

## THE TERRITORIAL TEMPTATION: A SIREN SONG AT SEA

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La mer a toujours été battue par deux grands vents contraires: le vent du large, qui souffle vers la terre, est celui de la liberté; le vent de la terre vers le large est porteur des souverainetés. Le droit de la mer s'est toujours trouvé au coeur de leurs affrontements.

— René-Jean Dupuy

The history of international law since the Peace of Westphalia is in significant measure an account of the territorial temptation.<sup>1</sup> The bonds of family, clan, tribe, nation, and faith; the need to explore, to trade, and to migrate; the hope for broader cooperation to confront common challenges—all in time came to be subordinated in the international legal order to the insistent quest for supremacy of the territorial state. At least in theory. At least on land.

The sea yields a different story. It wasn't always so. And perhaps it isn't necessarily so. But in fact the law of the land and the law of the sea developed in very different ways. If the history of the international law of the land can be characterized by the progressive triumph of the territorial temptation, the history of the international law of the sea can be characterized by the obverse; namely, the progressive triumph of Grotius's thesis of *mare liberum* and its concomitant prohibition on claims of territorial sovereignty.<sup>2</sup> That triumph reflected not only the transitory nature of human activity at sea, but a rational conclusion that the interests of states in unrestricted access to the rest of the world outweighed their interests in restricting the access of others at sea.

### I. REACTIONS TO THE TERRITORIAL TEMPTATION ON LAND

The territorial temptation, including its imperial manifestation, is in part a response to the assumption that territorial control brings with it control over important sources of sustenance or danger for the state and its people. Up to a point, that may be true. But sooner or later, the nettlesome persistence of others beyond (not to mention within) territorial limits will make

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<sup>1</sup> The phrase borrows from the title of Jean-François Revel's essay, *La tentation totalitaire*, published three decades before his death on April 30, 2006; that essay was first brought to the author's attention during the negotiation of the United Nations Convention on the Law of the Sea by the late Jorge Castañeda y Alvarez de la Rosa, who went on to serve as Mexico's foreign secretary from 1979 to 1982. It can be found in JEAN FRANÇOIS REVEL, NI MARX NI JÉSUS; LA TENTATION TOTALITAIRE; LA GRÂCE DE L'ÉTAT; COMMENT LES DÉMOCRATIES FINISSENT (rev. ed. 1986). For the source of the epigraph to this essay by René-Jean Dupuy, see *La mer sous compétence nationale, in TRAITÉ DU NOUVEAU DROIT DE LA MER* 219, 219 (René-Jean Dupuy & Daniel Vignes eds., 1985).

<sup>2</sup> "[T]he concept of community interests," including the freedom of the seas, "is pre-Grotian" and "appeared in the writings of Suárez and figured prominently in those of its true progenitor, the earlier Gentili." Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suárez*, 85 AJIL 110, 113–14 (1991). With respect to the status of the sea as *res communis* in Roman law, see Percy Thomas Fenn Jr., *Justinian and the Freedom of the Sea*, 19 AJIL 716 (1925).

itself felt. Thus, much of international law responds to the possibility that an act or omission by one state in its territory may affect others.

The history of international law in recent times in significant measure recounts the reactions to the triumph of the territorial temptation on land. To be sure, to paraphrase Mark Twain, reports of the death of the territorial state are an exaggeration. And the territorial temptation continues to influence the development of international law, as in the widening embrace of the principle of *uti possidetis juris* and the deference to boundaries in the law of treaties.<sup>3</sup> Albeit with myriad variations on the theme, for the foreseeable future there is no plausible alternative to the system of territorial states, a system that, for all its limitations, continues to confer significant benefits on humanity.

Nevertheless, more recent developments in international law often represent efforts to constrain the territorial state and the temptation to expand its discretionary reach, substantive as well as geographic. One need only consider the evolution of rules regarding the acquisition of territory, self-determination, human rights, the *jus ad bellum*, trade and investment, aviation, telecommunications, and protection of the environment, not to mention the freeze on claims to the planet's southernmost continent.<sup>4</sup>

Many of these rules are now taught and practiced as separate fields within international law. None could any longer be fully addressed without reference to the concurrent rise of efforts to institutionalize cooperation through international organizations, global and regional, political and functional.<sup>5</sup> Much of this burgeoning development began, or more accurately, took off in the middle of the twentieth century. It is associated with the conclusion of major, often constitutive, treaties such as the breathtaking succession in the ebb and wake of World War II: the Bretton Woods agreements<sup>6</sup> and the Chicago Convention on International Civil Aviation in 1944,<sup>7</sup> the Charter of the United Nations in 1945, the General Agreement on Tariffs and Trade in 1947,<sup>8</sup> and the four Geneva Conventions on the *jus in bello* in 1949.<sup>9</sup>

## II. THE TERRITORIAL TEMPTATION TURNS SEAWARD

The mid-twentieth century was also a watershed for the international law of the sea, but of a very different sort. At the same time that the territorial temptation ran up against increasingly important legal constraints on land—often in response to the values of facilitation of trade, communication, and cooperation, which had traditionally informed the law of the sea—the

<sup>3</sup> See Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AJIL 590 (1996); Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AJIL 808 (2006) (a centennial essay appearing in this issue).

<sup>4</sup> Many of these constraints apply to the conduct of the state at sea as well. To the extent that the sea is the object of the constraint, the matter is considered below.

<sup>5</sup> See the centennial essay by José E. Alvarez, *International Organizations: Then and Now*, 100 AJIL 324 (2006).

<sup>6</sup> Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 UNTS 39; Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, 60 Stat. 1440, 2 UNTS 134.

<sup>7</sup> Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295 [hereinafter Chicago Convention].

<sup>8</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 187.

<sup>9</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

obverse again occurred at sea. The territorial temptation thrust seaward with a speed and geographic scope that would be the envy of the most ambitious conquerors in human history. The effective start of this process—President Truman's claim to the continental shelf in 1945<sup>10</sup>—was so quickly accepted and emulated by other coastal states<sup>11</sup> that the emergence of the regime of the continental shelf, in derogation of the principle of *mare liberum*,<sup>12</sup> has been cited as an example of instant customary law.<sup>13</sup> The Truman Proclamation unleashed a quarter-century of territorial and quasi-territorial claims to the high seas so vast that, at the dawn of the Third United Nations Conference on the Law of the Sea, the leader of the Canadian delegation, Ambassador J. Alan Beesley, could quip that he comes to bury Grotius, not to praise him.

### III. THE GENEVA CONVENTIONS OF 1958

To be sure, the International Law Commission had made an earnest effort to codify the traditional law of the sea as one of its earliest undertakings in the 1950s, as had the first Conference on the Law of the Sea, which followed in 1958.<sup>14</sup> The 1958 Convention on the High Seas, the only one of the four adopted at Geneva to declare itself a codification, elaborated the Grotian regime and its application with admirable attention to principle and important detail; its text survived largely unchanged as Part VII of the 1982 United Nations Convention on the Law of the Sea.

The High Seas Convention defined the high seas as “all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”<sup>15</sup> While the classic 3-mile limit was defended well into the twentieth century,<sup>16</sup> the Hague Codification Conference, the International Law Commission, and the 1958 Convention on the Territorial Sea and the Contiguous

<sup>10</sup> Presidential Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12,303 (1945) [hereinafter Truman Proclamation].

<sup>11</sup> The process, including new claims to the waters of the high seas, was already discerned in 1948. See Richard Young, *Recent Developments with Respect to the Continental Shelf*, 42 AJIL 849 (1948). The equanimity with which the possibility of stimulating a cascade of claims to the high seas was contemplated at the time of the Truman Proclamation is notable. See Edwin Borchard, *Resources of the Continental Shelf*, 40 AJIL 53, 55 (1946) (expressing, in passing, “certain apprehensions” that “[s]ince the United States claims these rights for itself, it cannot object to similar or possibly greater encroachment on the high seas by other nations”). The effect in this hemisphere over the ensuing decades is traced in F. V. García-Amador, *The Latin American Contribution to the Development of the Law of the Sea*, 68 AJIL 33 (1974).

<sup>12</sup> Some apologists argued that high seas law did not apply to the seabed and subsoil in 1945, as its resources remained to be developed. Leaving aside the fact that at that time sailors dropped anchor, oysters yielded pearls, salvors raised wrecks, and cables linked continents, for purposes of the present analysis the most important response is that the claim of exclusive rights to the resources of the continental shelf was not consistent with the principle of the freedom of the seas. An ironic twist occurred some decades later when, in the face of a widespread view among developing countries that the high seas regime did not apply to the yet-to-be-exploited mineral resources of the seabed and subsoil beyond the continental shelf, the United States Congress expressly asserted that the regime of the high seas did apply to those resources. Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§1401(a)(12), 1402(a) (2000).

<sup>13</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 reporters' note 2 (1987); see David J. Bederman, *Congress Enacts Increased Protections for Sunken Military Craft*, 100 AJIL 649, 663 n.91 (2006).

<sup>14</sup> For an assessment of the 1958 conference, see Arthur H. Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AJIL 607 (1958). The Geneva Conference built on the codification effort of 1930. See Jesse S. Reeves, *The Codification of the Law of Territorial Waters*, 24 AJIL 486 (1930).

<sup>15</sup> Convention on the High Seas, Art. 1, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82.

