11. The territorial sea and other maritime zones

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Chapter: (p. 241) 11. The territorial sea and other maritime zones

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1. The Territorial Sea

(A) Introduction

Traditionally states were regarded as exercising sovereignty, subject to a right of innocent passage, over a belt of sea adjacent to their coastlines and bounded by the high seas.¹ The breadth of this ‘territorial sea’² was never definitively settled despite codification attempts in 1930, 1958, and 1960; claims varied between three and six nautical miles (nm) and even more.³ It came to be understood that the territorial sea was founded on a baseline, related to the low-water mark, and enclosing internal waters (rivers, bays, gulfs, harbours, etc) lying on its landward side. Both the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (GCTS)⁴ and the UN Convention on the Law of the Sea (UNCLOS)⁵ assume that every coastal state has a territorial sea.⁶
11. The territorial sea and other maritime zones

Following early debate, it came to be settled that states have sovereignty over the territorial sea. The GCTS Article 2 and UNCLOS Article 2 both state that sovereignty is exercised subject to the provisions of the respective conventions and other rules of international law. This was intended to highlight that the limitations on sovereignty in this area set out in the Convention are non-exhaustive. The sovereignty of the coastal state extends to the seabed and subsoil of the territorial sea and the airspace above it.

Understanding the modern law depends on understanding its history. In the eighteenth century, extravagant claims to sovereignty over the seas came to be seen as obsolete or nearly so. In 1702, the Dutch jurist Bynkershoek propounded the doctrine that the power of the territorial sovereign extended to vessels within cannon range of shore. At first, this doctrine seemed commensurate with the control of the actual guns of ports and fortresses over adjacent waters: it was not a maritime belt of uniform breadth. However, in the latter half of the eighteenth century several states laid down limits for belts for purposes of customs or fishery control in legislation and treaties, and Danish practice—after 1745 based on a four-mile belt—had some impact on European thinking.

In the later eighteenth century, two developments occurred. Writers and governments conceived of a hypothetical cannon-shot rule, a belt over which cannons could range if they were placed along the whole seaboard. Further, as ‘cannon-shot’ was a somewhat imprecise criterion, suggestions for a convenient substitute appeared. In 1782, the Italian writer Galiani proposed 3nm, or one marine league. The diplomatic birth of the three-mile limit appears to have been the US Note to Britain and France of 8 November 1793, in which the limit was employed for the purposes of neutrality. During and after the Napoleonic wars, British and US prize courts translated the cannon-shot rule into the three-mile rule.

A significant development was the shift from claims to jurisdiction for particular purposes to the extension of sovereignty over a maritime belt. Some claims, such as those of Denmark and Sweden, though commencing as pronouncements for neutrality purposes, quickly developed into assertions of sovereignty, especially when associated with exclusive fishery limits. In other cases, it remained unclear whether a claim was only to certain types of jurisdiction or a general limit of sovereignty. Such claims to jurisdiction have tended to harden into claims to sovereignty, and indeed a few states still claim a territorial sea or other zone of sovereignty beyond 12nm, the limit now laid down by UNCLOS Article 3. This process was, however, arrested to some extent by recognition of a legal distinction between the territorial sea as an extension of sovereignty and special jurisdictional zones. A variety were claimed during the twentieth century, and four were eventually accepted, namely the contiguous zone, the continental shelf and the exclusive economic zone (EEZ), and (in certain cases) archipelagic seas. These are
now regulated by UNCLOS, with non-parties showing little disposition to challenge its provisions. UNCLOS characterizes the coastal state’s rights over the continental shelf and the EEZ as ‘sovereign rights’, but they coexist with high seas rights applicable to other matters, notably maritime transit, the laying of submarine cables, etc (see chapter 13).

(B) The baseline for measurement of the territorial sea

The baseline from which the breadth of the territorial sea is measured is normally the coastal low-water line. There is no standard by which states determine this line, although UNCLOS Article 5 defines the line ‘as marked on large scale charts officially recognised by coastal States’. At one time it was arguable that the baseline was for all purposes the low-water mark. But in the signal case Anglo–Norwegian Fisheries the Court decided otherwise. The Norwegian limit of 4nm for territorial waters had been established by royal decree in 1812 and was not at issue in the case. However, later decrees of 1869, 1881, and 1889 continued the measure of 1812 in terms of a system of straight lines drawn from certain outermost points of the skjaergaard or rampart of rocks and islands which fringes much of the Norwegian coast. By a decree of 12 July 1935, Norway applied the system in a more detailed way, and the validity of the new limits was challenged by the UK. After a series of incidents, the UK took the case to the Court, seeking damages for interference with British fishing vessels outside the permissible limits. The Court held that the system of straight baselines following the general direction of the coast had been consistently applied by Norway and was unopposed by other states. The UK had not explicitly protested the position of baselines until 1933. Thus, the decree of 1935 could have been upheld on the basis of acquiescence; indeed, Judge Hackworth would have upheld Norway’s historic title to the areas in question.

But the Court went further, holding that the Norwegian system of baselines was lawful in principle. It stressed the broken and indented character of the Norwegian coastline to draw the baseline along the outer limit of the skjaergaard was a solution ‘dictated by geographical realities’. By contrast, a line which was an exact image of the coastline (the tracé parallèle), assumed to be the normal method of applying the low-water mark rule, did not apply to a coast where the baseline could only be determined by means of a geometric construction.

The British argument that the length of closing lines must not exceed 10nm was criticized in these terms:

[T]he practice of States does not justify the formulation of any general rule of law ... [A]part from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection ... [A]ll that the
The Court went on to elaborate criteria for determining the validity of straight baselines. First, because of the dependence of the territorial sea upon the land, ‘the drawing of baselines must not depart to any appreciable extent from the general direction of the coast’. Secondly, a close geographical relationship between sea areas and land formations was a ‘fundamental consideration’ in deciding ‘whether certain sea areas lying within [the baselines] are sufficiently closely linked to the land domain to be subject to the regime of internal waters’. Thirdly, it was relevant that there were ‘certain economic interests peculiar to a region, the reality and importance of which are evidenced by long usage’. Even if one regards *Anglo-Norwegian Fisheries* as an instance of judicial legislation, its significance for the development of the law cannot be underestimated. The Court’s pronouncements on the straight lines method were intended to have general (p. 245) application to coasts of that type. They have been codified in GCTS Article 4 and UNCLOS Article 7, which confirm the place of *Anglo-Norwegian Fisheries* in the modern law of the sea. A good number of states employ straight baselines, although not always in conformity with the rules.

UNCLOS Article 14 provides that ‘[t]he coastal State may determine baselines in turn by any of the methods provided for … to suit different conditions.’ Thus, straight baselines may be used in conjunction with closing lines across river mouths and bays. Furthermore, under UNCLOS Article 7(2), straight baseline systems may apparently be maintained despite changes in coastal morphology.

**(C) Breadth of the territorial sea**

In the seventeenth century, several forms of limit were known, including the range of vision on a fair day and the range of cannons on shore. By the last quarter of the eighteenth century, the cannon-shot rule obtained in Western and Southern Europe. It was not dominant, however, and other claims rested simply on a belt with a stated breadth. In 1793, diplomatic practice first gave the cannon-shot rule a standard value of one marine league or 3nm. By 1862, and probably earlier, the cannon-shot rule and the three-mile limit were generally regarded as synonymous.

