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The Exclusive Economic Zone

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Abstract and Keywords

The role of the Economic Exclusive Zone (EEZ) in the international law of the sea remains a controversial issue two decades after the 1982 United Nations Convention on the Law of the Sea (LOSC) came into force. This chapter examines the evolution of the concept and its juridical nature, and the legal regime applicable to the EEZ. It considers the future development of the EEZ legal regime, exploring the principal controversial features that may influence its course.

Keywords: United Nations (UN), UNCLOS (UN Convention on the Law of the Sea), since World War II, exclusive economic zone, territorial sea, maritime boundaries, baselines

1 Introduction

THE role of the economic exclusive zone (EEZ) in the international law of the sea has been examined by many authors over the years.[1] Almost all the relevant aspects of this concept have been explored, including its legal, economic, political, and social implications.[2] Yet, 20 years after the entry into force of the 1982 United Nations Convention on the Law of the Sea (LOSC),[3] the EEZ continues to provoke a wide range of cases, discussion, and international disputes with regard to the related (p. 160) provisions of the Convention, to the conformity of the latter to customary international law, and to the crucial issue of the gradual expansion of the jurisdiction of coastal States over new uses of the sea, leading to the risk of excessive restriction of freedom of navigation. This maritime zone, therefore, still constitutes a fundamental subject in the international law of the sea, owing to its wide extension and proximity to coasts, to the concentration within EEZs of the greater part of economically exploitable resources, and to the co-existence of several jurisdictional powers and economic and political interests, such as those of coastal States,

of flag States, and of the international community as a whole. All these aspects generate, inevitably, a series of crucial ambiguities in the interpretation and application of existing rules, which are destined to increase in proportion to the growth of environmental concerns, to the improvement of new technologies and as a result of increased demand for the control of maritime spaces.

The main aim of this chapter is to illustrate the issues already emerging from recent State practice, which will influence future developments and trends in the international law of the sea. Thus, an analysis of the evolution of the concept and its juridical nature, and the legal regime applicable to the EEZ will be examined. Finally, the future development of the EEZ legal regime will be explored considering the principal controversial features that may influence its course.

2 The Evolution of the Concept and the Nature of the EEZ in Contemporary International Law

2.1 History and genesis of the concept

The origin of the concept of the EEZ can be traced to earlier claims by coastal States to exercise national jurisdiction and control over marine resources in zones adjacent to and beyond the territorial sea (TS), which were presented by some delegations participating in the 1930 Hague Conference for the Codification of International Law.[4] After the Hague Conference, these aspirations merged with the on-going debate on the concept and the extension of the TS. The turning point of this trend occurred only after World War II when a 'multiplication of unilateral (p. 161) claims'[5] extending coastal State jurisdiction in the water column of the high seas beyond the TS began.[6]

The debate which took place within the First United Nations Conference on the Law of the Sea (UNCLOS I) led to the adoption of the concept of 'special interests' of coastal States regarding the management of the living resources of the high seas adjacent to the TS in Articles 6 and 7 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Sea.[7] Subsequently, a new maritime zone beyond the TS, corresponding to the Exclusive Fisheries Zone (EFZ), was gradually asserted by national and international[8] practice throughout the 1960s and 1970s, 1970and, then, was widely debated at the Third United Nations Conference on the Law of the Sea (UNCLOS III).[9]

Thus, the EEZ regime, codified by the LOSC, was the result of the fusion of the EFZ concept with the notion of the 'patrimonial sea',[10] promoted during the 1970s by newly independent and developing States in order to re-appropriate their natural resources.[11] It was a revolutionary compromise between the interests of the coastal States and those of the flag States, as well as the general interests of the international community, unifying, in a multifunctional zone, the regime of the waters superjacent to the seabed and the one of the seabed and its subsoil.[12] Moreover, the solution agreed for the EEZ legal regime, as well as those concerning other zones, was facilitated by the consolidation of the theory of functional powers.[13]

(p. 162) 2.2 The legal status of the EEZ

The EEZ, envisaged by Part V and other provisions of the LOSC, thus emerges as a *sui generis* zone,[14] subject only to selected sovereign rights and powers of the coastal State in coexistence with some remaining freedoms of the high seas. Article 55 of the LOSC defines the EEZ as 'an area beyond and adjacent to the territorial sea', that is subject to the 'specific legal regime' applicable to the coastal State and to other States, and provided for by the relevant provisions of the convention.

Before the entry into force of the LOSC in 1994, the concept of the EEZ was already considered a part of customary international law,[15] as a result of a great number of unilateral claims and the recognition of its legal value by international jurisprudence.[16]

The maximum extension of 200 nautical miles (nm) was accepted, although it was the most extensive claim at that time and lacked any scientific or legally expressed rationale.[17] Thirty years after the conclusion of the LOSC, this maximum limit still stands, even though the process of extension of the outer continental shelf is likely to also affect the water column above.

At present, 166 States are parties to the LOSC[18] and almost[19] all the 143 coastal States claiming EEZs or EFZs are among them.[20] It can be asserted that the rights of the coastal States provided for by the LOSC within the EEZ have become part of customary international law, although there is still the possibility of a divergence with State practice on specific provisions.[21] Concerning the obligations of coastal (p. 163) States within the EEZ, it is much more difficult to ascertain whether, and if so to what extent, they acquired a customary nature.[22]

When geographical reasons do not allow the claim for the maximum EEZ extension, a delimitation of overlapping zones must be agreed on by States with opposite or adjacent coasts, according to Article 74. The envisaged delimitation method, aimed at the achievement of an equitable solution without fixing any prevailing criteria, was another important milestone achieved by the LOSC, but, at present, it can be considered a further element in the complexity of the EEZ legal regime.

