he notes (ibid n 12), under the LOSC coastal States may at their discretion withhold their consent to research projects if they are of direct significance to the exploration and exploitation of living...resources...,[t]his would only mean in practice that the terms of such research by the developed state would be settled between the coastal developing state and the latter before the research programmes are started.

Writing in a similar vein, Tavares de Pinho (L'Ac­ees des étrangers à l'exploitation des ressources biologiques de la zone économique exclusive (thèse pour le Doctorat de 3e cycle, Université de Nice, décembre 1983) 20-21) points out that a number of fishing agreements between developing coastal States and fishing States expressly require the latter to supply detailed fishing data, thus indicating that even developing States do not take lightly the Convention obligations requiring them to take management decisions on the basis of the best scientific evidence available. At the same time, however, he acknowledges the difficulty of obtaining sound data and the at least occasional reluctance of fishing States to supply such information to the coastal State.

A much more pessimistic outlook in the above regard is expressed by Pardo (supra n 240, 498-499):

A fundamental deficiency in the [LOSC] is the unstated assumption that all coastal States are both willing and capable to effectively administer living marine resources within their jurisdiction, an assumption which patently does not correspond to reality. ...At the same time, despite the provisions of [the Convention]...,[MSR] related to natural resources in marine areas under coastal State jurisdiction is subjected to a discretionary consent regime, which in many cases is likely to prove burdensome. Thus the Convention cannot be said to encourage in practice either [MSR] or rational management of marine resources.
also by the complete failure of the LOSC to address the main deficiency of the 1958 Fisheries Convention: that is, the allocation of resources among competing users. Although the LOSC obliges all States to co-operate in conservation matters, its silence on the allocation issue may nullify the practical import of the obligation, for there would be no guarantee that a State imposing conservation measures on its own nationals would not see the stocks in question being harvested by others.249

Conservation problems are further complicated, of course, by the fact that many important fish stocks do not always remain entirely within the waters of a single State

249 See, eg, Balasubramanian, supra n 238, 32; S Oda, "Fisheries under the United Nations Convention on the Law of the Sea" (1983) 77 AJIL 739, 754, 755; R Wolfrum, "Die Fischerei auf hoher see" (1978) 38 ZaöRV 659, 708-709; and Copes (supra n 11, 222), who states that

The 200-mile limit has done little or nothing to improve the prospects of sound ecologically based management for stocks that spend much or most of their life in the remaining high seas. The...Convention's admonition that countries should cooperate in joint management endeavours, unaccompanied by any mandatory discipline, yields no substantial advance over the opportunities for such cooperation in the past.

Indeed, there are reasons to speculate that the advent of the 200-mile limit has worsened the prospects of conservation for stocks in the remaining areas of the high seas. For with distant-water fishing nations having been moved out of many of their accustomed grounds by the restrictive measures of coastal states, the stocks of the high seas that remain accessible to their underemployed fleets could well come under greater pressure.

De Klemm (supra n 240, 6) is much more optimistic, however, claiming that the provision obligating States to co-operate

is of very great importance from the conservation point of view since, for the first time, all states participating in the exploitation of the same resources will be bound to cooperate in the management of these resources, thus settling a problem which has been plaguing the international law of fisheries for a long time, the problem of the new entrants into a fishery, and allowing for real common management of common resources.

He appears to neglect similar, ineffective obligations contained in the 1958 Fisheries Convention as alluded to by Copes supra.
or in the high seas.\textsuperscript{250} Although early proposals were introduced for a regime to govern all coastal species throughout their migratory range,\textsuperscript{251} they were largely rejected by coastal States in favour of the EEZ approach to conservation and management. Late in the Conference, and by then more aware of the management problems associated with their own zones, those same EEZ advocates made concerted efforts to secure conservation authority over straddling stocks in adjacent high seas areas. They, in turn, ran into stiff resistance from major fishing nations and LLGDS. Having realized the extent of fishery authority already conceded the coastal State, they adamantly refused to make further concessions. Despite growing appreciation of the difficulties inherent in the conservation and management of shared stocks\textsuperscript{252} -- or, indeed, perhaps because of that appreciation -- Article 63 remained unaltered. Without giving guidance on how it should or must be achieved, all States concerned are simply obliged to seek to co-operate in the adoption and implementation of conservation measures for stocks occurring either in their adjacent EEZs or in high seas areas adjoining EEZs. While there may be no great difficulties in instances where only a few States are directly concerned, other cases may be very complicated indeed.\textsuperscript{253}

\textsuperscript{250} Carroz points out (\textit{supra} n 239, 196) that there are no known fish stocks which exist only in the high seas, \textit{ie}, beyond the 200-mile limit; while J Gulland (\textit{Some Problems in the Management of Shared Stocks} (FAO Fisheries Technical Paper No 206, 1980) 7) observes that "possibly even the majority of the stocks supporting large-scale industrial fisheries" are shared stocks.

\textsuperscript{251} See, \textit{eg}, Ch 10, n 59 and accompanying text \textit{supra}.

\textsuperscript{252} See generally, \textit{eg}, Gulland, \textit{supra} n 250.

\textsuperscript{253} Copes (\textit{supra} n 11, 220-221) observes that agreement on fishery management measures between two, even close, neighbours such as Canada and the US, is not always easy to reach. It is even more difficult in the case of fish found in an EEZ and an adjacent high seas area. Where one or more fishing States decide(s) to play a 'free rider' role in the latter area, conservation efforts can be greatly hindered (see, \textit{eg}, comment by
In sum, then, the conservation regime is characteristic of much of the LOSC in emphasizing the discretionary rights of the coastal State and the obligation placed on all States to co-operate on the basis of the Convention's framework and the fundamental principles enunciated in the text. Although the conservation objective set out in the Convention is probably useless at best, and perhaps even harmful, that

Copes, supra n 249), although in certain circumstances such States can be restrained by threats of not being allowed access for fishing purposes to the zone itself. If the 'free rider' problem is absent, notes Copes, "it is not impossible to achieve a workable multilateral fisheries management agreement" (supra n 11, 221).

More pessimistically, Pardo (supra n 240, 498) argues that even if all coastal State did have the capability to effectively administer fishery resources within their jurisdiction,

rational living resource management would be impossible in the small marine areas allocated to the majority of coastal States. Hence, most of the injunctions contained in article 61 of the Convention are likely to remain a dead letter in many parts of the world.

Whether such agreements would involve "proper conservation and management measures" (see Art 61(2) of the LOSC) is as yet uncertain, however. Holt (supra Ch 4, n 14, 80) and Balasubramanian (supra n 238, 39) point out that biological problems involved in shared stocks are complex, and in the latter's view, "are likely to impede progress towards the new regime" (ibid). See further in this regard, eg, Juda, supra n 240, 321-322; and Sae tersdal, supra n 245. For a detailed critique of Art 63's weaknesses and ambiguities see, eg, Burke, supra n 244, 104-106.

See nn 242-248 and accompanying text supra. Balasubramanian (supra n 238, 29) writes in this regard that the concepts MSY and OSY need to be replaced, but experts have not yet produced an alternative bio-economic management tool. The scientific basis for fixing legal criteria to determine the allowable catch is absent at present. The whole legal edifice built on a scientific basis not only appears to have little value, but may be positively harmful for the maintenance of the world's marine fisheries.

Cf P Adam, "Problèmes pratiques posés par l'élaboration d'une politique dans le domaine de la pêche" in Aspects économiques de la production de poisson: Colloque international sur l'économie de la pêche (Paris, 29 novembre - 3 décembre 1971) (Paris: OCDE, 1972) 39, 50; and Sae tersdal (supra n 245, 5), who opines that
realization came too late for negotiations to be reopened. Nevertheless, the very opacity of the text appears to provide the necessary flexibility for States to adjust their behaviour and adopt measures appropriate to modern conditions. By recognizing the pre-eminent position of the coastal State with respect to conservation of most living marine resources, the Convention has significantly enhanced the possibility of better conservation in the post-UNCLOS III world. Whether the LOSC's objective is realized in fact, however, will ultimately depend heavily on the seriousness with which coastal States accept their responsibilities and all States accept the basic obligation to co-operate for the common good. Both, in turn, will hinge to a greater or lesser extent on the effectiveness of the Convention's exploitation regime.

2. Exploitation

Given the direct economic importance of the issues involved, it is not surprising that much greater attention was focussed during UNCLOS III on the exploitation aspects of the fishery regime than on those concerning conservation. As witnessed, by 1976 it was generally recognized that the Convention's exploitation regime would centre upon coastal State rights within the EEZ rather than on either a combination of preferential rights and freedom of fishing beyond a

the 'state of the art' of our fishery sciences leaves much to be desired. The lack of clarity and the non-professional form of the relevant parts of the UNCLOS text is probably largely a reflection of the inadequacies of our science, or at least its application.

Cf comment by Satya Nandan in Consensus and Confrontation, supra n 11, 341.

255 Cf Oxman (comment in ibid 395), who observes that this was not a treaty to manage a particular stock of cod in a particular part of the ocean. It was a set of principles to govern all the world's oceans, and it therefore had to be general. Indeed, Article 61 had to be flexible enough to accommodate conflicting scientific and economic theories about the proper approach to conservation. It may be that it came out a bit too vague, but nevertheless...it is clear that the coastal state is not free simply to ignore conservation.
narrow territorial sea, or regional resource zones. Subsequent negotiations concentrated almost entirely on efforts by major fishing States and LLGDS to secure favourable access to resources within the zone.

To what extent does the LOSC's exploitation regime "promote...the equitable and efficient utilization" of living marine resources?\(^{236}\) Again, it is impossible to answer the question in a definitive fashion.

Commenting on the objective, for instance, Professor Parzival Copes observes that "[t]he concept of economic efficiency is not unambiguous", and can legitimately involve many so-called 'non'economic' considerations such as proper management of the environment.\(^{237}\) Two closely-related aspects of economic efficiency are of central importance, however, and may be briefly discussed at this point: namely, overcapitalization that results from the general character of open-access fisheries,\(^{238}\) and the 'wastage' of fishery resources.

The establishment of the EEZ has largely made it possible to overcome the problem of overcapitalization by restricting access to most of the world's fisheries.\(^{239}\) At

\(^{236}\) See text accompanying n 226 supra.

\(^{237}\) Copes, supra n 11, 222; cf, eg, D Bromley and R Bishop, "From economic theory to fisheries policy: conceptual problems and management prescription" in Economic Impacts, supra n 113, 281, 296. See further in this regard, eg, G Munro, "Extended fisheries jurisdiction in a regional setting: problems of conflicting goals and interests" in Regionalization of the Law of the Sea (1977; D Johnston, ed) 233.

\(^{238}\) See Ch 8, nn 10-17 and accompanying text supra.

\(^{239}\) Cf F Bell, "World-wide economic aspects of extended fishery jurisdiction management" in Economic Impacts, supra n 113, 3, 23. Copes (supra n 11, 222) points out that "[w]hile the 200-mile limit permits governments to regulate their fisheries efficiently, it does not compel them to do so". Coastal States, he explains, may prefer exploiting their zones in pursuit of other objectives than that of complete economic efficiency (eg, for welfare or employment goals). Cf Anderson, supra n 239, 670; and Gulland (supra n 238, 22), who observes
the same time, however, the problem has not been solved with respect to high seas fisheries because of the latter's continuing open-access character. It may indeed have been aggravated, at least in the short term, as fleets denied EEZ access may be forced to concentrate in particular high seas areas.  

Although the issue of 'wastage' of fishery resources was of great importance during UNCLOS III, as a result of scientific studies carried out in the 1970s, explains Sidney Holt, "the concept that a resource not 'fully utilized' is a resource wasted...can no longer be regarded as a biologically valid one". Furthermore, he suggests that the concept that "many of the most obvious examples of failures to manage fisheries or to manage them for the benefit of anyone except the fish come from fisheries carried out by a single country". For a discussion of the latter point see, eg, S Tanaka, "Management of fisheries resources in the exclusive economic zone" in Exclusive Economic Zone, supra n 245, 62, 63-64.

260 See, eg, comment by Copes, n 249 supra; and A Pardo, "The evolving law of the sea: a critique of the Informal Composite Negotiating Text (1977)". While the situation may be aggravated in the short term, there may be a fundamental change in the medium to long term. Bell, eg, suggests (supra n 259, 23) that given fees charged by all coastal States for entry by fishing vessels to the former's EEZs, we should gradually see a reduction in the degree of over-capitalization in world fisheries. This will lead to a reduction in fishing costs as redundant resources are used elsewhere in the various economies throughout the world.

Cf Copes, supra n 11, 226-227.

261 Holt, supra Ch 4, n 14, 81; cf, eg, Balasubramanian (supra n 238, 30), who explains that "[b]iologically speaking, there is no waste in allowing fish to die of old age, as the nutrients are recycled in what amounts to a closed system; there is no loss of sea food"; and the US House of Representatives Report on the Marine Fisheries Conservation Act of 1975 (cited in Bromley and Bishop, supra n 257, 297), which acknowledged that while biologists in the past have tended to regard any unused surplus of a fishery as waste, the resource manager may well determine that a surplus harvest below MSY will ultimately enhance not only the specific stock under management, but also the entire biomass....
of 'full utilization' serves the special interests of the major fishing nations, whose fleets require access to large stocks under favourable conditions in order to remain profitable. This, in turn, Holt argues, has a negative impact on the overall efficient utilization of resources since it is wasteful to expend fuel oil, and other natural resources in limited supply, by striving for catches at MSY level when one can often secure, say, 80 percent of that level with half the fishing effort, and hence with considerably greater total net profits.  

But does rejecting the bio-economic validity of the 'full utilization' concept mean that the provisions have a negative influence on the achievement of the Convention's objective to promote efficient utilization of living marine resources? Not necessarily, it seems, owing to wide discretionary powers granted coastal State in three main respects: the determination of 'optimum utilization' of EEZ fishery resources; the setting of the TAC; and the calculation

For a criticism of the concept of surplus see J. Gulland, "Conditions of access to fisheries: some resource considerations" in FAO Expert Consultation on Conditions of Access to the Fish Resources of the Exclusive Economic Zone (Rome, 11-15 April 1983) 81-83. Writing in 1978, Holt explained that after several years of relative stagnation, a beginning had recently been made in elaborating a useful economic theory for the management of marine fisheries. That stagnation, he continued (supra n Ch 4, n 14, 80-81), can be attributed in part to the fact that open and serious economic discussion has been effectively banned from [IFOs]. There attention has been directed to regulating output while ignoring input and avoiding questions of economic efficiency. Recently, the implications of taking account of the rate at which future values are discounted in cost-benefit analysis, as it might be applied to renewable resources, have been analyzed and suggestions made, on the basis of new theory, as to how yield allocations in biologically and technologically interdependent fisheries might be made rationally.

262 Holt, supra Ch 4, n 14, 82; cf. Adam, supra n 254, 44-45; Balasubramanian, supra n 238, 30; Clark, supra n 243, 2, 5; and Gulland, supra n 261, 82

263 Burke observes (supra n 244, 88), eg, that Article 62 (1) "leaves no doubt that the Convention does not impose any obligation on the coastal State to provide for
'full' or 'maximum' utilization of fisheries in the EEZ". Under the LOSC, he explains, "the specific meaning of optimum utilization in any specific context is a matter exclusively for coastal State decision" (ibid 89), citing (ibid 88-89) the following reasons for his conclusion:

(a) "the term...'optimum utilization'...emphasizes that the objective management need not be classified or measured only in terms of the largest possible catch of fish. 'Optimum' permits consideration of a variety of objectives in management. . . .";

(b) Art 62 requires the coastal State to "promote optimum utilization, which assumes that is the coastal State which has the decision-making authority. . . .[T]he injunction to 'promote' a particular objective seems neither onerous nor especially demanding, other than possibly forbidding extreme options such as prohibiting, without reason, any use of commonly exploited species";

(c) the coastal State's authority under Art 61 is not affected by any obligation regarding 'optimum utilization'; and

(d) Art 62(1) is excepted from the Convention's compulsory dispute settlement provisions, thus reinforcing the conclusion that "the specific meaning of optimum utilization in any specific context is a matter exclusively for coastal State decision".

Cf, Balasubramanian, supra n 238, 316; and Clingan (supra n 246, 57), who, observes that "by the deliberate use of the word 'optimum,' the Committee [II] negotiators rejected the notion of full utilization in favor of a more flexible management device".

Burke reasons (supra n 244, 80) that, given that the coastal State is not required to maintain fish stocks at levels than can produce MSY, "it is also not obligated to establish an allowable catch at any MSY level" (see n 263 and accompanying text supra). He suggests that the final specification of any 'allowable catch' as a quantity of fish may be a reflection of a range of factors that the coastal State judges important to its own interests. Cf Clingan (supra n 246, 57, 58), who adds that

Throughout the negotiations, distant-water fishing States tried to get the phrase 'national interests' removed from the text because they knew it would permit the coastal State to consider factors other than the biological yield when setting allocations. Those efforts were strongly resisted by coastal States, however, and failed.

Gulland (supra n 261, 82-83) explains that
of its own harvesting capacity and, hence, whether there is a surplus for foreign allocation. The combined effect of

The most serious difficulty in the simple argument to establish a 'surplus' is the implication...that if the catch that would be taken by the coastal State, with its existing capacity is less than the target allowable catch, then the difference --'surplus' -- can be taken without affecting the existing coastal state fishery. This is seldom the case. Any fishing by foreign vessels, carried out in addition to fishing on the same stock by the coastal state, will reduce the abundance of the stock. This reduction will tend to reduce the catches by the coastal state, or require it to increase the amount of fishing (and hence costs) if it is to maintain its catch. In either case the benefits to the coastal state from the resources off its coasts will be reduced. The pattern of fishing is therefore...sub-optimal, at least to the coastal state. A surplus therefore does not exist.

This argument ignores the possible benefits that the coastal state might get from the foreign fishery. It is now usually the practice for the coastal state to extract benefits of one kind or another from foreign fishing fleets off its coasts...If these direct benefits exceed the costs and reduced benefits to the local fishermen, the overall benefit to the coastal state from the resource will be increased. In that case the 'surplus' might be defined as the amount taken by the foreign vessels when the total benefits to the coastal state (however this is measured) are greatest.

Cf Garcia et al, supra n 243, 193-195.

Carroz (supra n 84, 856) points out that determination of the TAC is further complicated by the fact that the coastal State is not always able to act in isolation, fish very often not being confined to its own zone.

Since this determination under LOSC Art 297 is entirely discretionary and not subject to binding and compulsory dispute settlement procedures, concludes Burke, "the coastal State cannot be compelled to allow foreign access" to the EEZ's resources and that "giving access is not a meaningful obligation on the part of the coastal State"(supra n 244, 90). Cf T Treves, "La Communauté européenne et la zone économique exclusive"(1976) 22 AFDI 653, 670; and Clingan (supra n 246, 57), who explains that

On its face [Article 62(2)] appears to mandate access for foreign fleets. But such a rigid interpretation is incorrect, for that would mean the coastal State could neither set aside reserves for itself, nor decide whether to admit foreign fishing on any other than purely biological computations. The Committee negotiators never intended such a result. Indeed, the establishment of a domestic fishing reserve is a concept totally in keeping with the Convention.

In the view of Copes (supra n 11, 218),

Cf
Essentially, the rules constitute a commandment that 'thou shalt not waste fish,' imposing a moral obligation on the coastal state to be reasonable in sharing resources in excess of its own capacity to utilize them.

Satya Nandan ("Implementing the fisheries provisions of the Convention" in Consensus and Confrontation, supra n 11, 383, 387-388) claims that this, in fact, is what is likely to occur:

One could read [Arts 62 and 63] and conclude that the coastal state might deny absolutely any participation in the fishing of resources within the exclusive economic zone. Nonetheless, in practice, those who have resources will want to benefit from them. If they cannot themselves utilize the resources, they will make them available to those who are prepared to pay for them and benefit in that way.

In the above regard, Burke(supra n 244, 91) writes that Art 300 of the LOSC concerning the exercise of rights, jurisdictions and freedoms recognized under the Convention so as not to constitute an abuse of rights might appear to limit coastal State choice. Such an argument might prevail if there were a way to present it before an impartial tribunal. But Article 297 appears largely to preclude this possibility, and perhaps also establishes that a coastal State's refusal even to set an allowable catch is not an 'abuse of right' under the Convention. By excepting such non-action from binding dispute settlement, the Convention appears to imply that such a failure to act is not necessarily an abuse of discretion. If that is the case, it would seem difficult to contend that such a failure to act is necessarily an 'abuse of right'.

On the other hand, if a fishing State has the influence to secure outside review by agreement or otherwise, independent of the LOS Convention, then article 300 might provide a legal basis for attacking arbitrary actions by a coastal State.

In short, [the LOSC] contains virtually no restriction on coastal State authority to forbid access to foreign fishing. For practical legal purposes, the Convention provides no effective remedy even for arbitrary denials of foreign access.


Elsewhere (supra n 11, 321), Burke appears to suggest that the situation is somewhat different once a surplus has been declared and (an)other State(s) allowed to harvest (part of) the surplus:

Although the coastal state's decision on the terms and conditions of access is discretionary, the choice must be consistent with the treaty. Article 300 requires states parties to fulfill their treaty obligations in good faith and exercise their rights 'in a manner which would not constitute an abuse of right.' Accordingly a coastal state cannot simply promulgate regulations for foreign fishing that are arbitrary and capri-
the provisions is to free the coastal State to exploit the living marine resources within its EEZ largely as it sees fit. Whether, in reality, it does so efficiently, and so promote the Convention's objective in that respect, is a matter to be determined from case to case.

But given the above discretionary powers and the coastal State's right effectively to control access to EEZ fisheries, how might the Convention then be said to "promote...the equitable...utilization" of such resources? Yet again, no definitive response can be made. First, the LOSC is essentially a compromise negotiated through the modus operandi of the 'package deal' in which potential rights were surrendered by certain States in exchange for fishery rights. Secondly, the objective of the LOSC is to promote the equitable utilization of all marine resources, both living and non-living. Given the nature of the negotiations and the Convention, therefore, the issue of equitable utilization of

Kunio Yonezawa ("Some problems relating to the exercise of coastal State jurisdiction with respect to fisheries" in Exclusive Economic Zone, supra n 245, 55, 56) would include in such arbitrary measures the imposition of prohibitively high fishing fees. Burke (supra n 11, 321-322) asserts that a fee level must be reasonable, and might reflect the actual value to the foreign nation involved of the right to fish in the EEZ.

Kawakami (supra n 245, 36) observes in this regard, eg, that

The strengthening of the rights of the coastal State regarding fishing pleases developing nations in general, and, for developed nations whose fishing industries are not well developed, the broad guarantees of the freedom of navigation, overflight, telecommunication and so on are more important than rights concerning the harvesting of living resources. Because of these reasons...it was possible to obtain consensus on a summary of the EEZ relatively quickly.

See also n 274 infra.
living resources must comprehend both of the above factors, a subject beyond the scope of the present work.

Furthermore, what is 'equitable' in regard to the utilization of living marine resources is essentially a matter of subjective judgment. Nevertheless, it is generally considered in very broad terms to involve at least some redistribution of resources to those States which had not previously benefited substantially from their possession or use, and some observations may be made in that respect.

Professor Krateros Ioannou ("Some preliminary remarks on equity in the 1982 Convention on the Law of the Sea" in, New LOS, supra n 265, 97, 101) points out that

the new preambular references to equitable situations have nothing to do with classical equity. On the contrary, they are related to the equity invoked by the developing countries, which equity...constitutes a different concept. ...We must keep in mind that neither the third world claim of equity nor any other equity means equality. It is a means of achieving a balance between unequal facts and elements.

The new concept of equity, he explains (ibid 99, 101),

means partiality [sic] to correct inequalities...It is viewed as one of the legal tools for the restructuring of international relations and the readjustment of the administration of justice to the necessities of the modern world.

This is clearly reflected in the following comments by Jorge Castañeda (supra n 11, 41):

The equitably shared use of the oceans and their resources is one of the subjects that, by its very nature, lends itself to the realization of the New International Economic Order [NIEO] in substantive form and makes it operative. ....

