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The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone

CARL AUGUST FLEISCHER*

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Introduction

The Third United Nations Conference on the Law of the Sea (UNCLOS) has now completed five sessions. The last four were devoted to substantive questions and efforts to formulate texts which may be the basis of a generally acceptable Law of the Sea (LOS) Convention. Whether the UNCLOS will be a success or a failure in this regard cannot yet be determined, for negotiations are expected to continue. The number of issues and the wide range of disagreement make it difficult to achieve a solution which can command sufficient acceptance not only from a numerical majority of nations but also from States whose maritime interests, powers, and coastlines are such that their adherence is needed to obtain a workable new regime of the seas in actual practice.

I shall not venture to discuss or to predict the future of the UNCLOS or the possible emergence of a Convention to be signed, ratified, and acceded to. It suffices to state that the UNCLOS has now reached a stage at which an assessment of its progress seems appropriate. This assertion is particularly true with respect to perhaps the most important new concept which has emerged during the debates and negotiations—namely, that of the exclusive economic zone (EEZ) extending out to a maximum of 200-nautical miles from the baseline. Whether or not the UNCLOS will reach its primary aim of establishing a new LOS in the form of a binding legal instrument with precise rules, the principle of a 200-mile EEZ or a fishery zone of the same extent has come to stay. Whether the same or a similar development would have occurred in practice even if no UNCLOS had been convened is a hypothetical question which by its very nature cannot be answered with absolute certainty. However, rules and principles emerging from the documents of the UNCLOS serve to a large extent as the bases for national legislation in countries including Canada, Mexico, Norway, and the United States.
Consequently, an analysis of the present status of the 200-mile-zone concept is called for. This analysis must deal with the concept of the EEZ both as it is developed under the UNCLOS and as a de facto achievement in the practice of States.

In the following I shall first consider the rules contained in the Revised Single Negotiating Text (RSNT) in relation to claims put forward at the UNCLOS and in the actual practice of States. Then I shall view the rules of the RSNT in the light of other sources of international law, in particular the 1974 judgments by the International Court of Justice (ICJ) concerning the fishery limits off Iceland and the trend established by unilateral extensions of several States through national legislation. I shall end with a discussion of the status of the UNCLOS (and in particular of the Single Negotiating Text [SNT]). I will analyze whether these texts evidence a consensus or an opinio juris in the international community, whether they are a source of international law, and what type of conclusions this circumstance may invite regarding the rights of States in the 200-mile zone.

In the matter of fisheries, two basic questions arise, both of which have also played the major role in UNCLOS deliberations. Has a coastal State the right to establish a zone of maritime jurisdiction extending to 200 miles beyond the baselines? And if such a right is conceded, may foreign fishing be excluded, or must some rights of foreign States be respected within the zone?

### The Right of the Coastal State to Establish a Zone Under the RSNT

The main provision in the RSNT chapter on the EEZ is Article 44, which clearly gives the coastal State the right to establish such a zone. Under the Article, the EEZ apparently is something which

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

   1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has:

      (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or nonliving, of the bed and subsoil and the superjacent waters;

      (b) Exclusive rights and jurisdiction with regard to the establishment and use of artificial islands, installations and structures;

      (c) Exclusive jurisdiction with regard to:

         (i) Other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and

         (ii) Scientific research;

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exists ipso facto—without any express proclamation by the coastal State. The RSNT does not say that the coastal State "may establish" such a zone. Rather the coastal State "has" certain rights, inter alia "sovereign rights." with regard to the exploitation of resources "in an area," which is "described as the exclusive economic zone." According to this language it seems that the coastal State is obliged to exercise such jurisdiction in the zone beyond the territorial sea as is provided for in the Convention, or at least that this obligation will arise when the Convention has been ratified and entered into force. But this interpretation does not seem reasonable.

The general rules of international law do not mandate exercising jurisdiction beyond twelve-nautical miles or even beyond the traditional three-mile limit for the territorial sea. Although the question of whether an extension is allowed has been open to controversy, clearly any existing rule on a 200-mile limit can be only permissive—that is, it allows the State to extend its jurisdiction beyond three or twelve miles if it desires to do so. There is no valid reason that an LOS Convention should obligate a State to establish a 200-mile zone and thereby interfere with the activities of foreign vessels if the State does not want to do so. The language of Article 44 of the RSNT is unclear, but no compelling reason exists for interpreting it to contain an obligation which is called for neither by the interests of the coastal State nor by those of other States.

Furthermore, reference must be made to Article 45, which mandates that the EEZ "shall not extend beyond" 200-nautical miles. This language seems to imply that the coastal State may decide the breadth of its zone going out to fifty or 100 miles. If this interpretation is correct, the conclusion seems warranted that the State itself may decide whether it should have any zone at all.

(d) Jurisdiction with regard to the preservation of the marine environment, including pollution control and abatement;
(e) Other rights and duties provided for in the present Convention.

2. In exercising its rights and performing its duties under the present Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States.
3. The rights set out in this article with respect to the bed and subsoil shall be exercised in accordance with Chapter IV.
Finally, RSNT Article 65, concerning the continental shelf, should be considered. According to this Article, which is based on Article 2 of the 1958 Geneva Convention on the Continental Shelf, the rights of the coastal State over the shelf do not depend either on occupation or on any express proclamation. Because the chapter on the EEZ contains no similar provision, it may be a valid interpretation a contrario that there is no ipso facto EEZ where foreign fishing is prohibited even if the coastal State has not proclaimed any such zone.

Thus Article 44 of the RSNT purports to give a coastal State the competence to establish a zone and to exercise jurisdiction as therein described. This system is similar to the twelve-mile fishery zone beyond territorial waters which was developed in the years following the First and Second United Nations Conference in 1958 and 1960 and which was expressly accepted in the reasoning of the ICJ in its 1974 judgments. The difference between Article 44 and the traditional rules of international law is found in the much wider range of competences accorded the coastal State in the EEZ, which is not limited to fisheries or to living resources, and possibly in the distance to which the zone may be extended.

Just as a State may find an EEZ extending to less than 200 miles sufficient for its needs, it may also find sufficient reasons to refrain from exercising jurisdiction for all the purposes mentioned in Article 44. In particular, it may limit itself to establishing an extended zone for fisheries only.

The Rights of Other States Under the RSNT to Fish in the Zone

The word exclusive before economic zone must be considered as a term of art. First, the rights of jurisdiction which are conferred upon the coastal State are not exclusive in the meaning that no other State shall have similar rights in the zone. Inter alia, it is envisaged that the jurisdiction over preservation of the marine environment shall be exercised to a large degree by flag States and not by the coastal State.  

2. Fisheries Jurisdiction Case, Federal Republic of Germany v. Iceland, [1974] I.C.J. 24, 192. In the following, references are made to the judgment in the dispute United Kingdom-Iceland only.

3. This is, e.g., the case as regards the legislation of Iceland (regulations of July 15, 1975) and of the United States. Cf. Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-82 (1976) (200-mile fishery zone only).


5. See id., pt. 3.
Second, the RSNT provides for certain rights for other States in using the resources of the zone. The present text has three provisions on the rights of other States to take part in exploiting the living resources.

The first provision is the right of other States to exploit the living resources to the extent of the surplus of resources which exists after the coastal State has determined both the total allowable catch and the part of that catch which it itself has the capacity to harvest. On this point the formulation of the proposed LOS Convention is complex and not clearly drafted. The keys to the RSNT's system are found in: (A) Article 50, paragraph 1, according to which the coastal State shall determine “the allowable catch of the living resources in its economic zone”; (B) Article 51, paragraph 2, first sentence, according to which the coastal State shall determine “its capacity to harvest the living resources” of the same zone; (C) the second sentence of Article 51, paragraph 2 providing that the coastal State “give other States access to the surplus of the allowable catch.”

The second provision on the right to fish for other States is Article 58 on landlocked States.7

The third is Article 59, paragraph 1, which lays down a fishing right for certain geographically disadvantaged States (GDS). However, not all such GDS shall have the right to fish. Rather the Article is limited to developing countries which either are particularly dependent on the exploitation of living resources in the EEZ's of neighboring States or can claim no EEZ of their own.8

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6. The first provision is found in id. art. 51, ¶ 2, second sentence: “Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch.”

