DIVISION OF THE HUMANITIES AND SOCIAL SCIENCES

CALIFORNIA INSTITUTE OF TECHNOLOGY

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MARITIME ZONES ACT, 1976 AND THE DRAFT TREATY: THE QUESTION OF RATIFICATION

Manjula R. Shyam
California Institute of Technology
and
George Williams College

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ABSTRACT

This paper makes a comparative analysis between the Indian Maritime Zones Act, 1976 and the Draft Treaty on the Law of the Sea. The Treaty will constrict the rights of the coastal state to control overflight and navigation of foreign vessels in the exclusive economic zone and on the continental shelf. It will also impose obligations on the coastal state beyond those enumerated in the Indian Maritime Zones Act. The Treaty however, will still deserve to be ratified and supported by India because the advantages of ratification will greatly outweigh the disadvantages.

MARITIME ZONES ACT, 1976 AND THE DRAFT TREATY: THE QUESTION OF RATIFICATION

Manjula R. Shyam

The Third United Nations Conference on the Law of the Sea (UNCLOS III) is likely to conclude in 1981 with a comprehensive treaty. The treaty, if ratified by a (yet to be determined) majority of states, will codify certain current practices, create new law regarding the use of the oceans, and establish an international oceans regime. Each state will then have to decide if it should ratify the comprehensive treaty. The treaty will be a single package, the product of tortuous and lengthy negotiations involving many different uses and classes of users. Many times on its stormy journey towards conclusion, UNCLOS III seemed to flounder on rocky shoals of self-interest but the awareness of the significance of the ocean resources and of the process of resolving conflicting interests by international negotiations forced the participants to make compromises that averted disaster. A refusal to ratify the treaty by a large number of states will prompt others to take unilateral actions that will lead to a chaotic and conflict prone ocean regime. The effects of non-ratification will extend beyond ocean related matters. It will mean a serious setback to the process of codification and development of law and to conflict resolution through international negotiations and diplomacy. These effects of non-ratification will plague the international community for many years to come in many different areas.

In most states, ratification of the treaty (as opposed to the negotiation) will involve a larger set of decision-makers than were involved in its negotiation. Many of these participants are not likely to have international order in general or the ocean regime in specific as their major preoccupation. The rights bestowed and duties imposed by the treaty will surely undergo careful scrutiny within the domestic context of each state. An understanding of the nature of the privileges and obligations that will accrue to a state under the treaty will decrease the chances of their being repudiated at a later date. It is with this perspective that I make the following comparison between the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 of India[1] (hereafter referred to as the Maritime Zones Act, 1976 or simply the 1976 Act) and the Draft Convention on the Law of the Sea[2] (hereafter referred to as the Draft Treaty) which is expected to be very similar to the Treaty that states will be asked to ratify. My objective here is not to comment on every provision of the Maritime Zones Act 1976 or of the Draft Treaty which deals with the territorial waters, continental shelf or exclusive economic zone because such analysis has already been done in many books and articles. Instead, my goal is to examine the differences between the rights and duties that will accrue to India as a result of Treaty ratification and those claimed by India under the Maritime Zones Act, 1976. Such a comparison may provide a basis for deciding whether or not India should ratify the Treaty.

Though India actively participated in the First Law of the Sea Conference held in Geneva in 1958, she never ratified any of the four

conventions that resulted from that conference. Reasons for India's failure to ratify these conventions have never been analyzed at any length. Are there reasons for India to ratify the product of the Third Law of the Sea Conference? How does UNCLOS III differ from UNCLOS I? Do these differences matter to India? One last caveat is in order here. The purview of the 1976 Act is more limited than that of the Draft Treaty because the Act does not concern itself with straits, archipelagic states, high seas, rights of access of the landlocked states to and from the sea and freedom of transit and the resources and management of the seabed area beyond national jurisdiction. Those sections of the Treaty may in themselves constitute sufficient grounds to decide on ratification, however, they will not be examined here. In this paper I focus attention on those sections of the Draft Treaty on which India has adopted specific rights through the Maritime Zones Act of 1976. I will first discuss the nature of the rights claimed by India in each of the maritime zones and then compare them with those incorporated in the Draft Treaty.

TERRITORIAL SEA

Maritime Zones Act, 1976

Under Section 3 of the 1976 Act, the breadth of the territorial waters is declared to be 12 miles from the appropriate baseline. India has sovereign rights over the territorial waters, the seabed and subsoil and the airspace over such waters.

