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The Exclusive Economic Zone: Its Development and Future in International and Domestic Law

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THE EXCLUSIVE ECONOMIC ZONE: ITS DEVELOPMENT AND FUTURE IN INTERNATIONAL AND DOMESTIC LAW

INTRODUCTION

The recent conclusion of the United Nations Convention on the Law of the Sea,[1] the 1983 Presidential Proclamation of the United States' exclusive economic zone,[2] and recent Congressional consideration of legislation to implement that proclamation[3] all indicate that an examination of the exclusive economic zone concept in international and domestic law is both timely and important.

Ever since the South American States introduced the concept of a patrimonial sea into international law,[4] the future of the concept of an exclusive economic zone was decided. The subsequent redubbing of the patrimonial sea as "the exclusive economic zone" in 1972 by the Kenyan delegation to the Asian African Legislative Consultative Committee[5] simply aided acceptance of the concept in the negotiations of the Law of the Sea Convention (LOS Convention).[6] International acceptance of the concept of a coastal State's exclusive right to an all-encompassing coastal resource zone[7] is hardly surprising since the concept provides something for nothing to virtually every State in the world.[8] However, while the concept of an exclusive economic zone has almost certainly

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1. The United Nations, The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the Sea (1983) [hereinafter cited as LOS Conference].

2. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983) [hereinafter cited as EEZ Proclamation].

3. S. 750, 98th Cong., 1st Sess. (1983) [hereinafter cited as the Stevens bill]; and H.R. 2061, 98th Cong., 1st Sess. (1983) [hereinafter cited as the Breaux bill].

4. D. O'Connell, The International Laws of the Sea, Vol. 1, at 558 (1982) [hereinafter cited as O'Connell].

5. The term attained formal status in the Kenyan proposal to the U.N.'s Enlarged Seabed Committee in 1972. O'Connell, supra note 4, at 561.

6. Part V, arts. 55 through 75 in LOS Convention, supra note 1.

7. Claims to the right to protect resources within 200 miles of the coast were first made in the Declaration of Santiago in 1952 and the LOS Conference ended in 1982. I New Diretions in the Law of the Sea 231 (1973).

8. In fact, the LOS Convention appears to give something to everyone including land-locked and geographically disadvantaged States, see arts. 69 and 70, LOS Convention, supra, note 1.

achieved validity in international law, concurrence on the legal content of the zone has yet to coalesce.

The Legal and Economic Elements of the Exclusive Economic Zone

Basically, the exclusive economic zone (EEZ) is a 200 nautical mile zone extending from a coastal State's baseline in which the coastal State has priority of access to living resources and exclusive right of access to non-living resources. This zone evidently does not require a claim by the coastal State to come into existence;[9] thus, the EEZ possesses the same theoretical basis as the Continental Shelf Doctrine, though it lacks the geological justification of the "naturally appurtaining"[10] continental shelf.[11]

In an EEZ, the coastal State's rights extend to all ocean strata from the ocean's surface to its subsoil. Essentially, the EEZ concept attempts "to secure for the coastal state the resources of sea, seabed and subsoil irrepective of variations in geographic or economic or ecological circumstances."[12] The importance of this is that coastal States that were geologically impoverished under the Continental Shelf doctrine have EEZ rights roughly comparable to the rights they would enjoy if they possessed a continental shelf.[13] Thus, the EEZ doctrine provides mineral rights to the deep ocean floor and abyssal plain within 200 miles of a State's coast—rights that the Continental Shelf Doctrine limits to the continental shelf.[14]

Contrary to its name, the exclusive economic zone "is exclusive only in so far as [mineral resources] . . . are concerned; it is essentially only preferential so far as [living resources] . . . are concerned."[15] However, the EEZ is truly an economic zone because the coastal State has varying

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9. See art. 55, LOS Convention, supra note 1 and the EEZ Proclamation, supra note 2. The language used by these two documents indicates that a coastal State need not claim an EEZ—it exists in and of itself.

10. North Sea Continental Shelf Cases (Fed. Rep. Ger. v. Den.; Fed. Rep. Ger. v. Neth.) 1969 I.C.J. (Judgment of February 20) as reported in I New Directions in the Law of the Sea 134 (1973).

11. While a 200 mile limit is much easier to apply than a geological one, it remains to be seen whether this theoretical deficiency will create problems. Considering the nature of lawyers and international politics the development of such problems seems inevitable. See generally, Emery, 10 Ocean Development and Int'l L. J. 1 (1981).

12. O'Connell, supra note 4, at 552.

13. These rights may be subject to some important distinctions which would result in different legal concepts applying to areas with continental shelves and areas with only an EEZ. See text accompanying footnotes 43-51, infra.

14. For example, since the Continental Shelf Doctrine only gives rights to the geological limit of the State's continental shelf, the EEZ doctrine gives every State in the New World with a Pacific coastline rights to ocean resources that geology would deny them under the Continental Shelf Doctrine.

15. O'Connell, supra note 4, at 552.

rights to anything of economic value in the zone. Beyond the traditionally exploited living and mineral resources, the EEZ gives the coastal State the exclusive right to produce and exploit nontraditional energy resources within 200 miles of its baseline. Wind and ocean currents,[16] wave motion, and thermal gradients[17] are the major energy sources currently being exploited. (It must be noted, though, that technological and political impediments may prevent energy production from ever being a major economic resource of any EEZ.)[18]

CURRENT EEZ STATUS IN INTERNATIONAL LAW—UNCLOS III AND CUSTOMARY INTERNATIONAL LAW

State Practice Prior to UNCLOS III

While it has been said that the EEZ concept "has no theoretical antecedents, and thus depends for its viability and its content upon changes in customary law brought about as a result of state practice,"[19] this statement is too broad. The special contiguous zone,[20] the Continental Shelf Doctrine, and the various claims to fisheries zones (as recognized by the ICJ[21]) have extended coastal State authority over areas of formerly high seas for varying economic reasons and must be considered the theoretical antecedent for the extension of jurisdiction based on the economic needs of the coastal State. In fact in 1974, in the Fishery Jurisdiction Case, the International Court of Justice carefully avoided declaring that unilateral extensions of jurisdiction of fifty miles had no basis in international law[22]—probably because the "theory [of an exclusive fishery zone] has been in existence for centuries, and actually [has been] practiced during the past [twenty-seven] years."[23] Thus, the

16. The Gulf Stream and the Kuroshio Current near Japan are two sources of ocean current energy to which EEZs would provide exclusive coastal State access. See Ross, Opportunities and Uses of the Ocean (1980) at 281 [hereinafter cited as Ross].

17. OTECS (Ocean Thermal Energy Conversion Systems) currently offer the greatest promise in this area. See id. at 281-87 for a detailed explanation of how OTECS operate.

18. While significant energy production from these sources is unlikely, since large-scale production of energy from these ocean sources will have severe, adverse effects on climates and the ocean resources of other States, EEZs will still give coastal States exclusive rights to such energy production that may provide significant, local benefit to the coastal State.

19. O'Connell, supra note 4, at 570.

20. See, Convention on the Territorial Sea and the Continguous Zone, Geneva, April 29, 1958, in I New Directions in the Law of the Sea 1 (1973).

21. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. (Judgment on the Merits, July 25) as reported in 55 Int'l. L. Rep. 238, 261-262 (1979) [hereinafter referred to as the Fisheries Jurisdiction Cases].

22. Id. at 280.

23. Macrea, Customary International Law and the United Nation's Law of the Sea Treaty, 13 Cal W. Int'l L. J. 181, 218 (1983).

claims of national sovereignty to protect resources within 200 miles of the coast (the 1952 Declaration of Santiago)[24] and the 200 mile patrimonial sea claims over natural resources (the 1972 Declaration of Santo Domingo)[25] were simply typical (though bold) tests of what the international community would accept as an extension of ocean jurisdiction. In fact, "the only revolutionary aspect of the exclusive economic zone [in the Law of the Sea Convention] is the determination of a boundary."[26]

What gives the EEZ the appearance of lacking theoretical antecedents is the speed with which it has been accepted in international law and the speed with which it has become widespread state practice. Yet, as the International Court of Justice has stated, "the passage of only a short period of time is not necessary, or of itself, a bar to the formation of a new rule of customary international law. . .,"[27] and, as with all concepts in international law, the legal content of the EEZ will be decided through the patterns of "claim and response."[28]

UNCLOS III

In the formation of international law, "claim and response" includes acceptance of a State's claim by treaty. Thus, upon attaining final form at UNCLOS III, the Law of the Sea (LOS) Convention embodied the potential for active acceptance of a fixed EEZ regime in international law. Though ratification of the treaty by the major industrial and maritime powers is unlikely, and thus the treaty will not, by itself, generate customary international law,[29] a study of its EEZ provisions is appropriate for at least three reasons.

