Once More Unto the Breach: Some Thoughts on the Future of the EEZ

Guy Des Rosiers [1]

By public international law standards, the Exclusive Economic Zone (EEZ) remains a relative newcomer, the product of State practice following the end of the Second World War and multilateral negotiations culminating with the entry into force, in November 1994, of the 1982 United Nations Convention of the Law of the Sea. In defining the EEZ, the Convention has created a sui generis legal regime over vast areas that were previously part of the high seas. Neither Grotian nor Seldenian in spirit, the EEZ regime forgoes the absolute language of territory and sovereignty in favor of discrete sets of rights and obligations, leaving many legal and practical questions unanswered. The modest aim of this paper is to highlight a few of the grey areas that have since emerged, by reference to recent State practice.

Keywords: *Exclusive Economic Zone, 1982 United Nations Convention of the Law of the Sea*

I. Like Greyhounds in the Slips

I come to bury Grotius, not to praise him[2]

For centuries, the sea was considered a medium of communication for all States to enjoy, as well as a seemingly inexhaustible source of food for coastal States[3]. By the end of the Second World War, however, significant advances in halieutics, warfare, offshore exploration and exploitation, navigation and telecommunications (to name only a few), coupled with a growing realization of the vital importance of managing the living resources of the sea and protecting the marine environment, raised important new questions about mankind's use of, and relationship with, the world's oceans. Yet existing international law, which reflected a *modus vivendi*

1 Foreign Legal Consultant, Makarim & Taira S., Jakarta, Indonesia. LL.B. (1988), Université de Montréal; LL.M. (1993), Columbia Law School.

2 A quip attributed to Ambassador J. Alan Beesley of Canada, during the Third United Nations Conference on the Law of the Sea (see Oxman, B.H., "The Territorial Temptation: a Siren Song at Sea", (2006) 100 Am.J.Int.L. 830).

3 Nguyen Quoc, D., P. Daillier et A. Pellet, Droit international public, 3e édition (Paris : L.G.D.G., 1987), at 667.

between the Seldenian concept of a narrow territorial sea (over which a coastal State could assert full sovereignty, save for the right of innocent passage) and the Grotian concept of the high seas (open to all States yet belonging to none), seemed ill-suited to address these emerging questions[4].

In September 1945, Harry S. Truman proclaimed the natural resources of the subsoil and seabed of the continental shelf contiguous to the coast of the United States to be subject to United States "jurisdiction and control"[5], and sought to establish conservation zones for the protection of fishery resources in the high seas contiguous to the coast of the United States[6]. Truman's twin proclamations led to a flurry of unilateral declarations by other States[7], upheaving the customary law of the high seas and rekindling old debates about the extent to which the seas may be subject to claims of sovereignty[8]. The Truman proclamations and their progeny also heralded an unprecedented multilateral effort to modernize and standardize the law of the sea, leading ultimately to the Third United Nations Conference on the Law of the Sea, which began its work in December 1973 and continued until the 1982 United Nations Convention on the Law of the Sea[9] was finally opened for signature almost exactly nine years later[10].

II. The Game's Afoot

The Convention essentially codified existing international law with respect to the high seas[11], while building on a significant prior body of work by the International Law Commission in standardizing concepts such as the territorial sea, the right of innocent passage, the contiguous zone and right of hot pursuit. The Convention broke new ground, however, in areas

4 See Beesley, J.A., "Grotius and the New Law", in Ocean Yearbook 18 (Chicago: The University of Chicago Press, 2004), pp. 98-116.

5 Proclamation 2667 of September 28, 1945 – Policy of the United States with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12,303 (1945).

6 Proclamation 2668 of September 28, 1945 – Policy of the United States with respect to Coastal Fisheries in Certain Areas of the High Seas, 10 Fed. Reg. 12,304 (1945).

7 See Nandan, S.N., "The Exclusive Economic Zone: A Historical Perspective", in Mélanges à la mémoire de Jean Carroz – le droit de la mer (Rome: FAO, 1987), at pp. 171-188.

8 See Oxman, supra, note [1]; Esters, N., "Impacts of Language: Creeping Jurisdiction and its Challenges to the Equal Implementation of the Law of the Sea Convention", paper presented at the 5th ABLOS Conference on the Difficulties in Implementing the Provisions of UNCLOS, Monaco, 15-17 October 2008, available at: http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session5-Paper1-Esters.pdf (visited on 12 July 2010).

9 1833 U.N.T.S. 397 (hereafter "UNCLOS" or the "Convention").

10 See Nandan, supra, note [6]; Nguyen Quoc, supra, note [2], at ¶ 667.

11 See Oxman, supra, note [1].

such as deep seabed mining and marine environmental protection, and addressed recent State practice stemming from the Truman proclamations in fashioning the new regime of the exclusive economic zone (or EEZ), while refining emerging law on the partially overlapping regime of the continental shelf.

