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The Rights of Land-Locked and Geographically Disadvantaged States in Exclusive Economic Zones

ANTONIO MARTÍNEZ PUÑAL*

INTRODUCTION

This article attempts to answer some of the queries arising in regard to the rights of Land-Locked and Geographically Disadvantaged States (LL/GDS) in Exclusive Economic Zones (EEZ). Specifically, it aims to contribute to a better understanding of the main factors that, in the author's opinion, delimit the scope of the participation of such States in the living resources of the EEZ. While a number of obscurities will be clarified, there are undoubtedly others that perhaps await the more detailed analyses that will be forthcoming as the Convention on the Law of the Sea is subjected to progressively more complete study.

The conclusions arrived at are of course based on the Convention on the Law of the Sea (CLS) whenever this treaty provides a solution, satisfactory or otherwise, to the problem under discussion. In its absence, resort will be had to retrospective analysis of the problem by examination of its treatment in the Seabed Committee and in the Third Conference on the Law of the Sea (UNCLOS III), and by reference to previous contributions to doctrine. I present below my evaluation of what in my view are some of the weightiest legal factors affecting the rights of LL/GDS to participate in the living resources of the EEZ.

GEOGRAPHICAL SCOPE: "REGION OR SUBREGION"

Paragraph 1 of articles 69 and 70 of the CLS establish that Land-Locked States and Geographically Disadvantaged States, re-

*Professor of International Law, University of Santiago de Compostela, Spain. The translations into English of quoted text originally published in another language are the author's.

spectively, shall have the 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 of the same "subregion or region." Other instances of the expression "subregion or region" are found in these Articles in paragraphs 3, 4 and 5 of article 69 and paragraphs 4, 5 and 6 of article 70. It is accordingly desirable to clarify these terms as much as possible; this will help to delimit the geographical scope of the "subregional or regional" agreements mentioned in various paragraphs of articles 69 and 70 and will also aid in understanding the use of these terms in other parts of the Convention.

We shall approach the meaning of the terms "region" and "subregion" by studying the treatment they have received in the debates of UNCLOS III and in the relevant doctrine; this topic was not commented on in the Seabed Committee. The need to define these terms arises, of course, from the absence of any kind of definition in the various provisions of the Convention in which they are found, a deficiency which is no more than symptomatic of the obstacles to be overcome. To a certain extent, indeed, this situation is a corollary of the vagueness in the definition of the Geographically Disadvantaged State: if those with a legitimate title to rights of participation are largely undefined, it is not illogical that the field in which those rights may legitimately be exercised is also ill specified. This should be borne in mind in the discussion that follows.

When on May 18, 1978 the Danish delegate Villadsen pointed out the need for an adequate definition of the expression "the same subregion or region,"[1] the Canadian delegate Mawhinney, without attempting to define this expression, called attention to certain relevant points that would in principle seem to be unobjectionable. According to Mawhinney:

> The concept of region or subregion is one of the key elements in the new proposals. It must be made clear that land-locked and geographically disadvantaged States cannot claim to belong to more than one region or subregion, for, if they could, the privileges granted to them under articles 69 and 70 would be excessive. Similarly, it should be clearly established that no coastal State can be considered to belong to more than one region or subregion, because it would be an unacceptable burden for a coastal State to have to deal with claims coming from all directions. The legal limitations of the privileges and obligations

[1] 103rd Plenary Meeting, Off. Docs. III UNCLOS, IX, at 69.

provided for in articles 69 and 70 therefore still have to be defined.[2]

Another contribution to be noted is that of the Polish delegate, Symonides, who after highlighting the need to reach agreement on the interpretation of the definitions of certain obscure terms, "region" among them, went on to state that in his delegation's opinion "semi-enclosed seas, poor in living resources and without available surplus, did not constitute regions within the meaning of article 70. In such cases, the term 'region' should be understood as an oceanic region, in accordance with the terminology used by the Food and Agriculture Organization of the United Nations."[3]

To sum up, the most noteworthy feature of the few and unilluminating references to the terms "subregion" or "region" during UNCLOS III is the repeated expression of the want of a definition of these terms including among its criteria an available surplus of living resources. The definition of subregion or region by reference to geographical areas lacking resources would effectively abort the rights of participation contemplated in articles 69 and 70. Finally, it may be noted that there should be, on the one hand, just a single regional relationship of each Disadvantaged State, and on the other, just a single regional relationship of each Advantaged State, a notion that I judge to be valid as a general rule.

Concern for the need to possess a definition of the terms "region" and "subregion" was early on expressed in the doctrine. With regard to this topic, Montaz stated in 1974 that it was necessary to establish a certain satisfactory balance among the different regions, and that this equilibrium should be based on two criteria: quantitatively, the number of Disadvantaged States attached to each of the regions should be roughly the same; and, qualitatively, a certain number of economic factors should be taken into consideration, particularly the importance of preventing a single region being assigned a number of States large enough for their present and future populations to be a drain on neighbouring fisheries.[4] According to Montaz, regions should, therefore, be constituted in such a way as to observe a balance as regards both the number of Geographically Disadvantaged States belonging to each (quantitative equilibrium) and the degree of

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[2]Id. at 69–70. Concern regarding the definition of the term "region" was expressed by the Romanian Glica (57th Meeting, 2nd Commission, Off. Docs. III UNCLOS, XI, at 58) and by the Bulgarian Zhelyazkov (58th Meeting, id. at 66).

[3]138th Plenary Meeting, Off. Docs. III UNCLOS, XIV, at 61.

[4]Cf. Montaz, *La Mer et l'Egalité entre les Etats, Revue Iranienne des Relations Internationales,* No. 2, Winter 1974–5, at 27.

"dependence on fishing" of such States (qualitative equilibrium). In other words, it would be necessary to avoid the creation of regions that were themselves disadvantaged with respect to other regions on account of the unequal incidence of rights of participation.

Two years later, in 1976, Storer, while emphasizing the problem posed by the definition of the term "region," observed that "some countries in Europe have suggested that the appropriate region to consider was not just the eastern Atlantic but the whole north Atlantic."[5] He thus appears, implicitly, to have supported the idea of constituting regions on the basis of the principle that there should be a surplus of living resources, or, in other words, the constitution of what might be called "regions with a surplus." Symonides, more specifically, affirmed that the "regions" of articles 69 and 70 were identical to the geographical areas covered by the United Nations Economic Commissions,[6] while in 1977 Alexander similarly argued that "A possible definition of 'regions,' as seen on a global basis, could correspond with the Regional Economic Commissions of the UN Economic and Social Council."[7]

The publications of Gonçalves in 1978, 1979 and 1983 show her to have perhaps been the author devoting most attention to the definition of the term "region." Her monograph of 1983 contains the following passage in connection with the interpretation of the concepts of "region" and "subregion":

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[5]Storer, Law of the Sea Negotiations and Extended Jurisdiction, Economic Impact of Extended Fisheries Jurisdiction 109 (1976).

[6]Cf. Symonides, Geographically Disadvantaged States and the New Law of the Sea, Polish Y.B. Int'l L. 62 (1976).

[7]Alexander, Regional Arrangements in the Oceans, 71 Am. J. Int'l L. 94–95 (1977). For Alexander, "it becomes apparent that all regions are in a sense intellectual concepts—techniques for organizing phenomena into manageable patterns." Id. In relation to the organization of marine regions for the administration of resources, and to the rights of participation with which we are concerned, Sánchez-Rodríguez referred to national projects for "the existence of regions or subregions as operational modules for the achievement of joint participation in development by the neighbouring States of a particular geographical sector." L. I. Sánchez-Rodríguez, *La Zona Exclusiva de Pesca en el nuevo Derecho del Mar* 63 (1977).

The four Commissions referred to by Alexander are the Economic Commission for Europe, the Economic and Social Commission for Asia and the Pacific, the Economic Commission for Latin America and the Economic Commission for Africa. The U.S.A. is a member of all except the African Commission, which if the proposed definition of "region" were accepted would create a problem in that it would belong to more than one region, thus contravening the general rule that a state may belong to just one region. A possible solution would be to construe the reference in articles 69 and 70 to participation in "the living resources of the exclusive economic zones of coastal States of the same subregion or region" as meaning participation in the living resources of the exclusive economic zones of coastal States that are physically located in the same subregion or region. This would preserve the uniqueness of the region belonged to.

