

SEPARATE OPINION OF JUDGE ROBINSON

Nature and scope of rights and duties in the exclusive economic zone — Exclusive sovereign rights of the coastal State — Freedom of navigation.

1. I am in agreement with the Court's finding that Colombia has breached Nicaragua's sovereign rights in its exclusive economic zone (hereinafter "EEZ"). In this opinion I make some observations on the Court's treatment of a coastal State's sovereign rights in its EEZ. I treat Articles 56, 58, 61, 62, 69, 70 and 73 as reflecting customary international law.

2. The United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or "the Convention" or "the Montego Bay Convention") makes two novel and monumental contributions to the law of the sea in its adoption of the concepts of an exclusive economic zone and the common heritage of mankind. This case concerns the nature and scope of the rights and obligations of States in the EEZ under customary law.

3. The EEZ was a revolutionary concept that had received such widespread acceptance by States that in 1985, three years after the adoption of the Montego Bay Convention, the Court in *Libyan Arab Jamahiriya/Malta* determined that it had achieved the status of a rule of customary international law¹. In a real sense the EEZ was the central pillar in the architecture of the Montego Bay Convention.

4. During the UNCLOS negotiations, a principal issue was whether the EEZ was a zone of the high seas or a zone of national jurisdiction. The Montego Bay Convention does not answer this question directly. It provides a set of interlocking rights and duties to govern the relationship between the coastal State and other States in relation to the EEZ.

5. Article 56 (2) of the Convention provides that the coastal State must exercise its sovereign rights and perform its duties in the EEZ "hav[ing] due regard to the rights and duties of other States". However, Article 58 (3) of the Convention also provides that "[i]n exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State". By these provisions, the Montego Bay Convention attempts to strike a balance between the rights and duties of the coastal State in the EEZ and the rights — especially freedom of navigation and

¹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 33, para. 34.

overflight — and duties of other States in that zone. The many cases that have been decided in relation to the EEZ have not succeeded in unravelling the mysteries of the phrase “due regard”. An important issue is whether the “due regard” provision gives rise to procedural or substantive obligations. The balance between the coastal States’ rights, jurisdiction and duties in the EEZ on the one hand and the rights and duties of other States in that zone on the other is indeed a very delicate one.

6. The EEZ is a zone *sui generis* and its special character is described in Article 55 of the Convention, which provides that it is

“an area beyond and adjacent to the territorial sea, subject to the specific legal régime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention”.

7. Some commentators² maintain that Article 56 is a “relevant provision” within the meaning of Article 58 (1) of the Convention, which provides that “in the exclusive economic zone, all States, whether coastal or landlocked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight”. If this interpretation is correct, the freedom of navigation of other States in the EEZ would be enjoyed, subject to the coastal State’s sovereign rights in its EEZ to explore, exploit, conserve and manage its living and non-living resources; in effect, the freedoms enjoyed by other States in the EEZ would be subordinated to the coastal State’s sovereign rights in that zone. It was never the intention in the negotiations of the Convention to address the relationship between the sovereign rights of the coastal State in its EEZ and the rights and duties of other States in that zone in anything as stark and categorical as a “subject to” formulation. This rela-

² M. H. Nordquist, S. N. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, The Hague, Martinus Nijhoff Publishers, 2002, pp. 564-565, which states that the rights in Article 58 (1)

“are the same as those incorporated in Article 87, provided they are compatible with the other provisions of the Convention. The difference is that these freedoms are subject to measures relating to the sovereign rights of the coastal State in the zone, and they are not subject to such measures or those rights beyond the zone”;

see also A. Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary*, Oxford, Hart Publishing, 2017, p. 449, citing Y. Tanaka, *The International Law of the Sea* (2nd ed.), Cambridge University Press, 2015: page 135 refers to the “subject to” provision in Article 58 (1) as creating a rebuttable presumption in favour of the coastal State in the event of a conflict between the sovereign rights of the coastal State and the enjoyment by other States of the four high seas freedoms set out in that Article.

tionship is more subtly addressed in the due regard obligations in Articles 56 (2) and 58 (3).

