

Exclusive Fisheries Zones and Freedom of Navigation*

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The nearly universal extension to 200-nautical-mile resource fishery zones by coastal States has revolutionized the law of the sea in the past decade. In balancing coastal State fishery interests with rights of freedom of navigation, the author concludes that only limited authority to affect navigation should be recognized. This right should be reserved to developing States that have special dependence on fisheries for their economic development, but lack enforcement capabilities.

INTRODUCTION

The Problem

Widespread proliferation of coastal State resource jurisdiction to 200 nautical miles¹ has different effects on the interests of coastal and non-coastal States.² A major intended effect is to ben-

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1. As of May 1, 1981, the United States Department of State reported that 90 States claim 200-nautical-mile zones, of which 54 were economic zones, and 14 were territorial sea, leaving 32 extended fishing zones. The report notes also that boundary situations with neighboring States prevent many States from extending their fishing zones to a full 200 nautical miles. OFFICE OF THE GEOGRAPHER, BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, LIMITS IN THE SEAS No. 36, at 1 (4th rev. 1981).

2. Of course most States are coastal, but some have interests that arise from ocean uses and involvement on a global or oceanic scale and therefore have a different perception of issues concerning coastal State jurisdiction.

efit the coastal State by securing control over access to living resources in the area. The theory is that the benefits of controlled access can be captured and directed to the coastal State for such redistribution as its interests direct.³ In time the 200-nautical-mile exclusive economic zone (EEZ) concept might also enable coastal States to realize benefits from non-fishery resources in the zone in addition to oil and gas which are already being used.

Whether and to what extent the 200-mile zones actually do produce net benefits from fisheries exploitation to a specific State or to coastal States as a whole are matters for inquiry. Calculating gains and losses should include an assessment of the impact on non-coastal States in terms of both the distribution of the wealth realized from the 200-nautical-mile zone and of the detrimental effects on other interests.

Certainly most conventional living resources of the ocean are now within coastal State jurisdiction and control because of the nearly universal extension of 200-nautical-mile resource fishery zones. For non-coastal States it is also important that these zones continue to be used for navigation by all types of vessels moving between points external to the zone. Some of these are fishing vessels that also seek to catch (or process) fish outside the zone and sometimes have already done so before entering the zone. Coastal States seeking to exercise control over fisheries in their zones are naturally concerned whether fishing vessels found there either are merely in transit or are licensed and complying with applicable fishery regulations. These States have a significant interest in assuring that transiting vessels neither engage in illegal fishing nor violate other laws governing all fishing and fishery related activities in the zone. Flag States of transiting vessels, fishing and otherwise, also have important interests at stake in being assured that movement is not significantly impeded by coastal measures to protect fisheries.⁴ The basic problem is how to achieve a balance between these competing interests.

Examination of this problem is useful for two reasons. First, the threat of illegal fishing by unauthorized vessels is particularly important to some small developing States that are heavily dependent upon potential income from licensed fishing but have in-

3. For a particularly helpful discussion of the issues and difficulties involved in this economic analysis, see Holt & Vanderbilt, *Marine Fisheries*, in 2 OCEAN Y.B. 9, 44-56 (E. Borgese & N. Ginsberg eds. 1980).

4. See generally Bilder, *The Emerging Right of Physical Enforcement of Fisheries Measures Beyond Territorial Limits*, in FISHERIES CONFLICTS IN THE NORTH ATLANTIC: PROBLEMS OF MANAGEMENT AND JURISDICTION 147, 148, 162-63 (G. Pontecorvo ed. 1974) (for early recognition and caution about a link between treatment of fishing vessels and of navigation in general).

sufficient means to undertake the necessary surveillance and enforcement activities in their extensive resource zones. Second, the conflicting interests at stake, resource controls versus navigation, forces focus on a critical question about the major innovation of the United Nations Convention on the Law of the Sea (Convention),⁵ the introduction of the EEZ. The question is how to accommodate the exercise of coastal sovereign rights over resources in the zone with freedom of navigation under international law.

The immediate clash of interests is not wholly academic. Fears of unauthorized fishing by passing vessels have bothered some Pacific Island nations through whose zones vessels from Korea, Taiwan, and Japan normally travel enroute to fishing grounds elsewhere.⁶ Areas with potential problems include West Africa as European vessels transit enroute to South Africa, Namibia and Senegal, and the eastern Indian Ocean as vessels transit from the south to the Bay of Bengal.⁷

Measures are already being adopted or proposed by coastal States to protect against illegal fishing. The focus of this article will be on many of those proposed measures as enumerated hereinafter. Following brief consideration of the policies at stake, attention will be directed toward pertinent decisions and principles of conventional and customary law, with special reference to provisions of the Convention. The final section takes a close look at the proposed measures in light of those decisions and principles.

Claims of Authority Affecting Navigation

Coastal States seek improved marine law enforcement in a variety of ways, including the addition of personnel, ships, aircraft

5. U.N. Doc. A/CONF.62/122 (1982) [hereinafter cited as Convention].

6. Ambassador Djalal reported this concern regarding vessels transiting Indonesian waters. See Djalal, *Implementing of Agreements with Foreigners*, in *LAW OF THE SEA: PROBLEMS OF CONFLICT AND MANAGEMENT OF FISHERIES IN SOUTHEAST ASIA* 39, 44-45 (F. Christy ed. 1980). Evidence that this problem concerns States may also be seen in the discussion of it in the Workshop on Harmonization and Coordination of Fisheries Regimes and Access Agreements which was convened by the South Pacific Forum Fisheries Agency in Suva, Fiji in Feb.-Mar. 1982. The documentation and report of the Workshop are not yet available. FAO Fisheries Technical Paper No. 223, from which this article derives, was among the documents discussed at this meeting.

7. The areas mentioned in the text are cited for illustration only. The Caribbean and the western side of South, Central, and North America might also be cited.

and associated equipment; cooperative measures with other coastal nations with similar problems in the region; and agreements with fishing States on measures these States must take to facilitate enforcement.⁸ One means peculiarly within coastal State control is the fashioning of the regulatory system so that enforcement difficulties are minimized. Part of this effort is the establishment of fishery regulations that might affect movement or operation of fishing vessels in transit in such a way as to make the enforcement task easier.

A number of measures have been adopted or proposed for protecting coastal interests in fisheries from passing vessels. They reflect varying perceptions of the scope of authority a State is permitted, or should be permitted, to claim and exercise beyond national territory. Such alternatives include the following:

1. Application of territorial sea authority to fishing vessels passing through the exclusive fishing or economic zone;
2. Prohibition of entry by unlicensed fishing vessels into the EEZ or exclusive fishery zone (EFZ) unless specifically authorized;
3. Requiring use of prescribed sealanes by transiting fishing vessels;
4. Requiring report of entry and exit together with route used;
5. Stowage of fishing gear during passage;
6. Requirement for carriage and use of transponders during passage;
7. Protective measures reached by international agreement.

POLICIES AT STAKE

The principal policy problem is to balance coastal State interests in realizing benefits from its fisheries with worldwide interests in maintaining unimpeded navigation for all ships, including those involved with fishing.