The Convention generally defines the EEZ as an area extending no more than 200 nautical miles beyond the territorial sea, subject to the specific legal regime established in Part V of the Convention, and under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the Convention[12]. The blueprint for the EEZ regime consists of Articles 56, 58, and 59, which read as follows:

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

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[13] or non-living[14], of the waters superjacent to the seabed and of the seabed 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;[15]*
     - *(ii) marine scientific research[16];*
     - *(iii) the protection and preservation of the marine environment[17];*
   - *(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*

12 UNCLOS Articles 55 and 57.

13 The subject of living resources is further addressed in UNCLOS Articles 61-73.

14 Additional provisions relevant to the rights of coastal States regarding resources on the seabed and subsoil can be found in Part VI dealing with the continental shelf, and in particular Articles 77, 80 and 81.

15 These rights are further spelled out in UNCLOS Article 60.

16 Other provisions relevant to this principle are contained in Part XIII of the Convention, and include Articles 246, 248, 249 and 253.

17 Other provisions relevant to this principle are contained in Part XII of the Convention, and include Articles 193, 208, 210(5), 211(5) & (6), 214 and 220.

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 seabed and subsoil shall be exercised in accordance with Part VI.*

Article 58

Rights and duties of other States in the exclusive economic zone

1. *In the exclusive economic zone, all States, whether coastal or landlocked, 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*[18]*, 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*[19] *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.*

Article59

Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone

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

18 See also UNCLOS Article 79.

19 These referenced Articles are contained within Part VII of the Convention dealing with the high seas.

Article 59 of the Convention, with its reference to rights or jurisdictions 'not attributed' to coastal or other States, leaves no doubt that the incompleteness of the EEZ regime was arrived at by design. And while the area corresponding to the EEZ was previously considered part of the high seas by most States[20], the Convention now specifically excludes the EEZ from the scope of Part VII of the Convention[21] – though Articles 88 through 115 are then reintroduced to the EEZ regime via Article 58(2), but only "in so far as they are not incompatible with" the new EEZ regime[22]. Such roundabout language has created considerable uncertainty regarding the scope and status of non attributed categories.

A few basic questions come to mind: How can 'attributed' and 'non attributed' categories be distinguished, and what are the legal implications of the distinction? Do 'attributed' categories extend to matters incidental to the underlying subject matter? What is the intended distinction (if any) between legal concepts such as 'sovereign rights', 'jurisdictions', 'freedoms' and 'due regard'? These questions are briefly considered below.

The Problem of Non Attributed Categories

At the outset, the idea that certain subject matters concerning the EEZ are beyond the scope of the treaty – and therefore, beyond the scope of the EEZ regime itself – raises a jurisdictional question as to whether disputes concerning non attributed categories are subject to the mandatory dispute settlement provisions of Part XV of the Convention. These doubts are amplified, rather than assuaged, by the hortatory nature of Article 59's conflict settlement language.

Article 297(1) of the Convention, for instance, narrowly calls for the compulsory resolution of disputes regarding "the exercise by a coastal State of its sovereign rights or jurisdiction" only where there are allegations that: (a) the coastal State has "acted in contravention" of the provisions of the Convention regarding "the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other in-

20 As reported by the United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs in "Limits in the Seas - United States Responses to Excessive National Maritime Claims" (paper No. 112, March 9, 1992, at pp. 33-34), in 1958, only two States, i.e., Ecuador and Peru, claimed a territorial sea in excess of 12 nautical miles. However, since then, a number of additional States have claimed territorial seas of up to 200 nautical miles (see id, Table 4).

21 See UNCLOS Article 86.

22 UNCLOS Article 58(2). Article 86 also states that it "does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58".

ternationally lawful uses of the sea specified in Article 58"; (b) a State, in exercising the above rights, has "acted in contravention" of the Convention or of laws or regulation adopted by the coastal State in conformity with the Convention and other rules of international law "not incompatible with" the Convention; or (c) the coastal State has "acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by the Convention or through a competent international organization or diplomatic conference in accordance with the Convention".

Each of the enumerated cases set out in Article 297(1) requires, at minimum, some connection with a right or jurisdiction attributed under the Convention to coastal or other States. Therefore, it would seem logical that a dispute involving only a 'non attributed' subject within the strict meaning of Article 59 – *i.e.*, a subject which, by definition, is conferred neither to the coastal State nor to other States – would fall beyond the jurisdictional purview of Article 297(1).[23]

What is more, the very task of identifying whether a particular use of the EEZ relates to an attributed or non attributed category seems fraught with difficulty. For instance, Part V of the Convention says nothing about the conduct of military exercises within the EEZ[24]. Nevertheless, upon signing the Convention, a small number of States made declarations expressing their understanding that the Convention did not authorize other States to carry out military exercises and maneuvers in the EEZ, especially those involving the use of weapons or explosives, without the consent of the coastal State[25]. Some States went on to adopt national legislation embodying this principle[26]. These actions in turn drew objections from other

23 In the event of a dispute as to whether a right is attributed or non attributed, a court or tribunal established pursuant to Part XV of the Convention would arguably have jurisdiction to determine this threshold issue under the principle of Kompetenz-Kompetenz, which is reflected in UNCLOS Article 288(4).

24 By contrast, within the territorial sea, any military exercise or practice with weapons of any kind is deemed not to be 'innocent' and, therefore, can be refused by the coastal State (see UNCLOS Article 19(2)(b)). There can be little doubt, however, that the freedom of navigation within the EEZ is broader than the right of innocent passage within the territorial sea.