<sup>16</sup> “Diplomatists seldom or never question it; professors occasionally do.” Thomas Baty, *The Three-Mile Limit*, 22 AJIL 503, 503 (1928). A notable professor who soon did was Gilbert Gidel in volume III of *Le droit international publique de la mer*, pp. 62–152 (1934). (Gidel dedicated volume III to James Brown Scott, this *Journal's* first editor)

Zone failed to prescribe the maximum permissible breadth of the territorial sea, and accordingly the limits of the free high seas.<sup>17</sup> In addition, the 1958 Convention on the Continental Shelf failed to specify a definitive seaward limit for the coastal state's sovereign rights over seabed resources beyond the territorial sea, and accordingly the landward limit of any "international" seabed area.<sup>18</sup>

Moreover, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas failed to provide an effective means for avoiding the "tragedy of the commons," namely, a solution to the allocation problem and attendant conservation problem that arise when exploitation of a stock by multiple users approaches or exceeds its sustainable yield. This increasing threat prompted political pressure on coastal states to find ways to protect local fishing industries facing foreign competition for a limited resource. That pressure contributed to some claims to control the sea out to 200 miles<sup>19</sup> or beyond that had already appeared in Latin America when the International Law Commission began its work.<sup>20</sup>

While in retrospect one can imagine that the 1958 Conventions might have done more to redirect the way that governments approached problems posed by the high seas regime, the inability of the Conventions to identify precisely where that regime applies is a symptom of the reemergence of the territorial temptation at sea. Key provisions of the Conventions reflect the disagreements and confusion occasioned by that reemergence; they do not explain it and did not cause it.

#### IV. CHOICES

The response that emerged with full force following World War II to the systemic problems posed by the insistent demand by the territorial state for substantive discretion on land was to elaborate reciprocal international and regional instruments and mechanisms of restraint and cooperation through which each state could influence the acts and omissions of other states

in chief, an interesting indication of the "impressively cosmopolitan backgrounds" of the *Journal's* American creators noted at the start of this centennial series. Lori Fisler Damrosch, *The "American" and the "International" in the American Journal of International Law*, 100 AJIL 2, 2 (2006).

<sup>17</sup> This failure was repeated at the Second Conference on the Law of the Sea, called in 1960 for that specific purpose. See Arthur H. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AJIL 751 (1960).

<sup>18</sup> Convention on the Continental Shelf, Apr. 29, 1958, 15 UST 471, 499 UNTS 311. Article 1 of the Convention provides that the term "continental shelf" refers "to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." It has been called "one of the most disastrous clauses ever inserted in a treaty of vital importance to mankind." Wolfgang Friedmann, *Selden Redivivus—Towards a Partition of the Seas?* 65 AJIL 757, 759 (1971). Its history was traced by this author in *The Preparation of Article One of the Convention on the Continental Shelf*, 3 J. MARITIME L. & COM. 245, 445 (1972).

<sup>19</sup> It has been asserted that the 200-mile claims "found their origin in the concerns of a weak whaling industry to protect its exclusive access to a resource." Ann L. Hollick, *The Origins of 200-Mile Offshore Zones*, 71 AJIL 494, 500 (1977).

<sup>20</sup> On October 11, 1946, Argentina claimed not only the seabed and subsoil of the continental shelf but the waters above, styled the epicontinental sea. Chile made a 200-mile claim on June 23, 1947, that was emulated in weeks; it then joined with Ecuador and Peru in the Santiago Declaration of August 18, 1952, to proclaim "soberanía y jurisdicción exclusivas" extending to "una distancia mínima de 200 millas marinas" from their respective coasts. For the declaration, see LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA, UN Doc. ST/LEG/SER.B/6, at 723 (1956). The fact that these claims were largely ignored by the International Law Commission contributed to the successful proposal by Latin American states a decade or so later to entrust preparations for the Third UN Conference on the Law of the Sea to a committee of the UN General Assembly rather than the Commission.

and, through the intermediation of those states, influence human behavior beyond its territorial reach. That enterprise embraces the bulk of the international law agenda at the dawn of the twenty-first century, whether the object is trade and investment, environmental protection, human rights, or indeed the maintenance of international peace and security.

Then why not the sea? If the approach to the problems posed by the range of discretion of the territorial state is to work on the basis of that framework to shape international agreements and mechanisms to achieve desired levels of mutual restraint and cooperation, why not take the same instrumental approach to the problems posed by the range of discretion of the flag state (or state of nationality) in a nonterritorial system and work on the basis of that framework? To some extent the response to flag state discretion at sea has been the same as the response to the territorial state's discretion on land—a system of international agreements and mechanisms to restrain the scope of discretion, especially with respect to navigation and communications, Grotius's primary concern. This response is augmented, however, by significant port state and coastal state powers discussed later in this essay.

As for natural resources, the triumph of the territorial temptation with respect to almost all of the commercial fisheries and hydrocarbons in and beneath the sea resulted from a variety of factors. They include political and bureaucratic ambition, the lure of tax revenues and other economic rent, protection against competition,<sup>21</sup> impatience, frustration with international organizations, and, yes, domino effects and a dash of xenophobia. Once past the public rhetoric,<sup>22</sup> there may be some considerations behind the successful push to territorialize the ocean's resources that one would not necessarily wish to flaunt before Heaven's gatekeeper, even one with a degree in economics.

Except for one thing. Was there a better plausible alternative?

Perhaps those who conceived the outcomes at Bretton Woods and Chicago in 1944 and San Francisco in 1945 might have come up with something different from the Truman Proclamation had their attention been directed to the issue. Perhaps they would have wondered why it was proposed that the world's largest consumer of energy, and one of the few sources of the necessary capital and technology at the time, cede control over perhaps 90 percent of the world's exploitable undersea hydrocarbons to foreign states, including some that might not provide a hospitable investment climate for Americans or others.<sup>23</sup> Even if investment in oil and gas development depends on a system of exclusive private rights to exploit a site that in turn requires a recognized public grantor,<sup>24</sup> and also depends on the cooperation of a nearby state to fulfill a variety of practical needs, extension of coastal state jurisdiction is an obvious way,

<sup>21</sup> Although widely mentioned in this context, conservation is not listed here as a separate independent factor because the primary motivation for extension of jurisdiction over living resources, at least at the time it occurred, was economic: protection of local fishing industries from foreign competition and perhaps collection of economic rent. Conservation, of course, was, and remains, essential to sustained realization of both goals.

<sup>22</sup> For example, the allocation of ocean resources resulting from extended coastal state jurisdiction cannot be squared with the rhetoric of distributive justice that infused some of the debate on the subject. Landlocked countries, most of which are not prosperous, get no allocation. As among coastal states, both area and, more important, resources are very unevenly distributed.

<sup>23</sup> But some might. It may be of interest to note that the International Law Commission's commentary explicitly identifies the seabed and subsoil of the Persian Gulf as coming within its definition of the continental shelf. Report of the International Law Commission Covering the Work of Its Eighth Session, [1956] 2 Y.B. Int'l L. Comm'n, Art. 67 Commentary, para. 7, at 253, UN Doc. A/CN.4/SER.A/1956/Add.1 (1956).

<sup>24</sup> One might also consider that taxation of income from oil and gas development, including depletion allowances, foreign tax credits, and other tax relief, was itself rooted in such a system.

but not necessarily the only way, to accommodate those needs.<sup>25</sup> Still, it is not clear how one might deflect concerns, exaggerated or not, about a fixed offshore installation under the control of a foreign power.<sup>26</sup>

As for fisheries, a system of international negotiation and regulation had actually been tried on a bilateral and regional basis, before and after World War II. It was found wanting. In critical areas, durable solutions to the allocation problem eluded negotiators, the expedient tendency to agree on an allowable catch large enough to accommodate competing allocation demands was self-defeating, and the problems of monitoring and enforcement posed abiding difficulties. There was no reason to believe that a global organization, even if politically plausible, could have done better.

## V. THE UN CONVENTION ON THE LAW OF THE SEA

The real challenge faced by the Third United Nations Conference on the Law of the Sea, then, was to find ways to accommodate the territorial temptation in the context of an overall system that promised the degree of stability, predictability, and measured change one expects from law.<sup>27</sup> The response to the territorial temptation was to define and circumscribe both its geographic and its substantive reach. To that extent it mirrors the modern response to the territorial temptation on land. The difference is that the limitations in the Law of the Sea Convention are much more extensive and at times more innovative.

The geography of the accommodation is familiar. Sovereignty is limited to internal waters, archipelagic waters of an archipelagic state, and the territorial sea. The territorial sea has a precise maximum limit of 12 miles, measured from the normal baseline along the low-water mark or from straight baselines enclosing internal or archipelagic waters.<sup>28</sup>

<sup>25</sup> Notwithstanding Georges Scelle's skepticism regarding the doctrine of the continental shelf, the question of alternatives seems to have been excluded from the outset in the International Law Commission and elsewhere. See Herbert W. Briggs, *Jurisdiction over the Sea Bed and Subsoil Beyond Territorial Waters*, 45 AJIL 338 (1951); Richard Young, *The International Law Commission and the Continental Shelf*, 46 AJIL 123, 125 (1952) ("While no doubt there was some truth in M. Scelle's animadversions upon the doctrine as a hazardous new departure, it does not appear that M. Scelle had any satisfactory alternative to propose . . ."). Alternatives were elaborated years later with respect to the seabed beyond the continental shelf. See United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 153(6), Annex III, Arts. 3(4), 16, 1833 UNTS 397 [hereinafter LOS Convention]; Deep Seabed Hard Mineral Resources Act, *supra* note 12; Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed, Sept. 2, 1982, 1871 UNTS 275; Provisional Understanding Regarding Deep Seabed Matters, with Memorandum of Implementation, Joint Record, and Related Exchanges of Notes, Aug. 3, 1984, TIAS No. 11,066. But the policy with respect to hydrocarbons remained the same: one of the effects of placing all of the continental margin's natural resources under coastal state jurisdiction was to exclude hydrocarbons from the international seabed "Area" open to all states and subject to regulation by the International Seabed Authority. See LOS Convention, *supra*, Arts. 1(1), 76, 134. The oil industry was an early advocate of that result. See Luke W. Finlay, *The Outer Limit of the Continental Shelf: A Rejoinder to Professor Louis Henkin*, 64 AJIL 42 (1970).

