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2012

The International Law of the Sea

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City
Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9781107009998

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First published 2012

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Tanaka, Yoshifumi.

The international law of the sea / Yoshifumi Tanaka, University of Copenhagen, Faculty of Law.

pages cm

Includes bibliographical references and index.

ISBN 978-1-107-00999-8 (hardback) – ISBN 978-0-521-27952-9 (paperback)

1. Law of the sea. I. Title.

KZA1145.T36 2012

341.4'5–dc23

2011052555

ISBN 978-1-107-00999-8 Hardback

ISBN 978-0-521-27952-9 Paperback

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Marine Spaces under National Jurisdiction II: Sovereign Rights

Main Issues

This chapter will examine rules governing the contiguous zone, the EEZ and the continental shelf. In the contiguous zone, the coastal State may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. Whilst the LOSC contains only succinct provisions respecting the contiguous zone, the legal nature of the coastal State jurisdiction over the zone deserves serious consideration. The *raison d'être* of the institution of the EEZ and the continental shelf involves the conservation and management of natural resources. In this sense, the EEZ and the continental shelf can be considered as a 'resource-oriented zone'. Owing to the increasing importance of marine natural resources, these zones are particularly important for coastal States. Presently the extension of the continental shelf to a limit of 200 nautical miles attracts particular attention. This chapter will discuss the following issues in particular:

- (i) What is the coastal State jurisdiction over the contiguous zone?
- (ii) What is the coastal State jurisdiction over the EEZ and the continental shelf?
- (iii) What is the difference between territorial sovereignty and sovereign rights?
- (iv) What are the freedoms that all States can enjoy in the EEZ?
- (v) What residual rights are there in the EEZ?
- (vi) What are the criteria for determining the outer limits of the continental shelf?

1 INTRODUCTION

The legal regimes governing the EEZ and the continental shelf are essentially a result of the aspiration of coastal States for their need to control offshore natural resources. As will be seen, the coastal State exercises sovereign rights over the EEZ and the continental shelf for the purpose of exploring and exploiting natural resources. Other States cannot explore and exploit these resources in the EEZ and the continental shelf without the

consent of the coastal State. On the other hand, as the EEZ and the continental shelf are part of the ocean as a single unit, legitimate activities in these zones by third States, such as freedom of navigation, overflight and the laying of submarine cables and pipelines, must be secured.

An essential question thus arises as to how it is possible to reconcile the sovereign rights of the coastal State and the freedom of the seas exercised by other States in the EEZ and the continental shelf. With this question as a backdrop, this chapter will address rules governing the EEZ and the continental shelf. As the contiguous zone is part of the EEZ when the coastal State established it, this chapter will also examine rules governing the contiguous zone.

2 CONTIGUOUS ZONE

2.1 The concept of the contiguous zone

The contiguous zone is a marine space contiguous to the territorial sea, in which the coastal State may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.¹ The development of the contiguous zone was a complicated process of concurrence of different claims by coastal States.² Whilst it has been considered that the origin of the concept of the contiguous zone dates back to the Hovering Acts enacted by Great Britain in the eighteenth century, it was not until 1958 that rules governing the contiguous zone were eventually agreed. The rules governing the contiguous zone were enshrined in Article 24 of the TSC. Later, this provision was, with some modifications, reproduced in Article 33 of the LOSC.

The landward limit of the contiguous zone is the seaward limit of the territorial sea. Under Article 33(2) of the LOSC, the maximum breadth of the contiguous zone is twenty-four nautical miles. Article 33 of the LOSC contains no duty corresponding to Article 16, which obliges the coastal State to give due publicity to charts. It would seem to follow that there is no specific requirement concerning notice in the establishment of the contiguous zone.³ The contiguous zone is an area contiguous to the high seas under Article 24(1) of the TSC. Under the LOSC, the contiguous zone is part of the EEZ where the coastal State claims the zone. Where the coastal State does not claim its EEZ, the contiguous zone is part of the high seas. As of 15 July 2011, some eighty-nine States claim a contiguous zone.⁴

¹ LOSC, Article 33(1); H. Caminos, 'Contiguous Zone', in *Max Planck Encyclopaedia*, p. 1, para. 1.

² For an analysis in some detail of the historical development of the contiguous zone, see D. P. O'Connell (I. A. Shearer ed.), *The International Law of the Sea*, vol. 2 (Oxford, Clarendon Press 1984), pp. 1034 *et seq.*; A. V. Lowe, 'The Development of the Contiguous Zone' (1981) 52 *BYIL* pp. 109–169.

³ *Virginia Commentaries*, vol. II, p. 274.

⁴ United Nations, *Table of Claims to Maritime Jurisdiction as at 15 July 2011*.

2.2 Coastal State jurisdiction over the contiguous zone

Article 33(1), which follows Article 24(1) of the TSC, provides that:

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
 - (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
 - (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

This provision requires three brief comments.

First, Article 33(1) contains no reference to internal waters. However, it would be inconceivable that the drafters of this provision had an intention to exclude the internal waters from the scope of this provision since these waters are under the territorial sovereignty of the coastal State. Thus it appears to be reasonable to consider that internal waters are also included in the scope of 'its territory or territorial sea'.

Second, Article 33(1) literally means that the coastal State may exercise only enforcement, not legislative, jurisdiction within its contiguous zone. It would follow that relevant laws and regulations of the coastal State are not extended to its contiguous zone; and that infringement of municipal laws of the coastal State within the zone is outside the scope of this provision. Considering that an incoming vessel cannot commit an offence until it crosses the limit of the territorial sea, it would appear that head (b) of Article 33(1) can apply only to an outgoing ship. By contrast, head (a) can apply only to incoming ships because prevention cannot arise with regard to an outgoing ship in the contiguous zone.

Third, Article 33(1) does not make the further specification with regard to 'control necessary to punish infringement' of municipal law of the coastal State in its contiguous zone. In this regard, Article 111(1) makes clear that the coastal State may undertake the hot pursuit of foreign ships within the contiguous zone.⁵ Article 111(6), (7) and (8) further provide the coastal State's right to stop a ship, the right to arrest the ship, and the right to escort the ship to a port. One can say, therefore, that the coastal State jurisdiction to punish the infringement of its municipal laws in the contiguous zone includes these rights. On the other hand, Article 111(1) does not specify the place where the infringement of laws and regulations of the coastal State must have occurred. In view of maintaining consistency with Article 33(1), it appears reasonable to consider that the coastal State may commence the hot pursuit of a ship only where that ship has already breached the laws and regulation of that State within its territory or territorial sea.⁶

The legal nature of the coastal State jurisdiction over the contiguous zone is not free from controversy. According to a literal or restrictive view, the coastal State has only enforcement jurisdiction in its contiguous zone and, consequently, action of the coastal

⁵ The right of hot pursuit will be discussed in Chapter 5, section 2.7.

⁶ Lowe, 'The Contiguous Zone', p. 166.

State may only be taken concerning offences committed within the territory or territorial sea of the coastal State, not in respect of anything done within the contiguous zone itself. Sir Gerald Fitzmaurice is a leading writer supporting this view. According to Fitzmaurice, the power over the contiguous zone is 'essentially supervisory and preventative'.⁷

According to a liberal view, the coastal State may regulate the violation of its municipal law within the contiguous zone for some limited purposes. For instance, Oda argued that in the contiguous zone, the coastal State should be entitled to exercise its authority as exercisable in the territorial sea only for some limited purposes of customs or sanitary control. O'Connell and Shearer echoed this view.⁸

There appears to be little doubt that a strict reading of Article 33(1) does not allow coastal States to extend legislative jurisdiction to its contiguous zone. There is an exception, however. Concerning the protection of objects of an archaeological and historical nature found at sea, Article 303(2) of the LOSC provides that:

2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

This provision relies on a dual legal fiction. First, the removal of archaeological and historical objects is to be regarded as infringement of customs, fiscal, immigration or sanitary laws and regulations of the coastal State. Second, the removal of archaeological and historical objects within the contiguous zone is to be considered as an act within the territory or the territorial sea. By using the dual fiction, the removal of archaeological and historical objects within the contiguous zone is subject to the control of the coastal State, including hot pursuit. Thus, in so far as the prevention of the removal of archaeological and historical objects is concerned, the coastal State may exercise legislative and enforcement jurisdiction within its contiguous zone by virtue of Article 303(2).

