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WORLD MARITIME UNIVERSITY

Malmö Sweden

**HOW EXCLUSIVE IS THE EXCLUSIVE
ECONOMIC ZONE**

**(Contemporary analysis of the United Nations
Convention on the Law of the Sea 1982)**

By

OSCAR GARRIDO-LECCA HOYLE

Perú

A dissertation submitted to the World Maritime University in partial fulfillment of
the requirements for the award of the degree of

MASTER OF SCIENCE

IN

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

2013

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

Signature:

Date: 14 October 2013

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ABSTRACT

Title of Dissertation: **How exclusive is the exclusive economic zone, contemporary analysis of the United Nations Convention on the Law of the Sea 1982.**

Degree: **MSc**

International agreements as maritime international laws are the main tool for the sustainable development of the protection and employment of the oceans and seas. Dealing with maritime issues that arise every day, requires a highly focused analysis and establishment of principles and rules to prevent these problems.

Globalization provides the opportunity to carry out business around the world and its development has created transnational companies. Technological advances have allowed extended opportunities to explore and exploit the natural resources of the seas, with the resulting risk of these resources becoming extinct if such activities are not controlled. In this scenario, the required role of the States as part of the international community is to take measures to save lives, protect the marine environment and control the use of the oceans and seas. Thus, the United Nations Convention on the Law of the Sea, 1982 became the main international agreement related to maritime issues during the last 30 years, wherein States have jurisdictional rights and duties; however, in the Exclusive Economic Zone there are specific rules and regulations that differ substantially with other areas.

An analysis of the exclusivity of the Exclusive Economic Zone begins with an identification of the rights and duties as well the measures provided by the rules and regulations contained in the United Nations Convention on the Law of the Sea, 1982. This is followed by an analysis which aims to determine whether these measures are appropriate to achieve the objective of sustainable development to save lives, protect the marine environment and control the use of the oceans and seas. Following that, an evaluation of the perspective of the international legal environment on the use of this legal instrument for decision-making in international courts and tribunals is undertaken. Finally, the conclusion and recommendations are given according to the benefits and opportunities that the international community could attain by considering further changes in the legal international context.

Key words: International agreements; maritime international law; sustainable development; Globalization; international Court and Tribunals; United Nations Convention on the Law of the Sea; Safe live, protect the marine environment and control the use of the oceans; Exclusive Economic Zone; international community.

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List of Abbreviations

CCSBT	Convention for the Conservation of the Southern Bluefin Tuna
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
DOALOS	Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs of the United Nations
EEZ	Exclusive Economic Zone
EMSA	European Maritime Safety Agency

FAO	Food and Agriculture Organization of the United Nations
ICJ	International Court of Justice
ILO	International Labour Organization
IMO	International Maritime Organization
ISBA	International Seabed Authority
ISO	International Organization for Standardization
ITLOS	International Tribunal of the Law of the Sea
MLC - 2006	Maritime Labour Convention
STCW-F 95	International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNITAR	United Nations Institute for Training and Research
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNSC	United Nations Security Council
UNGA	United Nations General Assembly

UN FSA	United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995
UN SRC	United Nations Agreement for the implementation of the Seabed Regime Part XI of the Convention of 10 December 1982, 1994
WCO	World Customs Organization
WMU	World Maritime University

CHAPTER I

Introduction

“Inevitably... the international community would continue to evolve and its uses of the sea would continue to develop and diversify”¹

“International Law is Irrevocably Transformed”²

These statements are related with the evolution and development of the United Nations Convention on the Law of the Seas as a legal international instrument which tends to change. The first statement was made by Kurt Waldheim, Secretary General of the United Nations, in 1974 when the third United Nations Conference was opened, and the second one was made by Javier Perez de Cuellar, Secretary General of the United Nations, in 1983 in the official text of United Nations Convention on the Law of the Sea.

More than 30 years have gone by since the United Nations Convention on the Law of the Seas, 1982³ (UNCLOS) was opened for signature and almost 20 years since, on November 23, 1994, it entered into force. Despite the time elapsed, some States are still acceding, adhering or ratifying the Convention⁴. The decision to be party to the UNCLOS could be the natural tendency of the States trying to be part of a globalized world.

¹ Statement by Waldheim Kurt Secretary-General of the United Nations, 14th meeting, Thursday 20 June 1974, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. 1, 35, at 38, at para. 42

² Perez de Cuellar Javier Secretary-General of the United Nations, in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with annexes and index* (1983).

³ 1982 The United Nations Convention on the Law of the Sea entered into force on 23 November 1994.

⁴ Update: as of August 13, 2013, there are currently 166 State parties to the 1982 Convention as Niger acceded to the Convention on 7 August 2013.

Also, Professor Kjell Åke Modée⁵ in his conference about Ocean Law and the Processes of Globalization, stated, “There are four keywords I would like to elaborate on, in considering the core theme of this fascinating conference: Bringing New Law to Ocean Waters. They are: globalization, modernity, post colonialism and soft-law”. “The trends to harmonize international public law with help of legal instruments as conventions or declarations have resulted in ongoing conflicts between cultural concepts of different sorts”.

Indeed, a trend is a human factor that is influenced by the majority group called group conformity⁶. On the other hand, the analysis and evaluation for decision-making in the political, environmental, social and mainly economical interest is different from one State to another. The decision to be part or not of the Convention on the Law of the Sea is up to each State, and one of the most important aspects of this international agreement is the recognition by the others States which create customary international law.

According to a historical perspective of the United Nations⁷ (UN), at that time (1982), it was a successful agreement, when after nine years more than 160 States sat down and discussed the issues, bargained and traded national rights and obligations to achieve the adoption of an international treaty. However, it was necessary to wait for 12 years for it to enter into force in 1994; a year after Guyana became the 60th State to sign the Convention.

⁵ Professor of Law, Lund University. This talk was presented at lunch for the conference on “Bringing New Law to Ocean Waters,” Boalt Hall School of Law, UC Berkeley, April 6, 2002 (Law of the Sea Institute Occasional Paper #4, 2007)

⁶ Asch Conformity Experiment, 1951 edited by Saul McLeod 2008.
<http://www.simplypsychology.org/asch-conformity.html>

⁷ The United Nations Convention on the Law of the Sea (A historical perspective) Originally prepared for the International Year of the Ocean, 1998
http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm

Today UNCLOS is generally considered by the international community as the accepted legal norm for maritime conduct, a "constitution for the oceans" governing all ocean uses, exploitation of ocean resources and the protection of the marine environment⁸. The "Constitution of the Oceans" enjoys almost universal ratification, with 166 parties to it, making it the single legal framework for ocean governance⁹.

The law of the sea is an area of international law that embraces many aspects of the use of the seas and oceans, which includes their protection as the most important resource in the world. In this regard, the UNCLOS is the main international instrument which comprises the norms regulating the rights and duties of the States parties of this Convention in the whole marine area of the world. It is clear that this Convention affects third States. Treaties are generally defined as international agreements in written form and governed by international law, whatever its particular designation. According to the Vienna Convention on the Law of the Treaties¹⁰, a treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization¹¹. However, UNCLOS does.

The Convention deals with many issues related to the maritime field such as marine zones claims, demarcation and delimitation of marine zones (baselines, outer-limit lines, international maritime boundaries), rights and duties in marine zones for functional uses as fishing, navigation, marine scientific research, laying submarine cable and pipelines, marine environmental protection, mineral resource exploration and exploitation, among others and has dedicated international institutions for dispute settlement.

⁸ United Nations Publications prepared by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs last update August 1, 2012.

⁹ Update: as of August 13, 2013, there are currently 166 State parties to the 1982 Convention as Niger acceded to the Convention on 7 August 2013.

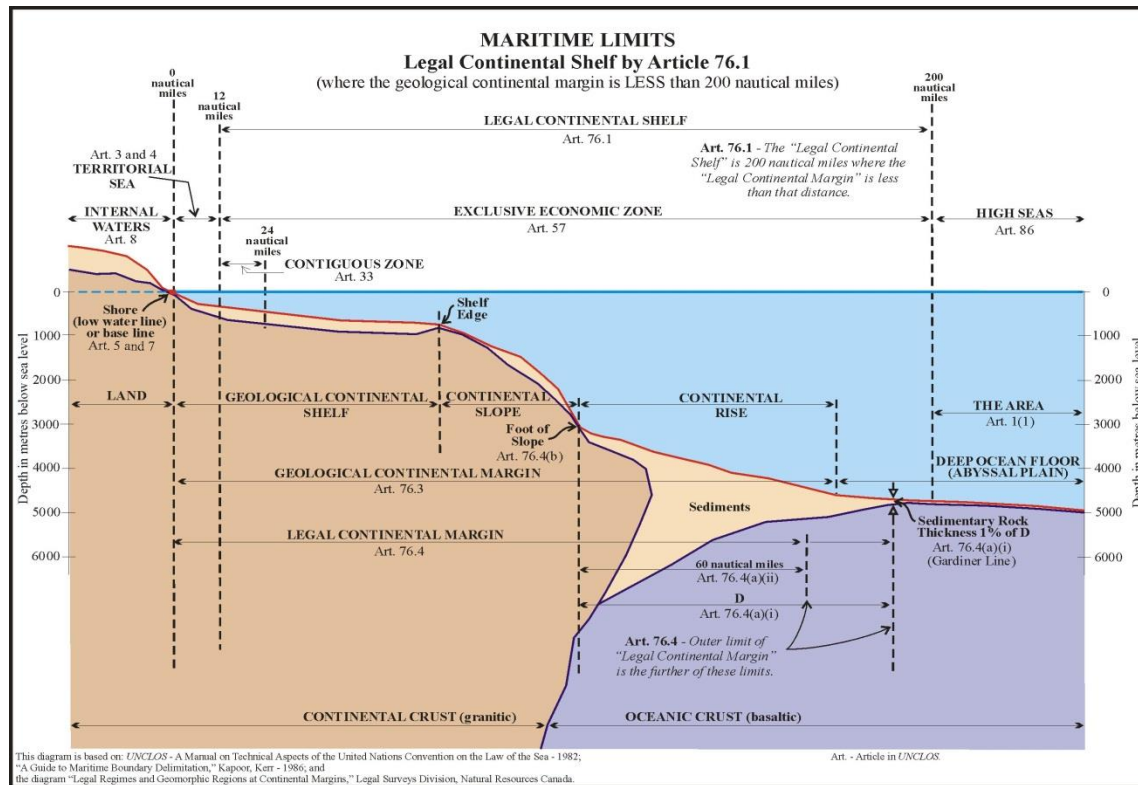
¹⁰ 1969 Vienna Convention on the Law of the Treaties, Article 2(1)(a); 1986 Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations, Article 2(1)(a).

¹¹ Ibid, Article 34.

Also, UNCLOS divides the sea into various legal zones as follows: Internal waters, Territorial Seas, Contiguous Zone, Exclusive Economic Zone, Seabed and ocean floor and subsoil thereof, Continental Shelf and High Seas.

The original focus for the States in UNCLOS III was to acquire exclusive rights to manage and exploit living resources. The result was the emergence of the new off-shore zone, the exclusive economic zone (EEZ)¹².

Figure 1- Diagrammatic division of the Maritime Zones according to the United Nations Convention on the Law of the Sea 1982



Source retrieved from: <http://www.acls-aatc.ca/files/english/books/5.4.jpg>

¹² Collins E., Jr. and Rogoff M. (1982). *The international law of maritime boundary delimitation*. (pp. 1-2). Maine law review 34.

The emergence of the new maritime zones established by UNCLOS III significantly increased the importance of the process to delimitate maritime boundaries in contemporary international law. The most notable feature of these new zones is their great distance from the coast. International law permits a State to extend its EEZ seaward to a distance of 200 nautical miles from its baseline, as defined by article 57 of the Convention¹³.

In that sense, UNCLOS established some specific rights and duties in the EEZ. It also, gives some specific rights to landlocked States and sets rules and regulations related to the limits and delimitations of territorial seas between States, right of innocent passage and transit passage, defines archipelagic States, establishes some duties related to piracy, right of visit, right of hot pursuit, right to lay submarine cables and pipelines, among others. However, judgments of international Courts, legal opinions and the activities carried out by the States within the Exclusive Economic Zone go beyond the faculties that may have been granted by the UNCLOS.

This dissertation undertakes an analysis of the development of the concept of Exclusive Economic Zone (EEZ), starting with a review of the historical background related to international maritime law and an explanation of the roots before the United Nations Conventions on the Law of the Sea 1982.

To develop this dissertation a qualitative research methodology was used. Using the technique of the *Five Ws* it was possible to find answers and understand the issues related to the Exclusive Economic Zone. This technique used the simple questions, what? where? when? who? and why? to develop an orderly and concise approach to the topic. These questions are not written in the text but it is easy to find when they were used.

¹³ The United Nations Conventions on the Law of the Sea 1982, Article 57.

Chapter I provides an overview of the international legal instruments related to the Exclusive Economic Zone and the role of international organizations in the development of the law of the sea. These instruments such as decisions of international Courts and Tribunals are the main features that impact directly on the development and the establishment of international customary law.

Chapter II provides an analysis of the problem of rights and duties in the Exclusive Economic Zone identifies and compares the rights granted and the benefits of being part, considering the interests of each State. To develop this chapter the technique of the *Five Ws and one H* was used, which allowed the author to establish the problems related to the rights and duties contained in UNCLOS. Similarly, it evaluates and compares other non-economic aspects such as military, fiscal, social, labor and health in order to determine which are the faculties, advantages, restrictions, limitations and disadvantages related to these in the EEZ.

Chapter III is concerned with the settlement of disputes in the Exclusive Economic Zone (EEZ). Although there are established settlements of disputes in the Convention, the States have the option to decide where to establish settlements of disputes, following the principle of general international law which makes it an obligation to settle international disputes by peaceful means in such a manner that peace, security and justice are not endangered, codified by the United Nations Charter, Article 2, paragraph 3. This chapter includes an analysis of relative international disputes and a review of legal opinions.

An analysis of the contemporary status of the issues in the EEZ in Chapter IV provides an overview of the legal international context and its influence on the development of new international agreements. Also, the Weighted Scoring Method was used to achieve the main goal of this dissertation.

In conclusion, after carefully evaluating and analyzing the articles in the United Nations Convention on Law of the Sea and comparing it with the related international legal instruments and decisions of international Courts and Tribunals concerned with the EEZ, the author will try to establish how exclusive the Exclusive Economic Zone is. The ultimate aim of this dissertation is to provide helpful recommendations to the international legal community concerned with the achievement of an efficient and effective international legal framework.

The conclusions offered at the end are of a strictly personal character. In no way should these personal views be considered conclusive nor do they express the Official position of the Maritime Administration to which the author belongs.

1.1 Development of the concept of Exclusive Economic Zone before and after the United Nations Conventions on the Law of the Sea, 1982 (UNCLOS).

The concept of marine areas and their delimitation is an old issue and these were established under what is called customary international law, under the concept that customary rules are the result of a process through which elements of fact, empirically verifiable, acquire a legal character thus creating rights and obligations for the subjects of international law¹⁴. Besides, it is known that the law of the sea is as old as nations, and the modern law of the sea is virtually as old as modern international law. For three

¹⁴ Treves, T. (2006). *Customary International Law*. Oxford University Press, United States.

hundred years it was probably the most stable and least controversial branch of international law¹⁵.

The development of the law of the sea is inseparable from the development of international law in general. Historically, international law evolved when the emergence of independent States made possible truly international relations, instead of the imperial relations which subsisted throughout the life of the Holy Roman Empire¹⁶.

In ancient times, Phoenicians, Greeks, Egyptians and Carthaginians were the main maritime nations, to which commerce attracted the right and power of having judges of their own nations to regulate and decide according to their own laws. A Rhodian law which was received through the medium of the Roman jurisconsults does not contain any proper international¹⁷ regulations. However, during the Roman Empire the principle of close sea was predominant. The Mediterranean was called “*mare Nostrum*”¹⁸, understanding that the Roman authorities exercised their sovereignty and jurisdiction in that space. Therefore, Roman law, considered the sea more than *res Communis omnium*, it was *res Nullius*. Hence, it belonged to no one. This concept was extended until the middle ages, when the states began to claim sovereignty over the seas close to their territories¹⁹.