First, the major impediment to ratification by industrialized nations is the treaty's ocean mining regime, not its EEZ regime;[30] hence, a study of the international consensus on the EEZ as embodied in the treaty

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24. See note 7, supra.

25. Id. at 247.

26. Macrea, supra note 23, at 219.

27. North Sea Cont. Sh. Cases 20 Feb 69, p 43, para. 74.

28. See M. McDougal & W. Burke, The Public Order of the Oceans 28-51 (1962). McDougal and Burke use the phrase "process of decision" to describe the claim-response phenomena in which a nation advances a claim of authority which is then subjected to the crucible of international reaction and counter-claim. Eventually, this process creates or prevents a new international norm.

In referring to the claim-response phenomena, I am including both active acceptance (treaties) and passive acceptance (acquiescence) of State practice in the formation of international law.

29. It should be mentioned, though, that some believe that "since virtually all members of the international community gave their support to the right to establish [an EEZ,] it is embodied as customary international law." Szekely, The International Significance of Mexico's 200 mile Zone Claim, 4 Ocean Development and Int'l L. J. 195, 201 (1977).

30. See text at footnote 111, infra.

would be the most logical standard against which to measure individual States' EEZ claims. Second, despite the nonparticipation of the industrialized nations, a sufficient number of developing States may ratify the treaty, binding those States to the treaty's EEZ articles and laying the foundation for the formation of customary international law regarding EEZs. Third, if the treaty is ratified by a large number of States, other States may ratify separate EEZ treaties containing provisions identical to those in the LOS Convention.[31]

The LOS Convention states that the EEZ "shall not extend beyond 200 nautical miles from [the territorial sea baseline]."[32] Within the EEZ, the coastal State has: (1) "sovereign rights for the purpose of exploring and exploiting, conserving and managing [all] natural resources . . . of the waters superjacent to the seabed and of the seabed and its subsoil;"[33] and (2) exclusive jurisdiction over man-made structures, marine scientific research, and protection and preservation of the marine environment.[34] These rights are to be exercised with due regard for the rights of other States.[35]

This seemingly simple statement of rights, however, contains several problems. The most obvious problem is that after article 56 lists the seabed and subsoil as part of the EEZ, the last sentence of the article removes these strata from the regime of the EEZ by stating that the rights involving the seabed and subsoil shall be exercised in accordance with Part VI of the convention—the continental shelf regime.[36] Immediately the flaws in the attempt to fuse the Continental Shelf Doctrine and a 200-mile fisheries zone[37] into a single concept become apparent. Part VI states that the continental shelf "does not include the deep ocean floor with its oceanic ridge or the subsoil thereof;"[38] yet, these areas form substantial parts of EEZs in numerous areas of the world.[39]

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31. Of course, this assumes that the LOS Convention's EEZ provisions prove workable.

32. LOS Convention, supra note 1, art. 57.

33. Id. art. 56 (1) (a). This includes all living and non-living resources as well as energy produced from water, currents, and winds.

34. Id. art. 56 (1) (b). Although article 56 generally indicates the authority of the coastal State over activity in the EEZ, more precise standards for the listed activities are found in article 60 (the exclusive right to construct and regulate man-made structures in the EEZ), article 245 (the exclusive right to conduct and regulate marine scientific research in the EEZ), and articles 210 (5) and 211 (5) (the exclusive right to regulate pollution in the EEZ).

35. Id. art. 56 (2).

36. Id. art. 56 (3).

37. While the EEZ includes other, minor elements, the continental shelf and fisheries zone are its primary elements.

38. LOS Convention, supra note 1, art. 76 (3).

39. The only coastlines that are not within 200 miles of the deep ocean floor are those of northern Europe, most of the Atlantic and Caribbean coastlines of the Americas, the coastlines of the Yellow Sea and the Sea of Okhotsk, and most of the coastline of the South China Sea.

Hence, while articles 76 through 85 essentially recreate the continental shelf regime created by the 1958 Convention on the Continental Shelf and apply it to the use of the seabed and subsoil of a continental shelf within an EEZ, the seabed and subsoil of EEZs lacking a continental shelf are governed exclusively by the EEZ regime.[40] This discrepancy in jurisdiction is important because while reproduction of the language of the 1958 Convention on the Continental Shelf in the LOS Convention[41] was almost certainly intended to retain the continental shelf jurisprudence and customary international law developed since 1958,[42] these legal developments would be inapplicable to the exploitation of resources of the seabed and subsoil in the deep ocean floor areas of EEZs. So, while use of the same language from the 1958 Continental Shelf Convention indicates an intent to maintain the status quo on the continental shelf regime in place since 1958, this discrepancy may eventually produce significant disputes over the legal principles applicable to the seabed and subsoil within EEZs but beyond the continental shelf.[43] The potential for international disputes increases when the problems surrounding the term "sovereign rights" are considered.

These problems arise when one attempts to define a coastal State's "sovereign rights" in its EEZ. In the 1958 Convention on the Continental Shelf the term was used as "a compromise term devised to deal, not with the nature of the coastal State's power, but with the definition and extent of the continental shelf and its legal separation from the

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40. LOS Convention, supra note 1, art. 56 (1) (a) and (2).

41. The following is article 77 of the LOS Convention, with the exception of the bracketed material which indicates the wording of the article 2 of the Convention on the Continental Shelf, the articles are identical.

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> 2. The rights referred to in paragraph 1 [of this article] are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities[, or make a claim to the continental shelf,] without the express consent of the coastal State.
>
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
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> 4. The natural resources referred to in this Part [(the Convention on the Continental Shelf uses the words "in these articles")] consist of the mineral and other non-living resources of the sea-bed [(the convention on the Continental Shelf does not hypenate "seabed")] and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

LOS Convention, supra note 1, art. 77; Convention on the Continental Shelf, art. 2, as quoted in Knight, The Law of the Sea: Cases, Documents, and Readings at 9-69.

42. E.g., the equidistance principle in apportioning the continental shelf announced by the International Court of Justice in the North Sea Continental Shelf Cases as quoted in I New Direction in the Law of the Sea 134 (1973).

43. See text accompanying footnotes 49-50, infra.

waters and their living natural resources."[44] The negotiating history of the 1958 Convention on the Continental Shelf indicates two things: (1) that although the term "sovereign rights" was accepted as a compromise, some States still consider it as equaling sovereignty; and (2) the compromise was made only to prevent jurisdiction over the superjacent waters.[45] Since sovereignty over the waters of the EEZ is impossible under the provisions of the LOS Convention[46] and since jurisdiction over the waters of the EEZ is expressly limited by the convention, neither of the rationales which serve to define the term "sovereign rights" in the 1958 Convention on the Continental Shelf is applicable to the articles concerning the EEZ in the LOS Convention. This inapplicability creates a theoretical problem because, while these two rationales should still serve to define "sovereign rights" as used in the LOS Convention articles on the continental shelf,[47] a completely different theoretical basis is needed to define the same term as used in the articles on the EEZ. The wording of article 56 compounds the problem by using "sovereign rights" to describe the coastal State's jurisdiction in the EEZ while referring to Part VI of the convention which uses "sovereign rights" to describe the coastal State's jurisdiction over the continental shelf. Thus, a term that was intentionally given two different meanings is blithely referred to in article 56 as though it had only one.[48]

Deciding what version of "sovereign rights" applies to the seabed and subsoil within the EEZ but beyond the continental shelf is difficult. If the continental shelf version is applied to this area, then the coastal State has the exclusive right to exploit the non-living resources in the zone. If the EEZ version of "sovereign rights" is applied, then the most likely definition of the term is "preferential rights," which is the practical meaning of the term with regard to living resources in the EEZ.[49] If this definition is used, article 59 would have to be invoked to resolve particular conflicts "on the basis of equity and in the light of all the relevant circumstances"[50] since no system exists for resolving disputes over access to these non-living resources. Unfortunately, since

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44. O'Connell, supra note 4, at 477.

45. Id. at 480.

46. "Sovereignty" implies territorial sovereignty and with the exception of article 57 of the LOS Convention which simply states the breadth of the EEZ, every article in the EEZ section of the convention elaborates rights and duties which are totally inconsistent with the notion of territorial sovereignty.

47. See text accompanying footnotes 39-40, supra.

48. Section 1 (a) of article 56 uses the words "sovereign rights," and section 3 qualifies those rights by refering to Part VI of the LOS Convention which uses the same term to define the coastal States' rights concerning the continental shelf.

49. The EEZ "is only exclusive so far as [mineral resources] . . . are concerned; it is essentially only preferential so far as [fisheries resources]. . . are concerned." O'Connell, supra note 4, at 552.

