FREEDOM OF NAVIGATION IN A POST-UNCLOS III ENVIRONMENT

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I

INTRODUCTION

The question of the exercise of rights of navigation in the post-UNCLOS III environment subsumes one of the most complex sets of issues relating to the law of the sea that could be addressed today under existing circumstances. As is well known, the United States and three other countries voted against the adoption of the Law of the Sea Treaty on April 30, 1982.¹ Since that time, Argentina has announced that it will not sign the Treaty,² and other countries are in the process of evaluating the Treaty in the light of their own national interests. Such circumstances complicate any analysis of navigation rights and call for an examination of two interrelated questions.

First, one must examine the Treaty provisions themselves to ascertain what the Treaty drafters intended with respect to the relative rights of coastal states and other states with respect to navigation-related issues. Before one can seek to understand the state of the law in this confused situation, that is, whether the Treaty provisions have any independent life of their own, it is critical to undertake a proper reading of them. The second question, when the analysis is complete, is one of the relationship of those texts to the rights and duties of those states which may not become parties to the Convention.

Some observers are already attaching considerable significance to the provisions of the Treaty, whether the Convention enters into force or not. Some are even of the view that the nonseabeds provisions of the texts already reflect norms of customary international law. For example, the introductory note to the American Law Institute's *Restatement of the Foreign Relations Law of the United States*, tentative draft 3, states: "Except with respect to Part XI of the Draft Convention, this Restatement, in general, accepts the Draft Convention as codifying the customary

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1. The treaty was adopted by a vote of 130 for to 4 against, with 17 abstentions. The four opposed were Israel, Turkey, the United States, and Venezuela. All rejected for different reasons. The United States voted against because the deep seabed mining part of the Convention did not meet stated U.S. negotiating objectives. For the President's views on this point, see 18 WEEKLY COMP. PRES. DOC. 887, 887-88 (July 9, 1982). Among the abstentions were members of the Eastern Bloc. The Soviet Union has since announced that it intends to sign the treaty, and presumably the rest of the bloc will follow suit.

2. Statement by Argentina on Sept. 24, 1982, in Plenary session at UN Headquarters, New York. The principal reason given was Argentina's objection to Resolution III of the Conference, part of which relates to the Falklands/Malvinas dispute.

international law of the sea, and as law of the United States."³ While this is a view held by some prominent U.S. lawyers, experts from other countries have also expressed similar views, though they do not go quite so far. A recent International Law Association report, for example, puts it this way:

In order to form a new rule of customary international law state practice should, according to traditional viewpoints, be "both extensive and virtually uniform," and in accordance with *opinio juris*, i.e., showing a "general recognition that a rule of law or legal obligation is involved . . . ." The principles worked out by UNCLOS III can constitute, at least potentially, a major factor in the creation of an extremely important new body of law . . . .⁴

With respect to the economic zone in particular, they said:

The rules elaborated by the Conference . . . have influenced the process of creating new legal regimes established by coastal state promulgations. It may be said that UNCLOS III has initiated this law-creating process.⁵

This particular line of thinking bestows an importance on the UNCLOS texts that transcends the actual Treaty itself.

For that reason, let us look at some of the key provisions. With regard to navigation rights, the Treaty establishes certain zones of jurisdiction and some special regimes such as those for international straits and archipelagos. It also sets the framework for fishing rights, for the preservation of the marine environment, and for marine scientific research. Obviously, the manner in which these activities are conducted or regulated has clear implications for the exercise of navigation; thus they need to be understood. But first this article discusses the major direct areas of concern.

II

THE TERRITORIAL SEA

The first and second Law of the Sea Conferences⁶ failed to deal successfully with the question of the breadth of the territorial sea, and, as a result, new, conflicting claims to extended national jurisdiction abounded.⁷ As a result of this new threat, in 1965 the Soviet Union initiated certain overtures with several maritime states aimed at containing expansive claims to broad territorial seas.⁸ These factors were prime motivating forces leading to the convening of the Third United

3. RESTATEMENT (REVISED), FOREIGN RELATIONS LAW OF THE UNITED STATES, introductory note to pt. V, at 55 (Tent. Draft No. 3, 1982).

4. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE INTERNATIONAL COMMITTEE ON THE EXCLUSIVE ECONOMIC ZONE 3 (1982).

5. *Id.*

6. The references are to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Geneva Convention] and the records of the Second United Nations Conference on the Law of the Sea, U.N. DOC. A/CONF. 19/8 (1960). For an excellent history of claims relating to the breadth of the territorial sea and of the two United Nations conferences, see 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, ch. IX, § 2 (1965).

7. According to information published by the geographer of the U.S. Department of State, by 1981, 105 states claimed territorial seas of 12 or more miles. Fourteen of these claimed 200 nautical mile limits. See 36 BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, LIMITS IN THE SEAS 8 (1982).

8. A. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 174 (1981). The Soviet approach was confirmed by Professor Bernard H. Oxman, who at that time, while representing the U.S. Defense Department, participated in the discussions.