The overall problem for the coastal State is to establish a credible fishery management system that can produce expected benefits. Credibility and expectation of benefits are closely linked. Credibility as used in this context means that prescribed regulations are taken seriously by the affected group and are usually observed. In order to establish credibility there must be some assurance that deviation from prescriptions will be penal-

8. For a comprehensive assessment of the objectives, needs, and methods of enforcement of marine law, see FAO/Norway Cooperative Program, Report on an Expert Consultation on Monitoring, Control and Surveillance Systems for Fisheries Management (1981), U.N. FAO Doc. N. FAO/GCP/INT/34-4/NOR [hereinafter cited as FAO-Norway Cooperative Program].

ized. But enforcing compliance is very difficult and sometimes an almost impossible and costly task for States with large fishing zones but few resources to devote to enforcement functions. Absent effective enforcement, credibility declines, the management system itself may be threatened, and potential benefits are reduced. Experience has shown that some minimum level of enforcement activity is required if foreign fishermen are to pay heed regularly to applicable regulations.⁹ If the level falls below the minimum the result is massive disregard of regulations, whereas even moderate enforcement capability may substantially increase compliance. Accordingly, for fisheries management to produce the social and economic benefits sought, the level and effectiveness of enforcement, including surveillance, capacity to apprehend, actual arrest, and penalty are all critical matters. The alternative is potentially severe reduction of benefits such as loss of revenue, loss of employment opportunities, and perhaps harm to the resource.¹⁰

For some States the consequences of enforcement failure are usually high because of two simultaneously occurring factors: (1) the resources of the EFZ are a major part of the national resource base, and (2) the zone itself is enormous relative to land territory. Under these circumstances revenues from fishery resources are a very significant actual or potential component of the national income, yet the size of the exclusive zone creates exceptional difficulties in maintaining the effective management system that is required to realize the potential revenues. A number of Central and Western Pacific Ocean island States fall into this category.¹¹ A few continental nations might also be included where terrestrial resources are extremely sparse and living marine resources are especially rich and abundant.¹² In all such instances the combination of abundant and valuable fishery resources, inadequate enforcement system and facilities, and relatively large ex-

9. See Gulland, *Fishery Monitoring, Control and Surveillance: When is it Worth While*, in FAO-Norway Cooperative Program, *supra* note 8, at 29.

10. The type and costs of a system for monitoring, control, and surveillance (MCS) will vary according to many elements, and each coastal State must examine its own situation carefully to determine the relative costs and benefits of alternatives. See Gulland, *supra* note 9.

11. For a description and appraisal of the MCS problems in these States, see Miles, *The Management of Tuna Fisheries in the West Central and Southwest Pacific*, in FAO-Norway Cooperative Program, *supra* note 8, at 103.

12. Mauritania and Senegal might be examples of this situation.

clusive resource zones suggests a special need to devise better means to increase compliance with fishery regulations.

In contrast, the general maritime community is concerned with maintaining efficient navigation of all ships transiting resource zones around the globe. If efficient navigation can easily be compromised in order to protect local fisheries interests, other interests of importance to coastal States might also serve to justify similar claims and navigation might be otherwise seriously compromised.

The immediate problem of accommodating coastal State fishing interests is not widely shared, while navigation interests are. Much greater weight should in general therefore be placed upon protecting navigation interests. Nevertheless, fishery resource interests merit protection, especially those of coastal States with unusual economic dependence on such resources.

The key to resolving the conflicting interests is recognition of the exceptional dependence of some small nations upon possible revenues from exploitation, mostly foreign, of fisheries within their jurisdiction.¹³ Where the fisheries are vital to national well-being because of this dependency, and enforcement is difficult yet critical to effective realization of financial benefit, it is appropriate to allow slight modification of total freedom of movement in order to facilitate effective management. A policy giving greater weight to coastal ocean resource interests appears justified in these exceptional situations where the impacts on navigation are slight and the benefits to the coastal State from improved compliance and enforcement would be unusually large and important.

Considerable emphasis is due two factors relating to this policy preference: (1) the very small number of States for whom fishery resources are or could be vitally important and whose enforcement capabilities are virtually non-existent;¹⁴ and (2) the recognition of very limited coastal authority to affect navigation. The latter consideration minimizes impact on navigation and the for-

13. Of the developing island States (independent or self-governing) in the central and southwest Pacific only two have substantial land area and resources: Papua New Guinea and the Solomon Islands. The other entities include Western Samoa, Nauru, Fiji, Tonga, Tuvalu, Kiribati, Vanuatu, Cook Islands, Niue, Palau, Federated States of Micronesia, and Marshall Islands. Most of them are or will be substantially dependent on ocean resources for long-term economic growth. Nauru and Kiribati have substantial phosphate deposits but these are being depleted progressively and other sources of income will be needed. For a convenient summary of historical and current data, see Australian Foreign Affairs Record, May 1981.

14. It seems likely that only the island nations of the Pacific and Indian Oceans and possibly a few West African States would fall in the category described in the text.

mer assures that even this slight effect would be felt, if at all, only in a few parts of the globe. As circumscribed by these two factors, coastal States should be accorded authority to adopt measures aimed at protecting fisheries and affecting navigation.

CURRENT TRENDS IN DECISION

Before discussing decisions specifically bearing on this problem, some preliminary remarks addressing the general question of the applicable law and the significance and meaning of the relevant provisions of the Convention are pertinent.

The most significant decisions concerning the claims of interest are those that comprise both customary international law and treaties; including the most recently adopted multilateral agreement, the Convention on the Law of the Sea. Customary international law has more than usual significance for a number of reasons. First, the prior law of the sea treaties concluded at Geneva in 1958¹⁵ are now superceded in important respects by developments in state practice. The near-universal adoption of 200 mile exclusive zones for fishing has largely displaced understandings embodied in the 1958 High Seas Convention or that on Fishing and Conservation of Living Resources of the High Seas. Second, the Convention on the Law of the Sea has been formally adopted by the Conference but its provisions will not come into force for some time. Meanwhile, customary principles are useful. Third, the negative vote by the United States could mean that so far as relations with the United States are concerned customary law principles will be applicable when they differ from those in the Convention. From a strictly United States perspective, customary law principles may be especially crucial because the United States might not be able to invoke the treaty's principles or always demonstrate that it represents customary law.

Special attention is due the Convention on the Law of the Sea. The Convention is extremely important, of course, because it will probably become effective for nearly all States of the world, excepting, only initially perhaps, the United States and a very few

15. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on Fishing and Conservation of Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

others. Even the non-party States may indicate their willingness to employ the treaty in their external relations, although this conceivably could not be effective if the other States determine that traditional customary law would be more beneficial to them as against non-parties.

At some point in the future, therefore, it is likely that the Convention will provide the principles virtually all States will apply in assessing the lawfulness of coastal State measures affecting navigation of fishing vessels in the economic zone. Contemporary views about interpretations of pertinent provisions of this treaty are accordingly of special interest, even though they were not advanced having in mind the specific problems considered here.

In terms of the Convention the question arising from all proposals to regulate fishing vessels in transit is that of accommodating coastal State rights over fisheries with appropriate recognition of freedom of navigation in the EEZ as provided for in the Convention. Article 56 of the Convention declares that in the EEZ, the coastal State has "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 seabed and of the seabed and its subsoil."¹⁶ In exercising these rights, the coastal State is obliged to have "due regard to the rights and duties of other States."¹⁷ The Convention spells out the coastal State's authority to promulgate laws and regulations for fishing in the EEZ in article 62, but does not expressly provide for regulatory competence vis-a-vis fishing vessels in transit.