50. LOS Convention, supra note 1, art. 59.

article 59 leaves the means of resolution solely with the disputing parties (*i.e.*, the typical process of settling international disputes) and since these disputes will be resolved individually, development of a universally acceptable definition of "sovereign rights" concerning non-living EEZ resources beyond the continental shelf may never be achieved.

These problems are the result of the LOS Convention's grafting together two distinct concepts (fisheries jurisdiction and continental shelf jurisdiction) with a label rather than developing a single regime encompassing both. Yet, the development of the EEZ concept is neither artificial nor an aberation in international law;[51] instead, the convention's failure to recognize the naturally developing EEZ concept resulted in a theoretically and legally unsatisfactory patchwork regime. Thus, the dual meanings of the same term in the same area of ocean space cannot be reconciled. One solution would be to treat exploitation and exploration of non-living resources of the seabed and subsoil within the EEZ but beyond the continental shelf as the exclusive right of the coastal State and to treat exploitation and exploration of the living resources in the waters of the EEZ as preferential rights. However, this solution is unsupported by the language of the convention and would probably be rejected by States with the technology to reach deep ocean areas.

Yet another problem is deciding whether the fisheries jurisdiction provisions in the convention's EEZ articles constitute a mere boundary extension or a fundamental change in the content of fisheries jurisdiction. However, "[u]nless the new practice of States is clearly to the contrary, it is preferable to suppose that the [existing fisheries] doctrine remained constant [and that] . . . a change in area rather than in context [occurred.]"[52] The degree to which a change in context is likely, though, depends on how many industrial nations ratify the convention. If few industrial nations participate, then existing notions of fisheries jurisdiction may be overturned by those developing States ratifying the convention, *i.e.*, the concepts of common heritage of mankind and the new international economic order may replace the concept of property rights.

In addition to the rights discussed above, the LOS Convention imposes important duties on the coastal State. First, although the coastal State has exclusive authority to build and regulate man-made structures in the EEZ, to ensure safety of navigation the coastal State must provide due notice of their construction and continued presence, and must remove all abandoned structures.[53] While these structures do not themselves possess a territorial sea and do not affect the delimitation of any other

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51. See text accompanying footnotes 20-26, supra.

52. O'Connell, supra note 4, at 542-543.

53. Article 60 (3) of the LOS Convention also stipulates that the coastal state have due regard for the environment, fishing, and the rights of other states when removing the structures.

area of jurisdiction,[54] the coastal State may designate (and other States must respect) surrounding safety zones that do not interfere with recognized sea lanes essential to international navigation.[55]

The second duty imposed on the coastal State by the convention restricts exploitation of living resources in the EEZ. While "the coastal State . . . determine[s] the allowable catch of living resources in its [EEZ],"[56] the coastal State must ensure that living resources are not endangered by over-exploitation[57] and must maintain these resources at maximum sustainable yield.[58] (Maximum sustainable yield is the point at which the rate of harvest is matched by the rate of growth in the population of living resources reaching harvestable stage.[59]) In addition to conservation, "the coastal State [must] . . . promote optimium utilization of the living resources in the [EEZ]."[60] This mandate requires the coastal State to allow foreign States access to whatever surplus the coastal State itself cannot harvest from the allowable catch.[61] In providing access to the surplus, the coastal State must consider all relevant factors such as the significance of the resource to its own economy, the requirements of developing States in the region, and the need to minimize economic dislocation of States that have habitually fished or have made substantial efforts at reseach and identification of stocks in the EEZ.[62] In return, the nationals of other States must comply with the conservation measures and other regulations established by the the coastal State that are consistent with the other provisions of the convention.[63] The coastal State must give due notice of any such laws and regulations.[64]

In enforcing these regulations, and any others that protect the coastal State's exercise of its sovereign rights in the EEZ, the coastal State may employ such measures as "boarding, inspection, arrest and judicial

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54. LOS Convention, supra note 1, art. 60 (8).

55. Id. arts. 60 (4) through (7).

56. Id. art. 61 (1).

57. Id. art. 61 (2).

58. Id. art. 61 (3).

59. H. Knight, Managing the Sea's Living Resources, 8 (1977). Generally, MSY is thought of as referring to annual recurrences of fish stocks. However, some Japanese fishermen engage in "pulse fishing" in which a stock is depleted to the point where continued fishing is uneconomical; after two or three years, when the stock has recovered sufficiently so that fishing is once more economically sound, the fishermen return to fish that stock.

60. LOS Convention, supra note 1, art. 62 (1).

61. Id. art. 62 (2). However, the method of calculation a coastal State uses to determine its catch seems very subjective and perhaps could be deliberately manipulated to prevent a surplus. See note 143 infra.

62. Id. art. 62 (3).

63. Id. art. 62 (4). This article also contains a long illustrative list of things the coastal State may regulate, e.g., licensing of vessels, fee payments, determining catch quotas, fixing harvest seasons, placing observers on foreign vessels, requirements for the transfer of fishing technology to the coastal State, and enforcement procedures.

64. Id. art. 62 (5).

proceedings,"[65] but imprisonment of foreign nationals is not permitted without agreement from the flag State.[66] Prompt notification of the flag State of arrest, detention, and sanctions,[67] as well as the prompt release of crews and vessels upon the posting of reasonable security[68] is also required by the convention.

Where stocks occur within the EEZs of two or more coastal States (*i.e.*, the size or migration pattern of the stock results in a trans-boundary stock), the States are required to seek agreement on conservation and development measures.[69] Similarly, States are to cooperate in conserving and promoting optimum exploitation of highly migratory species occurring thoughout the region, within and beyond the EEZ.[70]

"States in whose rivers anadromous stocks originate . . . have . . . primary interest in and responsibility for such stocks"[71] and must "ensure their conservation by the establishment of appropriate regulatory measures . . . [within] its exclusive economic zone. . . ."[72] Fisheries for anadromous stocks are limited to within the State of origin's EEZ unless economic dislocation to another State would result, in which case the States involved are to maintain consultations with a view to achieving agreement on fishing operations beyond the EEZ.[73] Cooperation to minimize economic dislocation of other States exploiting anadromous stocks is also mandated.[74] (At least one author believes that restricting anadromous harvesting to within EEZs will result in illegal anadromous fishing on the high sea where effective enforcement is impossible.[75]) If anadromous stocks migrate through the EEZ of another State, that State must cooperate with the State of origin in conserving and managing the stocks.[76] (A similar, though less complex, management scheme exists for catadromous species.[77])

Sedentary species ("organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in

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65. Id. art. 73 (1).
66. Id. art. 73 (3).
67. Id. art. 73 (4).
68. Id. art. 73 (2).
69. Id. art. 63 (1). Article 63 (2) provides for the similar situation of stocks occurring in more than one zone as well as outside the EEZs in question.
70. Id. art. 64 (1).
71. Id. art. 66 (1).
72. Id. art. 66 (2).
73. Id. art. 66 (3) (a).
74. Id. art. 66 (3) (b).
75. See generally, Copes, The Law of the Sea and Management of Anadromous Fish Stocks, 4 Ocean Development and Int'l L. J. 233 (1977). Although Copes' article considers the informal negotiating text rather than the final accepted version, the subsequent changes in the sections he discusses were minor and his observations are still relevant.
76. LOS Convention, supra note 1, art. 66 (4).
77. Id. art. 67.

constant physical contact with the seabed or subsoil"[78]) are specifically excluded from the EEZ regime by article 68. These species are regulated under Part VI of the convention—the continental shelf regime.[79] Once again, problems arise because the convention failed to create a single zone of uniform jurisdiction. The exclusion of sedentary species from the EEZ regime (the definition quoted above does not restrict itself to the continental shelf) and the geological limits of the continental shelf[80] mean that sedentary species within the EEZ but beyond the continental shelf are not subject to any governing regime. This omission is quite important because, while it can be argued that non-living resources located beyond the continental shelf should be treated the same way as those located on the shelf, this logic loses force when applied to living resources. Thus, the question left unanswered by the convention is whether sedentary species are subject to the "exclusive rights" regime of the continental shelf or the "preferential rights" regime of the waters of the EEZ. Since many sedentary species migrate,[81] legal and political arguments will certainly arise over questions such as whether the coastal State has proprietary rights to migratory sedentary species, whether the coastal State can attempt to prevent sedentary species from leaving the continental shelf, and whether a regime similar to that created for anadromous species is scientifically required. The language of the convention provides no answers.