7. Id. art. 58 ¶ 1:

Land-locked States shall have the right to participate in the exploitation of the living resources of the exclusive economic zones of adjoining coastal States on an equitable basis, taking into account the relevant economic and geographical circumstances of all the States concerned. The terms and conditions of such participation shall be determined by the States concerned through bilateral, subregional or regional agreements. Developed land-locked States shall, however, be entitled to exercise their rights only within the exclusive zones of adjoining developed coastal States.

8. Id. art. 59 ¶ 1:
These participation rights, according to Articles 58 and 59, shall be "on an equitable basis." The terms and conditions shall be determined by the States concerned through bilateral, regional, or sub-regional agreements.9

In the cases covered by these Articles, the coastal State would be under an obligation both to enter into negotiations with the other States and to accord such rights to other States as provided for by Articles 58 and 59.

During the UNCLOS deliberations the landlocked (LL) and GDS have formed a closely knit group and have built a common front against the majority of coastal States whose geographical situation is more favourable for the purpose of establishing maritime zones where exploiting natural resources is more or less reserved for the coastal State nationals. The term geographically disadvantaged has, unlike landlocked, no exact meaning.10 Indeed, it is a relative term, for States may be more or less advantaged or disadvantaged in relation to one or the other bases of comparison.

Article 59 does not itself use the term geographically disadvantaged and is limited to two categories: those in areas with geographical peculiarities making them particularly dependent, and those which cannot claim any EEZ—for example, a State whose only coastline is situated inside a bay, States bordering on enclosed or semi-enclosed seas, States whose claims to EEZ's can go out only to a limited distance. Indeed, the group of LL and GDS at the UNCLOS includes others than those covered by Articles 58 and 59.

And the extension of the scope of Article 59 to cover different types of GDS is one of the major demands by the group.

Developing coastal States which are situated in a subregion or region whose geographical peculiarities make such States particularly dependent for the satisfaction of the nutritional needs of their populations upon the exploitation of the living resources in the exclusive economic zones of their neighbouring States and developing coastal States which can claim no exclusive economic zones of their own shall have the right to participate, on an equitable basis, in the exploitation of living resources in the exclusive economic zones of other States in a subregion or region.

9. Id. art. 58 ¶ 1 & 59 ¶ 2.
11. The words at all are not included in the text. Perhaps there may be some flexibility in the interpretation so that a country with a very small economic zone beyond the twelve-mile limit might qualify under Article 59. However, such a contention seems rather dubious.
Because GDS is a new term in international law, developed in debates at an UNCLOS which has existed only two years, the concept has no definitely established meaning. Nevertheless, it is the subject of claims and counter-claims put forward in conflicting proposals. This situation may seem to invite yet another conclusion about the content of contemporary, general international law—that is, no rule governs the right of other States to fish in the waters of coastal States which have established contiguous fishery zones or even EEZ's reaching beyond the distance of twelve miles from the baselines. However, this line of reasoning is too simple. In particular it may conflict with the findings of the ICJ in the judgments of 25 July 1974. The fact that apparently no rule favors GDS based on a specific meaning of that term does not suffice to prove that a coastal State is never under any obligation to share the resources which are found in the areas adjacent to the territorial sea.

THE SURPLUS LIMITATION ON THE RIGHTS OF OTHER STATES

Beyond the Coastal State's Harvesting Capacity

Article 51, paragraph two, the first RSNT rule which we have seen concerning the right to fish, obliges the coastal State to give other States the right to fish for the surplus not covered by the coastal State's harvesting capacity. Article 51 does not specify which States shall be accorded the right, but certain guidelines are found in paragraph three, which inter alia mentions "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone."

Turning again to Articles 58 and 59, we see that they both have an important proviso in paragraphs 2 and 3, respectively, which states that the Articles are "subject to the provisions of articles 50 and 51." This language seems to imply that the rights of LL and GDS under the RSNT are also subject to the same limitation as are the rights under Article 51—namely, the restriction to the surplus. This implication leads to the somewhat surprising conclusion that Articles 58 and 59 in the present text are in effect rules regarding the application of the general principle

12. See text accompanying notes 44-59 infra.
of Article 51, paragraph two. The obligation on the coastal State to give others access to the resources beyond its harvesting capacity is already set out in Article 51. Articles 58 and 59 concern which States shall have the right to utilize the surplus, but they do not extend the substantive obligations of the coastal State beyond those described in Article 51.

From the legal scholar's viewpoint the text is unsatisfactory. Article 51, paragraphs 2 and 3, has some rules which concern the right to fish for the surplus and the allocation thereof to foreign States. However, Articles 58 and 59, found much later in the text, concern the allocation of that same surplus to LL and GDS. There are also difficult questions of interpretation regarding the relationship between Articles 58 and 59 and the "general surplus rule" in Article 51. Should, for example, the States expressly mentioned in Articles 58 and 59 be given a preference over other States which may be entitled to rights under Article 51, such as those which have traditionally fished within the new EEZ established by the coastal State? Or is the distribution among the different categories of States to be left to the coastal State's discretion? It seems difficult to deduce a preference from the simple fact that the LL and GDS have a double basis for the rights of exploitation and that they have a specific basis in Articles 58 and 59. In the interests of legal clarity, the provisions on the rights of access should be consolidated in one Article.

The obligation to give access to the surplus has its raison d'être in the need to utilize all protein resources available for the good of the entire world and of the developing countries in particular. Moreover, arguing for a coastal State's right to prohibit foreign fishing for a surplus seems unreasonable. The coastal State's needs, which are the basis of the development toward an extended fishery zone and an important part of the legal reasoning which can be invoked in favor of that development, do not seem to go further than the catch which that State is capable of harvesting. Consequently, the justification for Article 51, paragraph 2, and Articles 58 and 59 are rules which may be deduced from general principles of law as to the necessary catch. However, it is uncertain to what extent such reasons, relevant as they may be from a de lege ferenda viewpoint, can be regarded as decisive de lege lata in the present stage of legal development.

Thus, although strong reasons exist for allowing access by other States to a possible surplus of protein resources in the EEZ, the
right of other States to exceed that limit is not equally evident. Solutions are imaginable whereby the access of LL and GDS would be extended beyond the surplus which the coastal States are not able to use. The rights of the former and of others, such as nations which have traditionally fished, might be equal to those of the coastal States, or the rights might extend to a certain percentage of the catch. One could have a solution such as that of the ICJ in 1974—a preference for the coastal State whose population is dependent on fisheries but a retention of certain rights for other states whose nationals have habitually fished in the areas in question. When no sufficient surplus exists beyond the coastal State's harvesting capacity that will fill the needs of other parties, it is not self-evident that the coastal State shall be allowed to satisfy completely its fishing needs or even to increase its capacity over the years while foreign States are forced to reduce their take and perhaps even to scrap their vessels. In the interests of equity, it could be argued that a certain percentage of the necessary reduction in fishing effort should be borne by the coastal State, even if to a lesser degree than is borne by other States.

Claims to a portion of resources beyond the surplus limitation are being asserted also by LL and GDS at the UNCLOS. However, such claims are clearly not favored by the majority. The EEZ is different from, and considerably more than, the system of preferential rights upon which the 1974 ICJ judgments were based. The rationale for the absolute right of the coastal State to harvest its capacity must be found in the fact that such sovereign rights are an essential element in the EEZ concept and a part of the quid pro quo which is necessary to achieve a Convention and to establish a barrier against more extensive claims which would reduce traditional freedoms of the sea, in particular that of a 200-mile territorial sea. The coastal State's harvesting right is closely connected to the need for rational management of fishery resources which the traditional multi-partite "sovereignty" over the living resources of the high seas has never been able to achieve. Modern technology has brought the realization that the living resources are limited and endangered by over-exploitation under the traditional regime of

13. Letter from Mr. Evensen to the Chairman of the Second Committee (24 April 1975).
fisheries and that establishing a new regime of priority among nations is necessary.