However, practice was not uniform, and France, Belgium, Portugal, Germany, and Russia did not differentiate clearly in their practice between territorial sea and jurisdictional zones. Many states with a three-mile limit claimed contiguous zones extending beyond 3nm.

Thus, some jurists doubted whether the three-mile limit had been unequivocally settled. The results of The Hague Codification Conference of 1930 provide a significant balance sheet. Although a majority of states
favoured a three-mile limit, some also claimed contiguous zones. In its
report to the Conference, the second committee explained that, due to
differences of opinion, it preferred not to express any conclusion.45
Likewise, the International Law Commission (ILC) in 1956 indicated that
a majority (p. 246) of members did not regard the three-mile rule as
positive law.46 It proved impossible to agree on a limit at UNCLOS I
(1958) and II (1960). But as part of the trade-off which occurred at
UNCLOS III, agreement was reached. UNCLOS Article 3 provides that
every state has the right to establish the breadth of its territorial sea up
to a limit not exceeding 12 nautical miles’.

Until 1987 and 1988 respectively, the US and the UK supported the three-
mile limit and protested wider claims. British adherence to the three-mile
limit was reinforced by legislation, commencing with the Territorial
Waters Jurisdiction Act 1878. Now, however, almost all states have a
12nm limit,47 including non-parties to UNCLOS such as the US.48 Claims
apparently in excess of 12nm call for careful assessment. Certain of these
are fishing conservation zones, wrongly characterized.49

(D) Bays

In certain circumstances, bays may be enclosed by a line which leaves
internal waters on its landward side and provides a baseline for
delimiting the territorial sea.50

(i) Bays the coasts of which belong to a single state

The drawing of a closing line is possible only where the coast of the bay
belongs to a single state. The GCTS Article 7(2) and UNCLOS Article
10(2) provide a geometrical, semi-circle test for bays.51 This is a
necessary but not sufficient condition for the existence of a bay: there
must be ‘a well-marked indentation with identifiable headlands’.52 Gulfs,
fjords, and straits, or parts thereof, are not excluded from the legal
concept of a bay. On the other hand, the provisions concerning bays are
not intended to introduce the system of straight lines to coasts whose
configuration does not justify this.

It was asserted formerly that the closing line was limited to 10nm.
Practice was, however, not uniform,53 and in Anglo-Norwegian Fisheries
the International Court (p. 247) concluded that ‘the ten-mile rule has not
acquired the authority of a general rule of international law’.54 GCTS
Article 7(4) and UNCLOS Article 10(4) prescribe 24nm.

Coastal states may derive title to bays as a consequence of the Anglo-
Norwegian Fisheries system of straight lines. A considerable number of
claims relating to ‘bays’ are based on historic title, often on questionable
or equivocal evidence.55
11. The territorial sea and other maritime zones

(ii) Bays bounded by the territory of two or more states

Although the issue has not been uncontroversial, GCTS Article 12(1) and UNCLOS Article 15 now represent the law. Article 15 provides:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.

The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

The question of historic title was addressed in South China Sea.\(^56\) China had declared under UNCLOS Article 298(1)(a)(i) that it did not accept compulsory dispute settlement with respect, inter alia, to disputes involving historic title. An Annex VII tribunal asserted its jurisdiction on the ground that China did not claim historic title to the waters of the South China Sea, but rather a ‘constellation of historic rights short of title’.\(^57\)

(E) Islands, rocks, and low-tide elevations

These will be dealt with in turn.\(^58\)

(i) Definition of ‘island’

Whatever its size or population, a formation is legally an island if two conditions are satisfied: (1) the formation must be ‘a naturally formed area of land’; (2) it must always be above sea level.\(^59\) Permanently submerged banks and reefs generally do not produce a territorial sea, and formations visible only at low tide (low-tide elevations) will only do so in limited circumstances. By contrast, islands are ordinarily entitled to a territorial sea, contiguous zone, EEZ, and continental shelf.\(^60\)

However, UNCLOS Article 121(3) provides that ‘[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.’\(^61\) This provision reflects the concern that minor features permanently above sea level but otherwise insignificant should not generate extended maritime zones up to or beyond 200nm. It is unlikely that the term ‘rocks’ further restricts the application of Article 121(3) to features meeting unspecified geological criteria.\(^62\) A UN study on baselines published in 1989 suggests as a definition, ‘[a] solid mass of limited extent’.\(^63\) Yet proposals to limit those islands capable of supporting an EEZ by reference to size were not accepted.\(^64\) The term ‘rocks’ might be considered to refer to islands
meeting conditions (1) and (2) which cannot sustain habitation or economic life of their own.

But the qualifying phrase is unclear. Is past, present, or future sustenance of human habitation or economic life sufficient? The conjunction ‘or’ may suggest that an island may generate an EEZ provided it is capable of sustaining independently either human habitation or economic life; or it may operate cumulatively. The concept of ‘economic life of their own’ is also vague: many small island populations are dependent on remittances and metropolitan aid but presumably qualify as having an ‘economic life of their own’. In South China Sea, an Annex VII tribunal clarified that a feature must have the ability to support an independent economic life that does not rely on outside resources or is purely extractive in nature without the involvement of a local population. It is possible that sovereign rights to exploit living and non-living marine resources in the territorial sea could fulfil the requirement of ‘economic life’. By contrast, fisheries or sea-bed minerals beyond 12nm could not do so: otherwise every rock would be capable of sustaining economic life of its own and the provision would be entirely circular.

State practice is equivocal. While the UK’s renunciation of any claim to an EEZ or continental shelf off Rockall upon acceding to UNCLOS is often cited, other states continue to claim extended maritime zones for similar features.

(ii) Low-tide elevations

In two cases, low-tide elevations (by definition not islands) affect the limit of the territorial sea. GCTS Article 4(3) and UNCLOS Article 7(4) provide that straight baselines shall not be drawn to or from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them. Secondly, and independently, the low-water line on an elevation situated at a distance not exceeding the breadth of the territorial sea from the mainland or an island may serve as the baseline. The status of features as low-tide elevations is to be determined on the basis of their natural condition. Low-tide elevations are naturally formed features, and cannot be converted into islands, legally speaking, by human intervention. Low-tide elevations outside the territorial sea have no territorial sea of their own.
11. The territorial sea and other maritime zones

(iii) Groups of islands: archipelagos

The ILC failed to produce a draft article on archipelagos75 for inclusion in the GCTS, although in its commentary on Article 10 it noted that the straight baselines system might be applicable.76 This provides no solution to the problem of extensive island systems unconnected with a mainland. Indonesia and the Philippines77 have for some time employed straight baselines to enclose such island systems, and it may be that a polygonal system is the only feasible one. It is arguable that this is only a further application, to special facts, of the principles of unity and interdependence articulated in Anglo-Norwegian Fisheries. The difficulty is to allow for such cases without giving a general prescription which, being unrelated to any clear concept of mainland, will permit abuse.78

At UNCLOS III, the archipelagic states as a group79 successfully advanced the cause of straight archipelagic baselines, now embodied in Part IV (Arts 46–54). An archipelagic state is defined as ‘a state constituted wholly by one or more archipelagos and may include other islands’. This definition unaccountably excludes archipelagic baselines for those states, such as Ecuador and Canada, which consist of continental coasts as well as one or more archipelagos.