2.3 *Minoris generis* zones

An analysis of State practice indicates that the persistence of *minoris generis* zones (also called *sui generis* zones)[23] claiming a reduced application of the EEZ legal regime is a result of particular political or geographical features of the particular seas.[24] These are the EFZ or Fishing Protection Zones (FPZ),[25] Ecological Protection Zones (EPZ) or mixed zones. The majority of authors consider these reduced zones legitimate, following the Latin adage *in maiore stat minus.*[26]

There is a widespread tendency to consider the relevant LOSC provisions applicable in such reduced EEZs, but it must be underlined that the legal regime applicable varies according to the type of powers claimed. In fact, exclusive or protected fishing zones, on one hand, and ecological protection zones, on the other, invoke different powers regulated by distinct chapters of the LOSC (Part V and Part XII, respectively). Nevertheless, it is often the case that the powers exercised by coastal States in such reduced zones do not correspond either to the claimed purpose for the zone, or to the powers asserted in the zone by means of a proclamation or legislation.[27]

(p. 164) The case of the UK has been particularly enlightening in this regard. Indeed, the UK provided for the designation of the EEZ by the 2009 Marine and Coastal Access Act,[28] but established it only by the Exclusive Economic Zone Order No 3161 of 2013.[29] Therefore, for a long period, the UK had a de facto EEZ, as it had exercised within its 200

nm EFZ and a conterminous renewable energy zone[30] exclusive powers on marine pollution prevention and marine scientific research.[31]

Similarly, a remarkable degree of uncertainty, regarding the types and the limits of coastal State claims beyond the TS, has characterized Mediterranean Sea practice. However, this tendency has recently been reversed, with many States deciding to proclaim EEZs or to transform their *minoris generis* zones to EEZs.[32]

In the light of this practice, it can be assumed that the names given to *minoris generis* zones are simply indicative,[33] and it can also be questioned whether the act of proclamation is a constitutive element of the EEZ.[34] Recently, this latter issue has been brought into focus in the case of the excessive proclamation by Somalia of a 200 nm TS. Indeed, the interpretation of the excessive Somali claim as an EEZ proclamation has been invoked as legitimate in order to assert the duty of third States to abstain from the looting of the living resources of the Somali people in that maritime zone.[35]

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3 The Applicable Legal Regime

3.1 Coastal and third States' rights and obligations and the conflict over the attribution of rights

The preliminary issue for assessment concerns the rationale of the distinction, introduced by Article 56 of the LOSC, between 'sovereign rights' over living and non-living resources of the EEZ, as well as over other activities connected with the exploration and economic exploitation of the zone, and 'jurisdictional rights' over the establishment and use of artificial islands, installations and structures, scientific research, and the protection of the marine environment. The main question to ascertain is whether defining the resources-related rights of coastal States as 'sovereign rights', and thus as 'more than simply exclusive rights', corresponds to more extensive powers to prescribe, to enforce, and to adjudicate compared with the simple 'jurisdictional powers' attributed in the other domains.

This being so, for each area of coastal State competence, it is necessary to assess the exclusivity of the powers attributed to the State by the LOSC, their scope, nature, and the applicable regulatory regime, as well as the obligations related to such powers. Article 56(1)(b) expressly refers to the application of all relevant provisions of the convention in recognizing jurisdictional rights over non-resource related activities,[36] while the succeeding paragraph (c) recalls the existence in the LOSC of 'other rights and duties' of coastal States.[37] In any case, the rights, whether sovereign or jurisdictional, and the related duties of coastal States cannot be intended to be absolute, since due regard to the

rights and duties of other States is expressly provided for by Articles 55, 56(2), and 58 of the LOSC. [38]

Article 58(1) specifically envisages the freedom of navigation and overflight, the laying of submarine cables and pipelines, and 'other internationally lawful uses of the sea' connected with the above-mentioned freedoms. Article 58(2) allows for the application of the provisions regarding the high seas and the pertinent rules of international law only if these are compatible with the EEZ regime. The controversial nature of the EEZ was well known to the drafters of the LOSC, who, by the introduction of Articles 56, 58, and 59, aimed to create a 'permanent legal arrangement' for balancing the diverse interests in the EEZ.

(p. 166) As a final provision, Article 59, considered one of the most controversial of the convention,[39] seeks to resolve possible conflicts over the attribution of residual rights and jurisdiction within the EEZ not attributed or covered by the LOSC, with reference, at the same time, to equity and to all relevant circumstances.[40] Nevertheless, it does not offer a definite solution to possible conflicts between coastal and third States[41] and it does not call for a presumption in favour of one freedom or power over another. Therefore the interests of coastal States and other States must be constantly weighed and balanced, taking into account also the interests of the international community as a whole, and necessarily, also the applicability of any international obligation incumbent on all States.[42]

3.2 Powers over living resources

The provisions of Part V of the LOSC are primarily concerned with living resources. The coastal State enjoys exclusive sovereign rights over living resources, both on the regulatory level and on the enforcement and judicial level, but is also subject to a number of limitations in exercising these functional powers.[43]

3.2.1 Regulatory regime

According to Articles 61 and 62 of the LOSC, a coastal State that has proclaimed an EEZ, must first determine the total allowable catch (TAC) of living resources for any stock, then its capacity to harvest the living resources for every single stock, and, finally, the proper conservation and management measures necessary to promote the objective of optimum utilization of the living resources of its EEZ. The surplus fisheries can be allocated, through negotiations and agreements, to third (p. 167) States selected by the coastal State, taking into account relevant factors indicated by the LOSC.[44]

The vagueness of the above-mentioned duties of conservation and of rational allocation of the surplus, in the light of all pertinent provisions of the LOSC and of State practice,[45] leads, however, to the conclusion that the power of management and conservation of EEZ living resources is highly discretionary.[46] This seems to be confirmed by the provisions of

Article 297(3) of the LOSC concerning the settlement of disputes, as coastal States are not obliged to submit to settlement a dispute relating to their sovereign rights with respect to the living resources in the EEZ.[47]

Neither the reference to landlocked States (LLS) and geographically disadvantaged States (GDS) as favoured beneficiaries of the possible surplus[48] nor the allocation of the surplus itself to third States correspond to practice and customary law.[49] Coming to the specific legal regime for straddling stocks between one EEZ and another, as well as that regarding highly migratory species, marine mammals, anadromous, and catadromous stocks, Articles 63–67 of the LOSC provide for an ad hoc legal regime regulating rights and duties over those resources, which are by their nature shared by coastal States and maritime States fishing in the high seas. This regulatory system offers only general indications on the allocation of responsibility and on the need for cooperation among concerned States, leaving room for uncertain and conflicting interpretation. This led to the adoption, just one year after the entry into force of the LOSC, of the UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (FSA), integrating and implementing the related provisions of the LOSC. [50]

The 1995 FSA recognizes a special role for competent regional fisheries management organizations (RFMOs) in respect of its main cooperative goals, thus integrating the LOSC provisions, and consequently partially modifying the possible (p. 168) allocation of rights and duties regarding these species in the high seas.[51] This agreement also favours a leading role of coastal States in the decision making process regarding the management of transboundary resources within RFMOs.[52] On the other hand, according to a combined reading of Articles 3, 6, and 7 of the FSA, the principles of sustainable development and the precautionary approach are to be applied also to the management of living resources within EEZs. To date, participation in the FSA is not as wide as participation in the LOSC, with only 81 ratifying parties (80 States and the EU).[53] Nonetheless, a large number of significant provisions have already been incorporated into many regional fisheries treaties.[54]

3.2.2 Enforcement powers

Coming to the enforcing and coercive powers of the coastal State, Article 73 of the LOSC provides for a broad range of measures, including boarding, inspection, arrest, and judicial proceedings, that can be adopted on foreign vessels in the exercise of the sovereign rights of the coastal State over living resources.