Nations Law of the Sea Conference in 1973.⁹ Participants in this conference were able, as a part of a global package deal, to agree on an outer territorial sea limit of twelve nautical miles.¹⁰ This agreement was achieved only upon the condition that other problems associated with the breadth of the territorial sea would simultaneously be resolved. The first of these other problems was the question of coastal state jurisdiction over fisheries in waters adjacent to their coasts. This problem was critical because the primary reason for the failure of the 1958 and 1960 Law of the Sea Conferences to reach agreement on the breadth of the territorial sea was that the traditional concepts of the territorial sea and the high seas were inadequate to accommodate the legitimate interests of coastal states with respect to the management of resources in adjacent areas.¹¹ To solve this particular problem the concept of the Exclusive Economic Zone was developed.

A second important element of the package deal involved passage through international straits. By increasing the territorial sea to twelve nautical miles, many straits that had previously been considered as part of the high seas would fall within the territorial sea of one or more coastal states.¹² This prospect raised concerns for the major maritime powers. It was understood at the outset that both of these difficulties would have to be resolved before either the coastal states or the maritime states would be willing to accept the twelve-mile limit in the Treaty.

As in the 1958 Convention, the Treaty confirms that coastal states have sovereignty over the territorial sea, subject to the right of innocent passage.¹³ The definition of innocent passage in the new text is the same as that contained in the 1958 Geneva Convention. This term is defined as that which is "not prejudicial to the peace, good order or security of the coastal state."¹⁴ What has been added, however, is a specific list of twelve activities which, if engaged in by ships in the territorial sea, would be considered prejudicial, thus elaborating in some detail upon the

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9. The Conference was convened by a decision of the General Assembly contained in G.A. Res. 2750-C, 25 U.N. GAOR Supp. (No. 28) at 25, U.N. Doc. A/8273 (1970). It was preceded, of course, by several years of preparatory work in the ad hoc committee to study the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction (known as the Seabed Committee). This committee was established by G.A. Res. 2340, 22 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6964 (1967). The committee was subsequently expanded and made a standing committee. For a brief history of the work of that committee, see generally, KNIGHT, *THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS*, ch. 10 (1980); A. HOLLICK, *supra* note 8, ch. 8.

10. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), art. 3 [hereinafter cited as Convention], *reprinted in* 21 I.L.M. 1261 (1982).

11. The history of the evolution of the territorial sea concept is, with respect to questions of its breadth, reflective of the tension between maritime and coastal states. The issue was always the conflict between resource management and freedom of navigation. See 4 M. WHITEMAN, *supra* note 6, ch. IX.

12. The number of such straits is not clear. The number frequently heard is 116. See A. HOLLICK, *supra* note 8, at 235. A chart prepared by the geographer of the U.S. Department of State shows 121. OFFICE OF THE GEOGRAPHER, U.S. DEP'T OF STATE, *WORLD STRAITS AFFECTED BY A 12 MILE TERRITORIAL SEA* (1977). OFFICE OF THE GEOGRAPHER, U.S. DEP'T OF STATE, *SOVEREIGNTY OF THE SEA* 22-27 (1969) lists 94 straits between seven and twenty-four miles. For a description of the traffic in some of the major straits, see Hodgson & McIntyre, *Maritime Commerce in Selected Areas of High Concentration*, in *HAZARDS OF MARITIME TRANSIT* 1 (1973).

13. Compare Geneva Convention, *supra* note 6, arts. 1, 14-23 with Convention, *supra* note 10, art. 2(3).

14. Geneva Convention, *supra* note 6, art. 14(4); Convention, *supra* note 10, art. 19(1).

basic concept.¹⁵ Article 21 of the new text also more clearly indicates the specific kinds of laws and regulations that could be enacted with respect to innocent passage.¹⁶ Some concern has been voiced that the new Treaty provisions, and in particular Article 19(2)(a), actually broaden coastal state discretion to deny the rights of innocent passage because of the reference to violation of the principles of international law embodied in the Charter of the United Nations.¹⁷ This author, however, does not adhere to that view. The reference to the Charter is clearly linked to threats or use of force *against* the coastal state, and no one in the Conference questioned that limitation.

The history of the doctrine of innocent passage indicates that doctrinal thinking has now gone full cycle. The report of the Second Commission (Territorial Sea) of the 1930 Hague Conference for the Progressive Codification of International Law contained the following article on the "Right of Passage": "Passage is not innocent when a vessel makes use of the territorial sea of a coastal state for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State."¹⁸ One should note that the emphasis there was upon the *purpose* of the vessel in doing any prejudicial *act*, while the 1958 definition seems to focus more upon the effects upon the coastal state. In 1958, the United States took the position that prejudicial acts should be restricted to security matters alone and that these matters were purely military and not related to eco-

15. Convention, *supra* note 10, art. 19(2) reads as follows:

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of willful and serious pollution, contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.