¹⁵ Henkin, L. (1979). *How Nations Behave: Law and Foreign Policy*. New York, published for the Consular Foreign Relations by Praeger, United States.

¹⁶ Churchill, R. and Lowe, A. (1988). *Law of the Sea*. Second Edition. Manchester University Press, UK.

¹⁷ Reddie, J. (1984). *Researches, Historical and Critical in Maritime International Law*. Edinburgh Thomas Clark, Law Bookseller. Benning and Co. Bigg & Son, William Blackwood & Sons, London. Milliken, Dublin. (Harvard College).

¹⁸ Mc Lynn, F. (2009). *Marcus Aurelius: Warrior, Philosopher, Emperor*. (p.3). Great Britain, published by The Bodley Head London.

¹⁹ Everett, C. Dolman (2002). *Astropolitik: Classical Geopolitical in the Space Age*. (p.97). Great Britain, published by Frank Cass Publishers.

In the late 16th century, maritime disputes between countries under legal regimes started to improve and many scholars began to write about the legal context of international agreements.

An Italian jurist Alberico Gentili (1552–1608) was one of them. He published “*De Jure Belli*”²⁰ libri tres 1598; Three Books on the Law of War”, which contained a comprehensive discussion of the laws of war and treaties. Gentili’s work initiated a transformation of the law of nature from a theological point of view.

At the same time, there were many controversial cases that created the roots and notions of the maritime international law. One of the relevant cases was the dispute between Portugal and Netherlands regarding international maritime law²¹. Two concepts or principles were developed in that dispute to claim jurisdiction of the sea; one of these was made by Hugo Grotius (1583-1645) in his work *Mare Liberum*²² in 1609 in which he proclaimed and explained the concept of “freedom of the seas” and the other was made by John Selden in 1617 in his work *Mare Clausum*²³ to refute the tractate *Mare Liberum*. Both concepts were written to deal with the interest of their clients but at the same time these principles were used to deal with the positions of others countries who claimed for jurisdiction of the high seas and to exclude foreigners therefrom.

²⁰ Gentilis, A. (1877). *De iure belli*, libri tres. Edited by Thomas Erskine in Holland. Digitized by the internet archive in 2011 with the funding from University of Toronto
<http://archive.org/stream/dejurebellilibri00gent>

²¹ E. Gepken-Jager, G. Van Solinge, and L. Tmmerman (Eds.). (2005). *VOC 1602-2002: 400 Years of Company Law*. (pp. 17-38). Kluwer Deventer.

²² “*Hugonis Grotii De Jure Praedae*”. Edited with and introduction by H.G. Hamaker, Publisher Martinus Nijhoff M. at The Hague in 1868.

²³ Grotius H. “*The freedom of the seas*”. Edited with an introductory note by James Brown Scott. The Lawbook Exchange LTD. Union New Jersey 2001.

In the early 18th century, Van Bynkershoek in his work “*De Dominio Maris Dissertatio*”²⁴ joined the concepts of “mare claussum” and “mare liberum”, establishing two maritime zones: territorial sea and high sea. He assigned one area to the coastal state to exercise sovereignty and jurisprudence limited by the cannon shot (at that time three miles and it was known as “the cannon shot rule”) and another area for freedom to navigate.

In the same century, the roots of the “contiguous zone” were developed, under the 1718 Hovering Acts²⁵, which gave the authority to British warships to patrol the sea areas near the territorial sea. This area was expanded over time to six miles in 1764, then to fifteen miles in 1802 and finally to twenty four miles in 1853. This system was abolished in 1876; however, the precedent was taken by other legislations.

The two zones defined by Van Bynkershoek were definitively consolidated. However, the rule of the cannon shot was understood as a variable rule inasmuch as it depended on the circumstance and the development of technology. Although in 1782 Fernando Galliani, Secretary of legislation in Paris, trying to establish a limit of the territorial sea, considered that three miles was a reasonable distance²⁶. So, the three miles rule was adopted in some treaties by European countries and The United States of America. This rule was considered as customary international law in 1893 in the decision of the Bering Sea arbitration²⁷, which arose out of a fishery dispute between United Kingdom and United States.

²⁴ Van Bynkershoek, C. (1923). *De Dominio Maris Dissertatio*. Oxford University.

²⁵ “*Unresolved Issues and new Challenges to the Law of the Sea*” Edited by Strati A., Gavouneli M. and Skourtos N. Publisher Martinus Nijhoff. The Netherlands – 2006.

²⁶ Heller-Roazen, D. (2009). *The Enemy of All: piracy and the law of nations*. New York publisher Cambridge, Mass 2009.

²⁷ Bering Sea Tribunal of Arbitration. Papers relating to the proceedings of the tribunal of arbitration (1893) London.

In 1894, the Institute of International Law²⁸ in a session in Paris approved a project agreeing that the territorial sea was limited to six miles from the coast. Indeed, it was a good intention to establish the limit of the territorial sea; however, at the same time many countries established unilateral claims about the distance of the territorial sea.

In the twentieth century, to protect the fisheries in superjacent waters, nations began to claim and establish specific regimes in these areas. Portugal in 1910 prohibited trawling by steam vessels within the limit of the shelf as defined by the 100 fathom isobaths, or within a minimum of three miles from the coast²⁹. In 1907, Russia established eleven miles as its territorial sea and then in 1911 changed to twelve miles. At that time, the continental shelf was defined as the subsoil of the submarine areas contiguous to the coast extending to where the continental slope begins, approximately at the 100 fathom or 200 meter isobaths³⁰.

One of the first proposals for the codification of international law is found in a resolution adopted by the Second Hague Peace Conference held in 1907, which called for the codification of topics that were “ripe for embodiment in international codification”³¹. “The outbreak of the First World War delayed this initiative from being further pursued for a number of years. Nevertheless, this resolution has been identified as the seed which was ultimately to burgeon forth, first as the Committee of Experts for the Progressive Codification of International Law, and later at the International Law Commission of the United Nations”³².

²⁸ I.D.I - Institut De Droit International established in 1873

²⁹ Decree Regulating Fishing by Steam Vessels, 9th November, 1910, 2 Colecao Oficial de Legislacao Portuguesa (1910), p. 76; and UN High Seas Laws, pp. 19-21.

³⁰ Cosford, E. (1952). *The Continental Shelf and Canada in International Law*. Legal research essays, McGill University Faculty of Law, Quebec, Canada.

³¹ Harrison, J. (2011). *“Making the Law of the Sea”* (p. 28). Cambridge University United Kingdom.

³² Rosenne S. Committee of Experts for the Progressive Codification of International Law (1925-1928), at xxix.

After the First World War, in 1919 the League of Nations was created, which considered the necessity to define some specific issues in the maritime field including the establishment of the territorial sea. However, there was never consensus. The powerful countries wanted to continue with the three miles rule as a territorial sea but other countries did not agree. In 1924 the Council of the League of Nations initiated a process for the codification of international law, establishing a Committee of Experts for the Progressive Codification of International Law. However, its role was understood and it was reflected in a resolution of the League of Nations Assembly of September 27, 1927 which provided that codification “should not confine itself to the mere registration of the existing rules, but should aim at adapting them as far as possible to the contemporary conditions of international life”³³. Although there was a Codification Conference at The Hague in 1930 attended by delegates from forty-seven governments, it was not possible to achieve an agreement³⁴.

After the Second World War, by the middle of the twentieth century, the Truman proclamations³⁵ in 1945 stressed a policy with respect to the natural resources of the subsoil and the sea bed of the continental shelf and with respect to coastal fisheries in certain areas of the high seas. These proclamations motivated other states to claim extensions of the limits of coastal jurisdiction, for instance, Mexico in October of 1945, Panama and Argentina in 1946, Chile and Peru in 1947 and some Arab states in 1949³⁶. It then traces the development of the idea in Latin America through the Santiago Declaration of 1952, which first proclaimed 200-mile zones off Chile, Ecuador and Peru.

³³ Resolution adopted by the League of Nations on 27 September 1927 available in (1947) 41 Am. J. Int’l L. Supp. 105.

³⁴ See “Report of the Second Committee: Territorial Sea” in Rosenne S. *“League of Nations Conference for the Codification of International Law”* (1930), Vol. 4 8Oceana Publications, 1975) at 210.

³⁵ President Truman proclamation No.2667, 28th September, 1945. “Policy of the United States with respect to the natural resources of the subsoil and the seabed of the continental shelf.” Repr. www.oceanlaw.net.

³⁶ Parsons, L.S. (1993). *“Management of Marine Fisheries in Canada”* (p.224). Published by National Research Council of Canada.

Truman's proclamations were made to ensure the natural resources of the subsoil and the sea bed of the continental shelf off the coast of United States and to protect their fisheries and these changed the traditional point of view, opening a new concept related to the economic interest of the nations.

With the establishment of the United Nations (UN) in 1945, international law found a platform which allowed, through international conferences, the possibility for unilateral claims of the States to change into international agreements. The UN was created in order to maintain international peace and security, to develop friendly relations among states and to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character³⁷.

Thus, in 1947 the United Nations General Assembly (UNGA) established the International Law Commission³⁸ (ILC) for the purpose of advancing the progressive development of international law and its codification. At its first meeting in 1949, the ILC identified a provisional list of fourteen topics as suitable for codification³⁹ which included the regime of the high seas and the regime of territorial seas.

Furthermore, in 1953 the ILC in its report to the General Assembly submitted a set of drafts concerning the continental shelf and fisheries and recommended that the General Assembly adopt the articles on the continental shelf in the form of a resolution⁴⁰. These draft articles formed the basis for discussions at the First United Nations Conference on

³⁷ UN Charter, Article 1. (1945)

³⁸ "Establishment of an International Law Commission" (United Nations General Assembly Resolution 174 (II) November 21, 1947, to which is annexed the Statute of the International Law Commission.

³⁹ International Law Commission, "Report of the Working Group on review the multilateral treaty-making process" (1979-II) *Ybk Int'l Law Commission* 3, at para. 16.

⁴⁰ International Law Commission, "Report of International Law Commission covering the work of its fifth session, 1 June-14 August 1953" (1953-II) *Ybk Int'l Law Commission* 217, at para. 91.

the Law of the Sea⁴¹ (UNCLOS I), which took place in Geneva from February 24 to April 27, 1958 with the participation of eighty-six states.

Four principal treaties were negotiated at the Conference, dealing with the territorial sea and contiguous zone, the continental shelf, the high seas and fishing⁴². As a result the following conventions were adopted⁴³:

- The Continental Shelf Convention adopted by 57 votes to 3, with 8 abstentions.
- The Fisheries Convention adopted by 45 votes to 1, with 18 abstentions.
- The High Seas Convention adopted by 65 votes to none, with 2 abstentions.
- The Territorial Sea Convention adopted by 61 votes to none, 2 abstentions.

A Second United Nations Conference on the Law of the Sea⁴⁴ (UNCLOS II) was convened in 1960 for the purpose of trying to reach agreement on the outstanding issues in UNCLOS I, although this too failed. UNCLOS II was only able to conclude that the development of international law affecting fishing may lead to changes in practices and requirements of many states⁴⁵.

Despite the effort of the UN trying to achieve an international acceptance of these conventions, there was a controversial issue in the North Sea Continental Shelf Cases⁴⁶,

⁴¹ *International Conference of Plenipotentiaries to examine the Law of the Sea*, United Nations General Assembly (UNGA) Resolution 1105 (XI), February 21, 1957.

⁴² See D.P. O'Connell, *"The International Law of the Sea"* (Oxford University Press 1982) at 22. The work of the fifth committee on free access to the sea by landlocked states did not result in a separate convention but aspects of its work are contained in the Territorial Sea Convention and the High Seas Convention.

⁴³ See United Nations, *The work of the International Law Commission*, at 42.

⁴⁴ Convening of a Second United Nations Conference on the Law of the Sea, UNGA Resolution 1307 (XIII), December 10, 1958

⁴⁵ Resolution II adopted at the thirteenth plenary meeting on April 26, 1960.

⁴⁶ North Sea Continental Shelf Cases (1969) ICJ Reports 3, at para. 63.

in which the International Court of Justice⁴⁷ (ICJ) held that Articles 1 to 3 of the Continental Shelf Convention, setting out the basic principles of the continental shelf, had crystallized into customary international law; however, Article 6 of the Convention, which applied the so-called equidistance rule to the delimitation of the continental shelf was not accepted by the Court, finding that the rule had been “proposed by the Commission with considerable hesitation, somewhat on an experimental basis at most *de lege ferenda* and not at all *de lege lata* or an emerging rule of customary international law”⁴⁸.

In contrast, while the Vienna Convention on the Law of Treaties in 1969 gave the legal framework to treaties between states⁴⁹, considering the fundamental role of the treaties as a source of international law, customary international law will continue to govern questions not regulated in this Convention.

In 1967 the Maltese Ambassador Arvid Pardo addressed the First Committee of the UN General Assembly (UNGA), demanding urgent action to ensure the peaceful development of the law of the sea and in particular the legal regime relating to the deep sea bed. In response, the General Assembly established the Committee on the Peaceful Uses of the Sea Bed⁵⁰. The work of the Committee led to the adoption by the General Assembly of the 1970 Declaration of Deep Sea Bed Principles⁵¹. Furthermore, at the twenty-fifth session, the General Assembly also adopted a Treaty on the Prohibition of

⁴⁷ International Court of Justice established in 1945 by the UN Charter.

⁴⁸ North Sea Continental Shelf Cases (1969) ICJ Reports 3, at para. 62.

⁴⁹ Vienna Convention on the Law of Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.

⁵⁰ UNGA Resolution 2340 (XXII), December 18, 1967.

⁵¹ “Declaration of principles governing the sea bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction”. UNGA Resolution 2749 (XXV), December 17, 1970.

the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the subsoil thereof⁵².

In 1973 the UN General Assembly called for universality of participation at the Conference to adopt a convention dealing with all matters relating to the law of the sea⁵³. Whereas 86 states had attended the 1958 Conference, over 160 states participated in this Conference. Universal agreement was therefore the aim of the Third United Nations Conference on the Law of the Sea (UNCLOS III). As a result, after 9 years on April 30, 1982, the final text of the Law of the Sea Convention was adopted by 130 votes in favor, 4 against, and 17 abstentions and it was opened for signature in December 1982. UNCLOS entered into force on November 16, 1994 one year after the ratification or accession of sixty state parties.

The United Nations Convention on the Law of the Sea establishes and defines zones belonging to coastal states as Internal Waters, Archipelagic Waters, Territorial Seas, Contiguous Zone, Exclusive Economic Zone and Continental Shelf. It also, defined *res communis* zones as High Seas and International Seabed Area. The concept of EEZ is defined in The United Nations Conventions on the Law of the Sea which gives a specific legal regime of this area, establishing rights, jurisdiction and duties of the coastal States and other States, defining the breadth of the zone, setting a basis for the resolution of conflicts regarding the attribution of rights and jurisdiction and other issues and activities in the zone.

⁵² Appended to UNGA Resolution 2660 (XXV), December 7, 1970.

⁵³ *Reservation exclusively for peaceful purposes of the sea-bed and ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interest of mankind, and convening of the 3rd United Nations Conference on the Law of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction*, UNGA Resolution 3067 (XXVIII), November 16, 1973, at para. 3. The conference did not deal with military issues.

According to UNCLOS “The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions⁵⁴”. Within this zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone; jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment; the coastal State shall have due regard to the rights and duties of other States⁵⁵”. “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured⁵⁶”.

After that, in 1983 the President of the United States of America Ronald Reagan in a unilateral action, proclaimed the Exclusive Economic Zone of the United States⁵⁷, considering some terms and articles provided in the UNCLOS.

In 1991 the Chilean government declared a new concept called “presential sea”⁵⁸ which is defined as a part of the high seas where the State denotes its influence, contiguous to its Exclusive Economic Zone to protect its interests. At the end of that year, Argentina

⁵⁴ The United Nations Conventions on the Law of the Sea 1982, Article 55.