Rights of India

a) All foreign ships other than warships and submarines have the right of innocent passage through the territorial waters (Article 4).

b) Foreign warships and submarines may pass through the territorial waters after giving prior notice to the government. All submarines have to navigate on surface and show their flag while passing through the territorial waters.

c) If necessary to ensure peace, good order and security of India, the government can suspend absolutely or with qualifications the entry of all or any class of foreign ships in any area of the territorial waters.

Draft Treaty

Part II of the Draft Treaty deals with the territorial sea. Article 19 enumerates twelve conditions that would make a passage non-innocent. By giving an operational definition of innocent passage, the Draft Treaty aims to reduce the realm of discretion of the coastal state and at the same time lays down a code of behavior for ships seeking innocent passage. Article 22 provides that the coastal state may require foreign ships to use designated sealanes and prescribed traffic separation schemes. It also allows the coastal state to require special precautionary measures for foreign nuclear powered ships and ships carrying nuclear and other noxious substances.

The coastal state may, if necessary for its security or for the safety of ships, suspend temporarily, in specified areas of the territorial sea, the innocent passage of foreign ships. Such

suspension will be without discrimination among foreign ships. These provisions of Article 25 have to be read in conjunction with Article 24, which enjoins coastal states not to discriminate in form or in fact against the ships of any state or against ships carrying cargoes to, from or on behalf of any state.

It is useful to make a comparison between the two texts to review the rights of the coastal state to suspend innocent passage. At the outset it must be observed that the decision if a passage is innocent or otherwise, is made first and last by the coastal state. The decision of the state is not subject to the jurisdiction of a court or tribunal.

Ships can be classified on the basis of destination or nature of vessel, or cargo, or ownership. The 1976 Act permits a selective suspension of passage. A certain class of ships, e.g. oil tankers above a certain tonnage or nuclear powered ships, may be refused innocent passage temporarily if so required for environmental reasons.

The Draft Treaty allows a suspension of all ships or none. The intent is twofold. A selective suspension by a coastal state would affect fewer states which would limit the outcry if the coastal state acts without proper cause. This would permit coastal states greater freedom to suspend innocent passage and perhaps enable them to use it more readily. If they would have to suspend it for all ships, they are likely to face the combined and concerted displeasure of many states. Though at first blush it seems that the Draft Treaty gives the coastal state greater power than the 1976 Act does, in practice the Treaty allows coastal state less freedom to exercise that power.

Secondly, the intention of the Draft Treaty is to prevent the coastal state from discriminating among ships in such a way as to single out one state or a group of states. Though the 1976 Act of India only allows restrictions on a particular "class of ships" and not against any particular states, it is often possible to signify a particular class of ships with such specificity that it would have the intended or unintended effect of preventing passage of ships carrying cargoes to from or on behalf of a particular state without affecting most other ships.

The Draft Treaty only mentions suspension of innocent passage when it is deemed essential for the security of the coastal state. The 1976 Act on the other hand mentions the protection of the "peace, good order and security" which can encompass many more circumstances and is not confined to military security alone. However since the coastal state is the final judge of whether its security is or is not threatened, the exact language of this provision is unlikely to make much difference.

Ratification of the Treaty by India would imply undertaking the duty not to discriminate among ships on the basis of any criteria. This would mean, reduced flexibility and therefore a restriction on the right enjoyed under the 1976 Act.

The two texts also differ with respect to innocent passage of warships in territorial waters. The 1976 Act requires prior notification of the passage of all warships and submarines. The Draft Treaty does not expressly state that coastal states may require prior notification. To the contrary, Article 24 states that the coastal

state shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage. Does ratification of the treaty imply that India cannot require prior notification from foreign warships and submarines exercising the right of innocent passage in her territorial waters?

To answer this question, it is useful to summarize the international law on the passage of warships in territorial waters other than straits. There is considerable controversy and ambiguity in customary law. Elihu Root wrote in 1910 "warships may not pass without consent into the zone, because they threaten."[3] Jessup regarded it as a "sound rule" and maintained that warships "should not enjoy an absolute legal right to pass through a State's territorial waters any more than an army may cross the land territory."[4] Colombos thinks it is reasonable to concede to a state the right to enact regulations regarding the passage of foreign warships.[5] McDougal and Burke state that the predominant expectation of states is that warships have a right of access to the territorial sea subject to notification; coastal competence does not extend to denying a right of access to warships.[6]

The Convention on the Territorial Sea and the Contiguous Zone, 1958 failed to put an end to this controversy. The recommendation of the International Law Commission entitling coastal states to require previous authorization or notification did not win the two-thirds approval at UNCLOS I. The states which wanted prior authorization for the passage of warships, rejected the clause which would have required only prior notification after they failed to obtain approval on the

authorization clause.