The final important element of the convention's EEZ regime that must be discussed is the EEZ rights of land-locked and geographically disadvantaged States (States whose access to the sea is severely restricted by the proximity of neighboring States). Articles 69 and 70 ostensibly give land-locked and geographically disadvantaged States the right to participate in an appropriate part of the living resource surpluses of the EEZs in their region. However, "[t]he provisions of articles 69 and 70 do not apply in the case of a coastal State whose economy is overwhelmingly dependent on . . . the living resources of its exclusive economic zone."[82] In an age of increasingly complex and sensitive economies, little evidence (and little propaganda) is needed to demonstrate that virtually any economy is "overwhemlingly dependent" on the living resources of its EEZ. Yet, even if coastal States eschew this course of action, the language quoted from article 71 means that as coastal States become more dependent on their EEZs, the right of land-locked and geographically disadvantaged States to participate in the living resources

78. Id. art. 77 (4).

79. Id.

80. See, id. art. 76 (4).

81. For example, lobsters (if considered a sedentary species) travel across the seabed and certain mollusks change the location of their beds. It should be remembered, though, that immobility is not a necessary characteristic of sedentary species.

82. LOS Convention, supra note 1, art. 71.

of those EEZs will correspondingly decrease—despite their own increasing dependence on that participation. Thus, if the right of participation granted by articles 69 and 70 is ever granted, political conflict will be inevitable because these nations will claim that they have historical fishing rights and that the coastal State is bound by article 62 to minimize economic dislocation to them. To avoid this problem it seems certain that coastal States will never permit such participation, and thus, articles 69 and 70 will never be more than words.

Clearly, the EEZ regime of the convention has many inherent problems, most resulting from the failure to develop a comprehensive scheme of jurisdiction for the developing EEZ concept, rather than simply binding together fisheries and continental shelf jurisdiction. The convention did not even attempt a codification of customary international law concerning the EEZ.[83] Even if it had, though, the low number of States ratifying the document will be considered as evidence that it did not codify customary international law.[84] Therefore, barring widespread acceptance of the convention, customary international law on the EEZ will continue to develop.[85] Therefore, not only is an examination of current customary international law on the EEZ appropriate, but since technological developments "are [already] outstripping the foresight and political capacity of [LOST] negotiators,"[86] consideration of customary international law is imperative.

Customary International Law and the EEZ Concept

As mentioned briefly earlier,[87] the slow trend of increasing jurisdiction over ocean space accelerated dramatically when several Latin American states asserted patrimonial sea and economic zone claims of several Latin American countries. The subsequent acceptance of the EEZ concept in the LOS Convention indicates that the time was right for

83. Thus, despite the fact that the Fisheries Jurisdiction Case provided three possible grounds supporting an EEZ regime, the LOS Convention paid little, if any attention to the decision. O'Connell, supra note 4, at 542.

84. Colombia-Peru Asylum Case (Col. v. Peru) 1950 I.C.J. (Judgment on the Merits) as reported in 17 I.C.J. Rep. 280, 285 (1950).

85. As of May 1984, the number of LOS Convention signatories was 132, representing seventy-seven per cent of the world's recognized States. Nevertheless, only ten States (the Bahamas, Belize, Egypt, Fiji, Ghana, the Ivory Coast, Jamaica, Mexico, the Phillipines, and Zambia) had ratified the convention by this time and sixty ratifications are necessary for the convention to enter into force. National Advisory Committee on Oceans and Atmosphere, The Exclusive Economic Zone of the United States: Some Immediate Policy Issues, 47 (1984). In fact, even if sixty States ratify the convention and it enters into force, this will represent less than half of the nations of the world and would not be sufficient to create a customary norm by itself.

86. Burke, National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea, 9 Ocean Development & Int'l L.J. 289, 290 (1981) (footnote omitted) [hereinafter cited as Burke].

87. See text accompanying footnotes 3-8, supra.

both the concept and the increase in jurisdiction. Since negotiations on the LOS Convention began, several States have unilaterally claimed EEZs which vary in content and in the degree of authority claimed over the area. Hence, if the LOS Convention is not widely accepted, the slow process of developing an internationally acceptable EEZ content will continue.

Development of a rule of customary international law requires four basic elements: (1) the activity or restraint from activity must involve a sufficient number of States to constitute general practice (the quantitative element); (2) adherence to the practice must be out of a perception that is a binding norm, and not simply a gesture of comity (the psychological element); (3) the norm must be followed by a substantial majority of the specially affected States (the qualitative element); and (4) the practice must continue for an indefinite period of time which varies, depending on the degree to which the other three elements are met (the temporal element).[88] Both the concept and content of the exclusive economic zone must be evaluated according to these criteria to determine what law will govern EEZ claims if the LOS Convention fails to become customary international law.

Since 1975, when UNCLOS III reached tentative agreement on a 200 mile zone, the number of States claiming such a zone has increased so sharply that currently over two-thirds of all coastal States and all industrial maritime States claim a 200 mile zone.[89] And although "[p]ersistent and timely protest by a state to an emerging customary norm may render the norm inapplicable as against that state,"[90] few of the States claiming zones of less than 200 miles have protested the 200 mile claims of others.[91]

Such widespread acceptance which includes the industrial maritime nations probably satisfies the quantitative and qualitative elements necessary for international legal acceptance of the EEZ concept. The temporal element, if not already satisfied, will certainly be satisfied soon unless the claiming States uncharacteristically (and unbelievably) renounce their claims. The only element not obviously satisfied is the psychological element; yet it seems certain that if the claiming States do not presently consider their claims to be part of a binding customary norm, they will eventually consider it a binding customary norm as the number of coastal

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88. Arrow, The Customary Norm Process and the Deep Seabed, 9 Ocean Development & Int'l L.J. 1, 3-4 (1981) [hereinafter cited as Arrow].

89. Grolin, The Future of Law of the Sea: Consequences of a Non-Treaty or Non-Universal Treaty Situation, 13 Ocean Development & Int'l L. J. 1, 9 (1983).

90. Arrow, supra note 88, at 4 (footnote omitted).

91. Grolin, supra note 89, at 9.

States claiming 200-mile EEZs increases.[92] Indeed, the EEZ concept is probably already part of customary international law.[93]

While acceptance of the EEZ concept is proof that "[t]he law of the sea has slowly evolved from Grotius' free use regime to a modified Seldonian regime"[94] of national jurisdiction over the ocean, the legal content of the EEZ is still developing. Although the early 200 mile claims by Latin American countries were ostensibly territorial,[95] the claimants "disavowed the intention of interference with shipping, and even of overflight outside twelve miles, . . . a qualification . . . inconsistent with the claim to territorial waters."[96] This qualification, inconsistent with a claim of territorial expansion, indicates that even in its earliest form the EEZ was not a claim to absolute sovereignty over the area. In fact, using language which indicated territorial claims but immediately qualifying that language (probably to avoid attracting unfavorable attention from the world's major naval and maritime powers) arguably indicates that these territorial-sounding claims actually spoke to two different audiences: domestic and international. Essentially, grandiose "territorial" claims were made for domestic consumption, while more modest claims to economic resources were presented for international scrutiny. If this analysis is correct, few States have actually made territorial claims of 200 miles.

Considering the difficulty in determining what "sovereign rights" means in both the 1958 Continental Shelf Convention and the LOS Convention,[97] discovering the true jurisdictional content of EEZ claims around the world would seem impossible. However, given the United States' fear of creeping territorial sovereignty over the ocean (a concern shared by other maritime nations),[98] the accepted customary norm of EEZ jurisdiction certainly stops somewhere short of territorial sovereignty.[99] Supporting this conclusion is that aside from claims of twelve-mile territorial seas, all other recognized assertions of ocean jurisdiction have been subject to certain limits.

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92. The trend toward claiming an EEZ and supporting the EEZ concept will likely continue with developing countries, particularly those with long coastalines and without the capability of fishing in distant waters. Shyam, Extended Maritime Jurisdiction and Its Impact on Southeast Asia, 10 Ocean Development & Int'l L. J. 93, 95 (1981).

93. "It is clear that . . . unilateral extensions [of jurisdiction] have been greeted with majority support of the nations of the world, making such extension the new customary norm." Macrea, supra note 23, at 222; see also, Grolin, supra note 89, at 9; Burke, supra note 86, at 290; and O'Connell, supra note 4, at 570.

94. Macrea, supra note 23, at 222.

95. O'Connell, supra note 4, at 557.

96. Id.

97. See text accompanying footnotes 44-50, supra.

98. Booth, The Military Implications of the Changing Law of the Sea, in Gamble, Law of the Sea: Neglected Issues 341-345 (1979).

99. The probable limits of EEZ jurisdiction are considered in greater detail below. See text accompanying footnotes 171-173, infra.