<sup>26</sup> See Truman Proclamation, *supra* note 10, pmb. (stating that "self-protection compels the coastal nation to keep close watch over activities off its shores which are of their nature necessary for utilization of these resources").

<sup>27</sup> A contemporaneous account of the work of the Third United Nations Conference on the Law of the Sea by John R. Stevenson and this author in 1974 and 1975, and thereafter by this author, can be found at 68 AJIL 1 (1974), 69 AJIL 1 (1975), 69 AJIL 763, 71 AJIL 247 (1977), 72 AJIL 57 (1978), 73 AJIL 1 (1979), 74 AJIL 1 (1980), 75 AJIL 211 (1981), and 76 AJIL 1 (1982).

<sup>28</sup> LOS Convention, *supra* note 25, Arts. 2-11, 13-14, 16, 47-50. A minor exception to the 12-mile limit is that roadsteads "which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea." *Id.*, Art. 12. With respect to baselines, see *infra* note 39.

Three zones of functional jurisdiction<sup>29</sup> extend seaward from the outer limit of the territorial sea, and therefore overlap to some extent:

- the contiguous zone, whose maximum limit is 24 miles from the coastal baselines, and where the coastal state may prevent and punish infringement of its customs, fiscal, immigration, or sanitary laws in its territory or territorial sea;<sup>30</sup>
- the exclusive economic zone (EEZ), whose maximum limit is 200 miles from the coastal baselines, and where the coastal state has sovereign rights over the exploration and exploitation of the natural resources of the waters and the seabed and subsoil, and certain other specific competences;<sup>31</sup> and
- the continental shelf, whose maximum limit is the outer edge of the continental margin or 200 miles from the coastal baselines if the continental margin does not extend up to that distance, and where the coastal state exercises sovereign rights over the exploration and exploitation of the natural resources of the seabed and subsoil and certain other specific competences.<sup>32</sup>

The sovereignty of the coastal state in the territorial sea and in internal waters created by straight baselines is qualified by the right of innocent passage for ships of all states<sup>33</sup> and, in straits used for international navigation between two parts of the high seas or an EEZ, by the more liberal right of transit passage for ships and aircraft of all states.<sup>34</sup> Similar qualifications apply to archipelagic waters.<sup>35</sup>

“High seas” is not defined in geographic terms as such.<sup>36</sup> The freedoms of the high seas preserved in the EEZ are navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, while those

<sup>29</sup> Apart from the fact that certain associated states may become “States Parties” to the Convention, special arrangements may be made with respect to dependent territories regarding the exercise of certain coastal state rights. *Id.*, Arts. 1(2)(2), 305(1); Third UN Conference on the Law of the Sea, Resolution III, in UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA at 204, UN Sales No. E.97.V.10 (1997); THOMAS M. FRANCK, CONTROL OF SEA RESOURCES BY SEMI-AUTONOMOUS STATES: PREVAILING LEGAL RELATIONSHIPS BETWEEN METROPOLITAN GOVERNMENTS AND THEIR OVERSEAS COMMONWEALTHS, ASSOCIATED STATES, AND SELF-GOVERNING DEPENDENCIES (1978).

<sup>30</sup> LOS Convention, *supra* note 25, Art. 33 (contiguous zone). For an early discussion of the idea of a contiguous zone of up to four leagues (12 miles) from the baseline, see Editorial Comment, *International Law Involved in the Seizure of the Tatsu Maru*, 2 AJIL 391 (1908).

<sup>31</sup> LOS Convention, *supra* note 25, Arts. 56–75, 208, 210, 211(5) & (6), 214, 216, 220, 246–53, 258. The rights of the coastal state in the exclusive economic zone that relate to the seabed and subsoil are exercised in accordance with the provisions regarding the continental shelf. *Id.*, Art. 56(3).

<sup>32</sup> *Id.*, Arts. 76–81, 142, 208, 210, 214, 216, 246–53, 258. The rules concerning the determination of the outer limit of the continental shelf where it extends beyond 200 miles are complex, and engage review by an expert Commission on the Limits of the Continental Shelf established by the Convention. *Id.*, Art. 76, Annex II. See text at notes 47–48 *infra*. For an attempt by this author to explain and diagram Article 76, see *The Third United Nations Conference on the Law of the Sea: The Ninth Session*, 75 AJIL 211, 227–31 (1981).

<sup>33</sup> LOS Convention, *supra* note 25, Arts. 8(2), 17–32, 45, 211(4), 220, 223–27, 230–33.

<sup>34</sup> *Id.*, Arts. 34–44, 233; see Hugo Caminos, *The Legal Régime of Straits in the 1982 United Nations Convention on the Law of the Sea*, 205 RECUEIL DES COURS 9, 123 (1987 V); John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AJIL 77 (1980); S. N. Nandan & D. H. Anderson, *Straits Used for International Navigation: A Commentary on Part III of the U.N. Convention on the Law of the Sea 1982*, 1989 BRIT. Y.B. INT’L L. 159.

<sup>35</sup> LOS Convention, *supra* note 25, Arts. 52–54.

<sup>36</sup> Compare Article 1 of the 1958 High Seas Convention, quoted in text at note 15 *supra*.

beyond the EEZ are more extensive and open-ended.<sup>37</sup> Apart from this difference, the regime of the high seas applies both seaward of the EEZ and, except with respect to living resources, within the EEZ to the extent not incompatible with other provisions regarding the zone.<sup>38</sup>

### *Is the System Stable?*

The basic question is whether this system is stable. The territorial temptation received much to digest from the Law of the Sea Convention and the coastal state claims preceding it. But the temptation has far from disappeared. Will it continue to restructure the law of the sea? If so, will it do so within the current conventional framework or occasion its collapse?

The latter may be the more important question. The underlying significance of the Law of the Sea Convention, evident in its very existence, as well as in its regulatory and institutional structures, is global multilateralism: to discipline the prior unilateralist system by subjecting the territorial temptation to organized international scrutiny and decision. In a multilateral forum, states are more likely to measure and balance their own overall long-term interests. For example, multilateral negotiation is more likely to reflect the reality that the majority of coastal states, even those with large coastlines, are either entirely or in significant measure dependent for their access to the rest of the world upon navigation and overflight through the EEZs of their neighbors and other states as well as straits bordered by those states.

### *Geographic Limits*

The pressures on the geographic limits of the accommodation continue, but those limits appear to be holding. The textual indeterminacy inherited from the generalization in the 1958 Territorial Sea Convention of the International Court of Justice's decision in the *Anglo-Norwegian Fisheries* case renders squabbles about straight baselines inevitable.<sup>39</sup> Their impact, while important, seems to be confined.<sup>40</sup>

The International Tribunal for the Law of the Sea has been careful to keep the competences of the coastal state in the 24-mile contiguous zone confined to that area, and to resist open-ended assertions of similar competence beyond that limit.<sup>41</sup>

The 200-mile limit came under almost immediate pressure from coastal states concerned about high seas fishing adjacent to the EEZ. Argentina, Canada, and Chile made temporary

<sup>37</sup> LOS Convention, *supra* note 25, Arts. 58(1), 87(1); *see id.*, Arts. 136, 141.

<sup>38</sup> *Id.*, Arts. 58(2), 86.

<sup>39</sup> Fisheries (UK v. Nor.), 1951 ICJ REP. 116 (Dec. 18); Convention on the Territorial Sea and the Contiguous Zone, Art. 4, Apr. 29, 1958, 15 UST 1606, 516 UNTS 205; LOS Convention, *supra* note 25, Art. 7; *see* Jens Evensen, *The Anglo-Norwegian Fisheries Case and Its Legal Consequences*, 46 AJIL 609 (1952). The underlying idea has now been extended in a different way to vast "archipelagic waters" of independent island states, but with some, albeit quite liberal, mathematical discipline. *See* LOS Convention, *supra*, Arts. 46–54.

<sup>40</sup> *See* W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN INTERNATIONAL BOUNDARY DELIMITATION (1992); J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996).

<sup>41</sup> The M/V "Saiga" (No. 2) (St. Vincent v. Guinea) (ITLOS July 1, 1999), 38 ILM 1323 (1999). This outcome is consistent with the advice given U.S. courts in connection with ambitious measures to control liquor smuggling, namely, that the courts "will undoubtedly take cognizance of . . . the intent that no jurisdiction should be asserted outside the limits authorized by international law." Philip C. Jessup, *The Anti-Smuggling Act of 1935*, 31 AJIL 101, 106 (1937).



or indeterminate claims of right with respect to fishing beyond the 200-mile line,<sup>42</sup> and threatening noises were heard from Russia and the United States. Some of the underlying pressure apparently is being relieved by formal adherence to, and practical application of, the 1995 UN agreement on the implementation of the relevant fisheries provisions of the Convention,<sup>43</sup> which increases protection for coastal state interests in stocks that straddle or migrate across the 200-mile line, and by regional agreements.<sup>44</sup> But the problem persists.<sup>45</sup> So long as states resort to negotiations and international tribunals to resolve the matter, there is reason to hope that a solution will be found that strengthens the underlying structure.<sup>46</sup>

The Commission on the Limits of the Continental Shelf is receiving an increasing number of submissions from broad-margin states that, if approved, will permit those states to establish the definitive limits of their respective continental shelves beyond 200 miles and, accordingly, the limits of the international seabed "Area."<sup>47</sup> Although the commission faces a task of

<sup>42</sup> Argentina: Law No. 23.968, Aug. 14, 1991, Art. 5(3), [LI-C 1991] A.D.L.A. 2851; Canada: Coastal Fisheries Protection Act, *as amended*, R.S.C., ch. C 33 (1994), *reprinted in* 33 ILM 1383 (1994); Chile: Law No. 19.079, Sept. 6, 1991, Diario Oficial No. 34.962, at 1–9 (Sept. 1991); *see* Francisco Orrego Vicuña, *Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea*, 24 OCEAN DEV. & INT'L L. 81 (1993); Thomas A. Clingan Jr., Mar Presencial (*The Presential Sea*): *Deja Vu All Over Again?*—*A Response to Francisco Orrego Vicuña*, *id.* at 93; Frida Maria Armas Pfirter, *Straddling Stocks and Highly Migratory Stocks in Latin American Practice and Legislation*, 26 OCEAN DEV. & INT'L L. 126 (1995). Simultaneously with its claim, Canada filed a related reservation to its acceptance of the jurisdiction of the International Court of Justice that was upheld in *Fisheries Jurisdiction (Spain v. Can.)*, 1998 ICJ REP. 432 (Dec. 4).

