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DURING A SPEECH OPENING CHILE'S 1994 "Month of the Sea" celebration, President Eduardo Frei announced initiatives to enhance Chile's presence on the high seas and to protect marine resources within its national jurisdiction. In so doing, he echoed geopolitical thought of Chilean maritime theorists dating from the 1600s. The initiatives stemmed in part from disputes over free fishing and navigation on the high seas, wherein, Frei argued, certain maritime powers were disregarding weaker coastal states' interests.

Because this is a long-standing international concern in which Chile has played a prominent and influential role, the Chilean approach to important law of the sea issues needs to be well understood. This paper reviews the latest expression of that approach, *Mar Presencial*, in the light of two recent international maritime agreements—the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which entered into force on 16 November 1994, and the United Nations High Seas Fisheries Agreement, signed on 4 December 1995 but not yet in force.[1]

The Law of the Sea Convention (LOSC) is one of the most comprehensive and complex instruments of international law in world history. One major focus is on spatial issues. Its seventeen parts, 320 articles, and nine annexes divide the

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world's oceans into four basic zones: "internal waters," extending landward from a coast's low-water line;[2] "territorial seas," extending seaward from the low-water line for up to twelve nautical miles;[3] "exclusive economic zones" (EEZ), extending up to two hundred nautical miles from the low-water line;[4] and the "high seas," effectively extending seaward from the outer edge of the EEZ.[5] A concept of "archipelagic waters" is also introduced, whereby sovereignty may be recognized over waters within an island group.[6]

The LOSC effectively ensures traditional high seas freedoms for all maritime nations, while checking excessive maritime claims by coastal states. Its protracted negotiation involved the *quid pro quo* of granting to coastal states control of resources within two hundred nautical miles of their shores in exchange for broad navigational rights for all states beyond twelve nautical miles. The United States Department of Defense embraces the Convention as "revers[ing] a disturbing trend of jurisdictional creep";[7] at the same time, it identifies maritime resource conflicts as one of five threats to world order and U.S. interests in the post–Cold War era.[8]

Despite the strategic stakes of the major powers in the LOSC debate, which took place during the Cold War era, for the most part the impetus for the negotiations arose from Third World nations. As a result, it reflects the North-South, developed world–underdeveloped world, debate. The nonideological reality, however, is that unregulated growth of exploitation significantly depletes maritime resources for all potential users.

The recent entry into force of the LOSC has coincided with an increase in intensity, if not in frequency, of fishing disputes. Perhaps most visible has been Canada's naval activity to oppose Spanish trawlers on the Grand Banks (about which more below). There have been noteworthy confrontations—some involving gunfire and fatalities—in the Sea of Okhotsk and the East China Sea, the Andaman Sea and the Gulf of Thailand, as well as off the Philippines, Indonesia, Malaysia, Australia, Iceland, Ireland, and Portugal. Other cases are Norway's limitation on fishing off its coasts, and Argentina's moratorium on catching squid within its EEZ, along with its call for a voluntary moratorium below the 44th parallel (south). Notwithstanding the UN Law of the Sea Convention, a lack of regulation, or at least a lack of cooperation between fishing and coastal states, has continued to lead to such incidents and will lead to more in the future. With the world's fishing fleets nearly doubling in size in the last quarter-century and the annual marine catch holding steady around eighty million tons, the United Nations' Food and Agriculture Organization considers almost 70 percent of the oceans' stocks "fully fished" or worse. Each "crisis" has brought a particular solution, none applicable on a global scale. The 4 December 1995 United Nations High Seas Fisheries Agreement is an important effort to settle issues that persist despite the LOSC, but as of October 1996 only three nations out of the necessary thirty have ratified it.[9]

Another solution, one proposed by Chilean theorists, is known popularly as *Mar Presencial* (that is, a sea in which "one maintains a presence"). The purpose of this article is to examine that concept, specifically from Chile's standpoint—not in order to advocate the Chilean position as such but to understand how that nation with a self-consciously maritime orientation conceives *Mar Presencial*. Further, because the Chilean proposal is sometimes said to be in direct opposition to United States policy with respect to the Law of the Sea Convention, the rationale of the *Mar Presencial* approach will be compared with that of the LOSC.

Chile proposes to place the resources within a nine-million-square-mile triangle in the southeast Pacific under its jurisdiction. If Chile's efforts are successful, its sovereign rights (but not sovereignty—a distinction to which we will return) would extend into the *Mar Presencial* for the management of the exploitation of its maritime resources.[10] This theory reflects not only Chile's unique geography but also its longstanding seaward orientation and its level of economic development. Chile is also proposing *Mar Presencial* as a maritime resource management solution that is applicable globally, not just in its own case.

Mar Presencial may already have made as much progress as it is likely to, for many of its arguments and assumptions were incorporated into the 1995 High Seas Fisheries Agreement. But it remains to be seen if *Mar Presencial* supporters will be satisfied with the Agreement's implementation; international acceptance of that accord has not been rapidly forthcoming. Although there have been no subsequent disputes with the impact of the "turbot wars," it is all but certain, given the serious depletion of fish stocks and the jealous guarding of catch limits and exclusion areas, that arguments over who can fish where have not ended. When they resume, Chilean jurists and theorists will contribute, and their viewpoint will be influenced by the *Mar Presencial*. To see more clearly why Chilean thinking is important, we turn first to its influence in the development of contemporary maritime agreements.

The Law of the Sea

The law of the sea is the component of international law that deals with relations, activities, and interests involving the seas and oceans. Over the centuries, its evolution has reflected a constant struggle between states asserting special rights over large portions of the seas and other states insisting on total freedom to navigate and fish. Ancient Greece and the Roman Empire were among the first to attempt to assert sovereignty over the oceans.

As maritime interests expanded, so did writing on the topic. In 1609, the Dutch scholar and diplomat Hugo Grotius wrote *Mare Liberum*, the genesis of

the modern concept of freedom of the seas. As colonization and trade gained importance, extensive coastal state claims in that period receded in favor of narrow belts of territorial waters over which coastal states exercised considerable jurisdiction and control. In 1702, another Dutch jurist, Bynkershoek, wrote in his *De dominio maris* that control of the sea "from the land ends where the power of men's weapons ends."[11] State practice and legal scholars generally followed this measure; thus the now-familiar "three-nautical-mile limit" (reflecting the effective artillery range of that era) gained international favor. Since World War II, however, an increase in coastal state maritime claims has brought the world community full circle, back to expansive maritime claims.

Modern Growth of Maritime Jurisdiction. During the past five decades, coastal state jurisdiction over the high seas has expanded through state practice and international agreement. The reasons for this expansion have been the rapid development of fishing and seabed mining technology and also the increase in the number of states.