The Internationally Accepted EEZ Content

Discussing the internationally accepted content of the EEZ is difficult, not only because the concept is still in the early stages of development, but because the zone's label implies comprehensiveness. In fact, since few elements of currently claimed EEZs are similar enough to permit conclusions about currently accepted EEZ content, listing those things that a State cannot claim as part of its EEZ may eventually be the only efficient way to define its content.[100] In fact, as recently as 1981 a survey of the claims of thirty-nine of the fifty States then claiming an EEZ revealed "a substantial disparity in the concept [and content] of the economic zone."[101] Thus, while "[t]here can be no serious question remaining that insofar as resources are concerned, coastal-state exclusive authority extends beyond the territorial sea to a limit of 200 nautical miles[, state practice does not reveal concurrence] . . . on the specific authority permitted to be exercised within the zone."[102]

An EEZ claim typical of those currently claimed by developing States permits foreign access to living resources which the coastal State is unable to exploit, limits exploitation of mineral resources exclusively to the coastal State, and provides that the coastal State has the right to control, supervise, and participate in all stages of scientific research in the zone.[103] As far as claims to living resources in the EEZ are concerned, the Fisheries Jurisdiction Case indicated that fisheries jurisdiction beyond twelve miles could only be preferential, particularly when historical fishing patterns are involved.[104] Although this conclusion would limit fisheries jurisdiction, the question of what species the coastal State can regulate is unclear. The United States' position is that while highly migratory species (*i.e.*, tuna) are not susceptible of coastal State jurisdiction, anadromous species are only exploitable by the river of origin State and only within that State's EEZ.[105] As long as the position of the United States (a specially involved State whose participation is needed to satisfy the qualitative aspect of customary norm formation) is contrary to general State practice, the formation of a customary norm of fisheries jurisdiction will be delayed.[106]

Jurisdiction over minerals and energy production in the EEZ is more firmly established, however. Since the United States has itself claimed the exclusive right to minerals and energy production in the EEZ, the United States obviously recognizes that the coastal State has exclusive

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100. See text accompanying footnotes 174-177, infra.

101. Burke, supra note 86, at 312.

102. Id. at 311.

103. Suman, A Comparison of the Law of the Sea Claims of Mexico and Brazil, 10 Ocean Development & Int'l L. J. 131, at 151 (1981).

104. The Fisheries Jurisdiction Cases, supra note 21, at 262-263.

105. EEZ Proclamation, supra note 2.

106. See text accompanying footnotes 87-100, supra.

rights to these resources.[107] Thus, this aspect of the claims of developing countries apparently satisfies all the requirements for establishing a customary international law.

Though most States claiming an EEZ include exclusive authority over scientific research within their EEZ jurisdiction,[108] this aspect of EEZ claims has yet to coalesce sufficiently for one to conclude that such absolute authority is consistent with customary international law. And while the United States has recognized the legitimacy of coastal State jurisdiction over scientific research, the United States has not specified what degree of scientific research jurisdiction it considers consistent with international law.[109]

Thus, in customary international law the concept of the EEZ has been accepted as has been the following content:

1. a 200 mile width;
2. exclusive rights of the coastal State to all existing and potential non-living resources within the zone;
3. preferential rights of the coastal State to most living resources within the zone (highly migratory species and anadromous species are excluded primarily because the United States does not recognize their inclusion);
4. exclusive authority of the coastal State to regulate marine scientific research in the zone;
5. exclusive right of the coastal State to build structures within the zone as long as they do not substantially interfere with established lanes of international navigation. The issues of foreign access to living resource surpluses, whether all living resources are subject to the preferential rights of the coastal State, and methods of enforcement of coastal State regulations in the EEZ have yet to coalesce into customary international law.

THE UNITED STATES' EEZ CLAIM

Reagan Administration Activity

On July 9, 1982, the United States, stating that it objected to the LOS Convention's provisions concerning the seabed but endorsed the remaining provisions, announced its decision not to sign the LOS Con-

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107. EEZ Proclamation, supra note 2. This is considered in detail in text accompanying footnotes 111-117, infra.

108. Burke, supra note 86, at 293.

109. United States Ocean Policy, Statement by the President, 10 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983) [hereinafter referred to as the EEZ Statement].

vention.[110] Eight months later, President Reagan proclaimed "the sovereign rights and jurisdiction of the United States . . . within [a 200-mile] Exclusive Economic Zone. . . ."[111] The significance of this claim for the future of the United States has been considered as potentially "greater than the 1803 Louisiana Purchase acquisition—considering the rate of depletion of the Earth's natural resources on land and the potential that the oceans are believed to have for addition to our resource base."[112]

The EEZ Proclamation announced that within 200 miles of United States territory and possessions[113] the United States "has, to the extent permitted by international law, . . . sovereign rights for the purpose of exploring, exploiting, conserving and managing resources, both living and non-living, of the seabed and subsoil and superjacent waters . . . [including] the production of energy from the water, currents and winds."[114] The United States announced jurisdiction within the EEZ over "the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of marine environment."[115] The EEZ Proclamation did not change United States policy concerning the continental shelf, marine mammals, fisheries, or highly migratory species of tuna which remain exempt from United States jurisdiction.[116] While the United States recognizes the right of a coastal State to exercise jurisdiction over marine scientific research in an EEZ, the EEZ Proclamation did not assert this right.[117] Finally, the United States' EEZ does not affect "the high seas freedoms of navigation, overflight, laying of submarine cables and pipeline, and other internationally lawful uses of the sea."[118]

The United States' EEZ encompasses 3.9 billion acres, compared to the 2.3 billion land acres of the United States and its territories.[119] Thus, while the United States was formerly "looking at a billion acres of offshore territory. Today, . . . [the United States is] looking at nearly four times that amount."[120] And while the United States had already

110. Wertenbaker, The Law of the Sea—II, The New Yorker, August 8, 1983, at 80-81.

111. EEZ Proclamation, supra note 2.

112. National Advisory Committee on Oceans and Atmosphere, The Exclusive Economic Zone of the United States: Some Immediate Policy Issues, 1 (1984) [hereinafter cited as NACOA].

113. The United States' EEZ claim includes Puerto Rico and the trusteeship of the Northern Mariana Islands.

114. EEZ Proclamation, supra note 2.

115. Id.

116. EEZ Statement, supra note 110.

117. Id.

118. EEZ Proclamation, supra note 2. Evidently to avoid any possible confusion such as resulted after the Truman Proclamations, this disclaimer of interference is mentioned twice in the EEZ Proclamation and twice in the Statement by the President accompanying it.

119. NACOA, supra note 113, at 1.

120. Pendley, The U.S. Exclusive Economic Zone: The Ways and Wherefores, in Exclusive Economic Zone Papers 46 (1984).

asserted fisheries jurisdiction over this area via the 1976 Magnuson Fisheries Conservation and Management Act,[121] the United States added greatly to its petroleum and mineral jurisdiction in areas not covered by the 1958 Convention on the Continental Shelf which tied jurisdiction to the existence of a continental shelf.[122]

Thus, while the EEZ Proclamation does not change fisheries resources potential,[123] it significantly increases authority over potential sources of energy and mineral wealth. Currently, oil and gas revenues just from the continental shelf approach $33 billion.[124] Not surprisingly, "[t]he U.S. is placing great reliance on the [EEZ] as a future energy source,"[125] and "[t]he offshore industry is on the verge of significantly expanding its oil and gas exploration in the U.S. Exclusive Economic Zone [with greater] . . . emphasis on the remote frontier regions in deep water and Arctic . . . areas."[126] EEZ jurisdiction will also provide exclusive access to strategically important minerals beyond the continental shelf.[127] While interest in deep ocean manganese nodule mining is currently diminished, interest has increased in the significant volumes of cobalt-rich ferromanganese crusts which are found in shallower waters (less than 3000 feet) within the United States Central Pacific EEZs.[128]

Implementing Legislation for the EEZ

Though the EEZ Proclamation alone ensured the United States' interests in these resources, implementing legislation was introduced in Congress in 1984. Enacting legislation implementing the EEZ proclamation would force Congress to decide two important issues. The first is deciding to what degree implementing legislation is needed—should the United States simply amend existing legislation to be consistent with the EEZ Proclamation or should comprehensive EEZ legislation be enacted. And second, if comprehensive legislation is adopted, Congress must decide what form the legislation should take.

The need for some form of implementing legislation is great, primarily because of the current lack of coordinated activities among

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121. 16 U.S.C. 1811 (Supp. 1984).

122. Convention on the Continental Shelf, Geneva, April 29, 1958, art. 1, as cited in I New Direction in the Law of the Sea 101 (1973).

123. This remains essentially what it was under the MFCMA: between 10 and 20 percent of the world's marine protein. Sloan, The Fishing Industry & the Future: Confronted with Limitless Opportunites, 10 J. of Contemp. Bus. 45, 46 (1981).

124. Curlin, Technology and Oil and Gas Development in the Exclusive Economic Zone, in Exclusive Economic Zone Papers 47 (1984).