<sup>43</sup> 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, Aug. 4, 1995, 34 ILM 1542 (1995) [hereinafter *Fish Stocks Agreement*]. For a description of the negotiations and their outcome, *see* David Balton, *Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks*, 27 OCEAN DEV. & INT'L L. 125 (1996).

<sup>44</sup> *See, e.g.*, Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, June 16, 1994, S. TREATY DOC. NO. 103-27, at 7 (1994), 34 ILM 67 (1995); Canada–European Community: Agreed Minute on the Conservation and Management of Fish Stocks, Apr. 20, 1995, 34 ILM 1260 (1995); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sept. 5, 2000, 40 ILM 278 (2001).

<sup>45</sup> The conference held in May 2006 to review the operation of the 1995 Fish Stocks Agreement, *supra* note 43, made the following assessment:

The adoption and implementation of measures by a regional fisheries management organization for the long-term sustainability of straddling fish stocks and highly migratory fish stocks as well as efforts by States to address fisheries not regulated by a regional fisheries management organization are proceeding unevenly.

... The Food and Agriculture Organization of the United Nations (FAO) has indicated that about 30 per cent of the stocks of highly migratory tuna and tuna-like species, more than 50 per cent of the highly migratory oceanic sharks and nearly two thirds of the straddling fish stocks and the stocks of other high-seas fishery resources are overexploited or depleted.

Report of the Review Conference on the 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, UN Doc. A/CONF.210/2006/15, annex, paras. 5, 6, at 31–32 (2006) [hereinafter *Review Conference Report*].

<sup>46</sup> A dispute between Chile and the European Community over swordfish has been submitted both to a chamber of the International Tribunal for the Law of the Sea under the LOS Convention and to arbitration under the WTO system; action on both submissions was suspended at the request of the parties pending a search for a negotiated solution.

<sup>47</sup> *See* LOS Convention, *supra* note 25, Arts. 1(1)(1), 76(8), 134, & Annex II. In this regard, the influence of the territorial temptation is demonstrated by the Commission's decision to permit coastal states with claims of sovereignty or sovereign rights in the immediate vicinity to comment on a submission, but its implicit disregard of the legal interests of all states in the integrity and limits of the international seabed area protected by the principle of the common heritage of mankind by ordering that the technical comments submitted by other states are not to be

enormous magnitude, and its operations could benefit from greater transparency and public attention, the key point again is the international setting in which the territorial pressures are being considered.<sup>48</sup>

### *The Substantive Balance*

A more difficult question is whether the substantive balance within the specified limits can be maintained against a persistent territorial temptation. The classic debate in the law of the sea between *mare liberum* and *mare clausum* has shifted, at least for now, from an argument about geographic limits to an argument about substantive limits. In this respect, the real issue concerns the EEZ and the concomitant right of transit passage of straits connecting two parts of the EEZ. At heart, however, the issue remains the same as it has always been; territorializing the EEZ is simply another way of expanding the limits of the territorial sea.

The EEZ embraces about a third of the marine environment. All of the important seas and gulfs of the world are composed entirely, or mainly, of waters within 200 miles of the coast of some state.<sup>49</sup>

The essence of the EEZ is its substantive balance.<sup>50</sup> That balance is particularly vulnerable to the territorial temptation because the EEZ is already perceived in quasi-territorial terms. In this regard, we need to consider that, after all is said and done, what really separates the EEZ from the territorial sea is that the former embraces freedom of navigation, overflight, and communications, and is not in principle subject to comprehensive coastal state jurisdiction, while the latter is subject to comprehensive coastal state jurisdiction and, outside of straits, includes only a very limited, and suspendable, right of innocent passage that is subject to both important qualifications and unilateral coastal state regulation.

considered. This position casts an unnecessary cloud over the legitimacy of the carefully constructed system for permitting the coastal state to establish final and binding limits of the continental shelf beyond 200 miles. Its underlying infirmity soon became evident when Australia submitted limits for the continental shelf off that part of Antarctica claimed by Australia, and states from other regions complained that they did not recognize that claim. See Statement by the Chairman of the Commission on the Limits of the Continental Shelf [CLCS] on the Progress of Work in the Commission, 14th Sess., UN Doc. CLCS/42, paras. 16–17 (2004), available at <[http://www.un.org/Depts/los/clcs\\_new/clcs\\_home.htm](http://www.un.org/Depts/los/clcs_new/clcs_home.htm)> (about U.S. submission); CLCS, Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submission by Brazil (Mar. 1, 2006), available at <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_bra.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bra.htm)> (U.S. letters of Aug. 25 & Oct. 25, 2004, on submission of May 17, 2004, made by Brazil); *id.*, Submission by Australia (Jan. 30, 2006), available at <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_aus.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm)> (reactions of states to submission of Nov. 15, 2004, made by Australia).

<sup>48</sup> Report of the Sixteenth Meeting of States Parties to the LOS Convention, UN Doc. SPLOS/148, at 12–16 (2006); Decision on Issues Related to the Proposals by the Commission on the Limits of the Continental Shelf, UN Doc. SPLOS/144 (2006); Letter Dated 19 May 2006 from the Chairman of the Commission on the Limits of the Continental Shelf, UN Doc. SPLOS/140 (2006). These documents are available at <[http://www.un.org/Depts/los/meeting\\_states\\_parties/meeting\\_states\\_parties.htm](http://www.un.org/Depts/los/meeting_states_parties/meeting_states_parties.htm)>.

<sup>49</sup> Another effect of a broad mileage limit is to invite attention to islands. If  $r = 200$ , then  $\pi r^2 = 125,664$ . See Jonathan I. Charney, *Rocks That Cannot Sustain Human Habitation*, 93 AJIL 863 (1999). Maps illustrating the global and regional effects of extension of coastal state jurisdiction to 200 miles can be found at Sea Around Us Project, Countries' EEZ (Jan. 2, 2006), <<http://www.searoundsus.org/eez/eez.aspx>>.

<sup>50</sup> See LOS Convention, *supra* note 25, Art. 55. For comprehensive analysis of the EEZ, see BARBARA KWIATKOWSKA, *THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA* (1989); FRANCISCO ORREGO VICUÑA, *THE EXCLUSIVE ECONOMIC ZONE: A LATIN AMERICAN PERSPECTIVE* (1984). For an analysis contemporaneous with negotiations at the Third UN Conference on the Law of the Sea, see Jean-Pierre Quéneudec, *La zone économique*, 79 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 321 (1975).

In an early assault on the substantive balance in an institutional setting, a very few states that clung to claims to a 200-mile territorial sea attempted to persuade the International Civil Aviation Organization to cast doubt on the continued application to the EEZ of the provisions regarding overflight of the high seas in the Convention on International Civil Aviation.<sup>51</sup> That effort failed.<sup>52</sup>

A better organized assault on that balance in an institutional setting occurred in the United Nations Educational, Scientific and Cultural Organization, from which emerged a controversial UNESCO convention that purports to expand the authority of coastal states in the EEZ and on the continental shelf to embrace marine archaeology.<sup>53</sup> In itself, this matter may have little impact on the balance of the EEZ. The problem is that it reflects a view of the EEZ as an appropriate vessel for accumulating additional coastal state competences. And each such move increases the territorial perception of the EEZ, which in turn facilitates further territorialization.

Be that as it may, a frontal assault on freedom of navigation itself in the EEZ, if successful, would undeniably go a long way toward creating a functional 200-mile territorial sea. Two main sources for such an assault are likely to command attention for some time: national security and protection of the marine environment. Both reflect important values that should be advanced. Both attract committed adherents who believe that other values must be subordinated to their efforts.

*National security.* The law of the sea in general, and the regime of the EEZ in particular, accommodate two different types of security interests. Most states share both in some measure. One is global mobility; high seas freedoms constitute its legal manifestation. The other is coastal security; coastal state sovereignty and jurisdiction constitute its legal manifestation.

The interest in global mobility seeks to avoid impediments to the deployment of forces by sea anywhere in the world. This interest is ordinarily associated with naval powers. In fact, the security of almost every state depends in some measure upon the mobility of the forces of naval powers for the maintenance of stability and security in its region.

Global mobility is a predicate of the international security system as it exists at present and for the foreseeable future. Both collective self-defense and collective security under the United

<sup>51</sup> See Chicago Convention, *supra* note 7, Arts. 1, 2, 3(c), 12. This kind of issue was in fact foreseen by the LOS Convention, which makes clear that the freedoms preserved in the EEZ are high seas freedoms. Article 58, paragraph 1 describes the specific freedoms expressly preserved in the EEZ, including the freedom of overflight, as “freedoms referred to in article 87.” Article 87 is the basic provision on the freedom of the high seas, which “comprises, *inter alia*, . . . freedom of overflight.” Moreover, Article 86, after indicating that the provisions of Part VII (High Seas) apply beyond the EEZ, goes on to state, “This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.”