[N]owadays the international community finds itself obliged to establish and implement a series of norms that establish economic duties and obligations of the most powerful and affluent countries in order to provide protection and assistance to those that are not only the poorest but also the least able to negotiate and defend themselves in international economic relations. ....

In postulating a [NIEO], the intent is to put an end to the traditional, inequitable dealings based on imbalanced power relationships.

In short, the aim is to consecrate as a juridical principle the obligation of international cooperation in favour of the developing countries.

It is clear from the history of the Conference that the majority of the participating States saw the EEZ as the prime mechanism for achieving a more equitable distribution of fishery resources throughout the international community. This was particularly the approach of most Third World States, which viewed the LOSC as a whole making a significant contribution to the establishment of a New International Economic Order.268

To what extent has that redistribution taken place? There is no doubt that from the legal perspective the main beneficiaries of the new fishery regime are the coastal States and that, as Arvid Pardo observes, the LOSC reflects primarily the highly acquisitive aspirations of many coastal States, particularly of those developed and developing States with long coastlines fronting on the open ocean and of mid-ocean archipelagic States.269

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268 See, eg, n 107 and accompanying text supra.

269 Pardo, supra n 240, 496; cf, comment by Ambassador Tommy Koh in (1983) 46 LCP 25-26. Calculations of national EEZs differ considerably. According to Dr Robert Smith, Head of the US Office of the Geographer in the State Department (Exclusive Economic Zone Claims: An Analysis and Primary Documents (1986) 13-16), the fifteen largest EEZs are as follows:

<table>
<thead>
<tr>
<th>Country</th>
<th>Area (sq.n. miles - '000s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. United States</td>
<td>3,107.0*</td>
</tr>
<tr>
<td>2. France</td>
<td>2,100.0*</td>
</tr>
<tr>
<td>3. Australia</td>
<td>1,854.0*</td>
</tr>
<tr>
<td>4. New Zealand</td>
<td>1,792.8*</td>
</tr>
<tr>
<td>5. Indonesia</td>
<td>1,577.3</td>
</tr>
<tr>
<td>6. USSR</td>
<td>1,309.5</td>
</tr>
<tr>
<td>7. Japan</td>
<td>1,126.0</td>
</tr>
<tr>
<td>8. Brazil</td>
<td>924.0</td>
</tr>
<tr>
<td>9. Canada</td>
<td>857.0</td>
</tr>
<tr>
<td>10. Mexico</td>
<td>831.5</td>
</tr>
<tr>
<td>11. Kiribati</td>
<td>770.0</td>
</tr>
<tr>
<td>12. Chile</td>
<td>667.3</td>
</tr>
<tr>
<td>13. Norway</td>
<td>590.5</td>
</tr>
<tr>
<td>14. India</td>
<td>587.6</td>
</tr>
<tr>
<td>15. Philippines</td>
<td>551.4</td>
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</tbody>
</table>

(* includes overseas territories and possessions)
While there are virtually no restrictions on coastal State authority to prohibit foreign fishing in the EEZ, once a surplus is declared, the coastal State must allow other States access to the resources. In considering the equitable utilization of resources, therefore, it is necessary to look briefly at the allocation of access among non-coastal States. Besides its own interests, the Convention requires the coastal State in allocating access to "take into account" the interests of certain other States (Article 62(3)). It is almost universally agreed that the order stated in the LOSC does not establish a priority ranking.270

At the same time, however, it will be recalled that long and difficult negotiations took place during the Conference concerning possible preferential access to the EEZ by LLGDS. Although coastal States did recognize the special situation of LLGDS,271 and agreement was reached on specific provisions, it is difficult to assess the likely practical implications of the obligation of coastal States to have "particular regard" to LLGDS. While some writers suggest that LLGDS have at least some degree of preference in the

270 See, eg, Carroz, supra n 238, 189; M Dahmani, supra Introduction, n 17, 265; de Pinho, supra n 248, 141; R Puri, "Legal regime of marine fisheries" (1982) 22 IJIL 240, 245; and Burke (supra n 244, 102), who states that "[i]f any order of priority is suggested by the order in the listing in article 62, it appears vitiated by the discretionary authority given the coastal State to set the terms and conditions of access". For a contrary view see, however, n 84 supra.

271 See, eg, n 34 and accompanying text supra. Speaking in 1977, Castañeda (supra n 11, 47) observed that although the scope of LLGDS rights to EEZ living resources was a pending matter before the Conference, "there is concurrence as to the need to recognize such rights in an equitable manner".

allocation of access,\textsuperscript{272} others emphasize coastal State discretion in the matter.\textsuperscript{273}

\textsuperscript{272} Pointing out that ambiguous terms such as 'geographically disadvantaged States' and 'region or subregion' pose potentially thorny operational problems, Dahmani, for example, nevertheless concludes that LLGDS "seem to have a priority or preference over third states with respect to access" (\textit{supra} Introduction, n 17, 268, 265, 270; cf, L Caflisch, "The fishing rights of land-locked and geographically disadvantaged States in the exclusive economic zone" in \textit{La Zona Economica Esclusiva} (1983; B Conforti, ed) 38). What degree of preferential treatment would be accorded LLGDS is not clearly defined by the Convention, concedes Dahmani (\textit{supra} Introduction, n 17, 268), "but [it] will probably be determined by reference to the factors listed in paragraphs 2 and 3 of articles 69 and 70 respectively". He bases his interpretation on a number of Convention provisions, which may be summarized as follows. First, the coastal State is obliged to pay "particular regard" to LLGDS when allocating access (Art 62(2); see also in this regard n 170 and accompanying text \textit{supra}). Secondly, "where the coastal State has declared that a surplus of the allowable catch exists, 'an appropriate' part of it \textit{must be made available}" to LLGDS (Dahmani, \textit{supra} Introduction, n 17, 268; emphasis added). Thirdly (\textit{ibid} 269), retention of the word 'right' in relation to access by LLGDS to EEZ resources (Arts 69(1) and 70(1)) would... seem to suggest that although access is through agreements (bilateral, subregional or regional) between the coastal state and land-locked or geographically-disadvantaged states, such agreements cannot be a prerequisite for access, but may only regulate the form of enjoyment of the right to participate in the exploitation of an appropriate part of the surplus of the allowable catch.

Furthermore, he suggests, the reference to participation by LLGDS "on an equitable basis" in the exploitation of EEZ resources limits the discretion of coastal States in the allocation of access rights. And finally, special consideration is given LLGDS in situations where coastal States are approaching a stage in which they would be able to harvest the entire TAC (Arts 69(3) and 70(4)).

\textsuperscript{273} Burke (\textit{supra} n 244, 101), \textit{eg}, while conceding that LLGDS may have a greater legal claim to access to an adjoining State's EEZ fishery, concludes that

\textit{Where States contending for participation in EEZ fishing are subject to identical terms and conditions, there is a basis for arguing the superior claim of the LLGDS. Where the coastal State can make better arrangements for a non-LLGDS, the Convention leaves this choice to the coastal State.}
Many LLGDS may find themselves not only without any sort of preferential access to EEZ fishery resources but, in fact, at a considerable disadvantage in competing with richer and more powerful fishing nations in the 'auction' of access licenses held by the coastal State. To that extent, then, LLGDS will have gained little or nothing -- or even lost -- from the redistribution of benefits under the new fishery regime.\footnote{See generally, eg, L Alexander, "The 'disadvantaged' states and the law of the sea" (1981) 5 Marine Policy 185; Balasubramanian, supra n 238, 40; Burke, supra n 244, 99; G Hafner, "Die Gruppe der Binnen-und geographisch benachteiligten Staaten auf der Dritten See-rechtskonferenz der Vereinten Nationen" (1978) 38 ZaöRV 568; and Dahmani (supra Introduction, n 17, 269), who argues that in reality the requirement that [LLGDS] should be given priority in access to the surplus resources of the EEZ under equitable terms and conditions is all the more necessary because if they were left to compete with other states for this surplus they would have little or nothing to offer to coastal states in exchange for access to such surplus, considering that most of them are developing and therefore are not as yet able to make attractive offers of adequate compensation in the field of financ-}

This seems to be the message of article 62, article 69, paragraph 3, and article 70, paragraph 4.

\textbf{Cf} B Oxman, "An analysis of the exclusive economic zone zone as formulated in the Informal Composite Negotiating Text" in Law of the Sea: State Practice in Zones of Special Jurisdiction (1982; T Clingan Jr ed)[volume thereafter cited 'State Practice'] 57, 72-73; Puri, supra n 270, 244; T Koh, comment in Consensus and Confrontation, supra n 11, 391; and Ulfstein (supra n 244, 20), who argues that Article 62(2) does not give any priority to the LL/GDS, but it puts these States in a special position because they shall have special considerations. What this means may be open to some doubt, but it probably implies that the coastal State must have some special reasons if it wants to exclude the LL/GDS from its EEZ.

Burke suggests (comment in Consensus and Confrontation, supra n 11, 340) that no precise definition of such terms as 'region or subregion' is explained largely by the wish of coastal States to protect their discretionary powers regarding access to their EEZs. Tavares de Pinho (supra n 248, 167, n 5), however, observes that from the perspective of future access negotiations, LLGDS also stood to gain from there being no precise definition of the terms.

\footnote{See generally, eg, L Alexander, "The 'disadvantaged' states and the law of the sea" (1981) 5 Marine Policy 185; Balasubramanian, supra n 238, 40; Burke, supra n 244, 99; G Hafner, "Die Gruppe der Binnen-und geographisch benachteiligten Staaten auf der Dritten See-rechtskonferenz der Vereinten Nationen" (1978) 38 ZaöRV 568; and Dahmani (supra Introduction, n 17, 269), who argues that in reality the requirement that [LLGDS] should be given priority in access to the surplus resources of the EEZ under equitable terms and conditions is all the more necessary because if they were left to compete with other states for this surplus they would have little or nothing to offer to coastal states in exchange for access to such surplus, considering that most of them are developing and therefore are not as yet able to make attractive offers of adequate compensation in the field of financ-}
If, in general terms, the coastal State's discretionary right to allocate access is unchallengeable, the obligation to "take into account" the interests of developing and other States specifically mentioned in Article 62(3) similarly would not appear to confer on those States any substantive advantage in terms of an equitable utilization of the resources.\textsuperscript{278}

...ing, equipment, fishing technology and training of personnel which developing coastal States might require in exchange for access.

It must also be recalled at the same time, however, that no LLS had developed a large marine fishing industry and were unlikely to do so in the future (see, eg, Balasubramanian, supra n 238, 40; F Christy, "Transitions in the management and distribution of international fisheries" (1977) 31 International Organization 235, 247; Dahmani, supra Introduction, n 17, 271, 273; Shyam, supra n 20, 60; and n 35 supra). What they had in effect lost was a theoretical right under the freedom of fishing principle to exploit living marine resources. What they gain under the LOSC was a right which in practice may remain just as unexercised. Nandan (supra n 265, 386-387) explains that as part of the 'package deal' approach to negotiations, C.II (of which he was rapporteur) identified all the interest groups and their major interests and then attempted to create a balanced negotiating text. The most important interest of the LLS was identified as being their access rights to and from the sea, and "[i]t is here they got their satisfaction, a very strong access right which was much stronger than in previous conventions in which access rights were prescribed". What they lost on, relatively speaking, were strong access rights to EEZs for fishery-related purposes.

\textsuperscript{278} Clingan (supra n 246, 58-59) explains, eg, that the 'accounting' required of the coastal State under Art 62(3) falls clearly within coastal State discretion. The Convention does not require, nor did the negotiators ever intend it to require, that such a consideration could override the coastal State's own national interests. Indeed, the negotiating history supports this conclusion. At the outset, distant-water fishing States, particularly Japan and the Soviet Union (with United States support), wanted to give priority to States traditionally fishing in an area when allocating a surplus [see n 23 and accompanying text supra]. But these mandatory priorities were forcefully rejected by the coastal States, which did not want to subordinate their rights to those of foreign fleets. In the end, the discretion of the coastal State in deciding access questions was preserved.
The enhanced position of the coastal State has even overflowed the EEZ to further restrict the high seas freedom of fishing principle as enshrined in the 1958 Fisheries Convention. New provisions, for example, significantly limit beyond the EEZ the freedom of States to fish for anadromous species (Article 66(2)); completely prohibit the exploitation of catadromous species (Article 67(2); and appear to restrict the freedom to fish for stocks straddling the high seas and adjacent EEZs (Articles 63(2) and 116).

As well, Article 64, in spite of its varying interpretations noted below, is accepted as obliging all States concerned to co-operate with a view not only to "ensuring conservation" (arguably, at least, a general obligation under the 1958 Fisheries Convention) but also to "promoting the objective of optimum utilization" of such species beyond the

Cf Tavares de Pinho, supra n 248, 143ff.

See Art 1 of the 1958 Fisheries Convention (559 UNTS 285).

Art 116 makes the freedom of States to fish in the high seas subject to coastal State rights, duties and interests as contained in, inter alia, Art 63(2) concerning stocks found in both EEZs and adjacent high seas areas. While acknowledging that the Convention fails to clarify or elaborate on the relationship between the two articles, Burke suggests (supra n 244, 112, 113) that where the coastal and fishing States fail to agree on conservation measures for straddling stocks in high seas areas adjacent to the former State's EEZ, the LOSC seems to place the coastal State in the superior position as it has extensive rights over the EEZ portion of the stock and is legally competent to decide both upon any necessary conservation measures and upon the extent and conditions of foreign access to the stock in the zone. If the adjacent high seas fishing is subject to the coastal State's right to establish conservation zones in the EEZ, this would appear to mean that others must recognize these measures as applicable wherever the stock in question is found on the high seas. If the fishing State is not thus obligated to recognize and observe coastal State measures, the measures would likely be made ineffective for the stock as a whole. Whether failure to observe the measures on the high seas would have such an effect would depend on the extent, timing, and methods of such fishing. If significant high seas harvesting occurs, it is probable that coastal measures would fail. Such an outcome seems inconsistent with articles 116 and 63, paragraph 2, and other EEZ fisheries provisions.
EEZ. The latter, the present writer would suggest, for the first time accords some rights specifically to coastal States regarding the utilization of HMS resources beyond their own EEZs.

Given that the LOSC provides a mechanism for the distribution of the primary resource benefits of marine fisheries among a large number of coastal States, it must also be recognized that the legal regime of the EEZ does not ipso facto produce an even distribution. Because of geographical factors and the abundance of fish in their waters, some coastal States will benefit more from the EEZ fishery regime than others. Nevertheless, most coastal States in other areas will also benefit in being able to exercise sovereign rights over living marine resources which prior to the advent of the EEZ were res nullius and thus only for the benefit of the major fishing nations capable of harvesting them.

In sum, the LOSC may generally be said to promote the more efficient and equitable utilization of living marine resources. In particular, the EEZ regime offers a mechanism for overcoming the fundamental problems of resource exploitation, while distributing fishery benefits more widely than ever before. At the same time, however, the degree to which non-coastal States, particularly LLGDS, will benefit is more problematic. The realization of the Convention's goal will depend largely on the manner in which the coastal State exercises its broad discretionary powers and all States cooperate for the common good.

276 Generally speaking, living marine resources are more abundant over broad continental shelves (eg, the Grand Banks of Newfoundland); in the upwelling currents of waters off the subtropical western coasts of the major continents (eg, coastal zones of western South America); and in the temperate and sub-arctic waters of the Southern Ocean, the North Pacific and the North Atlantic (Carroz, supra n 239, 199; cf, Gulland, supra n 238, 20).
3. The Peaceful Use of Marine Fisheries

The ability of the Convention to "promote the peaceful use of the sea and oceans" with respect to fisheries, depends on a number of closely-related factors, including the degree to which it provides for an equitable distribution of rights and obligations among States; the willingness of all States concerned to co-operate without a supranational authority to ensure compliance; and whether, in fact, the LOSC offers clear and accepted solutions to key fishery problems.

Little need be said of the first factor. The final fishery regime was accepted in the overall LOSC context as constituting an equitable distribution of rights and duties among States. Whether it ensures the long-term peaceful use of marine fisheries will depend in large part on the extent to which fishing nations assess as reasonable coastal State discretionary interpretations of such general terms as 'optimal utilization', and the latter States' conditions of access to the fishery resources of their zones. This is particularly important given the limited role of the Convention's dispute settlement provisions in regard to such matters.

As indicated earlier, to be efficacious, the fishery regime requires co-operation by all States concerned. Pinto suggests that where States perceive reciprocal advantages and are both able and willing to accept them, a viable co-operative milieu can be developed. In the global context of UNCLOS III negotiations, however, it was impossible to generate a strong, common or complementary perception of interdependence. Thus, "[t]he co-operative milieu, if it existed at all, was merely notional". For that reason, he explains, States at the Conference appear to have attempted
to substitute treaty obligations for a central authority, and to rely entirely on the force of promises contained in the Convention for the establishment of co-operative

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279 See text accompanying n 226 supra.

280 Pinto, supra n 233, 136
activity. Thus, the co-operative relationship is, in a manner of speaking, artificially created.\footnote{Ibid 137. He observes (ibid 137-138) that this artificial co-operative relationship is further weakened by two other features of the Convention: first, the provisions on co-operative conduct are not manifestly or demonstratably based on reciprocity or mutuality of benefit; and second, although promises of co-operation in the Convention appear to contemplate positive initiated action on the part of the promisor, the wording more often than not, leaves it unclear as to the specific conduct required in fulfillment of that legal obligation. Correspondingly, proof of breach of such a provision, i.e., conduct falling short of a minimum which could be considered co-operation, would be difficult. Should the burden of proof lie with the party alleging non-co-operation, the lack of specificity as to the action required could make proof of default, or conduct not in conformity with the obligation difficult to demonstrate, except possibly where co-operation was actively obstructed or the respondent has actually taken no action at all.}

As indicated by Pinto, the duty to co-operate in the LOSC is meant to be translated into detailed provisions of more limited agreements governing specific situations.\footnote{See n 234 and accompanying text supra.} Setting out the rights and obligations of all States concerned, it is hoped that these agreements will themselves generate the milieu in which a real rather than artificial co-operative relationship develops.\footnote{Pinto (supra n 233, 135-136) observes that In practice, co-operative action is most efficient when undertaken and regulated in accordance with an agreement which sets out the details of the rights and obligations of the parties. From the co-operative milieu}
unlike the 1958 Fisheries Convention), great stress is placed on the role of IFOs in facilitating such co-operation.

It is clear from the above that the actions taken by coastal States in the exercise of their discretionary powers are directly related to the potential for developing co-operative relationships among both coastal and fishing States. To the extent that benefits from exploitation of fishery resources are seen by all as being equitably shared, the potential for co-operation among States will increase.

Given the failure of the Convention to address the issue of allocating resources beyond the EEZ, however, the likelihood of totally eliminating the 'free-rider' problem is slight. It may nevertheless be possible to reduce its occurrence and impact, however, through the effective operation of the LOSC's dispute settlement regime as well as recourse to the traditional methods for enforcing international law, including denying errant States access to the often richer waters within the 200-mile zone.

To the extent that a treaty resorts to vague or ambiguous formulations to paper over disagreements among negotiators, or even ignores important issues likely to pose future problems, its value as an instrument for the regulation of international conduct is lessened. Reference has already been made to such deficiencies in the LOSC. Perhaps the most important matter on which significant differences of views remained officially unresolved at the Conference's conclusion, however, was that of the HMS.

Detailed and lengthy negotiations took place over many sessions between the United States, on the one hand, and concerned coastal States, on the other, in an ultimately un-

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and deriving force and validity from it would emerge quite naturally a treaty reflecting the co-operative relationship.

In the case of the LOSC, however, the process may be seen as reversed. From specific treaties will (hopefully!) emerge a truly co-operative relationship.

See, eg, comment by the Argentinian representative at UNCLOS III (supra text accompanying n 198).

See text accompanying n 8, Annex IV infra.
successful attempt to reach an agreement. The United States consistently maintained that, because of their migratory nature, tuna must not be subject to the sovereign rights of the coastal State, and that what finally appears as Article 64 of the Convention precludes States from asserting such rights.\textsuperscript{286}

\textsuperscript{286} See, eg, n 224 and accompanying text supra. According to an American spokesman (cited in Burke, supra n 234, 304):

For over thirty years, since the first extended jurisdictional claims were made by states neighbouring tuna resources, the U.S. has rejected the notion that a coastal state may establish sovereign rights over tuna beyond 12 nautical miles off the coast. U.S. law, policy, and practice have been consistent on tuna.

The rationale behind the U.S. approach is straightforward. Tuna are not a resident resource of the EE2. They are only found within any EEZ temporarily and may migrate far out into the ocean waters beyond. Therefore, the coastal state does not have the ability to manage and conserve tuna, nor does it have a paramount interest in their development. Although many coastal states claim jurisdiction over tuna within 200 nautical miles, none exercise conservation and management authority through purely domestic measures. Only through international agreements have states actually managed effectively the highly migratory tuna species. In fact, the U.S. has led other nations in developing a regime of tuna management through international agreement [sic] such as the recent Eastern Pacific Ocean Tuna Fishing Agreement....Accordingly, customary international law precludes the coastal state from establishing sovereign rights over tuna. In the U.S. view this is evidenced by Article 64 of the Law of the Sea Convention, which requires co-operation between coastal states and distant water fishing nations to manage tuna, both within and outside the EEZ, on a regional basis, through an international organization. It is the view of the U.S. that Article 64 precludes the coastal state from establishing sovereign rights over tuna.

According to a 1979 report from the US Department of Commerce (Fisheries of the United States 1979 (1980) 91) the tuna catch by American vessels outside the US EEZ was 15 times greater than that taken within the zone. It may also be noted that under the US Fishery Conservation and Management Act (see Ch 12, n 24 and accompanying text infra) other HMS are subject to American jurisdiction in the US EEZ.

The present writer has been unable to locate any detailed analysis of the Convention supporting the United States position. Clingan (supra n 246, 62), in a brief reference to the subject, argues that the Art 64(2) provision stating that Art 64 applies "in addition to other provisions" relating to the EEZ presumably is a reference to Arts 61 and 62, under which the coastal State manages other fish. But, he continues,
While recognizing the need for international co-operation in the management of HMS, coastal States, for their part, just as consistently maintained that within the EEZ, HMS were subject to their sovereign rights. Article 64, in their view, must be read subject to Article 56 granting sovereign rights to the coastal State over all EEZ living resources without exception.\(^{287}\)

the existence of article 64 itself undercuts that position. Article 61 already contains references to the desirability of regional and sub-regional arrangements. Thus, if all that article 64 offers is an enticement to such arrangements, it would not have been needed. Furthermore, a workable tuna regime requires a uniform set of rules that would apply to fishing inside, as well as outside, the zone. This need for uniformity is the base upon which article 64 rests. Thus, the second paragraph, no matter what its interpretation, cannot be applied in a way that defeats the fundamental objective of uniform management.

At the same time, however, Clingan does acknowledge (ibid) that the matter of coastal State jurisdiction over tuna in the EEZ "is a source of major disagreement" and refers briefly to the (then) unpublished views of Burke (see n 287 infra) and others holding the opposite view.

\(^{287}\) Probably the most detailed legal analysis of the Convention regime governing HMS is that of Burke, supra n 234. He voices the view of most in arguing (ibid 309) that Article 64 is not the basic article on tuna in the LOS Convention. Indeed, tuna is not the sole object of any article in the LOS Convention. The basic article is Article 56 which deals with the general scope of coastal state authority in the EEZ, including the scope of coastal authority over living resources in the EEZ. ... Nothing in later provisions [ie, after Article 56] fundamentally alters this delegation of authority to the coastal state; Article 64 specifically declares that it is in addition to the other provisions of Part V on the Exclusive Economic Zone. Article 64 addresses what the coastal state with sovereign rights and other states with certain other rights are required to do with respect to conservation and management of certain species listed in the Annex including a number of different tuna species....

These observations make it evident that Article 64 does not preclude the coastal state from establishing sovereign rights -- it simply has nothing to do with this other than explicitly recognizing that the article which does establish such rights also applies to [HMS] as listed in Annex I.

\[\text{Cf Caminos, supra n 267, 149; C Narokobi, "The tuna issue, the South Pacific and the United States" in Consensus and Confrontation, supra n 11, 370, 371; and Wolfrum, supra n 249, 709.}\]
Although there is almost universal acceptance among legal scholars and others attending the Conference that the latter interpretation is more accurate, the fact that the United States does not agree means, as Clingan observes, that "[a]s a practical matter...the underlying tuna problem has not been effectively resolved by the Convention".