The Convention declares that other States have rights in the EEZ. Article 58 states that "[i]n 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"¹⁸

The specific issue arising under these provisions is whether the coastal State may prescribe and enforce upon passing vessels measures to prevent unauthorized fishing. In terms of the Convention the question is whether regulations affecting passing fishing vessels fall within the coastal State's sovereign rights to conserve and manage its EEZ fisheries. If such regulation is an exercise of its sovereign rights, then the coastal State, pursuant to article 73, may take such measures, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with the coastal State's laws and regulations.

16. Convention, *supra* note 5, art. 56, para. 1(a).

17. *Id.* art. 56, para. 2.

18. *Id.* art. 58, para. 1.

Further, the right to exercise freedom of navigation spelled out in article 58 is expressly stated to be subject to the relevant provisions of the Convention, among which are those providing for the sovereign rights of the coastal State.

Views differ regarding coastal State competence to adopt measures affecting navigation by fishing vessels in transit through the zone. One view is that the freedom of navigation mentioned in article 58 is identical to high seas freedom of navigation in traditional law. In an article emphasizing the importance to the United States of freedom of movement in the law of the sea context, then Ambassador Elliot Richardson of the United States commented on the key language of article 58:

In the group which negotiated this language it was understood that the freedoms in question, both within and beyond 200 miles, must be *qualitatively* and *quantitatively* the same as the traditional high-seas freedoms recognized by international law: they must be qualitatively the same in the sense that the nature and extent of the right is the same as traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete—and allow for future uses no less inclusive—than traditional high-seas freedoms.¹⁹

Although this quote does not explicitly rule out coastal State regulations that are designed and limited to protect coastal State resources from illegal fishing by passing vessels, it might reasonably bear this interpretation. Under traditional international law, a coastal State could not extend its regulations to fishing vessels in passage beyond its territorial sea and any effort to enforce compliance with its regulations would have been regarded as inconsistent with the high seas freedom of navigation.²⁰ A later passage in the Richardson article notes that “under the text the United States would have the right to bring suit against a State that interferes with navigation or overflight.”²¹

In another commentary offering detailed examination of the problem of accommodating coastal State resource rights with rights of third States in the EEZ, Professor Bernard Oxman also

19. Richardson, *Power, Mobility, and the Law of the Sea*, 58 FOREIGN AFF. 902, 916 (1980) (emphasis original).

20. See Bilder, *supra* note 4, at 150-52. However, Bilder also points out that both the Convention on the Continental Shelf and the Convention on Fishing and Conservation of Living Resources of the High Seas implicitly qualified the principle of non-interference that is the corollary to freedom of navigation. See *supra* note 15.

21. Richardson, *supra* note 19, at 916.

rejected any coastal State regulatory competence over passing fishing vessels. He stated:

In a strict juridical sense, the economic zone elaborated in the RSNT [Revised Single Negotiating Text] should be regarded as an overlay on the high seas. It generally eliminates freedom of fishing and to a certain degree some other freedoms (e.g., with respect to some scientific research and installations) and establishes a measure of concurrent rights or jurisdiction with respect to others (e.g., some scientific research and some vessel-source pollution), but it does not eliminate the traditional role of the flag state.

The clearest example of this is in the articles on vessel-source pollution. The rights of the coastal state do not displace the rights and duties of the flag state to control pollution from its vessels, but rather supplement them. However, other examples are worth noting as well. *The sovereign rights of the coastal state with respect to fishing do not deprive a fishing vessel of freedom of navigation*; nor do they deprive the flag state of its jurisdiction over that vessel, for example in the event of a collision, or even its right to punish the master and crew for violating coastal state fishing laws independent of any coastal state action. The existence of separate jurisdiction over the same vessel in the same area depending on its activities may require some nice accommodations in practice, depending on the facts. *Absent specific evidence it would be manifestly unjustifiable to stop and board a freighter or oil tanker navigating through the zone to ensure that it is not fishing, but it would also be manifestly imprudent to expect the coastal state to refrain from inquiry regarding a large fishing fleet moving slowly with gear in readiness and with no apparent destination through a rich fishing ground far from any known navigation route.*²²

The suggestion is that *all* the coastal State could do to protect itself is to make inquiry by stopping and boarding the vessels involved in the "large fishing fleet." Other measures would be prohibited even if reasonable in regard to coastal and flag interests.

A very different view of the balance in the Convention is that the rights of freedom of navigation and overflight are subject to the relevant provisions of the Convention and that, therefore, these rights are subordinate to the coastal competences in the EEZ. In this interpretation of the Convention the very use of the term "sovereign rights" "implies that, in case of doubt, there will be a presumption in favour of the plenary powers and jurisdiction of the coastal State."²³ Further,

22. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions*, 71 AM. J. INT'L L. 247, 263-64 (1977) (emphasis added) (citations omitted). For many years Professor Oxman has been one of the principal negotiators at the Conference for the United States and he continued to be until 1982.

In a recent article, I expressed agreement with Oxman's statement that the Convention establishes the "qualitative identity" of economic zone and high-seas freedoms. Burke, *National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea*, 9 OCEAN DEV. & INT'L L. 289, 303 (1981). This identity can be accepted without entirely rejecting coastal authority to protect fisheries by measures which affect navigation.

23. Brown, *The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts Between Different Users of the EEZ*, 4 MAR. POL. MGMT. 325, 334 (1977).

[i]t must be said that the balance of principles is weighed heavily in favour of the coastal states. It is a question of sovereign rights exercised with due regard to the rights of other States on the one hand; and, on the other hand, of freedoms of navigation, overflight, etc., being enjoyed "subject to the relevant provisions of the present Convention," . . . having due regard to the rights of the coastal State and in compliance with the laws and regulations of the coastal State.²⁴

This approach to interpretation places greatest weight on coastal interests and would resolve disputes in favor of the coastal State.

These two contrasting interpretations of the Convention do not exhaust the possibilities, but they do suggest that very different views exist on the issue presented. Another more specific view is that freedom of navigation does not wholly insulate fishing vessels in transit from compliance with coastal measures designed to enforce prohibition of illegal fishing, provided that such measures are essential to effective enforcement, do not significantly affect passage, and benefit the coastal State to a significant degree. Modest requirements that might occasion slightly longer voyages, or require specific measures aboard a fishing vessel, are consistent with the Convention.

Even if a great many coastal States adhere to the treaty, so that they use treaty standards to resolve conflicting claims regarding jurisdiction relating to fisheries, States not accepting the treaty may face considerable uncertainty regarding the views of the States parties. Rejection of the treaty may entail rejection of those provisions on freedom of navigation in the zone but would not also mean rejection of a resource or fisheries zone. In one form or another, extended exclusive coastal control over fisheries is already recognized customary law, but this recognition does not include an established arrangement for balancing sovereign rights over resources with rights of navigation. Most claimant States incorporate one or another formula, some drawn verbatim from earlier negotiating texts, for protection of navigation in the zone and preservation of coastal rights. But some legislation is so qualified that if unchanged it would countenance considerable interference with navigation.²⁵ Other States make no mention at all of freedom of navigation in their zone legislation. While it is fair to say that the majority of States evidence recognition of the problem and make some provision for it, it is also fair to say that State practice is still unclear and this might create difficulties if it is

24. *Id.*

25. For a discussion of this legislation, see Burke, *supra* note 22.

necessary to resort to customary law. The treaty has the advantage of a common formula for interpretation and application in practice and it narrows the range of differences that might arise.