As a counterbalance to those wide enforcement powers, it is expressly provided that, when a foreign vessel is detained, its flag State must be notified immediately and the vessel and crew ‘promptly released upon the posting of reasonable bond or other security’. Moreover, it is specified that the penalties, which the coastal State may impose in case of violation of its regulations, may not include ‘imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment’.[55]

Within this context, it becomes crucial to define the activities that are associated with the exploitation of living resources, and thus those which are covered by the afore-described regulatory regime. Indeed, State practice shows a tendency to apply the coercive measures of Article 73 even to foreign vessels engaged in activities other than fishing, but apparently connected with it.

(p. 169) This debatable practice has been widely discussed before the International Tribunal for the Law of the Sea (ITLOS) in several cases, since the well-known *M/V 'Saiga'* case, relating to the prompt release of foreign tankers seized while refuelling vessels illegally fishing inside the EEZ of another State (so-called offshore bunkering).[56] Thus, in the *M/V 'Virginia G'* case, Panama called upon ITLOS to rule on a damages claim for the interception, arrest, and detention of the Panamanian flagged oil tanker M/V '*Virginia G*' and its crew by the Guinea Bissau authorities while the tanker was carrying out the supplying of fuel to four foreign vessels fishing illegally inside Guinea Bissau's EEZ.[57] The Tribunal, while finding lawful both the regulation of bunkering of foreign fishing vessels and the related enforcement measures, namely the boarding, the inspection, and the arrest, recognized the violation of Article 73(1) and (4) of the LOSC by Guinea Bissau for having confiscated the vessel and its cargo and for not having notified the flag State of its enforcement measures. Thus, in principle, ITLOS stated the lawfulness of the Guinea Bissau enforcement action, but it specified that, in applying coercive measures, due regard must be paid by the State to the particular circumstances of the case and the gravity of the violation, according to the principle of reasonableness.[58]

Looking at the interpretation of the Article 73(2) prompt-release procedures, ITLOS has adopted a restrictive attitude since *The 'Volga'* case [59] regarding the concept of 'reasonable bond and security' that must be posted by the flag State on the release of the seized vessel by the coastal State. Indeed, despite the broad interpretation of the concept of reasonable bond adopted by coastal States, ITLOS has always assumed a position in favour of flag State interests, even much more so than that taken by the European Court of Human Rights (ECtHR) in the *Mangouras v Spain* case in 2010.[60]

(p. 170) 3.3 Powers over non-living resources and over all other economic resources

The power of the coastal State to exploit and conserve living and non-living resources of the seabed and subsoil, envisaged by Article 56(1)(a), overlaps with the power over the resources of the continental shelf and is regulated by the provisions of Part VI of the LOSC. Although the continental shelf regime is beyond the scope of this chapter, a number of interesting differences in the regulation of the seabed living resources (sedentary species) can be outlined.[61]

First of all, sedentary species are excluded from the application of the EEZ fisheries legal regime and are regulated under the continental shelf legal regime.[62] Secondly, the sovereign rights of the coastal State within 200 nm exist *ipso jure* and are expressly 'exclusive' and not limited by any duty of conservation and rational exploitation for the benefit of the international community.[63]

Lastly, notwithstanding the broad scope of the coastal States' sovereign rights, no specific enforcement powers are expressly envisaged, as in the case of those provided for fishing activities in Article 73.[64] Despite a tendency of coastal States to exercise full enforcement and judicial powers, the legitimate extent of such coastal State measures remains questionable.[65]

Similar perplexities arise in reading the pertinent provisions of the LOSC which recognize a coastal State 'sovereign rights…with regard to other activities for the economic exploitation and exploration of the zone, such as the production of (p. 171) energy from the water, currents and winds'.[66] This formulation seems to guarantee the coastal State full and exclusive rights over all economic resources, as well as over yet unknown activities that may develop as a result of technological advances. This general attribution of sovereign rights is not, however, followed by specific regulations and enforcement powers.

Activities related to the production of energy from the water, currents, and winds imply many different industrial sector activities that may be implemented at sea, which can therefore be regulated in a number of ways.[67] State practice concerning the exploitation of marine energy shows a lack of adequate knowledge about all the possible conflicts that may arise between the exercise of those activities and the freedoms enjoyed within the EEZ and even relating to the environmental impact of those activities.[68]

Diverse effects can arise from wave and tidal energy plants and offshore wind farms, particularly as the latter affect the surface of the water and the superjacent airspace, while the former involve only the water column or the seabed. Limitations to coastal State rights can be inferred from the general guarantee of the freedom of the high seas, and from the express regulation of connected activities, such as the construction of artificial islands and installations.

3.4 Construction of artificial islands and installations

Coastal State jurisdictional rights on the establishment and use of artificial islands, installations, and structures are regulated by Article 60. The legal regime envisaged by this provision is then applied, *mutatis mutandis*, to the continental shelf in accordance with the requirements of Article 80. The rights of the coastal State relating to islands and installations within the EEZ and the continental shelf are similar, with the sole difference that in this latter zone they are far more limited,[69] since within the EEZ such islands and

structures can be legitimately constructed and used for many other purposes, such as the exploitation of renewable energy.

According to Article 60, an almost total exclusivity is accorded to the coastal State to authorize and regulate various kinds of offshore construction, their placement, and their use within the EEZ. The distinction between artificial islands, installations, and structures for all the authorized economic purposes expressly provided for in Article 56 and 'installations and structures which may interfere with the exercise of the rights of the coastal States in the zone' is rather vague and often not (p. 172) reproduced in national legislation,[70] but it seems to admit, in principle, the placement of such constructions by third States, as not interfering with coastal States rights.[71]

The legal regime provided by Article 60 is identical for all these types of construction, in relation both to rights and to duties. It is expressly provided that the coastal State can exercise on those constructions exclusive jurisdiction with respect to customs, tax, health, safety, and immigration.[72] Moreover, the coastal State has the right to establish safety zones around those constructions, with the aim of ensuring safer navigation or protection of the construction itself, to an extent fixed by the coastal State and not exceeding a radius of 500 metres around the construction.[73]

Coming to the duties, the coastal State is obliged to keep third States continuously informed about the placement of those constructions, as well as their falling into disuse, and also regarding all relevant technical aspects in order to ensure the safety of navigation. Towards this end, Article 60(3) specifically requires dismantlement according to general international standards established by international organizations, taking into account other possible implications concerning fisheries, protection of the marine environment, or other rights and duties of third States.