The significance of Art 64, explains Burke (supra n 234, 281, 282) is that it requires coastal and fishing states to cooperate regarding 'conservation' and 'optimum utilization' of the specified HMS both within the EEZ and in the region beyond. These two terms appear to embrace all the substantive choices coastal states are authorized to make in the exercise of their sovereign rights in the EEZ and also the choices that must be made regarding the same stocks of HMS on the high seas. Since Article 61 and 62 provide for coastal authority to make these choices, Article 64 can be taken to require cooperation regarding the decisions dealt with by these articles.

...[W]hile the coastal state has final decision-making authority in the exercise of the sovereign rights over HMS, just as it does for other species, it cannot exercise that authority and employ its discretion until it has discharged its duty of cooperation [see his statement, n 234 supra] with other coastal states and with distant-water fishing nations...to 'ensure conservation and promote optimum utilization.' The object of this cooperation, according to Article 64, involves more than simply resources and fishing activities relative to HMS within 200 nautical miles. Co-operative measures are to deal with stocks and fishing within and beyond 200 nautical miles, i.e., the stocks of the 'region' which is relevant for the states and stocks concerned.

Cf Nandan (supra n 265, 388), who suggests that Art 64(2) was included in the LOSC "very clearly to indicate that coastal state rights are tempered by the rights of other states".

N Peter Rasmussen seems to go further than Burke. On the one hand, he states("The tuna war: fishery jurisdiction in international law"(1981) 4 U of Illinois L R 755) that "[t]he Convention recognizes the right of coastal nations to establish 200 mile economic zones, but includes an exception for migratory species such as tuna". On the other hand, he later concedes (ibid 768-769) that Art 64 is general in nature and fails to establish specific rights and obligations for the regulation of tuna. ...Prior to the establishment of regional authorities, the sole restraint on the power of a coastal state to regulate tuna fishing is the capacity of the state's fishermen to harvest the allowable catch.

Clingan, supra n 246, 62 (emphasis added). In this regard, however, should be noted the important Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States
In sum, then, while the situation and proposed solutions indicated above are far from ideal or complete, they do constitute an advance over the previous regime in a number of respects and do offer an opportunity for the more peaceful conduct of marine fishery activities.

IV. Conclusion

The preceding discussion has focussed on the deliberations of UNCLOS III and the extent to which the fishery provisions may serve to promote fundamental Convention objectives. The new fishery regime constitutes a revolutionary restructuring of the legal framework within which international marine fisheries has traditionally been conducted. At the same time, however, despite recourse to travaux préparatoires and other means of interpretation, certain provisions remain vague or ambiguous and the parameters of some prescriptions undelimited.

The unique character of UNCLOS III deliberations may at one and the same time permit recourse to other means of interpretation in order to clarify Convention provisions as well as to assess the impact of Conference proceedings on the development of the law outside of the LOSC itself. Article 31(3) of the Vienna Convention provides that for interpretative purposes there should be taken into consideration of America, concluded at Port Moresby, Papua New Guinea, on 2 April 1987 (see (1987) 26 ILM 1048). The treaty, negotiated primarily -- if not exclusively -- to settle disputes relating to American tuna fishing vessels in the region, acknowledged that "in accordance with international law, coastal States have sovereign rights for the purposes of exploring and exploiting, conserving and managing the fisheries resources of their exclusive economic zones or fisheries zones..." (ibid 1053). Although the provision arguably leaves open the HMS debate, the practical effect of the Treaty is to confirm the generally accepted view on coastal State EEZ rights to HMS. Besides falling outside the time period for the present study, a detailed examination of the Treaty and its legal implications would be the subject of a major sub-thesis in itself.
together with the context any subsequent agreement or practice between the parties regarding the interpretation of a treaty or the application of its provisions. Almost invariably, of course, treaties are concluded in a short period of time and State practice, including the negotiation of related agreements, would normally follow. As witnessed above, however, UNCLOS III stretched over eight years, although there had been general agreement on the basic elements of the new fishery regime by 1975 or 1976. It is therefore useful to consider to what extent, if any State practice or agreements outside the Conference during that period may illuminate penumbral areas of the new regime.

Similarly, as the ICJ had cause to point out in the Fisheries Jurisdiction cases, conference deliberations may have a catalytic effect on the evolution of the general law in any particular matter. Given the significance and duration of UNCLOS III, it is to be expected that such might well have been the case even before the Convention was signed in 1982.

In order to better understand the state of the law in 1982, therefore, it is useful to look briefly at events outside the Conference during the life of UNCLOS III. It is to that subject that we now turn.

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200 See Annex IV infra.
209 See Ch 9, n 49 and accompanying text supra.
CHAPTER TWELVE

STATE PRACTICE (1973-1982) AND INTERNATIONAL LAW

"Fisherien cannot eat negotiating texts."
Hon Romeo Le Blanc, Canadian Minister of Fisheries

"We know more or less what the law of the sea was; we know what the future law of the sea will be if the draft becomes a binding convention. But we hardly know what the law is at present....

Professor Rudolph Bernhardt

I. Introduction

Neither fishermen nor governments could afford to maintain their 1973 positions with respect to marine fisheries throughout the decade in which UNCLOS III negotiations ground inexorably towards their conclusion. In fact, both continued trends characteristic of the post-UNCLOS II period discussed in Chapter 8 above. Fishermen, particularly those of major fishing nations, intensified their activities in a number of areas, often with adverse effects on stocks. Governments of numerous coastal States which had not until then declared 200-mile zones did so, both to protect local fishermen and resources as well as to gain revenue through the sale of access rights. To complete this analysis of the evolution of the international law of marine fisheries, then, it is necessary to look briefly at these developments.

Ordinarily, of course, law-making conferences complete negotiations in a short period of time and only subsequently do States take appropriate action. Because of the unique character of UNCLOS III, however, State practice reflected Conference deliberations long before the LOSC was itself even adopted. This has caused complex problems in the iden-

1 Cited in Rigaldies, supra Ch 11, n 65, 294

tification and interpretation of the law, a number of which will be discussed in the concluding section of the Chapter.

II. State Practice (1973-1982)

A. Fishing Activities

As witnessed throughout the present work, the international law of marine fisheries (like international law as a whole) does not exist in a vacuum. Rather, it is influenced by and, in turn, exerts influence upon, external situations and developments. This was no less true during the decade of UNCLOS III proceedings than in previous periods. Although it is impossible to discuss in detail the then state of marine fisheries, a number of important features may be noted which help to explain the reasons for, and results of, State practice as it relates to the law.

Sidney Holt was expressing the view of numerous experts at the time in commenting that "[i]t is difficult, in mid-1977, to be optimistic about the state of world sea fisheries". While there had been a continuing high rate of growth in overall marine catches in the 1950s and 1960s, 1969 saw the beginning of a period, largely unexpected, in which that rate stagnated or even declined, falling for the first time below the growth rate of the world's population (see Table 3). The basic reason for the decline was the diminishing number of traditionally harvested species capable of sustaining significantly increased levels of exploitation.


Holt, supra Ch 4, n 14, 38; cf, J Gulland, "World fisheries and fish stocks" (1977) 1 Marine Policy 179

FAO Fisheries Review/Rev 1, supra n 3, 1; Holt, supra Ch 4, n 14, 40; and Robinson, supra Introduction, n 6,
By 1977, it was estimated that the commercially realizable potential of conventional marine species was some 20 to 30 million tons over existing catch levels. At the same time, however, experts cautioned that perhaps half of that amount could only be gained by better management, with the remainder caught through increased fishing effort. It was thought it unlikely in the foreseeable future that the average rate of increase in volume of the world fish catch would exceed 1 to 2 percent annually unless there were significant increases in the use of 'unconventional' marine resources such as krill or meso-pelagic species.

Of the total catch during the first half of the 1970s, almost 30 percent was taken by non-local fleets -- mainly from developed nations -- operating primarily in those sea areas of traditional importance. Of the non-local fleets,

20. The FAO explains (SOFA 1980, supra n 3, 102-103) that three factors limited marine fish supplies:
   (1) cultivation was generally not feasible in the marine environment, and any particular stock has a maximum yield it can produce;
   (2) there were only a limited number of species that were of interest to man; and
   (3) overfishing could significantly reduce the annual yields of certain species.

On the latter point, eg, there was, during the early part of the 1970s, a collapse through overfishing of anchoveta stock off Peru, cod and mackerel stocks in the NW Atlantic, and several herring stocks and probably North Sea sole in the NE Atlantic region (Gulland, supra n 4, 179-180; Holt, supra Ch 4, n 14, 38-39, 42-43; and Robinson, supra Introduction, n 6, 19).

Gulland, supra n 4, 179, 188; Holt, supra Ch 4, n 14, 50; and Robinson, supra Introduction, n 6, 20, 30-31

FAO Fisheries Review, supra n 3, 3; Robinson, supra Introduction, n 6, 23; and SOFA 1977, supra n 3, I-47

FAO Fisheries Review/Rev 2, supra n 3, 2; and Gulland, supra n 4, 186. The FAO observes (SOFA 1977, supra n 3, I-46) that

Many tropical waters are not attractive to long-distance fleets from temperate latitudes, on account of the generally lower fish densities and the very wide variety of species, which often poses marketing problems. Catches by foreign fleets off developing countries have therefore generally been small (less than half those off developed countries), and only
some 60 percent of the total value of catches (excluding tuna) in foreign zones in 1972 was taken by only two countries, the Soviet Union and Japan, while the latter's harvest of tuna in foreign zones was 47 percent of the total taken by the major distant-water fishing nations. Of that total, only some 10 to 20 percent was taken within zones of developed countries, the remainder being taken either in zones of developing countries or on the high seas.\(^7\)

As the decade progressed, more and more coastal States sought to bring marine resources threatened by overfishing under national management and to derive additional benefits therefrom by proclaiming 200-mile zones of exclusive jurisdiction. In areas such as the Northwest Atlantic, where domestic fishermen were capable of harvesting much if not all of the TAC, the catch by distant-water fleets decreased markedly. In areas such as the Northeast Pacific, where coastal States lacked such capacity, on the other hand, the catch by non-local fleets remained high. Generally speaking, however, the extension of maritime resource zones severely affected the operations of many distant-water fleets. Worst hit were the Soviet Union and Japan. Although the Soviet Union and other East European States continued to expand their fishing fleets during the 1970s,\(^\text{10}\)

\(^7\) SOFA 1980, supra n 3, 97; and Gulland, supra n 4, 186. Alain Fonteneau ("Panorama de l'évolution de la pêche thonnière dans le monde" (fév 1985) La Pêche maritime 90, 94) reports that in 1960 Japan harvested about 60% of the world's catch and the other major tuna fishing nation at the time, the US, about 17%. In 1980, Japan's share had dropped to 33% of the world total, although it remained by far the major tuna fishing nation. The American share had fallen to 13% of the world total. Taiwan and the Republic of Korea took another 12% of the total. A number of developing countries, including Ghana, Ivory Coast, the Maldives, the Philippines and Sri Lanka also acquired a noteworthy tuna fishing capacity during that period.

\(^\text{10}\) Vladimir Kaczynski ("The economics of the Eastern bloc ocean policy" (1979) 69 American Economic Review 261, 263-264) explains that
Japan and most other distant-water fishing States either reduced their fleets or increased them only slightly. All suffered a drastic reduction in catch from waters in which they had previously fished freely, and were forced to focus attention either on high seas resources or fisheries within their own waters. By the end of the decade, overcapacity was beginning to pose serious problems for many if not most

In planning the future development of ocean expansion during the era of unrestricted access to the ocean resources, Eastern planners always assumed the most advantageous biological and technological alternatives, that is, easy access to any resources and direct interrelationship between increase of harvesting capability and growth of the harvest volume. These principles did not substantially change even during the period when the catch limitations went into effect in all oceans. In order to increase the fish catch in the state yearly plans, it was enough to increase the fishing potential or assume better utilization of disposable fleets.

It was only towards the end of the decade that it became clear that the foundations for the East European's fishery industry were laid on a highly restricted resource based, and that (ibid 262). While reducing slightly the number of vessels in her deep-sea fishing fleet during the 1970s, Poland, another major East European fishing State, increased both the total tonnage of those vessels as well as the number and size of her factory mother-ships and other auxiliary fishing vessels. Although the Government decided in 1977 to decrease some investments in deep-sea fishing, it was not until 1980, in fact, that the number and tonnage of deep-sea fishing vessels started to decline for the first time (I Wrzesniewski and Z Russek, "The change in catches and economic conditions of the Polish fishery (prior to and following the establishment of exclusive economic zones)" in Adjustments to Changes in Fisheries Law and Economics (FAO Fisheries Technical Paper 269; 1985)[Paper hereafter cited 'Adjustments'] 93, 97, 105, 113).

In Japan during the mid-1970s, eg, among 21 types of fisheries, 979 boats with 13,531 crewmen had to be displaced out of a total of 3,685 licensed fishing boats with 46,202 crewmen (S Tanaka, "Japan's fisheries and international relations surrounding them under the regime of 200-mile exclusive fisheries zone [sic]" in The Law of the Sea and Ocean Development Issues in the Pacific Basin (1981; E Miles and S Allen, eds)[volume hereafter cited 'Pacific Basin'] 55, 63).
distant-water fishing nations, developed and developing alike.  

In contrast, the 1970s witnessed a great expansion in the fleets and fishing activities of developing countries. Between 1969 and 1979, the tonnage of the latter's fleets increased nearly fivefold, rising from 5 percent to 15 percent of the world's tonnage of trawlers and fishing vessels over 100 gross tons in size. Although the Republic of Ko-

Kaczynski (supra n 10, 264) observed in 1979 that

The present state of Eastern [European] fisheries, in which decreasing growth rates are accompanied by disproportionate increases in costs of ocean fisheries, has become a heavy economic burden for many Eastern [European] governments. They are now forced to support these activities with growing subsidies. Without state support, long-range ocean activities would be impossible in these countries or would have to be totally restructured.

Cf Solecki, supra Ch 10, n 19, 120; and Wrzesniewski and Russek (supra n 10, 100), who state that the Polish catch from distant-water fisheries dropped from over 1 million tonnes in the last year of free access to only 182,000 in 1983. As a result of EEZs, 75% of Polish distant-water catches came to be taken from high seas areas (ibid). This, in turn, resulted in less desirable selection of fish caught and, at least in the beginning, reduced local demand (ibid 102).

Japan's catch within foreign 200-mile zones fell from 4.48 million tons in 1974 to 2.9 million tons in 1979. She was, however, able to maintain her total marine catch through a heavy government subsidy and greatly increased harvests in her own offshore areas (Tanaka, supra n 11, 55, 58, 59).

Among developing, distant-water fishing States, Cuba was adversely affected by the institution of the 200-mile zone (see, eg, A Mena Millar, "Study on the economic situation of the Cuban fisheries" in Adjustments, supra n 10, 27), as were Thailand (see, eg, T McDorman, "Thailand's fisheries: a victim of 200-Mile Zones"(1986) 16 ODILA 183) and others (see, eg, SOFA 1978, supra n 3, I-24, and SOFA 1980, supra n 3, 111-114).

For technical and economic reasons, it is not likely that problems of overcapacity can be solved simply by redeploying distant-water fishing vessels to coastal operations (see, eg, Robinson, supra Introduction, n 6, 27-28; and SOFA 1980, supra n 3, 113).

Kenneth Lucas and Tony Loftas ("FAO's EEZ Program: helping to build the fisheries of the future"(1982) 3 Ocean Yearbook 38, 44-45) point out that in arriving at
rea, Cuba, and Panama owned almost half of that total, and
some represented the use of flags of convenience, most de­
veloping countries building their own fleets aimed to ex­
plot resources in their own zones.\textsuperscript{14} This development is
reflected in the fact that the proportion of the world catch
taken by developing countries climbed from 27 percent in
1950 to some 46 percent in 1980. Much of the increased har­
vest was exported, the value rising during the decade from
20 percent to an estimated 34 percent of the world total.\textsuperscript{15}

It was due largely to growth in Third World fisheries
that by 1982 the world catch had slightly exceeded the rate
predicted five years earlier. Nevertheless, coastal States
which had largely benefited from the EEZ regime were becom­
ing increasingly aware of problems concerning such matters
as development of the local capacities, enforcement of the
fishery regulations, as well as sharing and management of
straddling stocks and HMS. Far from disappearing, existing
IFOs continued to perform important research and advisory
functions as well as regulating high seas fishing, and new
IFOs were established in areas where none had previously ex­
isted.\textsuperscript{16}

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a complete picture of world fisheries it is necessary
to consider more than gross tonnage. In 1982, there
were an estimated 3 million small fishing boats -- the
majority in developing countries -- and that small-boat
fisheries provided about 25% of the world catch and 40%
of the world's total food supply.

\textsuperscript{14} Ibid 44; SOFA 1980, supra n 3, 113-114

\textsuperscript{15} Lucas and Loftas, supra n 13, 43

\textsuperscript{16} On the operations of IFOs during the period see, eg, S
Holt and C Vanderbilt, "Marine fisheries"(1980) 2 Ocean
Yearbook 9, 53-56; Robinson, supra Introduction, n 6,
31; and the several annual volumes of SOFA, supra n 3.
On the fishery problems faced by coastal States see,
eg, Lukas and Loftas, supra n 13, 73-75; Robinson,
supra Introduction, n 6, 27-32; and volumes of SOFA, su­
pra n 3, particularly SOFA 1980, pp 109-111.
B. National Legislation

While much has been written in recent years analyzing contemporary fishery jurisdiction claims and comprehensive treatment of modern State practice as it relates to the latter is beyond the scope of the present work, it is nevertheless useful within current confines to briefly highlight the most significant trends in State practice, citing a few examples of claims advanced during the period under review.

An examination of Table 11 immediately reveals that, on the whole and excepting a number of Latin American States in particular, national claims to extended fishery jurisdiction remained relatively modest between 1958 and 1973. The large majority were either to 12-mile territorial seas or EFZs as had been widely endorsed at UNCLOS II in 1960. In fact, it was not until after the fourth session of UNCLOS III in 1976 and the appearance of the RSNT that 200-mile EFZ or EEZ claims became common. Over the succeeding few years, a veritable avalanche of 200-mile claims to all natural marine resources gradually outnumbered those of EFZs. By the end

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| Mar 8   | Nigeria                 | 12            |                 |                        |                         |
| 30      | Tanzania                | 12            |                 |                        |                         |
| April 8 | Spain                   |               |                 |                        |                         |
| 20      | Monaco                  |               |                 |                        |                         |
| 30      | Yemen Arab Republic     | 12            |                 |                        |                         |
| June 7  | France                  |               |                 |                        |                         |
| Aug 1   | Ivory Coast             |               |                 |                        |                         |
| Sept 16 | Dominican Republic      |               |                 |                        |                         |
| 30      | India                   | 12            |                 |                        |                         |
| Nov 3   | Cameroon                | 18            |                 |                        |                         |
| 17      | Australia               |               |                 |                        |                         |
| Dec 17  | Kuwait                  | 12            |                 |                        |                         |

1968

| April 19 | The Gambia              | 6             |                 |                        |                         |
| June 24  | Liberia                 | 12            |                 |                        |                         |
| Sept 5   | Sweden                  |               |                 |                        |                         |
| Nov 15   | Burma                   | 12            |                 |                        |                         |

1969

| Feb 24   | Jamaica                 | 12            |                 |                        |                         |
| April 28 | Brazil                  | 12            |                 |                        |                         |
| June 6   | Kenya                   | 12            |                 |                        |                         |
| July 10  | The Gambia              |               |                 |                        |                         |
| Aug 2    | Malaysia                | 12            |                 |                        |                         |
| Sept 27  | Kampuchea               | 12            |                 |                        |                         |
| Dec 3    | Uruguay                 | 200           | 12              |                        |                         |
| Dec 6    | Trinidad and Tobago     |               |                 |                        |                         |

1970

| Jan 1    | French Polynesia (Fr)   |               |                 |                        |                         |
| Feb 9    | Yemen, P.D.R.           | 12            |                 |                        |                         |
| 12       | Poland                  |               |                 |                        |                         |
| Mar 9    | Albania                 | 12            |                 |                        |                         |
| 27       | Brazil                  | 200           |                 |                        |                         |
| April 5  | United Arab Emirates    | 12            |                 |                        |                         |
| 16       | Mauritius               | 12            |                 |                        |                         |
| Sept 24  | Equatorial Guinea       | 12            |                 |                        |                         |
| Oct 5    | Gabon                   | 25            |                 |                        |                         |
| Nov 28   | Sudan                   | 12            |                 |                        |                         |
| Dec 11   | French Guiana (Fr)      |               |                 |                        |                         |

1971

| Jan 7    | Sri Lanka               | 12            |                 |                        |                         |
| April 19 | Sierra Leone            | 200           |                 |                        |                         |
| June     | The Gambia              |               |                 |                        |                         |
| July 15  | Western Samoa           | 50            |                 |                        |                         |
| Aug 26   | Nigeria                 | 30            |                 |                        |                         |
| Dec 10   | Malta                   |               |                 |                        |                         |

1972

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| 15       | Costa Rica              | 12            |                 |                        |                         |
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| July 5   | French Guiana (Fr)      |               |                 |                        |                         |
| 21       | Gabon                   | 100           |                 |                        |                         |
| 17       | Oman                    | 50            |                 |                        |                         |
| 31       | Mauritania              | 30            |                 |                        |                         |
| Sept 1   | Iceland                 | 50            |                 |                        |                         |
| Nov 10   | Somalia                 |               |                 |                        |                         |
| Nov 3    | Gabon                   | 150           |                 |                        |                         |</p>
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<td>April 4</td>
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<td>Mar 21</td>
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<td>Feb 20</td>
<td>Oman</td>
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<td>Mar 9</td>
<td>UNCLOS III 10th session</td>
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<td>Mar 9</td>
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<td>UNCLOS III LOSC Signing Session</td>
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**Notes:**

(a) Unless otherwise stated, limits stated are the maximum distances in nautical miles from the baseline from which the territorial sea is measured.

(b) Unless otherwise stated, the date cited is that of the entry into force of the legislation, proclamation etc. Where that is unknown, the date is that cited by the United Nations (see infra), the gazette notice, or by Smith (see infra).

(c) Claim based on the Treaty of Paris (1898) and subsequent treaties; breadth varies, up to 285 nautical miles from coast.

(d) Twelve nautical miles in the Black and Mediterranean Seas.

(e) Limits defined as within and beyond the territorial sea, as defined in treaties and practice.

(f) Zone actually entered into force 30 January 1968.

(g) The Maldives 1964 Constitution defines the Republic by using geographical coordinates, which extend the country’s limits from 3 to 55 nautical miles from the coast. The fishing zone parallels those limits, at a distance of about 100 miles.

(h) In the Gulf of Oman; in the Persian Gulf, limits are the continental shelf, continental shelf boundaries, or median line.

(i) Boundary is outer limits of superjacent waters of continental shelf, or as per bilateral agreements.

(j) Zone actually entered into force 15 January 1977.

(k) First zones actually entered into force 12 February 1977.

(l) Zone delimited by geographical coordinates.

(m) It appears that the claim actually entered into force on 25 December 1977 (Smith, infra 21).

(n) Zone actually entered into force 1 December 1980.

(o) Zone as delimited with neighbours, or the median line.

(p) Zone formed by lines connecting extreme points of specified lateral limits.

(q) Different dates are given by various sources for the initial advancement of the claim. The one cited is the earliest located.

(r) Zone actually entered into force 1 December 1981.

(s) As (o) above.

(t) Legislation passed on 14 August 1979 but zone not in force before 31 December 1982.

(u) According to Smith (infra 259) the Malaysian Exclusive Economic Zone Bill of 1984 was not in force in 1986. Moore (infra 30), however, includes the claim as valid.

(v) As (o) above.