Currently the contiguous zone is part of the EEZ when the coastal State claimed the zone. As will be seen, in the EEZ, the coastal State may exercise both legislative and enforcement jurisdiction for limited matters provided by the law of the sea. Considering that the contiguous zone is becoming important for the purpose of regulation of illegal traffic in drugs, claims to legislative jurisdiction in the zone will not cause a serious problem in reality.⁹ If this is the case, as a matter of practice, it may not be unreasonable

⁷ G. Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea' (1959) 8 *ICLQ*, p. 114.

⁸ S. Oda, 'The Concept of the Contiguous Zone' (1962) 11 *ICLQ* p. 153; O'Connell, *The International Law of the Sea*, p. 1060; I. A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *ICLQ* p. 330.

⁹ R. R. Churchill and A. V. Lowe, *Law of the Sea*, 3rd edn (Manchester University Press, 1999), p. 138. Some States claim both legislative and enforcement jurisdiction over the contiguous zone. Examples include: India, the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, article 5(5); Pakistan, Territorial Waters and Maritime Zone Act, 1976, article 4(3); Sri Lanka, Maritime Zones Law, No. 22 of 1976, section 4(2). For the text of these provisions, see UNDOALOS, *The Law of the Sea: National Legislation on the Territorial Sea, the Right*

to extend the legislative jurisdiction of the coastal State over the contiguous zone for the limited purposes provided in Article 33 of the LOSC. In any case, it must be remembered that disputes with regard to the exercise by a coastal State of its jurisdiction over the contiguous zone fall within the scope of the compulsory settlement procedure in Part XV of the LOSC.

3 EXCLUSIVE ECONOMIC ZONE

3.1 Genesis of the concept of the EEZ

The EEZ is an area beyond and adjacent to the territorial sea, not extending beyond 200 nautical miles from the baseline of the territorial sea.¹⁰ The origin of the concept of the EEZ may go back to the practice of the Latin American States after World War II.¹¹ Originally the figure of 200 nautical miles appeared in 1947, when Chile, Peru and Ecuador claimed such an extent for the exercise of full sovereignty. The figure of 200 nautical miles relied on scientific facts: it would enable the Andean States to reach the Peruvian and the Humboldt Currents, which were particularly rich in living species. Furthermore, the guano birds, whose deposit is an important fertiliser, feed on anchovy. Scientific research has shown that anchovy larvae had also been located in up to a 187-mile width. The three Andean States thus inferred that a perfect unity and interdependence existed between the sea's living resources and the coastal populations. For the three countries of Latin America's Pacific coast, the claim for a 200 nautical mile zone was considered as a means to correct an inequity inflicted upon them by geography, namely the lack of a continental shelf.

Later on, the claim for a 200-mile zone spread to the majority of coastal developing States. As the Caracas session of UNCLOS III approached, however, it became apparent that the maritime powers would not accept such an extensive territorial sea which would deter economic and military interests. Thus, in 1971, Kenya proposed the concept of the EEZ in the Asian-African Legal Consultative Committee at Colombo in a spirit of compromise. In August 1972, with overwhelming support from the developing countries, Kenya formally submitted its proposal for a 200-mile EEZ to the UN Seabed Committee. According to this proposal, the natural resources of the zone would be placed under the jurisdiction of the coastal State, while freedom of navigation was to be guaranteed. Further to this, a variant of the concept of the EEZ, the notion of the 'patrimonial sea', was reflected in the Declaration of Santo Domingo, adopted by

of Innocent Passage and the Contiguous Zone (New York, United Nations, 1995), pp. 160, 257, 354, respectively. Some States claim jurisdiction for the purpose of security within the contiguous zone. But these claims have been protested by the USA. See J. A. Roach and R. W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd edn (The Hague, Nijhoff, 1996), pp. 166-172.

¹⁰ LOSC, Articles 55 and 57.

¹¹ Concerning the background of the EEZ, see R.-J. Dupuy, 'The Sea under National Competence', in R.-J. Dupuy and D. Vignes, *A Handbook on the New Law of the Sea*, vol. 1 (Dordrecht, Nijhoff, 1991), pp. 275 *et seq.*; D. Attard, *The Exclusive Economic Zone in International Law* (Oxford, Clarendon Press, 1987), pp. 1 *et seq.*; T. Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' (2000) 286 *RCADI* pp. 96 *et seq.*

the Conference of Caribbean Countries on 7 June 1972. On 2 August 1973, Colombia, Mexico and Venezuela submitted its proposal for the 'patrimonial sea' to the Seabed Committee.¹² The two concepts effectively merged at UNCLOS III. By 1975, the basic concept of the EEZ seemed to be well established.¹³ Thus the legal regime governing the EEZ was embodied in Part V of the LOSC.

Unlike the continental shelf, the coastal State must claim the zone in order to establish an EEZ. The vast majority of coastal States have claimed a 200-mile EEZ.¹⁴ In this regard, the ICJ, in the *Libya/Malta* case of 1985, stated that: '[T]he institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law'.¹⁵

It is said that the 200-mile EEZ amounts to some 35–36 per cent of the oceans as a whole. Seven leading beneficiaries of the EEZ are: the USA, France, Indonesia, New Zealand, Australia, Russia and Japan.¹⁶ It is ironic that leading EEZ beneficiaries are essentially the developed States. Whilst most States which had previously claimed an exclusive fishing zone (EFZ) have replaced such a zone by an EEZ, several States still maintain an EFZ.¹⁷ Considering that all States claiming an EFZ became parties to the LOSC, it may be argued that the relevant provisions of the EEZ respecting fisheries are applicable to the EFZ.

3.2 Legal status of the EEZ

The landward limit of the EEZ is the seaward limit of the territorial sea. The seaward limit of the EEZ is at a maximum of 200 nautical miles from the baseline of the territorial sea. Given that the maximum breadth of the territorial sea is 12 nautical miles, the maximum breadth of the EEZ is 188 nautical miles, that is to say, approximately 370 kilometres. The outer limit lines of the EEZ and the delimitation lines shall be shown on charts of a scale or scales adequate for ascertaining their position. Where appropriate, lists of geographical coordinates of points may also be substituted for such outer limit lines or

¹² The concept of the patrimonial sea can be defined as an economic zone not more than 200 nautical miles breadth from the base line of the territorial sea where the coastal State will have an exclusive right to all resources, whilst there will be freedom of navigation and overflight there. L. D. M. Nelson, 'The Patrimonial Sea' (1973) 22 *ICLQ*, p. 668.

¹³ S. Oda, 'Exclusive Economic Zone', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 11 (Amsterdam, North-Holland, 1989), p. 104.

¹⁴ According to Churchill, 100 out of the 127 coastal States Parties to the LOSC have claimed an EEZ. R. R. Churchill, 'The Impact of State Practice on the Jurisdictional Framework contained in the LOS Convention', in A. G. Oude Elferink (ed.), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Leiden and Boston, Nijhoff, 2005), p. 126.

¹⁵ ICJ Reports 1985, p. 33, para. 34. See also The American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, vol. 2 (American Law Institute Publishers, 1990) § 514, comment (a), p. 56.

¹⁶ Churchill and Lowe, *Law of the Sea*, p. 178.

¹⁷ These States are: Algeria, Belgium (coterminous with the EEZ), Croatia, Denmark (for the Faroe Islands), Finland, Gambia, Libya, Malta, Norway (Jan Mayen and Svalbard), Papua New Guinea, Spain (in the Mediterranean Sea), Tunisia and the United Kingdom. Ireland declared an EEZ in 2006, while it also declared an EFZ and a Pollution Response Zone. Department of Foreign Affairs and Trade, Ireland: www.dfa.ie/home/index.aspx?id=365. For an analysis of the EFZ, see S. Kvinikhidze, 'Contemporary Exclusive Fishery Zones or Why Some States Still Claim an EFZ' (2008) 23 *IJMCL* pp. 271–295.

delimitation lines pursuant to Article 75(1) of the LOSC. The coastal State is also obliged to give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the UN Secretary-General under Article 75(2).

The concept of the EEZ comprises the seabed and its subsoil, the waters superjacent to the seabed as well as the airspace above the waters. With respect to the seabed and its subsoil, Article 56(1) provides that '*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 seabed and *of the seabed and its subsoil*' (emphasis added). It would follow that the concept of the EEZ includes the seabed and its subsoil. The rights of the coastal State with respect to the seabed and subsoil are to be exercised in accordance with provisions governing the continental shelf by virtue of Article 56(3).

Article 58(1) stipulates that '*in the exclusive economic zone*', all States, whether coastal or land-locked, enjoy 'the freedoms referred to in article 87 of navigation and *overflight*' (emphasis added). Article 56(1) further provides that the coastal State has sovereign rights with respect to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and *winds*. One can say, therefore, that the concept of the EEZ also includes the airspace.