The United States spurred the phenomenon in 1945 with the "Truman Proclamations," which unilaterally asserted U.S. control over the natural resources of the seabed and subsoil of its continental shelf. In the late 1940s, the emergence of distant-water fishing fleets prompted Latin American states, most notably Chile and Peru, to assert national claims out to two hundred nautical miles.[12] In 1952, Chile, Peru, and Ecuador issued the "Santiago Declaration," proclaiming their "sole sovereignty and jurisdiction" to a distance not less than two hundred nautical miles from their coasts for the purpose of conserving, protecting, and regulating the use of natural resources. The Santiago Declaration became the basis for today's two-hundred-mile exclusive economic zones (EEZs), which embody coastal state interest and prerogatives in the management of fisheries and other marine resources while recognizing the right of innocent passage and other activities.

By the late 1950s, increasing disputes between fishing fleets and coastal states reflected the fact that fisheries stocks were being depleted. Developing states pressed for greater control over the exploration and exploitation of ocean resources, and over the technology involved in doing so. Developed states viewed such efforts as a potential threat to the freedom of navigation, as well as an attempt to redistribute wealth. Companies and states that had invested heavily in ocean technologies were not inclined to hand over resources and profits to noninvestors. Even the Soviet Union argued against considering maritime resources a "heritage of mankind" to be shared equally by all nations.

United Nations Conferences on the Law of the Sea. In 1958, the first United Nations Conference on the Law of the Sea (known as UNCLOS I) convened

in Geneva to address issues pertaining to the high seas, the continental shelf, fisheries conservation, and territorial waters. It adopted conventions in each of these areas, primarily reflecting international maritime traditions. However, the agreements never achieved the status of a universally accepted body of law, primarily because they had simply codified tradition and common practice, itself already recognized as customary law. In addition, several long-standing issues had not been addressed, because of a lack of consensus, and certain new problems had been neither foreseen nor dealt with adequately. In any case, the agreements were not ratified by enough participants to bring them into force.

In 1960, UNCLOS II negotiations attempted to establish a maximum breadth of the territorial sea, but the conference adjourned without substantial accomplishments. UNCLOS II's failure, coupled with the concurrent breakdown of customary restraint in maritime claims, meant that there remained no reliable way to prevent states from making increasingly diverse and conflicting claims about the use and control of the seas.[13] Among nations engaged in foreign fishing and those with blue-water navies, concern grew regarding the possible loss of innocent-passage rights due to the proliferation of expanded maritime claims.

During the 1960s and early 1970s, many former European colonies—many of them coastal states—became independent nations. While most of these could not protect, manage, or exploit their offshore resources, they reserved the right to do so, and over time they made jurisdictional claims as great as was then permitted. Distant-water fishing fleets were directed to move their operations outside the newly claimed "economic zones"; nonetheless they continually fished in the claimed areas, because the high seas were frequently not as familiar or productive. Overfishing and pollution further eroded yields, and economic zone violations increased, frustrating coastal states' fisheries management and conservation efforts.

A particular point of contention involved (as it does today) "straddling stocks." In many prime fishing locations, fish populations exist both within claimed jurisdictional areas and in seas adjacent to them. For instance, such fish as Atlantic cod, not having read any treaty, swim in and out of the economic zones bordering the United States and Canada. This makes management efforts difficult for coastal states because many stocks are intensively harvested by large distant-water fishing fleets. The same is true for highly migratory species, such as tuna and swordfish. By the late 1960s, clashes between distant-water fishing fleets and navies or coast guards of coastal states were making plain the need for cooperation in managing these dwindling resources.[14]

In 1970, the UN General Assembly called for a third conference, UNCLOS III, and adopted a nonbinding resolution declaring that the seabed and its subsoil beyond the limits of national jurisdiction were the "common heritage of mankind."[15] Two conferences in South America advanced law of the sea pronouncements that same year. The first, the Montevideo Declaration,

recognized a "geographic, economic, and social link" between the sea, the land, and man, a tie that conferred priority in the use of marine natural resources upon coastal states. While limiting jurisdiction to two hundred miles from the baseline of the territorial sea, the Declaration asserted the right of coastal states to conserve living marine resources "adjacent to their territories." This was the first formal indication of the broader notion of coastal state jurisdiction outside the arbitrary two-hundred-mile line. The results of the second South American conference, issued as the Lima Declaration, asserted the same connections and priorities. It supported coastal state authority "to establish the limits of its maritime sovereignty or jurisdiction in accordance with reasonable criteria," such as geographical, geological, or biological characteristics, and the need to make rational use of resources. The implication was that coastal states might assert jurisdiction beyond two hundred nautical miles.

In 1982, thirty years after the two-hundred-mile zone was first advanced by the Santiago Declaration, UNCLOS III produced a convention authorizing a two-hundred-mile EEZ and giving coastal states "sovereign rights for the purpose of exploring, exploiting, conserving, and managing natural resources" in these areas, but at the same time codifying non-resource-related freedoms (e.g., innocent and transit passage). The LOSC, designed to placate developing and developed states alike, exchanged control of resources within two hundred nautical miles for broad navigational rights beyond twelve miles.

In contrast, law and practice relating to fishing on the high seas have remained uncertain.[16] Also, several problems hinder the LOSC's implementation, reflecting continuing jurisdictional problems. Not all developing countries have been able to benefit from the 1982 Convention, and the principal fishing nations have not significantly diminished their share of the world catch. There has been intensified harvesting in areas adjacent to coastal states, a growing number of bilateral agreements that grant access to developing states' fishing zones, and an increase in high seas fishing.[17] Current international-law mechanisms for dealing with these matters rest upon the LOSC; however, its provisions that apply to straddling stocks and highly migratory species are deliberately ambiguous—necessarily so, in view of the compromises and concessions needed to reach agreement. Dissatisfaction with this situation has led to the development of new, and sometimes complicated, conceptual and legal "fixes." We shall consider the most important of these—the 1995 UN High Seas Fisheries Agreement—later. Let us turn now, however, to Chile's interpretation of the 1982 Law of the Sea Convention.

Mar Presencial

Increasingly, the world's oceans are being thought of as integrated ecosystems requiring appropriate management that embodies conservation, development,

and research.[18] On this basis, Chileans have proposed extending the coastal state's jurisdiction beyond the EEZ to protect and conserve maritime resources, including straddling and migratory fish stocks.