8. Case law does not appear to support the conclusion that Article 56 is a relevant provision within the meaning of Article 58 (1) of the Montego Bay Convention. In its Judgment in *M/V “Virginia G”*, the International Tribunal for the Law of the Sea (hereinafter “ITLOS” or the “Tribunal”) had to consider Panama’s submission that bunkering fell “within the category of freedom of navigation and other internationally lawful uses of the sea related to that freedom in terms of Article 58 (1)”³. The Tribunal held that Article 58 “is to be read together with article 56”. It rejected Panama’s argument, holding that, in exercise of its sovereign rights to conserve and manage the living resources in its EEZ, the coastal State was entitled under Article 56 (1) to adopt measures to control bunkering of fishing vessels in that zone. The Tribunal arrived at this decision without making any mention of Article 56 as a relevant provision for the purposes of Article 58 (1). It is reasonable to conclude that the Tribunal arrived at its decision by applying the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties (hereinafter the “VCLT”). By this process, the Tribunal decided that the nature of the sovereign rights enjoyed by coastal States in their EEZs was such that the coastal State was entitled to adopt measures in respect of bunkering of fishing vessels in their EEZs. If the enjoyment of freedom of navigation in the EEZ of a coastal State is subject to the sovereign rights of the coastal State in that zone, a dispute concerning the two sets of rights would always be resolved in favour of the coastal State’s sovereign rights, because those rights would always prevail over freedom of navigation. It is not merely, as one commentator maintains, that the “subject to” formulation creates “a rebuttable presumption in favour of the coastal State in the event of a conflict” between the two sets of rights⁴; rather, it is that that formulation subordinates the enjoyment of freedom of navigation to the sovereign rights of the coastal State by making the enjoyment of that freedom wholly dependent on the coastal State’s sovereign rights. A rebuttable presumption might have been created if the phrase used in Article 58 (1) was “taking into account” instead of “subject to”. In the present case, in which the two sets of rights are pitted against each other, the Court could readily have resolved Nicaragua’s claim — that Colombia by its activities breached Nicaragua’s sovereign rights in its EEZ — in favour of Nicaragua, on the basis that Colombia’s enjoyment of freedom of navigation is subordinated to Nicaragua’s sovereign rights. But the Court does not take that approach. It finds that freedom of navigation does not permit Colombia to engage in the activities it carried out in

³ *M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 56, para. 165.

⁴ See note 2 above.

Nicaragua's EEZ. In answering Nicaragua's claim, the Court makes no mention of Article 56 as a relevant provision for the purposes of Article 58 (1). Moreover, the question whether, in exercising its rights and performing its duties, Colombia has had due regard to the rights and duties of Nicaragua does not arise, if Colombia's freedom of navigation is subject to Nicaragua's sovereign rights. If the right of freedom of navigation enjoyed by other States in a coastal State's EEZ is subject to the sovereign rights of the coastal State in that zone, the Convention would provide a definitive answer to the question whether the zone is a zone of the high seas or a zone of national jurisdiction. The Convention never provided this answer in a clear and unambiguous way. The murky relationship between the two sets of rights is addressed by the equally murky due-regard obligations in Articles 56 (2) and 58 (3). An example of a "relevant provision" for the purpose of Article 58 (1) is Article 33 relating to the contiguous zone. Since the contiguous zone is part of the EEZ, the passage of ships of third States through the contiguous zone that is part of the EEZ would be subject to the sovereign rights of the coastal State, including its enforcement powers. On the other hand, it would upset the balance that the Convention seeks to establish between the sovereign rights of the coastal State in its EEZ and the freedoms enjoyed by other States in that zone, if those freedoms were enjoyed, subject to the coastal State's sovereign rights.

9. Nicaragua's claim is that Colombia, by the activities that it carried out in Nicaragua's EEZ, breached Nicaragua's sovereign rights under Article 56 (1) (*a*) to explore, exploit, conserve and manage the living and non-living resources in its EEZ. In general, Colombia answers this claim by contending that its activities were carried out in exercise of its freedom of navigation and overflight and other lawful uses of the sea under Article 58 (1) of UNCLOS. The Court found that

"freedoms of navigation and overflight enjoyed by other States in the exclusive economic zone of the coastal State, as reflected in Article 58 of UNCLOS, do not include rights relating to the exploration, exploitation, conservation and management of the natural resources of the maritime zone, nor do they give other States jurisdiction to enforce conservation measures in the exclusive economic zone of the coastal State. Such rights and jurisdiction are specifically reserved for

the coastal State under customary international law, as reflected in Articles 56 and 73 of UNCLOS.” (Judgment, para. 94.)