Theoretically, it might thus be conceived that the "region" in which access would be available to Land-locked and "Geographically Disadvantaged" States might be based upon consideration of

a) geopolitical aspects, the corresponding region being a continent or the geographical area covered by organizations such as the United Nations regional economic commissions or regional political groups such as the Organization of African Unity or the Organization of American States;

b) a continental geographical space comprising the area formed by a Land-locked State and adjoining or neighbouring coastal States;

c) "regional or subregional economic zones" created in terms agreed on between coastal and Land-locked States, and in which these States would have, among others, equal rights regarding the exploration of biological marine resources;

d) the EEZ of a single adjacent coastal State . . . .[8]

Thus, for Gonçalves, the problem still awaits solution; a point of view that faithfully illustrates the general attitude to the subject expressed when she writes that, owing to the diversity of local geographical and economic situations, UNCLOS III could not be expected to come up with a single, global definition of the concept of region, a situation that confirmed the flexibility of this concept.[9]

The same kind of "conceptual flexibility" argument was employed by Economides, in whose opinion the lack of definition of "region" and "subregion" was voluntary.[10] Though agreeing with his thesis as regards the need to negotiate the physical scope of the regions from the point of view to which their lack of definition in the CLS has led, I disagree with his suggestion that this lack of definition has been voluntary. In my opinion, it is the result of the inability of the delegations taking part in UNCLOS III to reach agreement. As was pointed out at the beginning of this section, the intimate connection between the definitions of "region" or "subregion" and that of "Geographically Disadvantaged State" should not be overlooked.[11]

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[8]M. E. Gonçalves, *A Politica Comun da Pesca da Comunidade Económica Europea* 125 (1983). This monograph is the published version of its author's Doctoral Thesis of 1977. Gonçalves expresses the same ideas in Analysis of the Concept of "Region" in the Informal Composite Negotiating Text, F.A.O., Doc. COFI/78/Inf. 10, May 1978, at 15; and in Concepts of Marine Region and the New Law of the Sea, Marine Policy, October 1979, at 261 (hereafter "Concepts").

[9]Cf., id., Concepts at 263.

[10]Cf., Economides, *La III Conferenza delle Nazioni Uniti sul Diritto del Mare, La Comunita Internazionale,* XXXIV, No. 1, at 34.

[11]I do not, however, wish to suggest that the two definitions were equally difficult, for while "geographically disadvantaged state" was a new term, "region" was already established in the conventional vocabulary of the law of the sea. This was recognized by Jayakumar: "There are, of course, other problem areas . . . . Nor have the terms region and subregion been defined . . . .

A different possible concept of "region" was put forward by Extavour, who after noting the absence of a precise definition of the term in the context of the new law of the sea,[12] proposed that it should be taken to refer to the geographical groups recognized in the United Nations system: Africa, Asia, Eastern Europe, Latin America and Western Europe, and Others.[13] Ulfstein, on the other hand, wrote that:

> "region" and "subregion" are not defined in the [CLS] and the terms have no distinct meaning in fisheries management or international law. It seems most appropriate to delimit the regions according to geographical and fisheries management criteria. This last criterion implies that one takes into consideration ecology, the fishing pattern and the traditional geographical competence area for the regional fishery organizations. Against this background the North East Atlantic and the Baltic Sea should be considered one region. If the same criteria are used on a subregion, the North Sea, the Barents Sea and the areas west of Ireland may be regarded as separate subregions.[14]

Finally, another possibility was mooted by Verwey when he wrote that "the formulation 'sub-region or region' creates the possibility for coastal states to refuse their co-operation in establishing arrangements with LL/GDS: for instance, by making their co-operation in the establishment of sub-regional arrangements dependent on the previous establishment of collective arrangements at the regional (continental) level, which may never come into existence."[15] While I take this opportunity to disagree with the opinion that cooperation might be refused under the circumstances described by Verwey, the point of interest for our present purposes is his apparent identification of

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However, in comparison with the five issues just discussed [among them, one entitled 'Which Countries Should be Covered by a Provision for GDS?'], the writer feels that these other questions can be resolved with less difficulty." Jayakumar, The Issue of the Rights of Landlocked and Geographically Disadvantaged States in the Living Resources of the Economic Zone, 18 Va. J. Int'l L. 115 (1977) (hereafter "The Issue").

[12]W. Extavour, The Exclusive Economic Zone 178 and 261 (1979).

[13]Cf., id. at 249. Extavour's proposal is reminiscent of Article 161 of the Convention on the Composition of the Council, Procedure and Voting, Paragraph 1(e) of which speaks of "eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats . . . . *For this purpose,* the geographical regions shall be Africa, Asia, Eastern European (Socialist), Latin America and Western European and Others." (Emphasis added).

[14]Ulfstein, 200 Mile Zones and Fisheries Management, *Nordisk Tidsskrift for International Ret,* 52, Fasc. 3–4, 1983, at 21.

[15]Verwey, The New Law of the Sea and the Establishment of a New International Economic Order: The Role of the Exclusive Economic Zone, 21 I.J.I.L. 406 (1981).

"region" with "continent," which gives rise to another possible way of making the regional scheme a reality.

The opinions reviewed above provide a whole set of different formulas for drawing the regional map implicit in articles 69 and 70. This in itself is a good measure of the want of an adequate definition, which has also been pointed out in one way or another by Alexander, Hassan, Paterson, Eriksson, Jayakumar, Caflisch and others.[16] As Rao said, "though some may consider that this expression is 'constructively ambiguous,' problems arising out of its interpretation in practice cannot be ruled out, for there is no internationally accepted meaning of what constitutes 'a region' or 'a subregion'."[17]

It should also be remembered that what has been said with respect to regions is also applicable to subregions, which are subject to the same, or greater,[18] difficulties, even when not mentioned explicitly. It is therefore clear that there is no one approach to the delimitation of regions which has so sound a basis as to have led to its predominant acceptance. Indeed, in spite of the absence of firm grounds upon which to base proposals having been consistently complained of in the various contributions to the doctrine, few of the commentators have attempted to remedy this state of affairs; and though the honourable exceptions that have made efforts in this direction must

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[16]P. Ch. Rao, The New Law of Maritime Zones, with Special Reference to India's Maritime Zones 260–261 (1983).

[17]Alexander, Regionalism and the Law of the Sea: The Case of Semi-Enclosed Seas, Ocean Development and International Law 164 (1974); Hassan, Third Law of the Sea Conference Fishery Rights of Landlocked States, 8 Lawyer of the Americas 701 (1976); Paterson, The Law of the Sea Conference: What are its Implications for Development, 2 International Development Review 34 (1976); Eriksson, Some Thoughts on Regional Marine Arrangements in the Developing World, Regionalization of the Law of the Sea, Proceedings, Law of the Sea Institute Eleventh Annual Conference, November 14–17, 1977, at 96–97 (the conference proceedings are hereafter referred to as "Regionalization"); Jayakumar, The Issue, supra note 11, at 115; Caflisch, The Doctrine of *Mare Clausum* and the Third United Nations Conference on the Law of the Sea, *Les Relationes Internationales dans un Monde en Mutation* 210 (1977); Caflisch, Landlocked and Geographically Disadvantaged States and the New Law of the Sea, VII Thesaurus Acroasium 393 (1977); Caflisch, The Fishing Rights of Landlocked States and Geographically Disadvantaged States in the Exclusive Economic Zone, *La Zona Economica Exclusiva* 44 (1983). (This publication is hereinafter called "La Zona"). With regard to the definition of "region," Caflisch wrote that "the formulation of any such definition would have met with unsurmountable difficulties both in the Group of land-locked and geographically disadvantaged States and in the Group of coastal States." *La Convention des Nations Unies sur le Droit de la Mer Adoptée le 30 Avril 1982, Annuaire Suisse de Droit International,* XXXIX, 1983, at 74. The problems surrounding the concept of "region" are also discussed in A. Tavares de Pinho, *L'Accés de Étrangers a l'Exploitation des Ressources Biologiques de la Zone Economique Exclusive,* Doctoral Thesis, Nice, 1983, at 165–171.

[18]Johnston, Regionalization and its Consequences at UNCLOS III, Regionalization, supra note 17, at 5.

be given their due, the want of a monograph throwing light on the subject is badly felt.

Though conscious of sharing the limitations suffered by other authors mentioned in this section, I feel that the situation may be summarized as follows. In view of the term "region" having been left undefined in the CLS, great flexibility should be employed in its realization. In my opinion, this process should nevertheless be guided by two principles that I regard as fundamental: firstly, that the regions emerging should possess surplus living resources, without which the additional difficulties created by regional divisions based upon a *deficit* of living resources would mean the rapid rejection of such a system; and, secondly, that inter-regional balance should be sought as regards the ratio between surplus living resources and nutritional dependence on fishing. Failure to observe the latter principle would be inconsistent with the more equitable worldwide distribution of fishery resources aimed at in the latest revision of the law of the sea, since it would imply that States belonging to different regions would be under different burdens that in some cases might amount to manifest injustice at the level of Advantaged States. These two principles should of course be applied judiciously and in such a way as to respect the possibility of agreed above-minimum participation explicitly left open in paragraphs 5 and 6 of articles 69 and 70 respectively. These paragraphs state that "the above provisions are without prejudice to arrangements agreed upon in subregions or regions where the coastal States may grant to land-locked States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones."