Inevitably, the exercise of exclusive jurisdiction over those spaces implies an assumption of responsibility of the coastal State over all the activities and the events occurring on them.[74] The features of artificial constructions at sea, as well as their legal implications, vary dramatically according to their characteristics and to the function to which they are destined. An interesting example regards the competence of coastal States regarding fish aggregating devices (FAD),[75] which are platforms of bamboo or other (p. 173) material anchored in the water to attract tuna, falls under Article 60 which regulates artificial installations.[76]

Looking, then, at oil, gas, or renewable energy platforms, the extent of the enforcement powers of coastal States over these items has recently caused concern and, in particular, the matters of their protection and of their environmental impact are likely to lead to significant developments in the EEZ legal regime. The major and irreparable damage to the environment, which occurred in the case of the 2010 explosion of the British Petroleum *Deepwater Horizon* platform in the Gulf of Mexico, drew attention to the

particular vulnerability of such installations, including the possibility of terrorist attacks.[77]

Then, the 2013 seizure of the Greenpeace vessel *M/V Arctic Sunrise*, and of the activists protesting against Gazprom's oil platform in the Russian Arctic EEZ, raised a number of questions about the extent of coastal State enforcement powers to protect offshore platforms.[78] Indeed, upon the Netherlands request for provisional measures as the flag State of the *M/V Arctic Sunrise*, ITLOS ordered that the *Arctic Sunrise* and all detained persons be released,[79] but did not rule on the merits of the dispute between the Netherlands and Russia or on the lawfulness of the seizure and detention of the vessel and of the 30 volunteers, most of whom were arrested on board the *Arctic Sunrise* outside the 500-metre safety zone established by Russia around its platform.[80]

3.5 Marine scientific research

The jurisdictional rights of the coastal State for marine scientific research are established in Article 56 (b), but are set out in detail in Part XIII of the LOSC.[81] In the (p. 174) absence of a definition of 'scientific research', the LOSC provides for the need of the explicit consent of the coastal State for research projects proposed by other States or international organizations within the EEZ independently of whether they are 'pure' or 'applied' research, the latter being destined to industrial and commercial purposes.[82]

Only general support for marine research aimed at peaceful purposes and at increasing scientific knowledge for the benefit of all mankind is included in Article 246, introducing a form of moral duty on the part of the coastal State to not unreasonably delay or deny its consent to this kind of research. Nevertheless, consent can be denied in a broad-spectrum of cases provided for by Article 246(5), according to the discretional evaluation of the coastal State,[83] thus producing controversial interpretations regarding research projects which involve commercialization of resources or installation and use of floating deployments or ocean upwelling pipes.

As an example, the activity of bioprospecting, which consists in gathering samples of resources for applied research purposes or for genetic manipulation, has increased dramatically in the high seas as well as within the EEZ or on the continental shelf of other States, thus giving rise to a number of unresolved legal disputes. Indeed, this technological exploitation of living resources, not foreseen by the LOSC, has no autonomous legal regime.[84] It cannot be considered solely as scientific research or a fishery activity, since it has characteristics of both. In either case, it remains doubtful whether the economic exploitation of these resources is connected principally with applied technological research, with all its related consequences regarding property rights, or whether it is more closely linked with, and a consequence of, the special value of the marine resource itself, taken as a single sample in a rare ecosystem.

A number of disagreements also arise from scientific research projects that imply the installation and use of equipment not fixed to the ocean floor or from research activities that can be connected to military interests, such as hydrographic surveying. The Argo Profiling Float Deployment, completed in 2007 under the auspices of several international organizations, is one significant example aimed at monitoring ocean signals related to climate change, thanks to the (p. 175) deployment in the high seas of more than 3,200 free-floating devices collecting a wide array of scientific data. However, those floating devices originally deployed in the high seas may drift into EEZs and thus also collect data related to this zone that could be useful to identify the position of fish stocks or other information concerning valuable natural resources.[85] Thus, a legal debate on whether the deployment of the floating devices should require the prior consent of the coastal State potentially affected by them led, in June 2008, to the adoption of the Guidelines for the Legal Regulation of the Argo Profiling Float Deployments on the High Seas.[86]

Similarly, ocean upwelling pipes, used for climate engineering through intervention in the global carbon cycle, can support both pure research and resource focused research and thus it can be difficult to foresee exactly and to control the use and the scope of this equipment.[87] In this context, it appears necessary to enhance multilateral cooperation in order to ensure a clearer interpretation and implementation of the pertinent LOSC provisions.[88]

State practice also shows a rise in the number of disputes relating to the classification of hydrographic surveying and intelligence gathering as pure or applied research, since they normally serve the goal of improving the safety of navigation, but can also be performed for military purposes.[89] Many national statutes do not distinguish between the different possible purposes of marine research and require coastal State consent for any kind of scientific project. The case of the interruption of the navigation of the US surveillance ship USNS '*Impeccable*' by the Chinese authorities in the South China Sea, highlights a major conflict between some coastal States, such as China and India, and maritime powers, such as the USA, on the interpretation of coastal State powers to restrict navigation and scientific research within the EEZ. [90]

(p. 176) 3.6 Environmental protection

As already mentioned, Article 56 recognizes the jurisdiction of coastal States with regard to the protection of the marine environment within the EEZ, but the provisions of Part XII of the LOSC do not grant coastal States exclusive and extensive rights in this field, but rather selected and specific powers, tailored according to the various types of pollutants under consideration: pollution from seabed activities, from installations and other devices, from dumping, or directly from vessels. For each of these types of pollution, except pollution from vessels, coastal States enjoy wide regulatory and enforcement powers, since the related activities are subject to their previous consent and are not limited by international standards.

By contrast, with respect to ship source pollution, coastal States cannot adopt domestic laws or regulations containing environmental protection measures that are less effective than generally accepted international laws or regulations, adopted by the competent international organizations, namely the International Maritime Organization (IMO)[91] and, for the most part, should not go beyond those international standards. The duty to respect the minimum international standards of environmental protection represents a form of limitation on the power of the coastal State to protect more strictly its EEZ environment.

