Navigation in the Exclusive Economic Zone

HORACE B. ROBERTSON, JR.*

Perhaps the most significant outcome of the Third United Nations Conference on the Law of the Sea (UNCLOS III or "Conference") was the recognition in the Convention adopted at that Conference\(^1\) of the exclusive economic zone.\(^2\) This new division of the sea, extending from the outer limit of the territorial sea to a distance of 200 miles\(^3\) from the baseline,\(^4\) comprises over thirty-five percent of ocean space.\(^5\) This space, formerly high seas, is subjected to a regime in which the coastal State exercises sovereign rights for the exploration and exploitation, conservation and management of the living and nonliving resources of the zone and for other economic activities such as the production of energy from water, currents and winds.\(^6\) The coastal State also exercises certain defined jurisdiction over other activities in the zone.\(^7\)

This new development obviously creates a potential for infringe-

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* Professor of Law, Duke University School of Law. Research for this article was done at the Institute of Advanced Legal Studies, University of London. The author expresses his gratitude to that Institute for making research facilities available to him.


2. The exclusive economic zone provisions are found in the Convention, pt. V, arts. 55-75.

3. Id. art. 57. All distances in the Convention are expressed in nautical miles. In this article, all references to miles should be read as "nautical" miles.

4. The "baseline" is defined as "the continuous point of origin along the coast from which the territorial sea is measured." S. Swartztrauber, The Three-Mile Limit of Territorial Seas 6 (1972).


6. Convention, supra note 1, art. 56, para. 1(a).

7. Id. art. 55, para. 1(b).
ment of the community interest in freedom of navigation in this vast area. It is the purpose of this article to analyze the regime created by the Convention to determine whether this important community interest is adequately safeguarded in this newly recognized coastal zone. It will also have as its purpose a brief examination of the implications of this new development in the law of the sea for the United States as a non-signatory of the Convention and as a nation that has expressed its intention not to become a party to it.

I. THE ORIGIN AND DEVELOPMENT OF THE EXCLUSIVE ECONOMIC ZONE

Although a detailed consideration of the origin and development of the exclusive economic zone is beyond the scope of this essay, some brief discussion is helpful to understanding the juridical nature of the zone as it has been formalized in the text of the 1982 Convention.

Most commentators have attributed the origin of the 200-mile exclusive economic zone to the Truman Proclamation of 1945 in which the United States laid claim to exclusive rights over the living and non-living resources of the seabed and subsoil of the continental shelf beyond the territorial sea. According to the conventional wisdom, this unilateral claim stimulated Latin American States not blessed with broad continental shelves to initiate broader, more comprehensive exclusive claims to offshore areas, embracing not only the seabed but also the resources of the water column as well. Some of these claims were so comprehensive that for all intents and purposes they amounted to claims to a territorial sea.

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10. See, e.g., Coquia, supra note 8, at 440-41; Krueger & Nordquist, supra note 8, at 324-25.

11. For an analysis of the juridical nature of the various types of coastal resource zones
Recent research by Professor Ann Hollick casts doubt on the theory that the U.S. decree was a direct stimulus to these 200-mile claims. The real stimulus, she concludes, was the desire of Chile, the first of the South American claimants, to protect its weak whaling industry against the resurgent European, Soviet, and Japanese post-war whalers.\(^\text{13}\) Although the Chilean whalers desired only a fifty-mile zone, the claim was increased to 200 miles because of a Chilean legal expert’s erroneous interpretation of the 1939 Declaration of Panama proclaiming the American neutrality zone in the early days of World War II.\(^\text{13}\) Professor Hollick admits, however, that although the U.S. action was not the direct stimulus, its unilateral nature gave encouragement to Chile, whose decree was followed within two months by that of Peru.\(^\text{14}\) In 1954 in the Santiago Declaration,\(^\text{15}\) Chile, Ecuador, and Peru made the 200-mile zone an article of solemn obligation among the three nations.

Until the end of the decade of the 1960’s, the 200-mile resource zone remained principally a phenomenon of Latin American practice in the law of the sea.\(^\text{16}\) Although it was a constant irritant in the fishery relations between Latin American States and distant-water fishing States whose vessels were often arrested for fishing in the claimed zones, the Latin American position gained few other adherents and had only minimal immediate impact on shaping the

\(^{12}\) Id. at 498-500.

\(^{13}\) Id. at 500. For the Chilean decree, see Presidential Decree No. 781 Concerning Submerged Continental or Insular Shelf, Aug. 1, 1947, reprinted in I Laws and Regulations on the Regime of the High Seas 16-17, U.N. Doc. ST/LEG/SER.R/1 (1951) [hereinafter cited as Laws and Regulations] and 4 M. Whiteman, Digest of International Law 797-98 (1965). It is interesting that an Argentinian decree, predating the Truman Proclamation, and making claim to the mineral reserves of the “zones of the epicontinental sea,” Presidential Decree No. 1386, Jan. 24, 1944, art. 2, reprinted in I Laws and Regulations, supra, at 3, and an amplification of that decree in 1946 declaring “that the Argentine epicontinental sea and continental shelf are subject to the sovereign power of the nation,” Presidential Decree No. 14,708, Oct. 11, 1946, art. 1, reprinted in I Laws and Regulations, supra, at 4, received little notice until after the Chilean decree. It was not until 1948 that the United States finally protested Argentina’s actions. See 4 M. Whiteman, supra, at 792-94.

\(^{14}\) Id. at 498-500. For the Chilean decree, see Presidential Decree No. 781 Concerning Submerged Continental or Insular Shelf, Aug. 1, 1947, reprinted in I Laws and Regulations on the Regime of the High Seas 16-17, U.N. Doc. ST/LEG/SER.R/1 (1951) [hereinafter cited as Laws and Regulations] and 4 M. Whiteman, Digest of International Law 797-98 (1965). It is interesting that an Argentinian decree, predating the Truman Proclamation, and making claim to the mineral reserves of the “zones of the epicontinental sea,” Presidential Decree No. 1386, Jan. 24, 1944, art. 2, reprinted in I Laws and Regulations, supra, at 3, and an amplification of that decree in 1946 declaring “that the Argentine epicontinental sea and continental shelf are subject to the sovereign power of the nation,” Presidential Decree No. 14,708, Oct. 11, 1946, art. 1, reprinted in I Laws and Regulations, supra, at 4, received little notice until after the Chilean decree. It was not until 1948 that the United States finally protested Argentina’s actions. See 4 M. Whiteman, supra, at 792-94.

\(^{15}\) Id. at 498-500. For the Chilean decree, see Presidential Decree No. 781 Concerning Submerged Continental or Insular Shelf, Aug. 1, 1947, reprinted in I Laws and Regulations on the Regime of the High Seas 16-17, U.N. Doc. ST/LEG/SER.R/1 (1951) [hereinafter cited as Laws and Regulations] and 4 M. Whiteman, Digest of International Law 797-98 (1965). It is interesting that an Argentinian decree, predating the Truman Proclamation, and making claim to the mineral reserves of the “zones of the epicontinental sea,” Presidential Decree No. 1386, Jan. 24, 1944, art. 2, reprinted in I Laws and Regulations, supra, at 3, and an amplification of that decree in 1946 declaring “that the Argentine epicontinental sea and continental shelf are subject to the sovereign power of the nation,” Presidential Decree No. 14,708, Oct. 11, 1946, art. 1, reprinted in I Laws and Regulations, supra, at 4, received little notice until after the Chilean decree. It was not until 1948 that the United States finally protested Argentina’s actions. See 4 M. Whiteman, supra, at 792-94.

law of the sea. The 200-mile resource zone figured in the outcome of the 1958 and 1960 Geneva Conferences on the Law of the Sea, but only in a negative manner. Proponents of the zone did not have sufficient support to make its adoption by the Conference a real possibility, but allied with other elements that opposed a narrow territorial sea, the pro-zone delegates played a decisive role in defeating more moderate proposals to deal with the wishes of many coastal States to exercise exclusive control of fishing beyond their territorial seas.17

The creation of dozens of new States in the 1960's added a new dimension to the problem. These new States, mostly in Africa, emerging from decades of colonial rule by European powers, were wary of the precepts of traditional international law—including the law of the sea. Much more attractive than the suspect notion of "freedom of the seas" espoused by former colonial powers and the States allied with them was the suggestion from Latin American and Asian associates that they had the right to claim broad areas of the oceans for their exclusive enjoyment. Such exclusive areas could be fruitful sources of food for their people and revenue from licensing foreign fishermen, and perhaps could provide a mechanism for fostering development and the acquisition of technology.


At the first substantive negotiating session of UNCLOS III at Caracas in 1974, it became apparent from the general debate as well as the numerous proposals submitted to the Second Committee that an exclusive economic zone would be part of any package that would emerge from the negotiations. Just as freedom of passage through straits was *sine qua non* for acceptance of a twelve-mile territorial sea by the maritime States, an exclusive economic zone was of similar importance to most coastal States if they were to be restricted to the twelve-mile territorial sea.\(^{21}\) The first formulation of an informal negotiating text in 1975—the Informal Single Negotiating Texts (ISNT)\(^{22}\)—included articles setting forth the basic structure and content of the exclusive economic zone.\(^{23}\) These first articles were believed by the maritime States to have an unacceptable “tilt” in favor of coastal State interests.\(^{24}\) Correcting this tilt occupied the agenda of the Second Committee and its working groups for several sessions. As will be developed in the next section, the “tilt” was finally corrected in the Informal Composite Negotiating Text (ICNT) issued by the President of the Conference at the close of the 1977 New York Session.\(^{25}\)

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\(^{21}\) At the Caracas session of UNCLOS III, over 100 delegations spoke in favor of some form of a 200-mile economic zone. Alexander & Hodgson, *The Impact of the 200-Mile Economic Zone on the Law of the Sea*, 12 San Diego L. Rev. 669, 570 (1975). After initial opposition in the Seabed Committee, even the United States expressed a willingness to accept a 200-mile economic zone. Ambassador Stevenson stated:

[W]e are prepared to accept, and indeed we would welcome, general agreement on a 12-mile outer limit for the territorial sea and a 200-mile outer limit for the economic zone, provided it is a part of an acceptable comprehensive package including a satisfactory regime within and beyond the economic zone and provision for unimpeded transit of straits used for international navigation.


\(^{23}\) Id. arts. 45-61.


II. The Juridical Nature of the Exclusive Economic Zone

Two-hundred mile coastal resource zones claimed by States through unilateral declarations outside the Conference proceedings have taken a variety of forms. Because of this variety, the zones do not have a uniform juridical character. Some are the equivalent of a 200-mile territorial sea. Others, though much resembling the traditional territorial sea, preserve freedom of sea and air navigation and the right to lay and maintain submarine cables and pipelines. A third type of exclusive economic zone only claims exclusive (or sovereign) rights to exploit all resources within the zone. A fourth, more limited form preserves merely the right to manage the resources of the zone. Reconciling the differing legal concepts that underlie these varying types of offshore resource zones created one of the most difficult negotiating problems at UNCLOS III. Although many issues were involved, including navigation, fishing, scientific research, protection of the marine environment, and construction and control of artificial islands and installations, resolving these specific, tangible problems proved less difficult than dealing with the underlying theoretical split between two major factions—the extreme territorialists within the Group of Seventy-Seven and the maritime States.

The former of these groups—the territorialists—regarded the economic zone as one of national jurisdiction in which the rights of the coastal States were primary and the rights of other States in navigation, oversight and communication were subordinate to the coastal States' rights of exploitation and control. The maritime States, on the other hand, regarded the zone as a part of the high seas but with an overlayer of coastal States' rights of exploitation of economic resources. Although it was possible to spell out the respective rights and obligations of coastal and all other States with some particularity, the manner in which the Convention treated the nature of the regime—high seas or national jurisdic-

26. For an extensive analysis of the various forms proclaimed by a number of coastal States, see Burke, supra note 11; Coquia, supra note 8.
tion—might have tipped the balance in the event of a future conflict of uses between coastal and other States, or it might have become the deciding factor in determining the lawfulness of activities not specifically mentioned or foreseen in the drafting of the text—the residual rights issue.