It is conceivable that non-parties to the Convention will seek to argue that the EEZ remains high seas so far as they are concerned and that traditional freedom of navigation is applicable. Such a view appears to assume that nearly universal State practice in extension of sovereign rights over fisheries and perhaps all other economic resources within 200 miles can be accommodated without disturbing other ocean uses, especially navigation. The problem with this view is that already noted immediately above. Most States with zone legislation recognize that there is a problem of accommodation and have adopted general formulas, most of which subjects navigation rights to resource rights. If customary law exists outside the Convention, this is the form it takes. More detailed comment on customary law in this matter is offered below in connection with discussion of possible measures for coping with illegal fishing.

POTENTIAL MEASURES

Turning from these general observations, we now consider some of the specific potential measures affecting navigation in light of current trends in decision.

*Application of Territorial Sea Authority to Fishing Vessels Passing Through the Exclusive Fishing or Economic Zone*²⁶

Insofar as actual fishing by such vessels is concerned, this alternative is already uniformly recognized; that is, coastal States may act to prohibit unauthorized foreign fishing in the fisheries zone in a fashion not significantly different than in the territorial sea. This approach adds, however, some new elements:

1. Fishing vessels in passage must comply with the same laws as are imposed on fishing vessels in passage through the territorial sea, including application of the concept of innocent passage in the exclusive zone.²⁷ Failure to comply with such laws

26. This situation already pertains for the fourteen States that now claim a 200-mile territorial sea.

27. Although the Maldives requires consent for entry of fishing vessels into its EEZ, its law applies innocent passage standards to movement through the EEZ. See Law No. 32/76 of 5th December, 1976, Relating to the Navigation and Passage by Foreign Ships and Aircrafts through the Airspace, Territorial Waters and the Economic Zone of the Republic of Maldives, in 9 NEW DIRECTIONS IN THE LAW OF THE SEA 295-96 (M. Nordquist & K. Simmonds eds. 1980). The consent requirement is inconsistent with the concept of innocent passage. (Unless otherwise noted, all laws cited are also to be found in the United Nations Legislative Series.)

would entail loss of innocent passage protection, thus entitling the coastal State to prevent passage. The coastal State might, on the other hand, seek to impose the more severe sanctions of arrest, fine, and confiscation of boat, gear, or catch. Perhaps the most significant single coastal law in this connection is that requiring gear to be stowed so that it is not readily available;²⁸

2. Passage of unlicensed fishing vessels might be suspended on the ground that widespread infringements of coastal fishing laws are a threat to the security of that State.²⁹ Justification for this action would be cast in terms of the impact upon the coastal State's economic health and fiscal standing resulting from large-scale illegal fishing in the zone;
3. Movement through the zone must be continuous and expeditious, meaning that no stopping is permitted except as incidental to ordinary navigation or required by *force majeure* or distress or for rendering assistance. Such a requirement implies that the navigation route be direct and detours avoided subject to the conditions just noted;
4. Another possibility might be a coastal demand that fishing vessels in the EEZ or the EFZ comply with all territorial sea laws and regulations extended to the zone whether aimed at fishing vessels or not. These might include regulations for navigation and traffic safety, pollution, security (including new closed areas, prohibition on radio traffic, special reporting procedures), and customs procedures (including reporting on movements).

Only a low probability of general acceptance awaits proposals that fishing vessels in transit through a fishery zone be treated as if they were in a territorial sea and the same laws made applicable to passage as in the latter zone. Neither customary law nor the treaty offer support for such an approach.

A major reason for this conclusion is that such an approach would significantly blur the distinction between the territorial sea

28. The reference in the text is to significance among all coastal State laws. Later discussion considers the alternative of extending only the stowage law to the economic or fisheries zone and concludes that this would be permissible under international law. See *infra* notes 56-57 and accompanying text.

29. Both the 1958 Convention on the Territorial Sea and Contiguous Zone and the Convention on the Law of the Sea permit temporary suspension of passage under certain conditions. It is very doubtful that the action identified in the text would be compatible with provisions in either document.

and the limited jurisdictional area beyond. The suggestion that, for navigational purposes, the two areas are similar, or should become so, would raise serious questions relating to military and other commercial navigation in the extended zone of jurisdiction. For a significantly large class of vessels, and potentially all vessels, this alternative would substitute the territorial sea regime, including the continued uncertainties and disputes about innocent passage, for the freedom of navigation that has historically prevailed in the ocean beyond national territory. Even though initially limited to fishing vessels, the change of regime to that extent would make the zone of extended jurisdiction more closely resemble a 200-mile territorial sea. The extension of national jurisdiction to 200 nautical miles has already advanced certain sovereign rights usually associated with national territory to a very large region beyond. Adding an element that might significantly affect the navigation of an important class of vessels would almost certainly cause great uneasiness among many flag States and ultimately be rejected by them.

An additional concern would immediately arise about the precedential effect of accepting a territorial sea regime for one class of vessels in the economic zone. Acceptance of such an extension of jurisdiction for this interest would inevitably be seen as inviting similar treatment for some or all other vessels. Apprehension over such a possibility would doom any initial proposal for special treatment of fishing vessels.

Sensitivity toward this issue certainly is heightened by the now-concluded negotiations in the Third United Nations Conference on the Law of the Sea which were in important part originally stimulated by the fear of major maritime States over so-called "creeping jurisdiction," a shorthand label for continued unilateral extensions of territorial sea limits. The new treaty firmly establishes a 12-mile territorial sea and an EEZ out to a 200-mile overall limit. A critical element of these agreed provisions concerns the regime for navigation in affected areas including the territorial sea itself, straits of all kinds, archipelagic waters, and the EEZ. A major distinction was drawn between the regime of innocent passage in the territorial sea and that of transit passage in straits, archipelagic sealanes passage in archipelagic waters, and freedom of navigation and overflight in the EEZ. The distinctions among these various regimes for navigation were central to the acceptance of the jurisdictional limits established for the various areas and for the overall Convention itself.³⁰

30. The Soviet Union and the United States, articulating the maritime view,

If there were now to be noticeable movement, in the form of unilaterally adopted State legislation (whether or not in purported implementation of the Convention), toward eliminating some of the distinctions arrived at through laborious and controversial negotiations, the results could be unfortunate for the international community. An expected result would be the generation of controversy and conflict surrounding the immediate legislative action as maritime States would insist that freedom of navigation cannot be totally abolished for fishing vessels.³¹ Over the longer and perhaps more important term another result might be to raise questions about the usefulness of adherence to the treaty itself. Although isolated actions proposing to eliminate freedom of navigation for fishing vessels in the economic zone probably would not have severe consequences or occasion undue alarm, they still might constitute one element in a complex calculus of factors affecting decisions about ratification of the treaty. If, instead of isolated actions, there appeared to be strong regional movements toward altering an element of the agreed balance between coastal State resource interests and flag State navigation interests incorporated in the Convention, much more serious consequences might be expected to follow.

The probability that the problem of transiting fishing vessels is localized (even though the regions involved are vast expanses of ocean) makes it unlikely that there would be a general worldwide movement of this kind. Nonetheless any tendency that garners significant support in one or more ocean regions could provoke serious opposition.

