

### **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.<sup>10</sup> The origin of the concept of the EEZ may go back to the practice of the Latin American States after World War II.<sup>11</sup> Originally the figure of 200 nautical miles appeared in 1947, when Chile (23 June 1947) and Peru (1 August 1947) 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 Andean States thus inferred that a perfect unity and interdependence existed between the sea's living resources and the coastal populations. 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, the distance of 200 miles was also claimed by Costa Rica (27 July 1948), El Salvador (7 September 1950) and Honduras (17 January 1951).

In 1952, Chile, Ecuador and Peru adopted the Declaration on the Maritime Zone, which later became known as the Declaration of Santiago. In this Declaration, three States proclaimed: '[A]s a principle of their international maritime policy that each of them possesses exclusive sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast'.<sup>12</sup> After UNCLOS I and II, coastal States expanded their claims to exclusive fishery zones of 12 nautical miles. Further, several Latin American States, such as Ecuador (1966), Argentina (1966), Panama (1967), Uruguay (1969) and Brazil (1970) extended their claims to 200 nautical miles.<sup>13</sup>

Against that background, the Montevideo Declaration on the Law of the Sea was adopted on 8 May 1970.<sup>14</sup> The Declaration recognised the right of coastal States to avail themselves of the natural resources of the sea adjacent to their coasts and of the soil and subsoil thereof in order to promote the maximum development of their economies and to raise the levels of living of their peoples. At the same time, the Declaration accepted the freedom of navigation and overflight. Furthermore, the Declaration of Latin American States on the Law of the Sea (the Lima Declaration) was adopted on 8 August 1970.<sup>15</sup> The Declaration essentially followed the Montevideo Declaration, although no mention was made of the 200-nautical mile limit.

As the Caracas session of UNCLOS III approached, it became apparent that the maritime powers would not accept such an extensive territorial sea which would deter economic and

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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. Furthermore, in January 1972, Kenya presented a working paper on the concept of the exclusive economic zone at the annual meeting of the Asian–African Legal Consultative Committee held in Lagos, Nigeria. The Kenyan working paper encouraged other States to further consider the question, and, in June 1972, this subject was discussed again at the African States Regional Seminar on the Law of the Sea at Yaoundé, Cameroon. The Report of the Yaoundé Seminar, which was adopted unanimously, firmly supported the establishment of an ‘economic zone’.<sup>16</sup> On 7 August 1972, with overwhelming support from the developing countries, Kenya formally submitted its proposal for a 200-mile EEZ to the UN Seabed Committee.<sup>17</sup> 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 the Conference of Caribbean Countries on 9 June 1972.<sup>18</sup>

On 2 August 1973, Colombia, Mexico and Venezuela submitted its proposal for the ‘patrimonial sea’ to the Seabed Committee.<sup>19</sup> The two concepts effectively merged at UNCLOS III. By 1975, the basic concept of the EEZ seemed to be well established.<sup>20</sup> 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.<sup>21</sup> 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’.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> 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. In fact, the Arbitral Tribunal, in the 1986 *Dispute Concerning Filleting within the Gulf of St Lawrence* between Canada and France, took the view that: ‘[T]he concepts of economic zone and fishing zone are

### 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 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.<sup>26</sup> 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.<sup>27</sup>

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. In fact, Article 62(4) prescribes specific contents of the laws and regulations of coastal States with regard to fishing of nationals of other States in the EEZ. Article 73(1) makes no reference to confiscation of vessels. However, ITLOS took the view that this provision may encompass confiscation of vessels in the EEZ.<sup>28</sup>

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.

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.<sup>29</sup>



### 3.4 Jurisdiction of coastal States over the EEZ

#### *(a) General considerations*

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:

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.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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.

### ***(b) Legality of bunkering in the EEZ of third States***

A particular issue which arises in this context concerns the legality of bunkering in an EEZ of a foreign State. The LOSC contains no explicit provision on this subject. This issue was, for the first time in the ITLOS jurisprudence, raised in the 1999 *M/V Saiga (No. 2)* case between Saint Vincent and the Grenadines and Guinea. The *M/V Saiga* is a tank vessel flying the flag of Saint Vincent and the Grenadines. On 28 October 1997, the *Saiga*, awaiting the arrival of fishing vessels to which it was to supply gas oil, was arrested by Guinean authorities in its EEZ on the ground that the *Saiga* violated Law L/94/007 by importing gas oil into the customs radius of Guinea. Criminal proceedings were subsequently instituted by the Guinean authorities against the Master of the *Saiga*, and the Tribunal of First Instance in Conakry, the Guinean capital, found the Master guilty as charged and imposed on him a fine. A central question in this case was whether 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.<sup>34</sup>

A similar dispute was subsequently raised in the 2014 *M/V Virginia G* case between Panama and Guinea-Bissau. On 20 August 2009, the *M/V Virginia G*, an oil tanker flying the flag of Panama, supplied gas oil to fishing vessels flying the flag of Mauritania in the EEZ of Guinea-Bissau. On 21 August 2009, the *M/V Virginia G* was arrested by the Guinea-Bissau authorities and the tanker, along with its gear, equipment and products on board, was confiscated. Panama instituted arbitral proceedings against Guinea-Bissau pursuant to Annex VII of the LOSC in a dispute concerning the *M/V Virginia G*. Later the dispute was transferred to ITLOS. The central question to be addressed by ITLOS was whether Guinea-Bissau, in the exercise of its sovereign rights in respect of the conservation and management of natural resources in its EEZ, had the competence to regulate bunkering of foreign vessels fishing in this zone. In this regard, ITLOS took the view that the regulation by a coastal State of the bunkering of foreign vessels fishing in its EEZ is among those measures which the coastal State may take in its EEZ to conserve and manage its living resources under Article 56 of the LOSC read together with Article 62(4) of the Convention.<sup>35</sup> According to ITLOS, the coastal State's jurisdiction over bunkering of foreign vessels fishing in its EEZ derives from the sovereign rights of that State to explore, exploit, conserve and manage natural resources. ITLOS also added that the coastal State does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the LOSC.<sup>36</sup>

### 3.5 Freedoms of third States

The next issue to be examined involves legitimate activities by third States in the EEZ.<sup>37</sup> In this regard, Article 58(1) of the LOSC stipulates that:

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.<sup>38</sup> 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

#### *(a) General considerations*

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.<sup>39</sup>

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.<sup>40</sup>

#### *(b) Protection of archaeological and historical objects found within the EEZ*

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.<sup>41</sup> 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

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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'.

## **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.<sup>42</sup> Before World War II, natural resources in the seabed and its subsoil had attracted little interest between States.<sup>43</sup> 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.<sup>44</sup> The Truman Proclamation declared that:

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.<sup>45</sup> 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’.<sup>46</sup> 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.<sup>47</sup> 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 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.<sup>48</sup> 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.<sup>49</sup> 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 the coastal State.<sup>50</sup>

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.<sup>51</sup> 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.<sup>52</sup> 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:

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.<sup>53</sup>

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.