In addition, there was the danger that States not parties to the Convention could nevertheless point to the exclusive economic zone articles as evidence of customary international law. Without the inclusion of the carefully delineated restrictions on coastal State competence expected to be included in the final text, a coastal State tilt might eventually lead to the type of jurisdictional "creep" so feared by the maritime States. In the early stages of the negotiation, neither side appeared to be willing to yield on its juridical theory. As late as 1976, the U.S. delegation stated that it would not agree "to any text which makes it clear that the zone is not high seas."30 The territorialists were just as firm.31

This apparent impasse was brought into focus by the promulgation of the Informal Single Negotiating Texts at the close of the Third Session in 1975.32 Part II of the texts was prepared by the then-Chairman of the Second Committee, Ambassador Galindo Pohl. As a basis for preparation of the section on the economic zone, the Chairman had the benefit of the "main trends" paper33 and the statements of delegations during the general debate and afterwards.34 He also had the results of extensive discussions in an "informal group composed of participants from all geographical regions and groups representing the main trends and tendencies of opinion in regard to the future law of the sea."35 The work product

31. Id.
32. ISNT, supra note 22.
35. Group of Juridical Experts, The Economic Zone (April 24, 1975) [hereinafter cited as
of this group, consisting of forty to fifty participants chaired by Ambassador Jens Evensen of Norway, was forwarded to the Second Committee Chairman in a working paper that had been through six revisions after long and tedious discussions.\textsuperscript{88} In the view of many, this working paper represented a carefully balanced set of articles granting coastal States sovereign rights to exploit the economic resources of the zone while preserving essential freedoms of other States in the same waters.\textsuperscript{87} Although much of the Evensen Group's paper was incorporated into part II of the ISNT by the Chairman, he modified it in some respects based on a competing paper submitted to him a week later by the Group of Seventy-Seven.\textsuperscript{88} This latter paper was in many respects quite similar to the Evensen paper, but accepted the extreme territorialists' views as to the national character of the zone.

The Evensen text gave coastal States sovereign rights "for the purpose of exploring and exploiting, conserving and managing the natural resources" of the zone,\textsuperscript{89} but with respect to other measures of control, such as over scientific research, structures in the zone, and preservation of the marine environment, the coastal States' jurisdiction was qualified by the term "as provided for in the Convention,"\textsuperscript{90} thus incorporating more detailed provisions concerning these matters found elsewhere in the text—some of which had not yet been dealt with in the negotiation.\textsuperscript{41} The ISNT was similar as to sovereign rights of exploration, exploitation, conservation and management of the resources of the zone, but it departed from the Evensen text by eliminating any qualifications on the coastal States' competences in other fields.\textsuperscript{42} Two other departures from the Evensen text were considered significant by the maritime States. The first added the word "exclusive" to the title

\textsuperscript{88} Id. See Clingan, supra note 16, at 540.
\textsuperscript{87} Stevenson & Oxman, supra note 24, at 776.
\textsuperscript{89} Evensen Paper, supra note 35, art. 1, para. 1(a).
\textsuperscript{90} Id. art. 1, para. 1(c).
\textsuperscript{41} In his forwarding letter, Ambassador Evensen noted that "these draft articles on the Economic Zone will be subject to and contingent upon satisfactory solutions on other subjects and issues not dealt with in the paper." Evensen Paper, supra note 35, at 209.
\textsuperscript{42} ISNT, supra note 22, art. 45, para. 1(b) and (c). Compare the Evensen Paper, supra note 35, art. 1, para. 1(c).
of the "economic zone." The second appeared in the articles on the high seas, an area that had not been dealt with by the Evensen group. Here the Chairman included an article that defined the high seas as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." These changes rendered the ISNT economic zone articles totally unacceptable to most of the maritime States.

Nevertheless, except for minor changes in wording, the ISNT articles on the exclusive economic zone were carried forward into the Revised Single Negotiating Texts (RSNT), promulgated by committee chairmen at the end of the Fourth Session in New York in 1976. In an introductory note to part II of the RSNT, the Second Committee Chairman, Andres Aguilan, explained his rationale for retaining the ISNT version of the economic zone articles in the RSNT. He stated:

The matter on which the [Second] Committee was perhaps the most divided was whether or not the exclusive economic zone should be included in the definition of the high seas. I felt initially that I should at least point the way to a compromise solution, giving tangible recognition in some manner to my opinion that an accommodation could be found.

However, upon more closely analyzing the discussion, I decided that to change the text now might be counter-productive, in the sense that it could upset the balance implicit in the single negotiating text.

It was perhaps unfortunate that the issue was addressed in terms of the definition of the high seas in Article 75. There could be little debate as to which of the provisions in this chapter on the high seas apply in the exclusive economic zone, whether included in the definition of high seas or not.

Nor is there any doubt that the exclusive economic zone is neither the high seas nor the territorial sea. It is a

43. ISNT, supra note 22, art. 45, para. 1.
44. Id. art. 73.
zone *sui generis*.

As has often been pointed out, the matter should be addressed in terms of the 'residual rights.' In simple terms, the rights as to resources belong to the coastal State and, in so far as such rights are not infringed, all other States enjoy the freedoms of navigation and communication. In fact this is specified in general terms in Article 46, when read in conjunction with Articles 44 and 47. Many had thought that these provisions dealt adequately with the matter. My original intention to point the way to a compromise solution would have related closely to these provisions and I would encourage a re-orientation of the discussion around these articles.46

With Ambassador Evensen by this time having focused his attention more upon negotiations involving the issue of the deep seabed, Ambassador Castaneda of Mexico stepped into the breach. Calling together an informal group along the lines of the earlier Evensen group, and assisted as co-rapporteur by Ambassador Vindenes of Denmark, he embarked on the task of giving the necessary precision to the articles so that they would satisfy both coastal and maritime States within the Chairman's injunction that the zone was neither territorial nor high seas but was *sui generis*.47 With the view of most segments of the Conference having been expressed by this time in either the informal texts or in the large number of informal proposals on the exclusive economic zone submitted to the Second Committee,48 the Castaneda group was able to synthesize a slightly modified set of articles on the economic zone that accommodated the seemingly irreconcilable views of the two major camps.49 The results of the Castaneda group's deliberations were incorporated essentially verbatim into the third iteration of the informal negotiating text—the Informal Composite Ne-

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46. Id., Introductory Note, paras. 14-18.

47. For a more detailed account of the convening and functioning of this informal group, see Brennan, The Evolution of the Sui Generis Concept of the Economic Zone, Proceedings of the 7th International Ocean Symposium, Tokyo, Oct. 21-22, 1982, at 8, and Brennan, Jurisdiction of Coastal States and Other States in the Exclusive Economic Zone, Proceedings of the 7th International Ocean Symposium, Tokyo, Oct. 21-22, 1982, at 46.

48. See the large number of informal proposals on the economic zone reprinted in IV Documents, supra note 35, at 283-320.

49. Castaneda Group, Exclusive Economic Zone Articles, reprinted in IV Documents, supra note 35, at 428 [hereinafter cited as Castaneda Paper].
negotiating Text,—the first of the negotiating texts integrated into a composite whole and promulgated by the President of the Conference instead of as individual parts by committee chairmen. The modifications suggested by the Castaneda-Vindenes text and incorporated into the ICNT, though modest in terms of the actual quantity of changes, were of major importance to the maritime States in defining the actual legal nature of the zone and the qualifications on the competence of the coastal States in the zone. Though the extreme territorialists and a few others continued to grumble about this formulation, it broke the deadlock, and the final text of the Convention remains as it appeared in the ICNT, except for minor drafting changes.

The Castaneda group's accommodation of the relationships between coastal and other States in the exclusive economic zone reflect the following principal points:

—The definition of the exclusive economic zone is separated out into a separate article which not only sets forth its geographic description but makes clear that the zone has no juridical existence apart from the specific legal regime established in part V of the Convention.\(^51\)

—The coastal State has sovereign rights—subject only to the general qualifications of article 55—for the purpose of exploring and exploiting, conserving and managing the natural resources of the seabed, subsoil, and water column.\(^52\) This is unchanged from prior negotiating texts.

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50. See supra note 25.
51. ICNT, supra note 25, art. 55. All references in this and the following footnotes are to the ICNT rather than the Castaneda Paper since the ICNT adopted the Castaneda proposals essentially verbatim.
52. Id. art 56, para. 1(a). The term, "sovereign rights," which is used to describe the rights the coastal State has over the delineated economic resources of the exclusive economic zone is derived from the 1958 Convention on the Continental Shelf, which describes the rights exercised by the coastal State over the continental shelf with the identical term. Convention on the Continental Shelf, done April 29, 1958, art. 2, para. 1, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311. The term was never given a precise juridical definition. It was adopted by the International Law Commission (ILC) in its 1955 Draft Articles on the Law of the Sea as a compromise between those members that desired to confirm that the coastal State exercised "sovereignty" over the shelf and its resources and those that desired to limit the competence of the State to jurisdiction and control as used in the 1945 Truman Proclamation and the earlier formulation by the ILC in its 1951 draft. Report of the International Law Commission Covering the Work of Its Eighth Session, 11 U.N. GAOR Supp. (No. 9) at 42, U.N. Doc. A/3159, reprinted in [1956] 2 Y.B. Int'l L. Comm'n 253, 297, U.N. Doc. A/CN.4/Ser.A/1956/Add.1.
The coastal State has jurisdiction as provided for in the relevant provisions of the Convention with regard to establishment of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment. The significant modification here is the cross-reference between the coastal State's competence over these activities and other articles of the Convention that deal with them in more detail. The competence of the coastal State is thus not unqualified but subject to the restraints that other parts

The term "sovereignty" was unacceptable to some in that it might give rise to the erroneous interpretation that it included the superjacent waters, whereas the term "control and jurisdiction" was felt by some not to express adequately that the rights were exclusive. See the International Law Commission debate at its fifth session, reprinted in [1958] 1 Y.B. Int'l L. Comm'n 83-93, 95-102, 169-70, 198-202, U.N. Doc. A/CN.4/Ser.A/1958; see also the discussions in Sixth Committee of the General Assembly in 1956, 11 U.N. GAOR (487-600 mtgs.) at 1, U.N. Doc. A/C.6/SR. (1956-57), summarized in 4 M. Whiteman, supra note 14, at 854-56.

The debate was carried forward into the 1958 U.N. Conference on the Law of the Sea, where a number of different formulations were proposed. Once it was clear at the Conference that the status of the superjacent waters was preserved as high seas, those delegations that were concerned with the implications of the use of the term "sovereign rights" were satisfied. See, e.g., Letter from Acting Secretary of State to President, transmitting the Treaty and recommending adoption of article 2, reprinted in 4 M. Whiteman, supra note 14, at 867. The Conference adopted the ILC's formulation. II United Nations Conference on the Law of the Sea: Official Records 142, U.N. Doc. A/CONF. 13/L.55 (1958).

All that can be concluded from the history of the term is that "sovereign rights" are something less than "sovereignty," but something more than jurisdiction and control, including as minimum additional elements, exclusivity of jurisdiction and dominion over the designated resources. Within the Convention on the Law of the Sea, the best indication of what they include is found by examining the specific provisions that describe the exact rights the coastal State is entitled to exercise. Although paragraph 1 of article 58 does not say explicitly that the exercise of the rights conferred therein is subject to the other terms of part V, article 58 states that the exclusive economic zone is "subject to the specific legal regime established by this Part," and the "rights and jurisdiction of the coastal State . . . are governed by the relevant provisions of this Convention." Convention, supra note 1, art. 55. The "sovereign rights" of the coastal State are thus not free-floating but rather tied to the specific provisions of the Convention.