Archipelagic straight baselines may be employed subject to conditions: for example, that these baselines ‘shall not depart to any appreciable extent from the general configuration of the archipelago’. The archipelagic state has sovereignty over the waters enclosed by the baselines subject to the limitations in Part IV: notably, the right of innocent passage for ships of all states, and (unless the archipelagic state designates sea lanes and air routes) the right of archipelagic sea lane passage ‘through the routes normally used for international navigation’.80

(F) Legal regime of the territorial sea

In the territorial sea, the coastal state has all the rights and duties inherent in sovereignty, whereas foreign vessels have privileges, associated particularly with the right of innocent passage, which have no general counterparts in respect of the land domain. The coastal state may reserve fisheries for national use. It may also exclude foreign vessels from navigation and trade along the coast (cabotage). Obviously, there are general police powers in matters of security, customs, fiscal regulation, and sanitary and health controls.

Foreign ships have a right of innocent passage through the territorial sea in customary law.81 GCTS Article 14 and UNCLOS Article 17 codify this right (see further chapter 13).

2. The Contiguous Zone
11. The territorial sea and other maritime zones

The power of the coastal state may be manifested in other ways. The territorial sea is the zone which involves the greatest concentration of ‘sovereign’ legal rights. The general interest in maintaining the freedom of the seas outside the territorial sea has been reconciled with the tendencies of coastal states to extend their power seaward by the development of generally recognized specialized extensions of jurisdiction and associated rights. The contiguous zone was the first to emerge.

(A) The concept of the contiguous zone

There is general recognition that contiguous zones give jurisdiction beyond the territorial sea for special purposes. In 1958, the sole article on the contiguous zone was GCTS Article 24 which referred to control by the coastal state ‘in a zone of the high seas contiguous to its territorial sea’. UNCLOS Article 33 describes it simply as a zone contiguous to the territorial sea of the coastal state. Under UNCLOS Article 55 the contiguous zone, if claimed, is superimposed on the EEZ. In the absence of a claimed EEZ, the areas concerned form part of the high seas (Art 86). It follows that the rights of the coastal state in such a zone do not constitute sovereignty, and other states have the rights exercisable over the high seas save as qualified by these jurisdictional zones.

Only recently has a consistent doctrine of contiguous zones appeared. UNCLOS Article 33 provides for the creation of contiguous zones for the same purposes and on the same basis as GCTS Article 24, except that (1) the contiguous zone is no longer considered ‘a zone of the high seas’; and (2) the maximum limit is expressed to be 24nm from the territorial sea baselines. Most coastal states claim a contiguous zone within and up to this maximum limit; these, when limited to purposes specified in Article 33, are uncontroversial.

(B) Functional jurisdiction in the contiguous zone

In considering the purposes for which a contiguous zone may be maintained, UNCLOS Article 33 is now the departure point. It refers to the exercise of control necessary to prevent infringement of ‘customs, fiscal, immigration or sanitary regulations within the territory or territorial sea of the coastal State’. Although it does not refer to the exercise of control for security purposes, some states have claimed jurisdiction in a zone contiguous to the territorial sea on this basis, both prior to and after the entry into force of the GCTS and UNCLOS. A set of draft articles relating to the territorial sea in times of peace approved by the Institut in 1928 included security measures among the controls exercised in a zone contiguous to the territorial sea. In 1956, however, the ILC stated that it:

- did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term ‘security’ would open the way for abuses and that the granting of such rights was
11. The territorial sea and other maritime zones

not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations.87

Recognition of such rights would go far towards equating rights over the contiguous zone and the territorial sea.

(i) Customs

The exercise of this jurisdiction is frequent and no doubt rests on customary international law. UNCLOS Article 33 refers compendiously to ‘customs and fiscal’ regulations in the contiguous zone; other sources refer to ‘revenue laws’. Modern vessels would find smuggling quite straightforward if a narrow enforcement area were employed, and customs zones of 6 and 12nm have been common. The US exercised customs jurisdiction over inward-bound foreign vessels within a four-league zone from 1790. The UK had similar ‘hovering acts’ operating against foreign vessels from 1736 until 1876.88 Claims for the enforcement of national legislation in areas of the high seas are limited by reasonableness, and regulations designed for revenue enforcement cannot be employed in such a way as to accomplish another purpose, for example the exclusion of foreign vessels.89 Treaty regimes may be created for the mutual recognition of zones and enforcement procedures, reducing the likelihood of incidents.90

(ii) Immigration

In practice, customs and fiscal regulations might be applied to deal with immigration, and this jurisdiction shares the same policy basis as that relating to customs. Immigration zones were reconciled partially by inclusion in the GCTS and UNCLOS.91 The limitation to immigration may be significant, although in its 1955 report the ILC indicated that the term was intended to include emigration.92

(iii) Sanitary purposes

Such zones are included in GCTS Article 24 and UNCLOS Article 33. The ILC’s commentary notes:

Although the number of States which claim rights over the contiguous zone for the purpose of applying sanitary regulations is fairly small, the Commission considers that, in view of the connection between customs and sanitary regulations, such rights should also be recognized for sanitary regulations.93

Doctrine supports this type of claim.94
11. The territorial sea and other maritime zones

Sanitary purposes might cover measures to prevent pollution, particularly by oil, but the position is unclear. Jurisdiction to police pollution has been advanced by the extension of the territorial sea and the appearance of the EEZ, where the coastal state has the right of conserving and managing natural resources. UNCLOS Part XII also sets out a general obligation to protect and preserve the marine environment. States are further required to take ‘all measures consistent with [the] Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source’ and to ‘take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights’. The coastal state may adopt ‘laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards’ in their EEZs. UNCLOS Article 220 sets out coastal state rights of enforcement in respect of vessels within its territorial sea and EEZ.

(C) Issues of enforcement

Under general international law, the coastal state may take steps necessary to enforce compliance with its laws in the prescribed zone. The power is one of police and control, and transgressors cannot be visited with consequences amounting to reprisal or summary punishment. Forcible self-help may not be resorted to as readily as in the case of trespass over a terrestrial frontier.

Thus, the conventional law may be more restrictive from the perspective of a coastal state than customary law. Both GCTS Article 24(1) and UNCLOS Article 33 provide for the exercise of control necessary to prevent and punish infringement of customs, fiscal, immigration, or sanitary laws or regulations within its territory or territorial waters. Fitzmaurice promoted this text prominently in the ILC. In his view:

It ... is control, not jurisdiction, that is exercised ... [T]aken as a whole, the power is essentially supervisory and preventative. The basic object is anticipatory. No offence against the laws of the coastal State is actually being committed at the time. The intention is to avoid such an offence being committed subsequently, when, by entering the territorial sea, the vessel comes within the jurisdiction of the coastal State; or else to punish such an offence already committed when the vessel was within such jurisdiction ... Whatever the eventual designs of the [incoming] vessel, she cannot ex hypothesi at this stage have committed an offence ‘within [the coastal State’s] territory or territorial sea’ ... As regards ordering, or conducting, the vessel into port under escort, the case is less clear. Though formally distinct from arrest, enforced direction into
This interpretation, whilst open, is not inevitable, and the travaux préparatoires indicate that most delegations did not intend to restrict rights by distinguishing between ‘control’ and ‘jurisdiction’. The language of GCTS Article 24 was retained in UNCLOS Article 33: again the record of negotiations does not indicate an intention to limit coastal state powers in the contiguous zone by using the term ‘control’. The decision to retain the contiguous zone, however, seems to have been based on the observation that coastal state jurisdiction in the EEZ related primarily to natural resources and did not cover the functions specified for the exercise of control in the contiguous zone. Although enforcement jurisdiction in the contiguous zone relates to the threatened or actual infringement of laws and regulations within the territory or territorial waters and does not extend jurisdiction to the contiguous zone, a small number of states argue that this limitation was not supported by the majority at UNCLOS I or by state practice. Nevertheless, a Polish amendment removing the reference to infringement within the territory or the territorial sea (and adding security to the list of recognized purposes for the exercise of control) failed in plenary.