25 See declarations of Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, and Uruguay, the full text of which can be found at the UN Treaty Collection website: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en (visited 16 July 2010) (hereafter UNTS Status Document).

26 See Uruguay, Act 17.033 of 20 November 1998 Establishing the Boundaries of the Territorial Sea, the Adjacent Zone, the Exclusive Economic Zone, and the Continental Shelf (Article 8); Brazil, Law No. 8.617 of 4 January 1993 on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf (Article 9); North Korea, Decree of 21 June 1977 by the

States, which did not view the Convention as authorizing coastal States to prohibit military exercises in their EEZ[27].

In the end, whether military exercises fall within an attributed or a non attributed category would seem to depend on whether the underlying activity can be viewed as: (a) forming an integral part of the "other internationally lawful uses of the sea" related to the freedom of navigation, as contemplated in Article 58(1) of the Convention[28]; (b) excluding "any non-peaceful use without the consent of the coastal State", as claimed (for instance) by Cape Verde[29]; or (c) falling outside of Part V altogether[30]. To complicate matters further, the term "military exercises" itself seems broad enough to encompass a variety of activities that cannot be treated wholesale as falling exclusively within an attributed or a non attributed category. Hence, it is likely that "military exercises" includes certain categories attributed to coastal States (such as jurisdiction over the protection and preservation of the marine environment, or jurisdiction over the conduct of marine scientific research), certain categories attributed to other States (such as the freedom of navigation), as well as activities that do not neatly fall within any attributed category[31].

Central People's Committee Establishing the Economic Zone of the People's Democratic Republic of Korea; Iran, Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993 (Article 16). English language versions of each of the above laws can be found at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/ (hereafter DOALOS State Practice Database)

27 See declaration of the Netherlands, in UNTS Status Document. See also declarations of Italy, Germany, and United Kingdom, id.

28 See Galdorisi, G.V. and A.G. Kaufman, "Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict", (2002) 32 Cal. West. Intl. L.J. 253.

29 See declaration of Cape Verde, paragraph V, in UNTS Status Document. As some scholars have already noted, UNCLOS Article 88 – a provision relating to the high seas which also applies, by reference, to the EEZ via Article 58(2) – states that "[t]he high seas shall be reserved for peaceful purposes". See Galdorisi 2002, supra; Tetley, W. H., "The Chinese/U.S. Incident at Hainan - A Confrontation of Super Powers and Civilizations (Five Unanswered Questions)", available at: http://www.mcgill.ca/maritimelaw/history/chinese/ (visited on 9 July 2010). Not everyone agrees, however, that "peaceful purposes" necessarily precludes military activities generally. See Official Records of the Third United Nations Conference on the Law of the Sea, Volume V, Document A/CONF.62/SR.67, 67th Plenary meeting of 23 April 1976, Statement of Mr. Learson (USA), at p. 62 ("The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law").

30 Notably, Article 298(1)(b) of the Convention specifically allows States to opt out of the compulsory dispute resolution mechanism of Part XV with respect to "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service", and a number of States, including Argentina, Belarus, Canada, Cape Verde, Chile, China, France, Mexico, Portugal, Republic of Korea, Russia, Tunisia, Ukraine, and the United Kingdom, have exercised this right. See UNTS Status Document.

31 With minimal effort, the same logic could be applied to a number of other activities within the EEZ, including, for instance, offshore bunkering (see infra).

Another promising subject for inclusion within Article 59 concerns objects having archaeological or historical value. The Convention says nothing about the fate of such objects found within the EEZ[32], and it is clear that these objects cannot be considered 'natural resources' falling within the sovereign rights of the coastal State. Yet States such as Bangladesh, Cape Verde, Malaysia and Portugal have unilaterally declared that archaeological or historical artifacts found on the seabed of the EEZ cannot be removed without prior consent[33]. The Netherlands have objected to such claims, while conceding the need for further development and cooperation in this area[34]. The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage[35], which became effective on 2 January 2009, now gives coastal State the right "to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights as provided for by international law"[36] whenever such heritage is located on its continental shelf or within its EEZ. In all other cases, however, States can declare their interest in such heritage to the coastal State, and are entitled to be consulted before any action is taken[37]. It must be noted, however, that the 2001 UNESCO convention applies only to a relatively small number of States, and the convention itself makes clear that it is without prejudice to the rights, jurisdiction and duties of States under international law (including UNCLOS)[38].

Residual Rights and Creeping Jurisdiction

Leaving aside the difficulties of distinguishing between attributed and non attributed categories, further uncertainty shrouds the intended scope

32 It bears noting, however, that UNCLOS Article 303(2) provides that archaeological and historical objects removed from the seabed of the contiguous zone (which is, technically speaking, part of the EEZ) without the coastal State's consent may be treated as an infringement of the coastal State's territory or territorial sea, but only for purposes of controlling traffic in such objects. This language suggests that the coastal State's authority is purely jurisdictional, and does not rise to the level of sovereign rights.