To date, no State has been known to extend all of its territorial sea laws to fishing vessels in its extended jurisdictional zone. Some do have a provision in their EEZ law which would authorize such action.³² As noted below, however, some specific compo-

were the most sensitive regarding these matters. See Oxman, *supra* note 22; Richardson, *supra* note 28; see also Clingan, *The Next Twenty Years of Naval Mobility*, in NAVAL REV. PROC. 82 (1980) (for several years Professor Clingan has been the United States representative on Committee II of the Conference and is currently the acting United States chief negotiator).

31. There can be no realistic doubt about the sensitivity of major maritime States on this issue. Clingan, *supra* note 30, at 92-93 (expressions of concern on the issue).

32. Examples of this include the economic zone laws of India, Pakistan, Seychelles, Barbados and Guyana. Section 7(7) of the Indian law appears to be the prototype. It reads:

The Central Government may, by notification in the Official Gazette:

nents of the territorial sea regime are being extended to the jurisdictional zone, including the most significant one, the prohibition of foreign fishing.

Prohibition of Entry by Unlicensed Fishing Vessels into the EEZ or EFZ Unless Specifically Authorized

Prohibition of entry for transit is even more extreme than the alternative just examined because it exceeds even the authority recognized over foreign fishing vessels in the territorial sea. Only two States appear to have laws that go this far. The Yemen Arab Republic's measure is ambiguous and, in any case, its prohibition excepts such entry "as may be permissible under international Law or Convention or treaty."³³ The Maldives, however, is quite explicit in forbidding any entry by fishing vessels even for passage.³⁴

Excluding these two nations, a requirement for authorization of passage of fishing vessels is universally considered to exceed coastal State authority. Neither customary international law, the 1958 Convention on the Territorial Sea nor the 1982 Convention provides any basis for such a claim.³⁵ That coastal States lack authority to prohibit innocent passage of a category of foreign ves-

(a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof, to the exclusive economic zone or any part thereof; and (b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of a territory of India.

The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, § 7(7) (India), in 5 *NEW DIRECTIONS IN LAW OF THE SEA* 305, 312 (R. Churchill, M. Nordquist & S. Lay eds. 1977).

It is possible that the aim of the above law is different than its apparent broad effect. Whatever the purpose, the terms seem broad enough to authorize extension of the corpus of territorial sea law to the EEZ.

For the Barbados Marine Boundaries and Jurisdiction Act of 1978, see *Marine Boundaries and Jurisdiction Act, 1978, Part III (Barbados)*, in 7 *NEW DIRECTIONS IN LAW OF THE SEA* 335, 344 (M. Nordquist, S. Lay & K. Simmonds eds. 1980).

33. Article 2, Fisheries Law, Yemen Arabic Republic (1976). I am indebted to Mr. R. Khan of the FAO for information about this law. At this writing this law does not appear in the U.N. Legislative Series.

34. Law No. 32/76 of 5 December 1976, *supra* note 27, provides that innocent passage applies to the economic zone but at the same time, inconsistently prohibits entry by any fishing vessel unless consent to do so is secured. Apparently enforcement of the prohibition is mostly unsuccessful, but vessels have been seized when disabled or grounded. Even if the entry prohibition were rescinded the Maldives would still be out of step with everyone else because of its innocent passage requirement.

35. The Convention provision, *supra* note 5, art. 25, para. 3, for suspension of innocent passage, if essential for protection of coastal security, offers a thin basis for prohibiting fishing vessel passage in the territorial sea because it is aimed at protection of military security. Such a restricted authorization in a territorial sea

sels may be seen in the continuing dissatisfaction expressed by many States over the fact that the Convention withholds this authority in the case of military vessels.³⁶ The treaty appears mainly to reflect customary international law in providing that all vessels, without distinction, have a right of innocent passage through the territorial sea. Such dissent as there might be from this proposition would apply only to warships and not to fishing craft.

It is evident that a proposal to institute a requirement of prior authorization for passage of fishing vessels through economic zone or fishing zone not only lacks legal precedent, but is inconsistent with the Convention provisions for freedom of navigation in the EEZ. Although there are undoubtedly more severe problems in enforcing fishery regulations in the vast expanses of a 188-mile zone beyond a 12-mile territorial sea than in the latter alone, the difficulties do not appear to warrant such a drastic change in the navigation regime.³⁷ Other available alternatives, less threatening to the general interest in unimpeded navigation, should be given priority consideration.

Requiring Use of Prescribed Sealanes by Transiting Fishing Vessels

Mandating the use of sealanes by fishing vessels in transit of a fishery (economic) zone would extend a portion of coastal authority previously recognized only in the territorial sea.³⁸ While no State presently appears to require use of a designated sealane for fishing vessels in the EEZ or EFZ, some have provisions in their domestic laws which would allow such a requirement. For example, India's law provides for the declaration of a designated area in the EEZ within which necessary provisions may be made for

of twelve miles adds to the perceived importance of freedom of navigation in the exclusive economic zone beyond.

36. This question continued to agitate a considerable number of States in the 1981 and 1982 Conference sessions and several meetings were held to consider their views.

37. The hazards of excluding vessels from the EEZ have not gone unnoticed. See Warbrick, *The Regulation of Navigation*, in 3 NEW DIRECTIONS IN THE LAW OF THE SEA 137 (R. Churchill, K. Simmonds & J. Welch eds. 1973). "It is a short step from excluding fishing vessels to excluding all ships, even without any reformulation of the nature of the exclusive claim." *Id.* at 146.

38. The sealane concept originated as a means of promoting safety of navigation. See Comment, *The Establishment of Mandatory Sealanes by Unilateral Action*, 22 CATH. U.L. REV. 108 (1972) (discussion of previous experience and an appraisal of sealanes under international law).

exploration, exploitation and protection of resources. An "explanation" following this section states:

A notification under this subsection may provide for the regulation of entry into and passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India.³⁹

Other States with such provisions include the Seychelles, Pakistan and Guyana, each of which makes this a section of the statute rather than an "explanation."⁴⁰

It is also worth noting that Australian law could have the effect of imposing a form of mandatory sealane applicable on a vessel-by-vessel basis. Section 5 of the Fisheries Act of 1975 provides that a "person shall not, in the declared fishing zone, have in his possession or in his charge a foreign boat equipped with nets . . . for taking, catching, or capturing fish."⁴¹ A boat in transit would fall within this proscription except for a subsequent paragraph which provides a defense if the person charged satisfies the court that "the boat was traveling through the Australian fishing zone from a point outside the Australian fishing zone to another point outside the Australian fishing zone, by the *shortest practicable* route"⁴² Presumably there is one route which is shortest between two points at any given time and it would be up to the vessel captain apprehended on another route to persuade a court that the latter route was the shortest practicable. This approach, of course, burdens the fishing vessel because it is liable to be arrested and then have to prove its bona fide status as a transiting vessel. In addition, compliance with the Act forces the vessel to use, where practicable, a specific route through Australian waters. Final judgment as to what is practicable is not for the officer in

39. Section 7(6) of the Act (India), *supra* note 32, at 312.

40. Spain's law on the economic zone is broad enough to require foreign vessels to comply with a variety of laws to protect against unlawful fishing. Article 5 provides: "In the exercise of the freedom of navigation, foreign fishing vessels must comply with Spanish laws designed to prevent such vessels from fishing in the economic zone, including the laws concerning the carrying of fishing tackle." Law 15/1978 of 20 February on the Economic Zone, Article 5, § 2 (Spain), in 8 *NEW DIRECTIONS IN LAW OF THE SEA* 18, 20 (M. Nordquist, S. Lay & K. Simmonds eds. 1980). It is not clear what sanction, if any, applies for non-compliance.