Article 55 of the LOSC makes clear that the EEZ 'is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part [V]'. Thus, the EEZ is not the territorial sea. Indeed, unlike internal waters and the territorial sea, the territorial sovereignty of the coastal State does not extend to the EEZ. Article 86 of the LOSC provides that the provisions of Part VII governing the high seas 'apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'. Accordingly, the EEZ is not part of the high seas. In fact, the freedoms apply to the EEZ in so far as they are not incompatible with Part V of the LOSC governing the EEZ in accordance with Article 58(2). In this sense, the quality of the freedom exercisable in the EEZ differs from that exercisable on the high seas. Overall it can be concluded that the EEZ is regarded as a *sui generis* zone, distinguished from the territorial sea and the high seas.

3.3 Sovereign rights over the EEZ

The key provision concerning coastal State jurisdiction over the EEZ is Article 56 of the LOSC. The first paragraph of Article 56 provides as follows:

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 seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.

It is important to note that the sovereign rights of the coastal State over the EEZ are essentially limited to economic exploration and exploitation (limitation *ratione materiae*). In this respect, the concept of sovereign rights must be distinguished from territorial sovereignty, which is comprehensive unless international law provides otherwise.

The concept of sovereign rights can also be seen in the 1958 Geneva Convention on the Continental Shelf. Article 2(2) of the Geneva Convention provides that:

The rights referred to in paragraph 1 of this Article [sovereign rights] are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

Although Part V does not contain a similar provision, it may be argued that the sovereign rights in the EEZ are essentially exclusive in the sense that no one may undertake these activities or make a claim to the EEZ, *without the express consent of the coastal State*. It is true that third States have the right of access to natural resources in the EEZ.¹⁸ Considering that the exercise of the right is conditional upon agreement with the coastal State, however, it does not challenge the exclusive nature of the coastal State's jurisdiction over the EEZ.¹⁹

With respect to matters provided by the law, the coastal State exercises both legislative and enforcement jurisdiction in the EEZ. In this respect, the key provision is Article 73(1):

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

Whilst this provision provides enforcement jurisdiction for the coastal State, the reference to 'the laws and regulations by it' seems to suggest that the State also has legislative jurisdiction.

It is beyond serious doubt that the measures provided under Article 73(1) can be applied to foreign vessels within the EEZ. This is clear from Article 73(4), which provides that:

In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

¹⁸ LOSC, Articles 62(2), 69 and 70. See also Chapter 7, section 3.2.

¹⁹ B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Dordrecht, Nijhoff, 1989), p. 15.

Thus a coastal State jurisdiction within its EEZ contains no limit *ratione personae*. Overall the sovereign rights of the coastal State in its EEZ can be summarised as follows:

(i) The sovereign rights of the coastal State can be exercised solely within the EEZ. In this sense, such rights are spatial in nature.

(ii) The sovereign rights of the coastal State are limited to the matters defined by international law (limitation *ratione materiae*). On this point, sovereign rights must be distinguished from territorial sovereignty.

(iii) However, concerning matters defined by international law, the coastal State may exercise both legislative and enforcement jurisdiction.

(iv) The coastal State may exercise sovereign rights over all people regardless of their nationality within the EEZ. Thus the sovereign rights contain no limit *ratione personae*. In this respect, sovereign rights over the EEZ differ from personal jurisdiction.

(v) The sovereign rights of the coastal State over the EEZ are exclusive in the sense that other States cannot engage upon activities in the EEZ without consent of the coastal State.

In short, unlike territorial sovereignty, the sovereign rights of the coastal State over the EEZ lack comprehensiveness of material scope. With respect to matters accepted by international law, however, the coastal State can exercise both legislative and enforcement jurisdiction over all people within the EEZ in an exclusive manner. The essential point is that the rights of the coastal State over the EEZ are spatial in the sense that they can be exercised solely within the particular space in question regardless of the nationality of persons or vessels. Thus the coastal State jurisdiction over the EEZ can be regarded as a spatial jurisdiction. Due to the lack of comprehensiveness of material scope, this jurisdiction should be called a limited spatial jurisdiction.²⁰

3.4 Jurisdiction of coastal States over the EEZ

Under Article 56(1)(b) of the LOSC, the coastal State possesses jurisdiction over matters other than the exploration and exploitation of marine natural resources, namely (i) the establishment and use of artificial islands, installations and structures, (ii) marine scientific research, and (iii) the protection and preservation of the marine environment. The coastal State also has other rights and duties provided for in this Convention (Article 56(1)(c)). The coastal State jurisdiction with regard to these matters requires some comments.

Concerning the coastal State jurisdiction over artificial islands, Article 60 stipulates that:

²⁰ See Chapter 1, section 2.2. R.-J. Dupuy took the view that the coastal State enjoys 'power of a spatial type' in the EEZ. Dupuy, 'The Sea under National Competence', p. 293. Combacau considered the coastal State's jurisdiction over the EEZ as territorial jurisdiction. J. Combacau, *Le droit international de la mer: Que sais-je?* (Paris, PUF, 1985), p. 21. Bastid considered the continental shelf and the EEZ as maritime domain under limited territorial jurisdiction (*la compétence territoriale limitée*). S. Bastid, *Droit international public: principes fondamentaux, les Cours de droit 1969-1970* (Université de Paris), pp. 814-815.

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
 - (a) artificial islands;
 - (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
 - (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.²¹
2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

At the same time, the rights of the coastal State on this matter are subject to certain obligations. Under Article 60(3), due notice must be given of the construction of such artificial islands, installations and structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused must be removed to ensure safety of navigation. Under Article 60(7), the coastal State may not establish artificial islands, installations and structures and the safety zones around them 'where interference may be caused to the use of recognised sea lanes essential to international navigation'.

It is clear that the coastal State has exclusive jurisdiction, including both legislative and enforcement jurisdiction, over installations and structures for economic purposes by virtue of Article 60. On the other hand, a question arises whether or not the coastal State also has the jurisdiction to authorise and to regulate the construction and use of installations and structures for non-economic purposes, such as military purposes. It appears that State practice is not uniform on this particular matter. When ratifying the LOSC, Brazil, Cape Verde and Uruguay made declarations claiming that the coastal State has the exclusive right to authorise and regulate the construction and use of all kinds of installations and structures, without exception, whatever their nature or purpose.²² By contrast, when ratifying the LOSC, Germany, Italy, the Netherlands and the United Kingdom declared that the coastal State enjoys the right to authorise, construct, operate and use only those installations and structures which have economic purposes.²³ Whilst this is a debatable issue, the preferable view appears to be that a dispute falls within the scope of Article 59 because the LOSC does not explicitly attribute rights or jurisdiction in this matter to a coastal State or to other States.²⁴

²¹ Article 60(1)(c) seems to literally mean that in the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorise and regulate the construction, operation and use of installations and structures which may interfere with the exercise of the rights of the coastal State in the zone. Yet this will lead to a strange consequence.

²² A. V. Lowe and S. A. G. Talmon (eds.), *The Legal Order of the Oceans: Basic Documents on the Law of the Sea* (Oxford, Hart Publishing 2009) pp. 915, 917 and 967.

²³ *Ibid.*, pp. 935, 941, 948–949 and 965. See also Churchill, 'The Impact of State Practice', p. 136.

²⁴ A. V. Lowe, 'Some Legal Problems Arising from the Use of the Seas for Military Purposes' (1986) 10 *Marine Policy* p. 180; Churchill, 'The Impact of State Practice', p. 136. It is also to be noted that freedom to construct artificial islands and other installations is not included in Article 58(1) and (2).

As noted, Article 56(1)(b)(ii) of the LOSC makes clear that the coastal State has jurisdiction with regard to marine scientific research in the EEZ. In relation to this, Article 246(1) stipulates that:

Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorise and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.

Marine scientific research in the EEZ and on the continental shelf is to be conducted with the consent of the coastal State in conformity with Article 246(2).

It is clear from Article 56(1)(b)(iii) that in the EEZ, the coastal State has legislative and enforcement jurisdiction with regard to the protection and preservation of the marine environment. Further to this, Articles 210(1) and 211(5) provide legislative jurisdiction of the coastal State concerning the regulation of dumping and vessel-source pollution. Moreover, Articles 210(2) and 220 contain enforcement jurisdiction of the coastal State with regard to the regulation of dumping and ship-borne pollution.