54. ICNT, supra note 25, art. 56, para. 1(b).
of the Convention impose.

—The coastal State has other rights and duties provided for in the Convention. This is unchanged from the RSNT.55

—All States enjoy, subject to the relevant provisions of the Convention, the freedoms of navigation, overflight and laying of cables and pipelines "referred to in article 87" (the article setting forth high sea freedoms) and "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of this Convention."56 This formulation contains three important modifications to the concept as it appeared in the RSNT. First, it adds the words "referred to in article 87," which makes it clear that the quality and quantity of these freedoms are identical to the same freedoms exercised on the high seas, subject only to the specific modifications that may be made in the Convention itself.57 The second is the addition of the phrase "and other internationally lawful uses of the sea related to these freedoms," which leaves no doubt that this list is not exhaustive. The third is the addition of the phrase, "such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention." Although this wording seems awkward, it was important to the maritime States because it conveys a conception of the types of activities that would be permissible.58 Naval maneuvers, for example, although not precisely described by the term "navigation," are certainly within the description, "associated with the operation of ships [and] aircraft."

—The articles of the high seas part of the Convention, except those concerning fishing, are incorporated into the exclusive economic zone part "in so far as they are not

55. Id. art. 56, para. 1(c).
56. Id. art. 56, para. 1 (emphasis added).
58. Clingan, supra note 28, at 65; Richardson, supra note 57, at 573.
incompatible with this Part." 60 This is unchanged from the RSNT, but the addition of a new article 89 to the ICNT, which is incorporated by reference into the exclusive economic zone part by this provision, becomes highly significant in eliminating any territorialist flavor from the juridical character of the economic zone. 61

—Both coastal States and other States, in performing or exercising their rights and performing their duties, are required to have due regard for each other's rights. Other States are required to comply with the regulations adopted by the coastal State in accordance with the Convention and other rules of international law not incompatible with the Convention. 61 This too is unchanged from the RSNT.

—in article 86, which continues to state that the provisions of the high seas part apply only to the sea beyond the exclusive economic zone, a second sentence is added to the effect that the listing of high seas rights in part VII does not abridge any rights that all States enjoy in the zone by virtue of article 58, which, as indicated above, in addition to listing specific freedoms enjoyed by all States, incorporates by reference all the rules applicable to the high seas except those pertaining to fishing as well as pertinent rules of international law not incompatible with the exclusive economic zone part of the Convention.

—Finally, a new article 89 is added to the high seas part

60. ICNT, supra note 25, art. 58, para. 2.
61. See infra text accompanying note 63.
61. ICNT, supra note 25, art. 56, para. 2 and art. 58, para. 3. Professor Oxman points out the curious anomaly that although coastal and other States must have due regard for the rights of each other by virtue of articles 56 and 58, there is no explicit requirement that users exercising high seas freedoms have due regard for the interests of other States exercising high seas freedoms as they are required to do on the high seas. Oxman, The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions, 71 Am. J. Int'l L. 247, 260-61 (1977). Professor Oxman adds that this was presumptively an oversight. Id. at 261. If so, it was not corrected in any of the subsequent revisions nor in the final text of the Convention. The omission does not appear to be significant, however. Since the quality of the high seas rights incorporated into the exclusive economic zone is the same as it is on the high seas, the freedom of navigation would seem to carry along its requirement that it be exercised with due regard for the interests of other States in the exercise of their freedoms of the high seas that are applicable in the exclusive economic zone.
stating that "[n]o State may validly purport to subject any part of the high seas to its sovereignty."\textsuperscript{62} The text of this additional article is not new but was taken from the second sentence of article 76 of the RSNT (which corresponds with article 87 of the ICNT and the Convention). Moving it to article 89, however, makes it one of those articles of the high seas part that is incorporated by reference into the exclusive economic zone part by article 58, paragraph 2, thus clearly refuting any contention that the economic zone is territorial in nature.\textsuperscript{63}

With these modifications, the residual rights provision of the RSNT, incorporated into article 59 of the ICNT, which provides criteria for resolution of conflicts between coastal and other States as to unspecified activities in the exclusive economic zone, becomes an acceptable formula.

From the foregoing summary of the development and content of the relevant parts of the exclusive economic zone provisions and articles 86 through 89 of the high seas part, it is evident that the exclusive economic zone of the 1982 Convention is not a formless concept by which a coastal State has resource competence over a broad zone off its coast, but rather is a zone in which the coastal State has a set of precisely defined rights and duties which mesh on an equal plane with a set of reciprocal rights and duties exercised by other States which carry out activities within the zone. It was only on the basis of this careful articulation of reciprocal rights and obligations—coupled with the compulsory dispute-settlement provisions of the Convention, about which more will be said later—that agreement was possible on the exclusive economic zone part of the Convention.\textsuperscript{64} Once any part of the formula is changed, the basis for consent disappears. Thus, while States may claim that other forms of broad coastal resource zones are justified by customary international law, they cannot rely on the UNCLOS III negotiation and formulation as evidence that they constitute State practice.\textsuperscript{65} With the foregoing as background, it is now possi-

\textsuperscript{62} ICNT, supra note 25, art. 89.
\textsuperscript{63} Oxman, supra note 28, at 73 n.49.
\textsuperscript{65} Id. at 15-19; see Treves, Military Installations, Structures and Devices on the Seabed, 74 Am. J. Int'l L. 898, 833 (1980).
ble to analyze freedom of navigation in the exclusive economic zone as provided in the 1982 Convention.

III. Framework for Analysis

As we have seen, the basic regime for navigation in the exclusive economic zone is "freedom" of navigation. Further, subject only to the provisions of the Convention, this "freedom" is the same as that applicable on the high seas. Even on the high seas, however, such freedom is not absolute. Article 87 provides that the freedoms of the high seas shall be exercised with due regard for the interests of other States in their exercise of the freedoms of the high seas and for activities in the area. Article 88 requires that the high seas may only be used for peaceful purposes. Articles 88 through 115 contain a number of provisions restricting total freedom of States on the high seas. Current conventional law, as well as the 1982 Convention, prohibit States from allowing ships flying their flag to engage in piracy or transportation of slaves. The 1982 Convention adds to this list of prohibited activities unauthorized broadcasting, and engaging in illicit traffic in narcotic drugs and psychotropic substances contrary to international conventions. Part XII of the Convention contains extensive provisions concerning pollution of the marine environment that are applicable on the high seas.

All of these qualifications on absolute "freedom" of the high seas are applicable in the exclusive economic zone, but, by virtue of article 58, the freedoms enjoyed by all States within that zone are also "subject to the relevant provisions of this Convention." In addition, the "other internationally lawful uses of the sea related to" the listed uses must be "compatible with this Convention." Articles 88 through 115 of the high seas part and "other pertinent rules of international law" are incorporated by reference only when they are "not incompatible with this [exclusive economic zone]
Part.

Legitimate limitations on the freedom of navigation in the exclusive economic zone beyond those existent in the high seas may come from two sources— incompatible uses authorized or actually conducted by the coastal State, and laws and regulations of the coastal State that directly or indirectly affect the freedom of navigation.

IV. Incompatible Uses

The problem of incompatible uses is a significant one. It can arise either from uses foreseen and specifically provided for in the Convention (as, for example, the construction of artificial islands or other structures in the exclusive economic zone) or by uses that were not specifically identified in the text of the Convention but are nevertheless embraced within the phrase “other activities for the economic exploitation and exploration of the zone.”

Where the Convention specifically lists a particular use or activity as being within the rights of the coastal State, it was a relatively straightforward task—although not always an easy one—to set forth in the text itself limitations on the competence of the coastal State to ensure that the exercise of its rights did not interfere with the community rights of other States that might be exercised in the zone. The most obvious example, of course, is the right of the coastal State to construct, and to authorize and regulate the construction, operation and use of artificial islands, installations and other structures in the exclusive economic zone. In this case, the Convention provides explicit safeguards to protect the freedom of navigation and other lawful activities in the zone. The coastal State’s exclusive rights of construction, authorization and exercise of jurisdiction are limited to installations and structures for the purposes provided for in article 56. The coastal State must give

73. Id. art. 58, para. 2.
74. Id. art. 56, para. 1(b)(i).
75. Id. art. 56, para. 1(a).
76. See supra text accompanying notes 23-49.
77. It should be noted that the coastal State’s exclusive authority with respect to artificial islands is not explicitly limited to artificial islands constructed for the purposes provided for in article 56 or other economic purposes. This limitation applies only to installations and structures. Compare Convention, supra note 1, art. 60, para. 1(a) with para. 1(b). The significance of this distinction is unclear inasmuch as the Convention nowhere delineates the distinction between artificial islands, installations and structures.
due notice of their construction, provide warning of their presence, and remove them when they are no longer used. 78 They may not be constructed where they will interfere with “recognized sea lanes essential to international navigation.” 79 Although the coastal State may establish reasonable safety zones around these installations and structures, it must take account of international standards, and the zones may not exceed a specified size. 80 In addition to these specific restrictions on coastal State action, the coastal State is also subject to the general injunction that it shall have “due regard” to the rights and duties of other States in the exclusive economic zone. 81

The difficulty comes when the coastal State is asserting a right under the general grant of “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living,” of the zone or “with regard to other activities for the economic exploitation and exploration of the zone.” 82 Some of these rights are given more specific content by later provisions in the Convention. Conservation of the living resources, for example, is tied by article 61 to measures that the coastal State may take to establish allowable catches to maintain or restore populations of the living resources of the zone. This later elaboration in article 61 makes clear that “conservation” does not, as perhaps might be argued, deal with protection of the marine environment from pollution. Nevertheless, there still remains a considerable area of discretion for the coastal State under its general rights of economic exploration and exploitation of the zone. To protect against abuse of this discretion, other States using the zone for navigation may rely on three safeguards—the “due regard” clause of article 56, the residual rights clause, 83 and the right to resort to the compulsory dispute-settlement processes of part XV of the Convention. 84

It is important to recognize, in assessing priority between competing uses of the zone, that the Convention does not establish any general order of priority between the rights of the coastal State

78. Id. art. 60.
79. Id. art. 60, para. 7.
80. Id. art. 60, para. 5.
81. Id. art. 56, para. 2.
82. Id. art. 56, para. 1(a).
83. Id. art. 59.
84. Id. part XV, arts. 279-99.
and those granted to other States in the zone. It is self-evident that if a coastal State lawfully constructs an artificial structure in the zone, the use of that structure for the time being takes priority over the right of navigation through the spot on which the structure is located. In a like manner, if there exists a recognized sea lane essential to international navigation, then the coastal State may not establish an artificial structure there; the sea lane has priority in this case.

This ad hoc system of priorities is reflected in the reciprocal “due regard” clauses of articles 56 and 58. Both coastal States and other States must have due regard for the competing rights of each other. The two provisions are stated in somewhat different language, but that difference is not meant to state any general priority of the interests of one type of State over the interests of the other. In the case of coastal States, in addition to having due regard for the rights of the other States, they must act “in a manner compatible with the provisions of this Convention.” This provision serves to emphasize again the point made earlier—that the exclusive economic zone part of the Convention is not an instrument that grants a large bundle of undefined rights in a broad offshore zone but rather is a set of precisely defined rights that cannot be separated from a corresponding set of international obligations.

In the reciprocal obligation of other States to have due regard for the rights of the coastal State, they are obliged, in addition, to “comply with the laws and regulations adopted by the coastal

85. “The text as it stands does not assign priorities of use as between the coastal State and others as such.” Oxman, supra note 61, at 264. See Clingan, supra note 28, at 65-66. Treves, supra note 65, at 832-33; Vindenes, The Environmental Rights of Coastal State and Freedom of Navigation, in 17 Law Sea Inst. Proc. 574, 578 (1984). Professor Brown, in an extensive analysis of the nature of the exclusive economic zone concludes that the plenary powers and jurisdiction granted to the coastal State in the economic zone would tip the balance heavily in favor of the coastal State. Brown, The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts between Different Users of the EEZ, 4 Maritime Pol. Mgmt. 325, 334 (1977). It should be noted, however, that Professor Brown’s article was based on an analysis of the Revised Single Negotiating Text, which, as we have seen, was significantly modified by the Castaneda Group’s amendments reflected in the Informal Composite Negotiating Text. See supra text accompanying notes 50-64.