It is precisely in order to deal with this need that the EEZ concept has been advanced, providing the coastal population with an absolute priority to the allowable catch. This solution is considered equitable by many States regardless of the development levels of the fishing capacity in the coastal communities concerned. The need to give priority to the coastal population may be as strong in countries which already have a considerable fishing industry as in countries which have not built up such an industry but which consider it essential that the possibility of doing so is not destroyed by the activities of foreign fishing fleets. For example, in northern countries such as Iceland and Norway, important parts of the population depend almost exclusively on the coastal fisheries for their employment. Especially in areas in which no possible or sufficient alternative source of livelihood exists, it would be unreasonable if the coastal population would have to curtail the one activity on which they depend in order to benefit foreign fishing fleets.

One of the arguments relied upon by other States for a right to fish within the EEZ of coastal States is that establishing such zones does not conform with contemporary international law. By entering into a Convention, the LL and GDS give coastal States a legal basis for the 200-mile extension. This line of thinking requires a certain quid pro quo, _inter alia_ regarding the claims by other States for a right to participate in exploiting resources. This argument does not in itself limit the claims to the surplus which is not harvestable by the coastal State. However coastal States will to a large extent stress that established international law already gives them a basis to extend to 200 miles, without according any rights to other States. Any rights accorded must therefore be viewed as a concession on the part of the coastal State.

The concept of surplus limitation concerning Articles 58 and 59 calls for a special discussion. The Articles first appeared in the

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14. The text was written by the Chairman of Committee II, Mr. Galindo Pohl from El Salvador, at the end of the 1975 Geneva session. The model for the text was, in particular, the Articles submitted after extensive discussion in the so-called Evensen group by its Chairman, Mr. Jens Evensen, on 16 April 1975. The Evensen group is a group for informal discussion and elaboration of tentative texts, among legal experts, which has made important contributions to the work of the UNCLOS (and the preparatory work of the Seabed Committee). [The text is hereinafter cited as the Evensen text].
SNT.\textsuperscript{14} That text had both a general surplus Article similar to the present Article 51 and separate Articles on access and negotiations with special reference to LL and GDS, similar to the present Articles 58 and 59.\textsuperscript{15}

\textit{Without Prejudice, Subject to, or Pursuant to}

The surplus limitation, first introduced by the chairman of Committee II in what are now Articles 58 and 59, was not explicit. The text stated that the provisions on the rights of LL and GDS should be "without prejudice" to Articles 50 and 51. This wording is ambiguous, for it could imply both that Article 51 and Articles 58 and 59 should exist side by side, without the latter Articles reducing the scope and effects of the former, \textit{and} that the rights under Articles 58 and 59 should be \textit{subject} to the same limitation applying to the scope of Article 51. According to the first possible understanding, both Article 51—which concerns surplus—and Articles 58 and 59—which per se are not limited to the surplus—would exist independently of each other and could both be invoked as a legal ground for the right to fish. In the second understanding, the "without prejudice to" would mean that the rights under Articles 58 and 59 shall be subject to the same limitation as the right under Article 51. Although the second interpretation appears correct, it must be remembered that the RSNT is only a negotiating and not a negotiated text. Because the text is solely the responsibility of the Committee's chairman, one should perhaps hesitate to use his presumed intention as a factor in the discussion. Perhaps more revealing are intentions of States\textsuperscript{16} which are parties to an actual treaty.

The double meaning of "without prejudice"—concerning a crucial point in the proposed new international order of fisheries—was clearly demonstrated in the March-May 1976 UNCLOS session in New York. An alternative proposal which contained the same wording, "without prejudice to articles 50 and 51," was suggested.

\begin{footnotesize}
\begin{enumerate}
\item See arts. 6, 9, \& 10 of the Evensen text, \textit{id.} \\
\item Or their representatives. \textit{Cf.} Vienna Convention on the Law of Treaties, Arts. 31 \& 32.
\end{enumerate}
\end{footnotesize}
This proposal clearly did not envision any limitation on the surplus but rather purported to give other States the right to fish on a more or less equal basis together with coastal State nationals.

However, the text was made clearer when it was revised during the New York session. The new chairman of Committee II, Andrés Aguilar from Venezuela, changed the reference from Articles 58 and 59 by using the term subject to instead of the disclaimer without prejudice to. ("This article is subject to the provisions of articles 50 and 51.")

This later language is more in accordance with the second understanding—mentioned above—that the rights of other States shall be restricted to the surplus. Although the amendment of Articles 58 and 59 was not considered major, the fact that it is favorable to the coastal State (substituting subject to for the more neutral expression without prejudice to) makes reasonable an interpretation of surplus which follows Article 51.

A further argument for this view is found in the French text, which states that Article 58 and 59 are "subordonné aux dispositions des articles 50 et 51." This wording—using subordinate to describe the relationship between Articles 58 and 59 and Articles 50 and 51—supports the interpretation that the "surplus limitation" of Article 51, paragraph 2, also governs the rights of LL and GDS. However, this language does not wholly rid the Article of its ambiguity or solve the problems with regard to the possible inapplicability of other parts of Article 51 (obligations to land catches in the coastal State, remuneration, etc.). The Spanish text, which may be regarded as the original text of chairman Aguilar of Venezuela, seems closer to the English version: "El presente artículo está sujeto a lo dispuesto en los artículos 50 y 51." Going back to the SNT of Geneva 1975, where Galindo Pohl of El Salvador was the chairman responsible, we see that the Spanish text read that Articles 58 and 59 (then 57 and 58) should be applied "without prejudice"—"se aplicaran sin perjuicio de lo dispuesto en los artículos 50 y 51." Linguistically, this wording indicates that the Articles apply independently of one another, while the 1976 Spanish original is a clearer indication of subordination and possibly of the application of the norms from Articles 50 and 51 within the ambit of Articles 58 and 59.

17. RSNT, supra note 4, arts. 58 ¶ 2 & 59 ¶ 3.
However, arguably even now the text is not entirely clear in this respect. In treaty language subject to may mean that a thing shall be respected and not touched upon but not necessarily that this thing shall also govern that which is otherwise stated in the Article in question. That Articles 58 and 59 are subject to Articles 50 and 51 may imply that the duties of coastal States to make the surplus available to other States according to Article 51 and the principles of total allowable catch and optimum utilization of resources (Articles 50 and 51) shall remain untouched by Articles 58 and 59. But at the same time the latter Articles may provide rights for third-party States which go further than those already accorded in Article 51 and which are not subject to the same limitations. Even if the rights under 58 and 59 go further and are additional to those specified in Article 51, Articles 58 and 59 may nevertheless be subject to 51. From a legal-logic viewpoint one might say that if subject to really meant that all limitations in Articles 50 and 51 should apply fully to Articles 58 and 59, the latter would be superfluous or strictly limitative (introducing new limitations in addition to those following from Articles 50 and 51) instead of permissive in relation to third-party States. This statement may seem contrary to the intention of Articles 58 and 59, which are meant to enhance not limit rights for LL and GDS.

**Access Rights**

Indeed, one may find limitations deriving from Article 51 which do not apply to Articles 58 and 59—despite the reference in the latter to the former (subject to). The wording of Article 51 clearly implies a certain degree of discretion on the part of the coastal State in granting access to surplus resources; this discretion must be regarded as a limitation upon the rights of other States. Such States may claim the right to fish only as it is accorded by the coastal State (which “shall give ... other States access”). Foreign States may claim a right to fish after the coastal State has, inter alia, decided on the distribution of quotas among claimants in accordance with the guidelines in Article 51.

LL or GDS have a stronger position under Articles 58 and 59. These States “shall have” a “right” to fish that is not contin-

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18. Also in domestic legislation or in private contracts.
gent upon the coastal State's interpretation and application of its obligations. Clearly the stronger language in favour of third-party States in Articles 58 and 59 must prevail here over the limitation following from Article 51.

Another difference between the Articles is that under Article 51 the coastal State has a choice between “agreements or other arrangements”—language which seems to include the somewhat precarious system of fishing rights accorded by unilateral legislation as opposed to a treaty binding the two governments. Under Articles 58 and 59 the terms and conditions “shall be” determined “through bilateral, subregional or regional agreements.” Again the rule of Article 58 or 59 must prevail, even if these Articles are “subject to articles 50 and 51.”