125. *Id.*

126. Id. at 49.

127. EEZ Statement, supra note 110.

128. Commeau, Clark, Johnson, Manheim, Aruscavage, Lane, Ferromanganese Crust Resources in the Pacific and Atlantic Oceans, in Exclusive Economic Zone Papers 62 (1984) [hereinafter cited as Commeau].

government agencies. Recognizing this problem, the National Advisory Committee on Oceans and Atmosphere stated that "[i]f we do not design an effort to better define the resources of our [EEZ] acquisition and such environmental limits as might exist to recovery [of those resources], future development of the EEZ may be more like opening the [EEZ] trunk with a crowbar instead of a key."[129] Fearing that comprehensive implementing legislation might interfere with rather than encourage exploitation of the EEZ, the National Advisory Committee on Oceans and Atmosphere has recommended that no comprehensive legislation be enacted.[130] The committee based its conclusion on findings that no development opportunities are currently constrained by a lack of comprehensive EEZ legislation and that no significant legislation is at odds with the EEZ Proclamation.[131] This finding represents the position of those advocating amending existing legislation as needed rather than enacting a comprehensive EEZ regime.

A modification of this "amendment" position has recently been proposed—on March 10, 1983, the day the President proclaimed the United States EEZ, Congressman John Breaux and Senator Ted Stevens jointly sponsored legislation to implement "the goals and declarations which the President . . . [stated] in his proclamation of an [EEZ]."[132] While their bill proposes comprehensive EEZ legislation, it does so largely by amending existing legislation which already regulates activities in the EEZ. But before this bill is examined in detail, the reason for the United States' opposition to the LOS Convention should be recalled. The United States opposed the convention's regime for managing deep seabed resources, but the United States favored the convention's EEZ regime. Hence, implementing legislation which differs from the convention's EEZ regime must be evaluated according to both domestic and international interests of the United States. The argument for EEZ implementing legislation that is in harmony with the LOS Convention is that United States interests would suffer greatly if other nations felt free to develop their own EEZ regimes irrespective of the LOS Convention's EEZ consensus.[133] Since an international consensus currently exists for an EEZ regime acceptable to the the United States, creation of a United States EEZ regime that is significantly different from that in the LOS Convention would actually inhibit the development of a customary norm acceptable to the United States. By creating a unique EEZ, the United

129. NACOA, supra note 113, at 1.

130. NACOA, supra note 113, at 6.

131. Id.

132. Breaux/Stevens bill, supra note 3. With the exception of a closing section in Senator Stevens' bill which restricts foreign fishing in the U.S. EEZ, the bills are identical and will be discussed as though they are one document.

133. Belsky, International Issues Raised by the Exclusive Economic Zone, in Exclusive Economic Zone Papers 110 (1984) [hereinafter cited as Belsky].

States would lose the value of international consensus as a factor in establishing an acceptable rule of customary international law. Since the EEZ claims made prior to entry into force of the LOS Convention have generally conformed to the regime set out in the convention,[134] even if the convention never enters into force, it is currently serving as the catalyst for the development of a customary norm. "With 58 other States currently claiming EEZs, and the number almost certain to grow, the exertion of certain jurisdictions by other States within their EEZs may well jeopardize U.S. navigational freedoms . . . [by creating zones which regulate maritime traffic] according to the coastal State's, not international, rules and standards."[135] Clearly, the possibility of creeping territorial jurisdiction and deliberate over-regulation of international shipping are major reasons why the United States' position on the EEZ should not vary substantially from the provisions of the LOS Convention. In fact, with few exceptions, the EEZ of the convention is consistent with United States interests.[136]

The first difference from the LOS Convention is the United States' position that highly migratory species of tuna are not subject to any EEZ jurisdiction;[137] this position appears to block any chance of the United States' EEZ coinciding with the LOS Convention's EEZ. However, this problem may be easily solved by article 64 of the LOS Convention which addresses the issue of highly migratory species by requiring States to cooperate "with a view to ensuring conservation and promoting the objective of optimum utilization throughout the region, both within and beyond the [EEZ]." Using the spirit of this provision as a foundation, the United States would be able "to develop both formal and informal regional arrangements for the conservation and management of tuna resources."[138] The viability of this course of action will depend on whether the United States has sufficient faith in its diplomatic and economic power to implement it successfully.

The second major difference between the two EEZ regimes is contained in the EEZ legislation proposed by Senator Stevens. In section 103 of Title III, Senator Stevens' bill would amend the MFCMA to phase out all foreign fishing in the EEZ by 1988.[139] Such action would be irreconcilable with the LOS Convention's EEZ which requires coastal States to permit foreign access to the surplus of the allowable catch.[140] This section was added by Senator Stevens out of a feeling that the

134. NACOA, supra note 113, at 7.

135. Id. at 8.

136. Belsky, supra note 132, at 108.

137. EEZ Proclamation, supra note 2, and Breaux/Stevens bill, supra note 3, Title I, section 102.

138. Belsky, supra note 132, at 110.

139. Breaux/Stevens bill, supra note 3, Title III, section 103 (11).

140. LOS Convention, supra note 1, art. 62.

United States "must reassert . . . [its] intention to fully develop and control the fishery resources within . . . [its] waters."[141] This sharp deviation from the provisions of the LOS Convention is unnecessary. Under the LOS Convention a coastal State must permit foreign fishing of whatever stock surpluses the coastal State does not itself harvest[142]—a modest requirement that nevertheless appears easily, but legally, circumvented by the coastal State.[143] Under the MFCMA, foreign fishermen are allowed access to stocks within 200 miles of the United States provided a surplus exists after the domestic annual harvest is subtracted from the optimum yield.[144] As long as this formula is used, the MFCMA and the LOS Convention are in agreement.[145] Thus, the United States can remain substantially consistent with the LOS Convention and still "fully develop and control" its fishery resources without excluding all foreign fishing from the EEZ.[146]

However, even if this section of Senator Stevens' bill is not enacted, Title III, section 103 (8) of both bills is contrary to article 62 of the LOS Convention. This section of the Breaux/Stevens bill would amend the MFCMA by making the currently mandatory allocation of surplus stock to foreign fishermen[147] an optional allocation. Since allowing foreign fishermen access to surplus stocks does not impair the domestic fishing industry, this change only serves to distinguish the United States' EEZ regime from that of the LOS Convention. As has been shown, the EEZ regime of the convention is acceptable to the United States and paralleling it is in the United States' best interests. Therefore, this section of the Breaux/Stevens bill is actually counterproductive and should be eliminated.

In describing United States' rights and jurisdiction within the EEZ, Title I, section 102 of the Breaux/Stevens bill[148] is so similar to article 56 of the LOS Convention that, except for section 102's specific exemption from jurisdiction of highly migratory species, their wording is virtually identical. And while section 102 does not claim jurisdiction over marine scientific research, section 105 requires the State Department

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141. 129 Cong. Rec. S2550 (daily ed. Mar. 10, 1983) (statement of Sen. Stevens).

142. LOS Convention, supra note 1, art. 62.

143. Burke, U.S. Fishery Management and the New Law of the Sea, 76 Am. J. of Int'l L. 24, 28-29 (1982).

144. 16 U.S.C. 1821 (Supp. 1984).

145. Cf., Burke, U.S. Fishery Management and the New Law of the Sea, 76 Am J. of Int'l L. 24, 39-40. Professor Burke notes that certain foreign access calculations permitted by the MFCMA are incompatible with the LOS Convention. Nevertheless, these differences may not be great enough to warrant changing the MFCMA to bring the United States EEZ in line with that of the LOS Convention.

146. Since the Breaux bill does not contain a section calling for the eventual exclusion of foreign fishing from the EEZ, adoption of this implementing legislation would be the better choice.

147. 16 U.S.C.A. section 1821(d)(4) (Supp. 1984).

148. Stevens Bill, supra note 3.

to submit scientific research requests to those States claiming reasonable and internationally legal jurisdiction over scientific research in their EEZ.[149] Marine research jurisdiction is not claimed by the United States because the United States considers this research a traditional freedom of the high seas.[150] Accordingly, section 103 states that marine research and the other traditional freedoms of the high seas[151] are not affected by United States EEZ jurisdiction. Thus, with the exception of the issue of highly migratory species discussed above, section 103 is in substantial agreement with the LOS Convention.[152] It should be noted, though, that American marine scientific research may be handicapped if the United States fails to pass legislation which includes "specific encouragement for . . . [other States] to adopt a [similar] less restrictive approach"[153] to jurisdiction. The current language of the Breaux/Stevens bill does not clearly or strongly demonstrate the United States' position on marine scientific research; thus, without a clear expression of United States policy as an inhibition, other States will individually determine marine research jurisdiction—as is currently permitted by international law.[154] This failure to present forcefully the United States' position on marine research evidently stems from confusion about the United States' position on marine research. In the President's statement on the EEZ, marine scientific research is clearly not considered a freedom of the high seas;[155] unfortunately, the Breaux/Stevens bill is not so clear. Section 103 lists marine research as a freedom of the high seas; yet section 105 requires the Secretary of State to negotiate with coastal States that exercise jurisdiction over marine research in a reasonable and internationally legal manner. Such action by the Secretary of State would constitute recognition that marine research is not a freedom of the high seas; thus, sections 103 and 105 are contradictory. Perhaps this inconsistency resulted

149. The exact language of section 105 is jurisdiction exercised "in a reasonable manner that is not inconsistent with international law." Such negative phrasing is also typically used by the ICJ when an activity is challenged as illegal, and simply reflects the fact that international law, as a legal system, is still in the early stages of development.