16. *Id.* art. 21 lists the following categories with respect to which a coastal state may adopt laws and regulations:

(a) the safety of navigation and the regulation of maritime traffic;

(b) the protection of navigational aids and facilities and other facilities or installations;

(c) the protection of cables and pipelines;

(d) the conservation of the living resources of the sea;

(e) the prevention of infringement of the fisheries laws and regulations of the coastal State;

(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;

(g) marine scientific research and hydrographic surveys;

(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

17. See, e.g., Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L. L. 48, 62 (1980).

18. 4 M. WHITEMAN, *supra* note 6, at 353.

nomics or ideology.¹⁹ On the other hand, eight Latin American powers suggested that passage should be considered noninnocent if it affected the *interests* of the coastal state.²⁰ Both of these positions were rejected in favor of the final version which was proposed by India. The difference of views focused upon the scope of activities that should be taken into account, but in the process, the emphasis placed upon "acts" by the Hague Conference was lost, perhaps inadvertently. The new text restores that emphasis. Each of the items listed in Article 19 describes an act, which if performed in the territorial sea, affects the status of the vessel. It seems clear, then, that the article was drafted to reflect an intention to restrict the coastal state to the prevention of specific acts, and therefore not to give it the broad discretion feared by some. This is supported by the provision of Article 21 which clarifies those areas in which the coastal state has legislative competence relating to innocent passage. All of these changes in the new Treaty give the Convention greater clarity, but they do not change in any way the basic principle from that which was previously understood. The new texts protect the right of innocent passage while making clear the rules that can be applied with respect to how that right may be exercised.

An example will illustrate this assertion. Article 19 lists as prejudicial "any act of willful and serious pollution contrary to this Convention." Article 21 permits the coastal state to adopt laws and regulations in respect to "the prevention, reduction and control of pollution" even if not willful and serious. On the other hand, Article 24 specifies that the coastal state shall not hamper innocent passage, and it shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage, nor shall it discriminate in form or in fact against the ships of any state "or against ships carrying cargoes to, from or on behalf of any State." Article 211(4) states that while laws may be adopted and applied with respect to pollution in the territorial sea, they shall not "hamper innocent passage." The conclusion to be drawn from these restrictions is that the coastal state rules cannot impinge upon the basic right of innocent passage itself. Further evidence of the intent to protect navigation interests can be found in Article 21, which provides that laws and regulations of coastal states cannot apply to the design, construction, manning, or equipment of foreign ships unless they give effect to generally accepted international rules and standards.

As before, the new Treaty permits a coastal state to suspend, temporarily, without discrimination in form or in fact among foreign ships, innocent passage for security reasons.²¹ Article 25(3) of the new Treaty, unlike the 1958 Geneva Convention, includes the right of suspension of passage in cases involving the exercise of weapons. While this at first may seem to broaden coastal state powers, it becomes understandable in light of the fact that the addition was made at the request of the delegation of Belgium, which wished to have a clear statement that temporary suspension was authorized if a coastal state wished to close off a zone

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19. See M. McDougal & W. Burke, *THE PUBLIC ORDER OF THE OCEANS* 251-52 (1962).

20. *Id.*

21. Convention, *supra* note 10, art. 25(3).

for the exercise of shore batteries.²² Since this right had never been disputed in the past, the change was not viewed as an alteration of existing norms, and it was thus acceptable to the maritime powers.

It is also necessary to say a word about innocent passage of warships under the Treaty, an issue which received considerable attention during the course of the Conference. Many delegations were engaged on both sides of this issue during the general debates.²³ All the debates proved was that there was no middle ground between the antagonists.²⁴ For that reason, no accommodation of views was possible through the medium of negotiation. In the closing days of the Conference, Gabon offered a formal amendment to Article 21 to allow coastal states to require prior authorization or notification for passage of warships through the territorial sea.²⁵ This proposal, of course, was tenaciously opposed by the maritime states, and, in the end, the amendment was withdrawn (partially in response to a plea by the Conference President for the withdrawal of all formal amendments to better enhance consensus) in favor of a proposal to add a reference to "security" to the provision in Article 21(1)(h), which gives coastal states the authority to enact laws regarding customs, fiscal, immigration, or sanitary measures.²⁶ To permit a coastal state to enact laws preventing infringement of security regulations would give such states extremely broad regulatory powers in the territorial sea—not necessarily limited even to warships. This proposal was even more strongly resisted. It therefore appeared imminent that the issue would go to a vote in the plenary. At the last minute, however, the sponsors of the proposal agreed to withdraw it in favor of a statement by the President of the Conference, on the record, that its withdrawal was "without prejudice to the rights of coastal states to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of this Convention."²⁷ Since those articles had already been accepted as governing the rights of coastal states,²⁸ it cannot be said that the President's statement does more than restate the obvious. Accordingly, the traditional view of the maritime states that warships, like other ships, are entitled to a right of innocent passage in the territorial is still the law of the sea.

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22. This proposal was made at the Conference in an informal session of the Second Committee, and the solution was negotiated privately. The statement is based on the author's notes and participation in the negotiations.

23. The basic split, of course, was between the maritime powers and the coastal states and their supporters. The debates took place in Committee Two on several occasions, as well as in small groups chaired by Ambassador Aguilar, chairman of the Second Committee. While the opponents of innocent passage for warships appeared at times to outnumber the maritimes, they were in fact split among themselves. A final attempt was made by Ambassador Aguilar to achieve a negotiated solution during the final week of the substantive negotiations, without avail.

24. At one point, the opponents of innocent passage for warships offered to settle for prior notification only, but this was seen by the maritimes as no different from requiring authorization.