THE EXISTENCE OF RESOURCES: THE RELATIONSHIP BETWEEN SURPLUS AND ALLOWABLE CATCH

1. Participation in the surplus

Paragraph 1 of articles 69 and 70 of the CLS state that LL/GDS shall have the 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 of the same subregion or region. Given this general provision for participation in a part of the surplus, it is needful to investigate the scope of the concept basic to this provision, the surplus, which, in the words of Pastor-Ridruejo, is

the very "keystone of the regulation of access by other nationals."[19]

Paragraphs 1 and 2 of article 56 of the Convention establish that:

> 1. In the exclusive economic zone, the coastal State has:
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil . . . .
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

The sovereign rights of the coastal State recognized in article 56 must furthermore be related to articles 61 and 62. According to article 61:

> 1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.
> 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall co-operate to this end.
> 3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global. . . .
> 4. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

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[19]Pastor-Ridruejo, *La Convención Sobre el Derecho del Mar y los Intereses de España, Cursos de Derecho Internacional de Vitoria-Gasteiz* 85 (1983). A similar view was expressed in Nawaz, On the Advent of the Exclusive Economic Zone: Implications for a New Law of the Sea, Law of the Sea: Caracas and Beyond 196 (1980).

The coastal State, by sovereign right and bearing in mind the precepts of article 61, is, therefore, to determine the allowable catch of living resources in its EEZ with a view to the obligatory maintenance of production levels in accordance with the concept of maximum sustainable yield as described in Paragraphs 2 and 3.[20]

Paragraphs 1 and 2 of article 62 establish that:

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall . . . give other States access to the surplus of the allowable catch . . . .

The search for the meaning of the concept of "surplus" has thus thrown up a battery of related concepts such as allowable catch, maximum sustainable yield, optimum utilization of resources and harvesting capacity, all of which doubtless give rise to their own difficulties as regards both definition and application.[21] In order to

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[20]O'Connell noted the following:

The concept of maximum sustainable yield has the aspect of scientific plausibility, but some emphasis is being placed upon an alternative standard to be aimed at in fishery management, namely, maximum economic yield. This would, in most cases, be less than the maximum sustainable yield. The difficulty with this concept is that there is no accepted economic aim in fishing, for the standard is relative to the standard of living of the fishermen, which will vary from country to country, and bears no relationship to the goal of earning foreign exchange.

The Draft Caracas Convention, by qualifying maximum sustainable yield according to relevant environmental and economic factors, including the economic needs of coastal fishing communities, has weakened the scientific character of the determination which the coastal State is obliged to make of the level of exploitability as a step towards the determination of the surplus available for allocation. The formula is a composite one, in which subjective judgments of an economic character modify objective judgments about verifiable ecological facts.

D. P. O'Connell, I The International Law of the Sea 565 (1982).

On the concept of economic optimum, see Southey, The International Fishery: A Proposal Based on the New Welfare Economics, The Law of the Sea: The United Nations and Ocean Management, Proceedings of the Fifth Annual Conference of the Law of the Sea, June 15–19, 1970, Kingston, Rhode Island, at 53–55 (1971) (these proceedings are hereinafter referred to as "Law of the Sea").

[21]In the Seabed Committee, Talbot, the delegate of Guyana, went so far as to suggest that "prudence would appear . . . to advise against the employment of the concepts of 'maximum sustainable yield' or 'optimum catch' in any new arrangements for the regulation of world fisheries." Doc. A/AC.138/SC.II/SR.30, March 29, 1972, at 83. Sánchez-Rodríguez has pointed out that:

arrive at a legal concept of surplus, however, we shall not go into the technical details of the definitions of these other terms, but shall, by and large, accept them in their normal logical sense when we have to use them, with just a few references to the literature when necessary. All these concepts are intimately interrelated, so that they may to some extent be regarded as different facets of one and the same problem, the optimal utilization of resources as manifested by the harvesting of the maximum sustainable yield. And, for example, has written that the maximum sustainable yield is the "optimum catch"; the maximum quantity of fish that can be caught without reducing the reproductive capacity of the species or adversely affecting associated or dependent species.[22] At the same time, the maximum sustainable yield should be reflected in the allowable catch,[23] which should, therefore, also be a faithful index of the optimal utilization of

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these proposals of a pretendedly scientific nature, which formally pursue the idea of maintaining a maximum constant yield of fishery resources, and which seek to keep open the national fisheries of States whose means of harvesting are materially and technologically poorly developed, generally come from powerful fishing States interested in fisheries far from their own shores. In principle, their thesis is attractive, since it apparently seeks to make a rational maximum of seafood available to mankind. It nevertheless has weak points. In the first place, because fixing an optimal allowable catch requires relatively sophisticated technology that these poorly developed States are reproached for lacking. In the second place, because the coastal State itself is the party most interested in the yield of its fisheries, and if its harvesting industries are insufficient it will itself solicit foreign participation, which it will subject to conditions ensuring true benefits for its national economy.

Sánchez-Rodríguez, supra note 7, at 258–259.

On the relational/discretional nature of the coastal State's faculties as established in previous articles of the Convention for the implementation of the concepts there dealt with, see Wodie, *Les Intérêts Économiques et le Droit de la Mer—Principales Tendances apres les Conférences de Caracas (20 juin–20 aout 1974), de Geneve (17 mars–29 mai 1975) et de New York (16 mars–7 mai 1976)*, 80 *Revue Générale de Droit International Public* 759–760 (1976); Extavour, supra, at 192; Sánchez-Rodríguez and González-Campos, *Reglamentación Internacional de las Pesquerias: Intereses Españoles y Soluciones al Problema Pesquero, Estudio y explotación del mar en Galicia* 481 (1979); Pérez-González, *La Ordenación Jurídica del Mar: Factores en Presencia, Temas Marítimos* 22–23 (1981); O'Connell, supra note 20, at 563; Carroz, *Les Problemes de la Pêche dans la Convention sur le Droit de la Mer et la Pratique des Etats, Le Nouveau Droit International de la Mer* 189 (1983); Pastor-Ridruejo, supra note 19, at 85; Scovazzi, *La Pesca Nella Zona Economica Eclusiva, La Zona,* supra note 17, at 18–19; J. Farnell and J. Elles, In Search of a Common Fisheries Policy 8 (1984).

[22]Cf. Anand, Editor's Introduction, Law of the Sea, supra note 20, at 18. Bombace, however, defined maximum sustainable yield as "the point that indicates the value of the maximum equilibrium catch from a given least possible fishing effort, and that if maintained constantly would give a constant catch in temporal equilibrium." Bombace, *La Gestione delle Risorse Biologiche: Aspetti Tecnico Scientifici,* in *La Zona,* supra note 17, at 57.

[23]"The 'allowable catch' is 'that catch which, if taken in any one year, will best enable the objectives of (fisheries) management (e.g., the optimum long-term yield) to be achieved." (Extavour, supra note 12, at 192, quoting Doc. GE75-64093 of the FAO Fisheries Department, which has been submitted to the III UNCLOS).

resources. As O'Connell has said, two levels of exploitation have been established: the allowable catch, which would seem to be the optimal sustainable yield (though this has not been stated explicitly); and the harvesting capacity of the coastal State.[24] With regard to the maximum yield, O'Connell wrote:

> It is obvious that fishery management policies must be based upon scientifically verified estimates of the maximum sustainable yield. There have been two approaches towards this question. One approach is to project on a global basis the yields established in practice in such heavily fished areas as the Humboldt Current, and the other is to calculate the amount of phytoplankton which is naturally produced in the oceans, and on which the fishery stocks depend. There is a wide discrepancy in the results reached by these methods. The political and legal issues for fishery management are obviously affected by the inconclusive character of the scientific evaluations that have been made, and also controversial views respecting the management policies of some coastal States and their competence to give effect to these policies.[25]

On examination of the relationship between the allowable catch and the harvesting capacity of the coastal State, it is possible that in practice the latter may be insufficient for the exploitation of all the former. As a result there arises a surplus of the allowable catch of the living resources of the EEZ, a surplus defined by Pastor-Ridruejo and Carrillo-Salcedo as "the difference between the allowable catch and the harvesting capacity."[26] It is in the exploitation of this surplus of the living resources of the EEZ that the LL/GDS of the same region or subregion would have a right to participate in the terms laid down by the Convention and subject to the limitation there specified for developed LL/GDS. In the case of developed LL/GDS, the right to participate applies exclusively to the exploitation of the living resources of the EEZ of developed coastal States of the same subregion or region; and in such cases there must evidently be a surplus of living resources, since otherwise, as we shall see below, there would be no

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[24]O'Connell, supra note 20, at 564.

[25]Id.

[26]Pastor-Ridruejo, in *La Convención,* supra note 19, at 85; Carrillo-Salcedo, *El Derecho Internacional en un Mundo en Cambio,* 216 (1984). Similarly, for Meseguer, the surplus is "a new concept in International Fisheries Law that in principle expresses the arithmetic result of subtracting the harvesting capacity of the coastal State's own fishing fleet from the total allowable catch fixed by the State." Meseguer, *Acuerdos Bilaterales y Multilaterales de Pesca Suscritos por España: Naturaleza y Problemas, Situación,* 1984, No. 4, at 79. See also Carroz, *Le Nouveau Droit des Pêches et la Notion d'Excedent,* 24 *Annuaire Francais de Droit International* at 851–865 (1978).

point in regulating the participation of developing LL/GDS as is expressly done in paragraphs 3 and 4 of articles 69 and 70, respectively.