Thus the Convention on the Territorial Sea and the Contiguous Zone, 1958 does not specify any special provisions for the passage of warships. The convention obligates all states that ratified that convention. India did not ratify the convention. There was no unanimity of opinion expressed at the conference that could be construed as an evidence of customary law binding even those states which did not ratify the convention. International practice continues to vary. Some states have interpreted the law to mean that since the convention does not expressly forbid notification and since most states at the conference were in favor of passage of warships subject to prior notification, customary law supports notification and this is reflected in the 1976 Act of India.

The Draft Treaty clearly rules out the requirement of prior authorization for warships. The question is if the Draft Treaty permits a coastal state to require notification or will that be regarded as an "impairment" of innocent passage? As we have seen above, customary law does not oppose prior notification and under the Draft Treaty a coastal state may make laws in conformity with "other rules of international law" (Article 21). Hence the ratification of the Treaty does not necessarily imply that India would have to eschew the notification clause in the 1976 Act. The interpretation of prior notification will be the critical variable. If, for example, foreign warships must notify 30 days in advance it may be regarded as an impairment but if they may notify 24 hours in advance, it may not be an impairment. The compatibility of the 1976 Act with the Draft

Treaty on the subject of notification for passage of warships and submarines may depend on its interpretation and its likely effect on the impairment of innocent passage.

CONTINENTAL SHELF

Maritime Zones Act, 1976

Section 6 of the 1976 Act declares that the continental shelf of India comprises the seabed and subsoil of the submarine areas that extend beyond the limit of the territorial water throughout the natural prolongation of the land territory to the outer edge of the continental margin or to a distance of 200 miles from the baselines where the outer edge of the continental margin does not extend up to that distance.

Rights of India

Subsection 3 states that India has/can

a) sovereign rights for purposes of exploration and exploitation of all resources on the shelf,
b) exclusive rights for the construction and maintenance of artificial islands and other structures,
c) exclusive jurisdiction to authorize and control scientific research,
d) exclusive jurisdiction to protect the marine environment and prevent pollution,
e) declare any area of the continental shelf and its superjacent water a designated area for purposes of regulating entry into and passage through by foreign ships by specifying traffic

separation schemes,

f) extend to any part of the continental shelf or the superjacent waters same or similar restrictions as have been placed on any part of the territory of India.

Draft Treaty

Article 76 of the Draft Treaty defines the limit of the continental shelf. For states whose geological margin extends beyond 200 miles, the outer edge of the continental margin shall be determined in accordance with paragraphs (4) and (5) of Article 76. Thus the continental shelf of India in some areas under the Draft Treaty may not be coterminus with the entire submerged prolongation of the land as described in the 1976 Act.

The Draft Treaty imposes some limitations on the unfettered use of the resources of the shelf. A coastal state shall make payments to the Authority from exploitation of the continental shelf beyond 200 miles for distribution to the developing countries (Article 82). These payments will start from the 6^{th} year of production, increase from one percent to seven percent in the 12^{th} year and remain at that level thereafter.

These provisions may not be relevant to the Indian situation since a developing country which is a net importer of the minerals produced from its continental shelf is exempt from making such payments. The demand for hydrocarbons in India will continue to outstrip domestic production in the forseeable future. Thus for all practical purposes the two texts are indistinguishable with regard to the exploitation of the resources on the continental shelf.

The other rights on the continental shelf are discussed together with the rights in the exclusive economic zone (EEZ).

EXCLUSIVE ECONOMIC ZONE

Maritime Zones Act, 1976

India has an EEZ which extends to 200 nautical miles from the baselines from which the Territorial Sea is drawn.

Rights of India

Within the EEZ India has/can

a) sovereign rights for purposes of exploration, exploitation, conservation and management of living and non-living resources, and for producing energy from tides, winds, and currents

b) exclusive rights for the construction of artificial islands and installations,

c) exclusive jurisdiction to authorize and control scientific research,

d) exclusive jurisdiction to protect the marine environment and prevent pollution,

e) declare any area a designated area for purposes of regulating entry into and passage through by foreign ships by specifying traffic separation schemes, and

f) extend to any part same or similar restrictions as have been placed on any part of the territory of India.