This conclusion would be more persuasive were it based on an analysis of the nature and scope of the two sets of rights. The right to freedom of navigation under Article 58 (1) does not exist in isolation or in the abstract; the right is to freedom of navigation in the EEZ, and there is a necessary and inevitable interaction between the two sets of rights. This explains why the analysis would be strengthened by an examination of the nature and scope of the two sets of rights; for example, the analysis might show that the sovereign rights of the coastal State, despite being sovereign, are so qualified as to allow for the types of activities carried out by Colombia. On the contrary, however, it is argued in this opinion that an analysis of the sovereign rights of the coastal State in its EEZ shows that those rights are exclusive to the coastal State in the sense that they may not be exercised by any other State without the consent of the coastal State.

10. In my view, the issues raised by Nicaragua’s claims and Colombia’s response call for an examination of the rights, duties and jurisdiction of the coastal State in its EEZ, as well as the nature of the rights and freedoms of other States in the zone.

THE NATURE AND SCOPE OF THE FREEDOM OF NAVIGATION

11. Freedom of navigation can be traced to the right of unimpeded navigation on the high seas that was trumpeted by Hugo Grotius in his famous treatise *Mare Liberum* (1609)⁵. In the Montego Bay Convention, it is treated substantively in two provisions. Article 87 (1) provides that “[t]he high seas are open to all States, whether coastal or landlocked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law.” The Article then lists six freedoms, the first three of which are freedom of navigation, freedom of overflight, and freedom to lay submarine cables. Article 58 (1) provides that, in the EEZ,

“all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention”.

⁵ H. Grotius, *The Free Sea* (1609), Liberty Fund.

As a result of the formulation of Article 58 (1), the freedom of fishing, reflected in Article 87 (1) (*e*), is not among the high seas freedoms enjoyed by a third State in the EEZ of a coastal State.

12. The phrase “freedom of navigation” must be interpreted in accordance with the customary rules of interpretation. The ordinary meaning of the term “navigation” is to be ascertained in the context in which it is used in Articles 58 and 87 of the Montego Bay Convention, and in light of the Convention’s object and purpose. Dictionaries give several meanings of the word “navigation”. In the context in which the term is used in these Articles, the most instructive meanings are the “passage of ships” (*Oxford English Dictionary*) and the “movement of ships” (*Collins Dictionary*). In the context, therefore, of Part V of the Convention, and in light of the object and purpose of the Convention, freedom of navigation is the freedom enjoyed by a third State of the passage or movement of its ships in the EEZ of a coastal State, without any entitlement on the part of the coastal State to restrict that passage or movement in any way, unless there is carried out on the ship an activity that interferes with the enjoyment by the coastal State of its sovereign rights.

13. The essence of freedom of navigation is unimpeded passage or movement of a ship. However, the freedom of navigation in the EEZ under Article 58 (1) is obviously more limited than freedom of navigation on the high seas under Article 87. This is so because the freedom is being exercised in the EEZ of a coastal State and, naturally, the sovereign rights of the coastal State to explore, exploit, conserve and manage its living and non-living resources will impact on a third State’s freedom of navigation in the zone. If there is carried out, on a ship passing or moving through the EEZ of a coastal State, any activity that interferes with the sovereign rights of the coastal State and which, therefore, is not directly related to that passage or movement, that ship is not exercising freedom of navigation under Article 58, and it would have violated the sovereign rights of the coastal State. The Virginia Commentary observes that many coastal States take the position that military activities are not protected within the EEZ and that the coastal State may oppose such exercises by foreign ships on the basis that they may affect the living resources or the marine environment or the safety of navigation⁶. The activities carried out by Colombian naval vessels of harassing Nicaraguan fishermen and stopping Nicaraguan fishing vessels or other Nicaraguan-licensed vessels in order to apply what Colombia considers to be proper conservation methods, do not fall within the scope of the freedom of navigation under Article 58 and would constitute a breach of Nicaragua’s sovereign rights to explore, exploit, conserve and manage its natural resources, including fishing.

⁶ *United Nations Convention on the Law of the Sea 1982: A Commentary* (see note 2 *supra*), Article 87, 2013, pp. 81 and 564-565, paras. 58.10 (*c*) and 87.9 (*c*).

14. There is evidence that on an occasion when Colombian military vessels carried out patrols in Nicaragua's EEZ, the Colombian President asserted, "[w]e find ourselves *patrolling and exercising sovereignty* over Colombian waters" (my emphasis); there is also evidence that at that time the Colombians were in fact in Nicaragua's EEZ. In such a situation, the activity of patrolling has no direct relationship with the passage or movement of the Colombian ship, and Colombia is not exercising freedom of navigation; rather, it is engaging in intimidating conduct that flagrantly interferes with Nicaragua's exclusive sovereign rights in its EEZ for the purpose of exploring, exploiting, conserving and managing the living and non-living resources of the zone.