The latest iteration of the concept was dubbed "*Mar Presencial*" by Admiral Jorge Martínez Busch, commander in chief of the Chilean Navy. This unique interpretation of the LOSC proposes, as noted, to draw a giant triangle from Chile's continental landmass out to Easter Island and Sala y Gómez in the Pacific and down to its claims in the Antarctic, and encompassing the high seas within. This would extend resource-related jurisdiction over the oceans in an attempt to counter overfishing on the high seas. By Admiral Martínez's definition (incorporated into the 1991 Chilean fisheries law), Chile's jurisdiction would expand from 1,347,556 to 9,056,944 square miles.[19]

Eduardo Frei's 1994 speech lent presidential support to the concept and asserted the Chilean Navy's role as a leader in developing not only Chile's maritime tradition but also international law. The codification of *Mar Presencial* into Chilean law (much of it had been incorporated before Admiral Martínez wrote) would purport to give Chile's navy and other national agencies responsibility to enact conservation and management measures to control high seas activities in areas well beyond its EEZ.

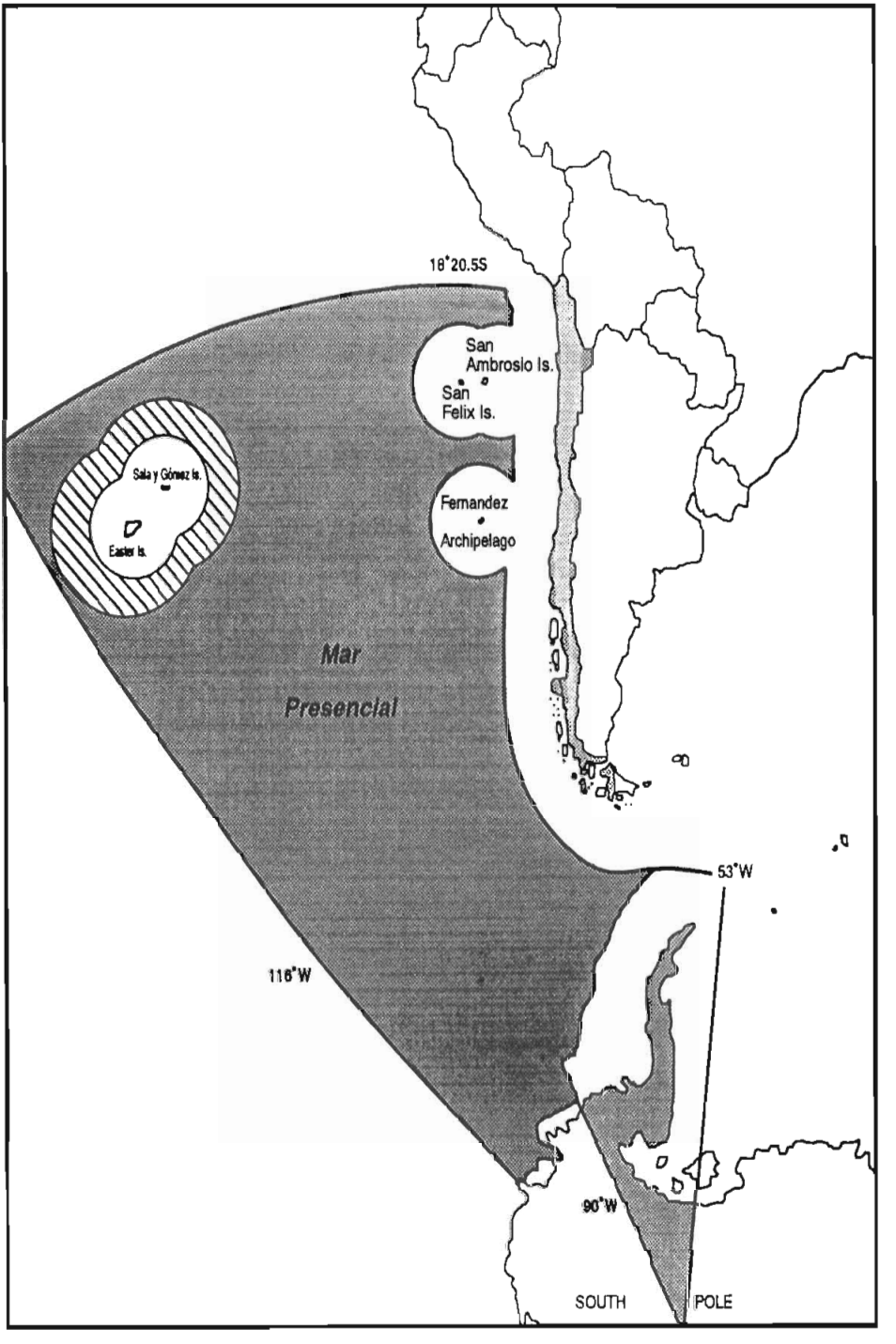
***Chilean Geopolitics and* Mar Presencial.** Chilean perception of the sea as part of the national heritage dates back to the Spanish conquest in the 1540s. During the war of independence (1810), Bernardo O'Higgins, creating a navy to transport the army to combat, applied the ideas of joint operations and maritime mobility. That maritime link became vital to both the conflict and Chile's later development. The nationalist writings of Diego Jose Victor Portales (a cabinet member and founder of the military academy in the 1830s) argued the idea that Chilean destiny was linked to control or predominance in the South Pacific.[20] In 1951, an article widely noted in Chile pointed out a specific Chilean interest in the triangle formed by the northern border with Peru, Easter Island, and the South Pole, asserting that the resources and strategic sea lines of communications in that triangle were vital to Chile's development and position in global affairs.[21] Finally, former head of government (1973–1990) General Augusto Pinochet, expanding on Karl Haushofer's theory that a nation's size and location determine its destiny, wrote of a "national sea" in the South Pacific. Pinochet confined this national sea to a much smaller area than other Chileans have written of, extending from the coastline only as far as the Juan Fernández archipelago.[22] Pinochet did speculate about a special interest as far as Easter Island, but he probably recognized that international pressure would preclude claiming such a large area as national territory.

Pinochet's ideas relate directly to Chile's level of development. A large and capable fishing fleet or extensive commercial shipping is useless unless there is a domestic market, infrastructure, and industry able to (for a fishing fleet) distribute, consume, or export its catch or (for a merchant fleet) import or export products.[23] Chilean geopolitical thinking appears to be that the nation has now reached a level of development where greater usage of the southeastern Pacific Ocean is necessary.