25. U.N. Doc. A/CONF.62/L.97 (1982).

26. U.N. Doc. A/CONF.62/L.117 (1982).

27. This statement was made by President T.T.B. Koh in plenary session on April 24, 1982. U.N. Doc. A/CONF. 61/SR.176 (1982).

28. For security-related provisions of article 19, *see supra* note 15. Article 25 refers to the right of a coastal state to suspend innocent passage for the protection of its security.

In sum, aside from the new straits regime, nothing occurred at the Law of the Sea Conference to change the regime of the territorial sea except to broaden its geographic application and to spell out more clearly the specific obligations and rules regarding innocent passage in a manner that accurately reflects the underlying balancing theory intended under the 1958 Geneva Convention.

III

THE EXCLUSIVE ECONOMIC ZONE

Much energy was fruitlessly expended during the Conference arguing about the "legal status" of the proposed Exclusive Economic Zone (EEZ). During these debates, the zone was variously referred to as "high seas," a "zone of national jurisdiction," or a zone *sui generis* in nature.²⁹ While such debates were interesting, they added little to the development of a rational legal framework for activities in the zone. Once the polemics died down, the focus shifted to negotiation of specific rights and duties, that is, to a functional approach to the problem rather than a definitional characterization. The cornerstone of the resulting economic zone package is found in two articles, 56 and 58, although many other provisions in the Treaty are made relevant through the use of cross-references and placement in the chapter.

Article 56³⁰ deals with the rights and duties of coastal states in the economic zone. Paragraph 1(a) of the article establishes sovereign rights for the coastal state for the exploration and exploitation of living and nonliving resources of the zone and for other economic activities such as the production of energy. This particular paragraph makes two points eminently clear: (1) the rights of the coastal state are economic in nature, having to do with resources and resource-related subjects; and (2) these economic rights are exclusive to the coastal state. Paragraph 1(b) also contains a general reference to coastal states' rights, but these rights, unlike those in 1(a), are not established by Article 56 itself. The rights that exist are established elsewhere and drawn into Article 56 by cross-reference. For this reason their scope is not merely qualified but is defined by provisions of other parts of the Conven-

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29. The maritime states, obviously, preferred "high seas" while coastal states referred to "national jurisdiction." Chairman Aguilar, of the Second Committee, said in his Introductory Note to the Revised Single Negotiating Text, U.N. Doc. A/CONF.62/WP.8/Rev. 1/Part II (1976), "Nor is there any doubt that the exclusive economic zone is neither the high seas nor the territorial sea. It is a zone *sui generis*."

30. Convention, *supra* note 10, art. 56 reads as follows:

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

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

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

tion, particularly, but not exclusively, those dealing with the protection of the marine environment³¹ and marine scientific research.³² This is also true with respect to the establishment and control over artificial islands, installations, and structures.³³ Paragraph 1(c) is also important to an overall understanding of the function of the article. It restricts what coastal states may do in the economic zone by reference to "other rights and duties provided for in the Convention," which gives coastal states duties relating to conservation and the environment.³⁴

In juxtaposition with Article 56, Article 58 refers to the rights and freedoms of other states in the EEZ.³⁵ The basic rights, unqualified in nature, are the freedoms of navigation and overflight referred to in Article 87 and of the laying of submarine cables and pipelines, which are therefore qualitatively the same as when they are exercised in the area seaward of the zone. Not all of Article 58, however, is unqualified. For example, the article also provides for "other internationally lawful uses of the sea related to" the basic freedoms "such as those associated with the operation of ships, aircraft and submarine cables and pipelines" so long as they are exercised in a manner that is "compatible with the other provisions of this Convention." Articles 88 to 115 are referred to in paragraph 2 as applying in the EEZ "insofar as they are not incompatible with" the provisions contained in the economic zone chapter. This compatibility requirement is beneficial because it provides necessary balance. Obviously, some of the high seas rights referred to in Articles 88 to 115 can be applied in the economic zone as written without raising any question whatsoever about compatibility. Provisions concerning piracy,³⁶ the nationality of ships,³⁷ or the proscription against subjecting any part of the high seas to sovereignty³⁸ are universal and pose no problem. Other provisions, however, if applied strictly could pose a complete or partial incompatibility problem. An example of such a provision is Article 110, which sets out the circumstances under which vessels may be approached and boarded when on the high seas.³⁹ The

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31. *See id.* pt. XII.

32. *See id.* pt. XIII.

33. *See id.* art. 60.

34. *See, for example,* the conservation requirements of article 61, with respect to fishing.

35. Convention, *supra* note 10, art. 58 reads as follows:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

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

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

36. *See id.* arts. 100-07.

37. *See id.* arts. 91-93.

38. *See id.* art. 89.

39. Article 110 limits high seas boarding, except when otherwise provided by treaty, to cases involving piracy, the slave trade, and unauthorized broadcasting. Boarding can also be carried out where the ship being boarded is without nationality or where it either flies a foreign flag or refuses to show a flag but is in reality a ship of the same nationality as the warship.

economic zone chapter, however, provides for additional boarding rights, such as for fisheries enforcement.⁴⁰ The compatibility requirement of Article 58 simply assures that these specifically stated coastal state rights in the zone cannot be *reduced* by the application of the high seas articles, which do not refer to fisheries enforcement.