(w) Breadth remains 6 miles in the Aegean Sea.
<table>
<thead>
<tr>
<th>TABLE 11</th>
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<tbody>
<tr>
<td><strong>Sources:</strong></td>
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<tr>
<td>Moore, Gerald. Coastal State Requirements for Foreign Fishing. (FAO Legislative Study No 21, Rev 2; 1985) 28-33.</td>
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<tr>
<td>New Directions in the Law of the Sea.</td>
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<tr>
<td>Regional Compendium of Fisheries Legislation (Western Pacific Region). (FAO Legislative Study no 35, 1984).</td>
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</tbody>
</table>
of 1982, some 90-odd claims to 200-mile resource jurisdiction were in force worldwide.\(^{18}\)

Two assertions were commonly made by States advancing claims. First, as had been the case for more than three decades, States pleaded the need to protect coastal fisheries against overexploitation. Guatemala, for example, justified the establishment of her EEZ in 1976 in part by arguing that living resources off her coasts "have been the object of exploitation of every kind by foreign fishing fleets to the detriment of the conservation thereof...".\(^{19}\) Similarly, the Canadian Secretary of State for External Affairs, in announcing the establishment of Canada's 200-mile EFZ that same year, explained that "[t]here will be no fishery resource left to protect if action is not taken now, because the fish stocks will be so depleted as to disappear as a resource of commercial significance".\(^{20}\)

Interestingly, those same distant-water fishing nations whose activities were being cited by coastal States as the reason for the latter being forced to take unilateral action were basing their own claims on similar grounds. While re-

\(^{18}\) Ibid 6

\(^{19}\) Legislative Decree No 20-76, of 9 June 1976 concerning the breadth of the territorial sea and the establishment of an exclusive economic zone, in 19 UNLS, supra Ch 8, n 143, 30

\(^{20}\) House of Commons Debates (4 June 1976) 14164-14165; reproduced in (1977) 15 CYIL 354, 355. For a discussion of the events leading up to the Canadian decision see, eg, Rigaldies, supra Ch 11, n 65, 293-298 and Ch 11, n 111, 47-49; and Johnson, supra Ch 8, n 54, 86.

The threat of overexploitation of resources was not everywhere the fundamental reason for the extension of jurisdiction however. Alberto Szekely ("Mexico's unilateral claim to 200-mile exclusive economic zone: its international significance"(1977) 4 ODILA 195, 208-209), suggests eg, that it was primarily for domestic political reasons that Mexico claiming a 200-mile zone when she did. That is, "President Luis Echeverria went out of office on December 1, 1976, and he probably wanted to be remembered for having given Mexico sovereign rights over the immense wealth in its 200-mile Exclusive Economic Zone".
ferring obliquely to "significant changes in the international environment relating to fisheries" in support of her 1977 claim, Japan, for example, was in fact prompted by perceived growing threats to her coastal fishery interests posed by actions of the Soviet Government and trawlers. A year earlier, the Soviet Union had proclaimed "provisional measures" to protect her own coastal fisheries. Similar pressures contributed to the establishment of the American 200-mile EFZ in 1977.

Law No 31 of 2 May 1977 on provisional measures relating to the fishing zone, as amended in 1977, in 19 UNLS, supra Ch 8, n 143, 215

Fukui (supra Ch 11, n 13, 48) explains that Soviet trawlers appearing in large numbers off the coasts of Hokkaido in the early 1970s caused considerable concern among local Japanese fishermen by allegedly competing with them for diminishing stocks, dumping waste at sea, driving Japanese coastal fishermen off their traditional fishing grounds, and occasionally damaging their fishing equipment. The Japanese fishermen tolerated the Soviets as long as Japanese boats were allowed to fish off the Soviet coasts. When the principle of reciprocity was breached by Soviet decision in 1976 to establish and enforce a 200-mile exclusive fishery zone [see n 23 and accompanying text infra], it became politically impossible for the Japanese Government to continue to let Soviet trawlers operate freely off Japanese coasts.

For a more detailed consideration of this matter see T Akaha, A cybernetic analysis of Japan's fishery policy process" in Japan and the New Ocean Regime, supra Ch 11, n 13, 173, 190, 192, 200-211.

Decree of the Presidium of the Supreme Soviet of the USSR of 10 December 1976 on provisional measures to conserve living resources and regulate fishing in the sea areas adjacent to the coast of the USSR, in 19 UNLS, supra Ch 8, n 143, 253. See in this regard, F Kovalyov, "The economic zone and its legal status"(February 1979) International Affairs [Moscow] 58, 60. It is noteworthy that in 1975 Canada closed her Atlantic ports to Soviet fishing vessels, claiming that the latter were engaged in serious overfishing (Rigaldies, supra Ch 11, n 65, 296).

See, eg, T Clingan Jr, "The United States and unilateral action: changing patterns of fisheries conservation and management"(1979) 22 GYIL 178, 183-189. Although the US Fishery Conservation and Management Act [hereafter cited 'FCMA'](reproduced in (1976) 15 ILM 635), which established the zone, was enacted on 13
Claims to extended fishery jurisdiction were also justified by reference to earlier claims of other States. That justification generally took two forms. First, the extension of fishery jurisdiction by neighbouring States would result in increased pressures being placed on local fisheries. And secondly, claims were cited as proof that international law recognized such coastal State rights. In 1977, for example, India asserted that her claim to a 200-mile EEZ was "in conformity with the consensus which has emerged at [UNCLOS III] during its deliberations since 1973. State practice conforming to the consensus and trends has also emerged in favour of the establishment of these zones."

April 1976, a bill to that effect had been under active consideration by Congress since early 1974 (F G Knight, Managing the Sea's Living Resources (1977) 78-79; and W Magnuson, "The Fishery Conservation and Management Act of 1976: first step toward improved management of marine fisheries" (1976-1977) 52 WLR 427, 433, 438-446).

Referring to the Soviet claim, eg, F Kovalyov argued (supra n 23, 60) that the USSR was forced to extend her jurisdiction in order to protect the fish stocks and other living resources in coastal areas...in view of a threatened massive shift into these areas of the fishery effort of many countries that have found themselves debarred from what had been their traditional fishing grounds due to the unilaterally established economic (fishing) zones off the shores of the USA, Canada and Norway.

For similar reasoning in support of other claims see, eg, statement by the Canadian Secretary of State for External Affairs (supra n 20, ibid); R Churchill, "Revision of the EEC's Common Fisheries Policy" (1980) 5 European L R 3, 8; EEC Council Resolution on "Certain external aspects of the creation of a 200-mile fishing zone in the Community with effect from January 1, 1977" (1976) 15 ILM 1425; and Cuba's Act of 24 February 1977 concerning the establishment of an economic zone, in 19 UNLS, supra Ch 8, n 143, 190-191.

"Notification by India of the exclusive economic zone (15 January 1977)" in Smith, supra Ch 11, n 269, 222-223; cf, eg, statement by the Australian Minister for Primary Industry (HR Deb (13 April 1978) 1515-1516); the 1976 statement by the Canadian Secretary of State for External Affairs (HC Deb (19 November 1976) 1189-1190, 1193-1194, in (1977) 15 CYIL 357); Dominican Republic Law No 573, in Smith, supra Ch 11, n 269, 119;
In fact, as implied in the above and other similar statements, Conference proceedings had not only a catalytic affect on the advancement of jurisdictional claims, but as Professor Carl Fleischer observes, "[i]n respect of the regime to be applied in the new 200-mile zones the ideas of UNCLOS III have also played an extremely important role by being adopted in national legislation and thereby appearing as elements of relevant state practice".\textsuperscript{27}

The emphasis on 'ideas' is important, since provisions from the fishery regime of the various negotiating texts were not simply transposed either verbatim or in toto into national proclamations and legislation. Rather, given the global nature of the LOSC,\textsuperscript{28} the texts were widely used as models for such laws and adapted to local circumstances and State interpretations of what the relevant norms were -- or what they wanted other States to believe they were. The Preamble to Mexico's EEZ legislation, for example, indicated that the latter "closely follows the guidelines" of the ISNT;\textsuperscript{29} while New Zealand's Minister of Foreign Affairs stated that in preparing EEZ legislation New Zealand had

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and G de Lacharrière, "La zone éCONOMique française de 200 milles" (1976) 22 AFDI 641, 646-647.
This was apparently not the justification employed by the Soviet Union. Kovalyov wrote (supra n 23, 60) in 1979 that
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the 200-mile economic zone concept might apparently be called as a nascent international legal rule. It has not yet, however, become a common rule of operative law, and whether or not it will become one is still open to question and is still to be settled, depending on the final outcome of the Conference and on the way other key problems of the law of the sea are going to be resolved. ... The measures taken by the Soviet Union can therefore be seen not so much as ones arising from the incipient 200-mile zone rule, but as ones founded on any nation's right to protect itself, without use or threat of force, from damage or threat of damage due to actions by other states.

See also in the latter regard n 84 infra.

\textsuperscript{27} Fleischer, supra n 17, 242 (emphasis added)

\textsuperscript{28} See Ch 11, text accompanying nn 228, 229 and n 255 supra.

\textsuperscript{29} Cited in Szekely, supra n 20, 199
"scrupulously ensured that the legal status of the zone
[was] consistent with the draft articles developed by the
Conference" and that the "principles" upon which the "heart"
of the legislation was based were "drawn directly" from RSNT
draft articles.30

The negotiating texts were probably most closely fol-
lowed with respect to geographical limits. Excluding Madag-
scar which proclaimed a 150-mile EEZ in 1973,31 all States
extending their fishery jurisdiction (as either an EFZ or
EEZ) during the life of UNCLOS III did so to the maximum ex-
tent possible, generally 200 miles (see Table 11).32

Within those limits, almost all claims were to "sover-
eign rights," often qualified by the phrase, "for the pur-
pose of exploring and exploiting, conserving and managing"
the resources -- terminology employed in Article 45 of the
ISNT and all subsequent texts.33 The major exceptions were

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30 HR Deb (23 August 1977) vol 413, p 2394; cf, statement
by Canadian Secretary of State for External Affairs,
supra n 26. For comparisons between national legisla-
tion and UNCLOS III negotiating texts and the LOSC see,
eg, Fleischer, supra n 17; L Juda, "The exclusive eco-

31 Ordinance No 73-060, of 28 September 1973, in Smith,
supra Ch 11, n 269, 253. In 1985, Madagascar extended
her zone to a full 200 miles(Ordinance No 85-013, of 16
September 1985, in ibid 254).

32 Cf Juda, supra n 30, 8. Not all States extended their
fishery jurisdiction to the maximum extent possible off
all coasts. Japan, eg, declined to apply her zonal leg-
islation to large areas off her west coast in the hope
that the Chinese and Korean Governments would not make
retaliatory claims (see, eg, Fukui, supra Ch 11, n 13,
49-50; and Akaha, supra n 22, 209).

33 See, eg, Antigua and Barbuda's Territorial Waters Act
1982, in Smith, supra Ch 11, n 269, 62; Burma's Terri-
torial Sea and Maritime Zones Act 1977, in 19 UNLS, su-
pra Ch 8, n 143, 8; Kampuchea's 1982 Decree, in Smith,
supra Ch 11, n 269, 91; Colombia's Law No 10 of 1978,
in 19 UNLS, supra Ch 8, n 143, 14; Law No 82-005 of
1982 of the Comoros Islands, in Smith, supra Ch 11, n
the laws of Japan and the United States, the former assert-

269, 103; the Cook Islands' Territorial Sea and Exclu-
sive Economic Zone Act 1977, in ibid 325; Cuba's Decree
Law No 2 of 1977, in 19 UNLS, supra Ch 8, n 143, 190;
Dominica's Territorial Sea, Contiguous Zone, Exclusive
Economic Zone and Fishery Zones Act 1981, in Smith, su-
pra Ch 11, n 269, 115; Fiji's Marine Spaces Act 1977,
in ibid 129; the FRG's Proclamation of 21 December
1976, in 19 UNLS, supra Ch 8, n 143, 211; Guatemala's
Decree No 20-76 of 1976, in 19 UNLS, supra Ch 8, n 143,
30; Guyana's Maritime Boundary Act 1977, in ibid 33;
Haiti's Decree No 38 of 1977, in ibid 43; Decree Law No
921 of 1980 of Honduras, in Smith, supra Ch 11, n 269,
205; Iceland's Law No 41 of 1979, in 19 UNLS, supra Ch
8, n 143, 213; India's Maritime Zones Act 1976, in ibid
213; Indonesia's 1980 Declaration, in Smith, supra Ch
11, n 269, 227; the 1979 Proclamation by the President
of Kenya, in 19 UNLS, supra Ch 8, n 143, 228; Mauritai-
nia's Law 78-043 of 1978 in Smith, supra Ch 11, n 269,
281; the Maritime Zones Act 1977 of Mauritius, in ibid
288; Mexico's Act of 10 February 1976 concerning the
EEZ, in 19 UNLS, supra Ch 8, n 143, 233; Morocco's De-
cree Law 1-81-179 of 1981, in Smith, supra Ch 11, n
269, 303; Mozambique's Decree Law No 31/76 of 1976, in
ibid 307; the Philippines' Presidential Decree No 1599
of 1979, in ibid 369; Portugal's Decree Law No 119/78
of 1978, in ibid 373; Sáo Tomé and Principe's Decree
Law No 15/78 of 1978, in 19 UNLS, supra Ch 8, n 143,
248; the Seychelles' Maritime Zones Act 1977, in ibid
250; the Solomon Islands' Delimitation of Marine Waters
Act 1979, in Smith, supra Ch 11, n 269, 413; Sri Lanka's
Maritime Zones Law No 22 of 1976, in 19 UNLS, supra Ch
8, n 143, 120; Suriname's 1978 Law Concerning the Ex-
tension of the Territorial Sea and the Establishment of
a Contiguous Economic Zone, in ibid 127; Thailand's
1981 Royal Proclamation, in Smith, supra Ch 11, n 269,
437; Tonga's Territorial Sea and the Exclusive Economic
Zone Act of 1978, in ibid 441; the United Arab Emirates' 1980
Declaration of the Ministry of Foreign Affairs, in ibid 465; the USSR's 1976 Decree, supra n 23; Vanuatu's
Maritime Zones Act 1981, in Smith, supra Ch 11, n 269,
471; Venezuela's Act Establishing an Exclusive Economic
Zone Along the Coasts of the Mainland and Islands of
the Republic of Venezuela of 1978, in 19 UNLS, supra Ch
8, n 143, 261; Vietnam's 1977 Statement, in Smith, su-
pra Ch 11, n 269, 481; and Western Samoa's Exclusive
Economic Zone Act 1977, in ibid 483.

Similar, if not more strongly worded, expressions
are found in the legislation of other States. The Ivory
Coast (Law No 77-926 of 1977, in ibid 241) and Nigeria
(Decree No 28 of 1978, in ibid 347), eg, claim "sover-
eign and exclusive rights"; while Qatar (Ministry of
Foreign Affairs Declaration of 1974, in ibid 379) as-
serts "exclusive and absolute sovereign rights".
ing merely "jurisdiction" over fisheries,34 while the American law asserted "exclusive fishery management authority".35

Most legislation claimed rights over all living marine resources within the zone. Some laws, however, did make specific reference to anadromous species or HMS. Japan, the Soviet Union and the United States, for example, asserted rights in high seas areas to anadromous species which spawned in their waters.36 In at least seven cases (all in the South Pacific), national legislation specifically provided for HMS management within the zones.37 The Bahamas, Japan and the United States, on the other hand, all enacted legislation explicitly excluding tuna from their jurisdiction.38

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34 Law No 31, supra n 21. Akaha (supra n 22, 209-210) explains that the reference to "jurisdiction" rather than, eg, 'sovereign rights', is in keeping with Japan's position that the 200-mile zone should not affect the high seas character of the area. The term 'jurisdiction' also suggests a limited function, pertaining only to fisheries, in comparison with other more comprehensive and inclusive terms.

35 FCMA, supra n 24, Title 102

36 See Art 12 of Japan's 1977 Law, supra n 21; Art 2 of the Soviet Union's 1976 Decree, supra n 23; and sec 102 of the American FCMA, supra n 24.

37 See legislation cited in n 33 supra of the Cook Islands (Sec 19), Fiji (Sec 22), Tonga (Sec 21) and Western Samoa (Sec 11); Nauru's Marine Resources Act 1978 (Sec 19), in *Regional Compendium of Fisheries Legislation* (FAO Fisheries Legislative Report 82/1; South China Sea Fisheries Working Paper/82/105; 1982)[hereafter cited 'Regional Compendium'] ii, 230; New Zealand's Territorial Sea and Exclusive Economic Zone Act 1977 (Sec 22), in Smith, supra Ch 11, n 269, 309; and Papua New Guinea's Tuna Resources Management (National Seas) Act 1977, in *Regional Compendium*, supra this n, 403.

In addition, Costa Rica and São Tomé and Príncipe when signing the LOSC declared their right to regulate HMS in their 200-mile zones (see Ch 11, text accompanying n 222 supra)

38 See Fisheries Resources (Jurisdiction and Conservation Act 1977 (sec 2) of The Bahamas, in 19 UNLS, supra Ch 8, n 143, 179; Japan's Law No 31 (Art 6), supra n 21; and the FCMA (sec 3 and Title I, sec 102), supra n 24. But see also n 107 infra.
While asserting sovereign rights for the purpose of conserving and managing living marine resources, few States chose to set out management policies or objectives in their laws, preferring to leave the matter for administrative determination. Of States that did so, references were invariably general in nature. In wording almost identical to that of Article 50 of the ISNT and subsequent texts, for example, legislation of Australia, the Comoros Islands, Mexico and Venezuela stated that national authorities "shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation". Legislation of Australia, Cuba, Mexico, São Tomé and Príncipe, the Soviet Union and Venezuela all identify 'optimum utilization' of resources as an objective to be promoted, without, however, essaying a definition of the term. The American FCMA, in contrast, referred to the need to achieve and maintain "the optimum yield from each fishery". "Optimum" in the latter context was defined as the quantity of fish which will provide the greatest overall benefit to the Nation with particular reference to food production and recreational opportunities; and...which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social or ecological factor.

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39 See further on this point, eg, Moore, supra n 30, 159-160.

40 Article 9 of Law 82-005 of the Comoros Islands, supra n 33; cf, Australia's Fisheries Amendment Act 1978 (Sec 6), in Regional Compendium, supra n 37, 32; Art 6 of Mexico's 1976 Act, supra n 33; and Art 5 of Venezuela's 1978 Act, supra n 33

41 Sec 6 of Australia's 1978 Fisheries Amendment Act, supra n 40; Art 4 of Cuba's 1977 Decree, supra n 33; Art 7 of Mexico's 1976 Act, supra n 33; Art 6 of Sao Tome and Principe's 1978 Decree, supra n 33; the Preamble to the Soviet Decree of 1976, supra n 23; and Art 6 of Venezuela's 1978 Act, supra n 33. Cf the goal of "optimum and efficient use" of resources in Art 3 of the 1980 Honduran Decree, supra n 33.

42 Sec 2, FCMA, supra n 24
As in the case of management objectives and policies, few national laws explicitly acknowledged a coastal State obligation to allow foreign vessels access to the surplus of the TAC of the former's zone. Rather, most legislation simply prohibited foreign fishing without coastal State authority. Legislation of several States, including the Co-

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43 Ibid sec 3; cf, Sec 2 of The Bahamas' 1977 Act, supra n 38

44 Cf Moore, supra n 30, 160. More generally, Moore (ibid 157) notes that in national legislation there is "almost universal elimination" of any reference to duties of coastal States with respect to living marine resources in their zones. In statements relating to legislation, however, some States were prepared to indicate their views in that regard. The Canadian Secretary of State for External Affairs, eg, stated (supra n 26, 356) that Canada was prepared to commit herself "to allow other nations to fish in Canada's 200-mile zone for stock surplus to Canada's harvesting capacity".

New Zealand's Minister of Foreign Affairs explained (HR Deb (26 May 1977) vol 410, 121) that New Zealand was "entitled to phase out foreign fishing fleets as the capacity of the New Zealand industry increases, but until we have the capacity to harvest the full catch we are obliged to allow foreign fleets access to the surplus".

The Australian Minister for Primary Industry, for his part, acknowledged (supra n 26, 1516) that a reading of Arts 61 and 62 of the ICNT showed that whilst the coastal State has sovereign rights over the living resources of the zone it has, in turn, certain obligations with respect to management of the resources in that zone. Briefly these are, to so manage these resources that they are conserved for optimum use of mankind both now and in the future. In this regard Australia will have to assess the resources of the Australian fishing zone and determine the total allowable catches of these resources. Where Australians are unable or perhaps do not wish to harvest all of the total allowable catches, we will be under an obligation to allow other nationals to take that surplus. However, such surplus will be taken under terms and conditions determined by Australia in line with internationally agreed provisions. Accordingly, we will have the right to determine who fishes these surplus stocks and under what terms and conditions.

45 See, eg, Sec 6 of the Marine Boundaries and Jurisdiction Act 1978-3 of Barbados, in Smith, supra Ch 11, n 269, 73; Sec 16 of Fiji's Marine Spaces Act 1977, supra n 33; Art 4 of Guinea-Bissau's Law No 3/78, in Smith, supra Ch 11, n 269, 191; Sec 7 of India's 1976 Act, supra n 33; Art 6 of Japan's 1977 Law, supra n 31; and
moros Islands, the Cook Islands, Cuba, Fiji, Mexico, New Zealand, the United States, the USSR and Venezuela, however, did provide for determination of the TAC and allocation among foreign vessels of that portion not capable of being harvested by national vessels. **

Only a few laws mentioned criteria to be applied in apportioning the surplus catch. Although all allowed the coastal State maximum flexibility in actually allocating the surplus, the criteria listed contrasted sharply with the negotiating texts and Article 62(2) of the LOSC in referring first to the previous fishing activities in the zone by foreign vessels and the degree to which the foreign States had co-operated in research and conservation activities. No mention was made of special status for either developing States or LLGDS. 

Art 3 of Spain's Law No 15/1978, in Smith, supra Ch 11, n 269, 425.

Art 9 of Law 82-005 of the Comoros Islands, supra n 33; Sec 10 of the Cook Islands 1977 Act, supra n 33; Art 4 of Cuba's 1977 Decree Law, supra n 33; Sec 13 of Fiji's 1977 Act, supra n 33; Art 8 of Mexico's 1976 Act, supra n 33; Sec 12 of New Zealand's 1977 Act, supra n 37; secs 201(d) and (e) of the FCMA, supra n 24; Art 4 of the Soviet Union's 1976 Decree, supra n 23; and Art 6 of Venezuela's 1978 Act, supra n 33. See also Secs 11-13 of Niue's Territorial Sea and Exclusive Economic Zone Act 1978, in Smith, supra Ch 11, n 269, 335.

In the case of the Cook Islands, Fijian, New Zealand and Niuean legislation, the responsible Minister is charged with determining the TAC for each fishery in the zone and the portion capable of being harvested by local vessels. "The remaining portion shall constitute the allowable catch for that fishery for foreign fishing craft." In each case, however, the Minister is empowered rather than obligated to apportion that catch among foreign States.

See Sec 11 of the Cook Islands 1977 Act, supra n 33; Sec 13 of Fiji's 1977, supra n 33; Sec 13 of New Zealand's 1977 Act, supra n 37; and Title II, sec 201 of the FCMA, supra n 24. Only a very few laws referred specifically to access by LLS to EEZ living resources. Art 13 of Morocco's 1981 Decree (supra n 33), eg, stated that

in consideration of African solidarity, Morocco will uphold the principle of privileged cooperation concerning biological resources with landlocked
In sum, concluded Gerald Moore in 1980, ...

While the concept of 200-mile jurisdiction over fisheries is now broadly accepted, national legislators seem to be cautious in fully implementing all the provisions of the Negotiating Texts. ...For the most part, however, recent national legislation reflects an awareness of the provisions of the Negotiating Texts and a desire not to run counter to them. Most recent legislation thus introduces tighter control over management of the extended zone and at least provides for the possibility of fishing by foreign vessels. The tendency, however, is to stress the element of coastal state control over 'access to surplus' rather than the obligation of the state to allow that access. The formal conditions set by the coastal state for foreign fishing operations in its waters conform by and large to the conditions exemplified in the Negotiating Texts. But, again, there is an impression that states do not feel inhibited by the list of conditions and will be prepared to take a broader view of negotiating access arrangements. So far as enforcement practice is concerned, there seems to be a move towards conformity with the provisions of the Negotiating Texts, but, again, not a total acceptance.  