Turning to the enforcement and judiciary powers of the coastal States, the provisions of Part XII, state a clear preference for the competence of the flag State to judge its vessel in cases of pollution violations within the EEZ of another State. Only in the case of clear proof of substantial discharge causing or threatening significant pollution, can the coastal State go beyond a simple request for information, and inspect the foreign vessel, with the *extrema ratio* of ordering the detention of the vessel and the institution of related judicial proceedings.[92] In this latter case, the flag State of the suspected polluting vessel can decide, within six months of the date on which proceedings were first instituted, to commence proceedings against the detaining ship in concomitance with the coastal State's judicial action. If this occurs, the coastal State has first to suspend and, then, if the 'proceedings instituted by the flag State have been brought to a conclusion', to terminate its judicial action against the vessel. The coastal State can continue its proceedings against the foreign vessel, only in the case of major damage or if the flag State in question has repeatedly disregarded its obligation to effectively enforce the applicable international standards.[93]

These limits of coastal State environmental powers came to light in the '*Fast Independence*' and '*Trans Arctic*' cases, decided by the French High Court in 2009. The Court, giving express application to Article 228, maintained that French criminal proceedings to prosecute illegal discharges within the French EEZ, carried out by two foreign vessels, had to be terminated since proceedings had been instituted by the flag States: Malta and Norway respectively. This was the case without it being (p. 177) necessary to ascertain whether the polluting vessels had been found guilty or not, and independently of the amount of the fine, if any, imposed by each flag State.[94]

These decisions, on one hand, favour freedom of navigation and the predominance of flag State jurisdiction, but, on the other, highlight the weakness of the coastal State's enforcement action and its capacity to represent a deterrent to these pollution violations.[95]

4 Other States Rights and Obligations

There are two main freedoms still existing within the EEZ: navigation and overflight, on one hand, and the laying of submarine cables and pipelines, on the other. It is clear that freedom of navigation and overflight cannot have an identical spectrum of application within the EEZ as in the high seas, because of the several limitations inherent in the EEZ regime. Consequently, the degree of freedom of navigation and overflight[96] accorded to other States is inversely proportional to the intention of the coastal State to take an active part in the environmental protection of its EEZ, or to its engagement in intensive exploitation of living and/or non-living resources, and of all other resources which imply the placing of installations interfering with minor routes of international navigation.[97]

Having said this, it is also necessary to underline that all States are subject to a number of general obligations provided for by the LOSC, not directly connected to coastal State rights or to the exercise of jurisdiction of the latter. Mainly, those obligations refer to the generally recognized international standard of environmental protection such as those under Article 211(2), and imply the direct exercise of flag State jurisdiction over all kinds of vessels potentially involved in EEZ or high (p. 178) seas pollution. Also, restrictions upon the navigation of foreign vessels transporting ultra-hazardous cargoes have proved highly controversial, since a number of coastal States have introduced into their domestic laws the requirement of prior consent of the State for the navigation of this kind of vessel within their EEZs.[98]

As mentioned above, some normative and enforcement measures of coastal States, restricting the navigation of foreign warships and military manoeuvres in their EEZ, have raised a number of unsolved conflicts. Finally, a more specific limitation to the freedom to lay pipelines—but not cables—is envisaged in Article 79(3), which provides for the requirement of the consent of the coastal State in respect of the delineation of the course of the placement of the pipeline. Thus, it has been questioned whether the laying of submarine pipelines has been rightly classified among the freedoms enjoyed by other States within the EEZ,[99] since prior consent to the delineation of the course can be easily seen as a discretional power of the coastal State to concede this right to the third State.

5 The Future of the EEZ

As noted above, the likelihood of conflict in the attribution of rights and competences within the EEZ remains very high. There is no doubt, therefore, that the EEZ is to be seen as a concept in a state of permanent flux. In the multiform context of the LOSC and related State practice, different types of creeping jurisdiction can be found.[100]

Looking at creeping coastal State jurisdiction, the classic distinction is between the pressure toward spatial extension of national jurisdiction beyond 200 nm and claims for powers not foreseen by the LOSC, based on an extensive interpretation of implicit powers concerning fishing, the protection of the marine environment, and any resource-related

functions of the EEZ.[101] Since the maximum limit of 200 nm has proved so far to be resistant to coastal State pressure, attention is being paid only to some individual attempts at creeping jurisdiction within the maximum spatial limit.

(p. 179) As far as the fisheries legal regime of the EEZ is concerned, a number of controversial issues emerge from international practice. First, as has been remarked, there is a tendency on the part of coastal States to expand their powers or their influence over activities not strictly connected with fisheries. Second, the exact extent of the coastal State duty of conservation of its EEZ living resources is still uncertain. Finally, against this wide background of uncertainty, arising from the LOSC provisions, including Article 59, there is a general tendency on the part of both coastal and maritime States to refrain from referring to international tribunals doubtful and controversial interpretations of their LOSC obligations.[102] Accordingly, the 2013 request to ITLOS for an advisory opinion concerning the extent of the obligations of flag States and the rights and duties of coastal States with regard to illegal, unreported, and unregulated (IUU) fishing conducted within the EEZ, represents an important step forward in terms of utilizing the advisory competence of the Tribunal and of ascertaining contested issues related to IUU fishing within the EEZ.[103] In this respect, the 2014 ITLOS judgment in the '*Virginia G*' case is also to be welcomed for its contribution to the definition of activities related to fisheries.

Coming, then, to the freedom of navigation within the EEZ, many attempts to restrict this freedom for security or environmental reasons emerge from State practice.[104] Recently, the protection of the marine environment is one of the principal motives of the navigational restrictions upon foreign vessels.[105] Often, these claims, being originally unilateral, are, at a later stage, accepted and adopted by the IMO, thus becoming generally accepted.[106]

Some authors state that a new norm of customary international law is emerging from this State practice, allowing restrictions on navigation within the EEZ based on the nature of the ship and its cargo.[107] Nevertheless, until now, this coastal State (p. 180) practice has been, in almost all cases, disputed by other maritime powers.[108] As a consequence, it cannot be considered sufficiently 'constant, uniform, and accepted as law' to warrant the formation of an international customary rule.