Draft Treaty

Part V of the Draft Treaty enumerates the rights of the coastal state in the exercise of which the coastal state shall have due regard to the rights of other states. I will compare the rights claimed under the 1976 act to see if they will be diminished or expanded under the Draft Treaty. With the exception of the right over living resources which are discussed first, all the other rights are common to the EEZ and the continental shelf and the following comments apply to both regions.

(a) The coastal state has been given sovereign rights for the purposes of exploring, exploiting, conserving and managing the natural resources. The coastal state has four classes of obligations corresponding to the rights over living resources.

1. Duty to Conserve Stocks

Article 61 enunciates the coastal state's duty to conserve. The coastal state shall determine the allowable catch and shall take appropriate measures to prevent overexploitation and restore populations of harvested species at levels which can produce the maximum sustainable yield. The coastal state and the relevant regional and global organizations shall cooperate as appropriate to this end.

The Draft Treaty has taken a more informed position on conservation than the 1958 Geneva Convention on Fishing and Conservation. The Geneva Convention referred only to optimum sustainable yield as a conservation method. The Draft Treaty refers to maintaining the maximum sustainable yield level qualified by

relevant environmental and economic factors, including the needs of coastal fishing communities, the special requirements of developing countries, fishing patterns and the interdependence of stocks. Thus the Draft Treaty provides guidelines for state practice on conservation based not merely on the biological aspects of fisheries but on the economic, social and environmental factors as well. The coastal state is allowed a wide latitude in determining the level of allowable catch. If living resources are endangered through the failure of the coastal state to take conservation measures, it will be obliged to submit to conciliation procedures. Conservation may impose onerous responsibilities to collect and exchange scientific information such as catch and fishing-effort statistics on each stock but, in the long run, such responsibilities will serve the interests of the coastal state.

2. Duty of Optimum Utilization

Article 62 describes the duty of the coastal state to ensure optimum utilization of the living resources. Where the coastal state does not have the capacity to harvest the entire allowable catch, it shall (not may as in the draft sponsored by India which emphasized complete exclusivity) allow other states to catch the surplus.

The concept of full utilization was pressed by distant water fishing states which have considerable stake in continued access to stocks in the economic zone and believe that without such provisions many coastal states will exclude fishing by outsiders for nationalistic reasons. However, as long as coastal states are entitled to obtain payment from the users of surplus yields they have

an economic incentive to fully utilize the living resources within their economic zone. There is a basic difference between biological and mineral resources. Unexploited or underexploited fishery stocks do not accumulate to become available for future use of the coastal state and therefore represent a deadweight loss.

In giving other states access to surplus stocks the coastal state shall be required to give special consideration to the needs of the landlocked states, the states with special geographical characteristics, other developing states in the region, and to minimize the dislocation in states which have traditionally fished in the area or which have made sustained efforts in research and identification of stocks. The Draft Treaty does not mention the order in which these candidates for surplus catch will be considered or the relative weight to be given to their needs. Nor is there any redress for their grievances if a coastal state grants all the surplus of allowable catch exclusively on the basis of a particular factor. Distribution of the surplus catch among different categories of states is left to the discretion of the coastal state.

The coastal state can lay down terms for harvesting the surplus of allowable catch. These may relate to: payment of fees or transfer of technology, required conduct of specified fisheries research programs, placing of trainees on board such vessels, landing of the catch in the ports of the coastal state, and terms and conditions relative to joint ventures, etc. The Draft Treaty provides a detailed list of such conditions most of which are relevant to developing states. Nationals of other states fishing in the EEZ are

required to comply with the conservation measures specified by the coastal state.

The extent of discretion that the coastal state should enjoy in the EEZ was a subject of serious disagreement at the Conference. States who wanted compulsory and binding adjudication in case of dispute, felt that unless there were effective provisions for such settlement, the rights granted to them by the convention would amount to nought. Many states including the developing coastal states were opposed to any outside efforts to restrict their sovereign rights and they argued that their rights in the EEZ could not be effectively exercised if any state could harass them by frivolous invocation of the dispute settlement procedures. This was one of the ´hard core´ issues that was resolved at the eighth session in the Conference in Geneva. The compromise provides that a coastal state would be obliged to submit to conciliation procedure in three categories of disputes: first, when living resources are endangered through the failure of the coastal state to take conservation measures which has already been mentioned; second, when there is an arbitrary refusal to determine the maximum allowable catch and the surplus that may be allocated to other states; and third, when a state arbitrarily refuses to allocate the surplus catch to anyone.