86. The concept of “due regard” was derived from the “reasonable regard” provision of article 2 of the Convention on the High Seas. Oxman, supra note 61, at 261. Professor Brown concludes that there is no difference in meaning between the two terms. Brown, supra note 85, at 339. This conclusion seems correct.

87. Convention, supra note 1, art. 58, para. 2.

88. See supra text accompanying note 64.
State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”\textsuperscript{89} Again, this addition does not reflect any general subordination of the rights of other States in the zone to coastal State rights; the other States' interests give way only in so far as the coastal State is given a prescriptive competence by the Convention itself or other rules of international law. As Professor Oxman has stated, “It can be anticipated that these balanced duties will provide the juridical basis for resolving many practical problems of competing uses.”\textsuperscript{90}

Where the Convention attributes to the coastal State and other States specific rights and obligations, the criteria for application in giving “due regard” to the opposing State’s rights can be derived from the terms of the Convention itself. Where the Convention does not make provision for a particular use, however, and where, as we have seen, there is no generalized priority in the zone for either coastal or other State rights, resort must be had to the “residual rights” clause of article 59. This article provides:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.\textsuperscript{91}

Although the criteria set forth are general, they at least provide some guidance to decision-makers. The concept of “equity” has a legal content in international law; it does not mean \textit{ex aequo et bono}.\textsuperscript{92} Further, the decision must be made in the light of all rele-

\textsuperscript{89} Convention, supra note 1, art. 58, para. 3.
\textsuperscript{90} Oxman, supra note 61, at 260-61.
\textsuperscript{91} Convention, supra note 1, art. 59.
\textsuperscript{92} The International Court of Justice has always made a clear distinction between decisions applying rules of equity, which are a part of international law, and those made \textit{ex aequo et bono}, in which the court may go beyond existing rules of international law to fashion a decision that may have a “legislative” character. For recent expressions of the Court's view on this issue, see Case Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 60 (Judgment of Feb. 24); Fisheries Jurisdiction Case (U.K. v. Iceland, 1974 I.C.J. 4, 33 (Judgment of July 25); North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v.
vant circumstances, and must take into account not only the importance of the interests of the parties to the dispute, but also the interests of the international community as a whole. This final criterion, by giving proper place to community concerns, is perhaps the most important provision of the article, for the international community as a whole has a major interest in an area that embraces over thirty-five percent of the world's oceans. If the world community was willing to invest fifteen years in the process of establishing the precise rules for allocation of coastal and community interests, it certainly could not afford to have the delicate balance upset by *ad hoc* decisions that did not take account of community interests.

An interest important to some maritime States that has already been asserted to be incompatible with coastal State interests in the exclusive economic zone is the right to conduct naval maneuvers. At the Convention-signing session of UNCLOS III in December 1982, the representative of Brazil stated his country's understanding of the Convention as not authorizing foreign States to carry out military exercises or maneuvers within the exclusive economic zone, particularly when those activities involved the use of weapons or explosives, without the prior knowledge and consent of the coastal State. In Brazil's view such maneuvers amounted to the threat or use of force against the territorial integrity or political independence of a State in violation of article 301 of the Convention as well as the provisions of the United Nations Charter.

The position reflected in the statement by the representative of Brazil is unsupported by the language of the Convention or its negotiating history. As developed above, the rights of other States in the exclusive economic zone embrace the full content of freedom of

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93. Office of the Special Representative of the Secretary General of the United Nations for the Law of the Sea, 1 Law of the Sea Bull. 21 (1983). In making this statement, the representative of Brazil was purporting to act under the provision of the Convention that allows States to make declarations or statements, either on signature or ratification, harmonizing their laws with provisions of the Convention, provided that such declarations or statements do not purport to exclude or modify the legal effect of the provisions of the Convention in their application to those States. Convention, supra note 1, art. 310. Statements of similar import were made by Cape Verde and Uruguay.

navigation as set forth in article 87 except as it may specifically be modified by the terms of the Convention itself. Further, it is amplified in article 58 by the words, "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships [and] aircraft . . . and compatible with the other provisions of this Convention." As stated by Ambassador Elliot Richardson, former head of the U.S. delegation to UNCLOS III:

Article 58 was the subject of particularly difficult negotiations in the informal group. Every word and comma was exposed to extensive debate. It was understood from the outset that the willingness of the maritime States to back off their insistence on explicit high-seas status for the exclusive economic zone must be compensated for by coastal State recognition that the high-seas freedoms exercisable in the zone are qualitatively and quantitatively the same as the traditional high-seas freedoms recognized by international law.

There is no question that such high seas freedoms include the right to conduct military maneuvers and exercises, subject only to the obligation to have due regard for the rights of other States exercising their freedom of the high seas.

The only possible term of the Convention which might be said to impinge on the right of naval maneuver in the exclusive economic zone is the provision in article 88, made applicable to the zone by article 58, paragraph 2, that the high seas are "reserved for peaceful purposes." This is not the place to debate the meaning of that phrase. Professor Oxman, in his accompanying article in this issue, although also eschewing a detailed analysis of the term "peaceful purposes," does provide some comments giving insight into its intended meaning in the Convention. His analysis is sufficient to support his conclusion that:

The size and complexity of the Law of the Sea Conven-

95. Convention, supra note 1, art. 58, para. 1.
96. Richardson, supra note 57, at 572-73.
97. Id. at 574. See also Clingan, supra note 94, at 5; Oxman, supra note 28, at 72. Cf. Treves, supra note 65, at 333.
98. Convention, supra note 1, art. 58, para. 2.
tion is intrinsic evidence that a one-sentence reference to peaceful purposes, applicable to all activities of all States, including coastal States, in both the exclusive economic zone and the high seas beyond, and therefore in all of the seas and oceans seaward of the territorial sea, was not intended to impose new legal restraints on military activities at sea. 100

For our purposes it is sufficient to note that if the term restricts military maneuvers in the exclusive economic zone, it does so in the high seas as well, and as we have seen, the right of naval maneuver there is well established. 101

If, however, many coastal States were to adopt the Brazilian view and apply it in their economic zones, the result could be disruptive not only of the careful balance attained in the exclusive economic zone articles of the Convention, but also of international stability as well. Some of the most strategically important areas of the world (for example, the Mediterranean Sea, the Caribbean Sea) are not sufficiently large to have any waters that are not part of the exclusive economic zone (or territorial sea) of one or another of the coastal States. These seas are areas of deployment and maneuver of the navies of several of the world’s major powers as well as of the naval ships and aircraft of States of the region. These States are unlikely to accept the unilateral interpretation asserted by Brazil in its statement. 102

One difficulty posed by the Brazilian contention is that in the

100. Id. at 831. For a detailed analysis of the meaning of the term, see Treves, supra note 65, at 815-19; Zedalis, “Peaceful Purposes” and Other Relevant Provisions of the Revised Composite Negotiating Text: A Comparative Analysis of the Existing and Proposed Military Regime for the High Seas, 7 Syracuse J. Int’l L. & Com. 1, 18-20 (1979). See also Richardson, supra note 57, at 574.

101. As Professor Oxman states, “The history of the military use of the sea is measured in millennia.” Oxman, supra note 99, at 831.

102. The U.S. actions in 1981 of conducting naval exercises in international waters and airspace claimed by Libya which resulted in the shooting down of two Libyan fighter aircraft provide evidence of the determination of the United States not to permit the erosion of high seas rights through international claims it regards as unlawful. See departmental statements and responses of U.S. Secretary of State Haig and U.S. Secretary of Defense Weinberger to reporters’ questions in 81 Dep’t St. Bull. 18, 19, 22, 57-62 (1981). Other important areas of the ocean that would become totally enclosed by the uniform adoption of a 200-mile zone include the Baltic, North, Black, Red, South China, East China, Japan, Java, Celebes and Sulu Seas and the Persian-Arabian Gulf. Areas almost totally enclosed would include the Gulf of Mexico, the Norwegian, Arabian and Okhotok Seas and the Bay of Bengal. Alexander & Hodgson, supra note 21, at 572-73.
event a dispute should arise as to the conduct of foreign military maneuvers in the economic zone, the compulsory, third-party dispute-settlement procedures may not be available to resolve the dispute. Article 298, paragraph 1(b), allows States, at the time of signing, ratifying or acceding to the Convention, or at any time thereafter, to declare that they do not accept third-party settlement procedures for disputes concerning military activities. Of course, the dispute-settlement machinery that does not entail a third-party binding decision is fully applicable, but if either party to such a dispute has filed a declaration under article 298, paragraph 1(b), no binding decision could be obtained.

Conclusion on Non-Compatible Uses

Although the provisions of the Convention attempting to harmonize competing activities in the exclusive economic zone do not contain the precision that marks some other aspects of the exclusive economic zone part, it is probably unrealistic to expect it to be more precise than it is. For current or foreseen uses, the Convention attempts to prescribe limits that allow accommodation with other uses by other States. In the case of uses that could not be foreseen at the time the Convention was negotiated, the treaty-makers provided a set of general criteria and procedures for resolving conflicts that might occur. If applied in good faith, these criteria and procedures should provide acceptable solutions that will accommodate the conflicting interests of coastal and other States.

In this respect, as Professors Riphagen and Treves have noted, the most important aspect of the relevant articles is mostly negative "as it rules out 'residual rights' of the coastal State."  

V. Coastal State Laws and Regulations

The articles of the Convention in only one instance explicitly empower the coastal State to regulate navigation in the exclusive economic zone. This grant of power is found in article 60, authorizing the coastal State to establish reasonable safety zones around artificial islands, installations and structures and within such zones "take appropriate measures to ensure the safety of navigation and

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103. See infra text accompanying notes 189-97.
of the artificial islands."\textsuperscript{105} The articles do, however, provide for regulatory powers by coastal States over a number of activities as to which they exercise either sovereign rights or jurisdiction. Article 58, paragraph 3, in turn, requires that foreign States, in exercising their rights and duties under the Convention, shall "comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with this Part."\textsuperscript{106}

Although these laws and regulations may not be aimed at controlling freedom of navigation, their implementation may indirectly have that effect. Abuse of their powers by coastal States could pose a serious danger to freedom of navigation. The most significant example of such regulatory power is with respect to protection of the marine environment, where the coastal State is given fairly broad prescriptive powers and certain limited enforcement jurisdiction over vessel-source pollution in the exclusive economic zone.\textsuperscript{107}

\textit{Explicit Powers}

As stated, the sole provision in the exclusive economic zone part of the Convention explicitly granting coastal States jurisdiction over navigation is paragraph 4 of article 60, which provides:

The coastal State may, where necessary, establish reasonable safety zones around . . . artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.\textsuperscript{108}

This provision would appear to pose little threat to freedom of navigation. Although there are no specific guidelines as to the content of the "appropriate measures" to ensure the safety of navigation or artificial islands, installations or structures (hereinafter referred to collectively as structures), the restrictions on the siting of the structures and the limitation on the size of the safety zones

\textsuperscript{105} Convention, supra note 1, art. 60, para. 3 (emphasis added).
\textsuperscript{106} Id. art. 58, para. 3.
\textsuperscript{107} See, e.g., id. arts. 211 and 220. Because of the expanse of coastal State powers over pollution, they are discussed in a separate section of this article. See infra text accompanying notes 134-58. The present section will address other coastal State regulatory powers.
\textsuperscript{108} Id. art. 60, para. 4 (emphasis added).
protect against interference with navigation. Paragraph 7 of article 60 prohibits establishing them “where interference may be caused to the use of recognized sea lanes essential to international navigation.”109 The size of the safety zones is limited to 500 meters surrounding the structures.110 With these limitations on the coastal State’s discretion, it is unlikely that the siting of structures or rules governing navigation in the surrounding safety zone should have any appreciable impact on the freedom of navigation. Should they do so, States whose vessels are affected could resort to the compulsory dispute-settlement procedures of part XV of the Convention.