According to Article 51, paragraph 2, the access of foreign State nationals to the EEZ under that provision is pursuant to the terms contained in paragraph 4 of the same Article. Article 51, paragraph 4, obliges the foreign fishermen to comply with the regulations of the coastal State. The regulations include the payment of fees and other remuneration, which in the case of developing coastal States may consist of “adequate compensation in the field of financing, equipment and technology relating to the fishing industry.”

Was the intention of the drafters and of the UNCLOS that the cross-reference from Articles 58 and 59 to Article 51 should include the right of the coastal State to apply this limitation on the rights of foreign states to LL and GDS? Can the intention be that fishing by, for example, Jamaica and Cuba in the coastal waters of Mexico under Article 59 be subject to the transfer of funds from Jamaica and Cuba to the Mexican government? Another example of the limitations applicable under Article 51 is that the coastal State may demand “the landing of all or any part of the catch by such vessels in the ports of the coastal State.”

Is the interpretation tenable that the rights of developing countries under this Article (which includes countries “particularly dependent for the satisfaction of the nutritional needs of their populations upon the exploitation of the living resources” in the zone) shall fall under this limitation? Can that be the meaning of the subject to reference in Article 59, paragraph 3? One is tempted to say that the answer clearly is no. However, the coastal State must undeniably have its right to apply ordinary, non-discriminatory fisheries regulations to the fishing vessels from LL and GDS.

19. RSNT, supra note 4, art. 51 ¶ (4) (2).
20. Id. art. 51 ¶ (4) (2) (h).
Another difficulty is found in the term "on an equitable basis," which refers to the access existing by virtue of Articles 58 and 59. This language, which is found in Articles 58 and 59 but not in Article 51, must prevail over the limitations which are or may be applicable under the latter.

This lengthy analysis poses crucial questions: Does the language to the effect that Articles 58 and 59 shall be subject to Article 51 imply that the limitation in Article 51 concerning the surplus is applicable also in regard to Articles 58 and 59? If other limitations found in Article 51 are not applicable to Articles 58 and 59, why should the surplus limitation in particular be applicable? And may not the equitable basis, which qualifies the rights accorded under Articles 58 and 59 be regarded as an alternative to the qualification given under Article 51—namely, the restriction to the surplus? No need exists for the reference to equity in Article 51, for the extent of the obligations on coastal States and of the rights of other States in toto is there clearly defined. However, in Articles 58 and 59 the extent of the obligations incumbent upon the coastal State and consequently the rights of the foreign States covered by those Articles are provided for with reference to another criterion, "on an equitable basis." May not this criterion be regarded as superseding that of Article 51, irrespective of the subject to references contained in Articles 58 and 59? The application of the lex specialis of the latter Articles to the exclusion of the limitations contained in the more general rules of Article 51 might not be contrary to the main principles of treaty interpretation.

Summary

Coming now to a conclusion, I state as my personal opinion, which perhaps coincides with that of the majority of the UNCLOS delegates, that the reference from Articles 58 and 59 to Article 51 implies

21. See id. art. 51 ¶ (4) (c) & (d). It might be an alternative to regard the "subject to" reference of Articles 58 and 59 as referring specifically to Article 51 ¶ (4) (2) (c) & (d) and possibly others. But this mere possibility is not sufficient to give us a definite answer about what is really the content of the RSNT in regard to the "surplus." One may suggest that the text should be made clearer in this respect, to make certain which parts of Articles 50 and 51 shall also govern the rights given under Articles 58 and 59 and which shall not.
the LL and GDS must also restrict their fishing to the surplus not harvestable by the coastal State. In reaching this conclusion, I draw upon my impressions from UNCLOS discussions occurring over a lengthy period, based on treaty provisions similar to that of the present RSNT.

Admittedly this evidence is rather slight to support a conclusion in a matter which is crucially important to the States concerned. It would of course be preferable if the text were to state expressis verbis that the rights shall be limited to the surplus, if such a limitation is really the intention of the drafters or of the UNCLOS. The lack of legal clarity is not helped by the fact that to a large degree official records from the UNCLOS debates and travaux préparatoires in general are not available because of the UNCLOS choice to do most of its work in informal sessions.22

In his introduction to RSNT part 2,23 chairman Aguilar expressly pointed out that a “great effort” had been spent in various groups concerning the issue of LL and GDS but that “no single proposal commanded significant support.” He had himself refrained from “any major change” because such action could “jeopardize any further negotiations which might take place.”24 In light of the complexity of the matters involved and the diversity of national interests, it is not surprising that important questions are left unsolved by the UNCLOS.

COASTAL STATE POWERS OTHER THAN JURISDICTION OVER FISHERIES: THE RELATIONSHIP BETWEEN THE ZONE AND THE HIGH SEAS

Seabed Resources

Perhaps the most important rights to be exercised in the EEZ,

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22. This statement must, of course, not be understood as implying any criticism against the work of any of the people responsible for the actual drafting of the texts of the UNCLOS. Their task has been to try to reflect to some extent the actual progress of the UNCLOS and the texts and viewpoints put forward by delegations. The carrying out of this difficult task must be regarded as a remarkable achievement by the chairmen as well as by their aides in the UN Secretariat. The working method chosen has, however, led to a large discrepancy between on the one hand the delegations with large staffs and the capacity to make extensive reports for their own use of the contributions by themselves and by other delegations and on the other hand the small-staffed delegations, including those from many developing countries.


24. Id. at 153. Arguably, Mr. Aguilar’s amendment of the cross-references from Articles 58 and 59 to subject to instead of without prejudice to (Articles 50 and 51) may have implied a “major change,” if this change had made the limitation to the surplus a part of Articles 58 and 59 (see text accompanying notes 15-18 supra.). This question is, as we have seen, rather complex and hypothetical.
other than those over fisheries, concern the resources of the seabed and its subsoil. In this area there are also sovereign rights to explore, exploit, and manage.

In this regard conformity with existing international law can easily be established. The principle that the coastal State possesses sovereign rights over its continental shelf is one of long standing practice. It has been recognized by Article 2 of the 1958 Geneva Convention on the Continental Shelf and by the ICJ in its 1969 judgment in the North Sea Continental Shelf Cases. However because the EEZ may extend to a limit of 200 miles from the baseline, doubts may arise about whether present international law allows exclusive resource jurisdiction over those parts of the seabed which lie within 200 miles but beyond the limit of the continental shelf as defined in accordance with the traditional criteria of exploitability and adjacency.

It seems evident that the claims by the LL and by the GDS for participation in exploiting the resources of the EEZ are weaker regarding seabed resources than regarding fisheries. No sharing of resources connected to the sovereign rights of the coastal State exists according to the 1958 Geneva Convention. Because the continental shelf does not present the same legal uncertainty and conflict of legal opinion as does the 200-mile fishery zone, there is


no justification for a right of participation in return for legal recognition. However, the regime of the EEZ, as opposed to the traditional regime of the continental shelf, might be more favorable to the coastal State, and this situation might justify renegotiating the right to resources, even to those already covered by the traditional regime of the continental shelf.\textsuperscript{28} Furthermore, establishing a 200-mile limit for mineral resources might in many areas go beyond what is considered continental shelf under Article 1 of the Geneva Convention. And even if the continental shelf doctrine as such is not a subject of controversy, the uncertainties with regard to the outer limit of the shelf might justify some concessions on the part of coastal States in connection with the recognition of a limit based on the outer edge of the continental margin or on 200-nautical miles from the coast\textsuperscript{29}—that is, sharing resources in certain parts of the economic zone or the continental shelf.\textsuperscript{30}

With regard to the existing rights of the coastal State, and thereby also the claims for participation, some commentators have contended on behalf of the LL and GDS that the ICJ in its 1969 judgment should have denied the application of the criterion of adjacency and of contemporary continental shelf doctrine to areas beyond 100 miles from the coast. This contention seems to be based on one sentence in the court’s opinion which is taken completely out of context. What the court really said was that areas lying 100 miles from the coast or even much less\textsuperscript{31} could not be regarded as “adjacent” to the coast in the ordinary sense of the word. Hence, the court went on to say, clearly inferring that such areas were nevertheless subject to coastal State jurisdiction under the Convention, that one could not draw any specific legal conclusion from the meaning of the word adjacency in its ordinary sense. It was

\textsuperscript{28} However, it does not seem probable that most coastal States would accept a system which in part would deprive them of resources clearly already subject to their sovereign rights under the 1958 Convention. Any far-reaching solution to this effect would deprive a number of coastal States, for which it is essential that the LOS Convention should apply, of the incentive to become parties thereto. In practice the coastal State would have the burden of administering the exploitation and the risk of grave pollution of its coast, while at the same time it would transfer the benefits achieved to other States. Any solution based on the sharing of benefits should therefore be limited to the outer portions of the shelf, where the claims of coastal States may be weaker both from the \textit{lex ferenda} and the \textit{lex lata} viewpoints.