3. The Continental Shelf

Submarine areas may be classified as follows: (1) the seabed of the internal waters and territorial seas of coastal states, which are under territorial sovereignty; (2) the seabed and subsoil of the EEZ, which is part of that zone; (3) the continental shelf area, which overlaps with the EEZ within 200nm but may extend further; and (4) the seabed and ocean floor beyond the outer limits of the continental shelf and EEZ, which come within the legal regime of the high seas.

UNCLOS Article 56 purports to address the problem of overlapping regimes by providing that rights with respect to the seabed and subsoil in the EEZ must be exercised in accordance with Part VI, that is, the continental shelf regime. But this does not solve the problem entirely, since an area may be within 200nm of state A (and thus part of its EEZ) but beyond 200nm from state B yet claimed by it as outer continental shelf: this is referred to as the ‘grey area’. The legal regime of the international seabed ‘Area’ and the International Seabed Authority are discussed in chapter 13.
11. The territorial sea and other maritime zones

(A) Origins of the continental shelf

Much of the seabed consists of the deep ocean floor, several thousand metres deep. In many parts of the world, the ‘abyssal plain’ is separated from the coast of the land masses by a terrace or shelf. This is geologically part of the continent itself, overlain by the relatively shallow waters of the continental margin. The width of the shelf varies from one mile to some hundreds of miles; the depth ranges from 50 to 550 metres. The configuration of the seabed has certain regularities. The increase in depth is gradual until the shelf edge or break is reached, when there is a steep descent to the ocean floor. The average depth of the edge is between 130 and 200 metres. The relatively steep incline of the continental slope gives way to the often large apron of sediments, which masks the boundary between the deep ocean floor and the pedestal of the continental mass, and is called the continental rise.

The shelf carries oil and gas deposits in many areas and the seabed itself provides sedentary fishery resources. In 1944, an Argentine decree created zones of mineral reserves in the epicontinental sea. However, the decisive event in state practice was a US proclamation of 28 September 1945 relating to the natural resources of the subsoil and seabed of the continental shelf (the Truman Proclamation). The shelf was regarded as a geological feature extending up to the 100 fathoms line. The resources concerned were described as ‘appertaining to the United States, subject to its jurisdiction and control’. Significantly, the claim was limited to the resources themselves and the proclamation declared that ‘the character as high seas of the waters of the continental shelf and the right to their free and unimpeded navigation are in no way thus affected’.

The Truman Proclamation was in substance followed by Orders in Council of 1948 relating to the Bahamas and Jamaica, and by proclamations issued by Saudi Arabia in 1948 and nine Gulf sheikdoms under UK protection in 1949. Practice varied, however. The Truman Proclamation and an Australian proclamation of 10 September 1953 related the claim to the exploitation of the resources of the seabed and subsoil of the continental shelf, and stipulated that the legal status of the superjacent waters as high seas was unaffected. Other states claimed sovereignty over the seabed and subsoil of the shelf but reserved consideration of the status of the waters above.

The Truman Proclamation proved attractive to many states. It provided a basis for the exploitation of petroleum and at the same time accommodated freedom of fishing and navigation in the superjacent waters. However, practice was uneven, and the discussions in the ILC from 1951 to 1956 indicated the immaturity of the regime. Inevitably, the GCCS represented in part an essay in progressive development. Nevertheless, by 1958 the first three articles reflected the customary law position. Article 1 defined the continental shelf by reference to a general concept of adjacency and a more specific (but still
11. The territorial sea and other maritime zones

apparently open-ended) depth-plus-exploitability limit; it also extended
the shelf regime to islands (undefined). Article 2 defined the rights of the
coastal state over the shelf as ‘sovereign rights for the purpose of
exploring it and exploiting its natural resources’: these rights are
exclusive and do not require proclamation. Article 3 preserved ‘the legal
status of the superjacent waters as high seas, or that of the air space
above those waters’.

The GCCS may remain relevant where both parties to a dispute are
parties to it and not to UNCLOS.112 However, the present position in
general international law depends on numerous sources, each given
appropriate weight. The Chamber in *Gulf of Maine* recognized the
relevance of codification conventions, the decisions of the Court and of
other international tribunals, and the proceedings of UNCLOS III where
they indicated that certain provisions reflected a consensus.113 In its
decision in *Continental Shelf (Libya/Malta)*, the International Court took
careful account of certain aspects of UNCLOS as evidence of custom,114
while also emphasizing state practice.115

(B) Rights of the coastal state in the shelf

According to GCCS Article 2, repeated in UNCLOS Article 77, the coastal
state exercises ‘sovereign rights for the purpose of exploring [the shelf]
and exploiting its natural resources’. The term ‘sovereignty’ was
deliberately avoided, as it was feared that this term, redolent of territorial
sovereignty (which operates in three dimensions), would prejudice the
status as high seas of the waters over the shelf. While the area within a
claimed 200nm EEZ is not designated ‘high seas’,116 UNCLOS Article
78(1) 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’.117 In the absence of a claimed EEZ, and
also when the shelf extends beyond 200nm, the superjacent
(p. 257)
waters will be legally considered high seas. When an EEZ exists, the
superjacent waters remain subject to most high seas freedoms in
accordance with custom and UNCLOS Article 58.

Several provisions attest to the delicate problem of balancing the rights
of the coastal state in exploiting shelf resources and the rights of other
states. UNCLOS Article 78(2) provides that ‘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 this Convention’ (see also
GCCS Art 5(1)). UNCLOS Article 79 provides that ‘all States are entitled
to lay submarine cables and pipelines on the continental shelf’ subject to
certain conditions. The coastal state ‘shall have the exclusive right to
authorise and regulate drilling on the continental shelf for all
purposes’.118
11. The territorial sea and other maritime zones

A major objective has been to provide a stable basis for operations on the seabed and to avoid squatting by offshore interests. Thus, ‘sovereign rights’ inhere in the coastal state by law and are not conditioned on occupation or claim. They are indefeasible except by express grant. While coastal states apply various parts of criminal and civil law to activities in the shelf area, it is by no means clear that they do this as an aspect of their territorial or other rights in the shelf area. Legislation of the UK and other states indicates that the shelf regime is not assimilated to state territory.

(C) Natural resources of the shelf

The Truman Proclamation concerned the mineral resources of the shelf, especially hydrocarbons. Subsequently Latin American states pressed for recognition of the interest of coastal states in offshore fisheries (whether or not they had a geophysical shelf). The ILC had decided to include sedentary fisheries in the shelf regime, and GCCS Article 2(4) defines ‘natural resources’ to include ‘sedentary species, that is to say, 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’. The definition excludes demersal species which swim close to the seabed; it is reproduced in UNCLOS Article 77(4). Provided an encompassing EEZ has been claimed, definitional issues will not arise, as living resources will be caught by one regime or the other.