C. Bilateral Agreements

Although, as we have seen above, few national laws specifically recognized the right of foreign States to the surplus of the TAC in extended jurisdictional zones, and some protests were lodged in the early 1970s at the establishment of such zones, during the life of UNCLOS III a

neighbouring countries under terms and conditions to be established by bilateral, regional or subregional agreements.

Cf Art 4 of Togo's 1977 Ordinance No 24, in Smith, supra Ch 11, n 269, 439. Writing in 1983, Ulfstein (supra Ch 11, n 244) found no instances of LLS having been given fishing rights. GDS had obtained such rights, probably as a result of traditional fishing in the area, a payment of fees or giving of other benefits.

Moore, supra n 30, 176-177. A typical example of such legislation is that of Mexico (supra n 33). Szekely (supra n 20, 199) points out that

The First Transitory Article of this law provides that more laws will be issued in order to regulate the extent of the specific jurisdictions which will be exercised in the zone and which were not detailed in the SNT because of lack of sufficient agreement. Mexico seems thus to be inclined to wait for such agreement to be perfected before proceeding to enact such specific laws.

Japan, eg, protested at the establishment of Mexico's EEZ (Fukui, supra Ch 11, n 13, 48); while both Japan and the Soviet Union protested against the American EFZ (Knight, supra n 24, 88-89). Subsequently, however, Japan, the Soviet Union et al. negotiated access agree-
large number of bilateral agreements were entered into between coastal and fishing States allowing the latter access to the surplus of the TAC.

According to Jean Carroz and Michel Savini, those agreements generally did not make any specific reference to negotiating text provisions requiring coastal States to allow access to the available surplus. Nevertheless,

it would appear that the ICNT has exerted a certain influence on a significant number of recent bilateral agreements in that foreign fishing fleets are authorized to fish only that part of the total allowable catch that cannot be harvested by the fishermen of the coastal state. The agreements concerned recognize explicitly that in the last analysis the coastal state alone determines the total allowable catch and its own harvesting capacity, even though several factors may be taken into account.\textsuperscript{50}

The latter were often only selectively reflected in the agreements and sometimes qualified by provisos that account would also have to be taken of unforeseen circumstances. Of those factors, observe Carroz and Savini, many agreements referred to the requirement that the TAC be determined on the basis of the best available scientific evidence and take into consideration interdependence of stocks, the work of appropriate international organizations and internationally accepted criteria.\textsuperscript{51}

Of the factors listed in the negotiating texts and Article 62(3) of the LOSC, apparently no bilateral agreements concluded during the period referred to the situation of LL-GDS, and few to the requirements of developing States of the same sub-region or region. The need to minimize economic


\textsuperscript{51} Ibid 48
dislocation in States whose nationals had habitually fished in the zone, on the other hand, was frequently mentioned in agreements granting access to zones of developed States.

In making the above observations, Carroz and Savini stress that factors guiding States in allocating surplus resources are not necessarily identified in the agreements themselves. This is particularly true of factors having political or ideological connotations. Although not specifically mentioned in the negotiating texts or the LOSC, a factor of increasing importance to the coastal State in allowing access to foreign fleets, for example, was the degree to which the fishing State concerned was co-operating with regard to trade in fish and fishery products.32

The degree of precision and detail included in bilateral agreements regarding terms and conditions of access to zones (fees and quotas, for example) varied considerably.33 However, the coastal State was invariably vested with enforcement authority under the agreements, and many agreements specified that foreign vessels were to comply with the former's fishery laws and regulations. They also frequently mentioned penalties in the form of fines, loss of license and seizure of gear and catches.34

In sum, concluded Carroz and Savini in 1979,

On the whole, bilateral agreements provide significant evidence that coastal states are in effect already implementing most of the provisions on fisheries which are to be found in the Negotiating Text before the Conference on the Law of the Sea. Contracting parties, however, do not indicate that they accept the new fishery regime in its entirety or that they will subscribe to it in the future. Indeed, coastal states granting access to living resources in extended zones of jurisdiction seem to be careful to avoid quoting or referring specifically to provisions of the Negotiating Text which limit or restrict national sovereignty.35

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33 1983 Analysis, supra n 50, 51-55; 1979 Analysis, supra n 50, 82-88

34 1983 Analysis, supra n 50, 55, 57
Acknowledging that many bilateral agreements were concluded during the period, the discussion would be incomplete without mentioning, albeit only briefly, that there continued numerous complaints by coastal States of unlicensed fishing in their zones. In one case at least, that of tuna, disputes hinged on differing interpretations of the law. Not recognizing coastal State jurisdiction over tuna, many American tuna fishermen chose not to negotiate a modus vivendi with foreign authorities. As a consequence, they were occasionally caught and subjected to strict penalties by coastal States for what the latter considered to be illegal fishing in their waters.\footnote{1979 Analysis, supra n 50, 97. Their 1983 Analysis (supra n 50) drew no conclusions as to the legal implications of bilateral agreements concluded during the period.}

D. International Fishery Organizations

The above extensions of marine fishery jurisdiction resulted not only in the bulk of the world's commercially important living marine resources coming under the control of coastal States, but also a significant increase in the number of stocks straddling more than one zone and often high seas areas beyond. This, in turn, generated changes in the organization and emphasis of international activities relating to fisheries, two of which are of particular legal significance.

Whereas numerous IFOs established in the post-World War II period were charged with a wide range of functions, they witnessed a reduction in both their direct management role and their geographical scope of responsibility in the second half of the 1970s. At the same time, however, their valuable scientific, information and co-ordinating functions were maintained and, in some cases, enhanced.

Perhaps the best example of the change is the Northwest Atlantic Fisheries Organization (NAFO), which replaced the International Commission for the Northwest Atlantic Fisheries (NEAFC) in 1979. Its basic objective is to encourage consultation and co-operation regarding the fishery resources of the Northwest Atlantic, "within the framework appropriate to the regime of extended coastal State jurisdiction". While also continuing to perform research functions and to offer conservation and management proposals on request, NAFO has no power to regulate activities in 200-mile zones and, indeed, must seek to ensure consistency between, on the one hand, its proposals regarding stocks occurring both within the Northwest Atlantic regulatory area and waters under national jurisdiction and measures taken by the coastal State within its own area. Professor Albert Koers suggests that at least in regard to the lack of IFO regula-

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57 See, eg, SOFA 1975, supra n 3, 33; and SOFA 1976, supra n 3, 28-29. Koers (supra Ch 8, n 8, 171) observes that functions of IFOs fall generally within 7 inter-related categories concerning: (1) full utilization of the living marine resources; (2) their conservation; (3) the economic efficiency of marine fisheries; (4) allocation of the catch; (5) research; (6) enforcement of fishery regulations; and (7) inter-use and intra-use conflicts.

58 See, eg, "Fisheries and the 200-mile zone"(1977) #88 OECD Observer 22; SOFA 1976, supra n 3, 28; SOFA 1977, supra n 3, 46. For more detailed consideration of IFOs during the period see J Gulland, "Fisheries: looking beyond the golden age"(1984) 8 Marine Policy 137; and E Miles, "Changes in the law of the sea: impact on international fisheries organizations"(1977) 4 ODILA 409.

59 This brief summary of NAFO's main features is taken from A Koers, "Commentary" in State Practice, supra Ch 11, n 273, 125.
tory powers in expanded coastal State waters, the weak position of the IFO concerning straddling stocks, and recognition of the need to continue multilateral scientific co-operation in fishery matters within broad maritime areas irrespective of jurisdictional boundaries, the NAFO Convention may have established a pattern that will be followed elsewhere.\footnote{Ibid 129; cf, Global situation, supra n 17, 103; and SOFA 1977, supra n 3, 146}

As well as leading to changes in existing IFOs, the extension of coastal State fishery jurisdiction combined with UNCLOS III deliberations to stimulate the creation of new regional IFOs. Having resolved in 1977 to extend their fishery jurisdiction to the maximum limit permitted by international law,\footnote{"Declaration on the Law of the Sea and Regional Fisheries Agency" adopted at the Eighth South Pacific Forum in 1977 (reproduced in (Sept 1977) 48 AFAR 468)} island States of the Southwestern Pacific, together with Australia and New Zealand, for example, in 1979 established the South Pacific Forum Fisheries Agency (SPFFA) in a desire "to promote regional co-operation and co-ordination in respect of fisheries policies" and "to facilitate the collection, analysis, evaluation and dissemination of relevant statistics, scientific and economic information about the living marine resources of the region, and in particular the highly migratory species".\footnote{Preamble to the South Pacific Forum Fisheries Agency Convention. A detailed discussion of the Convention and background relating thereto is found in C Aikman, "The South Pacific Forum Fisheries Agency" in Essays in International Law, Twenty-fifth Anniversary Commemorative Volume, Asian-African Legal Consultative Committee (New Delhi, 1981) 86; G Kent, "Fisheries politics in the South Pacific"(1980) 2 Ocean Yearbook 346, 375-381; and J Van Dyke and S Heftel, "Tuna management in the Pacific: an analysis of the South Pacific Forum Fisheries Agency" (1981) 3 U of Hawaii L R 1. The text of the Convention is appended to the latter article.}

Having deferred establishing a broadly-based IFO including both coastal and fishing States as mentioned in UNCLOS III negotiating texts and ultimately Article 64 of the
LOSCL Forum members were more immediately "[c]oncerned to secure the maximum benefits from the living marine resources of the region for their peoples and for the region as a whole and in particular the developing countries". Towards that end, and cognizant of the central importance of tuna resources in their zones, they expressly recognized that the coastal State has "sovereign rights, for the purpose of exploring and exploiting, conserving and managing the living marine resources, including highly migratory species," within its zone. At the same time, however, the Convention also stated that, without prejudice to those rights, effective co-operation for the conservation and optimum utilization of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal states in the region and all states involved in the harvesting of such resources.

A Committee was established to provide "detailed policy and administrative guidance and direction to the Agency" and "a forum for Parties to consult together on matters of com-

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63 Convention Preamble, supra n 62. At the Ninth South Pacific Forum, in 1978, the Forum decided to set up the SPFFA immediately and to "examine further" the more broadly-based organization comprising coastal and fishing States as had been recommended by officials (see Forum communiqué in (October 1978) 49 AFAR 496, 497). There was a widespread feeling among leaders that a broadly-based organization would be dominated by the major fishing nations and the Forum decided to postpone creation of such an organization until their sovereign rights to HMS were more firmly established (Van Dyke and Heftel, supra n 62, 15, 17).

64 See, eg, A Bergin, "Fisheries and the South Pacific" (1983) #22 Asia Pacific Community 20; and R Kearney, "The law of the sea and regional fisheries policy" (1978) 5 ODILA 249, 252, 255-260, and by the same author, "The development of tuna fisheries and the future for their management in the tropical, central and western Pacific" in Pacific Basin, supra n 11, 158.

65 Art III(1) of the SPFFA Convention, supra n 62

66 Art III(2)
mon concern in the field of fisheries". It was particularly charged with promoting "intra-regional co-ordination and co-operation" in the harmonization of management policies as well as co-operation in respect of relations with fishing nations, surveillance and enforcement, onshore fish processing, marketing and access to the 200-mile zones of other Parties. While not given direct fishery management functions, the Agency was made responsible for research, information and the provision of advice to Parties on a wide range of fishery development matters.

Although somewhat narrow in scope, the Convention was seen by Pacific Island States as a logical and necessary first step to more broadly-based co-operation with respect to fisheries both within and beyond the limits of national jurisdiction. During the first years of the Agency's operation there developed "a growing realisation...that regional co-operation in the development of fisheries policies is not just an attractive concept but is capable of practical implementation". Under the aegis of the Agency, significant advances were made with respect to the harmonization of coastal State approaches to the operation of fishing nations that augured well for more expanded co-operation within the region and constituted an inspiration for States elsewhere.

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67 Art V(1)
68 Art V(2)
69 Art VII
70 Director's Annual Report 1981/1982 (South Pacific Forum Fisheries Agency: Honiara, Solomon Islands) 1
71 On the harmonization and other co-operative activities see, eg, SOFA 1982, supra n 3, 46. David Ruzie ("Une expérience originale de coopération: la mise en valeur des ressources halieutiques du Golfe de Guinée"(1984) 111 JDI 848, 849) writes that African States in the Gulf of Guinea region "se sont...notamment, inspiré" by the example of the SPFFA when establishing the Comité régional des pêches du Golfe de Guinée in 1984.
The above developments concerning both existing and new IFOs reflected a growing international appreciation by 1982 that despite the new era of extended coastal State fishery jurisdiction, increased co-operation and co-ordination of activities on the part of coastal and fishing States alike, both within and beyond 200-mile resource zones, were imperative if all were to realize practical long-term benefits from the resources. While it would be an overstatement to claim that all existing IFOs were rapidly adjusting to the new realities, that overfishing (at least beyond zones of national jurisdiction) had ceased, or that new IFOs were quickly being created in all areas where none existed, the establishment of NAFO and SPFFA were at least hopeful signs.

III. The International Law of Marine Fisheries: 1982

When the international community gathered in Montego Bay, Jamaica, in December 1982 to sign the LOSC, it was

For problems within the Inter-American Tropical Tuna Commission (IATTC) and International Commission for the Conservation of Atlantic Tunas (ICCAT), for example, see J Joseph, "Management of tuna fisheries in the Eastern Pacific Ocean" in Pacific Basin, supra n 11, 145, 147-156; and Van Dyke and Heftel, supra n 62, 20-29. Writing in 1984, Gulland (supra n 58, 144-145) observes that

The way in which action will be formulated for tuna fishing in the future is far from clear. The problem is recognized in the text of the new Convention on the Law of the Sea, which calls on the countries concerned to collaborate, but offers no precise guidance on how this collaboration should be achieved. ...

An important aspect of the future management of tuna concerns the interests of coastal states in stocks which are caught in significant quantities both within and beyond national jurisdiction. With the important exception of the USA, most coastal states claim jurisdiction over tuna when they occur within their 200 mile zone. ...[A]lthough ingenious solutions have been proposed (for the international management of HNS) none has received unanimous support. In the absence of a commonly accepted approach to tuna management -- or a collapse of an important tuna stock to give urgency to negotiations -- it is likely that the decision-making process will proceed relatively slowly.
widely recognized that considerable time would pass before
the Convention was ratified by the sixty States necessary
for it to enter into force. What then was the applicable
law of marine fisheries at the conclusion of UNCLOS III?

Professor Robert Jennings observed in 1981 that

Whatever else that 'other' law may be, it will certainly not be the customary
international law of the seas as it existed at the commencement of the conference.
Customary law has been developed during that period...and there can be no doubt that
the existence of the conference contributed to the process. It could not in the na-
ture of things be otherwise. And certainly the existence of corresponding stable ele-
ments in the negotiating texts (apparently fixed items of the package, as it were) has
contributed not a little to the process. For where the requirement is to distil the
law from practice and opinion, any text which purports to represent a consensus and is
properly drafted, will be seized upon and may be in practice difficult or impossible
to displace.

While any attempt to define the precise impact of UN-
CLOS III proceedings and negotiating texts on the law relat-
ing to marine fisheries and to discuss in detail the legal
regime as it stood at the end of 1982 would require a sepa-
rate volume in itself, there is nevertheless value in exam-
in ing at least a few issues and offering some tentative con-
clusions with respect to the fishery regime of the exclusive
economic zone.

73 Art 308(1) of the LOSC provides that the Convention
will enter into force 12 months after the date of de-
posit of the sixtieth instrument of ratification or
accession.

74 R Jennings, "Law-making and package deal" in Mélanges
offerts à Paul Reuter: le droit international: unité et
out: the United States and the UN Convention on the Law
of the Sea" in Consensus and Confrontation, supra Ch
11, n 11, 73, 114; "The Exclusive economic zone: First
(Preliminary) Report of the Committee" in 60th ILA Con-
Report'] 304; C Fleischer, "Significance of the Conven-
tion: Second Committee issues" in 1982 Convention,
supra n 17, 53, 57-58; B Oxman,"Customary international
law in the absence of widespread ratification of the
U.N. Convention on the Law of the Sea" in ibid 668,
673; and T Treves, "The U.N. Convention on the Law of
the Sea as a non-universally accepted instrument: notes
on the Convention and customary law" in ibid 685, 687.
In its modern jurisprudence, the Court has commented upon the often close relationship between treaties and customary international law. In particular, it has observed that treaties may declare existing law;\textsuperscript{75} crystallize emerg-

\textsuperscript{75} In so doing, it is useful to recall the following observation by Professor Pitt Cobbett (\textit{Cases on International Law} (1947, 6th ed; Walker, ed) i, 5) about the development of customary international law:

The growth of usage and its development into custom may be likened to the formation of a path across a common. At first, each wayfarer pursues his own course; gradually, by reason either of its directness or on some other ground of apparent utility, some particular route is followed by the majority, this route next assumes the character of a track, discernible but not as yet well defined, from which deviation, however, now becomes more rare; whilst in its final stage the route assumes the shape of a well defined path, habitually followed by all who pass that way. And yet it would be difficult to point out at what precise moment this route acquired the character of an acknowledged path.

While, as Bill Edeson has observed (personal communication) the tempo of modern life may have seen the above 'wayfarer' replaced by the bulldozer, the general point remains valid.


\textsuperscript{76} In a number of decisions, \textit{eg}, the Court referred to certain provision in the Vienna Convention on the Law of Treaties as being codifications of customary international law. \textit{See, eg, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, in ICJ Reports 1971, p 16, 47. See also Annex IV infra.
In the *North Sea Continental Shelf* cases, *eg*, Denmark and the Netherlands contended (*North Sea Continental Shelf*, Judgment, *ICJ Reports* 1969, p 3, 38) that "the process of the definition and consolidation of the merging customary law [on the continental shelf] took place through the work of the International Law Commission, the reaction of governments to that work, and the proceedings of [UNCLOS I]'; and this emerging customary law became "crystallized in the adoption of the Continental Shelf Convention by the Conference.

The Court agreed that such a process was possible, conceding that Arts 1-3 of the Convention containing the basic definition of the continental shelf concept and the rights of States relating thereto were "the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" *(ibid* 39). See also text accompanying n 83 infra.

In the *North Sea Continental Shelf* cases, Denmark and the Netherlands contended that a particular Article of the 1958 Continental Shelf Convention (499 *UNTS* 311) had subsequently generated a new rule of customary international law. The ICJ observed (*North Sea Continental Shelf*, Judgment, *ICJ Reports* 1969, p 3, 41) that the contention involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.

"At the same time," cautioned the ICJ, such a result "is not lightly to be regarded as having been attained" *(ibid*). For customary law to be generated, the provision concerned "should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law" *(ibid* 41-42). Regard also had to be paid to the relationship between the provision and others in the convention *(ibid* 42).

For a more detailed discussion of the declaratory, crystallizing and generating effects of treaties on customary international law see sources cited n 75 supra and Judge Jiménez de Aréchaga *(supra* Ch 5, n 102, 14ff), who concludes that
ried a step further in the ICJ's 1974 Fisheries Jurisdiction Judgments, in which the Court recognized that after UNCLOS II, international law developed through State practice "on the basis of the debates and near-agreements at the Conference," and that the concepts of the fishery zone and preferential fishing rights for coastal States "crystallized as customary law...arising out of the general consensus revealed at the Conference". By emphasizing the general consensus of States rather than insisting on strict proof of State consent as found in a binding convention, observes Judge Jiménez de Aréchaga, the Court accepted "in appropriate circumstances a quickly maturing practice as a basis for customary rules".

As well,

The accent was displaced from the formal instrument to the conference process in itself, as being capable of revealing a consensus of the participating States, irrespective of the traditional requirements of adoption of a text, signature and ratification of a treaty.

Important for present purposes was the reflection of the above relationship between law-making conferences, treaties and customary international law in the ICJ's 1982 Tunisia-Libya Continental Shelf Judgment. Explaining the legal reasoning underpinning its decision, the Court stated that it had necessarily

an opposition or differentiation between treaty law and customary international law is not one to be made or applied too rigidly, since a rule contained in a treaty may be or become a rule of customary international law. In this sense a rigid distinction between the two, as though they existed in sealed compartments, would be incorrect.

79 Fisheries Jurisdiction (United Kingdom v Iceland) Merits, Judgment, ICJ Reports 1974, 3, 23. See also Ch 9 supra for a discussion of the Judgment.

80 E Jiménez de Aréchaga, "Customary international law and the Conference on the Law of the Sea" in Lachs Essays, supra Ch 11, n 156, 577

81 Ibid 580

82 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982, p 18
to take account of the progress made by [UNCLOS III]...; for it could not ignore any
 provision of the draft convention if it came to the conclusion that the content of
 such provision is binding upon all members of the international community because it
 embodies or crystallizes a pre-existing or emergent rule of customary law.

In a significant, albeit frustratingly brief, dictum, the ICJ observed simply that "the concept of the exclusive economic zone... may be regarded as part of modern international law". Considered outside the parameters of the instant dispute, no effort was made in the Judgment to address undoubtedly the most important succeeding question: was the EEZ regime under customary international law essentially that set out in the LOSC, or did it comprise only a few fundamental principles?

Answers to the latter question differ, as is clear from general comments in Individual Opinions appended to the Judgment immediately above. Jiménez de Aréchaga noted the "widespread recognition" of the 200-mile EEZ, in which the coastal State "has sovereign rights, for the purpose of ex-

Ibid 38

Ibid 74. This conclusion is widely endorsed by other legal authorities. See, eg, H Caminos and M Molitor, "Progressive development of international law and the package deal" (1985) 79 AJIL 871, 888; comment by Jorge Castañoeda, in 1982 Convention, supra n 17, 366; Goy, supra n 75, 53; G de Lacharrière, "La réforme du droit de la mer et le rôle de la Conférence des Nations Unies" in Nouveau droit, supra Ch 11, n 56, 1, 27, 28; Treat, supra n 75, 268, 272; and D Vignes, "L'Océan schismatique: considérations sur la codification du droit de la mer" in Lachs Essays, supra Ch 11, n 156, 685, 692.

Anatoly Kolodkin and Anatoly Zakharov ("The UN Convention on the Law of the Sea and customary law" in Consensus and Confrontation, supra Ch 11, n 11, 166, 168), however, deny that "any specific concept of a coastal zone has emerged as customary law".

B Oxman, "Customary international law and the exclusive economic zone" in Consensus and Confrontation, supra Ch 11, n 11, 138, 155-156
ploring and exploiting all natural resources". In that regard, he posited,

The provisions of the negotiating texts and of the draft convention and the consensus which emerged at the Conference, have had...a constitutive or generating legal effect, serving as the focal point for and as the authoritative guide to a consistent and uniform practice of States. The proclamation by 86 coastal States of economic zones, fishery zones or fishery conservation zones, made in conformity with the texts of the Conference, constitutes a widespread practice of States which has hardened into a customary rule, an irreversible part of today's law of the sea.

Judge Shigeru Oda accepted that "the Court need have few qualms in acknowledging the general concept of the exclusive economic zone as having entered the realm of customary international law". At the same time, however, he cautioned that quite apart from the treaty-making process which had resulted in a "cobbling together [of] a patchwork of ideas which are not necessarily harmonious," the sui generis nature of the EEZ regime would require "much more careful examination before the rules so far adumbrated may be viewed as susceptible of adoption into existing law".