In this context, the majority of authors still have great confidence in the ability of the LOSC to cope with new challenges, to solve conflicts, and settle disputes in order to overcome tensions between opposing interests within the EEZ.[109]

Today, the emergence of collective environmental and security needs and the on-going changes in the structure of the international community inevitably call for fostering new forms of cooperative dialogue among States, non-State actors, and individuals regarding the rights and duties to be applied within the EEZ. In this context, it would not be considered contrary to the spirit of the LOSC to transform the 'freedoms of the sea' into a

more specific regulatory regime of the rights of third States, through general or regional conventions implementing the LOSC provisions. The feared 'territorialization' of the EEZ has not yet happened, though it still remains a possible scenario for the future.[110]

Notes:

(1) The legal literature on the EEZ is extensive. See JP Queneudec, 'La zone économique' (1975) *Revue Générale de Droit International Public* 321; WC Extavour, *The Exclusive Economic Zone: A Study of the Evolution and Progressive Development of the International Law of the Sea* (Martinus Nijhoff Leiden 1979); B Conforti (ed), *La zona economica esclusiva* (Giuffrè Milano 1983); DJ Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press Oxford 1987); B Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff Dordrecht 1989); F Orrego Vicuña, *The Exclusive Economic Zone* (Cambridge University Press Cambridge 1989); F Rigaldies, 'La zone économique exclusive dans la pratique des états' (1997) 35 *Canadian Yearbook of International Law* 3; RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press Manchester 1999); DR Rothwell and T Stephens, *The International Law of the Sea* (Hart Oxford 2010).

(2) For an analysis of the economic implications of the EEZ, see EA Posner and AO Sykes, 'Economic foundations of the law of the sea' (2010) 104 *American Journal of International Law* 569, 584.

(3) 1982 United Nations Convention on the Law of the Sea (hereinafter LOSC).

(4) *Virginia Commentaries*, Vol II, 493; D Vignes, G Cataldi, and R Casado Raigon, *Le droit international de la pêche* (Bruylant Bruxelles 2000) 18.

(5) L Lucchini and M Voelckel, *Droit de la mer: Navigation et pêche* (Pedone Paris 1996) Vol 2, 412–21. The authors describe this 'multiplication des déclarations unilatérales' as a unilateralism not new in the international law of the sea.

(6) This movement, increasingly strong in the following twenty years, started with the US 'Truman Proclamations' of 1945 and continued with the claims of some Latin American States. Indeed, in 1952, the group of Chile, Ecuador, and Peru, adopted a 'Declaration on the Maritime Zone' (the so-called Santiago Declaration) claiming a sovereignty extension beyond the TS to a distance of 200 nm. See *Virginia Commentaries*, Vol II, 495; and RJ Dupuy and D Vignes, *A Handbook on the New Law of the Sea* (Martinus Nijhoff Dordrecht 1991) Vol 1, 39.

(7) 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas. This convention proved to be largely a dead letter because many fishing States did not ratify it. See M Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (Martinus Nijhoff Dordrecht 1987).

(8) The reference is in particular to the *Fisheries Jurisdiction* cases: *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)* (Merits) [1974] ICJ Rep 3; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Merits) [1974] ICJ Rep 175.

(9) Different approaches were advanced by developed States, the groups of the Latin American States, of the Asian and African States, and the group of the landlocked and geographically disadvantaged States. The ‘space approach’ prevailed in the LOSC, but the ‘species approach’ was not completely excluded by it, as observed by Lucchini and Voelckel, n 5, 451.

(10) This notion appeared for the first time in the Declaration of Santo Domingo of June 1972 of Latin American States.

(11) See Rothwell and Stephens, n 1, 82.

(12) Lucchini and Voelckel, n 5, Vol 2, 449.

(13) On the functional powers theory, see B Conforti, *Il regime giuridico dei mari* (Jovene Napoli 1957) 1–308; Dupuy and Vignes, n 6; Lucchini and Voelckel, n 5, Vol 2, 451; ED Brown, *The International Law of the Sea* (Dartmouth Aldershot 1994) Vol 1, 220; and M Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Leiden 2007) 59.

(14) In this sense, see Brown, n 13, Vol 1, 218; and Rothwell and Stephens, n 1, 84.

(15) The doctrine is almost unanimous on accepting the customary nature of the EEZ well before the entry into force of the LOSC. See Churchill and Lowe, n 1, 161.

(16) The ICJ stated expressly, for the first time, in the judgement of 1985 in the *Continental Shelf Case (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13, 33 that ‘the institution of the exclusive economic zone…is shown by the practice of States to have become a part of customary law’.

(17) AL Hollick, ‘The Origins of 200 Mile Offshore Zones’ (1977) 71(3) *American Journal of International Law* 71. On the breadth of the EEZ, see *Virginia Commentaries*, Vol II, 494.

(18) See the ‘Table recapitulating the status of the Convention and of the related Agreements, as at 10 October 2014’ (available at <www.un.org/Depts/los>).

(19) According to information from Doalos, *Maritime Zones and Maritime Delimitation*, available at <www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm>, only the following States have proclaimed EEZs or EFZs without ratifying the LOSC: Cambodia, Colombia, Democratic People’s Republic of Korea, Eritrea, Georgia, Iran, Israel, Libya, Syria, Turkey, United Arab Emirates, USA, and Venezuela.

(20) While many States transformed their original EFZs to EEZs, some States still maintain EFZs. Excessive claims extending the territorial sea outside the limit of 12 nm are maintained by Benin, Ecuador, and Togo: see information from Doalos, 'Maritime Space: Maritime Zones and Maritime Delimitation', available at <www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm>.

(21) See Churchill and Lowe, n 1, 162.

(22) The relationship between the exclusive powers recognized to the coastal States and the obligations arising from the exercise of related rights cannot be underestimated. See on this point T Treves, *La Convenzione sul diritto del mare del 10 dicembre 1982* (Giuffré Milano 1983) 24.

(23) G Andreone and G Cataldi, '*Sui Generis* Zones' in D Attard, M Fitzmaurice, and N Martinez (eds), *The IMLI Manual on International Maritime Law: The Law of the Sea* (Oxford University Press Oxford 2014) Vol 1, 217.

(24) The United Kingdom proclamations of an ecological protection zone off the Falkland Islands' coasts and off the Chagos Archipelago are notable examples, since in these maritime areas more extensive claims to exclusive economic rights would complicate the highly controversial sovereignty disputed by the UK over those islands and maritime spaces.

(25) Since the difference between the EFZ and the FPZ is not substantial and depends only on the main purpose of the costal State proclamation, from now on both types of zones will be referred to as EFZ.