(D) Artificial islands and installations on the shelf

The right to authorize and regulate artificial islands, installations, and other structures within the EEZ is set out in UNCLOS Article 60 which is applied ‘mutatis mutandis’ to artificial islands, installations and structures on the continental shelf’ by Article 80. Such installations do not have their own territorial sea. The coastal state may, where necessary, establish safety zones not exceeding 500 metres around them. Installations must not be established where they will interfere with the use of recognized sea lanes essential to international navigation.

The GCCS and UNCLOS are silent on the subject of defence installations on the shelf. Defence installations may thus be lawful if some other justification exists. To suggest that the coastal state may create defence installations and prohibit comparable activities by other states is to risk justifying a shelf-wide security zone.

(E) Regime of the subsoil

UNCLOS Article 85 provides that Part VI ‘does not prejudice the right of the coastal State to exploit the subsoil by means of tunnelling irrespective of the depth of water above the subsoil’ (see also GCCS Art 7). In other words, such activity falls outside the scope of the Convention and is governed by custom. There is a notable distinction; if exploitation is by
11. The territorial sea and other maritime zones

tunnel from the mainland, a different regime applies: if exploitation of the subsoil occurs from above the shelf, the UNCLOS regime applies.\(^{130}\)

**(F) Outer limit of the shelf**

The inner limit of the shelf is the outer edge of the territorial sea and its seabed. As to its outer limit, the solution proposed by UNCLOS is substantively and procedurally different from the criteria in GCCS Article 1. According to Article 1, the 200-metre depth criterion is subject to the exploitability criterion, but the latter is controlled by the generally geological conception of the shelf, and by the principle of adjacency.\(^{131}\) Only a handful of states still rely on this formula.\(^{132}\)

UNCLOS Article 76 adopts a different approach. It recognizes a 200nm breadth limit as an independently valid criterion, and provides complex guidelines for locating the ‘outer edge of the continental margin’, if that feature lies beyond 200nm from the relevant baselines. Article 76(5) sets maximum limits for the outer continental shelf, either 350nm from the relevant baselines or ‘100 nautical miles from the 2,500 metre isobath’.

So much for substantive difference. The key procedural difference is that Annex II provides for an expert Commission on the Outer Limits of the Continental Shelf. In accordance with Article 76(8):

> Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission … The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

The relationship between the work of the Annex II Commission and interstate delimitation of shelf areas is discussed in chapter 12.

Despite its complexity and the evident signs of diplomatic compromise in its formulations, Article 76 is generally recognized as representing the new standard of customary law for the shelf. There is always the possibility that states opposing the 200-mile breadth criterion might have adopted the role of persistent objectors, but in practice this has not happened.\(^{133}\)

**4. The Exclusive Economic Zone/Fisheries Zone**

**(A) Introduction**

The EEZ is one of the central innovations of UNCLOS. Most states now secure their right to fisheries by claiming an EEZ of up to 200nm from the territorial sea baseline, although a few continue to claim Exclusive
Fishery Zones (EFZ) either instead of or as well as an EEZ. The EEZ is not only a fisheries zone: it covers exploitation and management of non-living as well as living resources, and thus duplicates the continental shelf out to 200nm. UNCLOS Article 56 further provides for the sovereign rights of the coastal state ‘with regard to other activities for the economic exploitation and exploration of the zone’; it also lays down certain duties (though these are not denominated ‘sovereign’).

(B) Fishery zones

Since 1945 at least, coastal states with particular interests in offshore fisheries have sought means of limiting major operations by extra-regional fishing fleets. Paradoxically it was the US, historically an opponent of fishing zones, which drove initial change. In the first place, the US took an important initiative in claiming the mineral resources of the continental shelf in 1945, on the basis of the generous concept of ‘adjacency’. Unsurprisingly, other states were ready to claim the biological resources of the adjacent waters or ‘epicontinental sea’ by a general parity of reasoning. Secondly, the US produced a Fisheries Proclamation also of 28 September 1945, which empowered the government to establish ‘explicitly bounded’ conservation zones in areas of the high seas ‘contiguous to the United States’.

Beginning in 1946, a number of Latin American states made claims to the natural resources of the epicontinental sea, in effect a fishery conservation zone of 200nm breadth. Icelandic legislation on these lines was adopted in 1948. The tendency was initially incoherent. Adherents were scattered and the legal quality of some of the claims was uncertain and varied. Some, for example the Peruvian claim, were on one view an extended territorial sea with certain concessions to overflight and free navigation. In 1970, nine out of 20 Latin American states subscribed to the Montevideo Declaration on the Law of the Sea, which asserted a 200nm zone, involving ‘sovereignty and jurisdiction to the extent necessary to conserve, develop and exploit the natural resources of the maritime area adjacent to their coasts, its soil and its subsoil’, but without prejudice to freedom of navigation and overflight.

Meanwhile, the fishery conservation zone was attracting support as customary law. In the Fisheries Jurisdiction cases, an Icelandic fishing zone 50nm in breadth was held to be not opposable to the UK and Germany as a consequence of a 1961 bilateral agreement. The Court avoided taking a position on the validity of the Icelandic claim in general international law. But the Court went half-way, upholding as customary law ‘preferential rights of fishing in adjacent waters in favour of the coastal state in a situation of special dependence on its coastal fisheries, this preference operating in regard to other states concerned in the exploitation of the same fisheries’. The status of fishery zones in custom was also recognized by the Court in Jan Mayen. Thus, the
11. The territorial sea and other maritime zones

The concept of preferential fishing rights seems to have survived in customary law despite its absence from UNCLOS. But the development of 200nm fishery zones has been made largely redundant by the preponderance of EEZs. By 2016, only 14 states retained fishing zones of up to 200nm. The adherents to such zones included the US, Japan, and certain EU members. The UK claims a 200nm fishing zone, together with a 200nm fishery conservation zone in respect of the Falkland (Malvinas) Islands.

(C) The EEZ as an established zone

The increase in claims to exclusive rights in respect of the fisheries in an adjacent maritime zone, described earlier, led eventually to claims encompassing all natural resources in and of the seabed and superjacent waters in a zone 200nm in breadth. By 1972, this development was presented, in more or less programmatic form, as a ‘patrimonial sea’, or ‘economic zone’.

At UNCLOS III there was widespread support for the EEZ, and UNCLOS Articles 55–75 provide a detailed structure. The zone is to extend no further than 200nm from the baselines of the territorial sea. It is not defined as a part of the high seas (Art 86) and is sui generis. But apart from the freedom of fishing, the freedoms of the high seas apply (Art 87). The position of the coastal state is described as follows in Article 56(1):

In the EEZ, 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, 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;

(b) jurisdiction as provided for in the relevant provisions of the present Convention with regard to:
   (i) the establishment and use of artificial islands, installations and structures;
   (ii) marine scientific research;
   (iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

In South China Sea, an UNCLOS Annex VII tribunal found that China’s claim to historic rights to the living and non-living resources within the ‘nine-dash line’ was incompatible with UNCLOS to the extent that it exceeded the maritime zones established pursuant to UNCLOS. The
11. The territorial sea and other maritime zones

tribunal emphasized that UNCLOS comprehensively allocates rights to maritime areas and does not leave space for an assertion of historic rights.\(^{150}\) But China has rejected the award.

There can be no doubt that the EEZ forms part of customary law, as has been recognized by the International Court.\(^{151}\) The customary law version of the concept is closely related to the version which emerged within UNCLOS III. Both under UNCLOS and customary law, the zone is optional and its existence depends on an actual claim. Certain states, such as Canada, Germany, and Japan, are content to maintain 200-mile exclusive fishing zones.