Indicating what he considered to be ambiguities and uncertainties concerning the conservation and management provisions of the LOSC which made the EEZ regime difficult to implement, Oda concluded that

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86 Separate Opinion (Jimenez de Arechaga) in ICJ Reports 1982, p 100, 115
87 Ibid. See in this regard text accompanying nn 28-30 and 74 supra.
88 Dissenting Opinion (Oda) in ibid, 157, 228-229 (emphasis added)
89 Ibid 171
90 Ibid 229; cf, Treves, supra n 74, 687; Caminos and Molitor (supra n 84, 888), who observe that "clearly, exclusive economic zones as they now exist under customary international law may not resemble in all respects the EEZ regime embodied in the 1982 Convention"; and Professor Jonathan Charney ("The exclusive economic zone and public international law"(1985) 15 ODILA 233, 239), who predicts that the EEZ Convention regime "is unlikely to represent the existing rule of international law in all respects".
though the idea of the exclusive economic zone undoubtedly seems to have been accepted in international law, the competence of the coastal State and the mechanism for the functioning of the new regime do not yet appear to have undergone thorough examination. Until the draft convention becomes treaty law, it is premature and equivocal to speak of the Exclusive Economic Zone as if it had given rise to principles and rules of international law.91

Scattered dicta do indicate, however, that he was apparently prepared to recognize some degree of coastal State jurisdiction over fisheries within the zone under customary law.92

Did, in fact, the various negotiating texts and the LOSC themselves 'crystallize' or 'generate' a new customary legal regime of the EEZ, including the various rights and obligations enshrined in the Convention -- as the Court in its 1969 North Sea Continental Shelf Judgment declared possible?93 Or, rather, did the Conference consensus on the EEZ lead to the recognition in general law of only a few fundamental concepts -- as the Court agreed in its 1974 Fisheries Jurisdiction Judgment had been the case with respect to the EFZ and preferential fishing rights?94

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91 Dissenting Opinion (Oda), supra n 88, 230-231 (emphasis added). Later in his Opinion (ibid 233), Oda states that "the nature of the Exclusive Economic Zone, and its regime, particularly in regard to the rights and duties of the coastal State, is still comparatively unclear, but the 200-mile limit has been firmly established". His comments on select aspects of the fishery regime of the LOSC are discussed in pp 229-231 of his Dissenting Opinion and expanded in a 1983 article (supra Ch 11, n 249).

92 At one point, for example, (supra n 100, 231) that the EEZ had "essentially been designed to reserve for the coastal State the right to exercise jurisdiction for the purpose of exploitation of fishery resources". While that regime "should be considered as derogation from traditional international law," he continues, it "can be justified...with the development of international law"

93 See n 78 supra.

94 See text accompanying n 79 supra. Given the Court's confirmation that the "concept" of the EEZ was part of customary international law in 1982, it would appear
While some may invoke the LOSC itself as evidence of customary international law, the complex nature of Conference negotiations makes it necessary to look to State practice beyond UNCLOS III for an answer to the above questions. As Fleischer explains,

there will often be doubt and uncertainty regarding the relevance and weight to be accorded [proposals to and recommendations by an international conference] in establishing the content of the rules of general international law outside the areas that have been formally regulated by a treaty binding on all parties. Consequently, one may also be left with doubts and uncertainties concerning the question of what exactly the prevailing law is.

Statements concerning existing general international law in those matters and the rights and duties of the state must, therefore always be understood and qualified in the light of the uncertainties of general international law.

In the case of fisheries, those uncertainties are compounded by inherent weaknesses of major constituents of that that 'concept' must have some legal content, otherwise the result would be a jurisprudential mirage. To take Judge Oda's comments (text accompanying nn 90 and 91 supra) to the extreme would appear to deny the EEZ concept most, if not all, content. Although the Judge does not discuss the matter in detail, several of his comments (see nn 91 and 92 supra) indicate that he probably did not intend to go that far.

Cf Burke, supra Ch 11, n 11, 333; 1st ILA EEZ Report, supra n 74, ibid; L Lee, "The Law of the Sea Convention and third States"(1983) 77 AJIL 541, 567; and Carolyn Hudson ("Fishery and economic zones as customary international law"(1980) 17 SDLR 661, 686), who points out that Acquiescence, or its absence,..., may not necessarily be inferred from a list of those States at UNCLOS III which have either fostered or protested the EEZ concept. The verbalized, apparent positions of individual UNCLOS delegations may not reflect their convictions as to existing or desirable law. Conference positions may be adopted for other reasons including efforts to gain trade concessions or pledges or reciprocal support on issues tangentially or completely unrelated to the UNCLOS. Therefore, what a State does in practice is more credible evidence of its national policy than its position at UNCLOS III.

Fleischer, supra n 74, 59; cf, Charney, supra n 90, 234; J Gamble Jr and M Frankowska, "The 1982 Convention and customary international law of the sea: observations, a framework, and a warning"(1984) 21 SDLR 491, 510-511; R Jennings, "The discipline of international law" in 57th ILA Conference Report (1978) 621, 625; and Schweisfurth, supra n 75, 578.
State practice: national legislation and fishery agreements. National laws and regulations may not reflect the State's complete view of the international law governing marine fisheries, nor its intentions regarding implementation. Nor may they fully conform to final provisions of the LOSC. Similarly, fishery agreements may explicitly indicate neither reasons for allowing the foreign State concerned access nor whether that access was granted in recognition of a legal obligation to do so. Nevertheless, some obser-

See, eg, Charney, supra n 90, 240-241.

See, eg, Office of the Special Representative of the Secretary-General for the Law of the Sea, The Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone (UN, 1986) iii; "The freedom of the high seas and the exclusive economic zone: the problem of interactions" in 61st ILA Conference Report (1985) 183, 185; and nn 28-30 and accompanying text supra. In spite of the shortcomings of legislation, argues Burke (remark in Consensus and Confrontation, supra Ch 11, n 11, 162), "what states think they can do in their 200-mile zones, as evidenced by their legislation, is currently still the best evidence of customary law. The Convention will be secondary for some time." Occasionally, State enforcement activities provide evidence of fishery jurisdiction. Unfortunately, information regarding enforcement action are patchy or only sometimes documented. See generally on this subject, I Shearer, "Problems of jurisdiction and law enforcement against delinquent vessels" (1986) 35 ICLQ 320.

Cf Fleischer (supra n 17, 262, 274), who explains (ibid 267) that an obligation to allow participation in the exploitation of a zone's resources may, on the one hand, be closely connected to...the world's nutritional problems, a possible surplus over the harvesting capacity of a coastal state, and the need to leave that surplus to others in order to attain the objective of optimum utilization. On the other hand, the granting of access to foreign fishermen may be justified in itself, independent of the ideas of full utilization and coastal state harvesting capacity.

The practice of several states has allowed for foreign participation in a far greater range of cases than those provided for by the texts of UNCLOS III. It may seem a paradox, but the result of this may be that there is less possibility of developing a uniform rule of customary law on participation. The fact that several coastal states obviously grant access without feeling bound to apply the Convention's criteria may be interpreted to mean that a coastal state has complete freedom of
vations may be made on possible developments in customary international law by considering State practice in light of UNCLOS III proceedings and the various negotiating texts.

From the brief survey of State practice discussed above, it seems clear that by 1982, States were legally entitled to claim 200-mile maritime zones in which they could exercise sovereign rights for the purpose of exploring and exploiting, conserving and managing living marine resources. Those rights comprehended the power to allocate choice as to whether or not foreign states will be allowed to fish, there being no legal right of access.

In the above regard, the ICJ stated generally in its North Sea Continental Shelf Judgment (supra n 77, 44-45) that

the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so -- especially considering that they might have been motivated by other obvious factors.

See, eg, Ch 8, nn 63 and 67 for a discussion of wider factors influencing decisions by Australia and New Zealand to conclude fishery agreements with Japan.

See nn 17-56 and accompanying text supra.

Cf Burke, supra Ch 11, n 11, 332; Caminos and Molitor, supra n 84, 888; Charney, supra n 90, 241, 249; Fleischer, supra n 17, 247; Jiménez de Aréchaga, supra text accompanying n 86; Oda, supra n 91; and Ulfstein, supra Ch 11, n 244, 10. See also text accompanying nn 18, 32 and 33 supra.

Fleischer cautions against over-emphasizing the difference between 'sovereign rights', 'jurisdiction' and similar terms found in national claims (see text accompanying nn 33-35 supra). "Obviously," he writes, "the concept of 'sovereign rights' contains the idea of a stronger position of the coastal state than 'jurisdiction' does" (supra n 17, 251). Nevertheless, he continues,

the use of a term such as 'jurisdiction' in some instances does not necessarily weaken the formation of customary law based on 'sovereign rights.' The word 'jurisdiction' is completely neutral and applicable to 'sovereign' as well as to other rights accorded under international law. While the value of a national law based on jurisdiction alone is smaller than that of a law based on 'sovereign rights' in order to support a 'sovereign' regime in the extended zone, there is nothing in 'jurisdic-
fishing rights, as well as to regulate, limit or even prohibit foreign fishing activities in the zone for reasons of national interest.  

What limitations, if any, were there to those sovereign rights? National legislation reflected few of the provisions of the negotiating texts excluding those immediately above. Similarly, coastal States were careful not to

tion' which per se serves to deny the existence of 'sovereign rights' or to counter-balance a practice which is otherwise in evidence.

It did not matter that some claims in national legislation were expressed in terms such as 'territory', on the one hand, and 'authority' or 'jurisdiction,' on the other, explains Fleischer (ibid 254):

Once the general competence of the coastal state to establish a 200-mile resource zone with the right of decision as to who is entitled to fish there is recognized, the regime of 'sovereign rights' is in effect put into practice.

In the latter regard, he posits (ibid 252), the "true manifestation" of a State's 'sovereign rights' must be national legislation and the enforcement thereof, rather than in the practice of bilateral agreements. The latter, he suggests,

may, however, be regarded as practical instruments in the exercise of sovereign rights, in particular insofar as the coastal state by its own will chooses to allocate fishing rights to other states; or, if a coastal state is under an obligation to do so because of the general rules of customary law, bilateral agreements may be the most convenient way in which to execute such an obligation.

A bilateral agreement between the coastal state and another state interested in fishing in the extended zone may further be looked upon as a recognition by that other state of the rights of the coastal state. This strengthens customary law based on 'sovereign rights'.

102 Cf Fleischer, supra n 17, 262; and Ulfstein, supra Ch 11, n 244, 22. See also nn 45, 48, 50, 54 and accompanying text supra.

103 See nn 44 and 48 and accompanying text supra. Burke contends (supra Ch 11, n 11, 332-333), for example, that, except for the above basic principles, State practice as documented by national legislation, revealed that

the major provisions of the [LOSC] have not found their way into customary law by this route. In particular, state practice provides no basis for inferring general acceptance of any customary law concerning the following: allowable catch, determination of harvesting capacity, access to a surplus, endangering a target species, identification of such species,
recognize explicitly limitations to their rights in agree-
ments concluded with fishing States.104

There was little or no practice, for example, support-
ing general limitations of those rights in regard to stocks
that migrated to other zones or spent part of their life in
the high seas. Although a few States specifically rejected
coastal State jurisdiction over tuna within the 200-mile
zone,105 that might have been insufficient to found a rule
of law on HMS. Jurisprudentially speaking, Fleischer sees
the basic issue being that of burden of proof; that is,

whether evidence of a uniform practice is required in order to prove a specific rule
on the sovereign rights of a coastal state in regard to highly migratory species

prohibiting the initiation of a high seas fishery on anadromous species,
a requirement that high seas fishing states recognize or defer to coastal
states rights, duties and interests concerning highly migratory species
or straddling stocks or a requirement that coastal states cooperate with
high seas fishing states in utilization and conservation of highly migra-
tory species within a coastal state’s EEZ. Nor can one find national
legislation that recognizes obligations regarding LL/GDSs.

At the same time, however, Burke is by no means unaware
of the deficiencies of national legislation for deter-
mining customary international law (see text accompany-
ing nn 97 and 98 supra).

Amongst others, Gerald Moore (Coastal State Re-
quirements for Foreign Fishing (FAO Legislative Study
No 21, Rev 2; 1985) 7, n 3) points out that the vague-
ness or silence of national legislation or treaties
does not necessarily indicate a rejection of obliga-
tions:

National legislation by its very nature tends to be concerned more with
relations between the state and individuals, whether national or foreign,
and with relations among individuals rather than with inter-state rela-
tions. Legislative drafters are also traditionally cautious in using
language that unnecessarily acknowledges obligations of the state under
international law. The absence of any reference in national legislation
to responsibilities of the coastal state under international law does
not, of course, mean that such responsibilities do not exist or are not
accepted by the state

Cf, W Edeson, "Access by foreign fishing vessels to
economic zones, and problems of enforcement" in Pros-
ppects for a New Law of the Sea (1982; Martin Place
Papers No 2; I Shearer, ed) 55, 73.

104 See text accompanying n 55 supra.

105 See n 38 and accompanying text supra.
within its 200-mile zone or whether it is the possible exception for such species which needs a specific basis in state practice, once the general right of coastal states over the resources has been established.106

An examination of both State practice and the negotiating history of the LOSC provision covering HMS, however, clearly indicates that the vast majority of States consistently held the view that the coastal State had sovereign rights over HMS when the latter were found in the EEZ, and that view is all but universally accepted as being reflected in the Convention.107 The present writer would suggest, therefore, that the burden definitely rested on those few States holding against coastal State jurisdiction over tuna to prove their interpretation of customary international law on the matter was universally valid in 1982.108

106 Fleischer, supra n 17, 256

107 On this subject see, eg, Ch 11, nn 24, 200, 286 and 287 and this Chapter, nn 36-38 and accompanying texts supra. Burke asserts (supra Ch 11, n 11, 335) that excluding The Bahamas and the United States, "there is total agreement among States that highly migratory species are subject to coastal state jurisdiction as a matter of state practice". As for arguments that Japan claimed jurisdiction over tuna, he explains (supra Ch 11, n 234, 313, n 23),

The Japanese law on provisional measures relating to the fishing zone [see nn 21 and 38 and accompanying text supra] provides for jurisdiction over fisheries without qualification within the fishing zone. Article 6 thereof forbids foreigners to catch fish in the zone without permission except for highly migratory species prescribed by Cabinet order. Law No. 31, 2 May 1977, Article 3 of the Enforcement Order of 17 June 1977 identifies some highly migratory species for the purpose of Article 6. It is apparent, therefore, that Japan regards these species as a whole as subject to its jurisdiction in its zone and exercises that jurisdiction to allow foreign fishing for certain species without the necessity of permission.

In his view, the position of the two States was contrary to international law.

108 Cf Burke, supra Ch 11, n 11, 335-336. It is suggested that a fundamental general principle may be at stake in this matter: that is, the right of one or a very few States with only a relatively modest interest in a matter (speaking in both national and global terms) to prevent recognition of a specific rule of customary international law supported by the overwhelming major-
More generally, however, there is support for the view that the coastal State's sovereign rights were limited by a general obligation to adopt effective conservation measures for fishery resources in its own zone and to enter into negotiations and to co-operate with other States in the adoption of conservation measures, including use of appropriate IFOs, for stocks moving beyond waters under its jurisdiction. As has been observed, conservation was a primary reason for all moves toward extended fishery jurisdiction since the late 19th century, and the general conservation obligation under customary international law was recognized, for example, by both the ILC during its deliberations on a fishery convention, and the ICJ in its Fisheries Jurisdiction Judgments. It was also enshrined in the 1958.

...
Fisheries Convention\textsuperscript{112} and indirectly reflected in the 1958 High Seas Convention.\textsuperscript{113} While admittedly applicable at the time to the high seas, it can well be argued that with the subsequent emergence of the concept of the resource-rich 200-mile zone the obligation under customary international law extended to that zone as well. This is perhaps indicated by the fact that the conservation article in the LOSC was uncontroversial and was one of the first 'fixed' in the negotiating texts (see Article 61, Table 10). In addition, it may be recalled, the need for co-operation in conservation and management activities was also stressed by various States in official pronouncements during the course of UN-CLOS III.\textsuperscript{114}

Compared to conservation, the existence of a general obligation in 1982 to allow foreign access to EEZ fishery resources is more difficult to prove.\textsuperscript{115} Although there are some instances of coastal States having acknowledged an

\textsuperscript{112} Arts 1(2) and 2, 559 \textit{UNTS} 285

\textsuperscript{113} Art 2, 450 \textit{UNTS} 11

\textsuperscript{114} See, \textit{eg}, Ch 11, nn 24 and 200. Whether they were referring to a legal obligation, however, is not certain from the records.

\textsuperscript{115} Cf Burke, \textit{supra} Ch 11, n 11, 332; Treves, \textit{supra} n 74, 689; and Fleischer, who writes (\textit{supra} n 74, 67) that

As long as the Convention is not accepted and brought into force, the main uncertainty in the field of living resources will be found in respect of the obligations of coastal States, and, in particular, in regard to the obligation to give access to the fishing vessels of foreign states. Doubts may arise as to whether there is any legal obligation whatsoever and as to the conditions and criteria for such access.

This is not at all unusual in international law, as Professor Louis Sohn (\textit{supra} n 75, 232-233) observes:

two requirements [for the formation of customary international law] -- uniform practice and its acceptance as law -- are widely recognized though out without dispute. The more difficult questions ask what is necessary to show either or both of those elements. In other words, the difficulties with customary international law are mainly questions of evidence or at least of proof.
obligation to allow access to surplus resources,\textsuperscript{116} evidence of such admissions is difficult to locate and the obligation was rarely, if ever, explicitly recognized in either national legislation or fishery agreements.\textsuperscript{117}

An important, as yet unanswered question in regard to the question of access to surplus resources, however, is the significance, if any, of the 'package deal' understanding that was undoubtedly central to the negotiations and results achieved at UNCLOS III.\textsuperscript{118} De Lacharrière observes that the 'package deal' was seen to operate at different levels:

\begin{quote}
le 'package deal' est aussi vaste que possible, c'est à dire que la liaison établie s'étend à la solution de tous les problèmes qui sont inscrit à l'ordre du jour de cette réunion. Toutefois, les débats ont fréquemment faire apparaître des liens particulièrement étroits entre certains questions; on a ainsi fait état de divers 'mini-packages' à l'intérieur de celui qui porte sur l'ensemble.\textsuperscript{119}
\end{quote}

At its most comprehensive, of course, the 'package' consisted of the entire Convention.\textsuperscript{120} Viewed from the tra-

\textsuperscript{116} See, eg, Ch 11, nn 24, and 26; and n 44 supra.

\textsuperscript{117} See, eg, nn 44, 48, 50 and 55 and accompanying text supra.

\textsuperscript{118} See, eg, Ch 11, nn 9, 10, 177, 178, 214 and 215 and accompanying text supra.

\textsuperscript{119} G de Lacharrière, "Aspects juridiques de la négociation sur un 'package deal' à la Conférence des Nations Unies sur le droit de la mer" in Essays in Honour of Erik Castren (1979) 30. For further references to 'packages' at UNCLOS III see, eg, D Colson, "The United States, the law of the sea, and the Pacific" in Consensus and Confrontation, supra Ch 11, n 11, 36, 39; H Djalal, "The effects on the Law of the Sea Convention on the norms that now govern ocean activities" in Consensus and Confrontation, supra Ch 11, n 11, 50, 51-52; T Koh's comment in Consensus and Confrontation, supra Ch 11, n 11, 59-61, and supra Ch 11, n 228, xxxiv; and B Vukas, "The impact of the Third United Nations Conference on the Law of the Sea" in New LOS, supra Ch 11, n 265, 33, 43-44.

\textsuperscript{120} The comprehensive 'package deal' concept was referred to at the signing session of the Conference (A/Conf.62 /PV.187, pp.28-30) by the Fijian representative:

\begin{quote}
each chapter of the Convention is an integral part of the whole. To attempt to rationalize that parts of the Convention are simply customary
ditional perspective of the 'distinguishing marks' of customary international law formation, the position that all provisions of the LOSC were inseparably linked with respect to the generation of customary international law is a radical departure from existing practice and therefore probably untenable. While not discussing the issue in detail, the ICJ, for example, indicated in its 1982 Judgment referred to above that it would be possible for certain provisions of the Convention to become customary law, implying at the same time that others might not. Similarly, other observers take the view that the traditionally-accepted processes of customary international law-making continue to apply. According to Luke Lee, for example,

Even if the intent of negotiators of the Law of the Sea Convention was to limit the benefits of all its provisions to the signatories as parties to a so-called package deal, non-party states may enjoy the same benefits if the particular provision of the Convention reflects customary international law or has since acquired the status of a customary rule through widespread acceptance as law and confirmation by state practice.

international law, and thereby to separate them from others, is to ignore the fact that what is customary international law has been clarified or modified and that if such provisions were preserved it was done as a quid pro quo for other provisions. Any selective use of the Convention, therefore, will be not only inappropriate but also unacceptable.

See Ch 9, n 85 supra.

See nn 77 and 78 supra.

See text accompanying n 83 supra.

Lee, supra n 95, 568; cf, Caminos and Molitor, supra n 84, 887-889; Charney, supra n 90, 234; and de Lacharriere (supra n 119, 32) who asserts that

alors que le principe du 'paquet' est supposé gouverner l'ensemble des negociations, le droit coutumier peut choisir de ne s'appliquer qu'à certaines seulement des questions traitées et donc se libérer de ce principe.

In this regard, Oxman (comment in Consensus and Confrontation, supra Ch 11, n 11, 61-63) adds that there was no real sense that the total Convention involved a total commitment to every article in terms of the actual preferences of states. In the end they yielded to holding the total package together for fear that if they started pulling it apart, it would all fall apart.
Insofar as smaller 'packages' are concerned, however, the position becomes more complicated and uncertain. References have been made to a 'mini-package' consisting of the EEZ regime, and what even might be described as a 'micro-mini-package' relating specifically to fisheries. As Oxman recalls, under the LOSC the rights of the coastal State are qualified by duties to ensure conservation, protect the ecological balance, and to promote optimum utilization, as well as special rules regarding anadromous species, catadromous species, highly migratory species, marine mammals, stocks that traverse the limits of a particular state's economic zone, as well as obligations to protect the interests of landlocked and geographically disadvantaged states. Any participant in the negotiation of these articles knows that these limitations were necessary to secure a consensus on the underlying principle of sovereign rights.

It follows, he argues, that the invocation of the LOSC as a source of coastal State sovereign rights but not obligations "is a sham. The argument is in fact an attempt to propound a rule of law different from that of the Convention, masked by a selection of quids without the corresponding quos." The latter point may well, in fact, be the key factor in determining the basic content of the EEZ concept. Should the subjective element, opinio juris, in the customary law-formation process be represented by Conference consensus on the above catalogue of issues as the irreducible nucleus of the fishery regime that might be incorporated into customary international law (a stance not taken by Oxman), there appears as yet insufficient explicit evidence of, say, the protection of LLGDS interests, to warrant the conclusion that the above 'micro-mini-package' was part of customary international law by 1982. Such an approach, however, would appear both to cast doubts on the validity under customary

125 See Ch 11, nn 214 and 215 supra.

126 Oxman, supra n 85, 157; cf, comment by A Beesley in 1982 Convention, supra n 17, 368-370; and Koh, Ch 11, n 228, xxxiv supra. See also Ch 11, n 207 supra.

127 Ibid

128 See, eg, comment by Ulfstein, supra n 47.
international law of the coastal State's sovereign rights and to rob the EEZ concept of any juridical content although, as witnessed above, the ICJ concluded that it was part of customary law.\(^{129}\)

In this regard, there is value in recalling the negotiating history of the Conference and various pronouncements by the ICJ. First, as has been seen, the general global movement towards establishment of EEZs in national legislation took place in 1977 and later (see Table 10) -- after the main provisions relating to sovereign rights of the coastal State and duties with respect to conservation and access by other States had been accepted by the Conference, but before final agreement had been reached on, inter alia, anadromous species, the rights of LLGDS and MSR.\(^{130}\) There is room to suggest, therefore, the existence of a consensus involving core provisions agreed to early in the Conference that triggered State practice and led to the emergence of the EEZ concept in customary international law. In other words, there was a smaller 'micro-mini-package' than that referred to by Oxman which comprised the smallest 'package deal' on the EEZ.

Its contents? As indicated above, sovereign rights for the coastal State combined with a general conservation obligation seem clearly to have been essential components of the 'package'. There is less explicit evidence of a right of access by fishing States to surplus resources although arguments can be raised in support thereof. It is clear, for example, that throughout UNCLOS III, fishing States placed

\(^{129}\) See text accompanying n 84 supra.

\(^{130}\) Cf Anand, supra n 74, 114; Jennings, text accompanying n 74 supra; De Lacharriere, supra n 84, 28-29; and Fleischer (supra n 17, 242), eg, observes that it was only through the debates at UNCLOS III on the system of 200-mile economic zones and after having written this system into the UNCLOS III negotiating text in 1975 that extensions to 200 miles became a general and dominant practice in the world community.