(26) A Del Vecchio Capotosti, 'In maiore stat minus: A Note on the EEZ and the Zones of Ecological Protection in the Mediterranean Sea' (2008) 39 *Ocean Development and International Law* 287.

(27) See G Andreone and G Cataldi, 'Regards sur les évolutions du droit de la mer en Méditerranée' (2010) 56 *Annuaire Français de Droit International* 3. As an example, in the Italian EPZ, established solely in the North Western Mediterranean sea, Liguria and Tyrrhenian sea, through Law No 61 (8 February 2006) and Decree No 209 (27 October 2011, entered into force 1 January 2012), the powers claimed are not strictly limited to protection of the marine environment, but are also extended to the protection of marine mammals and to the conservation marine biodiversity, as well as to archaeological heritage.

(28) Marine and Coastal Access Act 2009 (UK) c 23, part 2 — Exclusive Economic Zone, UK Marine Area, and Welsh Zone. See the official website of UK Legislation <http://www.legislation.gov.uk>.

(29) Exclusive Economic Zone Order 2013 No 3161 (11 December 2013, entered into force 31 March 2014) (UK). See the official website of UK Legislation <http://www.legislation.gov.uk>.

(30) The Energy Act 2004 (UK) which designated a Renewable Energy Zone beyond the TS.

(31) See Rothwell and Stephens, n 1, 85.

(32) Reference is made to the proclamation of EEZs by Tunisia in 2005 and to the transformation of the French EPZ to an EEZ in 2012, as well as the more recent proclamation made by Spain in April 2013. For a deeper analysis of Mediterranean State practice, see Andreone and Cataldi, n 27, 8; and M Grbec, *Extension of Coastal State Jurisdiction in Enclosed and Semi-enclosed Seas, A Mediterranean and Adriatic Perspective* (Routledge New York 2014) 88.

(33) On the 'fluctuating' terminology adopted by States proclaiming an EEZ or a *sui generis* zone, see Lucchini and Voelckel, n 5, Vol 2, 460. See also Andreone and Cataldi, n 27, 10.

(34) The necessity of an express proclamation of the EEZ has been considered by doctrine as an indispensable act according to an *a contrario* reading of pertinent LOSC provisions. For a possible reinterpretation of this assumption see G Andreone, 'Observations sur la "juridictionnalisation" de la mer Méditerranée' (2004) 8 *Annuaire du Droit de la Mer* 7.

(35) T Neumann and TR Salomon, 'Fishing in Troubled Waters: Somalia's Maritime Zones and the Case for Reinterpretation' (12 March 2012) 16(9) *American Society of International Law* Insights, available at <www.asil.org/insights/volume/16/issue/9/fishing-troubled-waters-somalia%E2%80% 99s-maritime-zones-and-case>. On 30 June 2014, Somalia proclaimed an EZ; see UNDoalos, Maritime Zones and Maritime Delimitation, available at <www.un.org/depts/los/LEGISLATION ANDTREATIES/PDFFILES/index.htm>.

(36) R Beckman and T Davenport, 'The EEZ Regime: Reflections After Thirty Years' in HN Scheiber and MS Kwon (eds), *Securing the Ocean for the Next Generation: Papers from the Law of the Sea Institute-Korea Institute of Ocean Science and Technology Conference held in Seoul, Korea, May 2012* (2013) 9, available at <http://www.law.berkeley.edu/15589.htm>.

(37) This last reference is probably to the rights enjoyed in the Contiguous Zone and to the hot pursuit right. In this sense, see ibid, 10; and Churchill and Lowe, n 1, 169.

(38) On the due regard obligation, see Beckman and Davenport, n 36, 13.

(39) See Rothwell and Stephens, n 1, 97; and I Shearer; 'Ocean Management Challenges for the Law of the Sea in the First Decade of the 21st Century' in AG Oude Elferink and

DR Rothwell (eds), *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff Leiden 2004) 10.

(40) See *Virginia Commentaries*, Vol II, 569.

(41) According to some authors, the reference to equity in Art 59 substantially indicates that, in case of a dispute, it is necessary to resort firstly to negotiations and to consensual means of settlement, before referring the dispute to judicial bodies. See Churchill and Lowe, n 1, 176; and Beckman and Davenport, n 36, 12.

(42) R Virzo, 'La convention des Nations Unies sur le droit de la mer et la pollution provenant d'activités militaires dans la zone économique exclusive' in G Andreone, A Caligiuri, and G Cataldi (eds), *Droit de la mer et émergences environnementales* (Editoriale Scientifica Napoli 2012) 255, 257; S Karagiannis, 'L'article 59 de la Convention des Nations Unies sur le droit de la mer' (2004) 37 *Revue Belge de Droit International* 392, 402.

(43) Brown, n 13, Vol 1, 219.

(44) LOSC, n 3, Art 62(3). The practice of the fisheries agreements concluded by the European Community (EC) in the 1980s and 1990s with both developed and developing States, and the reform of EC external fishing policy in 2000s is enlightening on this regards.

(45) Going through the legislative practice of States in this field, LOSC, Arts 61 and 62 are often considered as mere guidelines for the adoption of domestic laws on the EEZ.

(46) The largest part of the doctrine accepts this interpretation, also supported by the analysis of State practice. See Brown, n 13, Vol 1, 220 and Vignes et al, n 4, 20.

(47) LOSC, n 3, Art 297(3)(c). Moreover, under Annex V, Section 2 of the LOSC, a conciliation procedure is possible only in case of manifest violation of the duty of conservation or in the case of an arbitrary refusal to determine the TAC.

(48) Ibid, Arts 69 and 70; see the discussion in Chapter 15 in this volume.

(49) To date, no agreement admitting landlocked States and the geographically disadvantaged States to fish in the maritime zones of the coastal States has been signed, except few and not relevant cases. See Churchill and Lowe, n 1, 439.

(50) 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (FSA).

(51) On the distribution of fishing rights, see T Henriksen and A H Hoel, 'Determining allocation: from paper practice in the distribution of fishing rights between countries' (2011) 42 *Ocean Development and International Law* 66.

(52) On the role and the influence of coastal States on the management of transboundary living resources in the high seas, through the participation to RFMOs, see G Andreone, 'Fisheries in the Antarctic and in the Arctic' in G Tamburelli (ed), *The Antarctic Legal System: The Protection of the Environment of the Polar Regions* (Giuffrè Milano 2008) 71, 92; and C Cinelli, *El Ártico ante el derecho del mar contemporáneo* (Tirant lo Blanch Valencia 2012) 272.