When claimed, an EEZ coexists with the regime of the continental shelf which governs rights with respect to the seabed and the subsoil (UNCLOS Art 56(3)). It may also coexist with a contiguous zone out to 24nm.

The US initially took the view that ‘highly migratory species’, including the commercially important tuna, were excluded from the jurisdiction of the coastal state, and therefore available for foreign distant-water fishing fleets.\(^{152}\) This position became increasingly untenable; it was contradicted by the provisions of UNCLOS Article 64 and is not reflected in state practice.\(^{153}\) The legal regime of the EEZ has various facets. UNCLOS Article 60 provides (in part) as follows:

1. In the EEZ, the coastal State shall have the exclusive right 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;
   (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

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.

The same article confirms that artificial islands, installations, and structures have no territorial sea of their own and do not affect the delimitation of the territorial sea, EEZ, or continental shelf.

Article 61 elaborates on coastal state responsibility in managing the living resources in the zone via its duty to ‘ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by over-exploitation’. Similarly, Article 62
11. The territorial sea and other maritime zones

requires the coastal state to promote the optimum utilization of the living resources in the zone. In particular, it is provided that:

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, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of Articles 69 and 70, especially in relation to the developing States mentioned therein.

The allocation of the respective rights and duties of the coastal state and those of other states in the zone involves a delicate balancing process which is articulated in fairly general terms in the provisions of the Convention. Article 58 provides as follows:

1. 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.

... 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State 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.

Article 59 appears under the rubric ‘basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the EEZ’ and provides:

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...
11. The territorial sea and other maritime zones

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.

The coastal state has the power to take reasonable measures of enforcement of its rights and jurisdiction within the zone in accordance with the standards of general international law and UNCLOS itself (Art 73).\(^{156}\)

In *Sub-Regional Fisheries Commission*, ITLOS gave an advisory opinion requested by an intergovernmental organization comprising seven West African states on the rights and duties of flag and coastal states with respect to illegal, unreported, and unregulated (IUU) fishing within the EEZ. ITLOS found that in light of the special rights and responsibilities of the coastal state over conservation and management of living resources in the EEZ, it has ‘primary responsibility’ to prevent, deter, and eliminate IUU fishing.\(^{157}\) But flag states on their part are responsible for ensuring that vessels flying their flag do not conduct IUU fishing within the EEZs of the Commission’s member states, this responsibility being a due diligence obligation.\(^{158}\) The flag state’s responsibility does not extend to a vessel’s failure to comply with relevant laws and regulations on IUU fishing activities as such acts are not attributable to it.\(^{159}\) In addition, where a state has transferred fisheries competence to an international organization—such as the EU—which has exclusive competence over fisheries, it is the organization which is responsible for failing to meet this due diligence obligation.\(^{160}\) Finally, the tribunal affirmed the coastal states’ duty to cooperate in the sustainable management of shared stocks and highly migratory species adopting a precautionary approach as required.\(^{161}\)

(D) The EEZ and continental shelf compared

Comparison of the legal concepts of the continental shelf and EEZ is instructive. They coexist both in the sphere of customary law and under UNCLOS, and contain significant elements of similarity and interpenetration. Both concepts focus on control of economic resources and are based, in varying degrees, on adjacency and the distance principle.\(^{(p. 265)}\) The EEZ includes the continental shelf interest in the seabed of the 200nm zone.

However, there are significant points of distinction.

(1) The EEZ is optional, whereas rights to explore and exploit the resources of the shelf inhere in the coastal state by operation of law. Thus, several states of the Mediterranean have shelf rights unmatched by an EEZ (which is less relevant in semi-enclosed seas).

(2) Shelf rights exist beyond the limit of 200nm from the pertinent coasts when the continental shelf and margin extend beyond that limit. Consequently, within the UNCLOS regime the rights of the
11. The territorial sea and other maritime zones

International Sea-bed Authority must be reconciled with those of the coastal state.

(3) The EEZ regime involves the water column and consequently its resources (apart from sedentary species) are subject to the rules about sharing the surplus of the living resources of the EEZ with other states and, in particular, with landlocked and geographically disadvantaged states of the same region or subregion (UNCLOS Arts 62, 68, 69, 70, 71).

(4) The EEZ regime confers on coastal states a substantial jurisdiction over pollution by ships, and also greater control in respect of marine scientific research.

5. Other Zones for Special Purposes

The twentieth century produced a number of national claims to non-contiguous, but adjacent, zones for special purposes.\(^{163}\)

(A) Security zones

Security or defence zones\(^ {164}\) in polygonal or similar forms extending beyond the territorial sea, and zones for the purposes of air identification,\(^ {165}\) have made their appearance in the practice of states.\(^ {166}\) Insofar as those zones represent claims to extraterritorial jurisdiction over nationals, they do not necessarily conflict with general international law, and, furthermore, groups of states may cooperate and be mutually obliged to respect such zones by convention. Again, such zones may take the form of a lawful aspect of belligerent rights in time of war. Otherwise such zones would be incompatible with the status of waters beyond the limit of the territorial sea, at least if they involved the application of powers of prevention or punishment in regard to foreign vessels or aircraft.

(B) Other miscellaneous claims

Evidently the period 1945–82 saw a growth not only in the extent of seaward claims but in new types of maritime zone. To the simple long-established picture of territorial sea and internal waters were added the four newcomers discussed here. The widespread ratification of UNCLOS has done much to stabilize the law, and for the moment it seems unlikely that new exclusive claims to high seas resources will be made. Yet new developments cannot be categorically excluded in a dynamic customary law system. Chile’s claim to a so-called ‘Presencial Sea’ is a case in point, although it has been explained as a non-exclusive zone of interest and not a territorial claim.\(^ {167}\)

6. Conclusion

To a large extent, UNCLOS has had the intended effect of endorsing claims already made before 1974 to maritime zones beyond the territorial sea (contiguous zone, EEZ, continental shelf, archipelagic sea)
11. The territorial sea and other maritime zones

while limiting the development of entirely new claims. At the same time, it has provided much further detail to the existing law and has instituted a rather elaborate system of dispute settlement (as to which see chapter 32). It has thus had a pronounced consolidating effect. But subsisting controversies especially in the South China Sea raise questions about this stability, even between parties to UNCLOS, and it does not help that the US continues to be unable to ratify it, despite its comprehensive recognition of US navigational and security interests. The balance struck in UNCLOS, though powerful, remains somewhat provisional.

Notes:


2 Other terms in use included the ‘marginal sea’ and ‘territorial waters’. The term ‘territorial waters’ was used occasionally in national legislation to describe internal waters, or internal waters and the territorial sea combined. Cf Fisheries (UK v Norway), ICJ Reports 1951 p 116, 125.

3 The marine or nautical mile (nm) is equivalent to 1,852 metres. National definitions have historically varied; however, this value was approved by the International Hydrographic Conference in 1929.

4 29 April 1958, 516 UNTS 205.

5 10 December 1982, 1833 UNTS 3, Art 311.

6 GCTS, Art 21; UNCLOS, Art 2.

7 Gidel, 3 Le Droit international public de la mer (1934) 181; O’Connell (1971) 45 BY 303; 1 O’Connell (1982) 59.


9 GCTS, Art 2; UNCLOS, Art 2.

10 Bynkershoek, De Dominio Maris Dissertatio (1702, tr Magoffin 1923) ch 2.
11. The territorial sea and other maritime zones

11 This is the view of Walker (1945) 22 BY 210.

12 Vattel adopted the theory of a maritime belt, but regarding breadth concluded that ‘all that can reasonably be said, is, that, in general, the dominion of the state over the neighbouring sea extends as far as her safety renders it necessary and her power is able to assert it’: Vattel, *Le Droit des gens* (1758, tr Anon 1797) I.xxiii.§289.