Thus the coastal state is obligated to determine the allowable catch and the share thereof that it can harvest by its own capacity and to make the surplus available to those who may wish to harvest it. However it is useful to look at the imperatives of the coastal state that cannot be questioned.

1. If the maximum allowable catch is fixed at too high a level, the coastal state may be accused of not undertaking proper conservation measures but if it is fixed at too low a level, there is no redress. Thus the Draft Treaty permits coastal states to eliminate all surplus by setting the maximum allowable level sufficiently close to its own capacity to fish.
2. A state may determine its own harvesting capacity at a higher level than may be the case. It is not always easy to determine catch levels. In countries with thousands of artisanal fishermen, estimates of catch are based on informed speculation at best. A state may intentionally or otherwise, overestimate its harvesting capacity and thereby determine that it has a very small surplus to allocate to other states. The coastal state's estimates of its own harvesting capacity are not open to dispute by outsiders.
3. For the purposes of the Draft Treaty, harvesting capacity of the coastal state may include the catch caught through collaborative international joint ventures. The Draft Treaty does not say that the catch has to be brought in solely by indigenous efforts. The term joint venture covers a multitude of different arrangements in which risks and profits are shared. A coastal state may enter into several joint ventures with foreign countries or companies that may considerably boost its own "harvesting capacity" and leave no surplus to be allocated to outsiders. If this article was included in the

Treaty to provide some legal safeguards for certain categories of states such as the landlocked or historically fishing nations, that purpose is unlikely to be achieved. On the other hand, if it was intended to ensure full utilization of the fishing resources it may have greater success.

4. If a coastal state chooses to allocate its entire surplus to a single state its discretion cannot be challenged by other states which have not been allocated a share.
5. The terms that the coastal state sets for allowing access to the surplus of the allowable catch by other states may not be challenged. In other words if a coastal state wished to exclude foreign fishing it could do so by simply demanding exorbitant payments which no state would be willing to pay. States do not have recourse to conciliation procedures if a coastal state were to impose prohibitive terms and conditions.

The force of law is reflected not merely in those provisions which are subject to conciliation procedures -- international law would be a weak force indeed if that were the case -- but in the general norms of expectations and behavior it establishes. If we were to analyze the Draft Treaty to examine what a coastal state can get away with, the obligations do not seem very demanding. But if it is seen as reflecting the international consensus or the goal to be attained, the duty of full utilization would require considerable investment in collection of scientific information about the nature and size of the stocks, the number of vessels, fishermen and size of the catch and the administrative set up to issue and regulate

licenses. In most instances such obligations will be undertaken because they would mean not merely compliance with the Treaty but also because they would be beneficial to the country itself. Here the value of the stocks is important. If the stocks have a large market, rhetoric apart, the coastal state would not forgo the benefit of harvesting them and would attempt to capture these benefits either through joint ventures or by selling licensing permits to outsiders. If the stocks are not in great demand, outsiders are unlikely to be interested in harvesting them in which case the coastal state may not be under pressure to undertake the scientific and administrative efforts to determine the size of surplus and to allocate it. As stated above, a xenophobic state has many ways of disregarding this obligation, but most coastal states will find it to their benefit to fully harvest the sustainable catch in their EEZ whether it is incorporated in their legislative act or not.

3. Obligations Regarding Highly Migratory Species, Marine Mammals, Anadromous, Catadromous, Sedentary and Shared Stocks

The Draft Treaty imposes special obligations on coastal states with regard to these stocks. The states in whose rivers anadromous stocks like salmon originate have been given special obligations and rights. Because the number of states involved in the fishing of anadromous stocks is small, the main arrangements will continue to be made by bilateral or multilateral agreements. Special rights and obligations have also been given to the coastal states in whose waters catadromous species such as eels spend the greater part of their life cycle. The right of international organizations to regulate and limit

the exploitation of marine mammals is not affected by the Draft Treaty. States have an obligation to cooperate to protect marine mammals. None of these are of direct interest to India.

Sedentary species are organisms which at their harvestable stage are either immobile or are unable to move except in constant physical contact with the seabed and include lobsters, crabs, pearl oysters, pearl shells and sacred chanks. Sedentary species have relevance to India since there may be commercially exploitable stocks of these species in the Indian EEZ which are not currently being harvested. Sedentary species are considered resources of the continental shelf and not of the EEZ. This has two implications. First, the coastal state has sovereign rights over the sedentary species even beyond the EEZ since the continental shelf under Article 76 may extend beyond 200 miles. Secondly, the coastal state has unqualified rights over the sedentary species without any obligation to share the surplus with other states unlike the other species mentioned in Part V of the Draft Treaty.