Rationale. When, on 2 May 1991, Admiral Martínez proposed this concept of national presence at sea, he borrowed heavily from Chilean geopolitical scholars. However, he adapted their theoretical concepts in a way that gave the navy a major role in protecting the southeastern Pacific: "The term *Mar Presencial* does not imply a lack of understanding of the meaning of high seas, but rather the recognition of a spatial continuity between the continental territory, Antarctica, and Easter Island, which is derived from the need to exercise actions which protect our sovereignty and thereby provide security to the exclusive economic zone and territorial sea."[24] Admiral Martínez applied geopolitics—the effect of geography (land) on politics—to the sea, coining the term "oceanic space."[25] Much of the Southern Hemisphere is ocean space. The land masses, with the exception of Antarctica, are controlled by sovereign states. While interior waters are subject to state rule, areas outside of baselines come under various degrees of jurisdiction of states, through multinational legal conventions. These areas include territorial seas, contiguous zones, EEZs, continental shelves, the seabed, archipelagic waters, and the high seas, as now codified by the 1982 Convention.

The purpose of the *Mar Presencial* is to patrol and exploit the defined ocean space so as to protect national interests and contribute to Chile's development. Naval power, according to Admiral Martínez, must be available to "assume forceful tasks to protect the economic activities that are carried out in ocean territory, providing vigilance and establishing a naval presence in ocean territory."[26] In other words, however much the Chilean Navy may prefer to use peaceful and diplomatic fora, in his view force is an alternative should these fail. *Mar Presencial* thus becomes the theoretical basis for possible future unilateral action, to be justified in the name of national security.

Indeed, Chile's geopolitical interest in the area specifically envisions direct and indirect threats to its maritime interests and security. *Mar Presencial* posits that Chile's sovereignty can be impinged upon by the actions of other nations on the high seas, that in fact actions taken on the high seas eventually reach and affect coastal states. According to Admiral Martínez, "such an oceanic territory, in addition to providing the need to preserve, occupy, and exploit [the *Mar Presencial*], provides also a westward expansion—away from the continent—from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the heartland of the state of Chile. The nation's borders thus become the outer limits of the continental, insular, and antarctic territories."[27]

Mar Presencial's legal basis rests on a Chilean interpretation of the 1982 LOSC. Instead of an absolute right to fish on the high seas, Chile sees certain international obligations as conditioning that right; in its view, that right is lost if the obligations are not met. For instance, the LOSC requires states to take measures necessary to conserve living natural resources in the sea. However, the specifics of such conservation measures are left to individual coastal states. Chile intends that its own conservation policies shall be enforced in the *Mar Presencial* zone. This view of the 1982 Convention is not meant to prohibit any state from using the high seas but rather to ensure that Chile, as a coastal state, participates in foreign activities off its shores.

In fact, protecting ocean resources is a key dimension of *Mar Presencial*. Despite the modern evolution of international fisheries law and the establishment of EEZs, fisheries remain, as noted, susceptible to intensive harvesting in the high seas by distant-water fleets. Chile, which has in the past observed resource exploitation in the Pacific, currently does not have the funds or the naval assets required to intervene; more highly developed nations have taken advantage of this situation. For example, the Soviet Union's fleets were long active in the Pacific Ocean, abusing the freedom of the seas, the Chileans argue, by interrupting the migratory paths of fish, with a detrimental effect on fishing within Chile's EEZ. Admiral Martínez specifically cited the Soviet fleet of three hundred ships that operated, when he was writing, between 250 and seven hundred miles from the Chilean coast. *Mar Presencial* addresses this matter by asserting coastal state jurisdiction to seaward of the EEZ.[28]

As has been seen, parts of the *Mar Presencial* concept have been incorporated into Chilean law. The existence of geopolitical interests in the South Pacific was declared in the 1974 Declaration of Principles of the Chilean Government;[29] they were expanded in the 1986 *Reseña* (outline, i.e., of those principles).[30] Chilean law, for example, now provides for refusal of transshipment through Chilean ports of fish caught on the high seas if they had been part of a population found both within and outside the EEZ and if the high seas fishing involved had a negative impact within the exclusive economic zone.[31]

Notwithstanding the rhetoric of sovereignty and unilateral action, *Mar Presencial* is based more on legal and economic interests than on power projection. Coastal states have reason to be concerned about not only the legal regime controlling the high seas but also the development of maritime and sea-bottom resources. (Admiral Martínez calls such matters "oceanopolitics," a perception of the ocean as a legitimate area for expanding and developing national interests.)[32] While the main emphasis of *Mar Presencial* is resource conservation and managed resource exploitation, through fishing, mining, or

oceanographic research, the principal effect will be the exclusion of non-Chilean or non-licensed fishing fleets and research fleets from the area. Specifics as to noncommercial rights (such as the presence of foreign navies) on what is elsewhere considered the high seas has been left deliberately vague, though rights of passage will presumably not be affected.

The 1982 Convention and *Mar Presencial*

The principal LOSC provisions regarding the EEZ are found in Part V (Articles 55–75), with the high seas treated in Part VII (Articles 86–120). They are the subject of intense scrutiny and debate with respect to *Mar Presencial*. Of particular interest are Articles 56, 63(2), 64(1), 73(1), 87, 89, and 116–119.

Provisions Pertaining to the EEZ ***and the High Seas.*** Article 56 declares that coastal states have "sovereign rights" in their EEZs with regard to "exploring and exploiting, conserving and managing" natural resources, living and nonliving. This makes it clear that coastal states have paramount interest in the resources of their EEZs.

Although the LOSC does not use the term "straddling stocks," Article 63(2) concerns situations where the same or associated stocks are found both within the EEZ and just outside it. Article 63(2) states, "Where the same stock or stocks of associated species occur both within the [EEZ] and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area." This article obligates states to "seek" agreement for stocks specifically in the adjacent area: that is to say, interestingly, that the conservation measures to be negotiated are to apply only in the adjacent high seas, and not in the EEZ itself. It does not explicitly provide coastal states the right to take unilateral action to mitigate the negative effects of uncontrolled high seas fishing adjacent to the EEZ. The implied premise, however, is that both coastal states and those operating distant-water fishing fleets have a common, fundamental interest in preserving maritime resources and therefore can agree to mutually beneficial conservation methods.

Article 64(1) is worded more strongly than Article 63(2), requiring states to involve themselves in bilateral or multilateral efforts to conserve highly migratory species. It declares that "coastal State[s] and other States whose nationals fish in the region for . . . highly migratory species . . . shall co-operate directly or through appropriate international organizations . . . to ensur[e] conservation and promot[e] the objective of optimum utilization of such species . . . both within and beyond the [EEZ]."

Article 73(1) pertains to enforcement by coastal states of their own laws and regulations, stating that "the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the [EEZ], take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."