14 Similar views were expressed by Azuni in *Sistema universale dei principii del diritto marittimo dell’Europa* (1795, tr Johnson 1806). Also: Kent (1954) 48 AJIL 537, 548.

15 1 Hyde 455.

16 *The Twee Gebroeders* (1800) 3 C Rob 162; (1801) 3 C Rob 336; *The Anna* (1805) 5 C Rob 373; *The Brig Ann* (1815) 1 Gall 62. Also: McNair, 1 *Opinions* 331.


18 Cf the Portuguese six-mile limit for customs and neutrality: Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) 41. The Spanish six-mile limit for a territorial sea appears to have originated in customs legislation. The 12-mile zone claimed by Imperial Russia related to customs and fisheries legislation.

19 Such general recognition certainly existed by 1920 and perhaps as early as 1880. Generally: Masterson, *Jurisdiction in Marginal Seas* (1929) 375ff. In 1914, Chile, which already had a territorial sea with a three-mile limit, declared the same limit for the purposes of neutrality. British sources often refer to ‘territorial jurisdiction’.


22 ICJ Reports 1951 p 116. For contemporary comment: Waldock (1951) 28 BY 114; Hudson (1952) 46 AJIL 23; Johnson (1952) 1 ICLQ 145; Evensen (1952) 46 AJIL 609; Wilberforce (1952) 38 GST 151; Auby (1953) 80 JDI 24; Fitzmaurice (1953) 30 BY 8; Fitzmaurice (1954) 31 BY 371; Lauterpacht, *Development* (1958) 190–9.
11. The territorial sea and other maritime zones

23 Under the 1935 decree (not strictly enforced until 1948), 48 fixed points were employed: 18 lines exceeded 15nm in length, one was 44nm in length. The decree referred to a fisheries zone, but both parties assumed in argument that it delimited the territorial sea: ICJ Reports 1951 p 116, 125.

24 Ibid, 138, but see ibid, 171–80 (Judge McNair, diss).

25 Ibid, 206. Also see *Anglo-French Continental Shelf* (1978) 54 ILR 6, 74–83 on acceptance of a basepoint by conduct.

26 Later references to the attitude of other governments appear to have been partially intended as evidence of legality: ICJ Reports 1951 p 116, 139.

27 Ibid, 127.

28 Ibid, 128.

29 See Waldock (1951) 28 BY 114, 132–7.


31 Ibid, 131.

32 Ibid, 133.

33 Ibid.

34 See also the statement that ‘in these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing’: ibid, 128.


36 GCTS, Art 13; UNCLOS, Art 9.

37 GCTS, Art 7; UNCLOS, Art 10.


39 Denmark and Norway, 4nm (1745); Sweden, 4nm (1779); Spain, 6nm (1760).

40 The US Proclamation of Neutrality, 22 April 1793, refers to the range of a cannonball, ‘usually stated at one sea league’. See 1 Hyde 455.

41 Cf Moore, 1 *Digest* 706–7.
11. The territorial sea and other maritime zones

An isolated case of reliance on the rule to justify a limit of 12nm occurred in 1912, when Russia referred to the rule to justify extensions of jurisdiction for customs and fishery purposes: 1 Hackworth 635. Also Costa Rica Packet (1898) in Moore, 5 Int Arb 4948; The Alleganean (1885), in Moore, 4 Int Arb 4332.

Cf (1926) 20 AJIL Sp Supp 73–4; Gidel (1934) 69ff, on treaty practice.

E.g. Hall, International Law (1880) 191–2; Westlake, International Law (1904) part I, 184–6. Also: Fulton (1911) 664.

For the views expressed: (1930) 24 AJIL Sp Supp 253; 1 Hackworth 628.


For information on maritime claims: UN Office of Legal Affairs, Law of the Sea Bulletin.

Presidential Proclamation No 5928, 27 December 1988, 54 FR 777.

UNCLOS, Art 310, allows states to make ‘declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention’. Such declarations or statements may clarify how zones characterized differently at the national level might correspond with those under UNCLOS. In Anglo-Norwegian Fisheries, the Court took the fisheries zone delimited by the Norwegian Royal Decree of 1935 as ‘none other than the sea area which Norway considers to be her territorial sea’: ICJ Reports 1951 p 116, 125.


McNair, 1 Opinions 353–6, 360.

ICJ Reports 1951 p 116, 131. Also: ibid, 163–4 (Judge McNair). However, Judge Read regarded the rule as customary: ibid, 188.
11. The territorial sea and other maritime zones

For bays claimed as ‘historic bays’ (over 30 in all): Jessup (1927) 383-439; Gidel (1934) 621-63; McDougal & Burke (1962) 357-68 (discounting the basis in authority of some claims); Rothwell & Stephens (2nd edn, 2016) 49-51. The Central American Court of Justice in 1917 declared that the Gulf of Fonseca was ‘an historic bay possessed of the characteristics of a closed sea’ and further, that without prejudice to the rights of Honduras, El Salvador, and Nicaragua had a right of co-ownership in the extraterritorial waters of the Gulf. See *El Salvador v Honduras*, ICJ Reports 1992 p 351, 588-605.


E.g. *Nicaragua v Colombia*, ICJ Reports 2012 p 624, 645 (concerning the large marine feature Quitasueño).

UNCLOS, Art 121(2). Also: *Nicaragua v Colombia*, ICJ Reports 2012 p 624, 690-1.

In *Nicaragua v Colombia*, the Court affirmed the customary international law status of Art 121(3), emphasizing that the legal regime of islands under Art 121 forms an indivisible regime: ICJ Reports 2012 p 624, 674.

For a comprehensive interpretation of Art 121(3): *Philippines v China*, Merits (2016) 170 ILR 1, 397-405 ([478]-[504]). The PRC did not appear and has denounced the award.


*Philippines v China*, Merits (2016) 170 ILR 1, 400-3 ([493]-[497]).


*Philippines v China*, Merits (2016) 170 ILR 1, 403-4 ([500]).
11. The territorial sea and other maritime zones

68 Hansard, HC Deb, 21 July 1997, vol 298, cols 397–8W: ‘The United Kingdom’s fishery limits will need to be redefined based on St Kilda, since Rockall is not a valid base point for such limits under article 121(3) of the convention.’ Cf [1997] UKMIL 591, 599–600.


70 29 April 1958, 499 UNTS 311. For the role of islands in maritime delimitation: chapter 12.


74 Philippines v China, Merits (2016) 170 ILR 1, 325 ([305]).


76 ILC Ybk 1956/II, 270.


78 Also: Chagos Marine Protected Area (Mauritius v UK) (2015) 162 ILR 1 (where the identity of the coastal state was disputed).

79 Twenty-two coastal states parties to UNCLOS claim archipelagic status. In Qatar v Bahrain, the Court declined to consider whether Bahrain, which had not formally claimed status as an archipelagic state, was entitled to do so: ICJ Reports 2001 p 40, 97.

11. The territorial sea and other maritime zones

81 GCTS, Art 14; UNCLOS, Art 17.


83 Cf Sorensen & Jensen (1991) 89 ILR 78.

84 Gidel (1934) 372ff deserves credit for giving the concept authority and coherence. Cf the materials of The Hague Codification Conference; and Renault (1889–92) 11 Ann de l’Inst 133, 150.