15. In any event, even if the activities carried out by Colombia in Nicaragua's EEZ could be said to be an exercise of the freedoms of navigation or overflight, Article 58 (3) of the Montego Bay Convention obliges Colombia, in carrying out such activities, to have due regard to the rights and duties of Nicaragua as the coastal State. This is a substantive obligation which requires all States, in exercising their high seas freedoms, to consider the sovereign rights of the coastal State in the EEZ and to refrain from activities that interfere with the exercise by the coastal State of its sovereign rights in its EEZ. In carrying out these activities, Colombia did not exhibit the consideration for Nicaragua's exclusive sovereign rights required by the due regard obligation, and therefore breached those rights. The exclusivity of these rights is addressed next.

THE NATURE AND SCOPE OF NICARAGUA'S SOVEREIGN RIGHTS IN ITS EEZ

16. It is also necessary to consider whether the nature and scope of the sovereign rights of a coastal State in its EEZ are such as to preclude Colombia from engaging in the activities that it carried out in Nicaragua's EEZ. In that regard, it should be determined whether the sovereign rights of Nicaragua in its EEZ are exclusive in the sense that they may not be exercised by any other State without the consent of Nicaragua as the coastal State. If Nicaragua as the coastal State has exclusive sovereign rights for the purpose of the exploration, exploitation, conservation and management of the living and non-living resources of the EEZ, this would be a cogent basis for finding that Colombia's interventionist activities in Nicaragua's EEZ breached Nicaragua's sovereign rights in that zone.

17. It is not merely, as the Court holds, that rights relating to the exploration, exploitation, conservation and management of the natural

resources of the EEZ, as well as the power to design conservation policies for the zone, are “specifically reserved for the coastal State”; rather, it is that they are exclusively reserved for the coastal State. The history of the development of the concept of an EEZ, the negotiations preceding the adoption of the Montego Bay Convention and the text of the Convention itself indicate that the sovereign rights enjoyed by a coastal State in its EEZ are exclusive to that State.

18. Undeniably, it was a developmental consideration that prompted developing countries in the last part of the twentieth century to insist on a zone of what was then the high seas as an area in which they would be entitled to explore and exploit the living and non-living resources. Thus, in explaining the rationale behind the concept of the EEZ to the Asia-Africa Legal Consultative Group in 1971, Kenya pointed out that the régime of the high seas benefited developed countries which, unlike developing countries, had ships that could carry out distant water fishing off the coasts of developing countries in maritime areas that were then part of the high seas. In the interest of their growth and development, those developing States sought exclusive, not shared, sovereign rights in relation to fisheries. Indeed, from as far back as 1952, Chile, Ecuador and Peru declared that they possessed “exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from their coasts”⁷. Kenya’s proposal in 1974 to the first session of the Conference was that

“in the exclusive economic zone a coastal State shall have sovereignty over the living and non-living resources. It shall have sovereign rights for the purpose of regulation, control, exploration, exploitation, protection and preservation of all living and non-living resources therein.”⁸

The element of exclusivity was emphasized in the provision in Kenya’s proposal that, “subject to Article 6” — relating to the rights of landlocked and geographically disadvantaged States — “no other State has the right to explore and exploit the resources therein without the consent or agreement of the coastal States”⁹. In fact, the near unanimity on the concept of an EEZ establishing exclusive sovereign rights of the coastal

⁷ A. Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary*, Oxford, Hart Publishing, 2017, p. 439, citing Declaration on the Maritime Zone of 18 August 1952, para. II, United Nations, *Treaties Series*, Vol. 1006, p. 325 *et seq.*

⁸ A. Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary*, Oxford, Hart Publishing, 2017, p. 421, para. 4.

⁹ S. N. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, Martinus Nijhoff Publishers, 2003, pp. 529-531.

State is highlighted by the proposal made by the United States at the first session of the UNCLOS Conference for an economic zone in which the coastal State exercised “the jurisdiction and the sovereign and exclusive rights set forth in this chapter for the purpose of exploring and exploiting the natural resources, whether renewable or non-renewable, of the seabed and subsoil of the superjacent waters”¹⁰.