In regard to the above see, eg, comment by Buzan, Ch 11, n 108, and Storer, supra Ch 11, n 113 supra.
great emphasis on gaining access to surplus resources of the EEZ and that recognition of coastal State sovereign rights in the zone was predicated on such recognition.\textsuperscript{131} In this regard, it will be recalled, the ICJ stated in its \textit{North Sea Continental Shelf} Judgments, that for a treaty provision to generate customary international law it must be considered in relation to other provisions.\textsuperscript{132} Given the intimate relationship between, \textit{inter alia}, coastal State sovereign rights and the right of access by other fishing States to surplus resources, it could very well be argued that the latter right was also an indispensable component of the 'package' that became customary law. As Fleischer suggests, for example,

\begin{quote}

one cannot reap the benefits of the new legal developments ([arising from the Conference] without accepting the corresponding obligations...may turn out to be the correct one as regards the link between certain major features of the Convention within specific fields, such as the relationship between the sovereign rights over biological resources within 200 miles and the obligation to make surplus fisheries available to foreign states.\textsuperscript{133}
\end{quote}

The view that a state cannot apply provisions that are favorable to it unless it respects the main obligations and applies the main principles which are more or less directly connected to the matter at hand. For example, a coastal state cannot invoke the system of a

\begin{itemize}

\item \textsuperscript{131} See, \textit{eg}, Ch 11, n 82 and nn 21, 31 and 84 and accompanying text \textit{supra} and text accompanying n 127 \textit{supra}.

\item \textsuperscript{132} See n 78 \textit{supra}.

\item \textsuperscript{133} Fleischer, \textit{supra} n 74, 62-63; \textit{cf}, Vukas (\textit{supra} n 119, 41, 42; emphasis added) who sees "solid reasons" in State practice why the "regime of the Exclusive Economic Zone...already forms part of the corpus of the law of the sea", and that necessarily means that all the basic principles constituting the regime are also part of customary law. Once we claim that the regime of the economic zone has been adopted in customary law, that means that fundamental norms concerning the rights and duties of coastal as well as other States do not depend upon the number of ratifications of the Law of the Sea Convention or on the attitude towards that Convention of States non-parties.

\end{itemize}
200-mile limit unless that state respects the main obligations to give access to foreign fishing...

In this version, the 'package deal' concept may be considered as part of the general law in regard to the major features of the Convention and the quid pro quo's of UNCLOS III, even if the detailed provisions of different articles and the specific contractual and institutional provisions are not being regarded as generally binding on non-parties.\footnote{Ibid 63; cf, Oxman, supra n 85, 157}

While coastal States were wary of explicitly acknowledging access rights to surplus fishery resources of their zones, the absence of any reference in national legislation to such an obligation does not necessarily mean that the latter was not recognized,\footnote{See n 105 supra.} and it is perhaps possible to infer from State practice greater acceptance of an obligation. National legislation, for example, reflected an awareness of the negotiating texts and a desire not to act contrary to them, and all but a few at least allowed the possibility of foreign fishing access.\footnote{See text accompanying n 48 supra. Ulfstein (supra Ch 11, n 244, 19) finds only the laws of Benin and Yemen explicitly prohibiting foreign fishing.}

Similarly, Professor Geir Ulfstein suggests that the use of 'strategic' terms such as 'surplus', '200 mile exclusive economic zone' and catch capacity' found in bilateral access agreements is no mere chance, but usually a very conscious result of legal considerations. Given the States' usual concern for precedents, the use of these terms should be interpreted as evidence that the contracting States are prepared to apply such principles on a general basis -- and that they think other States are obliged to do the same.\footnote{Ibid 8; cf, Edeson, supra n 103, 72. In this regard, the ILA Committee on the EEZ (supra n 74, 303; emphasis added) comments that}

The main processes which determine the actual content on the rules to apply in zones of special jurisdiction, and the further development of those rules, derive now from the practice of states. But to stress the essential element of state practice is not inconsistent with affirming the high significance of the UNCLOS texts as possible influential sources of customary international law (especially in terms of the element 'opinio juris sive necessitatis'). Their impact on the future as influencing state practice will not only depend on whether or not the Draft Convention i [sic] adopted and on its becoming formally binding on
In brief, however, given the great flexibility afforded the coastal State by the provisions of the various negotiating texts with respect to granting of access to foreign fishing vessels and the fact that reasons for allowing access were very rarely stated, it is most difficult to be certain of the precise state of the law on the question of access at the conclusion of UNCLOS III. In practice, of course, whether out of a sense of legal obligation or otherwise, many bilateral access agreements were concluded between coastal and fishing States during the period.

IV. Conclusion

In its *Fisheries Jurisdiction* Judgments, the ICJ remarked that "the rules of international maritime law have been the product of mutual accommodation, reasonableness and co-operation. So it was in the past, and so it necessarily is today." On that basis, it would appear to follow that, at a minimum, the EEZ concept would comprehend those limitations directly related to fisheries that were necessary to secure a consensus on the underlying principle of sovereign rights over living resources.

Given the uncertainties indicated above regarding State practice and the different conclusions that can be, and have

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138 See Ch 11, 263-265 and accompanying text supra.

139 ICJ Reports 1974, p 3, 24

140 See, eg, comment by Oxman, supra n 127.
been, drawn therefrom with respect to general law relating to marine fisheries at the end of the Conference a definitive, comprehensive statement of the law as it then stood is as yet impossible. In light of the above dictum and the strong consensus of the Conference on the 'package' of rights and obligations relating to marine fisheries that was ultimately incorporated into the LOSC itself, one can only agree with Oxman that "it is exceedingly difficult to point to an internationally accepted source of legitimacy regarding the rules of the law of the sea superior to that of the new Law of the Sea Convention, at least for the time being".\(^{141}\)

The burden would then be on those intending to prove that the LOSC's fishery provisions did not reflect customary international law. In fact, despite certain ambiguities concerning national legislation and its enforcement, as well as rights and obligations reflected in bilateral access agreements, there nevertheless exist varying amounts of evidence that at least selected features of the fishery regime in the negotiating texts were being accepted in State practice. Were they the first signs that those features were indeed inherent in the EEZ concept? Were they the beginnings of a customary law to be generated by the texts and which would ultimately give the EEZ concept enriched content? Or, were they simply isolated instances of State practice which would later contribute nothing to general legal development? Without much more evidence and detailed analysis of State practice as it is evolving, it is impossible to be certain.

\(^{141}\) Oxman, *supra* n 74, 673
EPILOGUE

WHITHER THE INTERNATIONAL LAW OF MARINE FISHERIES

"The acceleration of history, which is largely the result of the bewildering impact of modern technology, has changed the whole concept of national interest. Who can now ask where his country will be in a few decades without asking where the world will be? If we wish that world to be secure and prosperous, we must show a common concern for the common problems of all peoples."

The Pearson Commission²

If there is one leitmotiv stretching throughout the entire development of the international law of marine fisheries over the past 25 centuries, it is that the law evolves (not always moving to a higher plane) in response to a wide range of biological, economic, political, social, technological and, yes, even legal factors. From a bygone era in which the 'classical assumption' reigned supreme and freedom of the seas was the fundamental principle, mankind has moved to a new age in which its needs and interests are interrelated as never before with the result that the basic rule may be summarized as 'reasonable use'.

Whither then the international law of marine fisheries? The legacy left by UNCLOS III has mixed potential. On the one hand, the emergence of the EEZ allows for better management of most of the world's fisheries and a more equitable distribution of resource benefits among nations. On the other hand, of course, the EEZ has brought with it a host of unprecedented shared-resource problems and the possibilities that fisheries may be exploited no more wisely than in the past and that a significant sector of the international community, the LLGDS, may be effectively more disadvantaged than ever before. Whereas a perfect world might have enjoyed a truly international regime for the management and utilization of marine fishery resources, contemporary political

realities demanded power to be placed in the hands of coastal States. As Allott and Pinto have perceptively argued, however, to be effective that power must be exercised in the context of the world as it really is and requires co-operation not only between coastal States sharing fish stocks but also between coastal and distant-water fishing States. To a large extent, then, the future effectiveness of the EEZ regime will depend both on the degree to which coastal States assess their particular national interests as being inextricably bound with those of the wider international community and are able to act and react accordingly.

Given that the activities of distant-water fishing fleets were in large part responsible for the rise of the coastal State movement and the emergence of the EEZ, it is ironic that the future may perhaps witness a significant decrease in the importance of distant-water fishing operations due not primarily to the institution of 200-mile zones but rather to rising operational costs and world inflation. At the same time, possibilities open for more joint ventures between fishing and coastal States to alleviate such problems.

In the short run, however, economic pressures facing distant-water fishing fleets may well result in continued intensive fishing activities just outside 200-mile limits as fleets attempt to exploit rich stocks extending beyond EEZs into remaining areas of the high seas. As results are sometimes disastrous for regional and coastal State management activities, a major test of IFOs and the LOSC's dispute settlement mechanisms will be their ability to cope with such problems.

More generally, of course, the high seas fishery regime set out in the Convention has not solved the question of allocation of resources among competing users. Whether IFOs

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2 See Ch 11, nn 230-237 and accompanying text supra.
3 Cf comment by E Miles in 1982 Convention, supra Ch 12, n 17, 362
will be able to do so and reduce associated conservation problems remains to be seen.

In fact, how the problems of straddling stocks and exploitation of high seas fisheries are handled in future may well influence initiatives towards even greater extensions of fishery jurisdiction by coastal States as feared by Arvid Pardo. Such moves may even be incorporated into unilateral claims for wider comprehensive resource zones as an adverse reaction to future national exploitation of the deep sea-bed possibly not in keeping with what is widely understood as the 'Common Heritage of Mankind' principle and the regime negotiated at UNCLOS III.

The law of the sea beyond the Convention is in a state of flux. In the immediate future, however, it would appear that international attention will focus on the EEZ regime as set out in the LOSC. Whereas certain features of the regime form the nucleus of the EEZ concept and have already clearly become part of the general law, the fate of others remains uncertain and in some cases more problematic. While the fishery provisions negotiated at UNCLOS III were judged as comprising a carefully balanced regime of rights and obligations, how they will be considered as the Conference becomes more and more a part of history remains to be seen. As Professor Brian Fleming points out,

> laws are like children who may grow up or be interpreted in ways much different than their parents or their drafters ever intended. And anyone who thinks that that process is not going to occur isn't living in the real world.5

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4 A Pardo, "The law of the sea: its past and its future" (1984) 63 *Oregon L R* 7, 15

5 Fleming, *supra* Ch 12, n 75, 497
By the mid-nineteenth century it had become clear that marine fisheries were not inexhaustible as had once been thought. With the improvement of the North Sea fisheries as a result of reduced harvesting during World War I, scientists turned their attention increasingly to the impact of fishing activities on fish stocks. By 1960, the concept of maximum sustainable yield (MSY) had become the cornerstone of fishery management. In its basic form, MSY may be explained as follows:

In the absence of fishing, the total biomass of a stock of fish seeks to achieve equilibrium between the growth of individuals and the recruitment of young fish, on the one hand, and the losses due to natural deaths, on the other. When fishing is initiated, it will tend to reduce the abundance of the stock. At such reduced stock levels, losses due to natural deaths may become smaller, while recruitment and growth may increase -- hence providing a surplus. If the total catch of the stock is equal to this surplus, the average size of the stock will become stable at a lower level, which implies that the surplus can be constantly harvested. Therefore, it would represent a sustainable yield. This yield would be small if the stock were very large since in this case natural deaths are only a little less than growth and recruitment. The sustainable yield would also be small if the stock size is very limited since then the absolute value of the increase through growth and recruitment is small. Thus, the sustainable yield is at its peak at some intermediate stock yield.

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1 See, eg, Ch 1, text accompanying n 71 supra.

At this level the stock produces a maximum sustainable yield, i.e. a yield that can be taken year after year without depleting the stock.  

More pithily, and slightly tongue in cheek, P A Larkin summarizes the fundamental idea thus:

any species each year produces a harvestable surplus, and if you take that much and no more, you can go on getting it forever and ever (Amen). You only need to have as much effort as is necessary to catch this magic amount, so to use more is wasteful of effort; to use less is wasteful of food.  

The MSY concept was reflected in the aims and objectives agreed to at the Rome Conference, and subsequently in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas adopted at UNCLOS I, Article 2 of which stated that "the principal objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield [OSY] so as to secure a maximum supply of food and other marine products". Although specific reference is made in the Article to OSY rather than MSY, in the above context the two are "conceptually equivalent", or, at least as Stephen Cunningham remarks, "OSY tended to collapse into MSY if definition was pushed at all far".

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3 Koers, supra Ch 8, n 8, 45-46

4 Larkin, supra n 2, ibid. For more detailed descriptions of the concept see J Gulland, The Concept of Maximum Sustainable Yield and Fishery Management (FAO Fisheries Technical Paper No 70, 1968), and Cunningham, supra n 2, 252-255.

5 See Ch 7, nn 54-66 and accompanying text supra.


8 Cunningham, supra n 2, 266
The concept of MSY has a number of advantages appealing to decision-makers:

a) it is relatively simple to understand and, being a physical measurement, to utilize in negotiating terms and conditions for international fishery management schemes;

b) embodying specific measures, it allows judgments to be made on the operation of those schemes;

c) it aims at securing the greatest amount of food possible, an important consideration in many countries; and

d) its impact on fishing effort and unemployment is less drastic than other traditional management measures.  

By the 1960s, however, several practical difficulties arose concerning MSY. From the biological perspective, two main problems were identified. First, the relationship between fishing effort and sustainable yield is imprecise. Environmental factors impact upon fish stocks causing yearly fluctuations, and for MSY to be a useful management tool both a large amount of biological information and a will and ability to act on that information are required. These requirements proved often difficult to satisfy.  

Secondly, MSY treated the fish stock under consideration in isolation, ignoring the impact that fishing of the former may have on both other fish stocks and sub-stocks of the same species. Exploitation of a particular stock may

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10 Cunningham, *supra* n 2, 262-263; Gulland, *supra* n 2, 2; Koers, *supra* Ch 8, n 8, 47-48; Larkin, *supra* n 2, 5; and D Wallace, "Keynote address" in *OSY Concept*, *supra* n 2, 5, 7
serve either to increase or decrease other stocks in a predator-prey relationship, and the nature of that relationship may be difficult to either predict or quantify.\textsuperscript{11} Given the above, concludes Larkin,

from a biological point of view, the concept of MSY is simply not sufficient. Nevertheless, it should be stressed that it provides a valuable rough index of production potential. As a first rough cut at management policy for major commercial species, MSY is probably acceptable. But once the level of MSY is attained, it should be expected that it may not be sustained.\textsuperscript{12}

A further, major shortcoming of the MSY concept is that it is limited to biological aspects of fishery resource exploitation and, as Francis Christy and Anthony Scott observe, "[t]here is no logical connection between the number that represents the largest possible catch and the catch that is most desirable".\textsuperscript{13} Economists began to argue that the most desirable objective of fishery management would be to obtain the maximum economic yield (MEY), that is, the maximum difference between the value of the catch and the costs incurred in obtaining it.

Theoretically, MEY was an advance on the MSY concept in that it recognized the importance of the cost element in fishery management and allowed choices to be made as to the best combination of harvesting activities to maximize economic returns.\textsuperscript{14} In the real world of the international fish-

\textsuperscript{11} Christy and Scott, supra n 7, 78-79; Cunningham, supra n 2, 263; Koers, supra Ch 8, n 8, 48-49; and Gulland, (supra n 2, 1), who gives the following example: increased catches of cod may reduce predation by cod on herring, thereby allowing larger catches of herring; but increased catches of herring may reduce the food supply of cod, hence reducing cod catches. Larkin (supra n 2, 4) identifies a related problem, ie, over-exploitation of certain stocks caught in the gear with which other stocks are harvested.

\textsuperscript{12} Larkin, supra n 2, 6; cf, Cunningham, supra n 2, 264; and Wallace, supra n 10, 7

\textsuperscript{13} Christy and Scott, supra n 7, 220; cf, Radovich, supra n 2, 21
ery, however, MEY as a preeminent management objective was found wanting in several respects. First, international fisheries are almost exclusively open access in nature. As a result, so long as there is an economic rent to be obtained from them, they will attract fishermen, gradually eliminating in the process any possibility of achieving the MEY objective.\textsuperscript{15}

The efficiency of the MEY concept as a management objective is further diminished by the fact that not only will it vary between fisheries but also between countries exploiting the same fishery, depending on their national cost/revenue structures. The latter will, to varying degrees, determine the intensity and combination of fishing activities chosen, and those activities may conflict with those chosen by other exploiting the same fishery.\textsuperscript{16}

A third and related problem with the MEY concept is that few countries make fishery management decisions solely in terms of economic returns. In many instances, the value of the fishery in terms of food, employment, foreign exchange, etc are important factors determining a nation's strategy with respect to a particular fishery.\textsuperscript{17} As well,
there may be significant differences among participants exploiting the same fishery as to the rate at which harvesting should be undertaken. Those in a position to immediately exploit the fishery to its fullest may meet opposition from other interested participants unable to play such an active role at once and anxious lest the resources become exhausted before their harvesting capacities had developed.

By the mid-sixties, the above shortcomings of the MSY and MEY concepts had led many to seek a more appropriate management concept that would go beyond purely biological and economic considerations to comprehend social and political aspects as well. The concept of optimum sustainable yield (OSY) that had appeared in 1958 as a de facto equivalent of MSY (see above) was resurrected, this time in its own right as a broad, all encompassing objective of fishery management.

The problem with OSY from the beginning, however, was trying to determine what it meant, as its interpretation varied from one expert to another. Summarizing the deliberations of a conference on the use of OSY as a concept in fishery management, Philip Roedel attempted to offer general definitions of 'optimum yield' and OSY. The former, he suggested, was "a deliberate melding of biological, economic, social and political values designed to produce the maximum benefit to society from a given stock of fish"; while OSY was

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\text{a deliberate melding of biological, economic, social and political values designed to produce the maximum benefit to society from stocks that are sought for human use, taking into account the effect of harvesting on dependent or associated species.}^{19}
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10 R Croker, "Usefulness of the optimum yield concept" in *OSY Concept*, supra n 2, 75; Cunningham, *supra* n 2, 266; Guillard, *supra* n 2, 5; R Mauermann, "Optimum sustainable yield -- commercial fisheries views" in *OSY Concept*, supra n 2, 39; Radovich, *supra* n 2, 27; and Wallace, *supra* n 10, 7

19 Roedel, *supra* n 7, 85. He distinguishes between 'optimum yield' and OSY as the former may not be a yield sustainable indefinitely.
A number of experts observed that OSY was an advance on MSY and MEY in that it implies a balance between various objectives and, as defined by Roedel, recognized that: (a) since species are interrelated and jointly harvested, it is difficult, if not impossible, to obtain the MSY for each; and (b) there is no obligation to harvest a species simply because it is possible.20

At the same time, however, many argued, the concept had several deficiencies. Larkin, for example, points out that since 'optimum' means what one wants it to mean, "the concept is potentially subject to abuse, and would almost certainly be used primarily as a way of justifying a political course of action".21 Richard Croker agrees, adding that "[w]hatever nation has the most power succeeds in imposing its kind of optimum on weaker countries".22 Furthermore, observes Larkin, the definition of OSY proposed by Roedel "doesn't really say anything about sustaining anything".23 And thirdly, when applied to international fishery management questions, OSY does not provide an operation basis for decision-making:

The chances that your optimum is my optimum are nearly zero. The difficulty flows from the fact that natural systems are sufficiently diverse and complex that there is no simple, single recipe for harvesting that can be applied universally. When there is added in the complexity and variety of social, economic, and political systems, the number of potential recipes is just too enormous to be easily summarised by simple dogma.24

John Gulland agrees, opining that OSY

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20 See, eg, Gulland, supra n 2, 6; Harville, supra n 7, 51; Larkin, supra n 2, 8; and Wallace, supra n 10, 78.
21 Larkin, supra n 2, 8
22 Croker, supra n 18, ibid
23 Larkin, supra n 2, 8
24 Ibid 9; cf, Cunningham, supra n 2, 266-267
is well-suited for inclusion in the inspiring phrases that go into the preambles of treaties, or legislation about conservation and management of resources, but not for the operational sections where clear definitions are needed.25

It was in light of the contribution of experts from various sectors that the advantages and disadvantages of the MSY, MEY and OSY concepts as single objectives of fishery management became appreciated, and by the mid-1970s it was widely considered impossible to formulate a universal objective for fishery management in a single term.26 Rather, as Gulland concludes,

management requires a very broad approach. Some consideration needs to be given not just to the stock of fish being harvested by a particular stock of fishermen, but on the one hand all the other elements of the ecosystem with which the stock interacts, and, on the other, all the social and economic conditions which determine the actions of the fishermen, and the possibility of modifying them for the purposes of better management.27

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25 Gulland, supra n 9, 5. In this, Gulland may have changed his view. Writing a year earlier (supra n 2, 6) he suggested that

The term 'maximum sustainable yield'...clearly is now inadequate or misleading. Insofar as a specific term or phrase is needed, it is likely that 'optimum utilization' or 'optimum sustainable yield' is at least as suitable as any other.

26 See, eg, Cunningham, supra n 2, 276; Gulland, supra n 9, 5; and Larkin, supra n 2, 9.

27 Gulland, supra n 2, 7
ANNEX II

ILC DRAFT ARTICLES ON FISHERIES

(Final articles relating to fisheries submitted by the International Law Commission to the United Nations General Assembly (1956))

Freedom of the high seas

Article 27

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas comprises, inter alia:

(2) Freedom of fishing;

Right to fish

Article 49

All States have the right for their nationals to engage in fishing on the high seas, subject to their treaty obligations and to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

Conservation of the living resources of the high seas

Article 50

As employed in the present articles, the expression “conservation of the living resources of the high seas” means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

Article 51

A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged shall adopt measures for regulating and controlling fishing activities in that area when necessary for the purpose of the conservation of the living resources of the high seas.

Article 52

1. If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other marine resources in any area of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement the necessary measures for the conservation of such resources.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.
Article 53

1. If, subsequent to the adoption of the measures referred to in articles 51 and 52, nationals of other States engage in fishing the same stock or stocks of fish or other marine resources in the same area, the conservation measures adopted shall be applicable to them.

2. If these other States do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.

Article 54

1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal State is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

3. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.

Article 55

1. Having regard to the provisions of paragraph 1 of article 54, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within a reasonable period of time.

2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled:
   
   (a) That scientific evidence shows that there is an urgent need for measures of conservation;

   (b) That the measures adopted are based on appropriate scientific findings;

   (c) That such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.

Article 56

1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation.

2. If no agreement is reached within a reasonable period, such State may initiate the procedure contemplated by article 57.
Article 57

1. Any disagreement arising between States under articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to an arbitral commission of seven members, unless the parties agree to seek a solution by another method of peaceful settlement.

2. Except as provided in paragraph 3, two members of the arbitral commission shall be named by the State or States on the one side of the dispute, and two members shall be named by the State or States contending to the contrary, but only one of the members nominated by each side may be a national of a State on that side. The remaining three members, one of whom shall be designated as chairman, shall be named by agreement between the States in dispute. Failing agreement they shall, upon the request of any State party, be nominated by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from nationals of countries not parties to the dispute. If, within a period of three months from the date of the request for arbitration, there shall be a failure by those on either side in the dispute to name any member, such member or members shall, upon the request of any party, be named, after such consultation, by the Secretary-General of the United Nations. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

3. If the parties to the dispute fall into more than two opposing groups, the arbitral commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations, after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from amongst well qualified persons specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

4. Except as herein provided the arbitral commission shall determine its own procedure. It shall also determine how the costs and expenses shall be divided between the parties.

5. The arbitral commission shall in all cases be constituted within three months from the date of the original request and shall render its decision within a further period of five months unless it decides, in case of necessity, to extend that time limit.

Article 58

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal States, apply the criteria listed in paragraph 2 of article 55. In other cases it shall apply these criteria according to the circumstances of each case.