Article 58(3) provides that a state exercising its rights in the economic zone must comply with laws and regulations enacted by the coastal state in accordance with the Convention. This, of course, is a further restriction, but it is not a limitation on the *rights* specified in Article 58 but only a limitation upon the *manner* in which those rights are to be exercised. For example, Article 211(5) permits the coastal state to adopt laws and regulations for the prevention, reduction, and control of pollution in the EEZ. Enforcement of those laws, however, is circumscribed to specific circumstances. For instance, Article 220 limits port state enforcement to cases involving major damage or threats of major damage, and Article 218 limits enforcement for violations in the economic zone to the occasion when a vessel is voluntarily within a port or at an offshore terminal. In addition, section 7 of Part XII of the Convention provides for a number of additional safeguards such as the requirement that states, in exercising their rights with respect to pollution, shall not discriminate among vessels and that only monetary penalties may be imposed for violations. As a whole, the pollution rules in the Convention place a premium upon the viability of navigation within the economic zone, yet allow reasonable protection to the coastal state.

Let us return briefly to the phrase in Article 58, "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,"⁴¹ to explore its presence and meaning. This is language foreign to the 1958 Geneva Conventions which, of course, were void of the concept of the EEZ. As Article 58 makes clear, Article 87 is not incorporated by reference. There are several reasons why this is so. First, Article 87 specifying the high seas freedoms makes reference to some uses which are clearly incompatible with coastal state rights in the economic zone.⁴² The most obvious of these is fishing, which falls under coastal state management and is not a freedom to be exercised in the zone.⁴³ In addition, the listing of free-

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40. See Convention, *supra* note 10, art. 73.

41. See *supra* note 35.

42. Convention, *supra* note 10, art. 87 reads as follows:

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

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

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

43. *Id.* arts. 56, 61-62.

doms in Article 87 is not exclusive. This is made clear by the use of the phrase *inter alia* when those rights are listed. To incorporate that phrase by reference into Article 58 would broaden the freedoms in the zone beyond a limit that coastal states were willing to accept. On the other hand, a simple reference in Article 58 to the freedoms of navigation and overflight and the laying of submarine cables and pipelines, without more, was seen as presenting the possibility of a restrictive reading of the article to permit those freedoms and those freedoms only. There may be a touch of paranoia in this view because a legitimate argument can be made that the term "freedom of navigation" is a term of art adopted from the 1958 Geneva Convention on the High Seas⁴⁴ and has the same content as when used there. Nevertheless, the phrase in question was added⁴⁵ to make clear that while coastal states were entitled to any unspecified residual rights in connection with resource exploitation, other states could exercise any unspecified residual rights associated with the basic freedoms specified.

Other provisions of the Convention have an obvious bearing on the conduct of navigation in the economic zone. Article 60, for example, deals with the emplacement of artificial islands, installations, and structures in the zone. It provides, *inter alia*, for the establishment by the coastal state of reasonable safety zones which vessels in navigation must respect.⁴⁶ But it also requires that installations or structures which have been abandoned or fallen into disuse be removed "to ensure safety of navigation."⁴⁷ This is a modification of the 1958 rule which required such structures to be "entirely removed,"⁴⁸ providing a better balance by referring the question of removal standards to the appropriate international organization (in this case, the International Maritime Organization). The fisheries provisions contained in Articles 61 to 73 also impact on the conduct of navigation. The very act of fishing, taking into account the gear and procedures used, constitutes a potential conflict with the exercise of navigation rights by nonfishing vessels. The same can clearly be true of the conduct of marine scientific research. These potential conflicts are in part alleviated by several additional articles. In the first instance, if the dispute concerns whether a particular use of the economic zone, not identified or specified in the Convention, falls within the jurisdiction of the coastal state or is a right which can be exercised by other states, Article 59 gives guidance. That article sets forth considerations to be taken into account in such situations.⁴⁹

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44. 1958 Geneva Convention on the High Seas, art. 2, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

45. The negotiation of this article took place in informal consultations of a group of interested states on both sides of the issue chaired by Ambassador Jorge Castaneda, head of the Mexican delegation and now Foreign Minister of Mexico. He was assisted in this task by Ambassador Helga Vindenes of Norway. For an interesting insight into this negotiation, see Brennan, Jurisdiction of Coastal States and Other States in the Exclusive Economic Zone (unpublished manuscript presented before the Seventh International Ocean Symposium of the Ocean Association of Japan, Oct. 21-22, 1982).

46. Convention, *supra* note 10, arts. 60(4)-(7).

47. *Id.* art. 60(3).

48. 1958 Geneva Convention on the Continental Shelf, art. 5(5), 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

49. Convention, *supra* note 10, art. 59 reads as follows:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the

Furthermore, Article 300 must be kept in mind; it requires that rights, jurisdictions, and freedoms must be exercised in a manner which would not constitute an "abuse of right." Finally, Article 297 requires submission of disputes to compulsory settlement when it is alleged that a coastal state has acted in contravention of the Convention in regard to the freedoms and associated rights specified in Article 58.

In the light of the Treaty's overall complexity, the foregoing is an admittedly sketchy view of the EEZ provisions and their meaning. It should, however, serve to illustrate the proper balance and provide perspective on the subject.