Finally, with regard to the calculation of the surplus and related concepts, I must point out, as O'Connell does, that the determination of the allowable catch is not completely subjective because the coastal State "has the obligation to promote the objective of optimum utilization. Also exclusive to the coastal State is the determination of its capacity to harvest the living resources of the EEZ, but this too is not entirely subjective, because of the obligation on the part of the coastal State to allocate the surplus among the other States. The coastal State could hardly be allowed to say that there is no surplus when manifestly it does not have the capacity to harvest the entire allowable catch."[27]

2. Participation in the allowable catch

Articles 69 and 70 of the CLS establish in paragraphs 3 and 4 respectively that:

> When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall co-operate in the establishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing land-locked States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. In the implementation of this provision the factors mentioned in Paragraph 2 [respectively 3] shall also be taken into account.

The Convention thus provides for the possibility that *developing* LL/GDS may participate, under the conditions specified, in the living resources making up the allowable catch even though *the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its EEZ.*

It is clear that the italicized text above is a potential source of problems due to the vagueness of the verb "approaches."[28] Part of

[27]O'Connell, supra note 20, at 563.

[28]A rather unsuccessful attempt to clarify the expressions "surplus" and "approaches a point" was made in Doc.A/CONF.62/L.107 (Zaire: amendments) and orally by Kalonji

this vagueness is removed if it is accepted, as in my opinion it should be, that the term "approaches," rather than referring to proximity at a given moment in time, seeks at bottom to ensure that the rights of developing LL/GDS be protected *in advance* by the establishment of the relevant equitable arrangements *before* the coastal State develops a harvesting capacity *close* to "a point which would enable it to harvest the entire allowable catch of the living resources in its EEZ." Such a harvesting capacity would reduce the surplus living resources virtually to zero, and, in cases in which the harvesting capacity equals or exceeds the allowable catch, there would be no surplus.[29] The latter cases must be considered as covered by paragraphs 3 and 4 of articles 69 and 70, because otherwise there would be unjustified discrimination between States with a harvesting capacity close to the allowable catch and States with a harvesting capacity just sufficient to harvest the entire allowable catch.[30] The term "approaches" should thus be understood as providing for prudential advance action in the interests of the effective exercise of rights of participation, for effective participation would be quite ruled out if agreements were to be attempted *after* the harvesting capacity had come close to the

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Tshikala, the Zairean delegate, Off. Docs. III UNCLOS, XVI, 13th April 1982, at 222, and id., 169th Plenary Meeting, 15th April 1982, at 98–99.

Comments on the interpretation of Paragraphs 3 and 4 can be found in Treves, *La Settima Sessione della Conferenza del Diritto del Mare,* 62 *Rivista di Diritto Internazionale* 131–132 (1979); Verwey, supra note 15, at 407; Wani, An Evaluation of the Convention on the Law of the Sea from the Perspective of the Landlocked States, 22 Va. J. Int'l L. 650 (1982); and M. Benouna, *Droit International du Développment* 123 (1983).

The thesis of participation in non-surplus resources is also supported by Pueyo-Losa: "Even when the coastal State has the capacity to take by itself the totality of the allowable catch, the new Convention appears once more to care particularly for the interests of land-locked and geographically disadvantaged States in providing that 'when the harvesting capacity of a coastal State approaches a point . . . .'" Pueyo-Losa, *La Indeterminación del Nuevo Orden Jurídico-Marítimo Internacional: Reflexiones Sobre el Carácter Consuetudinario de la Zona Económica Exclusiva y el Valor de la Nueva Convención Sobre el Derecho del Mar,* 37 *Revista Española de Derecho Internacional* 345 (1985). Fleischer, too, says that "the provisions of article 69, paragraph 3, and article 70, paragraph 4, go further than those of article 62; they also grant a right to participate even when no surplus exists." Fleischer, The Exclusive Economic Zone Under the Convention Regime and in State Practice, The 1982 Convention on the Law of the Sea, Proceedings of the Law of the Sea Institute Seventeenth Annual Conference, July 13–16, 1983, Oslo, at 260.

[29]The total absence of a surplus would not appear to be a widespread threat in the short term. Cf. Mohan, Fisheries Jurisdiction, Law of the Sea, supra note 20, at 243.

[30]This view seems to answer the concern expressed by Caflisch when he asks whether "the inclusion of the word 'almost' means that paragraph 3 of article 69 and paragraph 4 of article 70 would become inapplicable as soon as the harvesting capacity of the coastal State reached the totality of the admissible catch." Caflisch, *La Convention . . . .*, supra note 17, at 73. The same answer is implied in quotation from Pueyo-Losa, note 28 supra: "Even when the coastal State has the capacity to take by itself the *totality* of the allowable catch . . . ."

allowable catch. At that point, cooperation in the establishment of equitable arrangements on a bilateral, subregional or regional basis would be quite impossible, at least as regards coastal States with harvesting capacities close to their allowable catch.

In the absence or near-absence of surplus living resources, rights of participation are to be based on the allowable catch,[31] i.e., the sum of the harvesting capacity plus any surplus. For several reasons, paragraphs 3 and 4 cannot be understood as simply reinforcing the right to participate in practically non-existent resources. Firstly, the latter interpretation would discriminate between States with a harvesting capacity close to their allowable catch and States with smaller capacity or capacity for the entire allowable catch, neither of which would be affected by such reinforcement. Secondly, paragraphs 3 and 4 never mention participation in the surplus, but in "the living resources of the exclusive economic zones of coastal States of the subregion or region." Finally, even if the literal text of these paragraphs were not sufficient to make this point clear, this interpretation follows from what is said in the Explanatory Memorandum on the Proposals (Doc. NG.4/9), presented by the Chairman of Negotiating Group 4, Ambassador Satya Nandan of Fiji (Doc. NG.4/10 of 3rd May 1978). In this Memorandum, Ambassador Nandan writes:

> In my view, if the coastal State is able to harvest the entire allowable catch on its own, the land-locked and geographically disadvantaged States do not have a strong basis for insisting on participation in such a situation. To allow such participation in these circumstances might well bring about the kind of detrimental effect which the coastal State wishes to avoid. At the same time if the harvesting of the entire allowable catch by the coastal State is the consequence of joint ventures or other similar arrangements with third parties, I think the land-locked and geographically disadvantaged States have a point when they say that their exclusion then would not be equitable.
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> The solution that I am therefore suggesting is the inclusion in articles 69 and 70 of a new provision to deal with this situation. This is to be found in paragraph 3 of article 69 and paragraph 4 of article 70. Under

[31]The Canadian delegate, Mawhinney, perhaps took the opposite view when, with reference to the Negotiating Text Formulations of Doc.NG.4/9/Rev.2, he said that the Canadian delegation "interpreted articles 69 and 70 to mean that the access of the land-locked and geographically disadvantaged States to the exploitation of those living resources continued to be limited to surplus resources; it would have to be clearly stated in the final text that a coastal State which approached the point of being able to harvest the entire allowable catch had no financial obligation of any kind, for it could not be expected to pay for the right to utilize its harvesting capacity to the full in the 200-mile zone off its own coast." 103rd Plenary Meeting, 18th May 1978, Off. Docs. III UNCLOS, IX, at 69. It is possible that in speaking of limitation to the surplus, the Canadians meant to refer to the first paragraphs of articles 69 and 70.

> this new provision, in the kind of situation I have just mentioned the coastal State shall take appropriate measures to enable the developing land-locked and geographically disadvantaged States to have adequate participation in such joint ventures or other similar arrangements on terms satisfactory to the parties concerned.

Paragraphs 3 and 4 of articles 69 and 70 of the Negotiating Text Formulations of Doc. NG.4/9 respectively propose the following:

> When a coastal State, as the consequence of joint ventures or other similar arrangements with third parties, increases its capacity to exploit the living resources of its EEZ to the point of harvesting the entire allowable catch, it shall take appropriate measures to enable developing land-locked States, especially those that have fished in the zone, to have adequate participation in such joint ventures or other similar arrangements on terms satisfactory to the parties concerned.

I point this out in order to avoid misunderstandings like that exhibited by Oxman,[32] who related the content of Doc. NG.4/10 to Doc. NG.4/9/Rev.2, whereas it was in fact written to explain Doc. NG.4/9, in which the specific treatment of developing LL/GDS first appears. Doc. NG.4/9/Rev.2, which is echoed almost literally in the Convention, makes no mention of basing the specific treatment of developing LL/GDS on the increase, as the consequence of joint ventures or other similar arrangements with third parties, of the capacity of a coastal State to exploit the living resources of its EEZ to the point of harvesting the entire allowable catch. My understanding is that this omission is intentional, and leads to the CLS logically being interpreted, as above, in terms of the simple possession of a harvesting capacity close to the allowable catch, regardless of the factors that may have created this capacity.

In my opinion, the correct interpretation of the Convention thus provides for two kinds of participation: participation based on the surplus resources, which we have seen to form part of the allowable catch; and participation based on the allowable catch itself.[33] The possibility of the latter cannot be refuted on the grounds of a hypothetical contradiction between, on the one hand, paragraphs 3 and 4 of articles 69 and 70 respectively, and, on the other, article 62

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[32]Oxman, The United Nations Conference on the Law of the Sea: the Seventh Session (1978), 73 Am. J. Int'l L. 16–18 (1979).