The LOSC contains no provision with regard to the coastal State jurisdiction over archaeological and historical objects found within the EEZ beyond the contiguous zone. Thus the protection of these objects would need to be assessed by the application of Article 59. In this regard, on 2 November 2001, UNESCO adopted the Convention on the Protection of Underwater Cultural Heritage (hereafter the UNESCO Convention) in order to ensure the protection of such heritage.²⁵ Article 9 of the UNESCO Convention places an explicit obligation upon all States Parties to protect underwater cultural heritage in the EEZ and on the continental shelf in conformity with this Convention. Under Article 10(2) of the Convention, a State Party in whose EEZ or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorise any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law, including the LOSC. Article 10(4) allows the coastal State as 'Coordinating State' to take all practical measures to prevent any immediate danger to underwater cultural heritage. These provisions would seem to provide the coastal State with grounds for exercising its jurisdiction over such heritage within the EEZ. In this regard, it is interesting to note that under Article 10(6), the 'Coordinating State' shall act 'on behalf of the States Parties as a whole and not in its own interest'.

3.5 Freedoms of third States

The next issue to be examined involves legitimate activities by third States in the EEZ.²⁶ In this regard, Article 58(1) of the LOSC stipulates that:

²⁵ Entered into force on 2 January 2009. For the text of the Convention, (2002) 48 *Law of the Sea Bulletin*, p. 29; Lowe and Talmon, *Basic Documents*, p. 721.

²⁶ The legality of military exercises in the EEZ of another State will be discussed in Chapter 11, section 4.

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

It follows that among the six freedoms enumerated in Article 87 of the LOSC, three freedoms of the seas – freedoms of navigation, overflight and the laying of submarine cables and pipelines – apply to the EEZ. Further, Articles 88 to 115 and other pertinent rules of international law relating to the high seas apply to the EEZ in so far as they are not incompatible with this rule under Article 58(2).

However, Article 58(3) requires States to ‘have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part [V]’. It would seem to follow that, unlike on the high seas, the three freedoms of the seas may be qualified by coastal State jurisdiction in the EEZ. For instance, overflight in the EEZ for the purposes of exploration and exploitation is subject to the permission of the coastal State.

Navigation of foreign vessels through an EEZ is subject to regulation of the coastal State with respect to marine pollution. Navigation of foreign vessels may also be affected by the presence of artificial islands and installations of the coastal State. In addition to this, shipping in the inner twenty-four miles of the EEZ will be subject to coastal State jurisdiction over its contiguous zone. Whilst the freedom of laying submarine cables and pipelines applies to the EEZ, the delineation of the course of a pipeline in the seabed of the EEZ is subject to the consent of the coastal State in accordance with Article 79(3). To this extent, the freedoms enjoyed by foreign States in the EEZ are not exactly the same as those enjoyed on the high seas.

3.6 Residual rights

Whilst the LOSC provides rules involving most of the obvious uses of the EEZ, there are some uses of the zone where it remains unclear whether they fall within the rights of the coastal State or other States. Here residual rights in the EEZ are at issue. In this regard, Article 59 provides as follows:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Under Article 59, there is no presumption in favour of either the coastal State or other States. It would seem to follow that the possible attribution of residual rights is to be decided on a case-by-case basis.²⁷

An international dispute could well arise with regard to a matter where the LOSC does not specify which States are to have jurisdiction. Such a dispute is to be settled by peaceful means of their own choice pursuant to Articles 279 and 280 of the LOSC. If this is unsuccessful, the dispute is to be referred to the compulsory procedures of dispute settlement in Part XV of the LOSC, unless the dispute relates to limitations and exceptions to the compulsory procedures. An example may be provided by the 1999 *M/V Saiga (No. 2)* case between Saint Vincent and the Grenadines and Guinea.²⁸ A central question in this case was whether or not Guinea was entitled to apply its customs law in its EEZ. In this regard, ITLOS held that whilst the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures in the EEZ pursuant to Article 60(2) of the LOSC, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the EEZ not mentioned in that provision.²⁹ In so ruling, ITLOS was wary about extending customs laws of the coastal State to its EEZ.

4 CONTINENTAL SHELF

4.1 Genesis of the concept of the continental shelf

Geologically the continental shelf is an area adjacent to a continent or around an island extending from the low-water line to the depth at which there is usually a marked increase of slope to greater depth.³⁰ Before World War II, natural resources in the seabed and its subsoil had attracted little interest between States.³¹ However, natural resources in the seabed and its subsoil, in particular, an extensive reserve of oil and gas, have attracted growing interest since World War II because of the increased demand for petrol. Furthermore, technological progress at the turn of the twentieth century has enabled the continental shelf's hydrocarbon resources to be extracted from the surface of the sea. Against that background, on 28 September 1945, the United States took the decisive step with the Truman Proclamation to extend its jurisdiction over the natural resources of the continental shelf.³² The Truman Proclamation declared that:

²⁷ Churchill and Lowe, *Law of the Sea*, p. 176. Concerning residual rights, see S. Karagiannis, 'L'article 59 de la Convention des Nations Unies sur le droit de la mer (ou les mystères de la nature juridique de la zone économique exclusive)', (2004) 37 *RBDI* pp. 325–418.

²⁸ The *M/V Saiga (No. 2)* case (Judgment), (1999) 38 *ILM* p. 1323. In this case, ITLOS did not refer to Article 59 of the LOSC.

²⁹ *Ibid.*, p. 1351, para. 127.

³⁰ UNDOALOS, *Definition of the Continental Shelf*, p. 44.

³¹ However, in 1942, the United Kingdom concluded a treaty with Venezuela dividing the seabed of the Gulf of Paria for the purpose of the exploitation of the oil field beneath the Gulf. O'Connell, *The International Law of the Sea*, p. 470.

³² US Presidential Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil of the Sea Bed and the Continental Shelf. Reproduced in Lowe and Talmon, *Basic Documents*, p. 19.

Having Concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

The unilateral action of the United States created a chain reaction, and many States unilaterally extended their jurisdiction towards the high seas. The Latin American States – which have virtually no continental shelf in a geological sense – claimed their full sovereignty over all the seabed at whatever depth and over all the adjacent seas at whatever depth to a distance of 200 nautical miles. Whilst State practice was not consistent until the early 1950s, the vast majority of States were prepared to agree to create a new zone relating to the exploitation of natural resources on the continental shelf with the passage of time.³³ Thus a legal regime governing the continental shelf was, for the first time, enshrined in the 1958 Geneva Convention on the Continental Shelf. In this regard, the ICJ, in the 1969 *North Sea Continental Shelf* cases, took the view that Articles 1 to 3 of the Convention on the Continental Shelf, which included the definition of the continental shelf, were 'regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf'.³⁴ Today there is no doubt that the rights of the coastal State over the continental shelf are well established in customary international law.

4.2 Spatial scope of the continental shelf

The landward limit of the continental shelf in the legal sense is the seaward limit of the territorial sea. In this respect, Article 1 of the Convention on the Continental Shelf stipulates that the continental shelf is the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea. Similarly, Article 76(1) of the LOSC stipulates that 'the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea'. It follows that the continental shelf in a legal sense does not include the seabed of the territorial sea.

On the other hand, the seaward limit of the continental shelf needs careful consideration. Article 1(a) of the Geneva Convention on the Continental Shelf provides two criteria to locate the seaward limits of the continental shelf: the 200 metres isobath and the exploitability test.³⁵ However, the exploitability test gave rise to a considerable degree of uncertainty because legal interpretation of the test may change according to the development of technology. In fact, the technological development during the 1960s made it possible to exploit the seabed at depths in excess of 1000 metres. It

³³ C. L. Rozakis, 'Continental Shelf', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 11 (Amsterdam, North-Holland, 1989), p. 84.

³⁴ ICJ Reports 1969, p. 39, para. 63.

³⁵ Simply put, 'isobath' means a line connecting points of equal water depth. International Hydrographic Organization, *Hydrographic Dictionary, Part I*, vol. 1, 5th edn (Monaco, 1994), p. 118 and p. 63.

could be reasonably presumed that this capacity would progress further. In this regard, some argue that the concept of exploitability may be interpreted in relation to the most advanced standards of technology. If this is the case, according to an extreme interpretation, all the ocean floor of the world would eventually be divided among the coastal States.³⁶ Hence it was hardly surprising that the precise limits of the continental shelf became a significant issue at UNCLOS III.

Negotiations at the Conference resulted in Article 76 of the LOSC. Article 76(1) provides two alternative criteria determining the outer limits of the continental shelf beyond 200 nautical miles:

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

This provision provides two criteria: (i) the limit of the outer edge of the continental margin (geological criterion) or (ii) a distance of 200 nautical miles (distance criterion).