\textsuperscript{29} Cf. RSNT, \textit{supra} note 4, art. 64.

\textsuperscript{30} Cf. id. art. 70.

precisely with this purely linguistic point that the court did deal, and with nothing else. The boundary between the United Kingdom and Norway which covers areas extending to much greater distances was mentioned in the judgment and was not objected to by any of the parties.\textsuperscript{32} Further, the court did expressly deny the claim that the term \textit{adjacency} should imply the same notion as proximity or nearness to the coast.\textsuperscript{33}

\textbf{Other Competences of the Coastal State}

Furthermore, doubts may arise with regard to the possibility under existing law of exercising other powers which RSNT Article 44 purports to confer upon the coastal State within the 200-mile zone, such as the control of artificial islands, structures, devices, and marine pollution. Obviously, the case for fisheries jurisdiction out to 200 miles is strong because there is a greater amount of State practice with fisheries than with other types of jurisdiction. However, a full EEZ as opposed to a fishery zone or a resource zone might be more adapted to the purpose of a comprehensive regime for the protection of coastal resources. And a full EEZ may be a more adequate system for the fulfilment of the obligations which today must be incumbent upon States, in particular the prevention and abatement of marine pollution.

\textbf{High Seas Freedoms}

The wide range of competences for the coastal State obviously entail a certain risk of "creeping jurisdiction," broadening the powers so that the 200-mile zone may more or less attain the attributes of the territorial sea. In this regard it is of paramount importance that the freedoms for other States of navigation and overflight (which shall continue to prevail in the EEZ) should be clearly recognized in the text. This recognition is found in RSNT Article 46, paragraph 1. Paragraph 2 of the same Article states that "articles 77 to 103," which are provisions from the chapter on the high seas, "and other pertinent rules of international law" shall apply to the EEZ, if they "are not incompatible with" the chapter on the EEZ.

This discussion leads us to the question of whether and to what extent the EEZ can be considered a part of the high seas. The

\begin{flushright}
33. Id. at 30-31.
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answer is mainly a matter of terminology. But it may also have certain repercussions in legal reasoning. The traditional principles of international law, which apply in all areas of the high seas, protect the interests of the world community in free navigation and prevent the encroachment upon that freedom by the exercise of coastal powers going beyond what is provided for in the RSNT.

Obviously the EEZ is not a zone of the high seas, in that all States shall have the freedom to fish. Nor is the EEZ a part of territorial waters. The point of departure is that the EEZ is a creation sui generis.

The RSNT makes a clear division between the rights of the coastal State, laid down in Article 44, and those of other States within the EEZ. There may be a slight imbalance, for paragraph 2 on the high-sea rules mandates their applicability only insofar as they are “not incompatible” with the provisions on coastal State’s rights in the EEZ; thus Article 44 has a certain precedence over Article 46. But this is, after all, not different from the usual situation in which a general rule governs, for example, freedom of the seas, and a more specific rule is applied in derogation of the more general one. The more specific will prevail as far as it goes. The RSNT also deals with a third category of legal questions with regard to the EEZ—namely, that of residual rights. In this area nothing has been provided in the Convention either in favour of the coastal State or in favour of other States. Here there is no rigid rule and no presumption for the one or the other solution. Conflicts which might arise shall be decided “on the basis of equity and in the light of all the relevant circumstances.”

From the point of view of the freedom of navigation, and taking account of the fact that States may establish EEZ’s without being formally bound by a future LOS Convention, it is perhaps unfortunate that Article 75 of the RSNT has a general definition which excludes the EEZ from the term high seas without any reservation for the questions of navigation and overflight. Article 75 may open the way for arguments in favour of an encroachment upon the freedom of navigation on the basis that the RSNT reflects the widespread acceptance of the right to establish a 200-mile zone, which shall “not be a part of the high seas” and therefore not subject to the traditional freedoms. Erroneous as such an argument might be, it might nevertheless be invoked by some States as a basis for inter-

34. Recognized by RSNT, supra note 4, art. 46 ¶¶ 1 & 2.
35. Id. art. 47.
ferring with foreign navigation beyond the restrictions laid down in the RSNT.

It would therefore, I submit, have been preferable if the RSNT, in addition to the provisions referred to, had contained an Article stating that the EEZ shall be treated as a part of the high seas with respect to questions of navigation and overflight. Such a provision would not add to the powers of other States nor detract from the powers of the coastal State under the RSNT. In legal doctrine and terminology both the twelve-mile exclusive fishery zone previously known in the practice of States, and also the EEZ, are in reality hybrid zones. Sovereign rights exist for coastal States in some respects and freedom for other States exists in regard to other aspects.

It is only in order to make the text clearer in this respect and in order to counteract the fear of abuse of powers in the EEZ that Article 75 should expressly state that the freedom of the high seas shall be preserved in respect to navigation and other aspects not subject to coastal State jurisdiction under the chapter on the EEZ. The rights of the coastal State, including those which might derive from the provision on residual rights in Article 47, the so-called Castañeda formula, would not be affected.

Of course the legal characteristics of the EEZ are not the same as those of other areas traditionally belonging to the high seas. But in relation to the questions of jurisdiction, which are not subject to coastal State powers under the relevant chapter, the EEZ is nevertheless subject to the principles of the high seas. Even if I may have been the first to point out that the traditional terminology on the twelve-mile fishery zone as part of the high seas may be open to criticism, I would advocate the retention of the high seas terminology in relation to the appropriate functions as regards the new concept of the EEZ, because of the uncertainties otherwise connected with EEZ vernacular and the risk of creeping jurisdiction resulting from a general list of coastal State powers. Perhaps the draft as it stands may assert strongly enough that the

36. After the leader of the Mexican delegation to UNCLOS, Ambassador Jorge Castañeda, who has suggested the compromise formula of Article 47.
EEZ shall not be assimilated to the territorial sea but be an EEZ sui generis. This concept is, however, by its very nature rather imprecise. One may be faced with the claims of States which apply the regime of the EEZ without a direct legal basis in a Convention. In this perspective one might wish for a underlining in the text of the so-called functional approach, which should be regarded as the essential element of the EEZ concept: Some functions in the EEZ are to be exercised by the coastal State, some by the international community, the latter being subject to the regime of the high seas.\(^{38}\)

**The Zone in Relation to General International Law as Evidenced by States' Practice**

Because the UNCLOS has not given us a negotiated, comprehensive Convention which can serve as a legal basis, and because States have nevertheless chosen to extend their jurisdiction to 200 miles, it becomes imperative to assess the present legal situation on the basis of general international law.

In the absence of conventional regulation, the most important source of law must be States' practice. In considering a practice's legal significance, however, we are faced with two preliminary questions. One is whether a distinction is necessary between establishing an EEZ—this being a rather new concept without a firm basis in traditional rules and practice—and establishing a special 200-mile limit purely for the regulation of fisheries or the exploitation of natural resources. Contiguous or adjacent zones for this more limited purpose have been a well-known element in actual practice since the failure of the Second UNCLOS in 1960, although opinions differ about how far the limit may extend. A zone up to twelve miles was expressly recognized by the ICJ in 1974 as something which was no longer a subject of dispute be-

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38. The need for further consideration of this problem was clearly stated by chairman Aguilar in his preface to the RSNT of Committee II. Inter alia, it was stated:

In simple terms, the rights as to resources belong to the coastal State and, in so far as such rights are not infringed, all other States enjoy the freedoms of navigation and communication. In fact, this is specified in general terms in article 46, when read in conjunction with articles 44 and 47. Many had thought that these provisions dealt adequately with the matter. My original intention to point the way to a compromise solution would have related closely to these provisions. And, I would encourage a reorientation of the discussion around these articles.