By their "sovereign rights" within their EEZs, coastal states are given broad law-enforcement and judicial powers in the prosecution of violations. It should be noted, however, that imprisonment may be imposed only when an agreement between the states involved provides for such punishment.[33] This particular limitation clearly illustrates the distinction between "sovereignty" and the "sovereign rights" that coastal states may exercise over EEZs. The two terms are not synonymous: "sovereignty" entails full and unquestionable authority to act, while "sovereign rights" reflects a distinct circumscription of the state's authority.*

With respect to the high seas, Article 89 lays down that "no State may validly purport to subject any part of the high seas to its sovereignty." Further, Article 87 provides that the high seas are open to all states, both coastal and landlocked. This "freedom of the high seas" includes both absolute and conditional freedoms, the only two absolute freedoms being navigation and overflight. Fishing, scientific research, the laying of cables and pipelines, and the construction of artificial islands and installations are conditioned on adherence to various other LOSC provisions. Article 87 also requires states exercising high seas freedoms to do so with "due regard" to the interests of other states.

With particular reference to the freedom of fishing, Article 87 requires states to meet conditions involving negotiation and cooperation on marine conservation measures, as set forth in Articles 116–120. High seas fishing is dealt with in Article 116, which subjects this freedom to a state's treaty obligations; to the rights, duties, and interests of coastal states provided for in Articles 63(2)–67 (covering highly migratory and catadromous species, marine mammals, and anadromous stocks);** and to obligations to cooperate in the conservation and management of living high-seas resources. Like Article 63(2), Article 116 does not explicitly provide coastal states the right to take unilateral action to counteract rampant high seas fishing.

The legal basis of *Mar Presencial* is a particular interpretation of LOSC Article 116. Its proponents contend that there must be consistency between the

* See endnote 10 for a fuller discussion.

** Catadromous species live in fresh water but travel to the sea to spawn, whereas anadromous fish ascend rivers to spawn.

conservation measures applied in the EEZ and in adjacent high seas.[34] They view, therefore, Article 116's citation of Article 63(2) as a *condition* attached to the freedom to fish on the high seas: that if foreign fishing fleets are to enjoy the right to fish on a particular portion the high seas affecting the EEZ of a coastal state, they must accommodate the interests of coastal states, as provided for in Article 63(2) (and also 64[1]). Failure to do so, *Mar Presencial* proponents argue, may disqualify foreign fleets from the right to fish on that area of the high seas.[35]

Mar Presencial advocates argue it is Article 56 (granting coastal states "sovereign rights" in their EEZs), viewed in light of the conservation requirements of Article 63(2) for straddling stocks and 64(1) for migratory species, that confers on coastal states this ability to place conditions on the freedom to fish in adjacent high seas. That ability follows, they believe, from the postulate that high seas fishing cannot be permitted to frustrate the conservation and management efforts of coastal states. Similarly, they argue that Article 73(1) can be applied to high seas fishing when flag-state enforcement arrangements are nonexistent or ineffective. Basically, *Mar Presencial* proponents maintain that coastal states are empowered not only to take unilateral enforcement action in their respective EEZs but also to enact regulations applicable to high seas fishing, at least in the absence of any other prior arrangement.

The Debate. The argument over *Mar Presencial* is a continuation of the North-South contention that reached its peak in the 1970s and early 1980s. That political and legal debate bears upon Chile's geopolitical motives and the standing of *Mar Presencial* with respect to the LOSC. While the LOSC codified existing pertinent maritime tradition and policy when it came into force in 1994, it left vague significant portions of international law, because the nations could not all agree—on, for instance, the sharing of technology, income distribution, or what constitutes "fair and equitable" catch limits. *Mar Presencial* is a Chilean effort to fill one such gap by claiming at least the potential right unilaterally to enforce resource conservation measures in the zone, thereby empowering coastal states to require anyone who wishes to fish in zones nearby to reach an agreement with them prior to doing so. Like other coastal states, Chile considers that it has a greater "investment" in such issues as straddling stocks and highly migratory species than do some nations, who seem to regard the freedom to fish on the high seas as a license for unrestrained exploitation.[36]

Some scholars note with concern that Chile's historical seaward orientation has been marked by sovereignty expansion.[37] This concern is not alleviated by Chile's restrictive view of navigation in the Drake Passage or by the fact that *Mar Presencial*'s most vocal proponent has been the navy, not the civilian sector.[38]

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However, the law of the sea has historically embraced, rather than rejected, innovative ways of dealing with problems. Its development over the centuries reflects a gradual maturation, incorporating principles of equality among states and a delicate balance of high seas freedoms against developing-state interests. Since 1958 the law of the sea has formally recognized the right of all states to engage in fishing on the high seas;[39] nonetheless, the freedom of high seas fishing has never been an unfettered one.[40] Article 2 of the 1958 High Seas Convention required, for instance, that it be exercised with "reasonable regard" to other states' interests. Also the 1982 Convention, by authorizing states to establish two-hundred-mile EEZs, significantly reduced the area in which fishermen may exercise this freedom at all.

Complicating this picture are the sharp differences that exist over the interpretation and application of LOSC articles relating to straddling stocks and highly migratory species. Article 89's prohibition of the subjection of the high seas to any state's sovereignty is arguably the clearest enunciation of the inviolability of the high seas. *Mar Presencial* advocates reply that acting as a good shepherd of increasingly scarce and fragile marine resources does not subject the high seas to coastal state sovereignty; they insist that no restriction on the LOSC freedoms of navigation, overflight, scientific research, or the laying of cables and pipelines is implied or contemplated.

The argument has been made that *Mar Presencial*'s solution to overfishing merely pushes jurisdictional limits thousands of miles seaward, where the problem simply recurs. But at least in the case of Chile, which contemplates pushing the limit westward to the 116th meridian, the enlarged zone takes in the entire range of the fish in question, effectively ending the problem. However, it must be remembered that the boundaries of *Mar Presencial* were set less with fish in mind than extending Chile's "space" to include all its land masses (continental, insular, and the Beagle Channel region) and thus strengthen its territorial claims on Antarctica (dormant though those claims may be for now). A second purpose was to make provision for the possible future maturation of such technologies as seabed mining, which might require regulation. Such geopolitical motivations are deeply embedded in *Mar Presencial*, and they must be kept in mind.

The figure of two hundred nautical miles assigned by the 1982 Convention to the exclusive economic zone was, as noted, derived from the 1952 Santiago Convention, whose sponsors in turn arrived at that distance for a number of reasons, one of them being that it represented a credible patrol area for their navies of the time. In fact, they had originally intended to claim zones out to three hundred miles, reducing the figure to reduce international criticism. A limit established for such reasons would seem to be as susceptible to alteration with changing circumstances as was the original three-mile limit, which

reflected the effective range of eighteenth-century cannon fire. Certain fundamental circumstances have in fact changed: high seas fisheries have assumed global importance, and fish stocks are now understood to cover, or migrate over, expanses that make the exploitation of high seas fisheries of direct interest even to littoral states not engaged in those fisheries. Such nations as Chile would seem, then, to have certain substantial grounds for arguing that the two-hundred-mile limit both should and can be extended.