Doc. NG.4/10 was first published on May 3rd 1978 to explain the proposals made in Doc.NG.4/9, and was later distributed, without any change in its content, under the title Explanatory Memorandum on the Proposals (NG4/9/Rev.2).

[33]The same view is taken by Caflisch, *La Convention . . .* , supra note 17, at 72–73.

paragraph 2 (which provides that other States be given "access to the surplus of the allowable catch"). This is so because, as the Zairean delegate Kalonji Tshikala pointed out, articles 62, 69 and 70 form "an organic whole and must be read in conjunction with one another."[34] This follows not only from the fact that these Articles belong to a single convention and deal with the same material subject matter, but also from article 62 paragraph 2's speaking explicitly of giving access to the surplus of the allowable catch with "particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein," for the only developing States explicitly mentioned in articles 69 and 70 are those referred to in paragraphs 3 and 4 respectively.

Before leaving this subject, it is appropriate to recall certain considerations that were voiced in UNCLOS III, and which to my way of thinking are valid, with respect to the discrimination between developed and developing LL/GDS in paragraphs 3 and 4 of articles 69 and 70. The Swiss delegate, Monnier, for example, speaking on August 26, 1980 of the Integrated Text/Rev.2, commented that his delegation "considered unjustified and inequitable the distinction made in article 69 between developed and developing land-locked States."[35] The same day, Wolf, speaking in representation of Austria and as Chairman of the Group of LL/GDS, stated more specifically that his delegation "did not see any need to confine the rights set out in article 69, paragraph 3, to developing countries, since they had their origin in the establishment of the exclusive economic zone, in respect of which no distinction had been made between developing and developed coastal States;"[36] and on March 31, 1982, in relation to the Draft Convention, Wolf repeated that "particular emphasis should be laid on the rights of the land-locked and geographically disadvantaged States in regard to the exploitation of living resources in the exclusive economic zone. No distinction should be drawn between developing and other States in that respect as both categories were equally disadvantaged."[37]

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[34]169th Plenary Meeting, 15th of April 1982, Off. Docs. III UNCLOS, XVI, at 98–99. I thus disagree with O'Connell, who with regard to article 62, paragraph 1, wrote that "although this is said to be without prejudice to Article 61, that is probably intended as a reference to paras. 2–5 of that Article, since a contradiction would arise if Article 62(1) would override Article 61(1)." O'Connell, supra note 20, at 563.

[35]136th Plenary Meeting, id., XIV, at 43.

[36]137th Plenary Meeting, id. at 52–53.

[37]163rd Plenary Meeting, 31st March 1982, id., XVI, at 56.

In my view, this discrimination is pointless. Given the spatial restrictions on the rights of developed countries imposed in paragraphs 4 and 5 of articles 69 and 70 respectively, it would have been fairer to adopt, albeit as the lesser evil, a text such as the formulation of articles 58, 59, 59b and 60 proposed by Ambassador Satya Nandan, as Chairman, for consideration by the Group of 21 (Doc. NG.4/1, September 8, 1976). The proposed article 58 paragraph 3 establishes that "should there not be any surplus of a considerable number of species in a particular zone, the States concerned shall cooperate at a bilateral, subregional or regional level to establish equitable arrangements allowing the land-locked State concerned to participate in the exploitation of the living resources of such zone or zones," and exactly the same provision is made with respect to developing States with special geographical characteristics. It should be noted that in this formulation the state of development of land-locked States is not mentioned when they are referred to; it is in paragraph 4 that the state of development is taken into consideration when the rights of participation of developed land-locked States are restricted to participation in "the exclusive economic zones of developed coastal States of the same region or subregion."

THE PREFERENTIAL NATURE OF THE RIGHTS

The establishment of both preferential and non-preferential regimes is invariably followed by particularization, while particularized regimes may also be imbued with a preferential spirit. Since the CLS opted for a particularized regime, it may therefore be asked whether, with respect to third party States, there are preferential features in the regime established for the participation of LL/GDS in the living resources of the EEZ of coastal States of the same subregion or region.

In my view it is unquestionable that the rights of participation established in paragraphs 3 and 4 of articles 69 and 70 of the Convention are preferential in nature. This is particularly evident in that, as we have seen, the resources referred to in these paragraphs belong to an allowable catch with no surplus or with a practically non-existent surplus, whereas other States only have right of access, by virtue of article 62, to surplus allowable catch. Furthermore, paragraphs 3 and 4 of articles 69 and 70 respectively stipulate that participation shall be provided for by "the establishment of equitable arrangements [. . .] as may be appropriate in the circumstances and on terms satisfactory to all parties," in doing which "the factors

mentioned in paragraph 2 [respectively 3] shall also be taken into account''; and the paragraphs alluded to refer to agreements ''taking into account, *inter alia:* (a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State; . . . . (d) the nutritional needs of the populations of the respective States.''

With regard to the rights of participation established in paragraph 1 of articles 69 and 70, it should be noted that although these paragraphs refer to participation in the surplus, they contain a wealth of detail that is totally lacking from the provisions of article 62 on the access of other States to the surplus. Specifically, paragraph 1 of articles 69 and 70 establish that ''land-locked [respectively 'geographically disadvantaged'] States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus . . . taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62.''

The latter part of the above sentence, where the rights of participation are subjected to ''conformity with the provisions of this article and of articles 61 and 62,'' may provoke certain doubts as to which are the articles on which the rights of LL/GDS are primarily founded; but in my opinion it is clear that they are articles 69 and 70. This is so because the absence of these Articles would remove all distinction between LL/GDS and other States considered in article 62, which the inclusion in the CLS of *ad hoc* articles concerning the complex problems of LL/GDS shows cannot have been the intention of those who drew the Convention up. What, then, is the meaning of the expression ''in conformity with the provisions of . . . articles 61 and 62?'' To my mind, this reference to articles 61 and 62 cannot be thoroughly understood without consideration of its antecedents in the Informal Single Negotiating Text, whose articles 57 and 58 were to apply ''without prejudice to the provisions of articles 50 and 51'' (paragraphs 2 and 3 of articles 57 and 58 respectively); in the Revised Single Negotiating Text, whose articles 58 and 59 were to be ''subject to the provisions of articles 50 and 51'' (paragraphs 2 and 3 of articles 58 and 59 respectively); in the Informal Composite Negotiating Text, whose articles 69 and 70 were likewise to be ''applied subject to the provisions of articles 61 and 62'' (paragraphs 2 and 3 of articles 69 and 70); in the Informal Composite Negotiating Text/Rev.1 and Rev.2, whose articles 69 and 70 state that ''Land-locked States [respectively ''States with special geographical characteristics''] shall have the right to participate . . . in conformity with the provisions of this article and of articles 61 and 62'' (paragraph 1 of articles 69 and 70);

and in the Draft Convention (Informal Text) and the Draft Convention, both of which, like the CLS itself, stipulate that "land-locked [respectively "geographically disadvantaged"] States shall have the right to participate . . . in conformity with the provisions of this article and of articles 61 and 62."

The reference to articles 61 and 62 (or their equivalents in earlier Texts) was the object of a variety of appreciations in the doctrine. The Group of LL/GDS, for example, adopting an attitude that to my mind was far-fetched but was perhaps comprehensible from the tactical point of view, had complained that article 57 of the Informal Single Negotiating Text "granted land-locked countries rights of participation only upon an equitable basis. This 'right' was more an 'advantage' than a 'right' in the strict sense, because it depended on the faculties of the coastal State as defined in Arts. 50 and 51,"[38] and that "the Revised Single Negotiating Text still reflected the position of the coastal States. The situation of the LL/GDS was if anything worse, since the expression 'without prejudice to the provisions' that had figured in Arts. 57 and 58 of the Informal Single Negotiating Text had been replaced by the words 'subject to the provisions'."[39]

General evaluations aside, the problem of interpreting the references to articles 61 and 62 (or their equivalents) was centered in the doctrine on the question of whether these references would have the effect of limiting the participation of LL/GDS to the surplus of the living resources, an issue that was not to be explicitly settled until the formulations of Doc. NG.4/9/Rev.2 were incorporated in the Informal Composite Negotiating Text/Rev.1. Jayakumar, for example, recorded that "the LL/GDS were particularly upset that the Chairman of the Second Committee altered the SNT articles wording of 'without prejudice to the provisions of articles 50 and 51' to the RSNT wording of 'subject to the provisions of articles 50 and 51.' In the 'without prejudice' wording of the SNT articles, it was arguable whether the LL/GDS were entitled to the surplus only or to some of the allowable catch as well. By altering this to 'subject to,' the RSNT now appeared to swing more categorically towards limiting LL/GDS rights to the surplus only."[40] Extavour did little to clarify matters

[38]Memorandum of the Group of Land-Locked and Geographically Disadvantaged States on the Rights of Land-Locked and Geographically Disadvantaged States in the Exclusive Economic Zone, Doc. NG.4/7, 20th April 1978, at 4.