IV

INTERNATIONAL STRAITS

These provisions are among the more complex rules of the Treaty, and because they have been analyzed in great detail elsewhere, this article addresses only the most important and fundamental questions. The articles by professors Moore and Reisman in the January 1980 issue of the *American Journal of International Law*⁵⁰ are particularly enlightening. The basic question examined in these two articles is whether the Treaty provisions do or do not provide as much maritime mobility, including submerged transit, through straits as does the extant regime for international straits. Put differently, does the Treaty regime accurately reflect the present state of understanding of nations with regard to navigation through straits as reflected in traditional practices of maritime states in those areas? Reisman argues the negative side of the question, while Moore takes the opposite view. This author agrees with the affirmative view. A few of the reasons follow.

First, unlike the 1958 Geneva Convention on the Territorial Sea, the new Treaty makes it crystal clear that aircraft in overflight are included in the concept of "transit passage." This is reflected in several places, such as in Article 38(2) which, while defining transit passage, refers to the "freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait."

The right of submerged transit is not so directly addressed, but is no less clear. Reisman is not so sure. He argues there is an ambiguity in the words "normal modes" as they are used in Article 39(1)(c).⁵¹ He says:

Mode of transit of different vessels is, in part, a factual question, but it also has normative and contextual components, for what is "normal" will depend on context, including the legal environment. It is neither implausible nor inconsistent with other [Treaty] provisions

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coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

50. Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L. L. 77 (1980); Reisman, *supra* note 17.

51. Convention, *supra* note 10, art. 39(1)(c) provides:

1. Ships and aircraft while exercising the right of transit passage shall:

(c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress . . . .

to assume that both the coastal and the flag state will participate in determining "normality" for vessels transiting coastal waters.⁵²

To this, Moore responds that Article 39(2) uses the term of art, previously alluded to in this article,⁵³ "freedom of navigation," when referring to transit passage.⁵⁴ That term is used in Article 87 with respect to the high seas and was taken from Article 2 of the 1958 Geneva Convention. This term was intentionally selected by the negotiators for use in the straits chapter for that very reason. All of the participants in the negotiations were sophisticated and fully aware of the implications of the use of this phrase, and, certainly no one has ever seriously argued that "freedom of navigation" in the 1958 Geneva Convention was ever meant to exclude submerged transit. These same participants were never in doubt with regard to the meaning of the words "normal modes" for it was made clear on several occasions by the maritime states.⁵⁵ Some have asked why, if submerged transit were meant, the texts do not specifically say so. Moore has answered this question by pointing out that if "freedom of navigation" as used in Article 38(2) were further expanded, that could create a negative implication in other articles, such as Article 87, where that term is used without qualification.⁵⁶ It was too late at the time the straits articles were negotiated to make corresponding changes in other articles, to say nothing of the implications for the use of the phrase in the 1958 Geneva Convention. It could also be noted, in this connection, that there is no reference to submerged transit in Article 58, yet no one is arguing that submerged transit cannot be undertaken in the EEZ.

Reisman also seems to feel that the limitations placed upon vessels in their exercise of the right of transit passage makes the straits regime more similar to the regime of innocent passage than to the regime of the high seas.⁵⁷ This author cannot agree. The two chapters are entirely different. The specific duties of the flag state and the rights of the littoral states describe the manner in which transit passage should be exercised, but the basic right itself is not related.⁵⁸ Furthermore, it is significant that the provisions for innocent passage and those for transit passage have been carefully and deliberately separated in the Treaty.⁵⁹ Only those provisions in the straits chapter, such as Article 45, where specific reference is made to innocent passage, can be said to be linked.

Questions have also been raised regarding the certainty of transit passage under the Treaty. Article 38 sets out the right of transit passage; Article 39 specifies the duties of vessels engaged in such passage. One should carefully note that the manner in which the rights and duties are set out varies completely from the way innocent passage is handled. Article 19 is structured so that a violation of any of the activities listed therein removes a vessel from innocent status and subjects it

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52. Reisman, *supra* note 17, at 71.

53. *See supra* notes 44-45 and accompanying text.

54. Moore, *supra* note 50, at 96.

55. *See id.* at 100-02.

56. *Id.* at 98.

57. Reisman, *supra* note 17, at 70.

58. Articles 39 and 40 refer to duties of ships and aircraft. The rights of coastal states are for the most part contained in Articles 41 and 42.

59. The innocent passage provisions appear in part II, section 3, subsection A, while the rules for straits are found in part III, a separate chapter.

to the right of the coastal state to take steps to prevent its passage.⁶⁰ The duties specified in Article 39, on the other hand, if violated, only entail international liability under the Convention⁶¹ and do not give rise to a coastal state right of action. Furthermore, the laws of coastal states under Article 42 are carefully circumscribed to four specific categories. The first two—safety of navigation and the prevention of pollution—limit actions taken by the coastal state to those acts consistent with internationally approved standards. The others—relating to fishing and violations of customs, fiscal, and immigration laws—are subject to the general requirement that laws enacted with respect thereto must not hamper transit passage nor discriminate among foreign ships.⁶² These latter provisions clearly relate to activities outside the scope of continuous and expeditious passage of a strait and, therefore, should cause no problem. Finally, one should note that warships are immune from the enforcement of such regulations,⁶³ and they also are not subject to pollution regulations.⁶⁴ The conclusion that must be reached is that the rights and duties of ships in transit passage are independent and unrelated.