33 See declarations of Bangladesh (paragraph 8), Cape Verde (paragraph II), Malaysia (paragraph 8) and Portugal (paragraph 6), in UNTS Status Document. Jamaica, in its national law, has also reserved for itself jurisdiction over "the recovery of archaeological and historical objects" (see Jamaica's Act 33 of 1991 entitled 'The Exclusive Economic Zone Act, 1991', Article 4(c)(i), in DOALOS State Practice Database).

34 See declaration of the Netherlands, paragraph VI, in UNTS Status Document.

35 The full text of the convention is available at: http://www.unesco.org/en/underwater-cultural-heritage/the-2001-convention/official-text/ (visited on 9 August 2010).

36 Id., Article 10(2).

37 Id., Article 9(5) and 10(3).

38 Id., Article 3. As of 9 August 2009, only 32 States have ratified or accepted the 2001 convention.

of each attributed category. This uncertainty operates on two levels. First, what does each attributed subject (*e.g.*, 'marine scientific research', 'protection and preservation of the marine environment', etc.) reasonably and naturally include? Second, what is the added effect of adorning each subject with labels such as "sovereign right", "exclusive jurisdiction", "exclusive right", "jurisdiction", "right", or "freedom"?

While the rights, jurisdictions and freedoms attributed to coastal and other States under Articles 56 and 58 of the Convention are reasonably specific, it is easy to conceive of examples where they might overlap or conflict.[39] One such area is the field of marine environmental protection. Here, the detailed provisions of Part XII of the Convention significantly reduce the possibility of conflict by granting coastal States gen[illegible]' (though broadly circumscribed) prescriptive jurisdiction over pollution by dumping[40], pollution relating to the exploitation of natural resources over which they have sovereign rights[41], and pollution from seabed activities, artificial islands, installations and structures under their jurisdiction[42], while strictly limiting the coastal State's jurisdiction with respect to vessel-source pollution to the implementation of "generally accepted international rules and standards established through the competent international organizations or general diplomatic conference"[43]. A lingering question, however, is whether the coastal State's jurisdiction over marine pollution is *limited*, in the EEZ, to what is specifically authorized under Part XII of the Convention, or whether it also includes any residual authority over marine pollution not otherwise *prohibited* by Part XII. Although Article 56(1)(b) of the Convention only confers jurisdiction "as provided for in the relevant provisions of this Convention", some States have interpreted the jurisdictional grant very broadly [44].

39 For a more detailed analysis of many of the issues touched upon in this section, see Kopela, S., "The 'Territorialisation' of the Exclusive Economic Zone: Implications for Maritime Jurisdiction", paper presented at the 20th anniversary conference of the International Boundaries Research Unit, Durham University, United Kingdom, 1-3 April 2009, available at: www.dur.ac.uk/resources/ibru/conferences/sos/s_kopela_paper.pdf (visited on 9 July 2010).

40 See UNCLOS Articles 1(1)(5), 210(5) and 216(1)(a).

41 See UNCLOS Article 193.

42 See UNCLOS Article 208.

43 See UNCLOS Article 211(5) & (6). Because vessels move from State to State, the need for uniform rules, particularly with respect to vessel design, is obvious. The Convention reflects this, while recognizing, in Article 211(6), that discrete areas of the ocean may require different or additional protection.

44 Russian national law, for instance, requires a "State environmental assessment" for any activity undertaken in the EEZ (see Federal Act of 1998 on the Exclusive Economic Zone of the Russian Federation, at Article 27, in DOALOS State Practice Database). Canada's Interpretation Act automatically extends to the EEZ any Canadian law relating (among other things) to the conservation

Another subject of dispute concerns the status of artificial islands, installations and structures. The wording of Article 60(1) of the Convention suggests that the coastal State has jurisdiction over all artificial islands, but more limited jurisdiction with respect to "installations and structures"[45]. Moreover, the coastal State's prescriptive jurisdiction is limited in many respects by the "rights and duties" of other States, most notably with respect to the freedom of navigation[46]. Despite the carefully balanced language of the Convention, however, a number of States have expressly asserted sovereign rights over all installations and structures within the EEZ, whatever their nature or purpose[47], which in turn has drawn objections from other States[48]. Also noteworthy in this respect are the national laws of Japan, Sweden and the United States[49], which purport to extend all coastal laws

---

and management of natural resources (see Interpretation Act, Consolidated Laws of Canada, Chap. I-20, Article 8(2.1)). Similarly, Japan's Law No. 74 of 1996 on the EEZ and Continental Shelf extends all Japanese laws and regulations to (among other things) the conservation and management of natural resources in the EEZ (see Law No. 74 of 1996, Article 3(1), in DOALOS State Practice Database). Belgian national law requires the issuance of an environmental permit in order to conduct certain activities in the EEZ, including (among others) civil engineering works, the use of explosives of high-powered acoustical devices, dredging and other industrial activities; however, the law specifically excludes fishing, navigation and marine scientific research from the list of activities requiring such a permit (see Loi du 20 janvier 1999 visant la protection du milieu marin dans les espaces marins sous la juridiction de la Belgique, M.B. 12 March 1999, Article 25).