⁵⁵ Ibid, Article 56.

⁵⁶ Ibid, Article 57.

⁵⁷ Ronald Reagan Proclamation 5030 March 10, 1983.

⁵⁸ Minoletti, J. (1993). *Chile's Presential Sea: A general overview*. Naval War College (U.S.) Center for Naval Warfare Studies (U.S.) Strategic Research Department, 1993.

proclaimed in its law⁵⁹ that its domestic law related to the protection and preservation of the maritime resources for migratory species was applied beyond 200 miles.

Moreover, in May 1994 Canada adopted a new law to protect its coastal fisheries whereby fishing is prohibited in the high sea in accordance with the policies established by the North West Atlantic Fisheries Organization (NAFO)⁶⁰. This unilateral decision taken by Canada was made without agreement with the other parties of the NAFO. Further, it includes the use of force for enforcement and also the right of hot pursuit commenced in high seas. As a result, on 9 March 1995, a ship flying the Spanish flag with a Spanish crew was stopped and inspected on the high seas approximately 245 miles off the coast by a Canadian patrol boat. The ship and the crew were forcibly escorted away and the Captain was imprisoned and subjected to criminal proceedings for having engaged in fishing activity on the high seas outside the Canadian EEZ⁶¹. This case was held in the International Court of Justice (ICJ) in 1995 and will be analyzed in Chapter III.

In the same way, the United Nations General Assembly (UNGA) on July 28, 1994 adopted the Resolution 48/623 and in 1995 the Resolution 50/24 to modify specific articles of the UNCLOS. Furthermore, the UNGA adopted the Agreement of New York on August 4, 1995 relating to the conservation and management of straddling fish stocks and highly migratory fish stock⁶² which allowed extending the jurisdiction of the Coastal States beyond 200 miles.

⁵⁹ Ley 23.968 Ley Nacional de Espacios Marítimos Diciembre 5, 1991 República Argentina
http://www.procostas.org/cms/index.php?option=com_content&view=article&id=88:ley-nacional-23968-espacios-maritimos&catid=41:normas&Itemid=74

⁶⁰ North West Atlantic Fisheries Organization founded in 1979.

⁶¹ Case Spain v. Canada, Fisheries Jurisdiction, ICJ filed in the registry of the Court on March 28, 1995.

⁶² Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea on December 10, 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks New York, August 4, 1995 Entered into force on December 11, 2001.

1.2. International legal instruments related to the Exclusive Economic Zone (EEZ).

Although it is true that the Exclusive Economic Zone was established by the UNCLOS to give exclusive rights and duties to the States related to economic aspects, there are other international legal instruments that create new obligations, rights and duties in this area such as Judgment of International and National Courts and Tribunals. Furthermore, domestic law can be applied in the EEZ and it is not always directly related to economic affairs.

In spite of the fact that international law is not limited by borders, its fulfillment requires domestic enforcement to be bound by the states while internal law or domestic law is limited to the jurisdiction of each state. This can be seen in that Territorial Sea State has sovereignty, meaning jurisdiction and control, but in the EEZ they have sovereign rights over specific issues on which they have faculty to legislate.

With the development of technology, political, scientific and legal instruments, and international agreements have to walk in parallel. Hence, an effective legal and regulatory framework gives the necessary support to apply international law but it is essential that this is enforced by each state regardless of whatever legal system they have.

Since the conclusion of the UNCLOS, a large number of international treaties has been adopted in the field of maritime affairs. The Convention itself expressly foresees that States Parties will continue to regulate their relations through subsequent treaties.⁶³

While Article 56 of the UNCLOS, establishes sovereign rights for the purpose of exploring and exploiting, and conserving and managing natural resources which is

⁶³ The United Nations Conventions on the Law of the Sea 1982, Article 311.

related to economic concerns, Article 58 paragraph 3, of the Convention calls for States to have due regard to the rights and duties of the Coastal State and to comply with the laws and regulations adopted by the Coastal State according to the provisions of the Convention and other rules of international law in so far as they are not incompatible with the Convention. Also, UNCLOS calls States to respect existing agreements with others States and exhorts them to recognize traditional fishing rights and other legitimate activities.

Furthermore, Article 62 of UNCLOS allows States to establish laws and regulations in their national law for the use of living resources, fixing quotas of catch, regulating seasons and areas, and placing of observers on board among others. However the most relevant aspect is the possibility to regulate enforcement procedures.⁶⁴

Institutions such as the Food and Agriculture Organization of the United Nations (FAO) and International Labour Organization of the United Nations (ILO) are special agencies which promote agreements and establish rules and regulations through resolutions, the first one related to the management of natural resources (fishing) and the protection of the environment and the second one related to social justice and internationally recognized human and labour rights. Indeed, both are applicable in the EEZ.

In summary, customary international law such as treaties, conventions and agreements, judgments made by Courts and Tribunals and national law and regulations of Coastal States are the legal instruments that create jurisprudence in the EEZ. Hence, UNCLOS is another legal instrument in use in this zone that does not necessarily prevail when it is used by the international Tribunals and Courts to make judgments in controversial cases.

⁶⁴ Ibid, Article 62 Para. 4 (k).

However, the lack of instruments as international agreements related to maritime issues in the EEZ such as UNCLOS with a global consensus, does not allow the establishment of an international legal system able to maintain an international legal order to protect and conserve the seas.

For instance, in cases of piracy, the right exists for other States in the EEZ that allows foreign naval operations to be carried out in the EEZ according to Article 58 (2) of the UNCLOS, but there are no specific rules as to how to apply it or when it is allowed. “Maritime violence, terror and piracy may spread out because the international legal system of interference rights and counter-measures is still full of gaps. In other words, an inadequate legal system is part of the problem”⁶⁵.

While general rules should be established to address the main problems related to a field, these should in turn generate specific regulations to govern its application. UNCLOS stresses the principles, but the enforcement depends on the States to take necessary measures to bind these principles. However, all international legal instruments will be subject to *opinio juris*.

1.3. Role of international organizations in developing the law of the sea

New concepts are always implemented by organizations such as International Maritime Organization (IMO), International Labour Organization (ILO), Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs of the United Nations (DOALOS), United Nations Institute for Training and Research (UNITAR), United

⁶⁵ Mejía Jr. M. (2010). Maritime Security and Crime (p. 159). Published in 2010 by WMU Publications Malmö, Sweden.

Nations Commission on International Trade Law (UNCITRAL), International Organization for Standardization (ISO), World Customs Organization (WCO), shipping management regional organizations such as European Maritime Safety Agency (EMSA), regional agreements on Port State Control such as Paris Memorandum of Understanding, Acuerdo de Viña del Mar, Black Sea Memorandum of Understanding and other intergovernmental organizations as well as non-governmental organizations and institutions which through the collection of data and recommendations in maritime casualty investigations, reports of inspections and other information adopt them issuing guidelines for the application of new ideas that could over time be converted into compulsory law. For example, the most recent concept is related to the application and promotion of international labour standards with the entry into force of the Maritime Labour Convention (MLC 2006), by the International Labour Organization.

As has been seen above, the main international legal instruments are related to the organizations, institutions and agencies associated with the UN as law-making bodies. The active participation of the States to establish international agreements is the key for the evolution of the international legal system. However, they can be overruled by the Courts and Tribunals through *Opinio juris*.

States as principal actors have the power to reach, through treaties, the establishment of a legal order to protect, conserve and control the management of the resources of the oceans and seas. However, there are other actors involved such as international organizations with economic interest in the EEZ and others with the sole purpose of protecting and conserving the marine environment.

Consensus through ratification is the main element for an agreement to achieve international acceptance. The lack of international approval may result in an international agreement falling into a legal vacuum as an unheeded expression.

For instance, the Nairobi International Convention on the Removal of Wrecks, 2007 (NAIROBI WRC 2007) which was open for signature from 19 November 2007 until 18 November 2008 is not yet in force because it requires twelve months following the date on which ten States have signed it without reservation⁶⁶. The lack of consensus has not allowed the agreement to enter into force.

But also, there is another pattern for the approval of conventions which is not strictly related to the decision of any State. This is the case of the International Convention for the Control and Management of Ship's Ballast Water and Sediments, 2004 (BWM 2004) which was open for signature by States from 1 June 2004 to 31 May 2005 and shall thereafter remain open for accession by any State. This Convention is not yet in force due to the fact that to be effective it requires twelve months after the date on which not less than thirty States, the combined merchant fleets of which constitute not less than thirty-five percent of the gross tonnage of the world's merchant shipping, have either signed it without reservation as to ratification, acceptance or approval, or have deposited the requisite instrument of ratification, acceptance, approval or accession. In such a case all states are not considered equal; states with the largest fleets, such as those considered flags of convenience, have more faculties. However, a State should have sovereignty over a geographic area in which its government has the competence and authority to make law⁶⁷. This singular feature shows that, comparatively, a state depends not only on jurisdiction over its territory but also on its ability to grant faculties to its flag vessels so they may obtain greater benefits than others. In brief, this situation, considering at the same time the use of flags of convenience, allows international companies, brands and firms to have empowerment over the real interest of the state in its EEZ.

⁶⁶ International Maritime Organization (IMO) Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions as at 31 July 2013. pp. 503-505.
<http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf>

⁶⁷ Ibid, pp. 498-502.

However, it is considered that “a sovereign state is a nonphysical juridical entity of the international legal system that is represented by a centralized government that has supreme independent authority over a geographical area. International law defines sovereign states as having a permanent population, a government, and the capacity to enter into relations with other sovereign states”⁶⁸.

It can be seen that the State through its government has the faculty and competence as a law making body, but does not always have the capacity and appropriate training to take decisions in affairs related to maritime issues. Hence the importance of international education institutions such as the World Maritime University⁶⁹ (WMU) which was founded in 1983 by the IMO and which promotes the international exchange and transfer of knowledge with the highest standards in maritime affairs to qualify personnel working in policy formulation or an advisory capacity at an executive level.

There is also the influence of other organizations and institutions that have interests in the development of economic activities such as the exploitation and exploration of living and non-living resources in the EEZ or the ability to cross an area without restrictions. These are important factors which influence the decisions of the law making bodies.

A new aspect in this matter is the influence of social media which through public opinion has enormous influence over the decisions of the law making bodies. For instance, the case of Arab Spring⁷⁰ in which “although the new media is one of the factors in the social revolution among others such as social and political factors in the

⁶⁸ Shaw, Malcolm Nathan (2003). *“International law”*. Cambridge University Press. p. 178.

⁶⁹ World Maritime University (WMU) founded in 1983 by the International Maritime Organization (IMO), a specialized agency of the United Nations.

⁷⁰ Arab Spring is a term for the revolutionary wave of demonstrations and protests (both non-violent and violent), riots, and civil wars in the Arab world that began on December 2010.

region, it nevertheless played a critical role especially in light of the absence of an open media and a civil society”⁷¹.

In addition, the long and cumbersome process to take decisions by the international Courts and tribunals does not enable a proper international legal regime to deal with the current problems in the EEZ. For example, in the case of Fisheries Jurisdiction of Spain v. Canada which was mentioned above, the case was held in 1995 and the judgment was given on 4th December 1998. As a result, the International Tribunal on the Law of the Sea (ITLOS) found that it had no jurisdiction to adjudicate upon the dispute brought before it through the application filed by the Kingdom of Spain on 28 March 1995. This was because months before the initiation of the legal process, the Kingdom of Spain filed for a document indicating that all the processes would be taken through the European Union without restriction. The case was not heard again.

In the same way, international conventions often take years to ratify due to a lack of consensus. To illustrate, the Maritime Labour Convention⁷² (MLC 2006), only entered into force on 20 August 2013.

To summarize, the role of international organizations is crucial for the establishment of an international legal regime. Lack of a legal framework, gaps in the law and the slow process to take decisions, in addition to the lack of qualified law makers and the influence of external bodies, make it impossible to have real and proper control of the activities taking place within the EEZ.

⁷¹ Khondkera H.H. “Globalizations Role of the New Media in the Arab Spring” Volume 8, Issue 5, 2011 pages 675-679 Published online: 18 Nov 2011
<http://www.tandfonline.com/doi/abs/10.1080/14747731.2011.621287#.Uiy94MZdySp>

⁷² Maritime Labour Convention 2006 (MLC) promoted by the International Labour Organization (ILO) specialized agency of the United Nations.

CHAPTER II

Problem of rights and duties in Exclusive Economic Zone

In a legal system, rights and duties are related to jurisprudence. “Rights and duties are capable of close analysis within a given legal order; they are reciprocal, they flow from fundamental human rights. In so far as a legal order protects these rights, then it complies with international standards”⁷³.

Although, UNCLOS established specific rights and duties in the EEZ, these are not entirely clear. The specific legal regime in this area is very ambiguous and its interpretation depends on other factors that have not been previously established. For instance, Article 60 gives the exclusive right to construct and to authorize and regulate the construction of artificial islands, structures and installations, and in paragraph 2 give the right to the Coastal State over such artificial islands and installations to have exclusive jurisdiction with regard to customs, fiscal, health, safety and immigration and regulations. Also paragraph 4 of the same article, gives the right to the Coastal State to establish reasonable safety zones around these to a maximum of 500 metres. However, it is not yet established whether the coastal state also has jurisdiction over this 500 metre zone. For example, this has been an issue when Greenpeace⁷⁴ activists come to this area to protest against the oil industry and they are arrested even though there is not international legal regime to empower the coastal state to do so⁷⁵.

⁷³ Wortley, B.A. (1967). *Jurisprudence*. (p.302) Manchester, published by the University of Manchester, United kingdom.

⁷⁴ Greenpeace is an independent global campaigning organization that acts to change attitudes and behavior, to protect and conserve the environment and to promote peace since 1971. Retried from <http://www.greenpeace.org/international/en/about/>

⁷⁵ Carrel, S., & Scott, K. (2010, September 2). Greenpeace activists arrested after abandoning occupation of Arctic oil rig. The Guardian. Retrieved from <http://www.theguardian.com/environment/2010/sep/02/greenpeace-abandons-oil-rig>

The problems of rights and duties are related to the activities carried out in the EEZ. Even the mere act of navigation represents a risk. In that sense, it is necessary to identify the activities that are carried out and analyze the potential hazards associated with them. However, it is so difficult to determine what the activities are when it is not possible to define the area. For this reason, it is obvious that the main problem is establishing which EEZ belongs to each State.

More broadly, it is necessary to evaluate and analyze the probabilities and consequences of all the activities that are carried out in the EEZ. Defining each activity is too complicated and differs from one State to another. However, these activities are mostly related to the economic factor, even militaries activities.

For instance, with respect to military activities, when a naval task force of the Coastal State is training in an area within the EEZ, the transit and operations of fishing vessels and others are forbidden. Consequently, fishing in this zone is restricted with the loss of opportunity to catch. Also the vessels planning to transit that area have to change their course to avoid this area with a consequent increase in fuel consumption. Paragraph 3 of Article 25 of UNCLOS stipulates that a Coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily, in specified areas of its territorial sea, the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises.

In summary, to develop activities in a legal order, it is necessary to establish rights and duties, and these at the same time need to be controlled by procedures and enforcement actions within an international legal framework to be set in accordance with the evolution of contemporaries' issues.

2.1. Definition and contemporary concepts of Exclusive Economic Zone.

The concept of EEZ is not only defined as a distance; it more broadly refers to the activities that could be performed in this zone with the sovereign rights being controlled and protected by the Coastal State. Nevertheless, not all the States have the capability to enforce the law in the EEZ, which results in many cases where sovereignty over this zone will be affected, for instance, in the case of piracy in Somalia, where today naval task forces⁷⁶ are operating in the EEZ of this State. Also, on March 2012 the Council of the EU extended the Mandate of Operation Atalanta until December 2014, and also extended the Area of Operation to include Somali coastal territory and internal waters. The UNSC through the Resolution 1816⁷⁷ of 2008 broadens the scope of existing narrow international rules on piracy, authorizing certain states to enter the Somali territorial waters in a manner consistent with action permitted on the high seas.