Of course, if one took the concept to its logical extreme—extending such boundaries from a nation's territorial baselines until they abut the next claimant (in Chile's case, New Zealand)—landlocked nations would be effectively barred from the fishing business, and no nation could send its fishing fleets to other parts of the world. But the United Nations postulate that ocean resources are "the heritage of mankind" is a protection against that prospect. So also, in the present case, are the facts that Chile has tied the *Mar Presencial* to its specific territorial holdings and claims, and that it argues for the concept on the very grounds of fairness and equity for all nations.

In any case, as emphasized above, "sovereignty" and "sovereign rights" are not synonymous. The latter implies a restricted application of a state's authority, as demonstrated by several juridical limitations in Article 73 of the LOSC. Consequently, any argument (on the basis of *Mar Presencial*, at least) that coastal states wish to exercise "sovereignty" over the high seas, whether de facto or de jure, appears to lack merit.

A more substantial criticism, however, arises from the codification of freedom of the high seas in Article 87 of the 1982 Convention. It confers no special rights on coastal states; rather, it lays out absolute and conditional freedoms and requires nations to give "due regard" to the interests of others, subjecting distant-water fishing states to no special requirements.[41] In reply, *Mar Presencial* advocates appeal to Articles 116–120, whose provisions on marine negotiation and cooperation measures specifically condition, in their view, the right to fish on the high seas. It has been replied that while Article 116, which governs high seas fishing, recognizes "certain rights, duties, and interests of [a] coastal state applicable in the EEZ, . . . it does not extend coastal states jurisdiction to the high seas."[42] The theoretical counterargument is, essentially, an assertion of the interpretation on which the whole *Mar Presencial* concept rests—that the right to fish on the high seas is conditional, not absolute—LOSC Articles 63(2) and 64(1) in particular making the harvesting of straddling and highly migratory stocks subject to coastal state approval. Indeed, though the extent to which Articles 116 and 87 qualify the freedom to fish remains unclear, the former's subjection of high seas fishing to the "interests" of coastal states in their EEZs suggests that the "due regard" clause operates substantially in favor of those states—or at least that the argument of "no special rights" is a weak one. (In

Naval War College Review, Vol. 50 [1997], No. 3, Art. 29

practice, moreover, Chileans hold that the "due regard" provision is ineffective in bringing distant-water fishing fleets to the bargaining table, just as the "reasonable regard" standard of the 1958 High Seas Convention proved inadequate—in itself another argument for the *Mar Presencial*.)

As to Article 63(2) and 64(1), it is by no means obvious that they give coastal states any high seas rights. In fact, their language can be construed as solidifying the right of distant states fishing in the high seas, that is, by guaranteeing their participation in the promulgation of any conservation or management regime concerning that area.[43] *Mar Presencial* proponents disagree, saying that Article 63(2) provides jurisdiction beyond the EEZ (i.e., the "adjacent" area of high seas) and that Article 64(1) also extends to the area "beyond" it. Further, in this view, since the straddling stocks and highly migratory species provisions are found in the EEZ clauses of the LOSC, they grant a degree of primacy to coastal states in the management and conservation of these stocks, and (through Article 116) this same primacy applies also to the high seas. On such a basis, coastal states could promulgate regulations applicable to outlying areas if negotiations failed to settle contentious issues. It is notable too that the United States has declared that "the coastal State has the right to participate in the negotiations contemplated by article 63(2) whether or not it maintains a fishery for the stocks in question."[44]

Finally, it can be held that Article 73(1)'s coastal state enforcement provisions have no application whatsoever over the high seas but are instead limited solely to the EEZ. The *Mar Presencial* view is that the coastal state, by the "sovereign rights" over the EEZ conferred by Article 56 and recognized by Article 73(1), is empowered to take unilateral enforcement action on the high seas adjacent to its EEZ in the absence of any other agreed arrangement. The presumption here is that while Article 73(1) is found in the EEZ section (Part V) of the 1982 Convention, a coastal state's "sovereign rights" within that zone are affected by activities adjacent to it. How to regulate the extent to which these activities should be permitted is the issue.

Implications for Development and Security

Central to the *Mar Presencial* rationale as propounded by Chile is the idea that maritime interests are vital to that nation's development and strategic security. The implementation of *Mar Presencial* would afford Chile, and by extension any other coastal state, a buffer zone against foreign maritime exploitation that impinges on its economic interests. Given Chile's particular geography and territorial claims, it would greatly expand that nation's jurisdiction.

In 1993, United Nations–sponsored negotiations began on a new agreement to regulate high seas fishing—negotiations that soon reached an impasse. What it took to break the deadlock was the "turbot war," which arose on 10 March 1994, when Canada in effect put into practice what Chile has been advocating with respect to unilateral conservation enforcement by coastal states. Canada's firing on and interning a Spanish trawler for catching under-age turbot beyond Canada's EEZ (and keeping two sets of logbooks) focused international attention on these issues and led to a solution that favored conservation efforts.[45]

This case was based on a specific finding of a domestic court that "some foreign fishing vessels continue to fish [on the high seas] in a manner that undermines the effectiveness of sound conservation and management measures," to such an extent that straddling stocks off the Grand Banks of Newfoundland were threatened with extinction.[46] Canada therefore requires all fishing vessels to comply "with sound conservation and management measures for those stocks" in Canadian waters and in certain areas of the high seas.[47] For its part, the United States protects anadromous fish, such as the Alaskan salmon, in a vast portion of the high seas, through a law implementing a regional international agreement to stop "directed fishing for, incidental taking of, and processing of anadromous fish."[48] Plainly, this statute authorizes the United States to exercise sovereign rights on the high seas for fisheries protection, but it does not confer sovereignty. A third nation, Norway, aggressively enforces catch limits in the fishing zone known as the "Smutthullet," a triangular area between Norway's and Russia's zones that is known for its abundance of Arcto-Norwegian cod; but it does so without claiming sovereignty.

In each of these three cases, the principals have argued essentially that the conservation of ocean resources in the high seas is up to the coastal state in question, in the event of irresponsibility by distant-water fleets. This is the same argument used by Chilean theoreticians in developing the concept of *Mar Presencial*. Plainly, therefore, the rationale is accepted as sound not only by Chile—though to date no nation effectively subscribing to it has acknowledged Chile's significant contribution.