The second preliminary question is whether the right to extend up to a certain limit must be justified by considerable evidence from State practice or whether the burden of proof is reverse. May one rely on the right of the coastal State to determine, in the first instance, the extent of its own jurisdiction (for this is per se a right which is being exercised by all nations) but with the proviso that "the delimitation of sea areas has always an international aspect" and must therefore be kept within the limits which might derive from international law?

The latter perspective might warrant the submission that there is at present no uniform legislation on the limits of fisheries jurisdiction and that such limits may be fixed by each coastal State within the range evidenced by State practice which in fact goes up to 200-nautical miles. Today no evidence exists of any uniform practice which obliges a coastal State to restrict itself to a narrower limit. Neither is there any evidence of an obligation to allow the sharing of resources inside the areas which fall within the limits of fisheries or continental shelf jurisdiction, for such limits may be fixed by the coastal State according to its own legislation within the limits imposed by international law.

In fact, there are a number of agreements or other arrangements entered into by States to allow for foreign fishing within the zones of coastal jurisdiction. But such arrangements seem to spring from reasons of politico-economical expediency rather than from legal requirements—or from an opinio juris sive necessitatis, which was emphasized by the ICJ in 1969 as an essential element in the formation of customary law. To a great extent such earlier agreements relate to voisinage and to the phasing-out of foreign fishing in connection with the extension to twelve-nautical miles in the 1960's—situations which are clearly different from that of the LL and GDS and thereby from the claims which have played the major role at the UNCLOS.

42. I have chosen to describe the legal situation around the present UNCLOS by using the terminology introduced by Myres McDougal, without there being an occasion for a more profound discussion and without taking any stand on the issues connected with this terminology as opposed to that
The present article does not call for any extensive review on the State practice. Perhaps the best overall view on the diversity of State practice, and the absence of any uniform limit, is found in a survey from region to region. While Western Europe and North America had earlier adhered to fairly narrow fishery limits, in accordance with a tradition going back to the days when the three-mile rule was being enforced in this respect, we now have countries such as Canada, Iceland, Norway, and the United States (and, further, members of the European Economic Community) as examples of 200 miles. In Latin America zones of 200 miles are claimed by, for example, Argentina, Brazil, Chile, Ecuador, and Peru. In Africa a 200-mile territorial sea is claimed by Sierra Leone and Somalia, and several other States have extended to limits between twelve and 200 miles either for fisheries or for the territorial sea. In Asia more than a twelve-mile resource jurisdiction is found in, inter alia, Bangladesh and India (200 miles). The only region in which the practice of members may seem to follow the more traditional view on twelve miles as a maximum is in fact the Eastern European, with twelve miles for the German Democratic Republic and Poland.43

THE 1974 ICJ JUDGMENTS

An occasion for judicial testing of the new ideas with regard to fisheries jurisdiction arose when Iceland extended its limit to fifty miles in 1972 and the United Kingdom brought the question of validity under international law before the ICJ by application of 14 April 1972. A similar application was filed by the Federal Republic of Germany. The court delivered its judgments on 25 July 1974, finding in favor of the plaintiffs.

The relevance of the judgments in the present situation and even in the very near future may be open to doubt, for we are in the midst of a fairly rapid evolution of State practice and international law. When the application was filed, the British government was apparently against establishing an extended zone for fisheries jurisd-
diction going beyond twelve miles. This view was reflected in its legal submissions before the court, although it later became a contender for the 200-mile limit, at least on a de lege ferenda basis.

When the judgments were delivered, the UNCLOS was in its first substantive session at Caracas, where the general tendency to agree on a 200-mile EEZ had not yet materialized and where there was no SNT. As for Iceland, it consistently refused to accept the court’s jurisdiction and did not argue its case before the court, a situation which led to the judgments being delivered by default in accordance with Article 53 of the Statute. Even if this Article obliges the court to satisfy itself that the claim is well founded in fact and law, it seems that the legal reasoning of the judgments cannot claim to have exactly the same status as if the judgments had been rendered on the basis of adversary proceedings.

Perhaps even more important are the developments which have taken place in the three years which have passed since 1974. Extensions to 200 miles by countries such as Canada, Mexico, and the United States are important legal facts, of which only a clairvoyant court could have taken any cognizance in 1974. Iceland has, in the meantime, extended its limit from fifty to 200 miles.

The findings of the court are well known. As in this article, the court was faced with two fundamental problems: (1) the right of a coastal State to extend its limit for fisheries purposes, and (2) the possible obligation to allow other States to fish in the extended zone. It is indeed remarkable that despite Iceland’s not appearing before the court, the judgments delivered were some kind of a halfway victory for the government of that country.

The court refused to make what was in fact the number one point of the United Kingdom’s submission part of its conclusions—namely, that Iceland’s extension was without basis in international law. This issue was left unsettled by the court; a majority of judges (10-4) believed that considering the issue was not necessary. But at the same time the court decided that Iceland’s extension to fifty miles was “not opposable to the United Kingdom.” Because of this finding, the court did not need to consider whether Iceland was entitled to declare a fifty-mile limit in relation to third States

44. By judgments of 2 February 1973, the court found that it had jurisdiction.
or if the extension was invalid *erga omnes*. The findings of the court were summarized, *inter alia*, as follows:

That Iceland's extension of its exclusive fishery jurisdiction [beyond twelve miles] is not opposable to the United Kingdom; that Iceland may on the other hand claim preferential rights in the distribution of fishery resources in the adjacent waters; that the United Kingdom also has established rights with respect to the fishery resources in question; and that the principle of reasonable regard for the interests of other States enshrined in Article 2 of the Geneva Convention on the High Seas of 1958 require Iceland and the United Kingdom to have due regard to each other's interests, and to the interests of other States, in those resources.\(^4\)

In an interesting concurring opinion, five judges expressly said that they had voted in favor of the judgment because it did not take any stand on the matter of whether a coastal State is entitled to establish a fishery zone going beyond twelve nautical miles.\(^4\)

We can therefore safely take as a point of departure that the ICJ has not in its 1974 judgment taken a position on the first main problem with regard to the EEZ of the RSNT, or a special fishery zone, of fifty or 200 miles from the baseline. The case was decided on considerations related to the second main problem of the EEZ—namely, the question of whether and to what extent other States shall have the right to exploit the resources of the zone.

At first glance, it might be argued that the court ruled out an exclusive zone. Indeed it was a crucial point in its reasoning that Iceland was entitled to "preferential rights" in the area between twelve and fifty nautical miles and that such preferential rights do not "suffice to justify" a claim unilaterally to exclude all foreign fishing. "The concept of preferential right is not compatible with


\(^4\) Id.

What has made it possible for us to concur in the reasoning of the Court and to subscribe to its decisions is that, while the Judgment declares the Icelandic extension of its fishery jurisdiction non-opposable to the Applicant's historic rights, it does not declare, as requested by the Applicant, that such an extension is without foundation in international law and invalid *erga omnes*. In refraining from pronouncing upon the Applicant's first submission and in reaching instead a decision of non-opposability to the United Kingdom of the Icelandic regulations, the Judgment is based on legal grounds which are specifically confined to the circumstances and special characteristics of the present case and is not based on the Applicant's main legal contention, namely, that a customary rule of international law exists today imposing a general prohibition on extension by States of their exclusive fishery jurisdiction beyond 12 nautical miles from their baselines. *Id.* at 45.
the exclusion of all fishing activities of other States." But these statements do not imply that an exclusive economic zone may not be established. Here we must remember that the term exclusive in relation to the economic zone is a term of art and that the EEZ is not intended to be exclusive in the sense that all foreign fishing may be prohibited; quite to the contrary, fishing by other states shall be allowed in certain cases, as evidenced by RSNT Articles 51, 58, and 59.