The exclusive economic zone establishes a special regime for vessels, ensuring that there is not a risk to the safety of human life at sea and the marine environment of the coastal state beyond the simple act of giving free transit to ships. However, it is not possible to enforce and verify whether a ship is complying with international regulations, unless according to Article 110 (right of visit) there is reasonable ground for suspecting that the ship is committing an unlawful act, with consequent compensation if the suspicions prove to be unfounded.

Moreover the EEZ, related to maritime liens and mortgages, could be seen and used as an area of convenience to avoid complying with international legal regimes. However it is not a loophole area, but rather an area in which, through international agreements the

⁷⁶ EU Naval Force Somalia - Operation Atalanta (EU NAVFOR - Atalanta) is the European Union Counter Piracy operation off the coast of Somalia, launched in 2008.

⁷⁷ Resolution 1816 (2008) Adopted by the Security Council of the United Nations at its 5902nd meeting on 2 June 2008.

laws of other states may apply such as extradition cases before a tort committed elsewhere.

Indeed, the relevant issues that were discussed at the UNCLOS III are not the same today. For instance, terrorism or genetic exploitation was never mentioned there. However, other issues such as the delimitation of boundaries between states remain a problem in the present.

Currently, globalization allows the rapid growth of transnational corporations⁷⁸. Actually, multinational companies have the power to exploit the sources for profit and then it is the State who has to ensure that these activities are performed in a safe way protecting the marine environment through proper conservation and management measures with respect for the rule of law. Considering that “the rule of law is a product of the liberal doctrine, is the result of a culture, an idea and a tradition designed to limit the power and preserve the rights of citizens”⁷⁹.

The appraisal of the concepts and issues in the maritime zone are kept under review. For instance, on September 11, 2013, DOALOS and UNITAR organized a briefing for delegates on recent developments in ocean affairs and the law of the sea. Their agenda considered the issues as follows: the work of the Commission on the Limits of the Continental Shelf and the Meeting of States Parties to UNCLOS; the World Ocean Assessment; marine biodiversity in areas beyond national jurisdiction; the meetings of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, and in particular the 14th meeting which focused on the impacts of ocean acidification on the marine environment; selected issues in sustainable fisheries; and DOALOS trust funds, technical cooperation and capacity-building programmes.

⁷⁸ Hamilton, L., & Webster, P. (2012). *The International Business Environment* (Second edition). Oxford University Press, New York.

⁷⁹ Corral, F. (2007) Principios del Estado de Derecho. *El Comercio Ecuador*. Retrieved from http://www.elcomercio.com/columnistas/Principios-Derecho_0_163186187.html

In an evaluation of marine safety policy instruments, researchers from the Centre for Maritime Studies, University of Turku, based on literary sources, concluded that “the development of individual policies will not greatly improve the current level of maritime safety, and more fundamental changes are needed in the governance of maritime safety”⁸⁰.

In brief, trying to limit the concepts and the rights and duties as well as the faculties granted by the UNCLOS is not the best way to interpret the aim of the Convention. This should be seen as a guide of principles that can and should be modified over time for the benefit of humankind and the environment surrounding it. However, the establishment of specific laws and regulations in UNCLOS restricts the Coastal State to implement and carry out activities for control and enforcement to safeguard human life at sea, protect and conserve the living and non-living resources of the marine environment and avoid and prevent illegal activities in the EEZ. Therefore, UNCLOS must be an international legal instrument that will be changed in time.

2.2. Problem in the Exclusive Economic Zone: rights and duties of Coastal States and other States.

First of all, it is necessary to understand the issues which were focused on in the development of the Convention. As it is stated in the preamble of the UNCLOS, the States Parties were conscious that the problems of the ocean space were closely interrelated and needed to be considered as a whole⁸¹. Hence, the definition of the EEZ is established as a whole too.

⁸⁰ Kuronen, J., & Tapaninen, U., (2010). WMU Journal of Maritime Affairs (Vol. 9) Evaluation of Maritime Safety Policy Instruments

⁸¹ The United Nations Conventions on the Law of the Sea 1982, Preamble.

Analyzing the articles in UNCLOS and using the technique of the *Five Ws*, the main problems that can be found in the Exclusive Economic Zone are related to three aspects which are linked to each other as follow:

- Determination of the EEZ itself.
- Jurisdiction in the zone (rights and duties).
- Activities in the zone.

The first aspect has two issues to define. One of these is to determine outer limits as a national and unilateral activity and the other is to determine limits with other States (opposite and adjacent States). As was mention before, it is an issue that has to be established through agreements, but in the case where that is to not achieved, it can be established by specials Courts or Tribunals to resolve the dispute or at least manage the conflict.

Subsequently, the second aspect is related to the rights and duties given in the UNCLOS concerning the EEZ, referring to jurisdiction in the zone. In this zone Coastal States have sovereign rights to particular activities subject to a specific legal regime. Also other Coastal and landlocked States have rights and duties in the zone. Further, Article 288 of UNCLOS established that a Court or Tribunal shall have jurisdiction over any dispute concerning the interpretation or application of the Convention. Moreover, The Seabed Disputes Chamber has mandatory jurisdiction over all disputes related to activities in the international seabed area, which is not part of the EEZ but has influence on it.

In a simple conception, Jurisdiction⁸² has two meanings. The first one is related to the authority granted to a legal body or political leader to make pronouncements in legal matters to administrate justice, and the second one concerns the territory in which an authority, court or government, can exercise its power. In this sense, the concepts of

⁸² Dorsett, S., & McVeigh, S., (2012). *Jurisdiction*. Published by Routledge, Taylor & Francis Group, New York, United States.

sovereignty in the territorial sea and sovereign rights in the EEZ can also be seen in UNCLOS. Hence, a Coastal State does not have exclusive jurisdiction in the EEZ.

Thereon, national interests are the main reason of the State for the benefit of its citizens. “The increasing openness and integration of world economy is challenging old assumptions about the integrity and coherence of nation-state”⁸³.

The power to establish rights and duties is limited in application according to the faculties granted by UNCLOS. However, the Convention allows States to implement laws and regulations, but they do not have to be incompatible with it. For instance, paragraph 4 (k) of the Article 62 of UNCLOS allows Coastal States to implement enforcement procedures for the conservation and utilization of living resources. However, in paragraph 3 of Article 73 of UNCLOS it is established that penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment. It is clear, that if in the domestic law of the Coastal State has established imprisonment penalties for illegal fisheries because it is considered as depredation of the marine environment, it is not to be bound according to the Convention.

Establishment of control and enforcement procedures in the EEZ is one of the major issues to avoid and prevent unsafe activities, environmental pollution and illegal activities such as illegal fishing, piracy, terrorism, slavery, smuggling and traffic of drugs among others. Control procedures could involve boarding and inspection routines and of course it is not necessarily implied that there is an illegal activity on board. Hence, paragraph 3 of Article 110 of UNCLOS (Rights of visit) restricts the control of activities that may be undertaken by the Coastal State. Only when there are reasonable grounds for suspecting some specific illegal activities, Coastal States have the right to visit.

⁸³ Trubowitz, P., (1998). *Defining the National Interest: Conflict and Change in American Foreign Policy*. The University of Chicago Press, Published and printed in the United States of America.

As was mentioned in the previous chapter, according to UNCLOS, Coastal States have sovereign rights for specific activities in the EEZ and are subject to the specific legal regime established in the Convention. Also these rights differ with the rights in the Contiguous Zone which lies within the EEZ. However, other States also have rights and duties in the same zone whether coastal or land-locked States⁸⁴.

According to UNCLOS, a Coastal State has sovereign rights to explore, exploit, conserve and manage living resources. However, Article 69 established specific rights of land-locked States in the EEZ to participate on an equitable basis in the exploitation of an appropriate part of the surplus of the living resources. Also, Article 70 sets rights to geographically disadvantaged States. But, the provisions of Articles 69 and 70 do not apply in case of a Coastal State whose economy is overwhelmingly dependent on the exploitation of the living resources of its EEZ. This can be seen as a way of establishing and sharing in an equitable manner the sources in the EEZ but it is set in general, as a principle that has to be established by agreement between States.

Further, according to Articles 27 and 28 the criminal jurisdiction of the Coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in special cases and it should not stop or divert a foreign ship for the purpose of exercising civil jurisdiction.

Furthermore, paragraph 2 of Article 293 of UNCLOS allows Courts or Tribunals having jurisdiction to apply the Convention and other international law and to decide a case *ex aequo et bono*, if the parties so agree.

The last aspect to review is related to the activities in the EEZ. Many actors are involved in the development of the activities in the EEZ. Some of them have special interest and others the simple action to navigate through this zone.

⁸⁴ The United Nations Conventions on the Law of the Sea 1982, Article 58.

In that sense, it is possible to find again that the national interests of a State are involved in the development of economic activities such as exploration and exploitation of resources and in the conservation and preservation of living and non-living resources in the EEZ. However, the national interests of a State trying to protect its own industry could be confused with private interest. For instance, on August 29, 2013 with the payment of U.S. \$ 223.2 million the Chinese company “China Fishery Group” bought 99.1% of the Peruvian company “Copeinca” one of the five largest producers of fishmeal and fish oil, which has five plants in the Peruvian coast and exports mainly to China, Japan, Germany, Canada, Chile and Denmark⁸⁵.

Another case is the use of flags of convenience, whereby some countries through their laws allow ships owned by foreign nationals or companies to fly these flags.

Thus, it can be seen that economic activities in the EEZ are not necessarily prosecuted by Coastal States. In this regard the role of the Coastal State is to take measures to protect human life at sea, conserve, preserve and protect the marine environment and prevent, avoid and enforce illegal acts in the EEZ. However, in a zone with limited jurisdiction it is too difficult to do this. Therefore, it is important to set standards in an international legal order to prevent excessive laws or otherwise soft laws. Hence, International organizations such as IMO, ILO and others, provide international legal instruments for cooperation among governments in the field of governmental regulation and practices.

On the other hand, the private interests, through alliances between organizations and companies shape joint lobbies to try to influence the decisions of the States⁸⁶.

⁸⁵ (2013, August 27) Grupo Dyer completó venta de sus acciones en Copeinca por US\$223,2 mlls. El Comercio Perú. Retrieved from <http://elcomercio.pe/economia/1624356/noticia-grupo-dyer-completo-venta-sus-acciones-copeinca-us2232-mlls>

⁸⁶ European Conference of Minister of Transport (2001). *Short Sea Shipping in Europe*. OECD publications service Paris, France.

Further, it can be seen that navigation is the main activity in the EEZ, either for developing a gainful activity or for the simple fact of crossing the zone. “Shipping is perhaps the most international of all the world’s global industry. Shipping is also an inherently dangerous occupation, with ships having to confront the worst that the elements can throw at them”⁸⁷.

Thus, the risk of incidents or disasters occurring in the EEZ is always latent. With the concept of freedom of navigation and the limitation of inspections under Article 110 of UNCLOS (right of visit), the restriction of exercising criminal and civil jurisdiction are overly benevolent actions to an industry which uses flags of convenience.

For instance, this becomes a significant issue when shippers, deliberately under-declaring container weights in order to minimize import taxes calculated on cargo weight, allow the over-loading of containers, and keep the declared weight within limits imposed by road or rail transportation. In view of the fact that container ships invariably sail very close to the permissible seagoing maximum bending moments, the additional undeclared weight has the potential to cause vessels to exceed these maxima. It is significant to note that container shipping is the only sector of the industry in which the weight of a cargo is not known⁸⁸.

To summarize, the problems in the EEZ are related to failure to establish clear rules and procedures to delimitate borders, the limitation of the powers of the States to set the rights to enforce the law without falling into soft laws and lack of preventive measures to avoid disasters.

⁸⁷ Mitropoulos, E., (2008). IMO: 60 years in the service of shipping. *IMO News*, 3.2008, p. 4.

⁸⁸ Report on the investigation of the structural failure of MSC Napoli English Channel on 18 January 2007 Marine Accident Investigation Branch Carlton House Carlton Place Southampton United Kingdom SO15 2DZ Report No 9/2008 April 2008.

2.3. Military, fiscal, social, labor and health matters related to the Exclusive Economic Zone.

Issues in the EEZ are not limited to economic activities. Also, there are other activities that are carried out in the zone. While UNCLOS has taken steps to address economic and environmental issues and give some specific rights and duties concerning military issues, such as military exercises, States have to deal with other activities and adopt measures to ensure these activities can be performed without affecting the welfare of seafarers and passengers, the safety of the ships and the environment and avoiding and repressing unlawful acts. Also, States are not alone in these matters. There are international organizations such as ILO which endeavor with international rules and regulations to establish better conditions for seafarers. For instance, The Maritime Labour Convention (MLC 2006) entered into force on August 20, 2013.

Related to military matters in the EEZ, UNCLOS defines the meaning of warship and establishes that if the ship does not comply with the laws and regulations of the Coastal State regarding passage through the territorial sea, the Coastal State may require it to leave the territorial sea immediately. However, it does not mention the procedure in the EEZ. Further, paragraph 3 of Article 25 of UNCLOS allows a Coastal State to suspend temporarily in specific areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Again, it is not mentioned what happens in the EEZ.

In spite of the fact that UNCLOS has established that warships have immunity everywhere at sea and, according to Article 20 of UNCLOS, in territorial waters submarines and other underwater vehicles are required to navigate on the surface and to show their flag, once again it does not establish any restriction to do this in the EEZ. A submarine sailing underwater in the EEZ could be considered as a threat to peace.

With respect to military uses of the EEZ, UNCLOS does not make clear whether military activities are included in the freedoms of navigation and overflight and other internationally lawful uses of the sea available in Articles 58 and 87 of the Convention⁸⁹. Over fifteen years ago, “One operational commander from United States has written that the EEZ regime does not permit the Coastal State to limit traditional non-resources related high seas activities in the EEZ, such as task force maneuvering, flight operations, military exercises, telecommunications and space activities, intelligence and surveillance activities, marine data collection, and weapons’ testing and firing”⁹⁰.

Some States consider Coastguard operations as a military branch with law enforcement capacity although to others it is regard as a law enforcement agency of the ministry of transport. Whatever the point of view of each State in particular, inclusive of whether the Coastguard has different faculties in each country, its main activity is related to maritime security and to law enforcement.

Article 110 of UNCLOS allows warship in the EEZ to board foreign ships if there is reasonable ground for suspecting specific illegal acts, also these provision apply to any other duly authorized ships or aircraft clearly marked and identifiable as being in government service. Hence, law enforcement in the EEZ could be confused as a military activity.

Related to fiscal activities, according to Article 33 of UNCLOS, in the Contiguous Zone States may exercise the control necessary to prevent and punish infringements of fiscal laws and regulations committed within its territory or territorial sea. It means that in the EEZ, the State does not have fiscal faculties. For instance, offshore bunkering as a part of the shipping business is an international business transaction based on a sales contract

⁸⁹ Churchill, R., & Lowe, A., (1999). *The Law of the Sea*. 3rd ed., Manchester University Press, Manchester.

⁹⁰ Doran, W. (1995). An Operational Commander’s Perspective on UNCLOS. *Marine & Coastal Vol.10*, No. 3, p. 341.

between a specialized bunkering enterprise and a shipowner⁹¹. No legal definition of offshore bunkering exists, nor is it mentioned in the UNCLOS. Therefore, bunkering in the EEZ is not under fiscal application.

With regards to fiscal activity as an economic public interest, States have to established fiscal policies in their territories. Although fiscal actions are economic activities, according to UNCLOS, the specific legal regime in the Exclusive Economic Zone does not consider fiscal activity as a part of sovereign rights. However, paragraph 2 of Article 60 of UNCLOS establishes that Coastal States shall have exclusive jurisdiction over artificial islands, installations and structures, including with regard to custom, health, fiscal safety and immigration laws and regulations.