There is little doubt that the distance criterion is closely linked to the concept of the EEZ. One can say that with the emergence of the concept of the EEZ, the continental shelf within 200 nautical miles from the baseline is currently established as customary law.³⁷ Hence the coastal State has the continental shelf in a legal sense up to 200 nautical miles regardless of the configuration of the seabed. As a consequence, approximately 36 per cent of the total seabed is now under the national jurisdiction of coastal State.³⁸

In relation to this, legal title over the continental shelf should be mentioned. Legal title can be defined as the criteria on the basis of which a State is legally empowered to exercise rights and jurisdiction over the marine areas adjacent to its coasts.³⁹ According to the Truman Proclamation, the continental shelf 'may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it'. Noting on this phrase, the ICJ, in the *North Sea Continental Shelf* cases, highlighted the concept of natural prolongation as a legal title over the continental shelf.⁴⁰ On the other hand, the emergence of the concept of the 200-mile EEZ inevitably affected the legal title of the continental shelf. As noted, the EEZ is based on the distance criterion. In this regard, the ICJ, in the *Libya/Malta* case, pronounced that:

³⁶ S. Oda, *International Control of Sea Resources* (Dordrecht, Nijhoff, 1989), p. 167.

³⁷ ICJ Reports 1985, p. 33, para. 34.

³⁸ Churchill and Lowe, *Law of the Sea*, p. 148.

³⁹ P. Weil, *The Law of Maritime Delimitation: Reflections* (Cambridge, Grotius, 1989), p. 48.

⁴⁰ ICJ Reports 1969, p. 31, para. 43.

Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone.⁴¹

In light of the *dictum* of the Court and Article 76 of the LOSC, it may be argued that currently the distance criterion is the legal title over the continental shelf up to 200 nautical miles and the natural prolongation offers legal title over the shelf beyond 200 nautical miles.

4.3 Criteria for determining the outer limits of the continental shelf beyond 200 nautical miles

Where the outer edge of the continental margin extends beyond 200 nautical miles, the limit of the continental shelf is to be determined on the basis of the geological criteria set out by Article 76(4). This provision contains two criteria for fixing the seaward limit of the continental shelf.

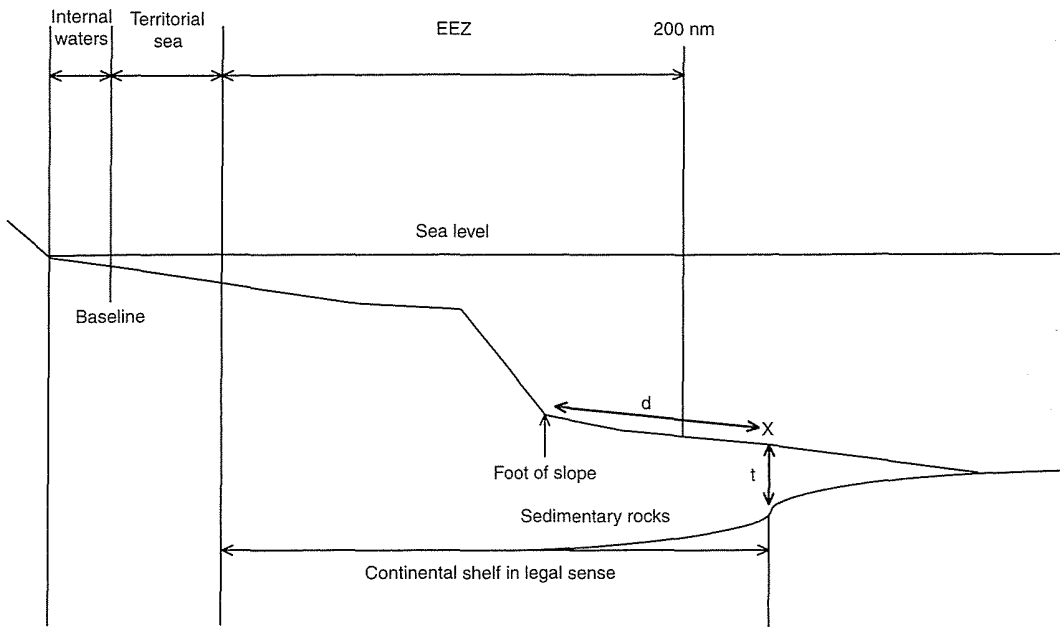
The first criterion is the sedimentary thickness test enshrined in Article 76(4)(a)(i). As this criterion was introduced by Ireland, this is called the *Irish formula* or *Gardiner formula* (see Figure 4.1). According to this criterion, the outer edge of the continental margin is fixed by a line delineated by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope. The sedimentary thickness test may provide a possible criterion to evaluate the presence or absence of hydrocarbon reserves. It may be said that this criterion seeks to reserve the right to exploit petrol for the coastal State.

A second criterion is the *Hedberg formula* provided in Article 76(4)(a)(ii) (see Figure 4.2). According to this formula, the outer edge of the continental margin is determined by a line delineated by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base by conformity with Article 76(4)(b).

In either case, lines delineating the outer limits of the continental shelf must be straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude (Article 76(7)). The fixed points comprising the line of the outer limits of the continental shelf on the seabed shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500-metre isobaths (Article 76(5), see Figure 4.3).

Presently the continental shelf beyond 200 nautical miles attracts many coastal States. Yet there is a concern that this regime reintroduces the inequalities between

⁴¹ ICJ Reports 1985, p. 33, para. 34.



D: distance between the foot of slope and point X

T: thickness of sedimentary rocks

X: outermost fixed point

$$t \geq \frac{d}{100}$$

Figure 4.1. Continental shelf as defined in accordance with Article 76(4)(a)(i)

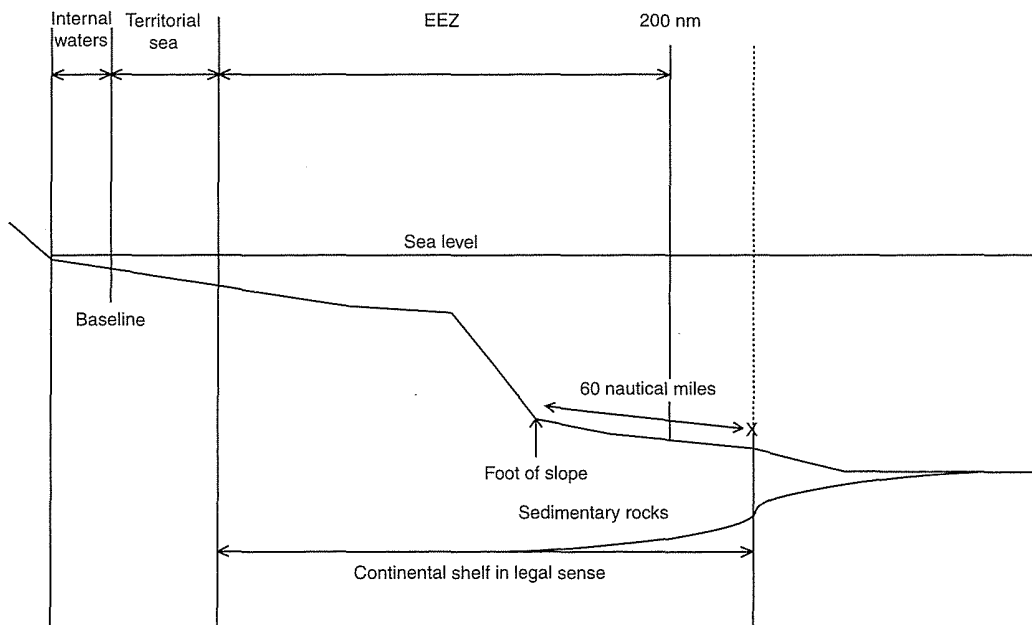


Figure 4.2. Continental shelf as defined in accordance with Article 76(4)(a)(ii)