The Draft Treaty subjects the fishing of tuna and other highly migratory species to regulations established by appropriate regional and international organizations. Tuna have extensive migratory patterns spanning many oceans and may swim inside and outside 200 miles from shore. International arrangements for tuna have been in existence since 1951. With the exception of skipjack, it is believed that all other species of tuna are being fished at the point of full utilization. While there is already economic waste due to overcommitment, there are other states who are starting new tuna

fleets or intend to do so in the near future. Thus there are two problems: first the adoption of global rational management measures and second, the allocation of benefits that is acceptable not only to the existing tuna fishing states but also to those who see themselves as prospective entrants.

In view of the capital intensive nature of tuna fishing and the transoceanic migratory pattern of tuna, it may be desirable for India to cooperate with other states who harvest tuna in the Indian Ocean and international bodies like the Indo-Pacific Fisheries Council's Committee on Management of Tuna, irrespective of the exclusive right over all stocks in the 200-miles EEZ.[7]

The Draft Treaty recognizes the need for coordinated conservation and allocation measures for transnational stocks or stocks that occur within the EEZ of two or more states. Conservation of shared stocks is much more complicated because in addition to total allowable catch, an agreement has to be reached on separate national quotas, on different procedures for reaching national allocations and the enforcement of such measures by the states concerned. As stocks get harvested to the limit, bilateral and multilateral negotiations will be necessary for conservation and management either directly among the fishing states or through an appropriate regional organization. Ratification or non-ratification of the Treaty will not obviate the necessity of negotiations on shared stocks.

4. Duty Towards Landlocked States and States with Special Geographical Characteristics

Landlocked states and states with special geographical

characteristics (SSGC) shall have the right to part of the surplus from the EEZ of neighboring coastal states provided they pay the licensing fees and comply with the conservation measures. When there is no surplus, the concerned states shall by negotiations set up arrangements allowing the landlocked and SSGC a share in the EEZ of the coastal states in the region (Articles 69 and 70).

The coastal states had taken the position at the Conference that issues of resource sharing are best settled on a bilateral basis. The argument of the landlocked and SSGC was that the EEZ does not conform to international law. By entering into a convention, the landlocked and SSGC give the coastal states a legal basis for a 200 mile extension of jurisdiction over resources which deserves a quid pro quo, namely the right to participate in exploiting resources within that extended jurisdiction. Even though the rights of the landlocked and SSGC are hedged in with many qualifying caveats, it cannot be denied that the Treaty gives legal recognition to their share in the EEZ of the neighboring states. The obligation that these articles impose on a particular coastal state would vary greatly depending upon the capacity and tradition of ocean fishing in the landlocked or SSGC, their distance from the coast and the nature of the stocks in the EEZ. Still, a coastal state will have the upper hand in negotiations, the Draft Treaty notwithstanding. Determination of the amount of surplus by the coastal state cannot be challenged; consequently, a part of the surplus is a promise of uncertain resources as far as the landlocked and the SSGC are concerned.

How onerous will be the obligations of India under Articles 69 and 70 if India ratifies the Treaty? There are no SSGC which have a claim on Indian EEZ. Bhutan, Nepal and Afghanistan are the landlocked states which can make a claim on the living resources (excluding sedentary species) in Indian EEZ as well as on other countries such as Pakistan and China. None of these landlocked countries have a significant marine fishing industry at the present time. They are unlikely to have great consumer demand for salt water fish either. In many inland parts of India, consumers prefer freshwater fish to ocean fish, if they find fish acceptable at all and the same will be true for Bhutan, Nepal and Afghanistan which are several hundred miles from the coast. Rights obtained by the landlocked states cannot be transferred to third parties through joint collaboration ventures, although the landlocked states can seek technical and financial assistance to build up their harvesting capacity. Bhutan, Nepal and Afghanistan may choose to negotiate with India for a share of the living resources, buy licenses, obtain technical assistance to train personnel, purchase facilities to freeze or can the catch and ship it a thousand miles inland or to external markets but the economics of it makes it unlikely that it will be a major claim on the Indian EEZ since these landlocked states can put foreign assistance to more productive use. Conceding the obligation to share the surplus in the EEZ with landlocked states which have a non-existent ocean fishing industry at the present time will detract very little from India's right to exclusive enjoyment of the resources.