<sup>52</sup> See ICAO Secretariat, United Nations Convention on the Law of the Sea—Implications, If Any, for the Application of the Chicago Convention, Its Annexes and Other International Air Law Instruments, Attachment to State Letter LE 4/41–84/33, para. 2.1 (1984), ICAO Doc. C–WP/7777 (1984), reproduced as LC/26–WP/5-1 (1987), reprinted in 1987 INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA: DOCUMENTARY Y.B. 243; Michael Milde, *The United Nations Convention on the Law of the Sea—Possible Implications for International Air Law*, 8 ANNALS AIR & SPACE L. 167 (1983).

<sup>53</sup> Convention on the Protection of the Underwater Cultural Heritage, Arts. 9, 10, Nov. 2, 2001, 41 ILM 40 (2002), available at <<http://www.unesco.org>>. The LOS Convention effectively accorded jurisdiction over marine archaeology to the coastal state in the 24-mile contiguous zone. LOS Convention, *supra* note 25, Art. 303(2); see Bederman, *supra* note 13. For more optimistic views of the UNESCO Convention, see PATRICK J. O’KEEFE, SHIPWRECKED HERITAGE: A COMMENTARY ON THE UNESCO CONVENTION ON UNDERWATER CULTURAL HERITAGE (2002); Guido Carucci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 AJIL 419 (2002).

Nations Charter, including enforcement, peacekeeping, and humanitarian operations, continue to rest on the assumption of global mobility, which means under current law that naval and air forces enjoy the freedoms of the seas in EEZs, as well as the concomitant right of transit passage through straits connecting EEZs.<sup>54</sup>

While the nature of security threats may change, the underlying interest in global mobility of forces does not.<sup>55</sup> It is as pertinent to the threats of today as it was to those during the Cold War.<sup>56</sup> The right at stake is the freedom to get to the sources of the threat. Absent that freedom, a right to act once there—such as the right to board and inspect, one aspect of the so-called proliferation security initiative<sup>57</sup>—is of no avail. If the right to board and inspect is rooted in flag state consent and flag state duties of cooperation derived from high seas principles,<sup>58</sup> it protects the global mobility essential to the achievement of the purposes of that system.

<sup>54</sup> Chapter VII of the UN Charter assumes that air, sea, or land forces acting pursuant to a Security Council decision under Article 41 or 42 would enjoy global access. That assumption is presumably based on the international law of the sea, in particular the freedoms of the high seas and concomitant passage rights through the territorial sea. It would be implausible to root the effectiveness of Chapter VII in either the general reference to mutual assistance in Article 49 or the specific reference to rights of passage in Article 43, which contemplates special agreements that have yet to be concluded. Absent global mobility guaranteed by the international law of the sea, conducting any significant collective security operations is hard to imagine.

Many collective self-defense arrangements, including the North Atlantic Treaty, contemplate the existence of the freedoms of the high seas and concomitant passage rights through the territorial sea. In light of the startling reference to straits in the European Commission's Green Paper (EC Green Papers are issued for public comment), *infra* note 71 and text at note 90 *infra*, it might be recalled that the Mediterranean Sea is part of the North Atlantic Treaty area, that it was unquestionably contemplated that under international law naval and air forces from non-Mediterranean NATO members would have access to the Mediterranean Sea and enjoy high seas freedoms therein, and that the Treaty was concluded in 1949 and Spain was not admitted to NATO until 1982. Perhaps a lack of responsibility for defense and international security may have contributed to the apparent inattention to interests in global mobility in the commission's paper.

<sup>55</sup> This analysis is not directed as such to the law of armed conflict, although the rules of the law of the sea do affect that body of law. See J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AJIL 64 (2000).

<sup>56</sup> For an analysis in that context, see Elliot L. Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902 (1980).

<sup>57</sup> See Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AJIL 526 (2004); Rüdiger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations Under International Law*, in VERHANDELN FÜR DEN FRIEDEN—NEGOTIATING FOR PEACE: LIBER AMICORUM TONO EITEL 649 (Jochen Abr. Frowein et al. eds., 2003).

<sup>58</sup> This, for example, is the foundation of the many useful provisions of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Nov. 1, 2005, IMO Doc. LEG/CONF.15/21 (2005). It is important here to distinguish between jurisdiction over the offense and the right to board a foreign ship at sea. That distinction was drawn in the *Lotus* case:

In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.

But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas.

S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 25 (Sept. 7), *available at* <<http://www.icj-cij.org>>. The distinction is evident in the multiple bases for legislative jurisdiction set forth in the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, including the flag state of the ship where the alleged offense occurred, the state of nationality of the suspect or of the victim, and the state that the alleged offense attempts to coerce. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Art. 6, Mar. 10, 1988, 1678 UNTS 221, 27 ILM 668 (1988); see Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AJIL 269 (1988).

Yielding to the territorial temptation and utilizing the EEZ and its 200-mile limit as the basis for boarding rights would have exactly the contrary effect: it would in all but name breach the essence of the distinction between the territorial sea and the EEZ for security purposes. The amendments to Chapter V of the regulations annexed to the International Convention for the Safety of Life at Sea regarding long-range identification and tracking of ships provide for notification to the coastal state when a ship is within 1000 miles of the coast. From the perspective of both coastal security and global mobility, use of the 200-mile figure, as some delegates suggested, would have been a mistake, providing less useful information and entailing further territorialization of the EEZ.<sup>59</sup> The temptation to impose new security controls in the 200-mile zone nevertheless remains a serious problem as states consider other measures to deal with the terrorist threat from the sea.

The territorial sea is the most obvious manifestation of the influence of the territorial temptation in the law of the sea and its association with coastal security concerns.<sup>60</sup> This influence is reflected not only in the sovereignty of the coastal state over the territorial sea, but in its right, except for straits, to suspend innocent passage temporarily "if such suspension is essential for the protection of its security."<sup>61</sup> But accommodation of coastal security concerns is not limited to the territorial sea. The EEZ and continental shelf regimes respond to such concerns as well by placing most offshore installations and structures, apart from submarine cables and pipelines, under coastal state jurisdiction.<sup>62</sup> In addition, the elaborate requirements regarding scientific research in the EEZ and on the continental shelf, while primarily a response to economic concerns, were adopted in some measure in reaction to coastal security concerns.<sup>63</sup>

As a result, the EEZ regime is designed to protect both types of security concerns, according each priority with respect to different types of activity. Global mobility prevails with respect to navigation, overflight, submarine cables, and activities related to those freedoms. Coastal security concerns prevail with respect to most fixed installations.

The accommodation in the territorial sea, while real, is much different. The right of innocent passage is a limited one. Only with respect to transit passage of straits does the accommodation approach that in the EEZ, and even then transit passage applies only to ships and aircraft in continuous and expeditious transit, and does not embrace the range of the high seas freedoms preserved in the EEZ.

<sup>59</sup> See Proposed Regulation 19-1, para. 8.1.3, IMO Doc. MSC/81/WP.5/Add.1, at 4 (2006). For the Convention, Nov. 1, 1974, see 32 UST 47, 1184 UNTS 277.

<sup>60</sup> How much actual security is thereby achieved is a different matter. The choice between being able to see those who may threaten, and inconveniencing them by forcing them to act covertly or from a distance, is not a question ordinarily addressed in the law of the sea literature, except with respect to law enforcement strategies regarding such problems as smuggling, where economic disincentives and threats of punishment may play a greater role than in questions of state security and intelligence.

<sup>61</sup> LOS Convention, *supra* note 25, Art. 25(3).

<sup>62</sup> See *supra* note 26. Freedom to lay and maintain submarine cables and pipelines is protected, subject to certain coastal state environmental rights with respect to pipelines. LOS Convention, *supra* note 25, Arts. 58, 79, 87. Apart from submarine cables and pipelines, the LOS Convention places artificial islands, economic installations and structures, and other installations and structures "which may interfere with the exercise of the rights of the coastal State in the zone" under the jurisdiction of the coastal state in the exclusive economic zone and on the continental shelf. *Id.*, Arts. 60, 80; see *id.*, Art. 258; Tullio Treves, *Military Installations, Structures, and Devices on the Seabed*, 74 AJIL 808, 840-51 (1980). The coastal state also has "the exclusive right to authorize and regulate drilling on the continental shelf for all purposes." LOS Convention, *supra* note 25, Art. 81.

<sup>63</sup> See LOS Convention, *supra* note 25, Arts. 246, 248, 249, 253.

The balance of the EEZ regime with respect to security interests appears to be stable for now.<sup>64</sup> It nevertheless remains subject to both direct and indirect challenge. The strongest one might well be the environmental challenge discussed below. But others might emerge alone or in combination with the environmental challenge. Regionalism could be one vehicle. Although the Law of the Sea Convention mandates cooperation between coastal states that border an enclosed and semienclosed sea, it does not augment coastal state rights or subject the freedoms and rights of all states to special regimes in such seas.<sup>65</sup> Yet the fact that the access of states outside the region may be a check on the ambitions of major regional powers has not escaped the latter's notice.<sup>66</sup> And the fact that the manifestation may be regional makes the role of the territorial temptation no less real.

*Protection and preservation of the marine environment.* One of the distinguishing features of the LOS Convention is the attention it devotes to environmental protection. It remains "the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."<sup>67</sup> It contains elaborate and complex provisions that seek to accommodate the navigational rights and freedoms of all states with the need to ensure effective protection for the environment. Many of these provisions relate to, and qualify, freedom of navigation in the EEZ.<sup>68</sup>

A significant aspect of these provisions is that they are self-adjusting. The obligation of the flag state to apply to its ships "generally accepted" standards,<sup>69</sup> like the coastal state's right to enforce generally accepted international standards regarding operational discharges in the EEZ,<sup>70</sup> evolves with the standards. Moreover, the flag state is subject to compulsory arbitration or adjudication, including provisional measures, for breach of its navigational and environmental obligations.<sup>71</sup> In addition, the Convention permits the coastal state to seek approval from

<sup>64</sup> A few verbal skirmishes regarding naval exercises and installations in the EEZ are evident in some of the declarations made by states in their instruments accepting the LOS Convention, and in the response to those declarations. See United Nations, *Declarations Made upon Signature, Ratification, Accession or Succession or Anytime Thereafter* (Aug. 29, 2006), at <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm)>; ROACH & SMITH, *supra* note 40.