In addition, Pakistan's Exclusive Fishing Zone (Regulation of Fishing) Act, 1975, provides in Section 4(1): "Every fishing craft shall be subject to any law relating to navigation for the time being in force." Exclusive Fishery Zone (Regulation of Fishing) Act, 1975, in 9 *NEW DIRECTIONS IN LAW OF THE SEA* 118, 119 (M. Nordquist & K. Simmonds eds. 1980).

41. Fisheries Act 1975, § 5 (13 AB.) (1), No. 11837/75, AUSTL. C. ACTS.

42. Section 15(d) (iii) of Fisheries Amendment Act of 1978, in 7 *NEW DIRECTIONS IN LAW OF THE SEA* 74, 79 (M. Nordquist, S. Lay & K. Simmonds eds. 1980) (emphasis added).

charge of the vessel but for a court with no firsthand knowledge of the sea or of the particular incident.

Traditional law, of course, provides authority for coastal States to prescribe regulations for protection of its living resources in the territorial sea. The 1958 Convention on the Territorial Sea and Contiguous Zone made provision in article 14, paragraph 5 precisely for coastal authority for this purpose:

Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.⁴³

Previous international consideration of this problem, in the 1930 Codification Conference, makes it evident that legislation for protecting fisheries was considered permissible under customary international law.⁴⁴

It seems eminently reasonable that under international law the entity with resource jurisdiction is permitted to take measures necessary to protect those resources from illegal harvesting. Nonetheless, under provisions of the Convention, there might be some question about use of sealanes for this purpose even in the territorial sea. Article 21 declares that the coastal State may adopt laws and regulations relating to innocent passage in respect of "the prevention of infringement of the fisheries laws and regulations of the coastal State."⁴⁵ This same article also provides that coastal State laws and regulations may relate to the safety of navigation and the regulation of maritime traffic.⁴⁶

Although both of these provisions seem broad enough to allow the coastal State to require the use of sealanes by fishing vessels, a question is created by article 22 which seems to limit such authority to where it is "necessary having regard to the safety of navigation." This combination of provisions might be interpreted to restrict the requirement for use of sealanes to safety considerations alone and to forbid their use for conservation or economic purposes in connection with fishing.⁴⁷

43. See *supra* note 15.

44. See M. McDougal & W. Burke, *THE PUBLIC ORDER OF THE OCEANS* 234-42 (1962).

45. Convention, *supra* note 5, art. 21, para. 1(e).

46. *Id.* para. 1(a).

47. Assuming any other legal requirements were met, the only feasibly permissible use of special sealanes for fishing vessels would be in situations where no existing sealane or traffic separation scheme was in use. Under present treaty law, ocean-going vessels are required to comply with traffic schemes and flag States are

If this restrictive interpretation were regarded as limiting coastal authority in its territorial sea, it would be extremely difficult to argue persuasively that the coastal State should have a broader authority regarding passing vessels in the fishing zone. On the other hand, even if the coastal State were considered to have the appropriate authority in its territorial sea, it does not necessarily follow that the same or substantially similar authority must be or should be permitted in the fishing zone beyond.

The question of future interest is whether the use of sealanes in the fisheries (economic) zone is compatible with customary law or with the Convention. With respect to customary law there is currently little evidence that sealanes are coming into general use for this purpose. National legislation and regulations concerning fisheries shed little light on this subject other than a possible negative inference that might be drawn from the relative absence of specific provisions on sealanes.⁴⁸

The more important question regarding customary law is whether the acceptance already accorded the extension of exclusive fishery management authority to 200 nautical miles carries with it acceptance of coastal authority to adopt protective measures that have some effect upon navigation in the area. As just suggested, the evolution of extended fishery jurisdiction should be accompanied by the authority necessary to protect the living resources subject to that jurisdiction while at the same time protecting the right to freedom of navigation from undue interference.

Under customary law, freedom of navigation has never been regarded as absolute even though its exercise has been widely recognized as an important and vital interest of all States. The traditional means of reconciling coastal and flag State interests has employed the standard of reasonableness, balancing the interests at stake and judging the permissibility of restrictions in terms of that standard. Over the centuries and up to today, limitations on freedom of navigation have been accepted as new exclusive interests have come to be recognized. A recent prime illustration, which occasions not even a raised eyebrow today, arose from the extension of coastal authority over the continental shelf. It was impossible to make adequate provision for shelf ex-

obliged to make deviation a crime under national law. These traffic problems would be unlikely to arise in areas far removed from normal shipping routes. In no circumstances should a sealane be allowed where it is incompatible with established sealanes.

48. *See supra* note 40. Only a handful of States have national regulations bearing on this issue and they are not known to have adopted any specific requirement.

ploration and exploitation under coastal State control unless freedom of navigation admitted of some modification allowing some interference. Similarly, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas,⁴⁹ and the later modest extension of exclusive fishing rights, required acceptance of some slight encroachment on absolute freedom of navigation.

The problem with 200-mile fishery zones is thus simply a larger instance of the familiar difficulty of accommodating enlarged coastal State exclusive interests with the general international community interests. A reasonableness standard does not call for absolute freedom for navigation nor do coastal State sovereign rights require or justify negation of that freedom. Under proper circumstances, coastal State protective measures affecting navigation could be considered reasonable where they are necessary for effective management and enforcement, hold unusual benefit for a particular coastal State or States, and impose modest or slight burdens on navigation. Such measures would not be directly aimed at regulating navigation as such, but designed to protect resources subject to coastal State jurisdiction. It is conceivable that in some situations limited probably only to certain key geographic and other circumstances (particularly an absence of other alternatives), even a sealane for fishing vessels would be a permissible development when reasonableness is assessed in terms of the factors mentioned.

The main question concerning these factors would be whether a sealane requirement would really make any appreciable difference in assisting enforcement. Unless it made a very substantial contribution to upgrading enforcement capability, the balance of interests ought still be resolved in favor of navigation.

The question under the Convention is whether a sealanes requirement is compatible with article 58 which declares that "[i]n 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"⁵⁰ Can the coastal State, consistent with this provision, require passing fishing vessels to use designated sealanes? There are two points to consider. The first is that the freedom of navigation mentioned is that found in article 87, which is inter-

49. See *supra* note 15.

50. Convention, *supra* note 5, art. 58, para. 1.

preted by some to mean the *high seas* freedom of navigation as *traditionally* understood, that is, before exclusive fishing zones were widely accepted.⁵¹ If this were all that is relevant, the question might be answered immediately—no coastal State has authority to require vessels passing on the high seas to employ any specific route for such passage. If it were desirable to use the sea-lanes concept to strengthen coastal authority to protect its interests in living resources, it would be necessary to seek international agreement to that end.