On 4 December 1995, the UN High Seas Fisheries Agreement, addressing the conservation and management of straddling and highly migratory fish stocks, was opened for signature. The Agreement states that current efforts to manage high seas fisheries are inadequate and calls on states to adopt measures to ensure the long-term sustainability of straddling stocks and highly migratory species (Article 5[a]). It authorizes the establishment of regional and subregional organizations to deal with high seas fisheries conservation and management issues (Article 8[1]) and excludes nonmembers and those not following the organizations' standards from "access to the fishing resources to which those measures apply" (Article 8[4]). The accord empowers member states to board,

inspect, seize, and prosecute fishing vessels for high seas violations of conservation and management measures (Article 21) and to use force "to ensure the safety of the inspectors and [when] the inspectors are obstructed in the execution of their duties" (Article 22[1][f]).

The Agreement takes a precautionary approach, based on scientific information, to the conservation and management of fish stocks. It obliges states to act conservatively when dealing with dwindling fish stocks and establishes minimum international standards for conservation efforts. It also provides measures for compliance and enforcement on the high seas. Should conflict still arise, compulsory and binding third-party settlement is prescribed. This approach accepts several of *Mar Presencial*'s basic premises, such as coastal state interest in high seas fishing by distant states, conservation based on conservative precautionary means, and the idea that fishing on the high seas affects harvesting within the EEZ.

The High Seas Fisheries Agreement is to enter into force after thirty states ratify it, but acceptance among the traditional maritime powers may be slow (the United States is one of the few nations to have ratified to date). However, given its appeal among certain developed and many less-developed states, the agreement's ratification is very probable. Its provisions may well preclude future "turbot wars," for which a potential exists off many coastal states, including some which not only have the military capability and political will to monitor the high seas but have expressed concern over high seas fishing practices. But if major maritime powers either do not ratify the agreement or do not police their own fleets' activities, or if the Agreement's provisions prove inadequate, for all practical purposes we will not have moved from the status quo ante. Such an unfortunate situation could bring the *Mar Presencial* approach to the fore.

Opposition to Chile's approach is based upon resistance to jurisdictional "creep." The United States has led the argument that the high seas should be protected at all costs from expansion of jurisdiction. Notwithstanding, what Admiral Martínez has called "oceanopolitics" are not limited to Chile but can be easily applied to, or by, virtually any coastal state. All coastal nations, certainly those actively exploiting ocean resources, have a vested interest in protecting and conserving those resources. *Mar Presencial*'s fundamentals have gained a measure of support among developing states, who believe that through collective power they can themselves acquire the technology and capability to exploit and conserve ocean resources.[49]

Before the High Seas Fisheries Agreement was opened for signature, *Mar Presencial* supporters believed that if there were to be a regional organization with management competence over the high seas fishery, its rules should be made consistent with those of the coastal state. Had this matter remained

unaddressed, Chile had intended to form a new international organization of southeastern Pacific states, as permitted under LOSC Articles 63(2) and 64, to deal with the issue. In fact, it is possible, although unlikely, that Chile could attempt to resurrect the South Pacific Commission, formed in 1954 between Chile, Peru, and Ecuador to consult on issues related to fishing, conservation, and defense of claimed maritime zones. In any event, failure or disregard of the High Seas Fisheries Agreement could very well result in calls for an UNCLOS IV.

A further possibility is that Chile may press for implementation of *Mar Presencial*, or of its concepts in some other form, even if the High Seas Agreement not only takes effect but is in practice effective. That would give color to perceptions that Chile's naval leaders are using international law for partisan posturing within their nation's armed forces. Admiral Martínez has summarized Chile's interest in *Mar Presencial* in this way: "The sea is a vital element in national progress and development. Therefore, for the 21st century, Chile is planning a very dynamic navy . . . that can operate on the high seas of Chile's ocean-space—the southeastern Pacific. . . . The ocean is there, and we cannot continue viewing it in terms of traditional geopolitics. In doing so we run the risk of arriving too late with not enough impetus to occupy and make use of it to assure our future development."[50] If pressure for *Mar Presencial* carries on despite apparent resolution of the fisheries issues at stake, it will indeed appear, as has been charged, that Chile is using the doctrine only to justify naval expansion in an era of budgetary constraint, declining regional threat, and increasing integration.

All of this remains to be seen. If Chile's true motivation is a geopolitical expansion into the Pacific, its rhetoric will change from coastal states' rights to a more nationalistic vein. If the real concern is to protect ocean resources, the High Seas Fishing Agreement, which incorporates almost all of *Mar Presencial*'s concepts, may bring to a successful conclusion Chile's push for extending coastal state rights.

Notes

1. The 1982 United Nations Convention on the Law of the Sea (hereafter LOSC), with annexes and an agreement relating to the implementation of Part XI, was completed at Montego Bay, Jamaica, on 10 December 1982 and entered into force on 16 November 1994, after ratification by sixty-two nations. President William J. Clinton transmitted the treaty for confirmation by the U.S. Senate on 7 October 1994. *U.S. Department of State Dispatch*, vol. 6, Supplement no. 1, February 1995, p. 1. The second document is formally 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, Doc. No. 94-27467 (8 September 1995).
2. LOSC, Article 8.
3. LOSC, Articles 3 and 5.

4. LOSC, Article 57. This article extends the territory under national jurisdiction for resource exploitation, without affecting rights of innocent passage. States "own" the resources and can sell licenses to exploit all or a portion of them to other states or to private companies.

5. LOSC, Article 86. The "high seas" are defined as those not included in any state's territorial sea or internal waters.

6. LOSC, Part IV.

7. U.S. Defense Dept., *National Security and the Convention on the Law of the Sea* (Washington: July 1994), p. 1.

8. Ibid., p. 8. The other four enumerated threats are ethnic rivalry and separatist violence, regional tensions, humanitarian crises, and terrorist attacks.

9. The three nations were Tonga, St. Lucia, and the United States. The FAO estimate and data on world fishing fleets and annual catches are taken from Tim Zimmermann, "If World War III Comes, Blame Fish," *U.S. News & World Report*, 21 October 1996, pp. 59–60.

10. A state exercises sovereignty through its own actions (passage of laws, promulgation of regulations, and establishment of civil and criminal governmental agencies to enforce them) and through the legitimacy imputed to that sovereignty by others. Alternatively, a state may exercise sovereign rights, duties, and obligations over a certain geographic area beyond that state's legitimate territorial claims for a recognized purpose (e.g., fisheries surveillance and protection).

This theory has not yet been fully codified into Chilean law. Chile currently claims a twelve-nautical-mile territorial sea, a twenty-four-mile contiguous zone, a two-hundred-mile EEZ along its 2,650-mile coastline, and a 350-mile continental shelf around Easter Island and the Sala y Gómez Island. U.S. Defense Dept., *Maritime Claims Reference Manual*, Office of the Assistant Secretary of Defense (International Security Affairs) DoD 2005.1-M, vol. 1, pp. 2-93 through 2-96.