**Implied Powers or Powers Exercised Indirectly**

In examining the extent to which powers granted to coastal States in the exclusive economic zone with respect to specific activities may imply authority over other activities that are characterized as “freedoms,” one must tread carefully. The negotiators who created the complicated web of relationships between States in the exclusive economic zone attempted to spell out as precisely as possible the respective rights and duties of coastal and other States. It might be argued that because of this precision and the careful articulation of qualifications and limitations on the competence of coastal States and the rights of other States, it would be contrary to the spirit of the agreement to suggest that any implied powers flow from explicit powers granted to coastal States. To take this view, however, fails to recognize the precept of paragraph 3 of article 58 that other States shall have “due regard” for the rights and duties of the coastal State “and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”111

Other than pollution-control measures, discussed below, the principal coastal competence that might give rise to coastal State regulations affecting navigation is that provided for in article 56 to explore and exploit, conserve and manage the natural resources of the zone. It is interesting that nowhere in the exclusive economic zone part of the Convention is there an explicit grant of authority to the coastal State to issue laws and regulations implementing

109. Id. art. 60, para. 7.
110. Id. art. 60, para. 5.
111. Id. art. 58, para. 3.
this competence. The powers that the coastal State are given in the various fisheries articles certainly imply the power of regulation, but the explicit power is only referred to in a back-hand manner in article 62 which requires nationals of other States fishing in the exclusive economic zone to "comply with the conservation measures and with other terms and conditions established in the laws and regulations of the coastal State." 112 The article then goes on to indicate, in a non-inclusive listing, the types of activities that may be covered in those laws and regulations. 113 Likewise, article 73, dealing with the enforcement powers of the coastal State with respect to living resources, provides that the coastal State may "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." 114

Could these prescriptive and enforcement powers of the coastal State over fishing in the exclusive economic zone be lawfully shaped into measures that would adversely affect the freedom of navigation in the zone? One can visualize that at least as to fishing vessels they might. With the number of coastal States that are "zone-locked" by the economic zones of neighboring States 115 and with many normal routes of sea navigation leading through 200-mile zones, 116 the fishing vessels of many States will be required, or may find it convenient, to cross one or more foreign zones in tran-

112. Id. art. 62, para. 4.

113. Subparagraphs (a) through (k) are quite detailed in setting forth the content that may be included in the coastal State's laws and regulations. As the use of the term "liaison inter" in paragraph 4 indicates, however, the listing is not inclusive.

114. Convention, supra note 1, art. 73, para. 1.

115. The problem of a large number of coastal States being "zone-locked" by the 200-mile resource zones of neighboring States was first raised in a statement by Ambassador John Norton Moore, Vice-Chairman of the U.S. Delegation to the Seabed Committee, in a statement to the Committee on August 13, 1973. Ambassador Moore pointed out that with a uniform economic zone of 200 miles, 61 coastal States would be totally zone-locked; that is, they "would have no access beyond their own area of jurisdiction to any ocean on which they face except through the economic area of one or more neighboring States." Statement by Mr. Moore, Main Committee, Aug. 13, 1973, 69 Dep't St. Bull. 410 (1973).

At UNCLOS III, the zone-locked problem came to be merged into the more general problem of geographical disadvantage, which included such additional factors as limited coastlines, adverse configuration and being "shelf-locked." See Alexander & Hodgen, supra note 21, at 577. Although the rights of land-locked and geographically disadvantaged States constituted a significant aspect of the negotiations on the exclusive economic zone at UNCLOS III, that subject is beyond the scope of this article.

sitting to their normal fishing grounds, whether these grounds lie in their own zones, the high seas, or a foreign economic zone in which they are licensed to fish. The very size of some 200-mile zones might necessitate a voyage of several days for a fishing vessel to complete its passage.\textsuperscript{117} In such situations it is not unreasonable that a coastal State would request some assurance that a vessel appearing to be merely passing through its exclusive economic zone is not actually fishing.

As we have seen, article 73 allows the coastal State to take such measures as are necessary, including boarding and inspection, to ensure compliance with its laws and regulations. Under a narrow interpretation of this provision, it would appear that the coastal State would only be allowed to board and inspect vessels actually engaged in fishing.\textsuperscript{118} Under the broadest view, any vessel passing through the zone could be subject to being stopped and inspected to ensure it was not in violation.\textsuperscript{119} Obviously, some middle ground

\textsuperscript{117} To gain an impression of the size of some of the prospective zones, one only needs to examine an ocean chart with a uniform 200-mile exclusive economic zone laid down on it, such as the one in Appendix A to Alexander & Hodgson, supra note 21, at 599. See also The Times, Atlas of the Oceans 222-23 (1983). The effect of islands is enormous. As Alexander & Hodgson point out, a tiny island could claim a 200-mile economic zone of approximately 125,000 square miles. Alexander and Hodgson, supra note 21, at 572. The island-dotted Central and Southwest Pacific Ocean becomes one long, continuous chain of exclusive economic zones, with only an occasional enclosed “puddle” of high seas from the Tuamotu and Marquesas groups of islands in the east to the Malay Peninsula and beyond, a distance of more than 6000 miles. The Times, Atlas of the Oceans 222-23 (1983).

\textsuperscript{118} Professor Burke ascribes this view to Professor Oxman and Ambassador Richardson, or says that at least their statements (which he quotes) are open to this interpretation. Burke, Exclusive Fisheries Zones and Freedom of Navigation, 20 San Diego L. Rev. 603-04 (1983). With respect, it is suggested that Professor Burke reads too much into these two statements. They contain arguments for the qualitative and quantitative equality of freedom of navigation in the exclusive economic zone with freedom of navigation in the high seas. Both authors recognize, in the articles from which the quotations are taken, that these freedoms in the zone are “subject to the relevant provisions of the Convention” and that in exercising them, States “shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of [the] Convention.” Convention, supra note 1, art. 58, paras. 1, 3. See Richardson, supra note 57, at 573; Oxman, supra note 61, at 264. It would seem that the key to Professor Oxman’s view is in his statement that:

Absent specific evidence it would be manifestly unjustifiable to stop and board a freighter or oil tanker navigating through the zone to ensure that it is not fishing, but it would also be manifestly imprudent to expect the coastal State to refrain from inquiry regarding a large fishing fleet moving slowly with gear in readiness and with no apparent destination through a rich fishing ground far from any known navigation route.

Oxman, supra note 61, at 264.

\textsuperscript{119} Professor Brown would apparently support this view. See Brown, supra note 85, at 334 (“the balance of principles is weighed heavily in favour of the coastal State”).
is the correct one. The circumstances of the presence of the vessel or vessels in the zone should determine the reasonableness of coastal State enforcement action. If the unit involved is obviously a cargo ship, the mere fact that crewmen may have streamed a few fishing lines astern would not warrant boarding and inspecting. On the other hand, if the foreign unit is a fleet of fishing trawlers, perhaps accompanied by a factory ship, the coastal State’s sovereign rights over the fish would seem to entitle it to assurance that fishing was not taking place.\textsuperscript{129} A strong argument could be made that boarding and inspection, or some alternative method of investigation, would be permissible under the circumstances.

The problem here, as seen elsewhere, is to find a formula that properly balances the coastal State’s legitimate interests in the resources with the international community’s navigation interests. In a recent article, Professor William Burke has examined this problem in considerable detail.\textsuperscript{121} Although he concludes that in some situations navigational interests must give way, he argues that only a very limited authority to affect navigation should be accepted and only in exceptional circumstances.\textsuperscript{122} The “exceptional circumstances” visualized by Professor Burke would only occur in the case of a few small nations whose dependence on the exploitation of coastal fisheries is vital to national well-being and enforcement of restrictions is difficult yet critical to effective management.\textsuperscript{123} In addition, the impact on navigation would have to be slight, and the benefits of better compliance and enforcement would have to be unusually large and important.\textsuperscript{124} The “very limited authority” that he would permit to be exercised under these exceptional circumstances would rule out measures that are the equivalent of a territorial-sea regime,\textsuperscript{125} or that would bar the entry of fishing vessels without specific authority,\textsuperscript{126} or that would require the carriage and use of transponders.\textsuperscript{127} It would, however, under certain circumstances, permit requiring adherence to sea lanes,\textsuperscript{128} stowage of

\textsuperscript{120} Oxman, supra note 61, at 264.
\textsuperscript{121} Burke, supra note 118.
\textsuperscript{122} Id. at 600, 623.
\textsuperscript{123} Id. at 600.
\textsuperscript{124} Id. at 600-01.
\textsuperscript{125} Id. at 606-10.
\textsuperscript{126} Id. at 610-11.
\textsuperscript{127} Id. at 621-22.
\textsuperscript{128} Id. at 611-18.
fishing gear,129 or reporting of entry and exit and route used.130 He suggests that the most effective protective measures would be those adopted by international agreements.131

As Professor Burke recognizes, there are dangers in singling out a class of vessels and permitting burdens on its freedom of navigation in the exclusive economic zone.132 The arguments made for allowing such measures in the case of fishing vessels could be made mutatis mutandis with respect to scientific-research vessels, since scientific research is subject to a large measure of coastal State control in the exclusive economic zone.133 Other coastal State interests could evoke the same type of arguments. Repeated acceptance of such arguments for various uses would eventually erode the freedom of navigation interest out of existence. This was the reason that spokesmen for the maritime States were so adamantly opposed to a regime in which the residuum of undefined rights was in the coastal State. Although they were successful in avoiding such a regime in the Convention, it will require continued vigilance on their part to ensure that what was gained in negotiations is not eroded slowly in ad hoc determinations of "reasonableness" without appraising where the sum total of such affirmations of coastal State competence is leading.

While Professor Burke's suggestions as to the criteria for coastal State restraints on navigation of fishing vessels in the exclusive economic zone may appear reasonable, as well as his suggestions regarding measures coastal States might take within those criteria, States against which such measures are attempted to be applied should be wary of them lest they become stepping stones to more onerous and unacceptable rules. States should not, for example, accept blanket rules for traffic lanes. Although Professor Burke suggests that traffic lanes are within the acceptable category under his criteria, certainly this should not be true where they impose long detours for transiting vessels. The costs of fuel and transition times to and from fishing grounds may be critical factors in the economic success of a particular enterprise. Though the coastal State is entitled to some assurance that the vessel is not fishing in the exclusive economic zone without permission, the freedom of

129. Id. at 620.
130. Id. at 618-20.
131. Id. at 622.
132. Id. at 608.
133. See Convention, supra note 1, part XIII, in particular, arts. 246-49, 253.
navigation is a right that is on the same level of importance. Some measures less disruptive of that interest should be adopted.

Fortunately, prescriptive and enforcement measures adopted by coastal States are within the compulsory, third-party dispute-settlement procedures of the Convention. Thus, if the parties involved are not able to resolve their disagreement in this regard, resort may be had to those procedures.

Conclusions as to Coastal State Laws and Regulations

Certain implied powers of regulation of navigation exist in the coastal State by virtue of express competence granted for protection of coastal State interests recognized in the exclusive economic zone articles. Their incidence would appear to fall most readily on vessels whose normal activity is in connection with an interest that is recognized as exclusively or primarily coastal (for example, fishing or scientific research). Even here, however, the burden of proving necessity for regulation, and the particular measures of control adopted, should rest on the coastal State. Where the vessel’s normal activity is beyond the explicit competence of the coastal State to regulate, a strong presumption against the legality of any regulation of navigation should exist. Only if the coastal State could overcome this presumption by a clear showing of necessity should any burden whatsoever on navigation be accepted by the international community.