V

ARCHIPELAGIC SEALANES PASSAGE

At this point, little needs to be said on the subject of archipelagic sealanes passage. Obviously, the archipelago concept had been around for some period of time or else it would not have been the subject of negotiations at the Conference. Certain states argued that their sovereignty should not be fractionated by the geographical accident that separated segments of their society on islands rather than on a continent. To permit states in this condition to create an envelope of sovereignty encompassing their outer boundaries, however, would create enormous areas under their control that had previously been considered high seas. Yet there was an element of rationality in the desire of these groups of islands to integrate themselves politically and economically under the protection of international law. It was for this reason that the chapter on archipelagos was promulgated.

Insofar as the articles⁶⁵ themselves are concerned, no serious questions with respect to their meaning or effect have been raised. While Article 49 bestows upon the archipelagic state sovereignty extending to the air space above the archipelago as well as to the seabed and subsoil, that sovereignty must be exercised subject to the other provisions of Part IV of the Convention. It is these other provisions that protect the interests of the maritime powers. The concept of archipelagic sealanes passage guarantees transit through the archipelago in the same way that transit passage protects navigation through straits. The archipelagic state may designate special sealanes through which ships and aircraft enjoy the right of archipelagic

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60. Convention, *supra* note 10, art. 25(1).

61. *Id.* art. 31.

62. *Id.* art. 24.

63. *Id.* art. 95.

64. *Id.* art. 236, mistakenly headed "Sovereign immunity." It is actually an exception.

65. *See id.* pt. IV.

sealanes passage, defined as navigation and overflight in the normal mode.⁶⁶ If the state fails to designate such lanes, or if not all normal routes are designated, then, in accordance with Article 53(12), the right of archipelagic sealanes passage extends to all routes normally used for international navigation and overflight. With respect to the duties of ships and the duties of the archipelagic state, Articles 39, 40, 42, and 44 of the straits chapter are specifically applicable.⁶⁷ To the extent that the operative parts of these provisions have been discussed in the preceding section, they need not be referred to again here. Outside of sealanes, the regime of innocent passage applies.⁶⁸ This chapter, taken together with the chapter on straits, establishes a pattern that reinforces the general conclusion that these are special regimes designed to enshrine the practices of maritime states which were recognized patterns of activity in these special areas prior to the initiation of the Law of the Sea Conference. If this were not so, this author does not believe that these maritime states would ever have agreed to accept the archipelagic principle in the Treaty.

VI

NONPARTIES

This article now turns to the second question: the effect of the Treaty upon (and its relation to) nonparties to the Law of the Sea Convention.

At the concluding plenary of the Conference in September, the delegate of Peru stated, on the record, that no rights could accrue to states not parties to the Convention. To that the United States representative replied that it was legally untenable to argue that no rights described in the Treaty inured to nonparties. The Peruvian remark reflects arguments that rights in the Treaty are contractual in nature, that they are not customary international law, and that states have no right to "pick and choose" among the various provisions of the Convention, electing to abide by those they consider beneficial while rejecting the rest. All such statements miss the mark of reality. From the quotations presented at the opening of this essay,⁶⁹ one can see that there is a view growing among international lawyers, both domestic and foreign, that the nonmining provisions of the Treaty are either customary international law, the best evidence of international law, or, at the very least, a pattern of understanding reflecting the foundation upon which customary law will undoubtedly develop.⁷⁰ The tentative draft of the Restatement elaborates on this view as follows:

Many of the provisions of the Draft Convention repeat, with minor modifications, provisions in the 1958 Conventions which the United States had ratified and which very largely restated customary law accepted by states generally. Also, most of the provisions of the Draft Convention that deviate from, or add to, the 1958 Conventions were accepted at the

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66. *Id.* art. 53(1).

67. *Id.* art. 54.

68. *Id.* art. 52.

69. *See supra* notes 3-5 and accompanying text.

70. For another view, see C. Oliver, *The Rule of Law at Sea—Uncustomary International Law* (unpublished manuscript presented at the 1982 Annual Meeting of the Section of International Law, American Bar Association).

Conference, after hard negotiations, by consensus, and many of these provisions have influenced and reflect the practice of states. The United States and other states generally regard the provisions of the Draft Convention, with the exception of Part XI relating to seabed mining, as authoritative statements of existing international law.⁷¹

Because of that belief, the drafters of the Restatement incorporated many of the principles of the Treaty, including, *inter alia*, those relating to straits and archipelagos.⁷² The Part XI mining provisions can and should be differentiated, as the Institute has done, since much of that part is institution-creating, and custom plays no role in that process. The view that the other provisions should be seen as existing law has a sound policy base.