[39]Id.

[40]Jayakumar, supra note 11, at 86. Cf. also Nelson, The Function of Regionalism in the Emerging Law of the Sea as Reflected in the Informal Composite Negotiating Texts, Regionalization, supra note 17, at 20 and 53.

when he wrote that in view of articles 50 and 51 of the Revised Single Negotiating Text, to which the provisions of article 58 were to be subject, it was likely that, in the exercise of their rights of participation in the exploitation of the biological resources of the EEZ, land-locked States might be required to observe a wide variety of terms and conditions established by the coastal State.[41]

The topic was most closely and in my view most successfully studied by Fleischer, who with reference to the Revised Single Negotiating Text had this to say about the relationships between articles 69 and 70 and articles 61 and 62 that justify the references to the latter in the former:

> However arguably even now the text is not entirely clear in this respect. In treaty language *subject to* may mean that a thing shall be respected and not touched upon but not necessarily that this thing shall also govern that which is otherwise stated in the Article in question. That Articles 58 and 59 are *subject to* Articles 50 and 51 may imply that the duties of coastal States to make the surplus available to other States according to Article 51 and the principles of total allowable catch and optimum utilization of resources (Articles 50 and 51) shall remain untouched by Articles 58 and 59. But at the same time the latter Articles may provide rights for third-party States which go further than those already accorded in Article 51 and which are not subject to the same limitations. Even if the rights under 58 and 59 go further and are additional to those specified in Article 51, Articles 58 and 59 may nevertheless be *subject to* 51. From a legal-logic viewpoint one might say that if *subject to* really meant that all limitations in Articles 50 and 51 should apply fully to Articles 58 and 59, the latter would be superfluous or strictly limitative (introducing new limitations in addition to those following from Articles 50 and 51) instead of permissive in relation to third-party States. This statement may seem contrary to the intention of Articles 58 and 59, which are meant to enhance not limit rights for LL and GDS.[42]

And he continues later:

> According to Article 51, paragraph 2, the access of foreign State nationals to the EEZ under that provision is pursuant to the terms contained in paragraph 4 of the same Article. Article 51, paragraph 4, obliges the foreign fishermen to comply with the regulations of the coastal State. The regulations include the payment of fees and other remuneration, which in the case of developing coastal states may consist of "adequate compensation in the field of financing, equipment

[41]Extavour, supra note 12, at 249.

[42]Fleischer, The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone, Law of the Sea IX, 14 San Diego L. Rev. 561 (1977).

> and technology relating to the fishing industry." Was the intention of the drafters and of the UNCLOS that the cross-reference from Articles 58 and 59 to Article 51 should include the right of the coastal State to apply this limitation on the rights of foreign states to LL and GDS? Can the intention be that fishing by, for example, Jamaica and Cuba in the coastal waters of Mexico under Article 59 be subject to the transfer of funds from Jamaica and Cuba to the Mexican government? Another example of the limitations applicable under Article 51 is that the coastal State may demand "the landing of all or any part of the catch by such vessels in the ports of the coastal State." Is the interpretation tenable that the rights of developing countries under this Article (which includes countries "particularly dependent, for the satisfaction of the nutritional needs of their populations upon the exploitation of the living resources" in the zone) shall fall under this limitation? Can that be the meaning of the *subject to* reference in Article 59, paragraph 3? One is tempted to say that the answer clearly is no. However, the coastal State must undeniably have its rights to apply ordinary, non-discriminatory fisheries regulations to the fishing vessels from LL and GDS.[43]

Fleischer's comments were afforded *a posteriori* support by the fact that, after various intermediate formulations, the expression "subject to the provisions of articles 50 and 51" was eventually replaced in the Draft Convention (Informal Text), the Draft Convention and the Convention itself by the words "in conformity with the provisions of this article and of articles 61 and 62."

As we have seen, the exercise of rights of participation in surplus resources requires attention to paragraphs 2 and 3 of articles 69 and 70 respectively, according to which:

> The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account, *inter alia:*
> (a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State; . . . .
> (b) the nutritional needs of the populations of the respective States.

With regard to paragraph 2(a), I should like to point out that "the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State" (which in view of the comprehensive

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[43]Id. at 562. A compatible, but more condensed and less detailed, analysis of this question, and of the Convention in general, is given by Fleischer, supra note 28, at 269–271. With regard to "the landing of all or any part of the catch . . . in the ports of the coastal State" (Art. 62, Paragraph 4(h)) by land-locked or geographically disadvantaged States, the delegate of Lesotho, Makeka, asserted that "it was . . . unfair to restrict them in their disposal and use of the resources they had harvested." 136th Plenary Meeting, 26th August 1980, Off. Docs. III UNCLOS, XIV, at 34.

reference to articles 69 and 70 in article 62 paragraphs 2 and 3 is also relevant to third-party States) should be construed in such a way as to allow systematic and coherent interpretation of articles 62, 69 and 70, and hence as seeking a balance between article 56 (Rights, jurisdiction and duties of the coastal State in the exclusive economic zone) and articles 69 and 70. Systematic interpretation is facilitated by the wording of article 69 paragraph 2 and article 70 paragraph 3 themselves, which stipulate that the States concerned shall establish the terms and modalities of participation "taking into account, *inter alia*" the factors listed in subparagraphs (a)–(d). This is so because the purpose of the expression "*inter alia*" can only be to induce a systematic interpretation of the CLS that unfolds all its intent and determines justly the extent of the supposedly contradicting rights. Were it not so, the Convention, which in this and many other questions is in any case far from being a model of clarity, would be converted into an instrument totally foreign to the aims announced in its Preamble. Articles 69 and 70, whose drafting was one of the most debated problems of all UNCLOS III, would be utterly futile were article 69 paragraph 2(a) and article 70 paragraph 3(a) to be construed literally without regard to their context, part of which (paragraph 2(d) or 3(d)) is that the terms and modalities of participation shall be established taking into account, *inter alia,* "the nutritional needs of the populations of the respective States."

Another provision that it is worth drawing attention to is the stipulation that terms and modalities of participation shall be established "through bilateral, subregional or regional agreements." The possibility of establishing subregional or regional agreements places the rights of participation of LL/GDS on a different footing from those of third-party States, to whom access shall be given "through agreements or other arrangements." The different levels of geographical scope envisaged for the exercise of the rights of participation of the LL/GDS throw further light on the special treatment afforded these rights, whose elevation from the bilateral to the subregional and regional spheres is prompted by an unfulfilled desire to establish communication between the worlds of the "haves" and "have nots," not because of any spontaneous impulse but owing (apart from the strength of the Group of LL/GDS) to the causes on which those rights are founded.[44] As Azcárraga y Bustamante has pointed out, there is

[44]Fleischer would seem to support this argument. He writes:
Indeed, one may find limitations deriving from Article 51 which do not apply to Articles 58 and 59—despite the reference in the latter to the former (subject to). The wording of

likewise a difference between the participation dealt with in articles 69 and 70 and that of articles 62 in that LL/GDS "enjoy rights of participation, whereas third-party States are to participate on the basis of concessions."[45] In my view this is the principal difference between the two regimes. Pérez-González, too, in discussing the access to the surplus governed by article 62 paragraph 2, remarks that "access by third-party States is to be specified via agreements or other arrangements in conformity with a series of conditions established by the coastal State, which in principle amounts to giving the

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Article 51 clearly implies a certain degree of discretion on the part of the coastal State in granting access to surplus resources; this discretion must be regarded as a limitation upon the rights of other States. Such States may claim the right to fish only as it is accorded by the coastal State (which "shall give . . . other States access"). Foreign States may claim a right to fish after the coastal State has, *inter alia,* decided on the distribution of quotas among claimants in accordance with the guidelines in Article 51.

LL or GDS have a stronger position under Articles 58 and 59. These States "shall have" a "right" to fish that is not contingent upon the coastal State's interpretation and application of its obligations. Clearly, the stronger language in favor of third-party States in Articles 58 and 59 must prevail here over the limitation following from Article 51.

Another difference between the Articles is that under Article 51 the coastal State has a choice between "agreements or other arrangements"—language which seems to include the somewhat precarious system of fishing rights accorded by unilateral legislation as opposed to treaty binding the two governments. Under Articles 58 and 59 the terms and conditions "shall be" determined "through bilateral, subregional or regional agreements". Again, the rule of Article 58 or 59 must prevail, even if these Articles are "subject to articles 50 and 51." See supra note 42, at 561–562, and supra note 28, at 270.

[45]This eminent maritime lawyer likewise wrote that "a discrimination may be established among third-party States. Mediterranean States, by which term I do not mean to refer to States adjoining the Mediterranean Sea with capital letters but to those that are located 'in the middle of the land,' i.e., that have no shore or direct access to the sea, or to geographically disadvantaged States, will in principle enjoy the right to exploit the biological resources of the economic zone of neighbouring coastal States . . . . As for other States foreign to the zone, in particular those whose fishermen habitually exploited the biological resources of the zone, they would not in fact be excluded, though they could only be allowed in on the basis of concessions granted by the coastal State under special international agreements to the effect." Azcarraga y Bustamante, *El Dominio Marítimo del Estado Sobre la Zona Económica Exclusiva* 35 (1983).