The second point, however, is that article 58 does not confer a pure or undiluted right to freedom of navigation in the zone. The enjoyment of this freedom is “subject to the relevant provisions of this Convention,”⁵² a condition not previously established. The relevant provisions include the coastal State’s “sovereign rights for the purpose of exploring and exploiting, conserving and managing” living resources.⁵³ This broad grant of authority is elaborated upon in article 61 and related articles to give the coastal State essentially complete power to dispose of the fisheries in its zone, subject to certain general standards, and to provide requirements for cooperation with adjoining States and certain other States fishing in the region. Articles 61 and 62, in particular, provide the coastal State with ample general authority to protect the living resources of its zone from unauthorized foreign fishing and lists specific competences to regulate all fishing activities by foreign vessels. The question not explicitly answered by these provisions is how far the coastal State may go in affecting *passing* vessels as distinct from those expected to fish in the zone.

As noted above, it does not seem unreasonable that in some circumstances a coastal State should be allowed to reduce an onerous regulatory and enforcement burden by measures that affect passing vessels. The question is, how much of an effect is reasonable? Assuming some impact on passing vessels does not unduly compromise the right of freedom of navigation, and experience indicates this assumption is reasonable, what are factors relevant to determining reasonableness?

Important factors surely must include the size of the zone relative to land mass and the value of resources therein to the national economy. In some parts of the ocean the ratio of water to land area of the State is extremely high and there are enormous obstacles to maintaining adequate monitoring and surveillance of

51. See *supra* notes 19 and 22.

52. Convention, *supra* note 5, art. 58, para. 1.

53. *Id.* See generally Convention, *supra* note 5, arts. 55-75 (exclusive economic zone).

fishing activities involving valuable resources. Designating sealanes for passing fishing vessels might in some such circumstances make the difference between effective and ineffective enforcement and this, in turn, could have a significant impact on coastal State revenues that are especially important to that State. Where the advantage to the coastal State is so high and can actually be realized, the small added burden on passing vessels might not be unreasonable. On the other hand, it is also in the large ocean areas that the freedom to select the exact route may have special importance because of the vast distances to be overcome and the hazards of long-distance transit. The skippers of fishing vessels may need to change course and normal navigation routes in order to avoid bad weather or to take advantage of new information regarding desirable fishing areas. Perhaps these conflicting considerations could be accommodated by contingent designations of required sealanes or by an approach that would allow for departure from a sealane under specified conditions. If the designation can be made flexible without eliminating its usefulness, there would be a stronger argument for the reasonableness of a sealane requirement.

On the other hand, where sealanes requirements add significant time or hazard to fishing vessels passage, the impact on freedom of navigation would be impermissible and flag States would have a sound basis for objection.

On balance under the treaty, the requirement of due regard by the coastal State for freedom of navigation imposes a heavy burden that can probably be discharged only in select and somewhat unusual circumstances. Restrictions on free navigation of any vessel should be limited to the exceptional situation. The main factors of importance in applying the due regard standard appear to be the coastal State's difficulty in securing adequate enforcement and the contribution that the fishery makes to the national economy. If the coastal State confronts unusual enforcement problems that are costly to a State which has significant dependence on revenues from fisheries and alternative remedies are

not available, then the case for some modest interference with navigation would be persuasive.

*Requiring Report of Entry and Exit Together with Route Used*⁵⁴

Another alternative that might assist coastal enforcement operations is that of requiring the report of entry by a vessel intending only to pass through, including the expected route for such passage. Because coastal States do not have this authority even in the territorial sea this might raise serious questions for those States who wish to maintain the zone as much as possible like the high seas and therefore subject to less coastal authority than in the territorial sea.

It might be a mistake, however, to consider a reporting requirement as simply another burden raising a question about creeping jurisdiction. From another perspective this procedure offers potential benefit to the vessel which reports its entry, route, and cargo. An initial premise is that the coastal State is authorized by international law to stop, board, and inspect vessels in its zone as a means of enforcing its laws and regulations concerning fishing. Article 73, paragraph 1 of the Convention recognizes that enforcement measures are an exercise of the coastal State's sovereign rights over living resources in the economic zone and declares that "the coastal State may . . . take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."⁵⁵ This article reflects State practice and customary law. Accordingly, even a passing vessel might lawfully be stopped and boarded in connection with enforcement of local fishing laws. In some situations

54. So far as can be discovered no State requires an unlicensed fishing vessel in transit to notify the coastal State of its entry and passage. But several States' laws are broad enough to include such a reporting requirement, including those of India, Seychelles, Pakistan, Barbados, and Guyana mentioned *supra* note 13.

However, Canada's Coastal Fisheries Protection Regulations in effect require reporting of entry if Canadian officials request the report. Coastal Fisheries Protection Regulations, 9 December, 1976, in 5 *NEW DIRECTIONS IN LAW OF THE SEA* 63, 70 (R. Churchill, M. Nordquist & S. Lay eds. 1977). Section 15(2) provides that a foreign fishing vessel en route through Canadian fisheries waters is subject to the following conditions while in Canadian waters: "(c) Where a protection officer or Regional Director-General requests information respecting the name, flag State, location, route or destination of the vessel, or the circumstances under which it entered Canadian fisheries waters, the master of the vessel shall promptly convey the information to that officer of Regional Director-General." If the vessel in transit had originally entered in distress or to render assistance, the vessel is required to initiate a report of the circumstances of entry and the name, flag State, location, route and destination of the vessel. *Id.* § 14.

55. Convention, *supra* note 5, art. 73, para. 1.

this procedure might put these vessels at considerable risk and a reporting procedure minimizes this risk.

The problem arises when a passing vessel has fish aboard. The fish might have been caught prior to entry into the zone or they could have been caught in the zone. If the vessel has no permit to fish in the zone but has fish aboard, the coastal State can reasonably conclude that the vessel has violated coastal laws requiring a permit to harvest fish in the zone. The difficulty is, of course, that without further evidence it would be extremely difficult to prove that the fish aboard were actually caught in the zone and not prior to entry.

Two States deal with this situation by adopting a presumption that the fish aboard were caught in the zone unless the contrary is proved. The Seychelles law permits the presumption to be rebutted by a radio call procedure:

(2) A radio call made by a foreign fishing vessel before entering the exclusive economic zone indicating that the vessel is exercising its right of free navigation through the exclusive economic zone and notifying its proposed route and the quantity of fish on board shall suffice to rebut the presumption in subsection (1).⁵⁶

Under the Bahamas law the presumption is rebutted only by a showing that the fish were caught outside the zone.⁵⁷

Requiring reports of entry and of fish aboard may thus be seen as both assisting coastal State enforcement and removing a potential heavy burden from the fishing vessel. Considering the problems involved for the vessel and the enforcement dilemma otherwise presented, a reporting requirement such as that provided by the Seychelles law might be sound. The presumption that fish aboard were caught in the zone is not irrational and it

56. Seychelles, Control of Foreign Fishing Vessels Decree, 1979, § 15(2).

57. The Fisheries Resources (Jurisdiction and Conservation) Act, 1977, § 19(2) (Bahamas), in 7 *NEW DIRECTIONS IN LAW OF THE SEA* 84, 98 (M. Nordquist, S. Lay & K. Simmonds eds. 1980).