45 Jurisdiction is granted over installations and structures "for the purposes provided for in article 56 and other economic purposes", or "which may interfere with the exercise of the rights of the coastal State in the zone" (UNCLOS Article 60(1)(b) & (c)).

46 See UNCLOS Article 60, paragraphs (3) through (8).

47 See Brazil: declaration, paragraph V (in UNTS Status Document); Cape Verde: declaration, paragraph VI (in UNTS Status Document); Guyana: Maritime Boundaries Act, 1977, Act No. 10 of 30 June 1977, Article 16(b) (in DOALOS State Practice Database); India: Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act No. 80 of 28 May 1976, Articles 7(4)(b) and 7(5) (in DOALOS State Practice Database); Mauritius: Maritime Zones Act 1977 (Act No. 13 of 3 June 1977), Article 7(1)(b) (in DOALOS State Practice Database); Myanmar: Pyithu Hluttaw Law No. 3 of 9 April 1977, Article 18(b) (in DOALOS State Practice Database); Pakistan: Territorial Waters and Maritime Zones Act, 1976 (of 22 December 1976), Article 6(2)(b) (in DOALOS State Practice Database); Seychelles: Maritime Zones Act 1977, Act No. 15 of 1977, Article 7(1)(b) (in DOALOS State Practice Database); Uruguay: declaration, paragraph (E) (in UNTS Status Document).

48 See United Kingdom: declaration, paragraph (a); Netherlands: declaration, paragraph II.3, Germany: declaration; Italy: declaration (each of the foregoing may be found in UNTS Status Document); United States: see United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Limits in the Seas - United States Responses to Excessive National Maritime Claims", paper No. 112, March 9, 1992, at p. 45.

49 Although the United States is not a party to the Convention, it has claimed an EEZ consistent with the provisions of Part V of the Convention. See Proclamation 5030 by the President of the United States of America on the Exclusive Economic Zone of the United States of America, 10 March 1983, 48 Fed. Reg. 10605 (1983).

and regulations to such artificial islands, installations and structures within the EEZ as if they formed an integral part of their territory[50] .

Less subtle forms of creeping jurisdiction can also be found. Leaving aside the handful of States that continue to claim full sovereignty over a 200 nautical mile territorial sea[51], territorialist claims have also been asserted by States that have accepted the EEZ concept. The government of the Maldives, for instance, has enacted a statute flatly prohibiting *any* foreign vessel from entering its EEZ without prior authorization[52], in apparent violation of the freedom of navigation recognized under Article 58 of the Convention. A few other States, through their national laws, have attempted to extend their jurisdiction over parts of the EEZ by reserving the authority to establish special areas within it, in which greater State authority may be exerted. Guyana, Pakistan, India and the Seychelles, for instance, each confer upon their respective governments the right to create 'designated areas' subject (among other things) to coastal State fiscal and customs regulations, and through which passage of foreign ships may be strictly controlled[53]. Tellingly, however, the Convention does not provide for the creation of such areas; rather, it provides only for the creation by coastal States of: (a) "safety zones" of at most 500 meters around artificial islands, installations and structures, for the limited purpose of "ensur[ing] both the safety of navigation and of the artificial islands, installations and structures"[54], and (b) "clearly defined areas" where existing international rules are demonstrably inadequate to meet special circumstances and "the

50 See Japan: Law No. 74 of 1996 on the EEZ and Continental Shelf, Articles 3(1) and 3(2) (in DOALOS State Practice Database); Sweden: Act on Sweden's Economic Zone, promulgated on 3 December 1992, Article 15 (in DOALOS State Practice Database). United States: Outer Continental Shelf Lands Act, 43 U.S.C. § 1333.

51 See Benin: Decree No. 76-92 extending the territorial waters of the People's Republic of Benin to 200 nautical miles, 1976; Congo: Ordinance No. 049/77 of 20 December amending article 2 of Ordinance 26/71 of 18 October 1971; Ecuador: Civil Code, as amended by Decree No. 256-CLP of 27 February 1970(1); El Salvador: Constitution of 13 December 1983; Liberia: Act to approve the Executive Order issued by the President of Liberia on 24 December 1976, approved 16 February 1977; Nicaragua: Act No. 205 of 19 December 1979 on the Continental Shelf and Adjacent Sea; Peru: Political Constitution, promulgated on 29 December 1993; Somalia: Law No. 37 on the Territorial Sea and Ports, of 10 September 1972. Each of the foregoing laws is available in DOALOS State Practice Database.

52 See Maritime Zones of Maldives Act No. 6/96, Article 14, in DOALOS State Practice Database.

53 See Guyana Maritime Boundaries Act, 1977, Act No. 10 of 30 June 1977, Article 18; Pakistan - Territorial Waters and Maritime Zones Act of 22 December 1976, Article 6(4); India's Act No. 80 of 28 May 1976 concerning Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones, Article 7(6); and Seychelles Maritime Zones Act 1977, Act No. 15 of 1977, Article 9. Each of the foregoing laws is available in DOALOS State Practice Database.

54 UNCLOS Article 60, paragraphs (4) through (6).

adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons"[55].