2. The arbitral commission may decide that pending its award the measures in dispute shall not be applied.

Article 59

The decisions of the arbitral commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.
No. S/164. CONVENTION ON FISHING AND CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS, DONE AT GENEVA, ON 29 APRIL 1958

The States Parties to this Convention,

Considering that the development of modern techniques for the exploitation of the living resources of the sea, increasing man's ability to meet the need of the world's expanding population for food, has exposed some of these resources to the danger of being over-exploited,

Considering also that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international co-operation through the concerted action of all the States concerned,

Have agreed as follows:

Article I

1. All States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of

1 In accordance with article 13, paragraph 1, the Convention came into force on 20 March 1966, that is to say, on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession. The following States have deposited their instruments of ratification or accession (a) on the dates indicated:

| United Kingdom of Great Britain and Northern Ireland | Portugal | 8 January 1963 |
| Cambodia | South Africa | 9 April 1963 (a) |
| Haiti | Australia | 14 May 1963 |
| Malaysia | Venezuela | 10 July 1963 |
| United States of America | Jamaica | 16 April 1964 |
| Senegal | Dominican Republic | 11 August 1964 |
| Nigeria | Uganda | 14 September 1964 (a) |
| Sierra Leone | Finland | 16 February 1965 |
| Madagascar | Upper Volta | 4 October 1963 (a) |
| Colombia | Malawi | 7 November 1963 (a) |
| United Kingdom of Great Britain and Northern Ireland declares that, save as may be stated in any further and separate notice that may hereafter be given, ratification of this Convention on behalf of the United Kingdom does not extend to the States in the Persian Gulf enjoying British protection. Multilateral conventions to which the United Kingdom becomes a party are not extended to these States unless such an extension is requested by the Ruler of the State concerned. |

** The instrument of ratification of the Government of the United States of America specifies that the ratification is subject to the following understanding: "That such ratification shall not be construed to impair the applicability of the principle of 'abstention', as defined in paragraph A.I of the documents of record in the proceedings of the Conference above referred to [United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1951]."
coastal States as provided for in this Convention, and (2) to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

2. All States have the duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 2

As employed in this Convention, the expression "conservation of the living resources of the high seas" means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. Conservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption.

Article 3

A State whose nationals are engaged in fishing any stock or stocks of fish or other living marine resources in any area of the high seas where the nationals of other States are not thus engaged shall adopt, for its own nationals, measures in that area when necessary for the purpose of the conservation of the living resources affected.

Article 4

1. If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other living marine resources in any area or areas of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement for their nationals the necessary measures for the conservation of the living resources affected.

2. If the States concerned do not reach agreement within twelve months, any of the parties may initiate the procedure contemplated by article 9.

Article 5

1. If, subsequent to the adoption of the measures referred to in articles 3 and 4, nationals of other States engage in fishing the same stock or stocks of fish or other living marine resources in any area or areas of the high seas, the other States shall apply the measures, which shall not be discriminatory in form or in fact, to their own nationals not later than seven months after the date on which the measures shall have been notified to the Director-General of the Food and Agriculture Organization of the United Nations. The Director-General shall
notify such measures to any State which so requests and, in any case, to any State specified by the State initiating the measure.

2. If these other States do not accept the measures so adopted and if no agreement can be reached within twelve months, any of the interested parties may initiate the procedure contemplated by article 9. Subject to paragraph 2 of article 10, the measures adopted shall remain obligatory pending the decision of the special commission.

Article 6

1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal State is entitled to take part on an equal footing in any system of research and regulation for purposes of conservation of the living resources of the high seas in that area, even though its nationals do not carry on fishing there.

3. A State whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a State shall, at the request of that coastal State, enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area.

4. A State whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal State shall not enforce conservation measures in that area which are opposed to those which have been adopted by the coastal State, but may enter into negotiations with the coastal State with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area.

5. If the States concerned do not reach agreement with respect to conservation measures within twelve months, any of the parties may initiate the procedure contemplated by article 9.

Article 7

1. Having regard to the provisions of paragraph 1 of article 6, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months.
2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled:
(a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;
(b) That the measures adopted are based on appropriate scientific findings;
(c) That such measures do not discriminate in form or in fact against foreign fishermen.

3. These measures shall remain in force pending the settlement, in accordance with the relevant provisions of this Convention, of any disagreement as to their validity.

4. If the measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 9. Subject to paragraph 2 of article 10, the measures adopted shall remain obligatory pending the decision of the special commission.

5. The principles of geographical demarcation as defined in article 12 of the Convention on the Territorial Sea and the Contiguous Zone shall be adopted when coasts of different States are involved.

**Article 8**

1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources of the high seas in that area, may request the State or States whose nationals are engaged in fishing there to take the necessary measures of conservation under articles 3 and 4 respectively, at the same time mentioning the scientific reasons which in its opinion make such measures necessary, and indicating its special interest.

2. If no agreement is reached within twelve months, such State may initiate the procedure contemplated by article 9.

**Article 9**

1. Any dispute which may arise between States under articles 4, 5, 6, 7 and 8 shall, at the request of any of the parties, be submitted for settlement to a special commission of five members, unless the parties agree to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations.

2. The members of the commission, one of whom shall be designated as chairman, shall be named by agreement between the States in dispute within three months of the request for settlement in accordance with the provisions of this article. Failing agreement they shall, upon the request of any State party,
be named by the Secretary-General of the United Nations, within a further
three-month period, in consultation with the States in dispute and with the
President of the International Court of Justice and the Director-General of the
Food and Agriculture Organization of the United Nations, from amongst well-
qualified persons being nationals of States not involved in the dispute and
specializing in legal, administrative or scientific questions relating to fisheries,
depending upon the nature of the dispute to be settled. Any vacancy arising
after the original appointment shall be filled in the same manner as provided
for the initial selection.

3. Any State party to proceedings under these articles shall have the right to
name one of its nationals to the special commission, with the right to participate
fully in the proceedings on the same footing as a member of the commission,
but without the right to vote or to take part in the writing of the commission's
decision.

4. The commission shall determine its own procedure, assuring each party to
the proceedings a full opportunity to be heard and to present its case. It shall
also determine how the costs and expenses shall be divided between the parties
to the dispute, failing agreement by the parties on this matter.

5. The special commission shall render its decision within a period of five
months from the time it is appointed unless it decides, in case of necessity, to
extend the time limit for a period not exceeding three months.

6. The special commission shall, in reaching its decisions, adhere to these
articles and to any special agreements between the disputing parties regarding
settlement of the dispute.

7. Decisions of the commission shall be by majority vote.

Article 10

1. The special commission shall, in disputes arising under article 7, apply the
criteria listed in paragraph 2 of that article. In disputes under articles 4, 5, 6
and 8, the commission shall apply the following criteria, according to the issues
involved in the dispute:

(a) Common to the determination of disputes arising under articles 4, 5
and 6 are the requirements:

(i) That scientific findings demonstrate the necessity of conservation measures;

(ii) That the specific measures are based on scientific findings and are
practicable; and

(iii) That the measures do not discriminate, in form or in fact, against fishermen
of other States;
(b) Applicable to the determination of disputes arising under article 8 is the requirement that scientific findings demonstrate the necessity for conservation measures, or that the conservation programme is adequate, as the case may be.

2. The special commission may decide that pending its award the measures in dispute shall not be applied, provided that, in the case of disputes under article 7, the measures shall only be suspended when it is apparent to the commission on the basis of *prima facie* evidence that the need for the urgent application of such measures does not exist.

**Article 11**

The decisions of the special commission shall be binding on the States concerned and the provisions of paragraph 2 of Article 94 of the Charter of the United Nations shall be applicable to those decisions. If the decisions are accompanied by any recommendations, they shall receive the greatest possible consideration.

**Article 12**

1. If the factual basis of the award of the special commission is altered by substantial changes in the conditions of the stock or stocks of fish or other living marine resources or in methods of fishing, any of the States concerned may request the other States to enter into negotiations with a view to prescribing by agreement the necessary modifications in the measures of conservation.

2. If no agreement is reached within a reasonable period of time, any of the States concerned may again resort to the procedure contemplated by article 9 provided that at least two years have elapsed from the original award.

**Article 13**

1. The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals except in areas where such fisheries have by long usage been exclusively enjoyed by such nationals. Such regulations will not, however, affect the general status of the areas as high seas.
2. In this article, the expression "fisheries conducted by means of equipment embedded in the floor of the sea" means those fisheries using gear with supporting members embedded in the sea floor, constructed on a site and left there to operate permanently or, if removed, restored each season on the same site.

**Article 14**

In articles 1, 3, 4, 5, 6 and 8, the term "nationals" means fishing boats or craft of any size having the nationality of the State concerned, according to the law of that State, irrespective of the nationality of the members of their crews.

**Article 15**

This Convention shall, until 31 October 1958, be open for signature by all States Members of the United Nations or of any of the specialized agencies, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention.

**Article 16**

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

**Article 17**

This Convention shall be open for accession by any States belonging to any of the categories mentioned in article 15. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

**Article 18**

1. This Convention shall come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

**Article 19**

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 6, 7, 9, 10, 11 and 12.

No. 2164
2. Any contracting State making a reservation in accordance with the preceding paragraph may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

**Article 20**

1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any contracting party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

**Article 21**

The Secretary-General of the United Nations shall inform all States Members of the United Nations and the other States referred to in article 15:

(a) Of signatures to this Convention and of the deposit of instruments of ratification or accession, in accordance with articles 15, 16 and 17;

(b) Of the date on which this Convention will come into force, in accordance with article 18;

(c) Of requests for revision in accordance with article 20;

(d) Of reservations to this Convention, in accordance with article 19.

**Article 22**

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States referred to in article 15.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed this Convention.

DONE at Geneva, this twenty-ninth day of April one thousand nine hundred and fifty-eight.
ANNEX IV

A NOTE ON THE INTERPRETATION OF THE 1982 UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA (LOSC)

The Vienna Convention on the Law of Treaties (hereafter cited as 'the Vienna Convention') is widely considered to reflect customary international law on the subject of treaty interpretation. According to the "general rule", a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".


2 Art 31(1) of the Vienna Convention. The Convention entered into force on 27 January 1980, and may be conveniently found in Basic Documents in International Law (2nd ed, 1972; I Brownlie, ed) 233. For an analysis of the general rule see, eg, Sinclair, supra n 1, 119-140; and M Yasseen, "L'Interprétation des traités d'après la Convention de Vienne sur le droit des Traités" (1976) 151 RDC 1, 19-77.

Art 31(2) of the Convention provides that for the purposes of interpretation, the "context" of a treaty comprises,

in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Together with the context, Art 31(3) of the Treaty provides that in the interpretation process there shall be taken into account:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
In order to confirm the meaning resulting from the application of the general rule, or to determine the meaning when the application of the latter leaves the text ambiguous or obscure, or leads to a result "manifestly absurd or unreasonable", the Convention permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty [ie, the travaux préparatoires] and the circumstances of its conclusion".

In light of the above, how should interpretation of the LOSC best be undertaken? On the one hand, Professor Michael Reisman, in his analysis of the straits regime of the Convention, argues that as the Convention is complex, and because of the Vienna Convention directives noted above, "an essentially textual approach to construction...would appear required...and eluctable owing to the absence of a formal record of the travaux".

That narrow textual approach to interpretation, on the other hand, is rejected by others, who place greater emphasis on supplementary means of interpretation. Professor William Burke, for example, strongly criticizes particular interpretations of strait provisions in the RSNT that rest almost completely on textual exegesis and manipulation of words without regard for, and with virtually no reference to, the negotiating context. There is a loss of plausibility when the interpreter makes no attempt to take into account the issues being negotiated, their origin, the contrasting views and proposals of the principal participants, contemporary interpretations of these proposals, and the formulation of the outcome in relation to these communications among the parties in the negotiations.

Art 32. The term 'travaux préparatoires' is not defined in the Convention, the Vienna Conference endorsing the view of the ILC which prepared the draft treaty on the subject that "to do so might only lead to the possible exclusion of relevant evidence"("Draft articles on the Law of Treaties with Commentaries, adopted by the International Law Commission at its eighteenth session", reproduced in United Nations Conference on the Law of Treaties: Official Records (A/Conf.39/11/Add.2) 7-94, at 43). For a discussion of the meaning of 'travaux préparatoires' see Yasseen, supra n 2, 83-84 and text accompanying nn 10ff infra.

These factors assist in determining the perspective of those concerned. Observers can expect difficulty in identifying the potential commitments embodied in a draft text if observations fail to go below the surface of the terms employed.

Professor John Moore agrees, observing at the same time that it would be an overstatement to say that there were no formal travaux préparatoires of UNCLOS III. Furthermore, he continues, when to facilitate interpretation the permissible context of the LOSC's conclusion is broadened, "as it should be, there is a great deal of relevant evidence that must be considered".

The present writer subscribes to the latter view, considering that a primary textual approach to the interpretation of the LOSC fails to provide an adequate appreciation of the fishery regime enshrined in the Convention. In adopting that position, however, it is at the same time necessary to comment briefly concerning the "supplementary means" of interpretation.

The first relates to the nature of travaux préparatoires. While the latter may in certain circumstances offer valuable assistance in the interpretation process as recognized by the Vienna Convention, they must nevertheless be used with care. Dr Mustafa Yasseen, for example, points out that

au cours d'une conférence, les positions peuvent changer, les premiers discours peuvent avoir été faits pour défendre des attitudes qui, plus tard, ont été abandonnées. Et les comptes rendus ne sont souvent que des résumés qui, malgré l'habileté des rédacteurs, pourraient contenir des erreurs, lesquelles n'ont peut-être pas été corrigées. Qui plus est, l'ambiguïté peut entacher non seulement les déclarations faites par les différents représentants, elle peut même entacher le rapport d'une commission.  

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5 W Burke, "Submerged passage through straits: interpretation of the proposed Law of the Sea Treaty text" (1977) 52 WLR 193, 202; cf, nn 23 and 24 and accompanying text infra


7 Yasseen, supra n 2, 85-86; cf, F Jacobs, "Varieties of approach to treaty interpretation: with special reference to the draft Convention on the Law of Treaties be-
Sir Ian Sinclair agrees. Like Yasseen and others, he observes that

Recourse to travaux préparatoires of a treaty must always be undertaken with caution and prudence. ...[T]he obscurity of a particular text will often find its origin in the travaux préparatoires themselves. The natural desire of negotiators to bring negotiations to a successful conclusion will often result in the adoption of vague or ambiguous formulations. Sometimes the parties will have deliberately wished to avoid too much precision in order to allow themselves in future to argue that the provision as formulated does not commit them to an inconvenient or too onerous obligation. Finally, the travaux préparatoires are unlikely to reveal accurately and in detail what happened during the negotiations, since, more often than not, they will not disclose what may have been agreed between the heads of delegations during private corridor discussions.

Although the latter point has not been addressed by judicial or arbitral authorities with specific reference to UNCLOS III deliberations, the Tribunal in the 1980 Young Loan arbitration did have cause to consider the general subject. The Tribunal observed that the term 'travaux préparatoires'

must normally be restricted to material set down in writing — and thereby available at a later date. This means that oral statements and opinions not recorded in minutes or conference papers can apparently be regarded as a component of travaux préparatoires only in exceptional cases. They can in any event be considered only if made in an official capacity and during the negotiations themselves. ...

A further prerequisite if material is to be considered as a component of travaux préparatoires is that it was actually accessible and known to all the original parties. Drafts of particular articles, preparatory documents and proceedings of meetings from which one member or some members of the contracting parties were excluded cannot serve as an indication of common intentions and agreed definitions unless all the parties had become familiar with the documents or material by the time the treaty was signed.

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Sinclair, supra n 1, 142, who in this regard follows closely Yasseen, supra n 2, 85, 86; cf, C de Visscher, Problèmes d'interprétation judiciaire en droit international public (1963) 117-118

59 ILR 495

Ibid 544-545
Both Sinclair and Yasseen suggest modifying slightly the above position. They posit that for interpretative purposes,

the better view would...appear to be that recourse to travaux préparatoires does not depend on the participation in the drafting of the text of the States against whom the travaux are invoked. To hold otherwise would disrupt the unity of a multilateral treaty, since it would imply that two different methods of interpretation should be employed, the one for States who participated in the travaux préparatoires and the other for States who did not so participate. One qualification should, however, be made. The travaux préparatoires should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them. Travaux préparatoires which are kept secret by the negotiating States should not be capable of being invoked against subsequently acceding States.\(^1\)

In light of the above dicta and comments thereupon, what then might be the probative value for interpretative purposes of negotiations and possible agreements reached on the meaning of specific LOSC provisions either in 'corridor' discussions or in larger group or committee contexts at UN-CLOS III itself? It appears from the above that, given their essentially private nature, 'corridor' negotiations and agreements concerning the meaning or parameters of specific LOSC provisions would not constitute part of the travaux préparatoires for general interpretative purposes. That is, they could not be invoked against States that had not participated in those private discussions as the sole definitive interpretation of Convention articles valid \textit{erga omnes}.\(^2\)

\(^1\) Sinclair, \textit{supra} n 1, 144; \textit{cf}, Yasseen, \textit{supra} n 2, 89-90

\(^2\) This would likely be based on the principle that all interpretation must be made in good faith. See in this regard, \textit{eg}, Reisman, \textit{supra} n 4, 56, n 20; Sinclair, \textit{supra} n 1, 119-120; Yasseen, \textit{supra} n 2, 20-23, 90; and text accompanying n 2.

It would appear that the validity -- either \textit{inter se} or \textit{erga omnes} -- of actions taken by States in accordance with such 'corridor' agreements would depend on whether the latter were compatible with LOSC provisions interpreted by other means or, as the case may be, customary international law. It might be possible, for example, for two States to agree between themselves on a definition of 'region or subregion' for the purpose of allowing access to fishery resources, given the failure of the Convention to define the term (see Ch 11, n 200 \textit{supra}). That agreement, however, would not
But what about negotiations and agreements reached in the several committees and various groups established at the Conference? In this respect, the situation appears somewhat more complicated. As has been seen, UNCLOS III was unique, not only in the number of States participating in the negotiations and the duration of the deliberations, but more importantly in respect of the above, the great extent to which much of what transpired went unrecorded by a central reporting authority. At the same time, however, negotiations were either open to all participating States or the results of deliberations in smaller, more circumscribed groups were reported back to the larger bodies for ultimate endorsement. Although the Arbitral Tribunal cited above did not explain what might constitute "exceptional cases" in which "oral statements and opinions" would warrant inclusion in travaux préparatoires for interpretative purposes, it could well be argued that the particular circumstances under which the LOSC was negotiated would entitle oral deliberations to indeed be accepted as part of the travaux.

The problem that immediately arises, of course, is that it is impossible retrospectively to produce Conference oral statements and opinions per se in support of one interpretation as against another. It may well be the case, however, that a partial solution to that problem lies in another feature of UNCLOS III that, while not unique, is certainly unparalleled in degree compared to earlier legal conferences. As Philip Allott observes, "there is already and there will increasingly accumulate an amorphous mass of material, in-

thereby ipso jure constitute the definitive interpretation of the terms for all other States parties to the Convention.

Whether representatives of a particular State were, in fact, present to hear certain explanations would appear immaterial. The fact that they were permitted to be present would seem to place the burden on them to ascertain what had transpired and agreements that had been reached. See in this regard text accompanying n 10 supra.

See text accompanying n 10 supra.
cluding very miscellaneous conference documents, together with contemporaneous and retrospective accounts purporting to describe the evolution of the texts".\textsuperscript{13} That material, he argues, cannot be considered as travaux préparatoires, at least in the sense of the Vienna Convention, since "[w]ith the possible exception of the successive published texts of the Convention, they do not have the objective character of negotiating facts, the actual material chain of causation of the resulting instrument, which is the essence of traditional travaux".\textsuperscript{14} In his view, "[t]he random and disorderly character of some of them and the partisan character of much of the rest mean that it would be wiser to regard them as a new kind of phenomenon, a physical manifestation of the decision-making process of consensus".\textsuperscript{17}

As such, the present writer would suggest, they constitute a valid, practical -- albeit in some ways novel -- supplementary means of interpretation, particularly for those many smaller States at the Conference whose representatives were unable to be present at every session of every committee or group and therefore unable to be apprised at first hand of deliberations and agreements on every provision of the Convention.\textsuperscript{18} Liable to many of the same deficiencies

\textsuperscript{13} Allott, Ch 11, n 230, 7 supra

\textsuperscript{14} \textit{Ibid}

\textsuperscript{17} \textit{Ibid}. In some respects, the present writer would suggest, traditionally recognized travaux préparatoires are also a "physical manifestation of the decision-making process" of the conference to which they relate.

\textsuperscript{18} It would be difficult to claim that such material (at least that appearing after the LOSC's conclusion) is actually to be understood as part of the "circumstances" of the Convention's conclusion (see text accompanying n 3 supra, and nn 21-23 and accompanying text infra). Nevertheless, Article 32 of the Vienna Convention does not limit supplementary means of interpretation to only circumstances of a treaty's conclusion and the travaux préparatoires (\textit{cf}, Yasseen, supra n 2, 79).

Although the volume of material relating to deliberations at UNCLOS III vastly exceeds that of earlier legal conferences, recourse for interpretative purposes to retrospective reports and statements regarding trea-
of traditional *travaux préparatoires*, however, their probative value in particular cases would be determined by a number of factors, including the role played at UNCLOS III by their authors in relation to the issues involved and the extent to which the materials attempts to deal fully and objectively with alternative positions on such issues. As Professor Charles de Visscher observes in regard to *travaux préparatoires* themselves, the use of such material "est affaire d'espèce et de bon sens".

As indicated by Burke and Moore above, the interpretation of the LOSC requires due weight being given to not only the *travaux préparatoires* (and, by extension, the present writer has suggested, contemporary or retrospective accounts of UNCLOS III deliberations), but also to what Article 32 of the Vienna Convention describes as the "circumstances" of the LOSC's conclusion. It need only be stated at this point that there do not appear to be strict limits to what might be considered in that regard. Both the historical background against which the Convention was negotiated and the traits and attitudes of individual States, for example,

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19 See text accompanying nn 7 and 8 supra.

20 De Visscher, supra n 8, 120

21 See text accompanying n 5 and 6 supra.
may offer valuable insights for interpretative purposes.\textsuperscript{22}

As Yasseen observes generally,

Le traite comme fait social est une conséquence de toute une série de causes. Il est donc utile de connaître les conditions des parties et la réalité de la situation que les parties ont voulu régler. L'importance du problème qu'elles ont voulu résoudre et la portée du litige auquel elles ont voulu mettre fin par le traité qu'il s'agit d'interpréter.

Il est logique que les circonstances dans lesquelles le traité a été conclu influencent la rédaction du traité. L'examen de ces circonstances peut donc jeter une certaine lumière sur l'intention des parties et aider ainsi à éclairer les formules que les parties ont adoptées.\textsuperscript{23}

In the view of the present writer, it is in light of the above considerations that the 1982 United Nations Convention on the Law of the Sea must be interpreted.

\textsuperscript{22} Sinclair, supra n 1, 141; and Yasseen (supra n 2, 90), who observes that

Il s'agit du cadre historique que forme l'ensemble des événements qui ont porté les parties à conclure le traité pour maintenir ou confiner le statu quo ou apporter un changement qu'une nouvelle conjoncture nécessite.

Il s'agit aussi des conditions individuelles des parties: les conditions idéologiques, politiques, économiques et autres qui pourraient normalement exercer une certaine influence sur l'attitude des États dans les différents domaines des relations internationales, comme, inter alia, l'appartenance à une groupe idéologique, une alliance militaire ou un système juridique donné et le fait que l'État est exportateur ou importateur, industrialisé ou en développement.

In this same vein, the Mexican delegate at the Vienna Conference stated that although the article did not say so explicitly, "it was understood that...the interpreter could also make use of the rules of logic and dialectics, legal maxims and all his legal, historical and sociological knowledge" (A/Conf.39/11, supra n 3, 181).

Numerous judicial bodies have also adopted a similarly broad approach to interpretation. The European Court of Human Rights in the Engels and Others case of 1976, to cite only one example, stated (ECHR Series A, vol 22, 23) that

when interpreting and applying the rules of the Convention [for the protection of Human Rights and Fundamental Freedoms] in the present case [involving persons in the military], the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces.

\textsuperscript{23} Yasseen, supra n 2, 90; cf, Allott, supra Ch 11, n 230, 3-4
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