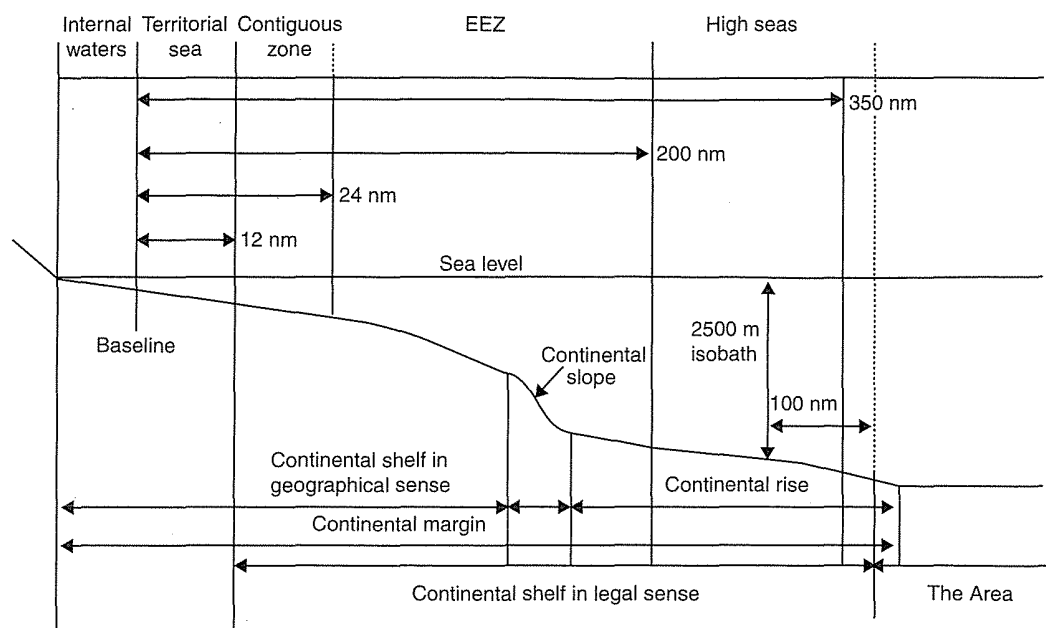


Figure 4.3. Continental shelf as defined in accordance with Article 76(5)

States which the uniform breadth of 200 nautical miles was supposed to remove. Further to this, the criteria set out in Article 76 give rise to a degree of uncertainty as to its practical application. For instance, in the application of the Irish and the Hedberg formulae, the location of the foot of the continental slope is of primary importance. However, the identification of the foot of the continental slope is not free from difficulty in practice.⁴² It is also suggested that the observed sediment thickness can be in error by as much as 10 per cent. If this is the case, this will have a significant impact upon the location of the outer limits of the continental shelf.⁴³ The points of the 2,500-metre isobath may also be difficult to locate when isobaths are complex or repeated in multiples.⁴⁴ In light of the scientific uncertainties, the LOSC established a technical body which assesses data respecting the outer limits of the continental shelf, namely the Commission on the Limits of the Continental Shelf (hereafter CLCS or the Commission).

⁴² *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf Adopted by the Commission on 13 May 1999 at its Fifth Session*, CLCS/11, p. 47, paras. 6.3.2 and 6.3.3; C. Carleton, 'Article 76 of the UN Convention on the Law of the Sea: Implementation Problems from the Technical Perspective' (2006) 21 *IJMCL* pp. 293–296; R. Macnab, 'The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76' (2004) 35 *ODIL* p. 5; by the same writer, 'Initial Assessment', in P. J. Cook and C. M. Carleton (eds.) *Continental Shelf Limits: The Scientific and Legal Interface* (New York, Oxford University Press, 2000), p. 258.

⁴³ *Ibid.*, p. 259. ⁴⁴ Macnab, 'The Case for Transparency', p. 8.

4.4 The Commission on the Limits of the Continental Shelf

As we shall discuss later, the coastal State intending to claim a continental shelf beyond 200 nautical miles is required to submit information on the limits of the shelf to the Commission. The Commission consists of twenty-one members who shall be experts in the field of geology, geophysics or hydrography. The members of the Commission are to be elected by States Parties to the LOSC from among their nationals, having due regard to the need to ensure equitable geographical representation, and they shall serve in their personal capacities in accordance with Article 2(1) of Annex II. The members are to be elected for a term of five years and can be re-elected (Article 2(4) of Annex II). Whilst the tasks of the Commission are not completely separated from the legal interpretation of relevant rules of the Convention, the Commission contains no jurists. No representative of the International Seabed Authority (hereafter the Authority) is included in the membership of the Commission, while the Authority is directly affected by the recommendation of the Commission.

The Commission is conferred with two functions by Article 3(1) of Annex II. First, the Commission is to consider the data and other material submitted by coastal States and to make recommendations to the coastal States in this matter in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by UNCLOS III. Second, the Commission is to provide scientific and technical advice, if requested by the coastal State concerned.

It can be reasonably presumed that the extension of the continental shelf beyond 200 nautical miles will increase overlapping of continental shelves. However, delimitation of the continental shelf beyond 200 nautical miles is outside the scope of the jurisdiction of the Commission. Article 9 of Annex II, along with Article 76(10), make clear that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts. Paragraph 2 of Annex I of the Rules of Procedure of the Commission, adopted on 11 April 2008, states that:

In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States, or in other cases of unresolved land or maritime disputes, related to the submission, the Commission shall be:

- (a) Informed of such disputes by the coastal States making the submission; and
- (b) Assured by the coastal States making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States.⁴⁵

In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute, unless there is prior consent given by all States that are parties to such a dispute.⁴⁶ The submissions

⁴⁵ The Rules of Procedure of the Commission are available at: www.un.org/Depts/los/clcs_new/commission_documents.htm.

⁴⁶ Para. 5(a) of Annex I of the Rules of the Commission.

made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States which are parties to a land or maritime dispute.⁴⁷

In order not to prejudice questions relating to the delimitation of boundaries between States, a State may make partial or joint submissions to the Commission.⁴⁸ For example, on 19 May 2006, France, Ireland, Spain and the United Kingdom made a joint submission to the Commission. On 1 December 2008, the Republic of Mauritius and the Republic of Seychelles also made a joint submission to the Commission. It appears that joint submissions may contribute to reduce the workload of the Commission and encourage cooperation between neighbouring coastal States to determine their outer limits of the continental shelf in an amicable manner.⁴⁹

4.5 Procedures to establish the outer limits of the continental shelf

The process of establishing the outer limits of the continental shelf beyond 200 nautical miles involves four steps.⁵⁰

(i) *Step One*: The coastal State is to initially delineate the outer limits of its continental shelf in conformity with criteria set out in Article 76 of the LOSC.

(ii) *Step Two*: The coastal State is to submit information on the limits to the CLCS within ten years of the entry into force of the LOSC for that State.⁵¹ A submission by a coastal State is examined by a sub-commission which is composed of seven members of the Commission, and, next, the sub-commission submits its recommendation to the Commission.⁵² The representatives of the coastal State which made a submission to the Commission may participate in the relevant proceedings without the right to vote pursuant to Article 5 of Annex II. Approval by the Commission of the recommendations of the sub-commission is to be by a majority of two-thirds of Commission members present and voting pursuant to Article 6(2) of Annex II. The recommendations of the Commission are to be submitted in writing to the coastal State which made the submission and to the UN Secretary-General in accordance with Article 6(3) of Annex II. The LOSC contains no rule concerning public access to the information submitted to the Commission. Nor is there any provision with regard to the public promulgation of the recommendations of the Commission. However, the executive summary of a submission to the Commission is public pursuant to Rule 50 of the Rules of Procedure, and third States have been allowed to make observations on submissions to the Commission.

(iii) *Step Three*: The coastal State is to establish the outer limits of its continental shelf on the basis of the recommendations of the Commission. Where the coastal State

⁴⁷ Para. 5(b) of Annex I of the Rules of the Commission.

⁴⁸ Paras. 3 and 4 of Annex I of the Rules of the Commission.

⁴⁹ H. Llewellyn, 'The Commission on the Limits of the Continental Shelf: Joint Submission by France, Ireland, Spain, and the United Kingdom' (2007) 56 *ICLQ* pp. 683–684.

⁵⁰ R. Wolfrum, 'The Delimitation of the Outer Continental Shelf: Procedural Considerations', in *Liber Amicorum Jean-Pierre Cot: Le procès international* (Brussels, Bruylant, 2009), pp. 352–353.

⁵¹ Article 76(8); para. 4 of Annex II. Concerning the procedures for submission of information, see Rules of Procedure of the Commission on the Limits of the Continental Shelf, CLCS/40/ Rev. 1, 17 April 2008.

⁵² Paras. 5 and 6(1) of Annex II.

disagrees with the recommendations of the Commission, the State is to make a revised or new submission to the Commission in accordance with Article 8 of Annex II of the LOSC. Under Article 76(8) of the LOSC, the limits of the continental shelf established by a coastal State on the basis of the recommendations of the Commission shall be final and binding. This provision requires two brief comments.

First, strictly speaking, what is final and binding is the outer limits established by a coastal State on the basis of the Commission's recommendations, not the recommendations themselves.⁵³ In the case of disagreement by the coastal State with the recommendations of the Commission, the coastal State is to make a revised or new submission to the Commission within a reasonable time pursuant to Article 8 of Annex II.