<sup>65</sup> LOS Convention, *supra* note 25, Art. 123.

<sup>66</sup> The Soviet Union was able to shape the Montreux Convention so as to limit outside naval presence in the Black Sea. See Convention Regarding the Regime of the Turkish Straits, Arts. 10, 18, July 20, 1936, 173 LNTS 213; C. G. Fenwick, *The New Status of the Dardanelles*, 30 AJIL 701, 704 (1936); LOS Convention, *supra* note 25, Art. 35(c).

<sup>67</sup> John R. Stevenson & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AJIL 488, 496 (1994). Secretary of State Christopher offered the same appraisal in his Letter of Submittal of the Convention of September 23, 1994. S. TREATY DOC. NO. 103-39, at V, VI-VII (1994).

<sup>68</sup> See LOS Convention, *supra* note 25, Arts. 56(1)(b)(iii), 58(3), 194(5), 210, 211, 216-21, 234.

<sup>69</sup> *Id.*, Arts. 94(5), 211(2).

<sup>70</sup> *Id.*, Arts. 211(5), 220.

<sup>71</sup> *Id.*, Arts. 286, 297(1)(b). Like many of the substantive and procedural protections afforded coastal state environmental interests by the LOS Convention, the availability of compulsory jurisdiction to enforce flag state obligations is not noted in connection with the description of environmental challenges posed by navigation in the recent Green Paper of the European Commission, including the following:

If the flag state is lax in the application or control of international rules, a "flag of convenience", it can become the home register of sub-standard ships or irresponsible owners. In contrast, registers which police international rules strictly, and enforce additional constraints, may find that owners transfer their vessels to less onerous registers. This is not a new debate and the dilemma for governments will remain.

Commission of the European Communities, Green Paper: Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas 22-23, COM (2006) 275 final (June 7, 2006), available at <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0275Ben01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0275Ben01.pdf)> [hereinafter Green Paper]. Interestingly, the matter of dispute settlement is referred to in the context of urging the systematic introduction in *new*

the International Maritime Organization to adopt and enforce additional standards regarding discharges or navigational practices in its EEZ.<sup>72</sup> States also have the increasingly important option of seeking new IMO regulations under existing conventions with liberal tacit acceptance amendment provisions regarding the entry into force of new technical requirements, including those with respect to particularly sensitive sea areas. And, of course, the IMO remains a responsive forum for the negotiation of new instruments that implement the provisions of the LOS Convention, such as the International Convention for the Control and Management of Ships' Ballast Water and Sediments, adopted on February 13, 2004.<sup>73</sup>

The LOS Convention contains no restriction on the right of a state to establish port entry requirements, including those regarding the construction, manning, equipment, or design of ships.<sup>74</sup> Acting either alone, or in concert with other states,<sup>75</sup> a state can therefore use port entry restrictions to control the construction, manning, equipment, or design of ships operating off its coast that are headed to or from its own ports or those of a state with similar entry requirements.<sup>76</sup> In the case of the United States, for example, such control now effectively applies to the overwhelming majority of ships operating off its coast.

The balance of a system rooted in port state and coastal state enforcement of evolving international standards, coupled with port state unilateral control of port entry requirements, need not be an impediment to the pursuit of new environmental objectives with respect to the EEZ. In most instances this balance turns on procedural rather than substantive constraints, and the IMO is showing itself to be very responsive in its procedural role in this connection. But procedural constraints do mean that some of the factors previously identified as influencing the reemergence of the territorial temptation with respect to the natural resources of the sea might remain pertinent here as well. From that list, one might recall, for example, political and bureaucratic ambition, impatience, and frustration with international organizations.

Nevertheless, that environmentalists in particular would embrace the territorial temptation is curious since their essential goal, especially with respect to the oceans, is to achieve global protection.

*agreements* "of referrals to the International Tribunal of the Law of the Sea or, where appropriate, to other forms of dispute settlement." *Id.* at 42.

<sup>72</sup> LOS Convention, *supra* note 25, Art. 211(6). Moreover, the ability of the straits states to implement and enforce international pollution standards, and to secure IMO approval for the adoption and enforcement of specific safety and traffic regulations, appears to be providing a flexible mechanism that can adapt to new needs and be tailored to specific requirements in a particular strait. *Id.*, Arts. 41, 42, 233. In this regard, the question of whether particular regulations are desirable should be distinguished from the question of the availability of the mixed coastal state/IMO approval procedure for adopting a wide range of binding regulations. All concerned, straits states and maritime states alike, have an interest in the effective functioning and responsiveness of such a "mixed" regulatory system. Given the difficulty of achieving express agreement with all possible flag states, the effect of a narrow construction of that regulatory option is to invite unilateral coastal state action to fill the regulatory vacuum.

<sup>73</sup> *See id.*, Art. 196. Brief discussions of the extensive use of tacit acceptance amendment procedures in IMO conventions can be found in IMO, Conventions (n.d.), at <<http://www.imo.org>>, and of the IMO process for designating particularly sensitive sea areas in Particularly Sensitive Sea Areas (n.d.), <[http://www.oceansatlas.com/unatlas/issues/pollutiondegradation/special\\_areas/sensitive\\_sea\\_areas.htm](http://www.oceansatlas.com/unatlas/issues/pollutiondegradation/special_areas/sensitive_sea_areas.htm)> (maintained by IMO).

<sup>74</sup> The existence of this right is reflected in notice provisions regarding port entry requirements for environmental purposes, and its exercise may even qualify innocent passage in the territorial sea. *Id.*, Arts. 25(2), 211(3).

<sup>75</sup> The LOS Convention expressly contemplates such concerted action by port states. *Id.*, Art. 211(3).

<sup>76</sup> "The exercise of this right by even a small number of states could have a widespread effect, for many oil tankers depend for their trade on a limited number of major ports." Oscar Schachter & Daniel Serwer, *Marine Pollution Problems and Remedies*, 65 AJIL 84, 93 (1971).

That goal can best be realized through strong and effective international measures that states are obliged and empowered to enforce.

If experience teaches us the difficulties of overcoming states' resistance to restraints on the discretion that accompanies territorial sovereignty, and the power of emotional appeals to territorial sovereignty by those who would resist international restraints, why allow the territorial temptation to expand its reach in the sea? The need for common ground rules and cooperation by users in an area open to all is self-evident; it is an indispensable concomitant of a regime of freedom of action itself, as demonstrated by the basic principle that high seas freedoms "shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas."<sup>77</sup> Even though yielding to the territorial temptation with respect to a particular environmental problem may promise some short-term or tactical benefit, doing so may augment the difficulties of achieving a desired level of international regulation of environmental problems in that area and elsewhere.

There is ample evidence that states more readily accept international regulation of activities that relate exclusively or principally to areas that are not subject to territorial sovereignty than to areas that are. One of the first and most widely ratified and effective modern international regulatory instruments, the Chicago Convention of 1944, makes this tendency clear. The basic obligation with respect to overflight of land territory set forth in Article 12 is that "[e]ach contracting State undertakes to keep its own regulations in these respects uniform, *to the greatest possible extent*, with those established from time to time under this Convention." However, "[o]ver the high seas, the rules in force *shall be* those established under this Convention."<sup>78</sup> Other evidence for this tendency includes:

- Codifying the principle discerned in the General Act of Brussels of July 2, 1890, Article 13 of the Convention on the High Seas provides, "Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free."<sup>79</sup>
- There is nothing on land approaching the open-ended legal obligations of the flag state under the LOS Convention to ensure that its safety regulations "conform to generally accepted international regulations, procedures and practices" and that its pollution regulations "shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference."<sup>80</sup>
- The conventions and other instruments emerging from the work of the International Maritime Organization regarding pollution from ships rank among the most extensive and effective in the field of international environmental law.
- The jurisdiction of the only international regulatory organization created by the LOS Convention, the International Seabed Authority, relates to the area "beyond the limits of national jurisdiction."<sup>81</sup>

<sup>77</sup> LOS Convention, *supra* note 25, Art. 87(2); *accord*, Convention on the High Seas, *supra* note 15, Art. 2.

<sup>78</sup> Chicago Convention, *supra* note 7, Art. 12 (emphasis added).

<sup>79</sup> Convention on the High Seas, *supra* note 15, Art. 13; *accord* LOS Convention, *supra* note 25, Art. 99.

<sup>80</sup> LOS Convention, *supra* note 25, Arts. 94(5), 211(2). In contrast, the Convention requires that with respect to land-based sources of marine pollution, international regulations only be taken into account. *Id.*, Art. 207(1).

<sup>81</sup> *Id.*, Arts. 1(1)(1)–(1)(3), 134, 157. The famous call by Ambassador Arvid Pardo of Malta for the establishment of an international regime for the seabed referred to the area beyond the limits of "present" national jurisdiction. UN GAOR, 22d Sess., Annex 3, 1st Comm., 1515th mtg. at 1, para. 3, UN Doc. A/C.1/PV.1515 (Nov. 1, 1967). Latin American 200-mile claimants were quick to secure the omission of the word "present" in General Assembly resolutions. *See* Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) (Dec. 17, 1970).