For instance, in the M/V SAIGA case (Saint Vincent and the Grenadines v. Guinea), which was held in 1997 by the International Tribunal on the Law of the Sea. Guinea arrested M/V SAIGA for carried out bunkering activities in its EEZ, avoiding public revenues from customs taxes such as the specific tax on oil products. Saint Vincent and the Grenadines claimed for prompt release of the arrested ship and its crew according to Article 292 of UNCLOS. This case will be discussed in Chapter III of this dissertation.

Social justice involves many aspects of the behavior of human being and their welfare and also implies equity in the distribution of rights, opportunities and resources⁹². In a global world, a State has the obligation that the laws and regulations related to this issue are binding to protect against the abuse of inequity or other kind of illegal action affecting social stability.

⁹¹ Lagoni, R. (2007). Offshore Bunkering in the Exclusive Economic Zone. In T. M. Ndiaye & R. Wolfrum (Ed.), *Law of the Sea, Environmental Law and Settlement of Disputes (Liber Amicorum Judge Thomas A. Mensah)* (pp. 613-627). Printed in the Netherlands.

⁹² Barry, B. (2005). *Why Social Justice Matters*. Polity Press Cambridge, United kingdom.

The UN Charter, in its preamble, emphasizes and reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and establishes conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. Therefore, the EEZ as an area subject to specific legal regimes is not excluding of international legal order related to social justice. However, enforcement of these principles is not established. For instance, the Captain is responsible for the social issues of the crew and the people on board under the laws and regulations of the flag State and the international laws or conventions that it is party or signatory to. Flag State is responsible for verifying its compliance and also the Coastal State may do this when a ship is voluntarily within its ports, but not in the EEZ.

Issues in the EEZ are mostly related to ships and their compliance with the laws and regulations under their flags and the activities in the zone over which the Coastal State has sovereignty and sovereign rights to establish laws and regulations. Indeed, health is related to both aspects. However, fishing is an activity which can impact on consumers in the absence of their effective attention in the zone. Also, fishing is the main activity in the EEZ that has an impact on human health. “EEZ brought over 20% of the oceans, a substantial proportion of its primary productivity and 90-95% of the world’s fisheries under the national jurisdiction of Coastal States”⁹³. For instance, the presence of toxic species such as harmful algae in the food chain could contaminate the seafood products that are caught in the EEZ with fatal consequence for the consumers on land⁹⁴.

⁹³ Edited by Ebbin, S., Hakon, A. & Sydnes, A. (2005). *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources*. Published by Springer, Dordrecht, The Netherlands.

⁹⁴ Dr. De Souza Sant’Ana, A. & Dr. Franko, B. (2012). *New Trends in Marine and Freshwaters Toxins, food and safety concerns*. Edited by Cabado, A. & Vietes, J. Nova Science Publisher, Inc. New York, USA.

In addition, the whole activities that are developing in the EEZ as well as the simple act of navigation are related to labor conditions. There are two new conventions that are engaged with this matter. The first one is the MLC 2006 convention, which entered into force on August 20, 2013, in which the ILO put its efforts into achieving a standardized convention of working conditions to protect seafarers, “probably the most important maritime instrument in a long time”⁹⁵. The second one is the STCW-F 95⁹⁶ Convention which entered into force on September 29, 2012 after 17 years. STCW-F 95 establishes international technical regulations and requirements on training, certification and watchkeeping for fishing vessel personnel.

Both conventions are new international maritime tools that have to be implementing by States. Also, these conventions are applicable in the EEZ. However, according to Article 110 of UNCLOS, the right of visit could be possible only when there is reasonable ground for suspecting specific illegal acts, not including labor conditions.

⁹⁵ Storhaug, H., Senior Advisor Norwegian Maritime Directorate. Retrieved from <http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm>

⁹⁶ International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F), 1995. International Maritime Organization.

CHAPTER III

Settlement of disputes concerning Exclusive Economic Zone

In order to provide a stable international legal basis related to settlement of disputes in the EEZ, UNCLOS establishes general provisions, compulsory procedures entailing binding decisions and limitations and exceptions to apply these procedures. Also, Article 280 of the UNCLOS allows States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of the Convention by any peaceful means of their own choice.

Indeed, settling a dispute is the first step to managing a conflict. There are many aspects involved in a dispute such as political, economic, social, religious and others. Conflicts are not stationary issues in time, meaning that a conflict that was settled in the past could arise in the future. For this reason, participation of international organizations such as the United Nations plays an important role in establishing procedures for settlement and decisions of international Courts and Tribunals, a status of international law by which the States should be bound.

Also, Article 283 of the UNCLOS establishes obligations to exchange views when a dispute arises between States Parties concerning the interpretation or application of the Convention and also establishes that the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. It can be seen that “UNCLOS has created new jurisdictional possibilities, including compulsory procedures leading to binding decisions”⁹⁷.

⁹⁷ Anderson, D. (2006). Article 283 of the United Nations Convention on the Law of the Sea. Law of the Sea, Environmental Law and Settlement of Disputes (Liber Amicorum Judge Thomas A. Mensah) (pp. 613-627). Printed in the Netherlands.

Further, according to Article 287 of UNCLOS, when the States are parties of the Convention, they shall be free to choose one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention:

- a) The International Tribunal for the Law of the Sea.
- b) The International Court of Justice.
- c) An arbitral Tribunal constituted according with the Annex VII of the UNCLOS.
- d) A special arbitral tribunal constituted according with the Annex VIII of the UNCLOS for one or more of the categories of dispute specific therein.

Furthermore, Article 296 of UNCLOS establishes that any decision rendered by a Court or Tribunal having jurisdiction shall be final and shall be complied with by all the parties to the dispute. Moreover, paragraph 2 of Article 299 of the UNCLOS considers the possibility for States party to the dispute to agree to some other procedure for settlement of such dispute or to reach an amicable settlement.

It can be seen that UNCLOS as an international legal regime allows States by many means to achieve conciliation to resolve a dispute. This mechanism was established by Article 33 of the UN Charter in 1945 as follows “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”⁹⁸.

⁹⁸ UN Charter Article 33. Retrieved from <http://www.un.org/en/documents/charter/chapter6.shtml>

3.1. Analysis of relative international disputes.

Due to the fact that international disputes could create jurisprudence, UNCLOS establishes and allows States to settle disputes between States Parties concerning the interpretation or application of the UNCLOS by any peaceful means of their own choice, and at the same time establishes in Article 287 a procedure to choose means for the settlement of disputes.

There are some relative cases that should be give an overview to show how UNCLOS is interpreted and how the international Courts and Tribunals could create jurisprudence in the EEZ. The analysis of these cases is based on the following aspects: the facts, the claims, the Court decision and the analysis with the author's opinion. To get a general idea, the analysis of four cases was performed considering some specific issues in the EEZ such as illegal fishing, jurisprudence and enforcement, bunkering, prompt release and delimitation of boundaries.

Case Spain v. Canada, Fisheries Jurisdiction, ICJ filed in the registry of the Court on March 28, 1995⁹⁹.

Facts

On 12 May 1994, Canada passed an Act to amend the Coastal Fisheries Protection Act. This Act gives the Canadian authorities discretion as regards the task of adopting and implementing regulations, together with the list of fish stocks for protection, the relevant protection measures and the categories of foreign ships to which these measures apply, and of stipulating the powers which may be used in order to ensure they are respected.

⁹⁹ ICJ web page on September 30, 2013. Contentious cases. Case Spain v. Canada, Fisheries Jurisdiction. Retrieved from: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=ec&case=96&k=ac&p3=0>

On 9 March 1995, the boat Estai, flying the Spanish flag and with a Spanish crew, was stopped and inspected on the high seas, in the area of the Grand Banks, approximately 245 miles off the coast, by the Canadian coastguard vessel Sir Wilfred Grenfell.

The captain of the boat was imprisoned and subjected to criminal proceedings for having engaged in a fishing activity on the high seas outside the Canadian exclusive economic zone, and for resisting authority; the boat's papers and part of the catch on board were confiscated. In order to obtain the captain's release and the freedom to use the boat, the owner, while asserting that he did not recognize Canadian jurisdiction, paid 8,000 and 500,000 Canadian dollars respectively, set by a judge of the Provincial Court of Newfoundland (Terre-Neuve) Judicial Centre of St. John's. A new hearing is scheduled for 20 April next.

Claims

The Kingdom of Spain considers that, quite apart from the violation of the provisions of the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, in particular Articles XI (7), XII, XVII and XVIII, the acts by Canada constitute a serious and flagrant violation of at least the following international principles and norms, which Spain invokes in support of its Application:

- (a) The principle of general international law which proclaims the exclusive jurisdiction of the flag State over ships on the high seas, a principle codified by the Geneva Convention on the High Seas, 1958, Article 6, paragraph 1, and by the United Nations Convention on the Law of the Sea, 1982, Article 92 and other articles to the same effect;
- (b) The principle of general international law which proclaims freedom of navigation on the high seas, a principle codified by the Geneva Convention on

the High Seas, 1958, Article 2, and by the United Nations Convention on the Law of the Sea, 1982, Articles 87, 90 and other articles to the same effect;

(c) The principle of general international law which proclaims freedom of fishing on the high seas, codified by the Geneva Convention on the High Seas, 1958, Article 2, and by the United Nations Convention on the Law of the Sea, 1982, Articles 87, 116 and other articles to the same effect;

(d) The principle of general international law according to which no State may subject any part of the high seas to its sovereignty, codified by the Geneva Convention on the High Seas, 1958, Article 2, and by the United Nations Convention on the Law of the Sea, 1982, Article 89;

(e) The norm of general international law which rejects the right of hot pursuit on the high seas, outside the exclusive economic zone, a norm stated by the United Nations Convention on the Law of the Sea, 1982, Article 111;

(f) The norm of general international law which, except as otherwise agreed between the States concerned, prohibits imprisonment and corporal punishment as penalties for violations of fishing laws and regulations;

(g) The principle of general international law regarding the co-operation of States in the conservation of the living resources of the high seas, stated by the United Nations Convention on the Law of the Sea, 1982, Articles 63, 117, 118 and 119;

(h) The principle of general international law which prohibits the threat or use of armed force in international relations, codified by the United Nations Charter, Article 2, paragraph 4;

(i) The principle of general international law which makes it an obligation to settle international disputes by peaceful means in such a manner that peace,

security and justice are not endangered, codified by the United Nations Charter, Article 2, paragraph 3;

(j) The principle of general international law according to which States may not invoke the provisions of their internal law as justification for their failure to observe the international norms in force which bind them, codified by Article 27 of the Vienna Convention on the Law of Treaties, 1969, in relation to treaty norms;

(k) The principle of general international law of good faith in fulfilling obligations assumed, codified by the United Nations Charter, Article 2, paragraph 2; a principle which, in the field of application of international treaties, takes the form of (1) the obligation to respect treaties approved: *pacta sunt servanda* (Vienna Convention on the Law of Treaties, 1969, Art. 26);

(2) the obligation not to impede, prior to entry into force, the object and purpose of treaties adopted and authenticated by a State by signature, until it has made clear its intention not to be a party to the treaty, and of multilateral treaties already approved by that State, provided that entry into force is not unduly delayed (*ibid.*, Art. 18); and (3) the obligation to refrain from acts aimed at endangering the smooth conduct of negotiations while negotiations are in progress.

Court decision

On 4 December 1998 the ICJ with regard to the determination of the questions on which the Court must adjudicate, in the Fisheries Jurisdiction Case (Spain v. Canada),

The Court notes that, in its Counter-Memorial of February 1996, Canada maintained that any dispute with Spain had been settled, since the filing of the Application, by the agreement concluded on 20 April 1995 between the European Community and Canada, and that the Spanish submissions were now without object. However, at the beginning of

Canada's oral argument, its Agent informed the Court that his Government intended to challenge the Court's jurisdiction solely on the basis of its reservation: "It is on this problem, and no other, that the Court is called upon to rule." This position was confirmed at the end of the oral proceedings. Spain nonetheless draws attention to the "Court's statutory duty to verify the existence of a dispute between States in order to exercise its function".

"It is true that it is for the Court to satisfy itself, whether at the instance of a party or *proprio motu*, that a dispute has not become devoid of purpose since the filing of the Application and that there remains reason to adjudicate that dispute (see Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I. C. J. Reports 1963, p. 38; Nuclear Tests (Australia v. France), Judgment, I. C.J. Reports 1974, p. 271, para. 58).

The Court has, however, reached the conclusion in the present case that it has no jurisdiction to adjudicate the dispute submitted to it by Spain. That being so, in the view of the Court it is not required to determine *proprio motu* whether or not that dispute is distinct from the dispute which was the subject of the Agreement of 20 April 1995 between the European Community and Canada, and whether or not the Court would have to find it moot.

For these reasons, the Court, by twelve votes to five, finds that it has no jurisdiction to adjudicate upon the dispute brought before it by the Application filed by the Kingdom of Spain on 28 March 1995.

Analysis and opinion

On March 15, the ship was released after the ownership posted a bond of 500,000 Canadian dollars. However the conflict between Spain and Canada grew. The Spanish government sent two patrol boats to the scene and Canadian did too. Negotiations

between the EU and Canada achieved a deal on April 5 and finally Spain and Canada reached a settlement on April 20. Canada reimbursed the \$500,000 that had been paid for the release and repealed the provisions that allowed the arrest of a Spanish vessel.

A new international regime to observe EU and Canadian fishing vessels was also created. This case gave rise to the so-called Turbot War¹⁰⁰.

The Court was not sufficiently able to take a decision on time of the deal causing the dispute to grow. The deal was managed by the EU and Canada according to the United Nations Charter, creating a bad precedent of the usefulness of the UNCLOS.

Today there is a similar case in Russia with a group of Greenpeace activists known as the Arctic 30¹⁰¹. On September 19, 2013 the Greenpeace ship “Arctic Sunrise” and its crew were arrested and charged with piracy in Russia after two activists climbed an oil platform in the Russian EEZ. On October 4, Greenpeace International applauded Dutch arbitration over the Arctic 30: “The Dutch government today announced that it would initiate arbitration proceedings against Russia under the UN Convention of the Law of the Sea to secure the release of 28 Greenpeace International activists, plus a freelance photographer and a freelance videographer, currently being detained in Russia on piracy charges.”¹⁰² 18 days have elapsed since the ship and the crew were arrested and the Dutch government to took a decision to initiate an arbitration process.

The decision that will arise from the Court that holds the case could be a crucial precedent for the international legal system in the history of the UNCLOS or maybe, once again, will demonstrate its failure as an international legal instrument.

¹⁰⁰ Donald, B. (1998). The Canada-European Union turbot war: internal politics and transatlantic bargaining Barry, Donald. *International Journal* 53.2 (Spring 1998): 253-284.

¹⁰¹ Rosenberg, S. (2013, September 23). Russia 'seizes' Greenpeace ship after Arctic rig protest. *BBC News Europe*. Retrieved from <http://www.bbc.co.uk/news/world-europe-24170129>

¹⁰² Press release (2013, October 4). Greenpeace International applauds Dutch arbitration over Arctic 30. *Greenpeace International Press center Publications* pressdesk.int@greenpeace.org Retrieved from <http://www.greenpeace.org/international/en/press/releases/Greenpeace-International-applauds-Dutch-arbitration-over-Arctic-30/>

Southern Bluefin Tuna case (New Zealand v. Japan; Australia v. Japan), ITLOS 1999 and an Arbitral Tribunal.

Facts

In 1993, Japan, Australia and New Zealand signed a tripartite Convention for the Conservation of Southern Bluefin Tuna (CCSBT), established to limit the total allowable catch. Since 1996 Japan proposed an Experimental Fishing Program, requesting authorization for a limited amount equal to 1800 tons test catch, outside of the total allowable catch. Australia and New Zealand agreed to a 1500 tons test catch. Japan insisted on 1800 tons, and the negotiations broke down in 1998.

In 1999, Australia and New Zealand decided to submit the dispute to an Arbitral Tribunal according to Article 287 of UNCLOS. Besides, according to Article 290 of UNCLOS, Australia and New Zealand appealed for ITLOS to issue an order to stop the Japanese experimental fishing program.

On August 1999, ITLOS issued the requested order prescribing provisional measures according to Article 290 (4) and Article 94 of UNCLOS, ordering Japan to stop its experimental fishing program.