While the judgment is thus silent on the question of the coastal State’s right to extend the fishery limit or to establish an EEZ, it can in a way be said to coincide with the RSNT insofar as it establishes an obligation to allow other States to fish in the zone. There is also a degree of conformity in the court’s considering that the coastal State is under an obligation to negotiate with other States having the right to fish in the waters in question. The court’s rationale was that the obligation to negotiate “is implicit in the concept of preferential rights” and “flows from the very nature of the respective rights of the Parties.”

The court was not concerned with the rights of the LL and the GDS but rather with the existence of traditional or historic fishing rights in the waters of the extended zone. The majority opinion pointed out that the vessels of the United Kingdom had “been fishing in Icelandic waters for centuries and that they had done so in a manner comparable with their present activities for a good fifty years.” It would, according to the applicant, not be economically possible for the fishing effort of United Kingdom vessels to be shifted to other fishing grounds in the North Atlantic. The court declared that

considerations similar to those which have prompted the recognition of the preferential rights of the coastal State in a special situation apply when coastal populations in other fishing States are also dependent on certain fishing grounds. In both instances the economic dependence and the livelihood of whole communities are affected.

47. Id. at 27-28.
48. See RSNT, supra note 4, arts. 58 & 59.
49. Fisheries Jurisdiction Case, Federal Republic of Germany v. Iceland, [1974] I.C.J. 2. To avoid any misunderstanding it should perhaps be added that, although the result (obligation to negotiate) is the same, the reasons given by the court are not necessarily the same as those of the UNCLOS.
50. Id. at 28-29.
According to the court, Iceland could claim a certain priority, but this priority must be "reconciled with the traditional fishing rights of the Applicant. Such reconciliation cannot be based, however, on phasing-out of the Applicant's fishing, as was the case in the 1961 Exchange of Notes in respect of the [twelve]-mile fishery zone." 51 The duty to respect traditional fishing has a certain parallel in the considerations of the RSNT, 52 which concerns the need to avoid economic dislocation in foreign fishing communities.

But it must not be overlooked that there seems to be a fundamental difference between the reasoning of the court—which limits itself to considerations of the right to take measures and exercise preferential rights for a State whose population is in a situation of special dependence upon fisheries—and the RSNT, which purports to give all coastal States the right to establish EEZ's of 200 miles. In the court's judgment there is no such rule of law with respect to a general right for coastal States. Nor does the court speak of any limitation to the surplus, which the coastal State cannot itself exploit and which has played a major role in the UNCLOS negotiations.

The reasons given for the court's findings were rather complicated. It was stated that the 1960 Conference on the LOS had failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. After the Conference, however, the law had evolved through the practice of States on the basis of the debates and near-agreements of the Conference. Two concepts had "crystallized as customary law in recent years arising out of the general consensus revealed at that Conference." The first was the concept of the fishery zone. 53

Although the right of Iceland to claim preferential rights in adjacent waters according to the court's reasoning might be regarded as a consideration in favour of that country, it was also used as an argument to its detriment. The concept of preferential rights, which were the rights to be exercised by Iceland according to the court, was "not [even] compatible" with the exclusion of

51. Id. at 30.
52. RSNT, supra note 4, art. 51 ¶ (3).
53. "[T]he area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baseline appears now to be generally accepted." The second concept was that of "preferential rights of fishing in adjacent waters, which would operate in favour of the coastal state in a situation of special dependence on its coastal fisheries." Fisheries Jurisdiction Case, Federal Republic of Germany v. Iceland, [1974] I.C.J. 23.
foreign fishing from the disputed area.\textsuperscript{54} Another important reason given by the court for its refusal to accept the Icelandic policy vis-à-vis the United Kingdom was that this policy "constitutes an infringement of the principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas which requires that all States, including coastal States, in exercising their freedom of fishing, pay reasonable regard to the interests of other States."\textsuperscript{55}

As might be expected, the court's judgment has not met with the unanimous approval of States and of legal writers.\textsuperscript{56} It may seem that the judgment is to some extent contradictory. Although the judgment intends to take no position on the right of a State to extend its fishery jurisdiction beyond twelve miles and on how far out in the sea the jurisdiction of fishery may go, it at the same time presupposes that the area beyond twelve nautical miles must be regarded as "high seas" in relation to the question of jurisdiction over fisheries. This assumption alone can be the justification for the application of Article 2 of the High Seas Convention and for the contention that Iceland's unilateral action was a violation of the 1960 Convention. The court referred to the extension of the fishery zone up to a twelve-mile limit as being "generally accepted,"\textsuperscript{57} but no explanation is given why there should be an obligation upon States to restrict themselves to what is "generally accepted," or a prohibition in customary international law to extend the fishery limit beyond that distance. In other words, the reason for applying the high seas rule is not sufficient.

Further, the application of the high seas regime of fisheries and in particular Article 2 of the Convention would seem to lead to the conclusion that all States, not only those having traditional fisheries, should have the right to fish, for this is indeed what is

\textsuperscript{54} Id. at 27.
\textsuperscript{55} Id. at 29.
said in Article 2. But according to the judgment, and in particular the authentic interpretation by five of the judges constituting half of the majority, the judgment should not be read as implying the invalidity of Icelandic regulations vis-à-vis all States.

The court's application of the preferential rights concept against Iceland seems to rest on the same implicit premise for the court's reasoning—namely, that all areas beyond twelve miles are to be regarded as the high seas in relation to the matter of fisheries. It may be true that the 1958 and 1960 Conferences revealed a "general consensus," according to which a coastal State in a situation of special dependence on fisheries has the right and thereby a claim to a system of "preferential rights" in adjacent waters and to negotiate the terms thereof. But such a right for certain coastal States cannot imply the obligation to establish such a regime of priority or to refrain from other measures which might be justified under general international law. The argument that Iceland by virtue of a general consensus among States has a right to a certain regime of priority cannot per se justify the conclusion that Iceland was obliged to respect the traditional fishing of the United Kingdom. This question again would seem to turn upon the issue of whether there is a rule of customary international law laying down twelve miles as the maximum for a fishery limit of a coastal State, an issue which was not discussed but in principle left undecided by the court.

As to the "high seas" argument, no compelling reason exists requiring that the areas beyond twelve miles should be regarded as "high seas" while the areas between a fishery limit of twelve miles and a narrower territorial sea should be regarded as falling outside that concept in the matter of fisheries. In both cases the areas involved would retain their character as high seas for other purposes.58

There are in other words, important differences between the ICJ's findings in its judgments of 1974 and the consensus which eventually may emerge from the UNCLOS, which cannot be overlooked. It becomes a crucial question for the international community as well as for the court whether and to what extent the work of the Conference as evidenced inter alia by the RSNT and the practice of States in the meantime can be said to justify a deviation from

58. That the 12-mile fishery zone beyond territorial waters must still be regarded as "high seas" for purposes other than fisheries must also have been the view of the court. Cf. id. at 25 (The fishery zone is mentioned as a tertium genus between the territorial sea and the high seas, a fact which cannot imply, however, that the high seas rules are inapplicable in the zone for matters such as navigation and overflight.)
what was in practice the result in 1974—namely, the non-opposability of a unilateral extension vis-à-vis traditional fisheries of a certain importance. If a case is put before the court in the future, it might be possible to reach another solution by rephrasing the issue and by directly answering the question which was in principle left undecided in 1974—that is, the right of the coastal State to extend its limit for fisheries jurisdiction beyond twelve miles.

**Status of the SNT and RSNT**

**Contribution to Customary Law**

Both the SNT of Geneva 1975 and the RSNT of New York 1976 are, as they have been named, *negotiating* and not *negotiated* texts. They are to serve as a basis for discussion at the UNCLOS and have not been accepted as the expression of any consensus or majority view or as elements of a possible future compromise between delegations. The texts are to be regarded as instruments for the further work of the UNCLOS, not as a binding result or as expressing the views of the States which participate at the UNCLOS. This situation alone explains how it has been possible to achieve a single text in each of the three committees at the present stage and to entrust the preparation of such texts to the individual chairmen. It has therefore been contended that the texts are the responsibility of one person only, or rather the three individual chairmen, each for his part of the text, and the president of the Conference as regards part IV on settlement of disputes.\(^{59}\) The texts do not represent the views of delegations.