Similar opinions are expressed by Reuter, who wrote that "as regards the biological resources of this zone, land-locked States and disadvantaged developing States would have the right to participate in the exploitation of the coastal zones of neighboring States, but States that habitually fish these waters would have no more than the expectation of discretional fishing licenses" P. Reuter, *Derecho Internacional Público* 306 (1982); by Scovazzi in *La Pesca Nella Zona Economica Esclusiva,* in *La Zona,* supra note 17, at 19; and by Juste-Ruiz, who wrote that "mere perusal of the rest of article 62 nevertheless makes it clear that the access of third parties to the surplus of the zone is conceived more as a concession granted by the coastal State than as a real right of the third-party States." Juste-Ruiz, *La Pesca Española ante el Actual Proceso de Revisión del Derecho del Mar (con Especial Referencia a la Problemática de Nuestra Flota Sur), Annuario de Derecho Marítimo,* No. 1, 1981, at 424.

latter absolute power of control, and, of course, of choice of clients and modalities of access."[46]

Further to the argument that I have been developing, it must be pointed out that none of the provisions concerning rights of participation that are made in articles 69 and 70 appear in article 62. The latter, in establishing that when a coastal State does not have the capacity to harvest the entire allowable catch it shall give other States access to the surplus of the allowable catch, merely favours the rights of LL/GDS by stipulating that access shall be given "having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein." Similarly, paragraph 3 of article 62 provides that "in giving access to other States to its exclusive economic zone . . . the coastal State shall take into account all relevant factors, including, *inter alia,* . . . the provisions of articles 69 and 70." I am nevertheless far from suggesting that the expressions "shall . . . give other States access" (paragraph 2) and "in giving access to other States" (paragraph 3) leave everything in the hands of the coastal State. The words "shall . . . give access" enshrine a definite obligation upon the coastal State to allow other States access to the surplus, an obligation which, though permitting the choice referred to by Pérez-González, entails a correlative right to the surplus. Like Fleischer, I consider that the *raison d'être* of the duty to give access to the surplus is the need to utilize all available sources of protein for the good of the world as a whole and developing countries in particular, so that to argue that coastal States

[46]Pérez-González, in *La ordenación* . . . , supra note 21, at 23. The same point is made by Rao, supra note 16, at 257.

Fleischer wrote:

> It may be said that in general the coastal state has a wide measure of discretion in regard to the distribution of that part of the allowable catch of its EEZ which it cannot harvest itself. The rule on the granting of access to foreign states to the surplus is mandatory—the coastal state "shall" give access according to article 62, paragraph 2—but in the implementation of this basic obligation the coastal state has evidently a certain freedom of action as to which states will be given the right to fish and as to the quotas to be allocated to the different foreign states with respect to the various species and fisheries in the EEZ. However, this right of decision is not purely arbitrary. As is said in article 62, paragraph 3: In giving access to other states the coastal state must "take into account all relevant factors," including the factors mentioned specifically in the same paragraph 3.
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> That the implementation of the basic obligation to give access to a surplus must be considered from case to case and from one year to the other also follows from the fact that it must be effectuated through "agreements" or other "arrangements" between the coastal state and the other states which obtain a right of access. If no agreement is reached, the coastal state may refuse to give access to the state concerned or it may use the option of an "arrangement" by establishing the quotas unilaterally in its own legislation.

Fleischer, supra note 28, at 268.

have the right to deny foreign fishermen access to the surplus is illogical. "The coastal State's needs, which are the basis of the development toward an extended fishery zone and an important part of the legal reasoning which can be invoked in favor of that development, do not seem to go further than the catch which that State is capable of harvesting. Consequently, the justification for Article 51, paragraph 2, and Articles 58 and 59 are rules which may be deduced from general principles of law as to the necessary catch."[47]

We have thus seen that it is reasonable to consider the rights of participation of LL/GDS as being of a different nature from and enjoying preference over those of third-party States. This preferential nature is evident from the wording of paragraphs 3 and 4 of articles 69 and 70 respectively: "When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch . . . ." Note that the harvesting capacity considered is that of the coastal State, not that of the coastal State plus third-party States, which would have indicated possible priority of the rights of the third-party States. Furthermore, there is no provision in article 62 by which, the surplus being zero or negligible, developing third-party States are granted rights of participation in the allowable catch. And finally, it is clear that there would be no sense at all in provisions that, while obliging coastal States to reduce their harvesting capacity when close to the allowable catch so as to allow the participation of LL/GDS, left it open for such participation to be frustrated by the harvesting capacity of third-party States even if that of the coastal State were considerably less than the allowable catch; such discrimination between coastal and third-party States would be a monument of legislative irrationality.

In paragraph 1 of articles 69 and 70, the preferential nature of the rights of participation of LL/GDS may be deduced from the rights being to participate "on an equitable basis" "in the exploitation of an appropriate part of the surplus." Neither of these thorny expressions is present in article 62. Exactly what an "appropriate part" is is, in my view, to be determined by the action and evaluation of the mechanisms and factors referred to in article 69 paragraph 2 and article 70 paragraph 3. However, it is more difficult to delimit the meaning of the expression "on an equitable basis." In the context of

[47]Fleischer, supra note 42, at 556. Similarly, Pulvenis wrote (referring to the coastal State) that "it has the *obligation* to ensure the participation of third-party States in the exploitation of those resources." Pulvenis, *Zone Économique et Plateau Continental: Unité ou Dualité, Revue Iranienne des Relations Internationales,* Nos. 11–12, Spring 1978, at 116.

the Revised Single Negotiating Text, one possible hypothesis was expounded by Fleischer as follows:

> Another difficulty is found in the term "on an equitable basis," which refers to the access existing by virtue of Articles 58 and 59. This language, which is found in Articles 58 and 59 but not in Article 51, must prevail over the limitations which are or may be applicable under the latter.
>
> This lengthy analysis poses crucial questions: Does the language to the effect that Articles 58 and 59 shall be *subject to* Article 51 imply that the limitation in Article 51 concerning the surplus is applicable also in regard to Articles 58 and 59? If other limitations found in Article 51 are not applicable to Articles 58 and 59, why should the surplus limitation in particular be applicable? And may not the equitable basis, which qualifies the rights accorded under Articles 58 and 59 be regarded as an alternative to the qualification given under Article 51—namely the restriction to the surplus? No need exists for the reference to equity in Article 51, for the extent of the obligations on coastal States and of the rights of other States *in toto* is there clearly defined. However, in Articles 58 and 59 the extent of the obligations incumbent upon the coastal State and consequently the rights of the foreign States covered by those Articles are provided for with reference to another criterion, "on an equitable basis." May not this criterion be regarded as superseding that of Article 51, irrespective of the *subject to* references contained in Articles 58 and 59? The application of the *lex specialis* of the latter Articles to the exclusion of the limitations contained in the more general rules of Article 51 might not be contrary to the main principles of treaty interpretation.[48]

Notwithstanding the above stance, many different views have been expressed in the doctrine, ranging from acceptance of the preferential treatment to be afforded LL/GDS to total denial of such standing. Among the exponents of the latter opinion, Hoft wrote that "Finally, within the Draft Convention (Informal Text) there is no order of preference in favour of certain States' claims to the surplus, in spite of there having been Delegations that argued the priority of the land-locked States and States with special characteristics of the

[48]Fleischer, supra note 42, at 563. Concerning this hypothesis, Njenga wrote: "Serious queries arise as to the nature of the right granted to land-locked and geographically disadvantaged States if it is considered 'subject to the existence of a surplus.' What is it that will be shared 'on an equitable basis' when there is no surplus, whether of one or all the species?" Njenga, El *Nuevo Derecho* del Mar y el Nuevo Orden *Económico Internacional,* 1 *Estudios del Tercer Mundo* 33 (1978). Kronful was more downright: "Furthermore, participation on 'an equitable basis' to obtain an equitable share of the living resources provides the LLS and GDS permanent access to fish an annual portion of the total allowable catch in the EEZ of their neighbours." Kronful, The Exclusive Economic Zone: A Critique of Contemporary Law of the Sea, 4 J. Mar. L. & Com. 474 (1978).

subregion or region."[49] Njenga, in an apparently preferentialist tone, asked "Should LL/GDS, and particularly developing LL/GDS, enjoy some kind of preference over others with respect to the surplus? And if so, how will this preference be regulated by the Convention?"[50] The possibility of preference was conceded by González-Campos and Sánchez-Rodríguez, for whom

> access to *surplus catch* by other States involves considerable relaxation of the principle of "exclusivity" in the exploitation of fishing resources. However, *the faculty of access is subjected to various conditions*. 1) In the first place, to the existence of a surplus . . . 2) Secondly, to the possible preferential access of certain "disadvantaged" States: land-locked States, the developing States with special characteristics of the region, and finally, though this point is as yet unsettled, on the assumption of a "preferential" regime, the States that have traditionally fished in the zone.[51]

According to Meseguer, the Informal Single Negotiating Text was already preferentialist in nature: "With regard to the regime governing the participation of other States in the zone, the objective of the Spanish position was to try to introduce in the wording of the various articles the general theses defended in Caracas . . . ; suppression of the preferential criteria established for the group of so-called 'geographically disadvantaged States' . . . and, finally, similar exclusion of the preferential criteria established in favour of developed land-locked States."[52] With regard to the Composite Negotiating Text, Herrero-Rubio wrote that:

> with respect to other States, the Composite Negotiating Text establishes interesting distinctions in that they determine differences, and sometimes considerable differences, in their participation in the special economic zone.
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> These articles, 69 and 70, which discriminate in favour of LL/GDS, are founded on the purpose of establishing material equality where

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[49]Hoft, *Los Problemas Regionales Marítimos Argentinos y el Derecho Internacional Público*, 1 *Anuario Argentino de Derecho Internacional* 213 (1983). This opinion has also been voiced in Phillips, The Exclusive Economic Zone as a Concept in International Law, 26 Int'l & Comp. L.Q. 604 (1977); Carroz, Le Nouveau . . .," supra note 26, at 858; and Les Problemes . . ., supra note 21, at 188–189; and O'Connell, supra note 20, at 566.