(b) There is no significant difference in the 1976 Act and the Draft Treaty regarding the right of the coastal state to construct artificial islands and installations in the EEZ or the continental shelf.

(c) The conduct of marine scientific research in the EEZ and the continental shelf had been the subject of a major controversy at UNCLOS III. The Draft Treaty gives the coastal state the right to authorize and regulate (not control) marine scientific research (Articles 246-255). The coastal state shall normally grant consent and consent will be implied if six months after the submission of information and compliance with conditions, consent is not denied. The coastal state can withhold consent if the proposed project is of direct relevance for exploration and exploitation of natural resources. The party wanting to conduct research must supply detailed information about the nature, objectives, methods, location and duration of the project and comply with conditions which would enable the coastal state to participate in the project and share the results, samples and data. Disputes regarding the interpretation and application of these provisions are largely exempt from the jurisdiction of any court or tribunal. While the Draft Treaty provides greater detail about how the coastal state can regulate marine scientific research in the EEZ and the continental shelf, the provisions are compatible with those of the 1976 Act.

(d) The Draft Treaty gives the coastal states jurisdiction to prevent pollution. They have the obligation to establish rules which are not less effective than the international rules for controlling

pollution from dumping, from vessel discharges and from activities to explore and exploit the natural resources of the seabed.

(e) Unlike the 1976 Act, the Draft Treaty does not mention the right of the coastal state to restrict navigation in the EEZ or in the superjacent waters of the Continental shelf in a single article. There are some reference to circumstances under which navigation may be regulated. Article 60 of the Draft Treaty states that the coastal state may establish safety zones around artificial islands and structures provided they do not exceed a distance of 500 meters around them and provided they are not established in areas where interference may be caused to the use of recognized sealanes essential to international navigation. Exploitation of mineral resources may require regulation of seatraffic in order to protect drilling structures, pipelines and these would be covered by Article 60.

Coastal states can take measures including presumably, regulation of sea traffic in order to protect their marine environment in cases of maritime casualty (Article 221). Acting through Intergovernmental Maritime Consultative Organization (IMCO) or a general diplomatic conference, a coastal state may promote routing systems designed to minimize accidents. Additionally, if international standards are inadequate for clearly defined areas in the EEZ, the coastal state may present all scientific evidence to IMCO with whose approval within 12 months the coastal state may be allowed to establish sealanes in order to prevent pollution from vessels (Article 211).

The 1976 Act however reaches farther than the scattered references found in the Draft Treaty entitling a coastal state to regulate navigation in the EEZ. Under the 1976 Act, India could regulate traffic in parts of the EEZ which may not have anything to do with safety zones around installations or instances of maritime casualty. The Draft Treaty represents the balance between the guarantee of freedom of navigation in the EEZ and superjacent waters of the continental shelf as the price exacted for conceding the EEZ; any right of the coastal state to regulate navigation is carefully restricted to enumerated circumstances. Disputes arising from alleged interference by a coastal state with the freedom of navigation, overflight and laying of submarine cables and pipelines are subject to the compulsory jurisdiction of the court and tribunal under the Draft Treaty (Article 296). The ratification of the Treaty will imply a more restrictive exercise of the right to regulate traffic in the EEZ and the superjacent waters of the continental shelf than that embodied in the 1976 Act.

(f) There is however no parallel for subsection 7 of Section 7 and for Subsection 6 of Section 6 of the 1976 Act in the Draft Treaty. Under those provisions India may extend any enactment in force in any part of the territory of India to any part of the EEZ or the superjacent waters of the continental shelf as if the latter were a part of the former. This would presumably include restricting the movement and entry of all foreign vessels, aircraft and nationals or of those belonging to a particular country. It is totally open ended since it does not specify the circumstances or the duration for which

such an enactment will remain in force in the EEZ. No such right can be derived from any interpretation of the Draft Treaty. The Draft Treaty lays down that all states shall enjoy the freedom of navigation and overflight and freedom in the laying of cables and pipelines in the EEZ and in the continental shelf (Articles 58, 78 and 79).

These sections of the 1976 Act are incompatible with the Draft Treaty and if applied after the Treaty comes into force will be deemed a violation of international law.