“On 4 August 2000, an Arbitral Tribunal, constituted pursuant to Article 287 (1) of the UNCLOS rendered an award on the Southern Bluefin Tuna case brought before it by Australia and New Zealand against Japan. In the award, the Tribunal decided that it was without jurisdiction to rule on the merits of the dispute and, consequently, revoked the provisional measures ordered earlier by the ITLOS”¹⁰³.

¹⁰³ Ando, N. (2007). The Southern Bluefin Tuna Case and Dispute Settlement under the UNCLOS: A Japanese perspective. In T. M. Ndiaye & R. Wolfrum (Ed.), *Law of the Sea, Environmental Law and Settlement of Disputes (Liber Amicorum Judge Thomas A. Mensah)* (pp. 613-627). Printed in the Netherlands.

Claims

The main issue of the award was whether the dispute settlement regime provide by the UNCLOS could allow the dispute settlement procedure established by the tripartite (Japan Australia and New Zealand) Convention for the Conservation of the Southern Bluefin Tuna (CCSBT) of 1993.

Court decision

With respect to the relationship between the CCSBT and UNCLOS, the Tribunal points out that there is a parallelism of both treaties in their substantive content and in their provisions for dispute settlement. However, the procedures provided for in UNCLOS Part XV apply only where (a) no settlement has been reached by recourse to such means and (b) the agreement between the parties does not exclude any further procedure.

The Arbitral Tribunal concludes that it is without jurisdiction to rule on the merits of the dispute and decides to revoke the provisional measures ordered by ITLOS.

Analysis and Opinion

The Southern Bluefin Tuna case highlights the importance of International Agreements and the settlement of disputes thereunder. According to Article 31 of the Vienna Convention on the Law of Treaties, as a general rule, interpretation of treaties “shall be taken into account, together with the context: any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”. For these reason, interpretation of UNCLOS is essential to the establishment of procedures to settle disputes. While UNCLOS in Part XV Section 2 provides compulsory procedures, it, at the same time, provides voluntary dispute of settlement procedures through treaties.

Case M/V SAIGA, Bunkering and prompt release (Saint Vincent and the Grenadines v. Guinea) ITLOS, 1997¹⁰⁴.

Facts

On October 28, 1997, M/V SAIGA (Oil tanker) was drifting in between the EEZs of Sierra Leone and Guinea. At around 09:00 she was attacked by representatives of the Guinea Government who took control of the ship and brought it to Conakry port of Guinea. Guinea officials forced the Master to discharge the cargo into shore tanks. Guinea's government accused the ship of providing gas oil to three boats in the EEZ of Guinea and this act was considered as smuggling according to the Customs Guinea Laws. According to the Counter-Memorial Submitted by Guinea, "the study of the navigational map shows that the supply of the three boats identified above took place in the exclusive economic zone of Guinea. There was on it a handwritten recommendation to stay at least 100 nautical miles away from the Guinean coast due to the fact that there was a crackdown on smuggling in Guinea".

Claims

The Applicant submits that the Tribunal should determine that the vessel, its cargo and crew be released immediately without requiring that any bond be provided. The Applicants are M/V "SAIGA" prepared to provide security reasonably imposed by the Tribunal to the Tribunal itself, but in view of the foregoing seek that the Tribunal do not determine that any security be provided directly to the Guineans.

Court Decision (Textual copy retrieved from ITLOS web page).

On December 4, 1997 the International Tribunal for the Law of the Sea in the M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea),

¹⁰⁴ International Tribunal on the Law of the Sea Convention web page on October 2, 2013. Retrieved from http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_1/judgment_041297_eng.pdf

(1) Unanimously,

Finds that the Tribunal has jurisdiction under article 292 of the United Nations Convention on the Law of the Sea to entertain the Application filed by Saint Vincent and the Grenadines on 13 November 1997.

(2) By 12 votes to 9,

Finds that the Application is admissible;

In favour: Judges Zhao, Caminos, Marotta Rangel, Yankov, Kolodkin, Bamela Engo, Akl, Warioba, Laing, Treves, Marsit, Eiriksson;

Against: President Mensah; Vice-President Wolfrum; Judges Yamamoto, Park, Nelson, Chandrasekhara Rao, Anderson, Vukas, Ndiaye.

(3) By 12 votes to 9,

Orders that Guinea shall promptly release the M/V Saiga and its crew from detention;

In favour: Judges Zhao, Caminos, Marotta Rangel, Yankov, Kolodkin, Bamela Engo, Akl, Warioba, Laing, Treves, Marsit, Eiriksson;

Against: President Mensah; Vice-President Wolfrum; Judges Yamamoto, Park, Nelson, Chandrasekhara Rao, Anderson, Vukas, Ndiaye.

(4) By 12 votes to 9,

Decides that the release shall be upon the posting of a reasonable bond or security;

In Favour: Judges Zhao, Caminos, Marotta Rangel, Yankov, Kolodkin, Bamela Engo, Akl, Warioba, Laing, Treves, Marsit, Eiriksson;

Against: President Mensah; Vice-President Wolfrum; Judges Yamamoto, Park, Nelson, Chandrasekhara Rao, Anderson, Vukas, Ndiaye.

(5) By 12 votes to 9, Decides that the security shall consist of: (1) the amount of gasoil discharged from the M/V Saiga; and (2) the amount of 400,000 United States dollars, to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form;

In Favour: Judges Zhao, Caminos, Marotta Rangel, Yankov, Kolodkin, Bamela Engo, Akl, Warioba, Laing, Treves, Marsit, Eiriksson;

Against: President Mensah; Vice-President Wolfrum; Judges Yamamoto, Park, Nelson, Chandrasekhara Rao, Anderson, Vukas, Ndiaye.

Analysis and Opinion

In order to establish the procedure within the Tribunal to take decisions for judgment, in this case it was necessary to express in detail how it was that the Tribunal took the final decision. Consensus was reached only on the point of the Tribunal's jurisdiction to rule on the matter. On the other points of decision, the Tribunal was polarized, demonstrating that the law is not totally clear.

According to Article 111 (3) of UNCLOS, Right of hot pursuit, establishes that the right of pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State. However it does not mention pursuit in the EEZ of another State. In its judgment of 1997, the Tribunal stated: "It is not necessary for the Tribunal to come to a conclusion as to which of these two approaches (regarding offshore bunkering) is better founded in law. For the purpose of the admissibility of the prompt release of the M/V SAIGA it is sufficient to note that non-compliance with Article 73 paragraph 2 of the

UNCLOS has been alleged and to conclude that the allegation is arguable or sufficiently plausible”¹⁰⁵.

Bunkering in the EEZ has neither been qualified as a being subject to flag State jurisdiction nor to the Coastal State. Articles 56 and 58 do not establish any special rights related to bunkering in the EEZ considering that bunkering is an economic transaction. Instead of giving a legal order established by the UNCLOS, the Tribunal gives separate opinions in its judgments.

The Judgment decision by 12 votes to 9 demonstrates that even people with legal understanding have serious problems deciding in the same direction, reviewing matters related to the interpretation of UNCLOS.

Case Nicaragua v. Colombia, Territorial and Maritime Dispute. ICJ filed in the Registry of the Court on 6 December 2001¹⁰⁶.

Facts

On December 2001, the Republic of Nicaragua submitted a dispute to the ICJ consisting of a group of related legal issues subsisting between the Republic of Nicaragua and the Republic of Colombia concerning title to territory and maritime delimitation.

Claims (Textual copy retrieved from ICJ web page).

The Republic of Nicaragua claim to the Court to adjudge and declare:

First, sovereignty over the islands of Providencia, San Andrés and Santa Catalina and all the appurtenant islands and keys, and also over the Roncador, Serrana, Serranilla and Quitasueno keys;

¹⁰⁵ ITLOS report 1997, p. 30, para. 59.

¹⁰⁶ ICJ web page on October 03, 2013. Contentious cases. Case Nicaragua v. Colombia, Territorial and Maritime Dispute Retrieved from: <http://www.icj-cij.org/docket/files/124/17164.pdf>

Second, in light of the determinations concerning the title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary.

Whilst the principal purpose of this Application is to obtain declarations concerning title and the determination of maritime boundaries, the Government of Nicaragua reserves the right to claim compensation for elements of unjust enrichment consequent upon Colombian possession of the Islands of San Andrés and Providencia as well as the keys and maritime spaces up to the 82 meridian, in the absence of lawful title.

The Government of Nicaragua also reserves the right to claim compensation for interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua.

Court Decision (Textual copy retrieved from ICJ web page).

(1) Unanimously,

Finds that the Republic of Colombia has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla;

(2) By fourteen votes to one,

Finds admissible the Republic of Nicaragua's claim contained in its final submission I (3) requesting the Court to adjudge and declare that "[t]he appropriate form of delimitation, within the geographical and legal framework

constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties”;

In Favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Sebutinde; Judges ad hoc Mensah, Cot;

Against: Judge Owada;

(3) Unanimously,

Finds that it cannot uphold the Republic of Nicaragua’s claim contained in its final submission I (3);

(4) Unanimously,

Decides that the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of Colombia shall follow geodetic lines connecting the points with co-ordinates:

Latitude north Longitude west

- | | |
|--------------------------------|--------------------------------|
| 1. 13° 46' 35.7" 81° 29' 34.7" | 2. 13° 31' 08.0" 81° 45' 59.4" |
| 3. 13° 03' 15.8" 81° 46' 22.7" | 4. 12° 50' 12.8" 81° 59' 22.6" |
| 5. 12° 07' 28.8" 82° 07' 27.7" | 6. 12° 00' 04.5" 81° 57' 57.8" |

From point 1, the maritime boundary line shall continue due east along the parallel of latitude (co-ordinates 13° 46' 35.7" N) until it reaches the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured. From point 6 (with co-ordinates 12° 00' 04.5" N

and 81° 57' 57.8" W), located on a 12-nautical-mile envelope of arcs around Alburquerque, the maritime boundary line shall continue along that envelope of arcs until it reaches point 7 (with co-ordinates 12° 11' 53.5" N and 81° 38' 16.6" W) which is located on the parallel passing through the southernmost point on the 12-nautical-mile envelope of arcs around East-Southeast Cays. The boundary line then follows that parallel until it reaches the southernmost point of the 12-nautical-mile envelope of arcs around East-Southeast Cays at point 8 (with co-ordinates 12° 11' 53.5" N and 81° 28' 29.5" W) and continues along that envelope of arcs until its most eastward point (point 9 with co-ordinates 12° 24' 09.3" N and 81° 14' 43.9" W). From that point the boundary line follows the parallel of latitude (co-ordinates 12° 24' 09.3" N) until it reaches the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured;

(5) Unanimously,

Decides that the single maritime boundary around Quitasueño and Serrana shall follow, respectively, a 12-nautical-mile envelope of arcs measured from QS 32 and from low-tide elevations located within 12 nautical miles from QS 32, and a 12-nautical-mile envelope of arcs measured from Serrana Cay and the other cays in its vicinity;

(6) Unanimously,

Rejects the Republic of Nicaragua's claim contained in its final submissions requesting the Court to declare that the Republic of Colombia is not acting in accordance with its obligations under international law by preventing the Republic of Nicaragua from having access to natural resources to the east of the 82nd meridian.

Analysis and Opinion

In this case the delimitation of boundaries between Nicaragua (Party of UNCLOS) and Colombia (Signed but not ratified UNCLOS) was taken in a proportional manner applying the principle of equitability due to the overlapping interests of both States. Also, the Court concluded that the result achieved by the application of the line provisionally adopted in the previous Judgment does not entail such disproportionality as to create an inequitable result. The goal of the tribunal was to achieve a solution in an equitable manner and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome.

However, it did not mention the principles of *ius utendi*, *ius fruendi* and *ius abutendi* which are the main features of the properties that belong to a State which has sovereign rights over its territories as if it were contemplated as *terra nullis*. Also, to deliver a judgment the Court had taken into account agreements such as the Treaty of Managua signed on 24 March 1928 which established the boundaries and the possession of the islands. However the interpretation of the treaty did not consider the meridian 82 as a boundary delimitation line.

The Court ruled that a group of islands belonged to Colombia, but expanded disputed maritime limits in favor of Nicaragua¹⁰⁷.

Today, the government of Colombia does not recognize the judgment and has denounced the unfounded pretention of Nicaragua. At the same time Nicaragua has launched a new legal action against Colombia in the ICJ, claiming for potentially oil rich areas in the Caribbean.

¹⁰⁷ BBC (2013, September 17). Nicaragua files new claim against Colombia over San Andres. BBC International. Retrieved from: <http://www.bbc.co.uk/news/world-latin-america-24120241>

3.2. Settlement of disputes under the UNCLOS vs. General International Law.

Whilst the settlement of disputes in the EEZ is directly related to the economic aspects of the interests of the States, Article 287 of the UNCLOS establishes a special arbitral tribunal to deal with disputes concerning other aspects such as the pollution of the marine environment, fisheries, marine scientific research and navigation.

Related to the protection of the marine environment, according to Article 230 of the UNCLOS, only monetary penalties may be imposed for pollution of the marine environment committed by foreign vessels beyond the territorial sea. Also, Article 229 of the UNCLOS establishes that any claim for loss or damage resulting from pollution of the marine environment could, additionally, be subject to civil proceedings.

Therefore, the Coastal State has the obligation and responsibility to protect and preserve the marine environment establishing measures necessary to prevent, reduce and control pollution. Also, the Coastal State shall enforce its laws and regulations adopted to prevent pollution by any means in its EEZ.

Part XV of the UNCLOS establishes an obligation to settle disputes by peaceful means. Also these means shall be chosen by the parties. Further, UNCLOS give States a choice by means of written declaration of some specific means for settlement of disputes concerning the interpretation or application of the Convention. Furthermore, in this specific means for settlement of disputes is included the International Court of Justice.

For instance, in the case of the Arctic 30 mentioned above, in which the Russian government accused the Greenpeace activist of piracy, the special arbitral tribunal could hear the case.

On the other hand, general international law¹⁰⁸ such as customary law needs universal acceptance and its application is under the principle of *ius cogens*. Moreover International law could be a treaty between two or more parties that does not necessarily have universal application.

For instance, the UN Charter has a universal character recognized by the sovereign States and this includes fundamental aspects of human rights with omnipresence.

While UNCLOS deals with some aspects related to the international interests of the States, these are not essentially part of the general international law. However the scope of the UNCLOS has general acceptance.

3.3. Legal opinions and teachings of the qualified publicists.

In order to formulate a general idea regarding the opinion of international legal scholars, the author accessed the United Nations Audiovisual Library of International Law¹⁰⁹. In this Library it was possible to find some legal opinions as follow:

- The Law of the Sea on the Thirtieth Anniversary of the United Nations Law of the Sea Convention by Mr. Tullio Treves¹¹⁰.
- The New Law of the Sea and the Settlement of Disputes by Mr. Tullio Treves.
- The Landlocked States and the Law of the Sea by Judge Helmut Tuerk¹¹¹.

¹⁰⁸ Tomuschat, C. (2008). Professor Emeritus Humboldt University of Berlin. International Law. General International Law - Video. Prepared by the Codification Division Office of Legal Affairs. United Nations. Retrieved from: <http://untreaty.un.org/cod/AVL/Is/Tomuschat.html>

¹⁰⁹ UN Audiovisual Library International Law 2013 Retrieved from <http://legal.un.org/avl/Is/lectures.html>

¹¹⁰ Tullio Treves Professor of International Law University of Milan. Former Judge of the International Tribunal for the Law of the Sea.

¹¹¹ Judge Helmut Tuerk Vice-President International Tribunal for the Law of the Sea.

- Environmental Law: Preservation of the Marine Environment by President Rüdiger Wolfrum¹¹².
- Non-State Users of the Law of the Sea by Mr. Emmanuel Roucounas¹¹³.
- The Resurgence of Piracy: A Phenomenon of Modern Times by Judge Helmut Tuerk.
- 25 Years of the Law of the Sea Convention - Has it been a Success? by Mr. David Freestone¹¹⁴.
- The United Nations Convention on the Law of the Sea and Beyond by Mr. Tullio Scovazzi¹¹⁵.