11. Cornelis van Bijndershoek [Bynkershoek], *Cornelii van Byndershoek, jurisconsulti, Ad L. axiosis IX de lege Rhodia de jactu liber singularis; et De dominio maris dissertatio* (Hagae Batavorum [The Hague]: Apud Joannem Verbessel, 1703). See also Hugo Grotius, *Mare Liberum sive, De iure quod Batavis competit ad Indicana commercia dissertatio* (Lugduni Batauorum: Ex Offician Ludovici Elzeviri; 1609).

12. C. Joyner and P. De Cola, "Chile's Presential Sea Proposal: Implications for Straddling Stocks and the International Law of Fisheries," *Ocean Development and International Law*, vol. 24, no. 1, 1993, p. 101.

13. Bernard Oxman, David Caron, and Charles Buderi, eds., *Law of the Sea: U.S. Policy Dilemma* (San Francisco: ICS Press, 1983), pp. 148–9.

14. See Michèle Bouziane, "The U.S. Coast Guard, National Security, and Fisheries Law Enforcement," *Naval War College Review*, Winter 1997, esp. pp. 127–31.

15. UN General Assembly Resolution 2749 (XXV) (17 December 1970), cited in Joyner and De Cola, p. 102.

16. Francisco Orrego Vicuña, "Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea," *Ocean Development and International Law*, vol. 24, no. 1, 1993, p. 81.

17. Ibid., pp. 81–2.

18. Ibid., pp. 86–7.

19. Law No. 19.079, *Official Journal*, 6 September 1991, cited in ibid., p. 88. The Chilean antarctic claims are not recognized by the U.S. government.

20. Howard T. Pittman, "From O'Higgins to Pinochet: Applied Geopolitics in Chile," in Philip Kelly and Jack Child, eds. *Geopolitics of the Southern Cone and Antarctica* (Boulder, Colo.: Lynne Rienner Publishers, 1988), pp. 175–6.

21. Pablo Ihl C., "El Mar Chileno," *Revista Geografica Terra Australis*, vol. 10, 1951, pp. 10–54.

22. Augusto Pinochet Ugarte, *Geopolitica* (Santiago: Editorial Andres Bello, 1984), pp. 123–6.

23. Ibid.

24. *El Mercurio* (Santiago), 21 May 1992.

25. Jorge Martínez Busch [Adm., Chilean Navy], "La gran tarea de esta generación es la ocupación efectiva de nuestro mar" [The great task of this generation is the effective occupation of our sea], lecture inaugurating the "Month of the Sea," 4 May 1990, Viña del Mar, Chile. The lecture was published as a chapter in Jorge Martínez Busch, *Oceanopolítica: Una Alternativa Para el Desarrollo* (Santiago: Editorial Andres Bello, 1993); the translated passage appears on p. 146.

26. *El Mercurio* (Santiago), 21 May 1992.

27. Martínez, p. 14.

28. *El Mercurio* (Santiago), 21 May 1992, p. 1.

29. Republic of Chile, *Declaración de Principios de Gobierno de Chile. Santiago, Marzo 11* (Santiago: Junta del Gobierno, 1974).

30. Republic of Chile, *Reseña* (Santiago: Instituto Geopolítico de Chile, 1986).
31. The General Law of Fisheries and Aquaculture, No. 18.892, 1989.
32. Martínez, pp. 10–11.
33. LOSC, Article 73(3).
34. B. Kwiatkowska, "Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice," *Ocean Development and International Law*, vol. 22, no. 2, 1991, p. 168.
35. Joyner and De Cola, p. 111.
36. W. Martin, "Fisheries Conservation and Management of Straddling Stocks and Highly Migratory Stocks under the United Nations Convention on the Law of the Sea," paper presented at the Georgetown University Law Center Conference on the Implementation of the United Nations Convention on the Law of the Sea, Washington, D.C., 27 January 1995.
37. See T. Clingan, Jr., "Mar Presencial (The Presential Sea): *Deja Vu* All Over Again?—A Response to Francisco Orrego Vicuna," *Ocean Development and International Law*, vol. 24, no. 1, 1993, p. 94.
38. Ibid. (For the Drake Passage, p. 96; for Navy advocacy, p. 94.)
39. Convention on the High Seas of April 29, 1958 (1958 High Seas Convention), 450 United Nations Treaty Series (UNTS) 82, 13 U.S. Treaties and Other International Agreements (UST) 2317. This Convention also defines "high seas freedom" as including fishing.
40. "Text of a Letter from the President to the U.S. Senate, October 7, 1994," *U.S. Department of State Dispatch Supplement*, vol. 6, no. 1 (February 1995).
41. Joyner and De Cola, p. 112.
42. Ibid., pp. 112–3.
43. Ibid., p. 113.
44. *Executive Branch Commentary*, p. 140 (emphasis added).
45. While true sabre-rattling may have died down, the countries' militaries have been replaced by the judiciaries. The owner (and master) of the Spanish ship is suing the Canadian government in Canadian courts, seeking damages for, among other things, piracy, malicious prosecution, and lost profits. At the same time, Spain has filed suit with the International Court of Justice (the World Court). Canada has filed a "reservation" with the World Court, claiming that the body has no jurisdiction over this matter. Spain is now fighting the jurisdictional battle.
46. Revised Statutes of Canada (RSC), 1985, c. C-33.
47. In the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area, defined by specific coordinates as being "on the high seas." RSC, 1985, c. C-33, s. 5.1, 5.2, and 7.
48. *North American Anadromous Stocks Act, U.S. Code*, vol. 16, secs. 5001 et seq. (1992), implementing the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, 11 February 1992.
49. Martínez, p. 11.
50. Martínez, pp. 16–7.

Ψ

Call for Papers

The 13th annual Siena College multidisciplinary symposium, "World War II: A Dual Perspective," will be held 4–5 June 1998; its foci will be 1938 and 1948. For 1938, papers would be welcomed on fascism and Nazism, Spain, Austria, Munich, literature, art, film, women's studies, Jewish studies, and the Sino-Japanese War. For 1948, papers dealing with the Holocaust, displaced persons, war crimes trials, literary and cinematic studies of the war, veterans affairs, the G.I. Bill, economic reconversion, broad issues of earlier years, and the beginnings of the Cold War will be appropriate. Inquiries from those wishing to chair or comment at the symposium are also invited. For more information: Prof. Thomas O. Kelly II, Department of History, Siena College, 515 Loudon Road, Loudonville, N.Y., 12211-1462; tel. (518) 783-2595; fax (518) 786-5052; e-mail <kelly@siena.edu>. Deadline for submissions is 1 December 1997.