Even if such a description may be regarded as correct in principle, the texts may also be considered as evidence of a growing consensus at the UNCLOS. Whether this “growing” is sufficient to reach a full consensus on all items covered by the RSNT is yet to be seen. It cannot be denied, however, that large areas of agreement have been established and that such agreement is expressed in the RSNT, even if the text is controversial both with regard to several specific and important issues and as a complete package.

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Cf. the statement of chairman Paul Engo (United Republic of Cameroon), in his introduction to RSNT, *supra* note 4, pt. 1: “What I now present does no more than reflect my personal view, as Chairman, of the possible direction in which the desirable consensus we seek may be found.” V *UNCLOS III, Official Records* 160 (1976).
Especially significant is the revision which took place in New York in the spring session of 1976 after extensive debates between delegations. In his introductory note to part 2 of the RSNT, chairman Aguilar of the Second Committee first expressed his conclusion that the SNT elaborated after the Geneva session “served well as a basis for negotiations in the Committee” and that the Committee was indebted to Ambassador Galindo Pohl for his preparation of the text. The guiding principle of the revisions undertaken after that by Aguilar was to “make such changes as would make the text conform more to the views of delegations.” In most instances the text was confirmed by the UNCLOS, for “by far the largest category of articles consisted of those to which no amendments commanding other than minimal support were introduced. It was clear that these should be retained as they were in the [SNT].” A second group consisted of Articles “where there was a clear trend favoring the inclusion of a particular amendment, which was consequently made by the chairman.” A third category consisted of Articles in which there was considerable opposition on the part of several delegations and in which no single solution achieved general support during the debates. In certain cases the chairman suggested compromise solutions; in other cases the issues were left for further negotiations while the text was not made subject to any major change. In particular this was the case with the fundamental issues of the relationship between the EEZ and the high seas and the right of LL-GDS. Finally, chairman Aguilar stated that he had prepared the text “in my capacity as an officer of the [UNCLOS] and not as a representative of my country” and that the text did not necessarily represent the views of his delegation.

In future international law practice the established texts may prove their relevance both directly, as evidence of a consensus or a growing consensus among States at the UNCLOS, and indirectly, because the texts will be used as guidelines in the practice of States and will thereby contribute to the formation of customary law. Perhaps the texts will have a somewhat weaker status in regard to those issues about which a large diversity of opinions was evident at the UNCLOS and about which it has been advocated that the text as such does not represent any acceptable compromise, such as the Articles dealing with the specific rights of LL and GDS.

61. See inter alia, the examples mentioned at notes 63-67 infra, & Virally, The Sources of International Law in MANUAL OF PUBLIC INTERNATIONAL LAW 116, 122 (M. Sørensen ed. 1968).
The ICJ and the Texts

The role which will be accorded to the RSNT and practice connected therewith will depend upon the more general questions on the sources of international law. Today one may safely assert that Article 38 of the ICJ statute, enumerating certain of these sources, cannot be considered exhaustive.\(^6\) Indeed, the ICJ has in later years made a remarkable contribution to the evolution of a wider concept on the sources of law—with regard to an established consensus of States, irrespective of the formal requirements of agreement, signature, and ratification, and concerning declarations by international conferences and even the statements on behalf of individual States. Even if one might have wished for a somewhat more radical attitude in the judgments of 1974, it would be a one-sided criticism of the court if one were to consider it as a purely conservative instrument and as an obstacle to the development of a new regime for the protection of coastal resources or if this were to be the only view presented. It must be noted that the court in its legal reasoning in the Icelandic cases gave considerable weight to what the court termed “the general consensus revealed” at the 1960 UNCLOS, and the concepts which had “crystallized as customary law in recent years” arriving out of such consensus.\(^6\)

Further, the use of sources of international law in regard to the concept of “preferential rights,” which was crucial for the court’s reasoning, is of great interest. This concerns both the positive use by the court of this concept, insofar as the court laid down that Iceland must by reason of its special dependence on fisheries have a priority to the resources in the zone adjacent to the twelve-mile limit, and the court’s consideration that the concept of “preferential rights” was incompatible with the unilateral exclusion of British fishing activities between twelve and fifty-nautical miles. What was at the basis of Iceland’s special rights to a priority, and of limitation of those rights so that the vessels from the United Kingdom should have a certain right to fish, was a resolution which had been passed by the first UNCLOS in 1958 concerning States whose population was overwhelmingly dependent upon fisheries and further proposals submitted at the second UNCLOS in 1960.\(^6\) These two factors were the main legal rationale for the court’s finding that

\(^6\) Sorensen, supra note 61; V UNCLOS III, OFFICIAL RECORDS 154 (1976).
\(^6\) See id. at 24–25.
contemporary international law comprises a rule on priority for certain coastal States, a rule which was applied by the court as decisive in the cases before it. Also Iceland's special situation had been recognized by the applicant. Here the court's finding of the existence in contemporary international law of a rule to be applied based on resolutions and proposals at international conferences, as evidence of a "consensus revealed," must be regarded as a rather interesting development.

As for the value of statements on behalf of individual States, an even more recent decision by the court must also be considered—namely, the Nuclear Tests Case. Australia and New Zealand had brought France before the court to contest the legality of the French bomb tests in the Pacific. The substantive issue of whether these tests were violative of international law, because of the damage which might be caused to the territory of other States and to the high seas, was left undecided by the court. The reason for this was that the Office of the French President in the meantime had issued a statement, according to which France would refrain from further testing which could affect the atmosphere or the waters of the Pacific, for further nuclear testing would be underground. This statement was held to be binding upon France, with the consequence that there was no longer any actual dispute between the parties.

Finally, an interesting line may perhaps be drawn between the UNCLOS and the court's emphasis on the obligation to negotiate in LOS matters. Both in the 1969 North Continental Shelf Cases and in the 1974 Fishery Jurisdiction Cases, the court refrained from laying down any hard-and-fast rule with regard to the exact location of the line of delimitation between two States whose coasts

65. Id. at 13, 26-27.
68. Id. at 270 & 475. It may be discussed whether such an individual commitment by a State should be considered on the level of "law," or as a "source of law"; nevertheless, according to the court's finding, there was here the binding legal basis which would decide the parties' future conduct in an important matter.
were adjacent and whose claims to the continental shelf did overlap and with regard to the exact division of quotas between States fishing in an extended zone with priority for the coastal State. In both instances it was pointed out that the parties were under an obligation to negotiate further and that certain considerations of both equity and the preservation of resources should apply during such negotiations. Although State practice may seem to support the coastal State's right to establish a "clean" fishery zone without special obligations towards third States, it may seem that the ICJ judgments and the RSNT both can be invoked in the direction of an obligation to negotiate in good faith in order to accommodate the interest of other States to some extent.

Whether such a view on an obligation to accommodate is tenable, is, however, open to doubt.

CONCLUSION

The right to a 200-mile zone, based on the State's unilateral decision on the breadth of its fishery zone within a maximum of 200 miles, may seem to rest on fairly firm ground. However, representatives of LL and GDS will advance the view that the acceptance of the EEZ is conditional upon an agreed solution on the right to fish for those other States and that the right to an EEZ may not be invoked as lex lata and as part of a consensus before such an agreement is reached. Irrespective of this argument, the work of the UNCLOS and in particular the RSNT seems to give rather strong support to the contention by several coastal States that they are now entitled to extend up to a 200-mile limit in the matter of fisheries. And it may seem that a possible corresponding obligation to accord to other States a right of participation in exploiting living resources within the State's fishery limit does not in itself have such a standing in State practice that this special part of the RSNT can be regarded as an expression of general law. At any rate, the extent of a possible obligation must depend on a wide discretion on the part of the coastal State and on the outcome of its negotiations with other States.