Analysis

After having listened to the legal opinions of experts about the topics concerning the issues in the EEZ, the following analysis can be drawn:

UNCLOS as a law in written form represented a huge step for the development of customary international law with general acceptance and consideration of the evolution of environmental, economic, scientific, technological and political aspects. Due to its fulfillment being mandatory, the States which ratify the UNCLOS do not have possibility to have reservation on the Convention.

UNCLOS was developed with the principle of zonal approach, establishing maritime zones, which include two specific definitions. The first one is the limits of these zones which consider where the zones begin and end. The second one is related to the regime in these zones, meaning the rights and duties therein. However, there are other zones

¹¹² President Rüdiger Wolfrum International Tribunal for the Law of the Sea.

¹¹³ Emmanuel Roucounas Professor of International Law University of Athens Member of the Academy of Athens.

¹¹⁴ Mr. David Freestone Professor of Comparative Law and Jurisprudence. The George Washington University Law School. Former Senior Adviser Office of the General Counsel World Bank.

¹¹⁵ Mr. Tullio Scovazzi Professor of International Law University of Milano-Bicocca, Milan.

unmentioned in the convention such as fisheries zone, environmental protective zone, defense zone and scientific zone among others. The declaration of these zones by the States is incompatible with the UNCLOS.

One of the important features to take into account in UNCLOS is the concept of sovereignty which differs from the land definition. That concept embraces the right of innocent passage. At the same time, the UNCLOS tries to define, in a clear way, its concepts. However, in some parts of the UNCLOS there are some concepts that are not possible to measure. For instance Article 46 considers the term “so closely” to describe an archipelago and Article 100, describes the right of visit using the term “reasonable”.

The concept of the EEZ was a new perception, creating a *sui generis* zone that is not part of the territorial sea neither the high sea. UNCLOS was intended to cover all the activities that were carried out at that moment, but with the development of technology and other issues, the concept needs to evolve.

Another characteristic of the UNCLOS is the establishment of a basis for resolution conflicts regarding the attribution of rights and jurisdiction in the EEZ. Under the principle of equity the conflicts should be resolved. However, it failed to establish other considerations and principles to resolve conflicts. For instance, in the case of removal of archaeological objects beyond the limits of 24 miles, the use of the principle of equity is not necessarily the best way to resolve a dispute.

With respect of settlement of dispute UNCLOS considers many options to deal with controversial situations to achieve solutions and resolve disputes. However, disputes concerning States parties of the European Union (EU) must be decided by the European Court of Justice which has exclusive jurisdiction over any dispute between members States of the EU, including issues related to UNCLOS. It could be seen as a provisory mechanism to resolve conflicts or as a legal instrument to avoid controversial decisions through others legal mechanisms established in the UNCLOS.

Other aspect which is necessary to consider is that there are other international conventions and agreements which have universal jurisdiction. Therefore UNCLOS cannot be seen in isolation; issues in the EEZ have to be seen in connection with the development of other conventions of other sectors. For instance, related to piracy, the Security Council of the United Nations looks at this matter from another angle considering it as a problem that affects human rights. Another similar case is illegal immigration. However, some specific articles of UNCLOS, such as Article 100, limit the possibility to realize preventive control without reasonable grounds.

There are many situations which are not contemplated in UNCLOS because it has to be seen as a basis of principles and a combination of the Law of the Sea and treaties in force with new implementing agreements that in the future could be consider as a customary law. For example, bunkering in the EEZ was heard by ITLOS in the case M/V Saiga; however, there was not a resolution or specific order to implement this matter in UNCLOS to prevent future disputes.

Also, UNCLOS establishes rights of land locked States and geographically disadvantaged States related to the exploitation of the living resources of the EEZ of Coastal States of the same sub region or region with a special regime. Further, these States have the right of access to and from the sea and freedom of transit.

Judge Helmut Tuerk mentions that UNCLOS is a major step in international rights for landlocked and disadvantaged States and contributes to the development of international law. Also, Judge Tuerk indicates and gives details of some agreements achieved with the UNCLOS. For instance, the fisheries agreements reached between Bolivia as a landlocked State and Peru as a Coastal State are mentioned by Judge Tuerk. However Peru is not part of the UNCLOS neither to the 1995 agreement for the implementation of the provisions of the Convention of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, which leads to

question whether it is really required to be part of the UNCLOS or can a state simply continue with bilateral agreements with neighboring countries.

With relation to the protection of the marine environment in Part XII of UNCLOS establishes specific regulations as an international effort. Also, according to Judge Wolfrum, UNCLOS is truly an approach of legal basis to protect the marine environment with universal comprehension. However, to Professor Roucouas, pollution can be described as a lacuna in international law, despite the existence of other international conventions which deal with this matter.

Enforcement in the EEZ to prevent pollution is explained regarding a precautionary approach. This principle was not in the UNCLOS, it was given in 1995 in the agreement for the implementation of the provisions of the Convention of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. This agreement is solely related to fishery activity. Further, with relation to protection of marine environment, according to Article 211 paragraph (5) and (6) for the purpose of enforcement in the EEZ, only when Coastal States have reasonable grounds can they carry out inspections to prevent pollution, but if the suspicions prove to be unfounded, the ship shall be compensated for any loss (Article 110). Also the applicability of the laws and regulations that the Coastal State could adopt in the EEZ for the prevention, reduction and control of pollution from vessels shall not become applicable to foreign vessels until 15 months after the submission of the communications to a competent international organization. Furthermore, enforcement in the case of presumption of serious pollution offense, clear grounds to carry out inspections are required for the Coastal State.

To summarize, UNCLOS is an established international legal regulatory instrument subject to international jurisdiction with universal recognition, which at that time, in 1982, created new rules, new institutions and also new concepts such as the Exclusive

Economic Zone. In its evolution an agreement relating to the implementation of the Seabed Regime Part XI of the Convention of 10 December 1982 was implementing in 1994, and in 1995, an agreement was made for the implementation of the provisions of the Convention of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. Both agreements modified the UNCLOS into a new regime which was adapting to the new circumstances. As outcomes, protection of biodiversity and ecosystem were taken into the international legal regime.

Despite the effort to achieve an international legal instrument that covers all aspects and issues at sea, UNCLOS is lacking a specific legal framework to take measures according to the world's development and evolution. There are many gaps to cover such as the exploitation of genetic resources in areas beyond the jurisdiction, suppression of crime at sea such as piracy, slavery, drug traffic, traffic of weapons and others. The process of evolution of the new UNCLOS linking with international practices requires development.

3.4. Law enforcement and penalty law in the Exclusive Economic Zone.

One of the most important characteristics of any law is the capacity for enforcement. UNCLOS is not exempt from this characteristic. Also, UNCLOS consider the act of enforcement given to the Coastal States within the option to adopt laws and regulations related to this issue. For instance, in Section 6 of Part XII establishes specific provisions related to enforcement with respect to pollution of the marine environment.

However, Article 58 paragraph 2 of UNCLOS establishes rights and duties to other States in the EEZ that include Articles 88 to 115. In this manner UNCLOS restricts the

faculties of the Coastal State to enforce the law in the EEZ. For example, Article 108 of UNCLOS establishes that all States shall cooperate in the suppression of illicit trafficking of narcotic drugs and psychotropic substances engaged in by ships, but it does not establish the right of boarding as a Coastal State, leaving in a legal limbo the faculty of the Coastal State to enforce the law.

Further, UNCLOS establishes some specific articles related to the faculty of the Coastal State to enforce the law such as the right of visit and the right of hot pursuit. However, its applicability can be conducted only when reasonable grounds exist for suspecting specific illegal acts such as piracy or slavery, but there is no other article that allows Coastal States to prosecute operations to enforce the law. Also, Article 110 paragraph 3 establishes compensation if the suspicions are unfounded and Article 106 establishes liability for seizure without adequate grounds. The meaning of reasonable grounds and adequate grounds are not established in UNCLOS.

Despite the fact that Article 73 of UNCLOS establishes specific rules to enforce laws and regulations of the Coastal State such as measures including boarding, inspection, arrest and judicial proceedings, these must be adopted in conformity with the regulations of the UNCLOS which are limited, restricted and constrained. For instance, according to Article 73 paragraph 3 penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment and also Article 97 of UNCLOS establishes no penal jurisdiction in matters of collision.

Furthermore, Article 73 paragraph 2 establishes prompt release of vessels and their crews upon posting of reasonable bond or other security. However, a controversial issue exists in this specific paragraph due to the translation to other languages, for instance in French the term “suffisante” is used, which means “adequate” and there is a difference between reasonable and adequate.

According to Article 27 of UNCLOS, Coastal States should not exercise criminal jurisdiction on board a foreign ship; save only in specific cases such as if the consequences of the crime extend to the Coastal State or disturb the peace of the country among others. In the same way, Article 28 of UNCLOS establishes that Coastal States should not stop a foreign ship in exercise of its right of innocent passage for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

Article 203 of UNCLOS establishes that monetary penalties may only be imposed with respect of violations of laws and regulations for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea. However, some States consider in their national legislation other types of penalties to vessels flying their flags which are more restrictive on national flag vessels and, consequently, unfair.

With respect of fishery, Article 62 paragraph 4 (k) of UNCLOS allows Coastal States to establish laws and regulations related to enforcement procedures. Also, the 1995 agreement for the implementation of the provisions of the Convention of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks establishes the precautionary principle that increases the faculty to enforce the law.

In exercise of powers of enforcement against foreign vessels, UNCLOS provides particular faculties to flag States and to Coastal States. Also, for investigation of foreign vessels for pollution of the marine environment, Article 226 of UNCLOS allows States to carry out physical inspection, limited to an examination of such certificates, records or other documents and further physical inspection may be undertaken only when there are clear grounds for believing that the condition of the vessel does not correspond with the particulars of those documents.

Relate to the responsibility and liability concerning the protection and preservation of the marine environment, according to Article 235 of UNCLOS, States are responsible for the fulfillment of their obligations and shall be liable in accordance with international Law. However, in some languages such as Spanish or French, the word “responsibility” encompasses both responsibility and liability; in English these terms have different interpretation. While responsibility has moral or ethical consequences, liability has legal consequences¹¹⁶.

One of the main principles considered in UNCLOS is the principle of freedom of navigation. However, as mentioned above, shipping are an inherently dangerous occupation; accidents and maritime disasters such us Titanic, Torrey Canyon, Exxon Valdez, Prestige and Costa Concordia can occur at any time. At the same time illegal activities such piracy or slavery could be carried out in the EEZ.

According to Article 19 of UNCLOS, innocent passage is not prejudicial to the peace, good order or security of the Coastal State. However, with limited faculties of control, it is not possible to guarantee these provisions. For instance, compulsory use of new technology on board such as Automatic Identification System (AIS) or the Vessel Monitoring System (VMS) could increase and improve safety and security in the EEZ.

To summarize, after analysis of the UNCLOS, it can be established that it has its basis in a facultative approach to the flag State, which considers the enforcement of the law in the EEZ as a responsibility of the Flag State more than the Coastal State faculty, consequently, it could consider as soft law (*para droit*).

¹¹⁶ Statement by Professor Mukherjee, P. (2013) during the course of Private Law of Maritime Pollution to Maritime Law and Policy class in World Maritime University.

CHAPTER IV

Current issues related to Exclusive Economic Zone

Today the world is shocked with the genocide that occurred in Syria on August 30, 2013¹¹⁷. The UN confirmed that sarin gas was used to kill civilians near Damascus¹¹⁸. But really, what is the relation between this crime and the EEZ? Although it seems incredible, there is a connection. “Germany exported 111 tons of chemicals to Syria between 2002 and 2006 that could be used in the production of sarin gas, according to a government document published”¹¹⁹. The chemicals exported to Syria are classified as dual use under European Union law, meaning they can be used for either civil or military purposes.

Analyzing the case, it could be deduced that trade from Germany to Syria has 3 possible modes of transportation. The first one is by air, but hazardous material is too dangerous and difficult to transport by plane unless using a military aircraft. However, as it was mentioned by the German government, the material was sold for civil use and they did not refer to how it was transported. The second one is by land, but trying to cross many borders with hazardous materials without restrictions of other countries could be difficult to do. Last of all is by sea, crossing the sea without control could be possible, and here is the relation with the EEZ.

¹¹⁷ Warrick, J. (2013, August 30). More than 1,400 killed in Syrian chemical weapons attack, U.S. says. *The Washington Post*. Retrieved from http://articles.washingtonpost.com/2013-08-30/world/41606663_1_obama-administration-u-s-intelligence-analysts-syrian-government

¹¹⁸ Borger, J. (2013, September 17). Syrian chemical attack used sarin and was worst in 25 years, says UN. *The Guardian*. Retrieved from <http://www.theguardian.com/world/2013/sep/16/syrian-chemical-attack-sarin-says-un>

¹¹⁹ Hudson, A. (2013, September 18). Edited by Jones, G. & Pomeroy, R. Germany sold Syria chemicals with military potential: government. *Reuters*. Retrieved from <http://www.reuters.com/article/2013/09/18/us-syria-crisis-germany-sarin-idUSBRE98H0QB20130918>

Certainly, international trade is a free activity; however, the possibility of supervising this trade with security is necessary, without imposing undue barriers to free trade¹²⁰. Also, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC) states that a State undertakes never under any circumstances to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone.

Furthermore Article VI of the CWC establishes that a State has to adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention.

This can be seen not only as a lack of control of States to monitor compliance with the laws and regulations in the EEZ, but also as lack of knowledge of what is transiting in its EEZ or, what is even worse, complicity. States have the right to conduct free trade with other countries; however, there are business situations that could be considered ethically immoral.

Moreover, as mentioned in Chapter II of this dissertation, international legal instruments such as the MLC - 2006 Convention and the STCW-F 95 Convention are tools that need to be improved as well as being ratified by other States. The lack of specific rules and regulations related to the enforcement of these conventions in the EEZ, specifically, not being allowed to perform control operations such as boarding to inspect because it is contrary with the specific regime established in UNCLOS.

¹²⁰ Bothe, M., Ranzitti, N. & Rosas, A. (1998). *The New Chemical Weapons Convention: Implementation and Prospects*. Published by Kluwer Law International. The Hague, The Netherlands.

Otherwise, issues related to the EEZ are repetitive, for instance, the London Convention and its Protocol¹²¹ and its more than 20 guidelines, the supposed activities for the protection of the seas for climate change, or the Ballast Water Convention and so on. All the issues, international instruments and new laws adopted without a real international framework for enforcement will remain largely a dead letter or maybe such as the STCW-F 95 Convention, after 17 years could find reasonable ground to be applicable. Furthermore, almost 20 years have gone on since the UNCLOS entered into force, however, issues in the maritime field such as delimitation of maritime boundaries continue without encountering solutions.

4.1. Status of the Exclusive Economic Zone: *lex lata* and *de lege ferenda*.

The issues that were considered for the development of the UNCLOS in 1973 arose regarding the interests of the States at that time. The establishment of a new, generally accepted international legal instrument was the goal to achieve. Also, the codification and development achieved in the Convention would contribute to strengthening peace, security, cooperation and friendly relations among all nations¹²². However, “the borderlines between interpretation of existing law and the making of new law are inevitably fluid”¹²³.

In interpreting the UNCLOS the courts and tribunals face different situations that have to deal with legal instruments constrained in the Convention (*lex lata*). However, as was mentioned above, the UNCLOS should not be viewed in isolation. As an international law

¹²¹ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and 1996 Protocol Thereto. International Maritime Organization.

¹²² UNCLOS (1982). Preamble of the Law of the Sea Convention.

¹²³ Friedman, W. (1970). The North Sea Continental Shelf case. A Critique, 64 American Journal of International Law pp. 229, 235.

instrument it should be considered in a common vision with other international laws that have jurisprudence within the same scope (*de lege ferenda*).