On balance, a comparison of the rights and obligations of India under the 1976 Act and the Draft Treaty shows that under the latter, India cannot control navigation and overflight and its right to living resources are circumscribed by the obligation to undertake conservation, full utilization, to declare surplus and share it with the landlocked states and harvest the highly migratory species in cooperation with other states. We have already discussed above that none of the obligations regarding fishing will be contrary to India's long term interests and will not significantly detract from the exclusive enjoyment of the living resources in the EEZ. The right to control navigation and overflight will unquestionably be eliminated and deserves closer scrutiny.

What will be the implications of restrictions placed on passage of ships in the EEZs at the discretion of the coastal states for India? India's imports and exports in 1976 reached a total of 11 billion dollars.[8] On a worldwide basis, 90 percent of all trade is carried by ships. Assuming the same percentages holds true for her, India has a substantial stake in ensuring freedom of navigation,

untrammeled by arbitrary decrees of coastal states. India may not have any intentions of placing unnecessary obstacles on trade routes and the provisions in the 1976 Act may be intended only as a measure of last resort to be used only in critical emergencies. But having incorporated such a provision, India will not be in a position to protest against similar provisions by other coastal states who may not be as reluctant to exercise them in an arbitrary fashion. As the tenth largest industrial country, India has more to lose than to gain by setting a precedent of placing restrictions on navigation.

Will the Draft Treaty restrict her options if the foreign vessels pose a threat to India? India will not have the rights to prohibit a foreign warship from entering its EEZ with the avowed (though thinly disguised) purpose of brandishing military power and threatening the integrity of the country. It may be argued that Subsection 7 Section 7 of the 1976 Act is designed precisely for such circumstances. Several responses are possible to this question. Perhaps we should ask if the 1976 Act will, as is being assumed, prevent the presence of ships that are clearly hostile to India? The 1976 Act is a unilateral enactment; it either has to reflect the international consensus or has to be supported by military action in order to have any meaning. The Draft Treaty which reflects the international consensus does not favor restrictive passage in the EEZ. In other words, the non-ratification of the Treaty and the force of the 1976 Act would not be sufficient to keep the threatening warship out of the Indian EEZ unless India was willing to use force to back up its claim. The advantage of international law that is based on a

Treaty is that it is enforced by general acceptance among the nations. If India does not ratify the Treaty, it will nonetheless come into force when it is ratified by the requisite number of states. The 1976 Act will be contrary to international law and Indian admonitions to the threatening ship to stay away will have little support in international law. Any action by force to repulse a foreign ship will be a violation of international law notwithstanding the 1976 Act. Politically it would be wise for a foreign ship to refrain from blackmail and making a show of force against another country but legally it will not be a violation of international law to use that country's EEZ for the purpose.

CONCLUSION

The comparative analysis above indicates that the Maritime Zones Act, 1976 is largely compatible with the Draft Treaty. An important exception is the right under the 1976 Act to control navigation in the EEZ and the superjacent waters of the continental shelf which is not recognized by the Draft Treaty. However, as a large industrial nation, India's maritime interests will be better served by a regime which allows for unhampered navigation in the EEZs. In considering the ratification of the Treaty, one may be tempted to pick and choose among its more or less desirable features. But as I have mentioned earlier, the Treaty will be an integrated whole in which each element has been carefully balanced against others through compromise among the diverse interests of states. Each state must either ratify or reject the whole package.

The Treaty will confer substantial advantages to India. A unilateral action such as the Maritime Zones Act, 1976 has to rely on force for compliance. A Treaty lightens the burden of enforcement since states consider themselves duty bound to observe a Treaty that they have agreed to. The Treaty will create a new international oceans regime that will bring greater order and predictability in the use of the oceans. As such, it deserves to be ratified and supported by India.

FOOTNOTES

1. See the Gazette of India, Extraordinary, Part II, Section I, New Delhi, August 26, 1976.

2. A/CONF.62/WP.10/Rev.3.Sept. 22, 1980.

3. Quoted in Donat Pharand The Law of the Sea and the Arctic, Ottawa, 1973: 7.

4. Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, New York, 1927: 120.

5. C. John Colombos, The International Law of the Sea, David McKay, New York, 1967: 261.

6. Myres McDougal and William Burke, The Public Order of the Oceans, Yale University Press, New Haven, 1962: 220.

7. For a more detailed discussion see, Manjula Shyam, "The Emerging Fisheries Regime: Implications for India." Ocean Development and International Law Journal 8, No. 1, 1980: 48-52.

8. United Nations Office of Statistics. Statistical Yearbook. United Nations, 1979.