Second, Article 76(8), along with Article 7 of Annex II, appears to indicate that the coastal State cannot establish outer limits of the continental shelf on the basis of information that has not been considered by the Commission. Yet the Commission is not empowered to assess whether a coastal State has established the outer limits of the continental shelf on the basis of its recommendations. It seems that the outer limits of the continental shelf which have not been established on the basis of the recommendations of the Commission will not become binding on other States.⁵⁴

(iv) *Step Four*: Under Article 76(9), the coastal State is to deposit with the UN Secretary-General charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General is to give due publicity thereto. Article 84(2) requires the coastal State to give due publicity to charts or lists of geographical coordinates and deposit a copy of each such chart or list with the UN Secretary-General and, in the case of those showing the outer limit lines of the continental shelf, the Secretary-General of the International Seabed Authority.⁵⁵

To date, fifty-one coastal States have submitted full or partial information on the outer limits of the continental shelf beyond 200 nautical miles. A question that may arise is whether or not non-States Parties to the LOSC may claim a continental shelf beyond 200 nautical miles under customary international law. It seems very difficult to find 'extensive and virtually uniform' State practice and *opinio juris* with regard to the continental shelf beyond 200 nautical miles. Hence it would be difficult to argue that the continental shelf beyond 200 nautical miles is part of customary international law.⁵⁶ In fact, in his statement at the final session of UNCLOS III, Tommy Koh, the President of the Conference, stated that 'a state which is not a party to this Convention cannot invoke the benefits of Article 76'.⁵⁷ Furthermore, Article 4 of Annex II sets

⁵³ L. D. M. Nelson, 'The Settlement of Disputes Arising from Conflicting Outer Continental Shelf Claims' (2009) 24 *IJMCL* p. 419.

⁵⁴ International Law Association, *The Second ILA Report (2006)* p. 15.

⁵⁵ On 21 October 2009, Mexico became the first member of the International Seabed Authority which had deposited charts and other relevant information on the limit of its continental shelf with respect to the western polygon in the Gulf of Mexico. ISBA/16/A/2, 8 March 2010, p. 20, para. 74.

⁵⁶ S. V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Berlin, Springer, 2008), p. 181.

⁵⁷ UNCLOS III, *Official Records*, vol. XVII, A/CONF.62/SR.193, p. 136, para. 48.

out a time limit for submissions of ten years after entry into force of the LOSC. This provision would seem to exclude the possibility of submission by a non-Party to the Convention.⁵⁸ It must also be noted that Article 76 is linked to Article 82 with regard to revenue sharing. The claim over the continental shelf beyond 200 nautical miles without the acceptance of the obligation with regard to revenue sharing should not be assumed.⁵⁹ Further to this, it is apparent that non-States Parties to the LOSC cannot use the recommendations of the CLCS. Hence there may be room for the view that the outer limits of the continental shelf unilaterally established by non-States Parties lack legitimacy because the limits have not been established through an internationally accepted procedure.

A further issue involves peaceful settlement of disputes concerning the interpretation and application of Article 76 of the LOSC. Other States Parties may be considered to have a legal interest in the outer limits of the continental shelf beyond 200 nautical miles. For instance, it may be argued that a State Party which undertakes the exploration and exploitation of resources in the Area has a legal interest in the outer limits of the continental shelf beyond 200 nautical miles.⁶⁰ Accordingly, it seems possible that other States may challenge the validity of the outer limits of the continental shelf concerned. There is no reference to such disputes under section 3 of Part XV which provides for limitations and exceptions to the compulsory procedures of dispute settlement. Thus, disputes involving the outer limits of the continental shelf beyond 200 nautical miles can, if necessary, be settled by recourse to the compulsory procedures of Part XV.⁶¹

4.6 Payments concerning the exploitation of the continental shelf beyond 200 nautical miles

Under Article 82 of the LOSC, the coastal State is obliged to make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles. It is generally recognised that this provision represents a compromise between a group of States which advocated their claims over their continental shelves beyond 200 nautical miles and an opposing group which attempted to limit the continental shelves at 200 nautical miles.⁶²

The payments and contributions are to be made annually with respect to all production at a site after the first five years of production of that site. For the sixth year, the rate of payment or contribution is to be 1 per cent of the value or volume of production at the site. The rate is to increase by 1 per cent for each subsequent year until the

⁵⁸ T. Treves, 'Remarks on Submissions to the Commission on the Limits of the Continental Shelf in Response to Judge Marotta's Report' (2006) 21 *IJMCL* p. 364; ILA Second Report, p. 21; A. G. Oude Elferink, 'Submissions of Coastal States to the CLCS in Cases of Unresolved Land or Maritime Disputes', in M. H. Nordquist, J. N. Moore and T. H. Heider (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden and Boston, Nijhoff, 2004), p. 269.

⁵⁹ *Ibid.* See also ILA Second Report, p. 21.

⁶⁰ Wolfrum, 'The Delimitation of the Outer Continental Shelf', pp. 363–364; Second ILA Report, p. 26.

⁶¹ *Ibid.*, p. 25; Wolfrum, 'The Delimitation of the Outer Continental Shelf', p. 364.

⁶² ILA, *Report on Article 82 of the 1982 UN Convention on the Law of the Sea (UNCLOS)*, Rio De Janeiro Conference (2008), p. 2.

twelfth year and shall remain at 7 per cent thereafter in conformity with Article 82(2). However, a developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments in respect of that mineral resource by virtue of Article 82(3). Under Article 82(4), the payments or contributions are to be made through the Authority. The Authority is to distribute them to States Parties to the LOSC on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them. It may be said that the principle of the common heritage of mankind counterbalances overexpansion of the exclusive interests of coastal States.⁶³

4.7 The sovereign rights of the coastal State over the continental shelf

The coastal State exercises sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources in accordance with Article 77(1). The principal features of the sovereign rights can be summarised in six points:

(i) The sovereign rights of the coastal State over the continental shelf are inherent rights, and do not depend on occupation, effective or notional, or on any express proclamation. Thus a continental shelf exists *ipso facto* and *ab initio*.⁶⁴

(ii) The sovereign rights of the coastal State relate to the exploration and exploitation of natural resources on the continental shelf. Non-natural resources are not included in the ambit of sovereign rights of the coastal State even if they are found on the continental shelf. For instance, wrecks lying on the shelf do not fall within the ambit of the sovereign rights over the continental shelf.⁶⁵ The sovereign rights are thus characterised by the lack of comprehensiveness of material scope. On this point, the sovereign rights must be distinguished from territorial sovereignty.

(iii) The natural resources basically consist of the mineral and other non-living resources of the seabed and subsoil. However, exceptionally, sedentary species are also included in natural resources on the continental shelf. Under Article 77(4), the sedentary species are organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil. Examples include oysters, clams and abalone. Yet it is debatable whether crabs and lobster fall within the category of sedentary species.⁶⁶ Where the coastal State established the EEZ, that State has the sovereign rights to explore and exploit all marine living resources on the seabed in the zone.

(iv) Although there is no provision like Article 73(1), there seems to be a general sense that the sovereign rights include legislative and enforcement jurisdiction with a view to exploring and exploiting natural resources on the continental shelf. In fact, Article 111(2) stipulates that:

⁶³ Oda, *International Control*, p. xxxii. ⁶⁴ ICJ Reports 1969, p. 22, para. 19.

⁶⁵ Churchill and Lowe, *Law of the Sea*, p. 152. ⁶⁶ *Ibid.*, p. 151.

The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

This provision appears to suggest that the coastal State has legislative and enforcement jurisdiction with respect to the continental shelf.

(v) The sovereign rights of the coastal State are exercisable over all people or vessels regardless of their nationalities. Thus there is no limit concerning personal scope.

(vi) The rights are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.⁶⁷ At the same time, the exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in the LOSC (Article 78(2)).

Overall sovereign rights of the coastal State over the continental shelf are limited to certain matters provided by international law. With respect to matters provided by international law, however, the coastal State may exercise legislative and enforcement jurisdiction over all peoples regardless of their nationalities in an exclusive manner. In essence, rights over the continental shelf are spatial in the sense that they can be exercised solely within the particular space in question regardless of the nationality of persons or vessels. Hence, like the EEZ, the sovereign rights of the coastal State over the continental shelf can also be regarded as a limited spatial jurisdiction.

In addition to these sovereign rights, the coastal State has jurisdiction with regard to artificial islands, marine scientific research, dumping and other purposes. Relevant provisions can be summarised as follows.