[50]Njenga, supra note 48, at 33. Questions were likewise raised by Oxman, supra note 32, at 16.

[51]Sánchez-Rodríguez and González-Campos, supra note 21, at 481. An equally hypothetical stance appears to be taken by Farnell and Elles, supra note 21, at 7–8.

[52]Meseguer, *III Conferencia Sobre el Derecho del Mar: Posición Española en Materia de Pesca Marítima*, 30 *Revisita Española de Derecho Internacional* 381 (1977).

purely formal equality involves a disadvantage.[53]

Simões-Ferreira recalled that the LL/GDS "have accordingly insisted to include that articles 69 and 70 be amended to include a reference to a preferential or priority right of the disadvantaged and landlocked. Coastal states were unwilling to have such an express reference in the text, contending that these preferential rights were implied."[54] Finally, Pueyo-Losa's comments are also pertinent:

> Though the new Convention on the Law of the Sea begins by recognizing coastal States' sovereign rights as regards the exploration and exploitation of the living resources of its exclusive economic zone, it then appears to restrict or limit their capacity in this respect when it notes the possibility that other States may have access to the exploitation of these resources. True, the coastal State is to determine not only "the allowable catch of the living resources in its exclusive economic zone" (Art.61.1) but also "its capacity to harvest the living resources" of this area of the sea, but it is also stipulated that "where the coastal State does not have the capacity to harvest the entire allowable catch, it shall give other States access to the surplus of the allowable catch" (Art.62.2); and it would further seem that this presumed obligation of the coastal State to give access to the "surplus" is enounced with greater rigour regarding LL/GDS, since Arts. 69 and 70 specify that these two kinds of State "shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region . . . ."[55]

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[53]Herrero-Rubio, *La Zona Económica Especial en la III Conferencia de las Naciones Unidas Sobre el Derecho del Mar, Estudios de Derecho Internacional, 2 Homenaje al Profesor Miaja de la Muela* 692–693 (1979).

[54]Simões-Ferreira, The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference, 7 Ocean Dev. & Int'l L. Nos. 1–2 (1979).

[55]Pueyo-Losa, supra note 28, at 344. Again, Pueyo-Losa states that "from the provisions contained in Arts. 69 and 70 it might nevertheless be deduced that there is recognition of preferential right of access by land-locked and geographically disadvantaged States . . . ." Id. at 347. See also id. at 348. Other supporters of the preferential right thesis include Hassan, supra note 17, at 708–709; Hafner, The Land-Locked and Geographically Disadvantaged States, 38 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 614 (1978); Pulvenis, supra note 47, at 116; Caflisch, La Convention . . . , supra note 17 at 71; and The Fishing . . . , supra note 17, at 38; A. Moulay, *Les Nouvelles Regles de Droit International de la Mer et leur Application au Maroc* 81 (1981); A. Lahlou, *Le Maroc et le Droit des Pêches Maritimes* 238 and 323–324 (1983); Bennouna, *Le Droit International Relatif aux Matieres Primes, Recueil de Cours. Academie de Droit International,* T.177, 1982, IV, at 140; and in *Droit International du Développment,* supra note 28, at 123 (on both occasions, Bennouna appears to limit agreements on participation by developing States, whereas the Convention literally establishes limitations only for developed States); and Mengozi, *Patrimonio Comune dell'Umanita e Zona Economica Esclusiva, La Zona,* supra note 17, at 140.

At this point I should make it clear that, in accordance with all that I have said above, my position supports, within the particularized regime provided by the CLS for LL/GDS, the defence of the existence of a general rule of preferentiality giving priority to the rights of these States over those of third-party States in the question of participation in the living resources of the EEZ; priority both as regards the origin of such rights and as regards their exercise. This thesis appears to be supported by the Explanatory Memorandum on the Proposals (NG.4/9), (Doc. NG.4/10), the immediate antecedent of the Negotiating Text Formulations of Doc NG.4/9/Rev.2, which were incorporated almost literally in the successive subsequent versions of the Composite Text and the Convention. In this Memorandum, the Chairman of Negotiating Group 4, Ambassador Satya Nandan of Fiji, wrote:

> Let me now turn to the major areas of difficulty which had to be considered in the formulation of these proposals. First of all, it will be recalled that the land-locked and geographically disadvantaged States stated that their participation in the neighbouring exclusive economic zones should be on a preferential or priority basis. Accordingly, they suggested that amendments be made to articles 69 and 70 to expressly include a reference to priority or preference in order to make those articles more meaningful. Many coastal States felt that such explicit wording was not necessary and contended that preference for these States was implicit in the special provisions contained in articles 69 and 70.
>
> While I can understand the views expressed by some of the coastal States on this matter, I am convinced that there is need for some clarification of the relationship between the provisions of articles 69 and 70 and those of article 62. In my assessment, the best way to achieve this is to amend article 62, paragraph 2, by providing that the coastal State in giving access to the surplus of the allowable catch to other States shall have particular regard to the provisions of articles 69 and 70, especially with respect to the developing States referred to in those articles.
>
> This amendment has the merit of avoiding the use of the term "priority" or "preference" in articles 69 and 70, while, at the same time, bringing out more clearly the need for special consideration to be given to the States mentioned in those articles. In my view this is a fair and reasonable compromise between the position of the land-locked and geographically disadvantaged States which sought to include reference to priority or preference and that of those coastal States who wished to suppress any such reference.

Satya Nandan's words are to my mind clear evidence of, at least, the rejection of the non-preferentialist thesis and the acceptance *sub*

limine of specific preference. It should be noted that the Chairman, whose opinion, in view of the informal level at which much of UNCLOS III was conducted, is highly qualified, states that "*many* coastal States felt that such explicit wording was not necessary and contended that preference for these States was implicit in the special provisions contained in articles 69 and 70,"[56] while in the next paragraph he continues "while I can understand the views expressed by *some* of the coastal States on this matter, I am convinced that there is need for some clarification of the relationship between the provisions of articles 69 and 70 and those of article 62."[57] What else could be the "special consideration" he speaks of? Any *tertium genus* that it might be wished to establish as "special consideration" of the LL/GDS could only succeed, however minimal, if embedded in some kind of preferential feature of the rights of participation of these States, and would thus support—and even constitute *stricto sensu*—an expression of this preferentiality.[58]

[56]My italics.

[57]My italics.

[58]The problems discussed in this article are also approached in, among other of my publications, *Reflexiones sobre los Intereses Pesqueros Españoles y los Derechos de los Estados Sin Litoral y en Situación Geográfica Desventajosa en los Recursos Vivos de las Zonas Económicas Exclusivas de otros Estados, Industrias Pesqueras,* Nos. 1422 and 1423, 15th June and 1st August 1986, at 13–15 and 11–14; *Los Derechos de los Estados Sin Litoral y en Situación Geográfica Desventajosa en la Zona Económica Exclusiva: El Ambito de la Participación,* 5 *Anuario de Derecho Marítimo* 97–154 (1986); *Los Derechos de los Estados Sin Litoral en Situación Geográfica Desventajosa en la Zona Económica Exclusiva (Participación en la Explotación de los Recursos Vivos), Xunta de Galicia,* Santiago de Compostela, 1988; *Los Derechos de los Estados Sin Litoral y en Situación Geográfica Desventajosa en la Zona Económica Exclusiva: Fundamentación y Nuevo Orden Económico Internacional, Anuario Mexicano de Relaciones Internacionales,* 1986, at 331–335; *La Zona Económica Exclusiva: Valorización de sus Razones de Oportunidad (con Consideración Particular del Caso Azoriano),* 8 *Semans das Pescas dos Açores, Relatório* 71–78 (1988; Id., 8 *Anuario de Derecho Marítimo,* Vol. VIII, at 257–284.)