- While the LOS Convention represents a milestone in its provision for compulsory arbitration or adjudication by states with respect to the extensive and varied obligations set forth in the Convention as a whole,<sup>82</sup> an exception to that provision confines its applicability to carefully circumscribed circumstances in the case of disputes concerning “the exercise by a coastal State of its sovereign rights or jurisdiction.”<sup>83</sup>
- It is doubtful that the international regulatory system that has emerged under the Antarctic Treaty, including its environmental protocol and the Convention on the Conservation of Antarctic Marine Living Resources,<sup>84</sup> would exist in anything like its present form if territorial claims in Antarctica were more widely recognized.
- Sophisticated environmentalists understand that, quite apart from the economic or other costs of the necessary accommodations, the resistance of the territorial state to the intrusion of international environmental regulation on its traditional range of discretion is an obstacle to progress.<sup>85</sup>

The environmental calculus is difficult. The serious literature makes clear that we have gone beyond the easy part of Manichaean norms, and must mediate between competing goods as best we can.<sup>86</sup> To do so, we must confront the complex choices and enforcement challenges that attend almost every environmental decision.<sup>87</sup>

Let us take, for example, the transport of radioactive nuclear materials for reprocessing. Obviously, such an activity requires careful regulation: the LOS Convention and other treaties provide the substantive foundation for doing so, and both the IMO and the International Atomic Energy Agency offer competent venues. Also obviously, fear of an accident is likely to trigger negative reactions by coastal states.<sup>88</sup> Up to a point, those reactions are useful: they indicate that a special problem exists, and can help gain the attention necessary to spur productive

<sup>82</sup> LOS Convention, *supra* note 25, Art. 286 (“Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”)

<sup>83</sup> *Id.*, Art. 297.

<sup>84</sup> Antarctic Treaty, Dec. 1, 1959, 12 UST 794, 402 UNTS 71; Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 ILM 1455 (1991); Convention on the Conservation of Antarctic Marine Living Resources, May 21, 1980, 33 UST 3476, 1329 UNTS 47; see Robert D. Hayton, *The Antarctic Settlement of 1959*, 54 AJIL 349 (1960).

<sup>85</sup> This problem has long been recognized:

States are, in general, reluctant to agree to any regulation which will affect their freedom of action within territorial waters. . . . [Treaty regulation of conservation] would imply a recognition of some degree of modification in former claims to exclusive jurisdiction in territorial waters and a recognition of the general well-being as paramount to special national claims.

George Grafton Wilson, *Conservation of Maritime Life*, 22 AJIL 603 (1928).

<sup>86</sup> For an examination of the role of normative hierarchy in such a process, see the centennial essay by Dinah Shelton, *Normative Hierarchy in International Law*, 100 AJIL 291 (2006).

<sup>87</sup> Perhaps one lesson to be drawn from the tortuous *MOX Plant* litigation is that tribunals are not inclined to ignore either jurisdictional constraints or substantive complexity. See *MOX Plant (Ir. v. UK)*, Provisional Measures, No. 10 (ITLOS Dec. 3, 2001), available at <[http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html)>; Access to Information Under Article 9 of the OSPAR Convention (Ir. v. UK), Final Award (Perm. Ct. Arb. July 2, 2003), available at <<http://www.pca-cpa.org>>; *MOX Plant (Ir. v. UK)*, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits (Perm. Ct. Arb. June 24, 2003), 42 ILM 1187 (2003), available at <<http://www.pca-cpa.org>>; Case C-459/03, *Comm'n v. Ireland* (Eur. Ct. Justice May 30, 2006), available at <<http://curia.europa.eu/en/content/juris/index.htm>>.

<sup>88</sup> These political and legal reactions were described recently in Jon M. Van Dyke, *Ocean Transport of Radioactive Fuel and Waste*, a paper presented at a conference on the oceans and the nuclear age at Boalt Hall, University of California at Berkeley, in February 2006 (publication forthcoming).

international negotiation. But does the substantive solution reside in yielding to the territorial temptation?

Regardless of one's view of the appropriate elements of a solution to this problem, an outcome in the general interest that accommodates the relevant concerns, including the desire both to minimize proliferation of nuclear reprocessing capability and to protect the oceans and coastal areas, is more likely to emerge from international negotiations. Left to their own devices, coastal state politicians are prone to respond to local pressures simply to keep the ships away.

But political pressures are what make and change the law, both municipal and international. As the European Commission recently observed:

In the wake of the Prestige accident in November 2002 there was an emotional wave of solidarity throughout Europe, and the institutions and highest authorities of the European Union expressed their firm resolve that the policy of strengthening maritime safety pursued following the Erika accident in December 1999 should be continued and reinforced.

. . . .

. . . The European Union has at times been reproached for having a calmer attitude than the United States which, through OPA 90 (Oil Pollution Act), reacted unilaterally to the Exxon Valdez accident. This disregards the fact that Europe is not in a comparable situation to that of the United States. Europe's basic problem is transit traffic, outside the jurisdiction of the Member States, involving high-risk vessels flying the flag of third countries: some 200 million tonnes of crude oil and petroleum products are moved each year off our coasts without control being possible in a European Union port.<sup>89</sup>

One marvels that the emerging political hub of the world's historic and still dominant global maritime shipping countries identifies maritime traffic of noncoastal origin as a problem without referring to countervailing interests in global navigation rights and freedoms in the EEZ and straits. It would be ironic if the territorial temptation were to administer its coup de grâce in the very place where the Grotian system first emerged. The European Commission's Green Paper states:

The legal system relating to oceans and seas based on UNCLOS needs to be developed to face new challenges. The UNCLOS regime for EEZ and international straits makes it harder for coastal states to exercise jurisdiction over transiting ships, despite the fact that any pollution incident in these zones presents an imminent risk for them. This makes it difficult to comply with the general obligations (themselves set up by UNCLOS) of coastal states, to protect their marine environment against pollution.<sup>90</sup>

Grotius might ask: "Developed" how? "Harder" than what? "Their" marine environment?

<sup>89</sup> Commission of the European Communities, Third Package of Legislative Measures on Maritime Safety in the European Union 2, 5–6, COM (2005) 585 final (Nov. 23, 2005) (footnotes omitted), *available at* <[http://eur-lex.europa.eu/RECH\\_naturel.do](http://eur-lex.europa.eu/RECH_naturel.do)>. There is no more sense in limiting the scope of a port state enforcement arrangement to the European Union than there would be in limiting the scope of any such arrangement to the territory of a single state; the object is to reach ports outside, not merely within, the concerned entity. One wonders whether anyone has seriously pursued the idea of an enhanced enforcement arrangement with Russia and other states to or from which the offending vessels travel, and done so in a manner designed to encourage a positive response rather than evoke confirmation of noncooperation. After all, Russia, principally as port state but also as flag state and state of nationality of ship operators, has a great deal to lose from the advance of the territorial temptation, especially in Europe.

<sup>90</sup> Green Paper, *supra* note 71, at 42.

A further type of challenge to the system of functional allocation of competence in the EEZ is found in the increasing pressure, especially from environmentalists, for "spatial planning."<sup>91</sup> The underlying idea of coordinated or integrated management can be expected to promise similar benefits and pose similar problems to those on land. The difficulties are compounded at sea by the decidedly territorial focus and the coastal state's selection of and control over the planners. In the context of the exercise of coastal state jurisdiction over most activities requiring coordination, the need to deal with foreign ministries, not to mention foreign governments and international organizations, regarding navigation or submarine telecommunications cables seems nettlesome indeed, a pest to be swatted the next time an accident arouses public concern. And lest aviators think themselves immune, they might recall that it is the legal status of the surface of the earth that determines the legal status of the airspace.<sup>92</sup>

Quite apart from its provisions on pollution from ships and coastal state rights in that regard, the Law of the Sea Convention imposes significant environmental obligations on coastal states with respect to their own offshore activities.<sup>93</sup> Many of these and other limitations on the territorial temptation in the LOS Convention were achievable because they were negotiated in the context of substantial disagreement over the nature and extent of coastal state jurisdiction itself. That is no longer the case.<sup>94</sup>

The experience with fishing may illustrate the point. Lured by the hopeful prospect of sound management by a few coastal states whose citizens tend to dominate international nongovernmental organizations,<sup>95</sup> conservationists were largely content to accept the argument that coastal state control of fishing in the EEZ would yield desirable results. Some were skeptical but, in vivid contrast to the hard obligations achieved with respect to environmental and pollution matters in general, the coastal state conservation obligations they settled for in the EEZ are not easy to violate and are not subject to compulsory arbitration or adjudication.<sup>96</sup>

That the alliance between coastal fishing industries and conservationists with respect to fisheries management was largely a marriage of rhetorical convenience became clear once the coastal fishing industries, having embraced the territorial temptation and achieved subordination or expulsion of their foreign competitors in the EEZ, became more wary of conservation restraints notwithstanding their long-range interests in maintaining a renewable resource. The result is evident in the troubling statistics on the state of the world's ocean fisheries,<sup>97</sup> even though some 90 percent of them have been placed under the largely discretionary control of coastal states by virtue of the regime of the EEZ.

<sup>91</sup> See, e.g., the discussion in *id.* at 34.

<sup>92</sup> Chicago Convention, *supra* note 7, Arts. 1, 2, 3(c), 12; LOS Convention, *supra* note 25, Arts. 2(2), 38, 53(2), 58(2), 87(1).

<sup>93</sup> LOS Convention, *supra* note 25, Arts. 192, 193, 194(2), 198, 199, 204–06, 208, 210, 212.

<sup>94</sup> Most coastal states have adopted legislation implementing their jurisdictional entitlements under the Convention. Not surprisingly, many of the statutes conveniently omit mentioning a large number of the concomitant limitations and obligations, including those regarding environmental protection.

<sup>95</sup> The general role of nongovernmental organizations is analyzed in the centennial essay by Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AJIL 348 (2006).

<sup>96</sup> See LOS Convention, *supra* note 25, Arts. 61, 68, 297(3).