The principles governing UNCLOS are justice and equity; however in the absence of law enforcement in the case of fishing, in 1995 through the implementation agreement of the provisions of the United Nations Convention on the Law of the Sea (UN FSA) the precautionary principle was implemented. “It is generally accepted by writers of authority that equity in international law fulfills a triple function: First, a corrective function, i.e. to mellow the harshness of strict rules of law in cases where their application would evidently lead to unjust result; second, a supplementary function, i.e. to form a basis for the extension of legal principles in cases where the rules of positive law are silent or imperfect; and third, in certain cases an eliminatory function where the application of rules of law would lead to manifest injustice”¹²⁴.

Principles of statutory interpretation, analogy and *argumentum e contrario*, conflict solving mechanism (*lex superior, lex posterior and lex specialis*) have to be taken into account by courts for UNCLOS interpretation.

UNCLOS contains the principle of freedom of navigation which was developed by Hugo Grotius in the XV century, and after six centuries in the current scenario where injustice is seen every day such as the arrest of 30 Greenpeace activists accused of piracy, destruction due to oils spills like the one occurred in the gulf of Mexico, radiation in fukushima, insecure navigation as occurring with piracy in Somalia, and so on. And it is still believed that this is the price of our freedom to navigate, based on a statement made by vested interests with its own benefits, trying to be interpreted not as far as the right of freedom or intended to say that it depends on the people perceptions. The right of freedom cannot override the right of justice.

¹²⁴ Dinstein, J. (1989). *International Law at time of Perplexity*. Published by Kluwer Academic Publishers incorporates the publishing programmes of Martinus Nijhoff. Dordrecht, The Netherlands.

“The deeper my research goes, the more I question if people really want a better world”¹²⁵.

4.2. Adoption of the UNCLOS as a universal instrument: position of other countries not parties to the UNCLOS.

Although that the UNCLOS is considered as a Convention with general acceptance, there are some States which are not party to it. There are 192 States recognized by UNCLOS¹²⁶; however, as mentioned above, there are only 166 States Parties of UNCLOS and according to Article 305 to be part of the Convention a State is required to have the approval and recognition of the United Nations, but not necessarily be part of it. For instance, Niue is a State not party of UN, but is party of UNCLOS. Therefore, the use of these numbers can create confusion if they are not researched deeply.

States that have signed, but not ratified:

- Cambodia, Colombia, El Salvador, Iran, North Korea, Libya, United Arab Emirates

States parties of the United Nations that have not signed:

- Eritrea, Israel, Peru, Syria, Turkey, United States and Venezuela.

Landlocked States that have not signed:

¹²⁵ Wichmann, W. (2013, September 29). Greenpeace activist, Shipmaster of Esperanza Greenpeace Ship. Personal communication.

¹²⁶ Update: as October 3, 2013. Member States of the United Nations. Retrieved from the UN web page <http://www.un.org/en/members/index.shtml>

- Andorra, Azerbaijan, Kazakhstan, Kyrgyzstan, San Marino, South Sudan, Tajikistan, Turkmenistan, Uzbekistan and Vatican City.

The position of the States not parties of UNCLOS differ by several factors such as political, economic and environmental factors among others. Each country has its own interests and unique priorities; however, they are not strangers to international law.

For example, the position of Peru is a controversial issue because its Political Constitution¹²⁷ establishes in Article 54 that:

“The territory of the Republic is inalienable and inviolable. It includes the soil, subsoil, maritime dominion and the superjacent airspace. The maritime dominion of the State includes the sea adjacent to its coasts, as well as the seabed and subsoil thereof, extending out to a distance of 200 nautical miles measured from the baselines established by law. In its maritime dominion, the State exercises sovereignty and jurisdiction, without prejudice to the freedoms of international communication, in accordance with the law and treaties ratified by the State. The State exercises sovereignty and jurisdiction on the airspace over its territory and its adjacent sea up to the limit of 200 miles, without prejudice to the freedoms of international communication, in conformity with the law and treaties ratified by the State”.

While Article 3 of UNCLOS sets that “every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles”, and also, Article 55 of UNCLOS establishes a specific legal regime in the EEZ with sovereign rights but not sovereignty.

Therefore, UNCLOS is juxtaposed with the Political Constitution of Peru, decreasing the sovereignty and the jurisdiction from 200 to 12 miles. However, Article 56 of the Political Constitution of Peru establishes that “Treaties must be approved by Congress

¹²⁷ Political Constitution of Peru. Official Edition enacted on 29th December, 1993 Published by Congress of the Republic August – 2006.

before their ratification by the President provided that they deal with the following matters: 1. Human rights; 2. State sovereignty, dominion or integrity; 3. National defense; and 4. State financial obligations. Treaties that create modify or eliminate taxes, those requiring modification or repeal of any law, and those requiring legislative measures for their application, must also be approved by Congress”.

In conclusion, for the Peruvian State it is a political issue that its Congress has to solve *sine qua non*.

Another example is the position of the United States of America which is a party to the four treaties hosted by the UNCLOS and is also a party to the 1995 Agreement for the implementation of the provisions of the Convention of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.

Further, the Center for Oceans Law and Policy of the University of Virginia School of Law promoted an annual conference in 2010 related to the “United States Interests in Prompt Adherence to the Law of the Sea Convention”¹²⁸ and in its framework considered the issue of being party to UNCLOS as a step in the process of globalization. In these meetings is collected the opinion of jurists; politicians such as Hilary Clinton, US Secretary of the State; Coastguard representatives; US Navy representatives; and scholars among others. At the conference, it was expressed “the interest to join the UNCLOS that advances national security interests, facilitates the exercise of US sovereign rights, benefits the US economy, and promotes the sustainable development of ocean resources”¹²⁹. However, the UNCLOS Convention has been in the Senate of the

¹²⁸ Center for Ocean Law and Policy (2012). *The Law of the Sea Convention, US Accession and Globalization*. Edited by Nordquist, M., Norton Moore, J., Soons, A. and Kim, H. Published by Martinus Nijhoff in Leiden, Boston.

¹²⁹ Clinton, H. (2010). Statement as Secretary of State in the 34th Annual Conference, “*United States Interests in Prompt Adherence to the Law of the Sea Convention*”, organized by the Center for Ocean Law and Policy, held in Washington DC on May 2010.

United States since 1994 waiting for approval and there is no light which indicates that this will happen.

4.3. Exclusivity of the Exclusive Economic Zone.

Unlike some other languages such as Spanish or French, there is no institution which regulates or establishes the use of the English language. There are some specific dictionaries such as Oxford English Dictionary, Longman Dictionary of Contemporary English, Chambers Dictionary, and Collins dictionary among others, which are exclusively limited to defining the usage of words, but they are not regulatory.

In this dissertation, the Longman Dictionary of Contemporary English¹³⁰ was used to define the term “exclusive”.

Etymologically, “exclusive” is a word that could be considered as a noun or an adjective.

As a noun, it means: excluding all else; rejecting other considerations, possibilities, events, etc. is synonymous with absolute, sole, unique, undivided.

As an adjective, it means: belonging to a particular individual or group and to no other; not shared; belonging to or catering for a privileged minority; limited (to); single; unique; separate and incompatible.

The term exclusive is not a measurable factor since, there are only two possibilities: exclusive or not exclusive. However, for academic reasons and to achieve the goal of this research, which is not only to define whether the EEZ is exclusive or not, but rather

¹³⁰ Pearson Longman (2009). The Longman Dictionary of Contemporary English (5th edition) the most comprehensive dictionary.

to try to reach an approach to appraise its exclusivity, the faculties and attributes that Coastal States have in the EEZ are compared with those they have on land, which allows a quantitative answer to be reached.

Using the Weighted Scoring Method as the most suitable method, it was necessary to assign numeric values to factors, taking into account multi criterion analysis developed by the author during this research.

To develop the matrix, the scale assigned by the author was:

Table 1 - Degree of exclusivity

DEGREE OF EXCLUSIVITY	VERY HIGH	80-100
	HIGH	61-80
	MEDIUM	41-60
	LOW	21-40
	VERY LOW	0-20

Source: Author.

The factors used were the follow:

Economic	Exploitation of living and non-living resources and other activities such as fiscal activities and bunkering
Environmental	Activities to prevent and protect the marine environment
Social	Labor and health
Political	Delimitation of boundaries, laws, regulations and policies, others
Military	Weapon exercises, intelligence, others
Scientific	Research and others

Considering that the first three factors are the pillars for sustainable development, the weighting assigned was:

Table 2 - Factors and Weighting assigned

TABLE OF FACTORS AND WEIGHTING ASSIGNED	
FACTORS	WEIGHTING
ECONOMIC	20
ENVIRONMENTAL	20
SOCIAL	20
POLITICAL	15
MILITAR	15
SCIENTIFIC	10
TOTAL	100

Source: Author.

Also, to relate the factors employed to develop this matrix, it was necessary to describe the faculties that are carried out in each area as follow:

- Perform activities
- Make laws
- Enforcement of law
- Judgment
- Compliance

Each of them were weighting with a score from 0 to 20, regarding with the influence of international law, agreements, social influence, environmental impact, economic limitations, intervention of international Courts or Tribunals and others.

Table 3 - Score assignment comparison tables between Land and EEZ.

FACTORS	WEIGHTING	PERFORM ACTIVITIES		MAKE LAWS		ENFORCEMENT		JUDGMENT		COMPLIANCE	
		LAND	EEZ	LAND	EEZ	LAND	EEZ	LAND	EEZ	LAND	EEZ
ECONOMIC	20	18 x 20	15 x 20	17 x 20	14 x 20	18 x 20	12 x 20	15 x 20	12 x 20	18 x 20	12 x 20
ENVIRONMENTAL	20	16 x 20	12 x 20	18 x 20	14 x 20	16 x 20	10 x 20	18 x 20	12 x 20	16 x 20	10 x 20
SOCIAL	20	18 x 20	12 x 20	16 x 20	10 x 20	18 x 20	08 x 20	16 x 20	10 x 20	16 x 20	08 x 20
POLITICAL	15	16 x 15	10 x 15	18 x 15	12 x 15	18 x 15	10 x 15	18 x 15	10 x 15	16 x 15	08 x 15
MILITARY	15	16 x 15	08 x 15	16 x 15	08 x 15	18 x 15	10 x 15	16 x 15	08 x 15	16 x 15	08 x 15
SCIENTIFIC	10	18 x 10	14 x 10	18 x 10	14 x 10	18 x 10	14 x 10	18 x 10	14 x 10	18 x 10	14 x 10

Source: Author.

Table 4 - Result of the comparison between Land and EEZ factors.

FACTORS	WEIGHTING	PERFORM ACTIVITIES		MAKE LAWS		ENFORCEMENT		JUDGMENT		COMPLIANCE	
		LAND	EEZ	LAND	EEZ	LAND	EEZ	LAND	EEZ	LAND	EEZ
ECONOMIC	20	360	300	340	280	360	240	300	240	360	240
ENVIRONMENTAL	20	320	240	360	280	320	200	360	240	320	200
SOCIAL	20	380	240	320	200	360	160	320	200	320	160
POLITICAL	15	240	150	270	180	270	150	270	150	240	120
MILITARY	15	240	120	240	120	270	150	240	120	240	120
SCIENTIFIC	10	180	140	180	140	180	140	180	140	180	140
TOTAL	100	1720	1190	1710	1200	1760	1040	1670	1090	1660	980

Source: Author.

Table 5 - Final comparison table of exclusivity between Land and EEZ.

FINAL COMPARISON TABLE BETWEEN LAND AND EEZ	
LAND	EEZ
1720	1190
1710	1200
1760	1040
1670	1090
1660	980
8520	5500

Source: Author.

As a result, it is established that in Land there are 85.20 degree of exclusivity which according to table 1 correspond to a VERY HIGH degree of exclusivity and in the EEZ there are 55.00 degree of exclusivity which represents a MEDIUM degree of exclusivity.

Table 6 – Measurement results of exclusivity

DEGREE OF EXCLUSIVITY	VERY HIGH	80-100	85.20	LAND
	HIGH	61-80		
	MEDIUM	41-60	55.00	EEZ
	LOW	21-40		
	VERY LOW	0-20		

Source: Author.

CHAPTER V

Conclusions and Recommendations

In the last century, International legal Instruments have gained an important role in the management of international conflicts and resolution of disputes between States, settlement an international legal order which regulates the establishment of laws and regulations with international standards. However, as seen during the development of this dissertation, these instruments have fallen into a soft law (*para droit*) which can be dangerous to the basis of the international legal system achieved so far. Therefore it is necessary to evolve.

The aim of this dissertation was to establish how exclusive the Exclusive Economic Zone is. Through an analysis of the United Nations Convention on the Law of the Sea from its roots, and a review of the current issues, and other legal aspects related to the EEZ it was possible to achieve the goal.

Previous to the analysis an overview was made of the transition of UNCLOS and how it was developed to reach its current status. Indeed, defining the measure of the EEZ was the most important goal achieved in the UNCLOS, but on the other hand, not establishing specific rights and duties was one of its greatest weaknesses.

During the analysis the revision of legal issues in the EEZ was considered, finding that the rights and duties there have quite a difference in comparison with the Territorial Sea, and enforcement of the law was found to be the main problem in the EEZ. The acquired concepts from the past have not evolved with the current situation causing loopholes that allow impunity for unlawful acts committed in the EEZ.

Another important finding is that, from the opinion of the experts, there is an overriding needed to achieve the development and evolution of UNCLOS in a short time, as was done in 1994 with the implementation of the Seabed Regime Part XI of the Convention of 10 December 1982, and in 1995 with the agreement for the implementation of the provisions of the Convention of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. It can be seen that UNCLOS is flexible and subject to changes, it is not stationary.

On the whole, these backgrounds have created an important precedent in the jurisdictional aspect that is not considered in UNCLOS. The reason can be found in that UNCLOS which does not take into consideration real situations, such as was the case with policies related to the protection and preservation of highly migratory resources, which were not recognized until 1995.

Moreover, from the analysis of the cases it can be concluded that in the dispute between Spain and Canada in the case related to established fisheries jurisdiction, to take a decision and to deal with urgent situations which could create an armed conflict, the Courts took too much time for judgment, while they can took a temporary decision to management the dispute. In the case of the dispute between New Zealand, Australia against Japan, it can be concluded that the resulting votes of decision of 12 to 9 point to a controversial interpretation of the international right. It means that there is a lacuna in the law or the instruments are not clear. In the case between Nicaragua and Colombia, the Court was not composed by ITLOS because Colombia is not part of UNCLOS. However, the topic that was discussed was related to delimitation of maritime boundaries, and also in there it can be concluded that the principle of equity was considered isolated. Finally, in the case of M/V Saiga it can be concluded that activities such bunkering are not established in UNCLOS.

A significant finding is that related to the settlement of disputes there are no established special tribunals in the UNCLOS to deal with issues such as piracy, slavery, genocide, terrorism and other crimes against humanity. It could also be taken into account as a risk of committing these illegal acts, with the simple act of allowing freedom of navigation without the possibility of enforcement in the absence of reasonable grounds.

After an overall analysis, to achieve the main goal of this dissertation to measure the exclusivity of the EEZ, it was necessary to create some specific tables to make measurable the exclusivity, assigning a degree of exclusivity by the author to compare with the exclusivity on Land using specific factors which have more influence in the area. As a result, it can be concluded that, according to the analysis the EEZ has 55.00 degree of exclusivity which equates MEDIUM level of exclusivity and on Land has 85.20 degree of exclusivity, which it means a VERY HIGH level of exclusivity.

According to all the considerations mentioned during the process of research and analysis of the information provided, it is possible to conclude that the EEZ is moderately exclusive in comparison with the exclusivity in the territory. Certainly, having sovereign rights over specific issues is not the same as having sovereignty. However, as mentioned above, the term “exclusive” is not measurable because there are only two possibilities: exclusive or not exclusive. Therefore, the Exclusive Economic Zone is not exclusive.

To conclude, the analysis of all factors in this dissertation allows making the following recommendation:

Convene a General Assembly to celebrate the Fourth United Nations Conference on the Law of the Sea, or at least continue implementing agreements to fill gaps in the law.

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