First, the consensus negotiations during the Conference have, over the years, produced two identifiable consequences: (1) several states have already taken the necessary steps, by legislation, decree, or other internal process, to give effect to provisions of the Treaty bearing upon fishing, the continental shelf, and other matters;⁷³ and (2) a vast number of participating delegations in the Conference came away from the Conference firmly convinced that what they had created, other than institutional provisions, was in fact representative of their view of international law. Such international expectations are important and must now be kept clearly in the forefront of considerations involved in contemporary decision-making. To reverse or undercut such expectations, particularly with respect to navigation issues, even for what some may see as the beneficial object of pressuring states outside of the Treaty to accept the mining provisions, would be short-sighted and conflict-producing.⁷⁴ Some contenders have even gone so far as to suggest that the Law of the Sea Convention represents a scrapping of the 1958 Geneva Conventions.⁷⁵ Such a proposition is both wrong and dangerous. The Law of the Sea Convention itself provides that it prevails, as between states parties, over the 1958 Geneva Conventions.⁷⁶ While that applies to the law between parties, it is a far cry from saying that the earlier conventions are not alive to regulate at least some activities as between nonparties. In fact, the implication is just the opposite. Furthermore, it is contrary to the understanding of the participants with respect to

71. RESTATEMENT, *supra* note 3, at 55.

72. *Id.* at 56, § 513.

73. The United States, itself, has done so. See, e.g., Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended in scattered sections of 16 U.S.C. and 22 U.S.C.).

74. See generally M. McDOUGAL & W. BURKE, *supra* note 19, particularly at page 12, where the authors speak of the "provincial myopia."

75. Several statements to this effect were made at the final session of the Conference at Montego Bay. Exemplary is the following excerpt from the remarks of Paul Engo (Cameroon):

[T]he Third United Nations Conference on the Law of the Sea was not a mere codification conference, as was the Second United Nations Conference, which produced the short-lived 1958 Geneva Conventions. The representatives of the African nations made it clear from the outset of our endeavours that so-called customary international law emanating from the European maritime experience could not juridically form the basis for codification or even progressive development of any law which is intended to bind us Africans directly. This Convention represents for the first time a truly universal law and must be seen as such. Any of its features that bear resemblance in content or form to any custom or agreements or treaties recognized by any region or sub-region or among maritime nations sharing common interests must be viewed as purely coincidental.

U.N. Doc. A/CONF. 61/PV.185 (1983).

76. Convention, *supra* note 10, art. 311.

the nature of the undertaking in the Conference, when many of the 1958 provisions were transferred, essentially intact, into the new Treaty.

Second, it makes no sense to embark on any other course. It is clear that it is in the national interest of all states, coastal or otherwise, to see to it that global patterns emerge reflecting a careful balance of interests between the coastal states and the maritime powers. For example, it would not be in the interests of archipelagic states to favor a regime that would not promote global recognition by all states, whether parties to the Convention or not, of the archipelagic principle. That would place them in only a slightly improved position compared to the pretreaty situation. By the same token, the problem of passage through international straits is so universal, affecting in a direct way the interests of both the maritime states and the littoral states, that only a uniformly recognized and applied set of rules could be conceivable. These rules reflect the practice of states,⁷⁷ and these are the rules expressed by the Treaty. It boggles the mind to think that any other practice could be acceptable at this point in history, nor is it conceivable that rational, reflective decisionmaking could lead to a contrary conclusion.

While legal scholars, shielded from the ugly glare of international reality, may enjoy further debate on the constitution of customary international law, the reality of navigation in modern history and its importance, politically as well as in terms of global strategic considerations, dictates that the nonmining provisions of the Treaty control the actions of states by universal recognition and application.

Finally, some have argued that the provisions in question should be applied with respect to *signatories* to the Treaty without respect to ratification, but not otherwise. Perhaps this argument is based upon some emanations from the Vienna Convention.⁷⁸ But a distinction of this nature is basically specious. The position of a state which has signed but not ratified, and a state which has done neither, carries no different implications with respect, say, to the financial obligations under Part XI of the Treaty. Neither such state has accepted them. What is the basis, therefore, of distinguishing between them with respect to navigational rights? Furthermore, what state bordering constricted waters would wish to place itself in the politically difficult position of applying different norms to different maritime users based on such a slim distinction? To do so, it would appear, would create potential political and diplomatic problems of immense proportions and unacceptable consequences which can easily be avoided to the general benefit of all. One of the major advantages of the negotiated provisions relating to navigation is that they relieve coastal states from the need to make such decisions, thereby setting off one maritime user against another, or, for that matter, causing conflict between neighbors, a situation that could be even more troublesome.

For such reasons, I am optimistic that the international community, in its wisdom and realism, will prefer to opt for general application of the navigation and overflight provisions reflected in the Treaty. One need only look to past experience to verify the advantage to be attained. The 1958 Geneva Conventions,

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77. See Harlow, *Comment*, LAW & CONTEMP. PROBS. Spring 1983, at 125.

78. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (May 22, 1969).

while not signed ⁷⁹ by many states participating in the Law of the Sea Conference, were recognized as valuable, and they were uniformly applied by all signatories to all states, signatory or not. I see no reason why we should not benefit from the experience of this wisdom, or why that approach should not now be expected to continue toward the goal of global stability.

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79. For a list of countries signing the 1958 Geneva Convention, *supra* note 6, see 15 U.S.T. 1606.