19. Thus, Nicaragua is correct in its submission that “exclusive control of offshore fishing was the very *raison d'être* of the EEZ”. Consistent with that outlook, what Kenya and other developing countries sought and received from the Montego Bay Convention was exclusivity in this new zone in the enjoyment of sovereign rights for the purpose of exploring, exploiting, conserving and managing the living and non-living resources. Of course, developed countries also benefited from the concept of an EEZ.

20. The Chamber of the Court acknowledged this element of exclusivity in the *Gulf of Maine* case. The Chamber spoke plainly when it held:

“But after the coastal States had set up exclusive 200-mile fishery zones, the situation radically altered. Third States and their nationals found themselves deprived of any right of access to the sea areas within those zones and of any position of advantage they might have been able to achieve within them. As for the United States, any mere factual predominance which it had been able to secure in the area was transformed into a situation of legal monopoly to the extent that the localities in question became legally part of its own exclusive fishery zone.”¹¹

21. Colombia argues that Nicaragua’s reliance on this case is misplaced because, in its view, it merely stands for the proposition that private practice has no impact on maritime delimitation and does not address the impact of maritime delimitation on vested rights. However, a careful reading of the Judgment shows that the Chamber did not accept the argument for historic rights. The Chamber held that it would not “ascribe any decisive weight, for the purposes of the delimitation it [was] charged to carry out, to the antiquity or continuity of fishing activities carried on in the past within that part of the delimitation area”¹². In its delimitation of the exclusive fisheries zones the Chamber found such historic rights — otherwise characterized as the factual predominance in the area by United States fishermen — to be irrelevant. Ultimately, the

¹⁰ S. N. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, Martinus Nijhoff Publishers, 2003, pp. 529-530.

¹¹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, *I.C.J. Reports 1984*, pp. 341-342, para. 235.

¹² *Ibid.*, p. 341, para. 235.

Chamber did not enquire whether the rights were vested, since it found such rights to be not relevant.

22. Subject to the exception set out in this paragraph, the design of the Montego Bay Convention does not admit of States other than the coastal State exercising any of the sovereign rights attributed to that State in its EEZ for the purpose of conserving and managing the fisheries resources; nor does it admit of States other than the coastal State performing any of the obligations imposed on the coastal State in its EEZ for the purpose of conserving and managing the fisheries resources. In this respect, the Montego Bay Convention is comprehensive in its identification of the States that have rights and obligations in respect of living resources of the EEZ. Thus, coastal States have not only sovereign rights to explore and exploit the living resources, but also an obligation under Article 61 to determine the allowable catch and to ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by overexploitation. Article 62 also imposes on coastal States the duty to promote the objective of optimum utilization of the living resources in the EEZ, and to determine its capacity to harvest the living resources; where it does not have the capacity to harvest the entire allowable catch, Article 62 obliges the coastal State to give other States access to the surplus of the allowable catch through agreements or other arrangements and, in doing so, to have particular regard to the provisions of Articles 69 and 70. These latter provisions give landlocked and geographically disadvantaged States a right to participate on an equitable basis in the exploitation of an appropriate part of the surplus of the living resources of the EEZ of coastal States. These agreements are the only exception to the exclusivity of a coastal State's sovereign rights for the purpose of exploring, exploiting, conserving and managing its living resources in its EEZ. Landlocked and geographically disadvantaged States have, by way of an agreement with the coastal State, a right to participate on an equitable basis in the exploitation of an appropriate part of the surplus of the allowable catch. There is no agreement or arrangement between Colombia and Nicaragua for Colombia to have access to any surplus of the allowable catch in Nicaragua's EEZ.

23. The obligations of the coastal State are as exclusive to that State as are its sovereign rights to exploit, explore, conserve and manage those resources; in particular, the obligation to conserve and manage the living resources in a specific way is as exclusive to the coastal State as are its sovereign rights to exploit and explore those resources. If a coastal State, such as Nicaragua, does not conserve and manage its living resources so that it is in a position to determine the allowable catch, as well as its capacity to harvest its living resources and whether there is a surplus of the allowable catch, its international responsibility may be engaged for that failure. A landlocked or geographically disadvantaged State that is unable "to participate" in "an appropriate part of the surplus", because