<sup>97</sup> Boris Worm et al., *Impacts of Biodiversity Loss on Ocean Ecosystem Services*, 314 SCIENCE 787 (2006); see Intergovernmental Oceanographic Commission, *Fisheries and Ecosystems* (2005), at <<http://ioc.unesco.org/iocweb/ecosystems.php>>; Fisheries Global Information System, *Topics and Issues Fact Sheet*, at <<http://www.fao.org/figis/servlet/topic?fid=2329>>; Review Conference Report, *supra* note 45.

Of course, the outcome probably would not have been any better absent the advent of the EEZ. But the puzzlement in this story is the failure of some environmentalists to realize that they made a mistake not only in assuming that territorialization in itself would solve conservation problems, at least in most places, but also in failing to exact a higher price for accommodating the territorial temptation before it consolidated its grasp on the living resources of the EEZ. When interested coastal states engaged environmentalists in efforts to launch the negotiations that led to the 1995 UN implementing agreement on stocks that straddle or migrate across the 200-mile line, a few individuals who did appreciate the problem hoped the negotiations would afford an opportunity to add new normative, organizational, or dispute settlement obligations regarding conservation within the EEZ. But such hopes were dashed.<sup>98</sup> The coastal states regarded their existing range of discretion in the EEZ, including their right to determine the total allowable catch and to take as much of it as their harvesting capacity would permit, as vested rights.<sup>99</sup> To protect those rights, they focused on the acquisition of means to reduce competition from foreign high seas fishing. Fortunately, at least beyond 200 miles, a stronger model for an international conservation regime responded both to environmental values and to the allocational objectives of coastal fishing industries.<sup>100</sup>

The link between environmentalism and the territorial temptation remains real. It is worth considering its origin. Canada was the first to dramatize a conflict between environmental protection and freedom of navigation. Its 1970 claim to a 100-mile zone in which it asserted unilateral control over navigation,<sup>101</sup> complemented by a reservation to its acceptance of the compulsory jurisdiction of the International Court of Justice, evoked considerable controversy.<sup>102</sup> Much of that controversy was expected to subside with the settlement reached in the LOS Convention, including both its general provisions regarding pollution from ships and a special provision regarding ice-covered areas.<sup>103</sup> But, as was foreseen at the time the claim was first made, the real object was sovereignty.<sup>104</sup> Canada has since established baselines around its Arctic islands and taken the position that the waters thereby enclosed are sovereign historic waters.<sup>105</sup>

<sup>98</sup> A modest strengthening of conservation measures with respect to highly migratory species within the EEZ was easier to achieve because the LOS Convention itself, in response to the need to manage such stocks throughout their migratory range, imposed stronger cooperative obligations on the coastal state with respect to highly migratory species as part of the original jurisdictional settlement. LOS Convention, *supra* note 25, Art. 64.

<sup>99</sup> See *id.*, Arts. 61(1), 62(2).

<sup>100</sup> See *supra* note 43.

<sup>101</sup> Arctic Waters Pollution Prevention Act of 1970, R.S.C., ch. A-12 (1985), reprinted in 9 ILM 543 (1970).

<sup>102</sup> Canada, Declaration Concerning Compulsory Jurisdiction of the International Court of Justice, Apr. 7, 1970, 724 UNTS 63, 9 ILM 598 (1970); see Louis Henkin, *Arctic Anti-Pollution: Does Canada Make—or Break—International Law?* 65 AJIL 131 (1971).

<sup>103</sup> See LOS Convention, *supra* note 25, Art. 234 (ice-covered areas).

<sup>104</sup> At the time, Prime Minister Pierre Elliott Trudeau all but admitted this motive when he responded to domestic criticism of the failure to claim full sovereignty by noting that one starts by doing something reasonable. Canadians were doubtless aware of Soviet pretensions to sovereignty over Arctic waters first adumbrated many years earlier. See W. Lakhtine, *Rights over the Arctic*, 24 AJIL 703 (1930).

<sup>105</sup> See Donat Pharand, *Canada's Sovereignty over the Newly Enclosed Arctic Waters*, 1987 CAN. Y.B. INT'L L. 325. Soon after his election, Prime Minister Stephen Harper reopened the question of Canadian sovereignty in Arctic waters. See Gloria Galloway, *Harper Rebukes U.S. Envoy over Arctic Dispute; Ambassador Reminded Panel That U.S. Doesn't Recognize Canada's Sovereignty*, GLOBE & MAIL (Can.), Jan. 27, 2006, at A4, available in LEXIS, News Library, Major World Newspapers File; *Canada-US Arctic Dispute Sparks Sharp Exchange*, Voice of Am. Eng. Serv., Jan. 27, 2006, available in LEXIS, News Library, Wire Service Stories File. In this connection, it may be interesting to recall the reference, by the chairman of the U.S. delegation to the 1958 and 1960 law of the sea conferences, to

## VI. CONCLUSION

International law at any given time represents an equilibrium between opposing pressures. Whether or not rooted in a tendency to extend historical trend lines into the future, the territorial temptation evidently continues to influence proposals to change the law of the sea. Although one would normally expect the maritime powers to be the main source of resistance to such a trend, some facts suggest otherwise.

- While the U.S. Department of State is careful to monitor and protest coastal state claims that it believes to be inconsistent with the LOS Convention, and the U.S. Navy tries to devote adequate resources to a program entailing the global exercise of rights designed to demonstrate nonacquiescence in such claims,<sup>106</sup> the effectiveness of these efforts is impaired by perceptions of a lack of will rooted in at least two factors: (1) the U.S. political system is as yet unequal to the task of formally embracing the only plausible basis for disciplining the evolution of the law of the sea, the United Nations Convention on the Law of the Sea; and (2) the Departments of State and Defense face a constant struggle with unilateralist territorialist sentiments percolating at any given moment in one or another U.S. domestic agency concerned with marine resources, environmental protection, or law enforcement, not to mention such sentiments in Congress and the states.
- The European Community and its member states seem on the verge of leading a new wave of territorialization against navigation itself in the name of environmental protection.
- The existing and emerging maritime powers of Asia—China, India, Japan, and South Korea—have shown little disposition to assume global leadership on these issues. Some need to liberate themselves from legal perspectives ill suited to their status and expectations.

Whatever one's projection may be, the critical issue is how the law of the sea will change in response to old pressures and new perceptions. The question of multilateralism lies at the center of that inquiry and arises at two levels. The first is whether the allocation of powers of governance derives from a multilateral process: will multilateral treaty negotiation rooted in consensus under UN General Assembly auspices, building on the LOS Convention and perhaps using additional implementing agreements,<sup>107</sup> become established as the source of legitimacy at sea, and displace a costly and occasionally bloody unilateralism?<sup>108</sup> The second is whether the powers of governance are themselves allocated to individual flag states or individual coastal states, or to global multilateral institutions, including the novel system rooted in the navigational

the "opening of the Northwest Passage between the Atlantic and the Pacific Oceans under the Arctic ice by the atomic submarines U.S.S. *Seadragon* and U.S.S. *Nautilus*." Dean, *supra* note 17, at 751.

<sup>106</sup> See Susan Biniaz, *The U.S. Freedom of Navigation Program*, in *THE LAW OF THE SEA: NEW WORLDS, NEW DISCOVERIES* 57 (Edward L. Miles & Tullio Treves eds., 1993).

<sup>107</sup> With regard to the novel means used to bring the 1994 Agreement Relating to the Implementation of Part XI of the LOS Convention into effect quickly, it was observed, "In this era of rapidly growing international communications, . . . it is time to abandon formalistic approaches of the past and to provide the twenty-first century with modern means for adapting international instruments to rapidly changing circumstances." Louis B. Sohn, *International Law Implications of the 1994 Agreement*, 88 AJIL 696, 705 (1994). For the Agreement, July 28, 1994, see 1836 UNTS 41.

<sup>108</sup> For a more sanguine celebration of the "process of continuous demand and response," see Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AJIL 356, 357 (1955).

and environmental provisions of the LOS Convention; namely, a shared coastal state/IMO legislative competence paired with flag state enforcement obligations and supplementary port state and coastal state enforcement powers, all kept in check by compulsory dispute settlement procedures.

The outcome will depend in some measure on how governments behave in the multilateral regulatory system through which the LOS Convention effects its implementation, be it in a global organization like the IMO or in a regional fishery management organization. Making such a system work requires some accommodation of substantive preferences to the broader interests in the success of the multilateral process that is the key to stability and ordered change in the law of the sea.

Reflexive negativism in multilateral institutions is likely to yield perverse effects. It weakens confidence in those institutions and poses a long-term risk of provoking unilateral action, which may entail substantive losses on the issue at hand and strengthen the territorial temptation. That is a high price to pay for buying time or avoiding responsibility for difficult decisions.

Activist constituencies might bear in mind that, measured carefully against the benefits of a universal law of the sea rooted in the substantive and institutional provisions of the UN Convention on the Law of the Sea and global multilateral implementing agreements that provide a clear and workable basis for protecting coastal and environmental interests, the territorial temptation is best recognized today for what it is: a unilateralist impulse often born of narrow agendas, impatience, frustration, or political and bureaucratic ambition. It tends to confuse substance with inspiring rhetoric and useful tactics. If locally successful, it may simply export environmental problems elsewhere.<sup>109</sup> Most important, it entails systemic costs that may ultimately imperil the existing and future foundation for strong international measures necessary to protect the global marine environment and provide a rational global order for the oceans.

Louis Henkin summed it up this way:

[I]f those favored by the old law court catastrophe if they merely sit on ancient rights, coastal states are hardly likely to make the law that is needed by unilateral assertion. For the issue is not in fact between *laissez-faire* for shippers and *laissez-faire* for coastal states. The seas—all the seas—cry for regulation as a veritable *res communis omnium*.<sup>110</sup>

<sup>109</sup> “States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.” LOS Convention, *supra* note 25, Art. 195.

<sup>110</sup> Henkin, *supra* note 102, at 136.