Other examples of creeping jurisdiction include various attempts to extend jurisdiction over areas "related to" attributed subjects, or areas not otherwise attributed to other States. In its declaration made upon signing the Convention, for instance, Cape Verde stated that "[t]he regulation of the uses or activities which are not expressly provided for in the Convention but are related to the sovereign rights and to the jurisdiction of the coastal State in its exclusive economic zone falls within the competence of the said State, provided that such regulation does not hinder the enjoyment of freedoms of international communication which are recognized to other States"[56]. Cape Verde national law took this principle much further, boldly proclaiming the country's "exclusive jurisdiction" over "any other rights not recognized to third States"[57] The Netherlands and other States objected to such declarations, making clear that the "coastal state does not enjoy residual rights in the EEZ", and that the "rights of the coastal state in its EEZ are listed in article 56 of the Convention, and can not be extended unilaterally"[58].

Also notable is Jamaica's comprehensive law dealing with its EEZ, which, among other things, requires the issuance of a license to "carry out any economic activity" within Jamaica's EEZ[59]. What is more, such licenses are to be granted in accordance with a scheduled list of statutes (including one relating to customs) and the jurisdiction of any person or authority under such statutes is deemed to extend to the EEZ "in like manner as if ... the [EEZ] constituted a part of the territorial sea of Jamaica"[60].

An Abundance of Legal Terms

Further complicating matters, the Convention uses different legal terms to describe each attributed subject. Hence the coastal State enjoys: "sov-

55 UNCLOS Article 211(6).

56 Declaration of Cape Verde, paragraph IV (in UNTS Status Document). A similar declaration was also made by Uruguay (see id., declaration of Uruguay, paragraph (C)).

57 Cape Verde Law No. 60/IV/92 of 21 December 1992, Article 13(b)(iv), in DOALOS State Practice Database.

58 Declaration of the Netherlands, paragraph II.4 (in UNTS Status Document). These statements were echoed in the declarations of Germany and Italy.

59 Jamaica Act 33 of 1991 entitled 'The Exclusive Economic Zone Act, 1991', Article 7(1)(d), in DOALOS State Practice Database.

60 Id., Article 8(1)(a).

ereign rights"[61] with respect to natural resources; "exclusive rights"[62] with respect to the construction, operation and use of artificial islands, structures and installations, and with respect to the authorization and regulation of all drilling on the continental shelf for whatever purpose; "exclusive jurisdiction"[63] over all artificial islands, as well as over structures and installations used for economic purposes; "jurisdiction"[64] with respect to marine scientific research and the protection of the marine environment, and with respect to pipelines and cables used in connection with the exploration or exploitation of natural resources or the operation of artificial islands, structures and installation; and the "right"[65] to regulate, authorize and conduct marine scientific research and to take reasonable measures for the prevention, reduction and control of pollution from pipelines. Moreover, all States enjoy the "freedom"[66] of navigation, overflight, and the laying of submarine cables and pipelines.

Arguably, the twin concepts of 'sovereign rights'[67] over natural resources and 'freedom of navigation' were intended to sit, more or less comfortably, at the top of the jurisdictional pyramid, each representing a side in the age-old debate between Selden and Grotius. But while the idea of 'sovereign rights' as a form of State control over natural resources (regardless of whether the State can be considered the legal 'owner' of such resources) is intuitively appealing and can readily be defined in relation to

61 UNCLOS Articles 56(1)(a), 77(1) and 193.
62 UNCLOS Articles 60(1) and 81.
63 UNCLOS Article 60(2).
64 UNCLOS Articles 56(1)(b) and 79(4).
65 UNCLOS Articles 79(2) and 246(1).
66 UNCLOS Article 58.
67 Interestingly, in the early 1950's, when the International Law Commission was first tasked with drafting articles on the continental shelf in the wake of the Truman proclamations and similar unilateral declarations, the Commission referred, in its initial draft of 1951, to the coastal State's exercise of "control and jurisdiction" for the purpose of exploring and exploiting the continental shelf's natural resources. In its revised draft of 1953, however, the Commission referred to the coastal State's "sovereign rights" over such natural resources (see Yearbook of the International Law Commission, 1953, Vol. 3, at p. 214). By 1969, however, the territorialist view of the continental shelf as a natural prolongation of the coastal State's land territory had become so entrenched that the International Court of Justice described it as "the most fundamental of all the rules of law relating to the continental shelf" (International Court of Justice, North Sea Continental Shelf Case (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, at ¶ 19).

existing mineral tenure regimes[68] and coastal fisheries laws[69], the 'freedom of navigation', by its very nature, is more diffuse because it belongs to the flag State[70], and because the degree to which flag States are prepared to defend it can vary greatly[71]. What is more, the Convention provides that the exercise of sovereign rights by the coastal State must not result in any "*unreasonable* interference" with navigation or the other rights and freedoms enjoyed by other States[72] (suggesting, *a contrario*, that some reasonable degree of interference is permitted). Conversely, the very narrow area where the freedom of navigation apparently trumps the sovereign rights of the coastal State is where the establishment of an artificial island, installation or structure would interfere with the use of "recognized sea lanes essential to international navigation"[73]. Thus, even within the internal structure of the Convention, the sovereign rights of coastal States appear to have edged out the navigational rights of flag States.