150. Regardless of whether or not marine scientific research is a traditional freedom of the high seas, sections 103 and 105 (while somewhat inconsistent) support the position stated in the President's statement accompanying the EEZ Proclamation: the United States does not claim jurisdiction over this activity, but will respect reasonable exercises of such jurisdiction by other States in their EEZ. See text accompanying footnote 118, infra.

151. Section 103 lists them as "including, but not limited to, those pertaining to navigation, overflight, marine scientific research, and the laying and maintenance of submarine cables and pipelines."

152. See LOS Convention, supra note 1, art. 58.

153. Sheen, An Evaluation of Marine Research Policy within the Exclusive Economic Zone, in Exclusive Economic Zone Papers 130 (1984).

154. Id.

155. "While international law provides for a right of jurisdiction over marine scientific research within such a zone, the Proclamation does not assert this right. I have elected[italics] not to do so. . . ." [italics added] EEZ Statement, footnote 110, supra.

from efforts to incorporate the goals of the Studds bill on marine scientific research[156] into the Breaux/Stevens bill. The Studds bill proposes basically the same duties for the Secretary of State as does the Breaux/Stevens bill, and perhaps when the language of the Studds bill was used in the broader EEZ legislation of the Breaux/Stevens bill the inconsistency between sections 103 and 105 was overlooked. This discrepancy is a major flaw that must be eliminated before any version of the Breaux/Stevens bill is enacted or else the United States will risk creating international confusion similar to that which followed the second Truman Declaration.[157] To avoid confusion leading to jurisdictional claims contrary to United States interests, any implementing legislation must (1) state clearly that the United States asserts no jurisdiction over marine research and (2) clearly announce what type of marine research jurisdiction the United States recognizes as internationally legal. If this is not done, the United States will voluntarily and foolishly forfeit its significant power to influence the development of a customary norm for marine research.

The majority of the remaining provisions of the Breaux/Stevens bill simply amend existing legislation to ensure consistency with the goals, coverage, and language of the implementing legislation.[158] However, a few provisions demand special consideration because of their domestic effects.

Section 102 of the Breaux/Stevens bill states that "the United States shall exercise sovereign rights . . . over all fish . . . within the exclusive economic zone." This provision supersedes the MFCMA which proclaims United States jurisdiction solely for conservation and management of fishery resources "without chang[ing] the existing territorial or other ocean jurisdiction of the high seas."[159] By changing federal jurisdiction from mere management to sovereign rights, the bill raises the possibility of federal ownership of fishery resources, which in turn raises the possibility of the federal government imposing licensing or royalty fees

156. H.R. 703, 98th Cong., 1st Sess., 129 Cong Rec. H97, (1983) [hereinafter cited as Studds Bill].

157. The first Truman Declaration claimed the resources of the continental shelf. The second Truman Declaration made no resource claims, but simply announced that the United States had the right to make international agreements concerning fishing off its coasts. Unfortunately, the simultaneous release of the first declaration and the confusing wording of the second declaration so confused other nations that many felt they were simply following suit when they claimed a 200-mile resource zone or patrimonial sea.

158. The amended acts are: The Outer Continental Shelf Lands Act (43 U.S.C. 1331(a)); The Deep Seabed Hard Minerals Act (30 U.S.C. 1401 et seq.); Sections 4496(b), 4497(b), 4498, and subchapter F of chapter 36 of the Internal Revenue Code of 1954; The Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.) With the exception of the previously discussed amendment of the MFCMA to eliminate all foreign fishing by 1988, these amendments basically just make the various provisions consistent in their language.

159. 16 U.S.C.A. section 1801(c)(1) (Supp. 1984).

on domestic fishermen who had no such concern under the MFCMA. To avoid this controversy, section 104 of Title I of the Breaux/Stevens bill states that "[n]othing in this Act is, nor shall be deemed to be, a basis for any royalty, fee, tax, or other assessment of revenue, for fishing by U.S.-flag vessels for living marine resources over which the United States exercises sovereign rights." This express disclaimer prevents any interpretation of the Breaux/Stevens bill giving the United States government either ownership of the fish in the EEZ or the right to exact payment from domestic fishermen for taking fish within the EEZ. This provision would clarify the previously nebulous issue of ownership of fish in the 200-mile zone.[160]

Another amendment to the MFCMA proposed by the Breaux/Stevens bill is pointless and could cause confusion. Title III, section 301(3), of the EEZ Act amends the MFCMA by replacing its definition of the extent of the continental shelf ("the seabed and subsoil [to a point] . . . where the depth of the superjacent waters admits of the exploitation of the natural resources of such areas"[161]) with that of the Outer Continental Shelf Lands Act which defines the continental shelf as essentially "all submerged lands lying seaward [of the coast] . . . of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."[162] Since the 1958 Convention on the Continental Shelf is the source of the language used verbatim in the MFCMA[163] (and quoted above) and since the United States is a party to that treaty, this amendment simply restates the obvious—that the United States exercises as much jurisdiction as it is currently allowed under the Convention on the Continental Shelf. Furthermore, Title II, section 201(a)(1) (covering mineral resources) of the Breaux/Stevens bill proposes a definition of the continental shelf which is essentially the same as article 76(4)(a)(ii) of the LOS Convention.[164] Why this same definition was not used in the living resources section is unclear, but it is far more exact than and should be used in place of the ambiguously worded definition currently proposed for the fishery section of the EEZ Act. Whether or not the LOS Convention enters into force, its provisions anchoring continental shelf jurisdiction to geologic phenomena at least indicate some international consensus on the maximum extent to which any coastal State can "creep" beyond its true continental shelf.[165]

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160. Sullivan, The Who, What, How and When of Marine Resources Development, 10 J. of Contemp. Bus. 1, 3 (1981).

161. 16 U.S.C.A. 1802(3) (Supp. 1984).

162. 43 U.S.C.A. 1331(a) (Supp. 1984).

163. 1958 Geneva Convention on the Continental Shelf, see note 100, supra.

164. Curiously, while 43 USCA section 1331 would be amended for mineral resource jurisdiction on the continental shelf, that same language of section 1331 is proposed for living resource jurisdiction on the continental shelf! Since the proposed legislation does not explain this inconsistency, it may have been an oversight.

165. Article 76(4), LOS Convention, note 1 supra note 31.

Summary

The Breaux/Stevens bill is neither a completely independent, comprehensive EEZ package nor does it merely amend existing legislation; instead, it combines the strengths of these extremes while avoiding their weaknesses. As a result, the bill protects domestic interests in fishing and deep water mining, while advancing United States international interests by remaining largely consistent with the LOS Convention. However, the bill's provisions excluding foreign fishing by 1988 are unnecessary to protect domestic fishing interests, are detrimental to the United States' international interests and should be eliminated. Additionally, a clearer statement on marine scientific research is needed to protect the United States' role in the formation of customary international law. Finally, to avoid confusion, implementing legislation should use only one definition of the continental shelf, preferably the definition used in the MFCMA.

The Future of the EEZ

Both domestically and internationally, the EEZ concept is inexorably developing into a fully realized regime of ocean jurisdiction. Although the EEZ is still in its early stages of development, controlled speculation about the direction of its development is possible.

Domestically

The Breaux and Stevens versions of the EEZ Act, introduced in the House and Senate respectively, were immediately referred to committee and died there on January 23, 1984. (The Studds bill covering marine scientific research within 200 miles of the coast suffered the same fate.) Although neither is currently scheduled to be reintroduced in 1985, some conclusions about the eventual form of the United States' EEZ regime are possible.

Considering the advantages of adopting legislation that does not conflict with the non-deep sea portions of the LOS Convention, the eventual EEZ implementing legislation should neither exclude foreign fishermen nor list marine research as a freedom of the high seas. As discussed above,[166] the LOS Convention's management scheme of highly migratory species and anadromous species protects United States interests, and implementing legislation should carefully avoid any confusion over United States claims. Finally, in addition to conforming appropriate existing legislation, any EEZ legislation will likely include a disclaimer of federal ownership of the living resources of the waters of the EEZ.