United States fishery regulation of incidental catches of prohibited species employs a rebuttable presumption. Section 611.13 of title 50 of the Code of Federal Regulations states: "It shall be a rebuttable presumption that any prohibited species or part thereof found on board a foreign fishing vessel was caught and retained in violation of this Part 611." 50 C.F.R. § 611.13(c) (1982). This section would presumably apply to fish caught outside the fishery zone and carried as cargo on a transiting vessel. Section 611.60(c)(2) provides for rebuttal if a vessel stores prohibited species caught outside the fishery conservation zone (FCZ) in a hold area which was inspected and sealed before the vessel commenced fishing in the FCZ. Section 611.60 is applicable only to vessels fishing subject to a Governing International Fishery Agreement (GIFA). 50 C.F.R. § 611.60(c)(2) (1982).

seems reasonable that reporting entry and the fish aboard will suffice to rebut it. If a vessel has no fish aboard and intends merely to pass, it need make no report.

Reporting entry and expected route of passage also does not seem unreasonable. Provision of information on the location of the vessel should assist materially in enforcement efforts by easing the burden of surveillance and inspection. The effect on navigation of reporting entry is negligible if any, while the benefit to the coastal State could be substantial. It is possible that since a reporting requirement sufficiently assists enforcement that more drastic measures, such as a sealane for fishing vessels, could not be justified.

*Stowage of Fishing Gear During Passage*⁵⁸

Stowage requirements are a common provision in national legislation dealing with the territorial sea and also with the fishing zone. The widespread adoption of this measure and its obvious direct relationship to the protection desired make it a preferred approach. It would seem to be a minimal obligation, in principle, for a vessel intending only to pass. For these reasons the imposition of a gear stowage requirement as a condition of unimpeded passage is generally well within customary law applicable to fishing zones.

Nonetheless a stowage requirement presents the practical difficulties of being too onerous a burden for some fishing gear while for other gear it offers no protection against illegal fishing. For example, tuna seine nets are so bulky and heavy as to prevent stowage below deck and it is difficult to otherwise put such gear under constraint. Accordingly an absolute stowage requirement in such circumstances would be tantamount to forbidding passage completely and this is probably too severe to be regarded as permissible under international law. What appears to be needed is a practical technical solution that places the gear beyond easy availability.

On the other hand for pole and line fishing a stowage requirement is totally inadequate as such gear can be brought into play quite easily even if it is stored below deck.⁵⁹ By and large the

58. States with gear stowage requirements in the economic or fisheries zone include Australia (a defense to a charge of possessing or having in charge a foreign boat equipped to catch fish), New Zealand, Seychelles, Sierra Leone (territorial sea of 200 nautical miles), Solomon Islands, Spain, Canada, The Gambia, Maldives, and United Kingdom.

59. It has been recommended for halibut long-line gear in the Gulf of Alaska where it was possible to place the gear under seal before it moved through areas closed for halibut fishing. Koers, *The Enforcement of Fisheries Agreements on the*

stowage requirement originated as a means of coping with trawling gear and it requires ingenuity and flexibility to make it an effective measure for other gear. Assuming that the necessary technical solutions can be discovered so that gear is made practically unavailable without imposing an impossible burden such that passage itself is not feasible, this requirement seems easily within international law, either customary or conventional.

The Convention does not provide specifically for management jurisdiction that might require certain behavior aboard passing vessels but it does establish management authority broad enough to include such regulations. Illegal fishing by passing vessels might impact on the coastal State's responsibility for ensuring that the resource is not endangered by over-exploitation, that the resource produces yields which serve the economic needs of coastal communities and the special requirements of development, and that fishing within its zone combines with fishing outside so that the total resource and its overall exploitation are at appropriate levels. Article 61 specifically authorizes measures by the coastal State which serve these ends, and measures to prevent illegal fishing by passing vessels would fall under such authorization. Finally, coastal State measures may also seek to safeguard species associated with or dependent upon harvested species and so illegal fishing may also raise concerns for this reason.

*Requirement for Carriage and Use of Transponders
During Passage*⁶⁰

This suggestion suffers from both practical and legal difficulties. From the practical point of view, it would be difficult to enforce a demand that even casual transiting vessels carry a transponder. In addition, a transponder can simply be left inoperative so that no response can be forthcoming to an electronic query.

The legal difficulty, more relevant to this discussion, arises because a requirement for carrying certain equipment aboard a vessel as a condition of transiting a fishing or economic zone has a fragile legal basis and could provoke a considerable outcry of pro-

High Seas: A Comparative Analysis of International State Practice, 6 LAW OF THE SEA INST. OCCASIONAL PAPER 24-25 (1970).

60. Vessels authorized to fish in a zone are often required to carry transponders, but so far as is known this has not been extended to passing vessels.

test. During the Conference negotiations, flag States were very sensitive to suggestions that coastal States could require installation and carriage of equipment relating to vessel-source pollution in the territorial sea. They succeeded in eliminating any such coastal State authority except as the coastal laws are "giving effect to generally accepted international rules and standards."⁶¹ The same approach was used to eliminate any independent coastal State authority in the EEZ. Article 211, paragraph 5 limits coastal State measures for prevention, reduction and control of pollution from vessels to those "conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference."⁶² This language eliminates any independent coastal authority to regulate pollution control equipment aboard passing vessels.

Strong sentiment toward protection of navigation interests is reflected throughout Part XII of the Convention and this feeling reveals an attitude that might surface quickly if coastal States sought to exercise authority to prescribe requirements for equipment aboard passing fishing vessels.

A specific difference should be noted between the requirement for adding certain equipment to a vessel and a regulation affecting equipment normally carried. A directive to stow gear so it is not available for fishing is not the same as mandating the carriage of specific devices that must be operated in accordance with coastal instructions. The former may occasionally be impractical, as noted above, so that it might be considered unreasonable solely for that reason, but the latter rests squarely on a more open-ended claim to authority and it is this feature which causes the difficulty.

Protective Measures Reached by International Agreement

Often, the most effective and least costly means of dealing with fishing vessels in transit through a zone is to spell out acceptable and effective control measures in agreements with distant-water fishing nations. This approach might be particularly attractive to nations whose enforcement costs (monitoring, control and surveillance) are very high because of their small land mass in relation to the ocean region involved. In such circumstances the coastal State (or better, the coastal States of the region) may gain a great deal by avoiding the high costs of enforcement activities

61. Convention, *supra* note 5, art. 211, para. 5.

62. *Id.*

while the flag State assumes some of the costs of enforcing coastal State control measures. To achieve this by agreement would probably entail some form of recompense to the flag State, either by a reduction in fishing fees or some other expected benefit. However, the pay-off required by the flag State may well be small relative to the very high costs of enforcement otherwise borne by the coastal State.

The advantages of the agreement approach include, of course, the removal of legal objections or obstacles to measures that might otherwise cause concern.

CONCLUSION

The extension of coastal State sovereign rights to resources out to 200 nautical miles has virtually revolutionized the law of the sea in the past decade. The effects of this development on movement of vessels occasioned the noticeable concern of maritime States during the Conference negotiations and disquiet continues to be expressed from time to time about the accommodation reached in Convention articles 55, 56, 58, and 87. The preceding discussion argues that in reconciling coastal fishery interests with navigation, only a very limited authority to affect navigation should be recognized and then only in exceptional situations. Such situations should probably be limited to instances of very large resource zones outside developing States with a special dependence on fisheries for economic development but without enforcement capability.

A major reason for being cautious about general conclusions concerning impediments to navigation is that coastal State jurisdiction extends not only to resources but to other activities, including scientific research and environmental protection. States need to move carefully lest restraints become generalized and restrictions on vessel movement become both common and excessive.