Next highest in this hierarchy are the 'exclusive' jurisdictions and rights granted to coastal States with respect to certain artificial islands, installations and structures, and with respect to drilling on the continental shelf. The reference to 'exclusivity' can be explained in relation to the concept of 'sovereign rights' over natural resources, thereby limiting such jurisdiction to installations and structures related to the exploration or exploitation of natural resources or other economic purposes. Nevertheless, to the extent that the continental shelf is now considered, under customary international law, as a natural prolongation of the coastal State's land territory[74], a persuasive argument can also be made for a broader extension of the coastal State's prescriptive jurisdiction to cover all installations and

68 See, generally, Bastida, A.E., Mineral Tenure Regimes in the Context of Evolving Governance Frameworks: a Case Study of Selected Latin American Countries, thesis submitted to the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee, Scotland, in fulfillment of the requirements for the award of degree of Doctor of Philosophy in October 2003, and defended in April 2004 (http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=CEPMLP_RNDT_2010_01_647253806.pdf).

69 See, generally, Stewart, C., Legislating for Property Rights in Fisheries, FAO Legislative Study No. 83 (Rome: Food and Agriculture Organization of the United Nations, 2004).

70 See UNCLOS Article 90.

71 See Blanco-Bazan, A., "Freedom of Navigation – An Outdated Concept?" lecture delivered at the Summer Academy, International Tribunal for the Law of the Sea, Hamburg, 29 July – 26 August 2007, available at: http://www.iflos.org/media/8890/blanco-bazan%20lecture.pdf (visited on 9 July 2010).

72 UNCLOS Article 78(2).

73 UNCLOS Article 60(7).

74 See International Court of Justice, North Sea Continental Shelf Case (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, at ¶ 19.

structures attached or connected in any way to the continental shelf, regardless of their purpose.

Finally, the reference to coastal State 'jurisdiction' in connection with marine scientific research and marine pollution reflects the idea of a more limited role of the coastal State (particularly in the case of marine scientific research) and a greater reliance on international organizations and rule-making (particularly in the case of vessel-source pollution).

III. Once More Unto the Breach

Just as technological advances provided the necessary impetus for the drafting of the Convention, continuing developments in the use of the world's oceans – and the heightened risks that accompany them – must inform future developments in the law of the sea. A few of these emerging issues are considered below.

Offshore Bunkering Operations

The very first matter[75] to come before the newly created International Tribunal for the Law of the Sea (ITLOS) involved, on its merits, an issue of jurisdiction over a type of commercial activity not specifically addressed in the Convention: the offshore bunkering of fishing vessels within the EEZ.

The *Saiga* was an oil tanker registered in Saint Vincent and the Grenadines (Saint Vincent) and chartered to a Swiss company. In the days immediately preceding its arrest in October 1997 at the southern edge of the Guinean EEZ, the *Saiga* had been engaged in selling fuel to fishing and other vessels off the coast of West Africa. The Master was charged and convicted, under Guinean law, of crimes involving contraband, fraud and tax evasion for illegally importing taxable merchandise into Guinean territory. These events gave rise to a dispute under the Convention between Saint Vincent and Guinea. By agreement of the parties, the dispute was submitted to ITLOS for resolution.

In its submission to the Tribunal, Guinea maintained that its customs laws applied within a defined "customs radius" (*rayon des douanes*) extending 250 km from the Guinean coast. Saint Vincent countered that such a broad application of Guinean customs laws would be contrary to the

75 The M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea). The judgment of 1 July 1999, as well as the separate opinions referred to infra can be found at the ITLOS website (http://www.itlos.org).

Convention. In its 1999 judgment, the Tribunal had no difficulty concluding that, "[i]n the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulation in respect of artificial islands, installations and structures, [but] the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone mentioned above"[76]. Therefore, in applying its customs laws to activities within the EEZ beyond those strictly contemplated in the Convention, the Tribunal found that Guinea had acted in a manner contrary to the Convention[77].

In defending the application of its customs laws within the EEZ, Guinea had invoked the right to deter unwarranted economic activity affecting Guinea's "public interest", as well as the "doctrine of necessity". The Tribunal gave short shrift to both contentions, holding that "recourse to the principle of 'public interest', as invoked by Guinea, would entitle a coastal State to prohibit any activities in the exclusive economic zone which it decides to characterize as activities which affect its economic 'public interest' or entail 'fiscal losses' for it." The Tribunal concluded that such result, by curtailing the rights of non-coastal State within the EEZ, would be incompatible with Articles 56 and 58 of the Convention[78]. As for the "doctrine of necessity", the Tribunal simply noted that Guinea had failed to adduce any evidence showing that its interests were in grave and imminent peril, as required under international law in order for the doctrine to apply[79].

Significantly, the Tribunal declined the invitation, pressed by both sides, to "make declarations regarding the right of coastal States and of other States in connection with offshore bunkering"[80]. While Saint Vincent claimed that foreign ships should be allowed to engage in bunkering activities within the EEZ as an exercise of the "freedom of navigation" guaranteed by the Convention, Guinea maintained that bunkering was essentially a commercial activity which should not be subsumed within the protected "freedom of navigation". Having already concluded that Guinea's actions were inconsistent with the Convention, the Tribunal felt it unnecessary to reach this issue. In a series of separate and dissenting opinions, however, many of the Judges addressed this question at greater length.