VI. POLLUTION CONTROL

Perhaps the most serious potential threat to the freedom of navigation in the exclusive economic zone is that posed by vesting in the coastal State competence for protection and preservation of the marine environment.\textsuperscript{134} Recognizing that such competence could be a way of indirectly controlling navigation in the zone, some maritime States, at least in the early stages of the Conference, were wary of giving to coastal States very broad powers over vessel-source pollution in the economic zone, preferring instead to

\textsuperscript{134} Pollution of the marine environment may occur from “dumping,” defined in the Convention as “deliberate disposal of wastes or other matter from vessels” or other man-made structures. Id. pt. I, art. 1, para. 5(a)(i). The subject of coastal States’ competence to regulate dumping is not addressed here because the Convention further defines dumping as not including “the disposal of wastes or other matter incidental to, or derived from, the normal operations of vessels . . . .” Id. art. 1, para. 5(b)(i).
reinforce existing flag State enforcement schemes. This was not just a concern of the traditional maritime States. Some of the developing States realized that the industrialized States might set strict standards in their 200-mile zones, thus freezing out the ships of developing States that might not be able to meet such high standards. The occurrence of the Amoco Cadiz disaster during the course of the Conference, however, resulted in a more general consensus to recognize the concerns of coastal States in protecting the resources of the zone as well as their coastlines from the dangers of vessel-source pollution. Nevertheless, because of the possibility that powers granted to control pollution could be abused to harass navigation, the Conference was unwilling to cede a general competence to coastal States. Rather, the Convention creates a carefully circumscribed set of coastal State rights, tied in large measure to generally accepted international rules and standards, balanced by clearly stated safeguards against arbitrary enforcement measures.

The basic grant of authority is contained in paragraph 1(b)(iii) of article 56. It provides that:

1. In the exclusive economic zone, the coastal State

135. See, e.g., the statements of the following delegations: In the Plenary: Belgium, 1 Third United Nations Conference on the Law of the Sea: Official Records 167 (1975); Federal Republic of Germany, id. at 138; France, id. at 156; Greece, id. at 129; Norway, id. at 85-86; United Kingdom, id. at 112; United States, id. at 161; In the Third Committee: Denmark, II Third United Nations Conference on the Law of the Sea: Official Records 313 (1975); France, id. at 350; Greece, id. at 327; Italy, id. at 325; Japan, id. at 326; Liberia, id. at 315; United Kingdom, id. at 322.

136. Ambassador Jose Luis Vallarta of Mexico, who served as Chairman of the informal group at UNCLOS III on the item, “Protection and Preservation of the Marine Environment,” has pointed out that the developing States were slow to recognize this point, originally reacting instinctively in favor of comprehensive coastal State jurisdiction over vessels-source pollution in the 200-mile zones. See Vallarta, Protection and Preservation of the Marine Environment and Marine Scientific Research at the Third United Nations Conference on the Law of the Sea, Law & Contemp. Probs., Spring 1983, at 147, 151. For a representative developing State latter-day view, see statement of the delegation of Cuba at VI Third United Nations Conference on the Law of the Sea: Official Records 111 (1977). See also statements of the representatives of Kenya, id. at 102; Republic of Korea, id.

has:

. . .

(b) jurisdiction as provided for in the relevant provisions of the Convention with regard to:

. . .

(iii) the protection and preservation of the marine environment. 138

The most important part of this provision is found in the words "as provided for in the relevant provisions." There is thus no grant of general competence to establish a 200-mile pollution control zone. 139 To determine what powers the coastal State has, one must turn to other relevant articles. In the case of vessels exercising freedom of navigation and other uses associated with the operations of ships and aircraft, the relevant provisions are found in part XII. Part XII, in turn, provides a system of interlocking and overlapping prescriptive and enforcement jurisdictions that ensure that vessel-source pollution, no matter where occurring, will be governed by the rules and regulations of one or more States and that at least one State (and usually more than one) will have enforcement jurisdiction over the offending vessel in case they are breached. It provides a rudimentary system for sorting out jurisdictional conflicts in cases where more than one State has enforcement jurisdiction, and a system of safeguards to secure the rapid release of vessels that may be detained for investigation or punishment by States other than the flag State.

For pollution created by vessels beyond the territorial sea, the responsibility for establishing 140 and enforcing 141 rules concerning discharges rests primarily, as it has in the past, with the flag State. Flag States do not have an unfettered discretion. Under paragraph

138. Convention, supra note 1, art. 56, para. 1(b)(iii).
139. As noted earlier, it would be possible to construct an argument that the existence of "sovereign rights" for the purpose of "conserving" the natural resources of the zone, provided for in paragraph 1(a) of article 55, creates some sort of general competence for pollution control in the exclusive economic zone. As noted earlier, however, the word "conserving" is given specific content by article 61, which ties it to measures coastal States may take to establish allowable catches to maintain or restore populations of the living resources of the zone. See supra text accompanying note 76. And as Helga Vindenes has stated, "This is certainly a possible interpretation, though it does give rise to the question of why a separate paragraph on environmental jurisdiction was included if this aspect were to be regarded as covered already." Vindenes, supra note 85, at 578.
140. Convention, supra note 1, art. 211, para. 2.
141. Id. art. 217, para. 1.
1 of article 211 they are required to act through the competent international organization or general diplomatic conference to establish international rules and standards to prevent, reduce and control pollution, and to promote adoption of routing systems to reduce the danger of accidents that might cause damage to coastal States.\textsuperscript{142} They are also required to adopt and enforce pollution-control standards for vessels flying their flags that are at least as stringent as the generally accepted international standards,\textsuperscript{143} and must issue certificates showing compliance with these standards.\textsuperscript{144} They must also make periodic inspections to ensure that the actual condition of the vessel is as indicated on the certificate.\textsuperscript{145}

Under certain circumstances, the authority of the flag State may be duplicated or overlapped by coastal State competence to prescribe rules and regulations and by coastal or port State enforcement of such rules and regulations. Achieving the right balance in this respect in the part XII articles was the most difficult task faced by the Third Committee of the Conference in the marine-environment part of its schedule of work.\textsuperscript{146} The key provisions pertaining to the prescriptive authority of the coastal State in the exclusive economic zone are found in article 211 that provides, in pertinent part, as follows:

Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels \textit{conforming to and giving effect to generally accepted international rules and standards} established through the competent international organization or general diplomatic conference.\textsuperscript{147}

Several aspects of this provision are important. First, although stated in terms of "enforcement," the article actually deals with prescriptive jurisdiction of the coastal State. Second, although it

\textsuperscript{142} Id. art. 211, para. 1.
\textsuperscript{143} Id. art. 211, para. 2. Flag States may make their standards as strict as they please for ships flying their flag, provided they are at least as strict as generally accepted international rules and standards.
\textsuperscript{144} Id. art. 217, para. 3.
\textsuperscript{145} Id.
\textsuperscript{146} The Third Committee also deliberated the issues of marine scientific research and transfer of technology.
\textsuperscript{147} Convention, supra note 1, art. 211, para. 5 (emphasis added).
vests prescriptive jurisdiction in the coastal State, any laws or regu-
lations adopted must conform to generally accepted international
rules and standards. Unlike in the more restricted area of the terri-
torial sea, the coastal State may not establish its own unilateral
standards. This is particularly important to maritime States be-
cause a universal 200-mile economic zone would embrace some of
the world’s most important shipping routes. Third, paragraph 5
of article 211 specifically identifies the source of the “generally ac-
cepted international rules and standards” as the competent inter-
national organization or general diplomatic conference. It was un-
derstood by the Conference that the competent international
organization was the International Maritime Organization
(IMO). The addition of a “general diplomatic conference” as an
alternative was added to satisfy some members of the Group of
Seventy-Seven who regarded the IMO as a maritime States
organization.

Although paragraph 5 of article 211 vests quite broad prescrip-
tive jurisdiction in the coastal State, enforcement jurisdiction is
not co-extensive with that prescriptive jurisdiction. Only if the pol-
lution threat crosses a certain threshold does the coastal State
have competence to take direct enforcement action. For viola-
tions of its laws or regulations giving effect to applicable interna-
tional rules and standards that do not reach this threshold, the
coastal State’s action with respect to vessels navigating in its ex-
clusive economic zone is limited to requiring the vessel to give in-
formation regarding its identity and port of registry, its last and
next port-of-call and other relevant information required to estab-
lish whether a violation has occurred. Follow-up enforcement ac-

148. Id. art. 211, para. 4. Note that the only restriction on the coastal State’s discretion in
prescribing pollution-control regulations in its territorial sea is that it may not hamper inno-
cent passage. Such coastal State regulations may not, however, apply to the design, con-
struction, manning or equipment of foreign ships unless they are giving effect to generally
accepted international rules or standards. Id. art. 211, para. 2.
149. See supra note 116 and accompanying text.
150. Vallarta, supra note 136, at 151.
151. See, e.g., statements of representatives of Tanzania, VI Third United Nations Con-
ference on the Law of the Sea: Official Records 103, U.N. Sales No. E.77 V.2 (1977); Somal-
ia, id. at 110; Libya, id. at 115.
152. Convention, supra note 1, art. 220. See infra text accompanying notes 155-61.
153. Convention, supra note 1, art. 220, para. 3. Although the authority of a coastal State
to demand and receive such information is technically “enforcement” jurisdiction, it is not
so considered for purposes of this discussion because, if the vessel ignores the coastal State’s
request, the coastal State’s only recourse is through the flag State (or perhaps a subsequent
tion falls within the competence of the flag State or port State to which the coastal State reports the relevant information. If the vessel does not comply with the coastal State’s request for information, the coastal State’s follow-up action is limited to reporting the violation to the flag State, or subsequent port State if known.\(^{154}\) Thus, the relevant articles provide no opportunity for interference with freedom of navigation in cases of minor violations. There are three circumstances that will activate the coastal State’s competence to take enforcement action with respect to violation of its anti-pollution regulations in the exclusive economic zone.

The first is where the ship is in an off-shore terminal which lies within the exclusive economic zone.\(^{155}\) Under these circumstances the coastal State may exercise all the powers that a port State may exercise, not only with respect to violations of its own rules and regulations applicable in the exclusive economic zone but also with respect to any violations occurring beyond the zone or in foreign internal waters, territorial seas or economic zones referred to it in its capacity as a port State.\(^{156}\) In addition, under article 219, if the coastal State determines that a vessel in its off-shore terminal is in violation of applicable international rules and standards relating to seaworthiness and thereby threatens damage to the marine environment, it may take measures to prevent the vessel from sailing except to the nearest appropriate repair yard.\(^{157}\)

This port State enforcement jurisdiction is quite broad, and intentionally so, for port State enforcement is one of the bases of the whole scheme of vessel-source pollution control adopted in the

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\(^{154}\) See id. art. 220, para. 4. For the remainder of the analysis, “prescriptive” and “enforcement” jurisdiction are used in the sense that they are described and distinguished in Restatement (Second) of Foreign Relations Law of the United States § 6 and comment a (1965). This nomenclature appears to be consistent with the structure of the Convention, which generally distinguishes between the authority of coastal States to adopt or establish laws and regulations (e.g., article 211) and the authority to enforce such laws and regulations (e.g., article 220). The tripartite division into jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce, adopted in the proposed Revised Restatement of Foreign Relations Law, does not adapt easily to analysis of the Convention text. See Restatement of Foreign Relations Law of the United States (Revised) § 401 (Tent. Draft No. 4, 1983).

\(^{155}\) Id. art. 218, para. 1.

\(^{156}\) Id.