First, under Article 80 of the LOSC, Article 60 concerning the coastal State's jurisdiction over artificial islands is applied *mutatis mutandis* to the continental shelf. It follows that on the continental shelf, the coastal State has exclusive rights to construct and to authorise and regulate the construction, operation and use of (a) artificial islands, (b) installations and structures for the purposes provided for in Article 56 and other economic purposes, and (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone. The coastal State also has exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

Second, on the continental shelf, the coastal State has jurisdiction with regard to marine scientific research in accordance with Articles 56(1)(b)(ii) and 246(1) of the LOSC. Article 246(2) makes clear that marine scientific research in the EEZ and on the

⁶⁷ LOSC, Article 77(2); Article 2(2) of the Geneva Convention on the Continental Shelf. The ICJ echoed this view: ICJ Reports 1969, p. 22, para. 19.

continental shelf shall be conducted with the consent of the coastal State. However, with regard to the continental shelf beyond 200 nautical miles, the discretion of the coastal State is limited by Article 246(6), the first sentence of which provides as follows:

Notwithstanding the provisions of paragraph 5, coastal States may not exercise their discretion to withhold consent under subparagraph (a) of that paragraph in respect of marine scientific research projects to be undertaken in accordance with the provisions of this Part on the continental shelf, beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, outside those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time.

At the same time, this provision seems to suggest that within 'those specific areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time', the coastal States may exercise their discretion to withhold consent if, as provided in Article 246(5)(a), a research project is of direct significance for the exploration and exploitation of natural resources. Furthermore, the restriction in Article 246(6) does not apply to the withdrawal of consent relating to marine scientific research on the basis of Article 246(5)(b)-(d).

Third, Article 210(5) of the LOSC makes clear that the coastal State has the right to permit, regulate and control dumping on the continental shelf. At the same time, the coastal State has enforcement jurisdiction with respect to pollution by dumping on the continental shelf.

Finally, Article 81 provides that: 'The coastal State shall have the exclusive rights to authorize and regulate drilling on the continental shelf for all purposes'. The phrase, 'for all purposes', seems to suggest that the exclusive rights of the coastal State concerning drilling on the continental shelf are not limited to the purposes of exploration and exploitation of natural resources.

4.8 Freedoms of third States

With respect to the freedom of use *on* the continental shelf, Article 79(1) stipulates that all States are entitled to lay submarine cables and pipelines on the continental shelf. However, the delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State pursuant to Article 79(3). Under Article 79(2), the coastal State also has rights to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines.

In this context, some mention should be made of the judicial nature of the superjacent waters above the continental shelf. Following Article 3 of the Convention on the Continental Shelf, Article 78(1) of the LOSC provides that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of

the airspace above those waters. It follows that where the coastal State has not claimed an EEZ, the superjacent waters above the continental shelf are the high seas. Where the coastal State has established an EEZ, the superjacent waters above the continental shelf beyond 200 nautical miles are always the high seas under the LOSC. Hence all States enjoy the freedoms of navigation and fishing in the superjacent waters of the continental shelf and the freedom of overflight in the airspace above those waters. However, it must be noted that freedoms of third States may be qualified by the coastal State in the superjacent water of the continental shelf beyond 200 nautical miles.

First, the coastal State has exclusive jurisdiction over the construction of artificial islands as well as installations and structures on the continental shelf beyond 200 nautical miles by virtue of Article 80 of the LOSC. In practice, artificial islands and other installations are constructed in superjacent waters above the continental shelf. It would seem to follow that freedom to construct artificial islands may be qualified by the coastal State jurisdiction, even though literally the superjacent waters of the continental shelf beyond 200 nautical miles are the high seas.

Second, in practice, coastal States explore and exploit natural resources on the continental shelf from the superjacent waters above the continental shelf. Accordingly, it appears inescapable that the coastal State excises its jurisdiction in the superjacent waters above the continental shelf for the purpose of the exploration and exploitation of natural resources.⁶⁸ In fact, Article 111(2) of the LOSC provides the right of hot pursuit in respect of violations on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable to the continental shelf, including such safety zones. In practice, safety zones are established on the superjacent waters of the continental shelf. It would seem to follow that the coastal State jurisdiction relating to the exploration and exploitation of the continental shelf is to be exercised at least in safety zones on the superjacent waters of the shelf.

Third, as noted, the coastal State has jurisdiction with regard to marine scientific research *on* the continental shelf under Articles 56(1)(b)(ii) and 246(1) of the LOSC, and such research on the continental shelf is to be conducted with the consent of the coastal State pursuant to Article 246(2). On the other hand, Article 257 of the LOSC provides that all States have the right to conduct marine scientific research *in* the water column beyond the limits of the EEZ 'in conformity with this Convention'. A question arises whether the complete freedom of marine scientific research applies to superjacent waters of the continental shelf. According to a literal interpretation, consent under Article 246(2) seems to be required only for research physically taking place on the sea floor. Considering that normally marine scientific research is carried out from the superjacent waters or airspace above the continental shelf, however, it appears to be naïve to consider that coastal States will not exercise their jurisdiction to regulate marine scientific research there.

⁶⁸ S. Oda, 'Proposals for Revising the Convention on the Continental Shelf', in S. Oda, *Fifty Years of the Law of the Sea: With a Special Section on the International Court of Justice* (The Hague, Nijhoff), p. 275; Churchill and Lowe, *Law of the Sea*, p. 215.

In summary, it appears that in some respects the freedom of the high seas may be qualified by coastal State jurisdiction in the superjacent waters above the continental shelf and the airspace above the waters. To this extent, their legal status should be distinguished from the high seas *per se*.

5 CONCLUSIONS

The principal points discussed in this chapter can be summarised as follows:

(i) In the contiguous zone, the coastal State may exercise jurisdiction to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory, internal waters and the territorial sea. Literally the coastal State has only enforcement jurisdiction, not prescriptive jurisdiction, in the contiguous zone. In light of the increasing importance of the prevention of illegal traffic in drugs, in particular, there appears to be scope to reconsider the question whether the coastal State cannot extend legislative jurisdiction to the contiguous zone in practice.

(ii) The coastal State exercises sovereign rights over the EEZ and the continental shelf for the purpose of exploring and exploiting the natural resources there. The sovereign rights are limited to the matters defined by international law (limitation *ratione materiae*). Thus the sovereign rights must be distinct from territorial sovereignty in the sense that such rights lack the comprehensiveness of material scope.

(iii) Concerning matters provided by international law, in the EEZ and the continental shelf, the coastal State may exercise legislative and enforcement jurisdiction over all peoples regardless of their nationalities in an exclusive manner. Furthermore, like territorial sovereignty, sovereign rights over the EEZ and the continental shelf are essentially spatial because they can be exercised only within the specific space concerned. Hence, it is argued that the sovereign rights of the coastal State can be considered as a sort of spatial jurisdiction, namely, limited spatial jurisdiction.

(iv) In the EEZ, all States enjoy freedoms of navigation, overflight and the laying of submarine cables and pipelines. In exercising these freedoms, however, States must have due regard to the rights and duties of the coastal State under Article 58(3) of the LOSC. To this extent, freedoms of the seas in the EEZ may be qualified by coastal State jurisdiction.

(v) If an international dispute arises with regard to a matter where the LOSC does not specify which States are to have jurisdiction, such a dispute should be resolved on the basis of equity and in the light of all the relevant circumstances in accordance with Article 59 of the LOSC. This provision contains no presumption in favour of either the coastal State or other States.

(vi) The outer limit of the continental shelf beyond 200 nautical miles is to be determined by the criteria enshrined in Article 76 of the LOSC, namely, the sedimentary thickness test (the *Irish formula* or *Gardiner formula*) and the fixed distance (60 nautical miles) test (the *Hedberg formula*). The coastal State is required to submit information with regard to the outer limits of the continental shelf beyond 200 nautical miles to the CLCS. On the basis of the recommendations of the CLCS, that State is

to establish the outer limits of its continental shelf. Whilst the extension of the continental shelf beyond 200 nautical miles attracts growing attention between States, such a claim may create a difficult issue with regard to the delimitation of overlapping shelves between two or more coastal States.

(vii) The institution of the EEZ and the continental shelf rests on a balance between the rights of the coastal State on the basis of the principle of sovereignty and the right of other States according to the principle of freedom. Nonetheless, it is likely that the coastal State will attempt to extend its jurisdiction over matters which do not clearly fall within the rights of that State. The increasing influence of the coastal State may entail the risk of promoting 'territorialisation' of the EEZ.

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The outer limits of the continental shelf are a subject of discussion in the International Law Association. To date, three reports have been published. These reports are available at the website of the ILA: www.ila-hq.org/en/committees/index.cfm/cid/33.