there is no surplus on account of the coastal State's mismanagement, would be entitled to claim reparations for the coastal State's breach. Interference by another State, such as Colombia, in the conservation and management of the living resources may impact adversely on the capacity of the coastal State to discharge this obligation. Such interference engages the international responsibility of that State as a breach of the Montego Bay Convention. This is all the more reason why the Convention gives a coastal State, such as Nicaragua, exclusive sovereign rights over the conservation and management of its living resources. A State's perception that a coastal State is not discharging its obligation to conserve and manage its living resources, even if it is well founded, does not give it the right to assume the responsibility of discharging those obligations. Such a far-reaching power would have had to be expressly provided for in the Convention. No State may, consistently with the Convention, arrogate to itself the responsibility of conserving and managing the living resources in the EEZ of a coastal State on the basis of its view that the coastal State is not discharging its customary and conventional obligations in that regard. There is no warrant for interpreting the Montego Bay Convention as giving such a State that power. That would be a certain basis for confusion and, worse yet, conflict.

24. An important indicator of the exclusivity of the coastal State's sovereign right to conserve and manage the living resources of its EEZ is provided in Article 73 (1), which reads as follows:

“The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, 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.”

25. This is an extensive and far-reaching power that has been given to the coastal State in its EEZ. In setting out this power Article 73 of the Montego Bay Convention is merely interpreting Article 56 (1), which attributes to the coastal State exclusive sovereign rights in its EEZ. Article 73 of the Convention allows the coastal State to adopt any measure in its EEZ to ensure compliance with its laws, so long as that measure is in conformity with the provisions of the Convention. Importantly, the Article sees the adoption of such measures as derived from the sovereign rights of the coastal State; that is the significance of the phrase “in the exercise of its sovereign rights”. It is by virtue of these sovereign rights that the coastal State is given these broad and pervasive enforcement powers in the conservation and management of its fisheries. The intention of the drafters is to ensure that the coastal State is able to respond to the conduct of any State that would adversely affect the enjoyment of its sov-

ereign rights and the performance of its duties to conserve and manage its fisheries. If the coastal State has exclusive sovereign rights for the purpose of exploring, exploiting, conserving and managing its living and non-living resources, it is to be expected that it would also have the power to adopt measures within the zone that would enable it to enjoy those rights. The decision of ITLOS in *M/V "Virginia G"* illustrates very well not only the extent of the coastal State's sovereign rights in its EEZ, but also the exclusivity of those rights. In *M/V "Virginia G"*, the Tribunal found that the sovereign rights of a coastal State under Article 56 (1) (a) "encompas[s] all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures"¹³. Such enforcement rights would not have been given to the coastal State in its EEZ if other States were also entitled to the same rights in the coastal State's EEZ. Therefore, the coastal State's sovereign rights in its EEZ are properly interpreted as exclusive to the coastal State in the sense that no other State may exercise them without its consent.

26. It remains now to consider whether the jurisdiction of States over vessels flying their flag is an exception to the exclusive sovereign rights of the coastal State in its EEZ.

27. The Judgment refers to the ITLOS Tribunal's finding in *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* that the flag State has "an obligation to ensure compliance by vessels flying its flag with the relevant conservation measures concerning the living resources enacted by the coastal State for its exclusive economic zone"¹⁴.

28. However, there is an important distinction between the rights and duties of a flag State in the EEZ of a coastal State and the exclusive sovereign rights of a coastal State in that zone. It is only the coastal State that has the right and duty to devise and initiate conservation measures for the protection and preservation of the marine environment in its EEZ, including such measures concerning its living resources. This is clear from a reading of Articles 56 (1) (a), 61, 62 and 73. Indeed, the coastal State's exclusive obligation to adopt such measures may be seen as a corollary of its exclusive right to explore, exploit, conserve and manage the living resources in its EEZ.

29. Under Article 92 of the Montego Bay Convention, ships are subject to the exclusive jurisdiction of the flag State on the high seas. Under Article 94, every State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

¹³ *M/V "Virginia G" (PanamalGuinea-Bissau), Judgment, ITLOS Reports 2014*, p. 67, para. 211.

¹⁴ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 37, para. 120.

While the power of the flag State over its vessels under these provisions is exclusive, the exercise of that power within the EEZ of a coastal State is governed by Article 58 (2) of the Convention, which provides that “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part”. Thus, while a flag State has exclusive jurisdiction over its ships on the high seas, and may therefore set conservation standards for those ships while they are on the high seas, in the EEZ it is the coastal State that has the exclusive right and duty to set the applicable conservation standards for the zone.

(Signed) Patrick L. ROBINSON.