76 Judgment of 1 July 1999, at ¶ 127.
77 Id., at ¶ 136.
78 Id., at ¶ 131.
79 Id., at ¶ 135.
80 Id., at ¶ 137.

Judge Zhao expressed the view that bunkering should not be considered part of high-seas navigation. After observing that offshore bunkering is not practiced by a great many States, Judge Zhao described bunkering "as a means of evading customs duties of coastal States"[81]. In the end, Judge Zhao concluded that bunkering activities should not be freely engaged in, whether on the high seas or within the EEZ, but instead that such activities should be controlled through some form of agreement between the relevant coastal State and the flag State of the ship engaged in bunkering activities[82]. By contrast, Judge Vukas, based on a review of the Convention's *travaux préparatoires*, argued that the economic sovereign rights of coastal States within the EEZ must be strictly limited to the exploration and exploitation of resources[83]. Going one step further, Judge Vukas reasoned that bunkering may be viewed as an internationally lawful use of the sea, which is related to navigation because of its inherent association with the operation of ships[84]. A middle ground in favor of judicial restraint was struck by Judge Anderson, who endorsed the Tribunal's decision not to make any express findings on this question, in view of the fact that bunkering is conducted under a wide variety of circumstances, and that "the Tribunal could not address such varied situations in the abstract and without the necessary materials and evidence"[85]. Finally, in a lengthy separate opinion, Judge Laing, after a comprehensive review of various provisions of the Convention dealing with the contiguous zone, the EEZ and the high seas, reached essentially the same conclusion as Judge Anderson, namely that "a full and clear body of evidence would be required properly to address attribution and bunkering", though adding, somewhat cryptically, that "the available evidence is not inconsistent with at least a measure of tolerance of the use of this maritime space by all States that are legitimate users of non-territorial waters within their respective functional or other spheres"[86].

The apparent impetus for Judge Laing's analysis stems from the entirely correct observation that the Tribunal's holding with respect to Guinea's violation of the Convention "logically presupposes" a determination that Saint Vincent's rights, as the flag State of the *Saiga*, were somehow violated[87]. Indeed, it is difficult to reconcile the logic of Judge Laing's premise

81 Separate Opinion of Judge Zhao, at ¶ 2.
82 Id., at ¶ 3.
83 Separate Opinion Judge Vukas, at ¶ 16.
84 Id., at ¶ 17.
85 Separate Opinion of Judge Anderson, at p. 5.
86 Separate Opinion of Judge Laing, at ¶ 56.
87 Id., at ¶ 17. See also UNCLOS Article 297(1)(a).

with the Tribunal's ultimate decision not to reach the parties' competing claims regarding the legality of offshore bunkering activities, in particular whether such activities constitute an integral part of the rights and freedoms granted to all States, or whether they fall instead within the a 'non attributed' category within the meaning of Article 59 of the Convention. In the end, the Tribunal's narrow decision that Guinea could not punish the *Saiga* for violating its *customs* laws says remarkably little about the respective rights and obligations of coastal and non-coastal State with respect to offshore bunkering, particularly as the limited scope of customs laws within the EEZ is a subjects specifically addressed by the Convention[88]. In this sense, the case might have presented a closer legal issue had the *Saiga* been charged, for instance, with violating Guinean environmental laws, or if the Guinean-licensed fishing vessels that purchased fuel from the *Saiga* had been charged with evading Guinean customs law.

More than eleven years have elapsed since the Tribunal handed down its judgment, and while offshore bunkering has become more common, its status under the Convention remains unclear. Some States, such as Belgium, have enacted environmental rules requiring a license to engage in any commercial offshore bunkering activities within the EEZ[89], while others, such as the United Kingdom, regulate only bunkering activities within their territorial sea[90]. The International Maritime Organization (IMO), for its part, has recently adopted environmental rules governing ship-to-ship transfers of oil cargo between oil tankers at sea, but such rules specifically do not apply to bunkering operations[91].

88 Article 60(2) of the Convention provides that "[t]he coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations" (emphasis added). When read in conjunction with Article 33(1)(a), which limits the coastal State's jurisdiction in the contiguous zone (i.e., the 12 nautical mile zone of the EEZ that is closest to the territorial sea) to the prevention of customs and other violations "within its territory or territorial sea", it is clear that Article 60(2) must be read as excluding coastal State customs jurisdiction with respect to any activity other that those specifically listed.

89 See Arrêté ministériel du 18 avril 2001 désignant la procédure à suivre pour les demandes de permis et autorisations requis pour les activités d'offshore bunkering, M.B. 27 April 2001. See also Malta's Bunkering (Authorisation) Regulations of 7 May 2010, Legal Notice No. 270 of 2010.

90 See Merchant Shipping (Ship-to-Ship Transfers) Regulations 2010.

91 See IMO Resolution MEPC.186(59) adopted 17 July 2009 concerning Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973.