86 Institut de droit international (1928) Ann de l’Inst 755; Caminos, ‘Contiguous Zone’ (2013) MPEPIL.


88 On British and US legislation and the diplomatic repercussions: Masterson (1929).

89 See 1 Hackworth 657–9.

90 Helsingfors Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors, 19 August 1925, 42 LNTS 75. On the ‘liquor treaties’ concluded by the US: Masterson (1929) 326.

91 The type had appeared in the ILC Draft Articles in 1955, but was deleted in 1956: ILC Ybk 1956/II, 295. Cf Fitzmaurice (1959) 8 ICLQ 73, 117–18 (critical of inclusion); Oda (1962) 11 ICLQ 131, 146.

92 GAOR, 8th Sess, Supplement No 9, A/2456, para 111.


94 Gidel (1934) 455–7, 476, 486; Fitzmaurice (1959) 8 ICLQ 73, 117.

95 UNCLOS, Arts 56, 61, 73.

96 UNCLOS, Art 192.

97 UNCLOS, Art 194(1)–(2).

98 UNCLOS, Art 211.

11. The territorial sea and other maritime zones

A grey area will exist, to a degree, wherever the lateral maritime boundary between A and B departs from equidistance. The tribunal in *Barbados v Trinidad and Tobago* (2006) 139 ILR 449 sought to eliminate it by tapering the EEZ/shelf boundary to a single point 200nm from the nearest (Tobago) coast. By contrast, in *Bangladesh/Myanmar*, ITLOS delimited the grey area by allocating water column rights over that area to Myanmar and continental shelf rights to Bangladesh: *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No 16 (Judgment 14 March 2012); similarly Bay of Bengal *Maritime Boundary (Bangladesh v India)* (2014) 167 ILR 1, 169-71.

105 Decree 1836 of 24 February 1944.


109 See the award in *Abu Dhabi* (1951) 18 ILR 144. The date at which the concept of the shelf matured as part of custom may still matter: *Re Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984) 86 ILR 593.

110 For contemporary discussion: Whiteman (1958) 52 *AJIL* 629; Gutteridge (1959) 35 *BY* 102; Young (1961) 55 *AJIL* 359.

11. The territorial sea and other maritime zones


113 ICJ Reports 1984 p 246, 288-95.

114 ICJ Reports 1985 p 13, 29-34.

115 Ibid, 29-30, 33, 38, 45.

116 UNCLOS, Arts 55, 86.

117 Cf GCCS, Art 3.

118 UNCLOS, Art 81.

119 Continental Shelf Act 1964; Clark (Inspector of Taxes) v Oceanic Contractors Inc [1983] 2 AC 130.


125 GCCS, Art 5(4); UNCLOS, Art 60(8) via Art 80.

126 GCCS, Art 5(3); UNCLOS, Art 60(5) via Art 80.

127 GCCS, Art 5(6); UNCLOS, Art 60(7) via Art 80.

11. The territorial sea and other maritime zones


130 On the Channel tunnel project: van den Mensbrugghe (1967) 71 RGDIP 325; Marston (1974–75) 47 BY 290.


132 According to the UN unofficial table of claims to maritime jurisdiction, 11 states use 200m depth plus exploitability; a further three use an exploitability criterion alone: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/claims.htm (as at 2011).

133 See Baumert (2017) 111 AJIL 827, 866–9 for the possible jurisdiction of the Annex II Commission with respect to coastal states not parties to UNCLOS.


135 (1946) 40 AJIL Sp Supp 45; 4 Whiteman 954. The Proclamation has never been implemented by Executive Order.

136 Argentina (1946), Panama (1946), Peru (1947), Chile (1947), Ecuador (1947), Honduras (1950), El Salvador (1950).

137 Text: (1970) 64 AJIL 1021.

138 *Fisheries Jurisdiction (UK v Iceland)*, ICJ Reports 1974 p 3; *Fisheries Jurisdiction (Germany v Iceland)*, ICJ Reports 1974 p 175.

139 ICJ Reports 1974 p 3, 35–8 (Judge Ignacio-Pinto); 39 (Judge Nagendra Singh). In a joint separate opinion five judges expressed the firm view that no rule of customary law concerning maximum fishery limits had yet emerged: ibid, 45ff (Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh, and Ruda).


143 US Department of State, *Limits in the Seas* No 36 and revisions.
11. The territorial sea and other maritime zones

Fishery Conservation and Management Act 1976, 15 ILM 635. This legislation has some controversial features: Statement by the President, ibid, 634.


Fishery Limits Act 1976 (UK). For the dispute over the Falkland (Malvinas) Islands: chapter 9.


Declaration of Santo Domingo, 9 June 1972, 11 ILM 892; Castañeda (1972) 12 *Indian JIL* 535; Nelson (1973) 22 *ICLQ* 668; Gastines (1975) 79 *RGDIP* 447; cf the Declaration of Lima, 8 August 1970, 10 ILM 207.


*Continental Shelf (Tunisia v Libya)*, ICJ Reports 1982 p 18, 38, 47–9, 74; *Gulf of Maine*, ICJ Reports 1984 p 246, 294; *Libya/Malta*, ICJ Reports 1985 p 13, 32–4.

Ibid. Nevertheless, the US conceded that tuna was included in the EEZ resources of Pacific Island States in the Treaty of Port Moresby, 2 April 1987, 2176 UNTS 173.


Attard relies on the reference to ‘sovereign rights’ in Art 56(1)(a) to support a presumption in favour of the coastal state: Attard (1987) 48. This may be true of the modalities of the recognized rights of the coastal state, but not when independently constituted rights (like those of landlocked and geographically disadvantaged states) are in question (Arts 69, 70, 71). The general formulations of Art 59 beg the question, but
11. The territorial sea and other maritime zones

Churchill & Lowe (3rd edn, 1999) 175-6, hold that it excludes any presumption.

155 On the interpretation of Art 58 and various related issues, see M/V Saiga (No 2) (1999) 120 ILR 143, 188-92; M/V ‘Virginia G’ (Panama v Guinea-Bissau), Judgment, ITLOS Reports 2014 p 4, 70 (§§221–3).

156 ITLOS has found that confiscation of vessels may be permitted as an enforcement measure by the coastal state in case of fisheries violations in the EEZ: ‘Tomimaru’ (Japan v Russia), ITLOS Reports 2005–7 p 74, 96; M/V ‘Virginia G’ (Panama v Guinea-Bissau), Judgment, ITLOS Reports 2014 p 4, 77, 78 (§§253, 257).


158 ITLOS Reports 2015 p 4, 36–40 (§§116–29); also ibid, 42 (§§138–9).

159 Ibid, 44–5 (§§146–8).

160 Ibid, 51 (§§172–3).

161 Ibid, 59 (§208).

162 Libya/Malta, ICJ Reports 1985 p 13, 33.

163 On marine protected areas, see chapter 15.


166 In 2013, China declared an air defence identification zone over the East China Sea which partly overlaps with the air defence identification zones established by South Korea and Japan while covering a group of islands (Diaoyu in China; Senkaku in Japan) contested by both China and Japan. For discussion: Daugirdas & Mortenson (2014) 108 AJIL 94, 106; Kaiser (2014) 63 German J Air & Space Law 527; Su (2015) 14 Chin JIL 271.