\(^{157}\) Id. art. 219.
Fairness and integrity in enforcement by port States can probably be safely assumed, since port States have, in addition to their interests as coastal States, a common interest with maritime States in the free flow of ocean commerce and an economic interest in the reputation of the port for friendliness to foreign ships. Should this assumption prove not to be well founded, accused vessels are protected by the safeguards built into the Convention as well as their ability to avoid the ports of States that prove to abuse their powers in the pollution-control field.

The second situation in which a coastal State may take direct enforcement action in its economic zone is where there are clear grounds for believing that a vessel navigating in the exclusive economic zone has committed the type of violation mentioned in the first situation and the violation results “in a substantial discharge causing or threatening significant pollution of the marine environment.” If this occurs, the coastal State may make a “physical inspection of the vessel for matters relating to the violation,” but only if the vessel has refused to give information or if the information supplied is “manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.”

The third situation is where there is “clear objective evidence” that a vessel navigating in the exclusive economic zone has committed a violation as described above and the violation has resulted “in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of the territorial sea or exclusive economic zone.” If these facts exist, the coastal State may, “provided the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.”

159. See infra text accompanying notes 164-74.
160. Convention, supra note 1, art. 220, para. 5.
161. Id.
162. Id. art. 220, para. 6.
163. Id. In addition to the foregoing three situations, article 221 makes clear that the enforcement competence of coastal States in part XII does not prejudice any special competence that States may have by virtue of other international agreements or customary international law with respect to protection of their coasts and the marine environment from the
Coastal State enforcement competence in the exclusive economic zone is qualified by a number of safeguards. Many of these are restraints on action by the coastal State that might physically interfere with or interrupt the freedom of navigation in the exclusive economic zone. Others are provisions ensuring due process rights for all parties concerned in the investigation and institution of proceedings in an enforcement process. Within the former are provisions that:

—Limit the types of ships or aircraft that may exercise enforcement powers to warships, military aircraft or other specially designated and marked ships and aircraft;\textsuperscript{164}

—Prohibit enforcement measures that hazard or endanger foreign vessels;\textsuperscript{165}

—Limit inspections at sea to examination of documents except under exceptional circumstances;\textsuperscript{166}

—Require prompt release of vessels upon posting of bond or other financial security;\textsuperscript{167}

—Prohibit discrimination against vessels of any other State.\textsuperscript{168}

The procedural protections, though not directed at actions that might physically interfere with the freedom of navigation, are just as important; unfair or arbitrary procedures or penalties could make navigation in the exclusive economic zone more expensive or burdensome, even though the vessel itself has been released from

\textsuperscript{164} Convention, supra note 1, art. 224.
\textsuperscript{165} Id. art. 225.
\textsuperscript{166} Id. art. 226, para. 1(a).
\textsuperscript{167} Id. art. 226, para. 1(b). But see the qualifying conditions set out in art. 226, para. 1(c).
\textsuperscript{168} Id. art. 227.
arrest. Included in this category of protections are provisions that:

— Provide for attendance at the proceedings by representatives of the flag State and the competent international organization;\textsuperscript{169}

— Require the coastal State to suspend its proceedings if the flag State takes proceedings to impose penalties on the vessel within six months of the beginning of the coastal State’s action. This flag State pre-emption is subject to exception in cases of major damage to the coastal State or when the flag State has repeatedly disregarded its obligations of enforcement;\textsuperscript{170}

— Impose a three year statute of limitations on actions by States other than the flag State;\textsuperscript{171}

— Limit punishment to monetary penalties only;\textsuperscript{172}

— Require observance of “recognized rights of the accused;”\textsuperscript{173}

— Require notification of the flag State of measures taken.\textsuperscript{174}

Several other points deserve at least brief mention in the consideration of the effects of pollution-control measures on navigation in the exclusive economic zone. The first concerns ice-covered areas, to which the Convention vests jurisdiction in coastal States to adopt and enforce non-discriminatory laws and regulations for prevention, reduction and control of vessel-source pollution “where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.”\textsuperscript{175} The only restrictions on coastal State discretion in adopting and enforcing such regulations are that they be “non-discriminatory,” and have “due regard to navigation and the

\textsuperscript{169} Id. art. 231.
\textsuperscript{170} Id. art. 228, para. 1.
\textsuperscript{171} Id. art. 225, paras. 2 and 3.
\textsuperscript{172} Id. art. 230, para. 1.
\textsuperscript{173} Id. art. 230, para. 3.
\textsuperscript{174} Id. art. 231.
\textsuperscript{175} Id. art. 234.
protection and preservation of the marine environment based on the best available scientific evidence.” 176

The absence of a reference to the “freedom of” navigation and the failure to include other limitations on a coastal State’s direct enforcement actions (such as those found in article 220, paragraphs 5 and 6) would seem to create risks of arbitrary action against vessels in ice-covered areas that do not exist in the exclusive economic zone in general. Such vessels and their flag States would have the benefit of most of the procedural safeguards set forth in section 7 of this part of the Convention, 177 and the compulsory, third-party dispute-settlement procedures would apply. Nevertheless, there is a greater potential for harassment of vessels navigating in ice-covered areas than in the economic zone generally. Fortunately, such areas do not embrace many of the major international sea lanes, thus making the greater potential for harassment of much less moment than it would be if such broad coastal State discretion were to exist elsewhere. 178

A similar but more restricted coastal State competence is granted with respect to clearly defined areas within the exclusive economic zone for which standards stricter than the generally accepted international ones are necessary because of “recognized technical reasons in relation to [their] oceanographical and ecological conditions, as well as [their] utilization or the protection of [their] resources and the particular character of [their] traffic.” 179 Coastal States desiring to issue more stringent rules for such clearly defined areas must submit supporting data to the competent international organization. This body may in turn establish special international rules and standards or navigational practices for implementation by the coastal State and may, if the coastal State requests authority to adopt additional rules, authorize it to adopt such additional laws and regulations.

These additional rules, however, may not “require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and stan-
Although the formulation is awkward, the inclusion of the requirement of advance approval of the coastal State’s laws and regulations by the competent international organization should prevent arbitrary rules and regulations and the general safeguard provisions of part XII should prevent capricious enforcement. The prohibition against unilateral design and construction standards is particularly important for the protection of vessels of special characteristics, such as nuclear-powered vessels.

The final provision of part XII worthy of note in connection with the exclusive economic zone is article 236, which exempts warships, naval auxiliaries and other vessels and aircraft owned or operated by a State and used only on government non-commercial service from the application of any provisions of the Convention regarding the protection of the marine environment. The article, however, obligates States to adopt appropriate measures to ensure that such vessels act in a manner consistent with the Convention, in so far as this is reasonable and practicable. This complete immunity for such vessels is consistent with customary international law as to the status of warships and other non-commercial service government-owned ships. Coastal State pollution-control laws and regulations cannot, therefore, have any effect upon such ships. It should be noted, however, that article 236 does create an obligation for the State, and failure to live up to it may engage the international responsibility of the State.

Conclusions as to Pollution Control

In assessing the effect of the Convention’s vessel-source pollution-control provisions on the freedom of navigation in the exclusive economic zone, the same thought that was expressed earlier concerning the legal nature of the economic zone also seems relevant. The provisions must be taken as an inseparable whole if they are to constitute a workable and stable system. Coastal States’ competence to exercise prescriptive and enforcement jurisdiction in the vast areas of the exclusive economic zone is acceptable to

180. Id. art. 211, para. 6(c).
181. Article 236 provides, in pertinent part:
   However, each State shall ensure by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.
Id. art. 236.
maritime States only if that competence is qualified by the numerous checks and balances against arbitrary and unfair actions. The freedom of navigation for other States is acceptable to coastal States only if flag States have the obligation of enforcement of international standards for less serious violations and the coastal States themselves have the right of direct intervention in cases of more serious violations. The system will work only if both coastal and flag States take their obligations seriously.

If flag States are lax in their enforcement of applicable international standards, there is sufficient ambiguity and subjectivity in such phrases as “clear grounds for believing,”182 “substantial discharge,”183 “threatening significant pollution,”184 “clear objective evidence,”185 “major damage or threat of major damage,”186 “correspond substantially,”187 and “release . . . promptly”188 to allow a coastal State considerable latitude in inspecting, investigating or instituting proceedings against vessels navigating in its exclusive economic zone.

Assuming good faith on the part of both coastal and flag States, however, the articles appear to be carefully balanced to meet the dual objectives of the negotiators who formulated them—the protection of freedom of navigation for all States and the safeguarding of coastal State shores and economic zones from the adverse effects of unregulated discharges or spills from vessels. In the event this turns out to be a naive hope, the dispute-resolution provisions of the Convention provide an avenue of relief.

VII. Resolution of Disputes Concerning Freedom of Navigation in the Exclusive Economic Zone

In the event that coastal States take measures that interfere with freedom of navigation in the exclusive economic zone, States whose vessels are affected by such measures may have recourse to the compulsory dispute-settlement provisions of the Convention. Although a detailed discussion of these provisions is beyond the scope of this article, several features are worthy of note as they

182. Id. art. 220, para. 5.
183. Id.
184. Id.
185. Id. art. 220, para. 6.
186. Id.
187. Id. art. 226, para. 1(a)(i).
188. Id. art. 226, para. 1(b).
pertain directly to navigation in the exclusive economic zone. The
first is that the articles which allow a State to refuse to submit to
certain procedures that produce binding decisions do not include
decisions concerning freedom of navigation in the exclusive eco-

momic zone.\footnote{189}

The Convention explicitly states that disputes in which it is al-
leged that a coastal State has acted in contravention of the Con-
vention in regard to the freedoms and rights of navigation, over-
flight, or in regard to other internationally lawful uses of the sea
specified in article 58 or in contravention of specified international
rules and standards for the protection of the marine environment
which are applicable to the coastal State are subject to compulsory
third-party procedures.\footnote{190} Disputes in which it is alleged that a
State in exercising such freedoms has acted in contravention of the
Convention or coastal State laws or regulations adopted in con-
formity with generally applicable international standards are like-
wise explicitly subject to such procedures.\footnote{191} In sum, these provi-
sions ensure that a State that asserts that its freedom of navigation
in the exclusive economic zone has been infringed will have access
to compulsory, third-party dispute-settlement machinery to resolve
the issue.

The other important provision of the dispute-settlement part
that pertains directly to navigation in the exclusive economic zone
is article 292. That article provides flag States whose vessels are
detained contrary to the provisions of the Convention with access
to an appropriate tribunal within ten days of the vessel's deten-
tion. When a flag State makes an application for release under this
article, the tribunal will deal "without delay" with the applica-
tion\footnote{192} and may issue a binding order for release on bond or other
financial security without prejudice to the merits of the underlying
case.\footnote{193}

Without these compulsory dispute-settlement procedures, it is
doubtful that the exclusive economic zone provisions of the Con-
vention, no matter how carefully drawn, would have been the basis
of an acceptable agreement. As stated by Professor Louis Sohn,
one of the principal architects of the dispute-settlement articles of the Convention, "It was recognized early in the negotiations that if the parties to the Convention had retained the right of unilateral interpretation, then the complex text drafted by the Conference would have lacked stability, certainty, and predictability." 194 This is nowhere more true than in the delicately balanced set of rights and obligations of coastal and other States in the exclusive economic zone. A compulsory, third-party dispute-settlement system was a fundamental aspect of U.S. policy from the beginning of the negotiations. 195

The irony of this situation is that for some States—such as the United States, that fought so hard to make compulsory, third-party dispute-settlement machinery a part of the Convention package—the benefits of that part of the package may not be available. Whatever the merits of the arguments made by some U.S. government spokesmen that all parts of the Convention other than part XI (deep seabed provisions) are, or soon will become, customary international law, 196 it seems reasonably clear (at least to this author) that the compulsory dispute-settlement system is like part XI in its application only to "State Parties." Article 291 is explicit in this respect, and many of the other provisions of the part, in-


cluding those of article 292 dealing with the prompt release of vessels, use the term "State Party" or "States Parties" in setting forth rights and obligations.