The specific content of the United States' EEZ will ultimately depend on the success of opposite legislative ideologies: the first creates the

166. See text accompanying footnotes 69-77, supra.

impulse to regulate an activity before it begins, while the second creates the impulse to regulate an activity only after it has become a problem. Given the increasing speed of technological development and its impact on exploiting the EEZ, a total triumph by either ideology would be undesirable. Too much advance regulation will initially inhibit EEZ development, although history shows that laws have never been permanent barriers to technology. Too little advance regulation will result in a capitulation to technology, and history shows that this has rarely been the best exercise of human wisdom.

The Breaux/Stevens bill does not attempt much advance regulation of the EEZ since other legislation such as the Outer Continental Shelf Lands Act and the MFCMA already cover activities in the EEZ. However, one aspect of EEZ development that will inevitably require legislative attention is determining domestic access to or allocation of resources. Current conflicts between shrimpers and oyster fishermen bear an uncanny resemblance to the conflicts between cattle farmers and sheep farmers during the westward expansion of the 19th century, and without prophylactic legislation allocating the resources of the EEZ, the conflicts and inequities of our country's westward expansion are virtually certain to recur. A legislated system of boundary allocation and licensing according to activity in an area may be the only means of avoiding these results.[167] Currently, no legislation and very little debate has addressed this problem—one that will become increasingly complex and intractable as scarcity of resources induces greater exploitation of the EEZ.

Internationally

Determining the ultimate content of the EEZ regime in international law is slightly more complex than doing so for domestic legislation, but since customary international law rarely crystalizes suddenly, predicting its course is usually easier than doing so for more fickle domestic legislation.

Aside from claims of a twelve-mile territorial sea, all assertions of ocean jurisdiction have been subject to certain limits. This indicates that international law requires a certain minimum of foreign activity to be permitted in formerly high seas areas that are subject to new jurisdictional claims. Almost certainly "freedom of navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms"[168] would be permitted

167. Conversation with Gary Knight, Professor of Law, Paul M. Hebert Law Center, Lousiana State University, Baton Rouge, La. (Spring 1984).

168. LOS Convention, supra note 1, art. 58. Although the quoted language is from the LOS Convention, virtually identical language can be found in the 1958 conventions. This adds weight to the conclusion that as long as a territorial sea beyond twelve miles is not accepted by the international community, certain activities will have to be allowed in ocean areas that were formerly high seas.

by whatever EEZ regime becomes the customary norm.[169] Support for the argument that these activities consititute the absolute minimum of international activity that must be permitted in formerly high seas areas is found in the specific activities allowed in the zones of the four 1958 Law of the Sea Conventions and in the zones of the 1983 LOS Convention. Given the ambitious nature of a zone that aims to reserve to the coastal State all existing and potential economic uses of a 200-mile zone, the only remaining restraints on jurisdiction in the EEZ (aside from the activities listed above) are the amorphous concepts of "peaceful use" and "due regard for other States."

However, it is interesting to speculate on the alternative EEZ futures of a world with or without the entry into force of the LOS Convention.[170] Without entry into force of the convention, strong economic needs may result in EEZ claims beyond 200 miles.[171] If the content of the EEZ does not solidify into a customary norm, this possibility will increase dramatically. Even though such claims will be subject to the usual pattern of claim-response, in a world where a single, highly mobile missile can sink an intruding ship, the complexities and costs of the claim-response patterns can quickly escalate beyond the States' ability to calculate them. Thus, while claims of jurisdiction beyond 200 miles will be difficult to defend legally, they will certainly be more difficult to oppose militarily. However, of the fifty-nine nations that currently claim an EEZ, most generally conform to the regime set out in the LOS Convention;[172] thus, even if the convention does not enter into force, international law is apparently developing toward the convention's EEZ regime.

If the LOS Convention enters into force and those States that do not ratify the convention (primarily industrial and major maritime States) make EEZ claims consistent with it, most of these problems will be

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169. Indeed, freedom of high seas navigation has been called a cardinal principle of customary international law. Slade, Some "Limited Additional Steps to Protect the Marine Environment" of the United States Exclusive Economic Zone, in Exclusive Economic Zone Papers 100, 101 (1984).

170. Failure of the LOS Convention to enter into force seems likely when one realizes that aside from vessel source pollution, no contemporary ocean problem cannot be solved more quickly and reasonably by nations acting alone or in small groups. R. Eckert, The Enclosure of Ocean Resources, 358 (1979).

171. Grolin, supra note 89, at 9.

172. NACOA, note 113 supra, at 7. The States claiming an EEZ are currently: Bangladesh, Barbados, Burma, Cape Verde, Colombia, Comoros, Costa Rica, Cuba, Djibouti, Dominica, Dominican Republic, Fiji, France, Grenada, Guatemala, Guinea, Giunea-Bissau, Guyana, Haiti, Honduras, Iceland, India, Indonesia, Ivory Coast, Kampuchea, Kenya, Madagascar, Malaysia, Maldives, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Nauru, New Zealand, Nigeria, North Korea, Norway, Oman, Pakistan, Papua New Guinea, Philippines, Portugal, Sao Tome and Principe, Seychelles, Spain, Sri Lanka, Suriname, Thailand, Togo, Trinidad and Tobago, Union of Socialist Republics, United Arab Emirates, United States, Vanuatu, Venezuela, Vietnam, Yemen (Aden). NACOA, note 113 supra, at 26.

preempted. This is because the States likely to ratify the convention, primarily developing States, are the States most likely to make extended claims of jurisdiction in the absence of the LOS Convention—an action which would be inhibited by their ratification of the LOS Convention. Thus, the industrialized States are in the paradoxical position of benefiting from the entry into force of a treaty they have no intention of ratifying.

Conclusion—the EEZ in the Year 2010

Domestically, by 2010 the fisheries and continental shelf concepts will have been absorbed by the EEZ. Technological advances will certainly result in legislation allocating both rights and areas to interested enterprises. Obviously, as increasing demands for resources cause increased activity in the EEZ, such legislation will become vital if the United States is to optimize EEZ exploitation. Quite possibly, by 2010 a map of the United States EEZ will look more like the plat of a subdivision than a map of ocean space.

Internationally, two scenarios for 2010 are possible.[173] In both, the LOS Convention either will have been superseded or will be in the twilight of its existence.[174] The first scenario consists of a customary norm of 200-mile EEZs for coastal States in which the coastal State has complete authority over all activity other than the traditional freedoms of the high seas. In this scenario both highly migratory species and anadromous stocks will be governed according to smaller treaties between the coastal State and other interested States. The area beyond the EEZs will be open for exploitation by whomever gets to the resources first. If this scenario comes to pass, the high seas will remain an international commons and the greatest problem the world will face is the Tragedy of the Commons.[175] If the Tragedy of the Commons comes

173. Of course, if any of the following possibilities occur, all bets on the future are off—a global economic crisis, any general global war (nuclear or not), or virtually any breakthough in genetic engineering (the effects of which on the world order are potentially the most radical of any possible developments).

174. "Most meaningful maritime treaties probably have a lifespan of less than 30 years. The UNCLOS III treaty may not last any longer in its present form, but . . . 200 miles is the magic number and is likely to remain fixed for better or worse, for an indefinite period." Rothschild, Discussion and Questions on Global Fisheries Management, in Johnston & Letalik, The Law of the Sea and Ocean Industry: New Opportunites and Restraints 343 (1982).

175. The tragedy of the commons occurs when all users of the commons perceive that they can increase their use or consumption of the commons; however, the universality of this perception results in all users attempting to take more from the commons, thereby exceeding the area's carrying capacity. The final result is sudden, unexpected resource depletion,accompanied by economic and social dislocation. Hardin, The Tragedy of the Commons, Science, December 1968, at 1243-1248.

to pass, the world's economic and political structure will experience its greatest trial.

The second scenario is essentially a world lake—a modified Seldonian regime in which virtually every inch of ocean space is subject to national jurisdiction. If a customary norm limiting seaward jurisdiction to 200 miles does not develop within the next fifteen years, claims beyond 200 miles will begin to proliferate. Once the phenomenon begins, stopping it will be difficult and the subsequent "claims rush" will result in a patchwork quilt of ocean jurisdictions extending to the equidistant lines between land masses in which coastal states control every non-traditional high seas activity. Given the confrontational history of the same system on land, even a modified Seldonian regime will not, of itself, solve the problems of the world's ocean resources by the year 2010.[176]

Regardless of which scenario comes to pass by the year 2010, the tension between world cooperation and world conflict that arose in the 20th century will not subside early in the 21st—although the world's oceans may yet be the scene of its ultimate resolution.

James E. Bailey, III

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176. It is worth noting that originally Peru attempted to justify its claim to a 200 mile sea zone as scientifically based on the anchovy-guano cycle on which the Peruvian agriculture is dependent. O'Connell, p. 555. Since the modern concept of the EEZ has no scientific basis or inherent limit, there is simply no reason for the EEZ to be limited to 200 miles. Therefore, extension beyond 200 miles seems inevitable as the need for resouces increases.