Not only does this language suggest that the dispute-settlement provisions are purely contractual between parties to the Convention but it also destroys the foundation of the argument, made by some as to navigational rights, that non-State parties would have the benefit of treaty rights as third-party beneficiaries. Further, as U.S. spokesmen have argued with respect to part XI, institution creation is not normally accomplished by customary international law; explicit agreement is required for this process. One would have to conclude that the compulsory, third-party dispute-settlement machinery per se would not be available to non-parties.

VIII. IMPLICATIONS FOR U.S. POLICY

As a non-signatory of the Convention on the Law of the Sea and a prospective non-party, the United States nevertheless has an enormous stake in the interpretation and implementation of the Convention articles dealing with the exclusive economic zone. It was one of the principal architects of the final structure created by those articles. It has itself proclaimed an exclusive economic zone patterned after the economic zone articles. Its naval, merchant and fishing vessels navigate, and will undoubtedly continue to navigate, within exclusive economic zones proclaimed by foreign States. How the United States interprets its own economic zone declaration and deals with those of other States will have a powerful impact on the future of the exclusive economic zone in international law, whether or not the Convention enters into force.

Although this article has been concerned solely with navigation, and where U.S. interests have been addressed, it has treated the United States as a global and maritime power, it is nevertheless important to recognize that the United States is also a pre-eminent coastal State. In measuring whether a coastal State gains or loses from the creation of a 200-mile economic zone, the United States

198. Malone, supra note 196, at 33; Clingan, supra note 196, at 121 (Professor Clingan was speaking unofficially on this occasion, but he had served as Vice Chairman of the U.S. Delegation to UNCLOS III and was the principal U.S. representative at the signing of the Convention at Montego Bay in December 1982).
must be placed in the former category. The actual area encompassed by a U.S. 200-mile zone is greater than that of any other State.200 Waters within 200 miles of the U.S. coast encompass some of the world's richest fishing grounds.201 The seabed contains proved oil and gas resources202 and potentially valuable polymetallic sulfides and oxides.203

In so far as a national oceans policy is concerned, therefore, it would be consistent with U.S. interests to adopt a regime for off-shore areas that strikes an appropriate balance between the coastal and maritime (or global) interests. It would also be in the U.S. interest to have other States do the same. Since the articles of the 1982 Convention reflect this sort of balance—negotiated in a world arena in the same sort of process that they would be in a U.S. national arena—it would seem that the Convention text would logically form the basis for such a U.S. regime. In fact, the articles finally adopted, except for the articles on marine scientific research,204 are very close in substance to what the United States would have chosen if it had been acting unilaterally.205 Further, the Convention provides the most universally accepted set of common principles governing the reciprocal rights and duties of coastal and other States within the zone.

As noted earlier, though, national laws establishing 200-mile resource zones vary substantially from State to State, and most differ in some respects from the Convention.206 Many do not reflect the careful attention paid to navigation interests that exists in the Convention.207 Harmonization with the Convention would obvi-

200. Alexander & Hodgson, supra note 21, at 574.
202. Id. at 102-07.
203. Id. at 116-17. Also frequently overlooked are aggregates, which currently constitute the most important hard marine mineral deposit mined. Id. at 112.
205. Compare Stevenson, supra note 21, at 232-34 with Convention, supra note 1, arts. 56-75.
206. See supra notes 26-27 and accompanying text.
207. See generally Burke, supra note 11.
ously work to the benefit of community interests in navigation and would also give a degree of uniformity and stability to the law that has not existed for several decades.

It is as yet too early to tell whether States will attempt to harmonize their legislation with the exclusive economic zone provisions of the Convention now that it has been signed. The fact that a large number of States have signed the Convention\textsuperscript{208} would suggest that there exists a broad consensus in favor of its terms. Spokesmen for the United States have expressed general satisfaction with its exclusive economic zone terms.\textsuperscript{209} The congruence between U.S. interests and a broad international consensus for the treaty text would suggest that with the proper stimulus, harmonization of national legislation could proceed rapidly. Unfortunately, however, the initial actions of the United States following signing have not fostered this desirable goal.

The U.S. Proclamation establishing an exclusive economic zone, although patterned after the Convention, departs from its terms in several respects.\textsuperscript{210} The Breaux Bill,\textsuperscript{211} which if enacted would provide legislative implementation of the Proclamation as well as amend the 1980 Deep Seabed Hard Minerals Resources Act,\textsuperscript{212} also departs from the Convention.\textsuperscript{213} These actions open the United States to charges of "pick-and-choose" implementation of the treaty provisions. More carefully conceived actions conforming more closely to the Convention's terms might have encouraged other States to take similar action.\textsuperscript{214} Future actions to bring the

\textsuperscript{208} At the time of preparation of this article, 131 States and other entities had signed the Convention; 9 had ratified. Sixty ratifications or accessions are necessary to bring the Convention into force. Convention, supra note 1, art. 303, para. 1.


\textsuperscript{213} For an analysis of the differences, see A Legal Analysis of the "Exclusive Economic Zone Implementation Act," (research paper prepared for Citizens for Ocean Law under auspices of The Yale-Legislative Services Internship Program (Jan. 1984) (copy available from Citizens for Ocean Law).

\textsuperscript{214} The Breaux Bill has not yet been enacted and may, of course, be amended substan-
U.S. declaration more into line with the economic zone part of the Convention should be encouraged.216

Two other aspects of U.S. policy with respect to the exclusive economic zone deserve careful consideration. The first concerns dispute settlement, the second, vessel-source pollution controls.

As demonstrated earlier, one of the principal protections afforded by the Convention against arbitrary or unlawful actions by coastal States is the compulsory, third-party dispute-settlement processes provided by part XV.216 Without access to these processes, it is doubtful that some of the provisions of the economic zone articles would have been acceptable to a number of States, including the United States.217 Without the availability of such processes, the position of one party to a dispute, no matter how meritorious, could not prevail over the contrary view of the other party or parties without resort to unacceptable means of coercion. As Professor Louis Sohn has recently stated:

As the United States has found out in its disputes with Canada and Latin American States in the last decades, without a satisfactory dispute settlement system even a powerful nation cannot adequately protect its citizens and ships against harmful acts of foreign governments who are not willing to submit to impartial adjudication.218

It thus remains in the U.S. interest to have access to compulsory, impartial dispute-settlement mechanisms for law of the sea disputes, even though as a non-party to the Convention, it would not have access to the procedures of part XV per se. Though a detailed consideration of the modalities by which this might be accomplished is beyond the scope of this article, a brief suggestion or two might be appropriate.

216. See supra text accompanying notes 189-98.
217. See Stevenson, supra note 195.
218. Sohn, supra note 194, at 200.
One possible avenue for such action might be a unilateral declaration by the United States that it accepts compulsory arbitration machinery such as that established in annexes VII and VIII of the Convention for the settlement of any law of the sea dispute that would be subject to such procedures if the United States were a party to the Convention. Such a unilateral declaration would, of course, not oblige other States to use the procedures in a dispute with the United States, but it would bind the United States$^{219}$ and would evidence the bona fides of a U.S. intent to conform its actions to all provisions of the Convention except part XI.

A second method might be to enter into a series of bilateral agreements by which the United States accepted compulsory dispute-settlement procedures substantially identical to those of the Convention for law of the sea disputes. Both of these suggestions bristle with legal difficulties and may ultimately prove infeasible, but the objective they seek to obtain deserves further study by U.S. experts.$^{220}$

A further implication of U.S. aloofness from the Convention itself while accepting and implementing the non-seabed provisions is the difficulty that might be experienced by U.S. shipping resulting from coastal State pollution-control measures and the reciprocal difficulty of U.S. implementation of its regulations concerning vessel-source pollution from foreign vessels in the U.S. exclusive economic zone. As we saw, the scheme adopted in the Convention consists of an interlocking and overlapping system of flag State, port State and coastal State prescriptive and enforcement jurisdictions tied to a set of safeguards against abuses by coastal States.$^{221}$ Some of these arrangements are institutional in nature and implementation outside the framework of the Convention would seem to be difficult indeed.$^{222}$ But they too were at the heart of U.S. negotiat-

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220. Louis B. Sohn and Kristen Gustafson have suggested that the United States might file a supplementary declaration with the International Court of Justice, "by which it would accept the jurisdiction of the Court with respect to those rules of customary international law which have been codified in the Convention, with the exception of parts dealing with deep seabed mining." L. Sohn and K. Gustafson, The Law of the Sea in a Nutshell 246 (1984).

221. See supra text accompanying notes 144-174.

222. The problem is essentially the same as that discussed above for compulsory dispute-settlement. See supra text accompanying notes 209-13. See also Vallarta, supra note 136, at 152.
ing positions at UNCLOS III, and adoption of the balanced scheme in the Convention was to a large degree the result of U.S. inventiveness and persistence in the negotiations. Some further effort to preserve these arrangements outside the Convention—but compatible with it—would seem to merit further study by U.S. experts.

IX. Summary and Conclusions

The decision early in the Third United Nations Conference on the Law of the Sea to recognize coastal State rights of exploitation of the natural resources and other economic benefits of a zone extending 200 miles to sea created the possibility of conflicts with community interests of navigation in this heretofore high seas area of the oceans. The acceptance of the zone as juridically sui generis—neither territorial nor high seas in character—made it necessary to spell out with precision the respective rights and duties of coastal States and other States in the zone. This proved to be one of the most difficult negotiating tasks of the Conference, at one time or another involving most of the principal figures at the Conference.

The result was an interlocking web of relationships between coastal States, other States and international institutions created by the Convention or recognized by the Convention as having competence over the subject matter. These relationships are provided for not only in part V of the Convention (Exclusive Economic Zone), but also in part VII (High Seas), part XII (Protection of the Marine Environment), part XIII (Marine Scientific Research), and part XV (Settlement of Disputes). The various strands of the web have no separate vitality but can only function when connected to other parts of the whole.

Coastal State rights to resources cannot be separated from the correlative duty to have due regard to the rights of other States exercising their rights of freedom of navigation in the zone. No general system of priorities between coastal and other State activities is established. The priority of individual uses is governed by explicit terms of the Convention in relation to other uses of the zone. Where conflicts occur as to uses not specifically addressed, the residual-rights clause in article 59 does not assign priority to

223. E.g., International Maritime Organization.
either coastal or other State activities but instead provides for res-
olution of the conflict ad hoc by assessing all the relevant circum-
stances, taking account of the relative importance of the competing
uses to the international community as a whole and not merely to
the parties.

While coastal States are given exclusive rights to exploit the eco-
nomic resources and the necessary ancillary jurisdiction to allow
such exploitation to be effective, their prescriptive authority is
constrained by specific terms of the Convention, by international
law outside the Convention, and in some cases is limited to imple-
mentation of generally accepted international standards. Enforce-
ment jurisdiction is even more severely restrained, with enforce-
ment in many cases being left to the flag State, as it was in
traditional international law. If there should be overreaching by
the coastal State or an abuse of discretion by it, compulsory, third-
party dispute-settlement mechanisms are available to resolve any
resulting disputes.

Under this comprehensive and detailed regime, freedom of naviga-
tion in the exclusive economic zone is reasonably well protected.
As we have seen, however, national laws of many States, including
those of the United States, differ in material respects from the
scheme of the Convention articles. Only by harmonization of na-
tional exclusive economic zone decrees with the Convention text
can there be uniformity in administration of economic zone re-
gimes between States. This should take place whether or not the
Convention enters into force and, if it does enter into force, for
States that are not parties to the Convention as well as those that
are. The exclusive economic zone articles of the Law of the Sea
Convention form the most recent, most generally accepted and
carefully balanced regime that is available today. Uniform adop-
tion of these articles within the national laws of all States would
give the greatest chance for stability in this important branch of
the law of the sea.