(53) Doalos, n 18.

(54) On the current status of the agreement and on the reasons of the slow ratifications process, see EJ Molenaar, 'Non-Participation in the Fish Stocks Agreement: Status and Reasons' (2011) 26 *International Journal of Marine and Coastal Law* 195.

(55) Notwithstanding this prohibition, many States, most of them having ratified the LOSC, provide in their legislation for imprisonment, even in the absence of agreements with other States. See Rothwell and Stephens, n 1, 429.

(56) The possible inclusion of bunkering among the domains on which the coastal State can lawfully legislate has been questioned for the first time before the ITLOS in the *M/V 'Saiga' (No 1) (Saint Vincent and the Grenadines v Guinea)* (Judgment) (Prompt Release) [1997] 110 ILR 736 and *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) [1999] ITLOS Rep 10.

(57) *M/V 'Virginia G' (Panama v Guinea-Bissau)*, Judgment of the International Tribunal for the Law of the Sea, Case No 19 (14 April 2014), available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14.04.14_corr.pdf>.

(58) Ibid, 270.

(59) *The 'Volga' (Russian Federation v Australia)* (Judgment) (Prompt Release) (2002) ITLOS Rep 10. See W Gullett, 'Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgement of the International Tribunal for the Law of the Sea in the *Volga* Case (*Russian Federation v Australia*)' (2003) 31 *Federal Law Review* 395.

(60) In *Mangouras v Spain* (Application No 12050/04, [2010] ECHR 1364), the Grand Chamber of the ECtHR confirmed that no violation of Art 5(3) of the European Convention of Human Rights could be ascribed to Spanish courts for having fixed a bail of EUR 3,000,000 upon the release of Captain Mangouras, master of the ship Prestige. The court, with a cross reference to the ITLOS jurisprudence, affirmed that: In view of…the disastrous environmental and economic consequences of the oil spill, the [Spanish] courts were justified in taking into account the seriousness of the offences in question and the amount of the loss imputed to the applicant.

T Treves, 'Cross-fertilization between Different International Courts and Tribunals: The *Mangouras* Case' in H Hestermeyer et al (eds), *Coexistence, Cooperation and Solidarity:* Liber Amicorum *Rüdiger Wolfrum* (Martinus Nijhoff Leiden 2012) Vol 2, 1787.

See

(61) LOSC, n 3, Art 77(4) specifies that the natural resources referred to in Part VI, devoted to continental shelf, are the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, organisms which are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil; see discussion in Chapter 9 in this volume.

(62) LOSC, n 3, Art 68 provides explicitly that Part V, devoted to the EEZ, does not apply to sedentary species as defined in Art 77(4).

(63) See Rothwell and Stephens, n 1, 89; DM Ong, 'Towards and International Law for Conservation of Offshore Hydrocarbon Resources within the Continental Shelf' in D Freestone, R Barnes, and DM Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press Oxford 2006) 93.

(64) Some doubts have arisen concerning the kind and limits of the coastal State coercive measure concerning extraction of minerals from the column of water. See Brown, n 13, Vol 1, 220.

(65) In this sense the attitude of Australian maritime officers in the case *Muslimin v The Queen* (2010) 240 CLR 470 is typical. The High Court excluded fisheries protection measures contained in the Fisheries Management Act 1991 (Cth) (FMA) from application to foreign vessels, navigating outside the Australian Fisheries Zone (but over its continental shelf), and equipped with nets, traps, or other equipment compatible with sedentary species fishing. Nevertheless, the case shows an extensive enforcement practice by the coastal State authorities. For a commentary of the decision, see G Andreone, 'Chronique de la jurisprudence' (2010) 15 *Annuaire du Droit de la Mer* 570.

(66) LOSC, n 3, Art 56(1)(a).

(67) KN Scott, 'Tilting at Offshore Windmills: Regulating Wind Farm Development within the Renewable Energy Zone' (2006) 18 *Journal of Environmental Law* 89.

(68) D Leary and M Esteban, 'Recent Developments in Offshore Renewable Energy in the Asia-Pacific Region' (2011) 42 *Ocean Development and International Law* 94, 111.

(69) See Churchill and Lowe, n 1, 168.

(70) For national legislation not distinguishing among the different types of constructions, see Churchill and Lowe, n 1, 168; and S Kopela, 'The "Territorialisation" of the Exclusive Economic Zone: Implications for Maritime Jurisdiction', International Boundary Research Unit on 'The State of Sovereignty', 20th Anniversary Conference, Durham UK (1–3 April 2009) 6, available at <www.dur.ac.uk/resources/ibru/conferences/sos/s_kopela_paper.pdf>.

(71) On this point, see Brown, n 13, Vol 1, 243–4. The author argues that the construction of those installations by third States could be for military purposes.

(72) LOSC, n 3, Art 60(2).

(73) Ibid, Art 60(4) and (5). Article 60(5) also provides for an eventual extension of the safety zone breadth if authorized by generally accepted international standards or as recommended by the competent international organization. Nevertheless, to date, the IMO never accepted the proposals to agree on more extended safety zones. See A Harel, 'Preventing Terrorist Attacks on Offshore Platforms: Do States Have Sufficient Legal Tools?' (2012) 4 *Harvard National Security Journal* 131.

(74) In this context, the position of the Court of Justice of the European Union (CJEU) is worth noting. The Court stated that, according to LOSC, Arts 77, 60, and 80, an EU Member State has sovereignty (albeit functional and limited sovereignty) over the continental shelf adjacent to it and exclusive jurisdiction over the artificial islands and installations positioned on it. As a consequence, the 'work carried out on these fixed or floating installations…is to be regarded as work carried out in the territory of that State for the purposes of applying EU law' and in particular EU law provisions designed to ensure the freedom of movement of persons: *A Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* (C-347/10, CJEU, 17 January 2012) [33]–[35].

(75) They are used mainly in the Pacific and Indian Oceans. In the latter, the use of drifting fish aggregating devices is increasing and furthering calls for greater implementation of their management and sustainability. See T Davies, CC Mees, and EJ Milner-Gulland, 'The Past, Present and Future Use of Drifting Aggregating Devices (FADs) in the Indian Ocean' (2014) 45 *Marine Policy* 45.

(76) See Brown, n 13, Vol 1, 234. The author is in favour of defining them as installations or structures with the related attribution of duties to the coastal State.

(77) Harel, n 73, 131; S Kaye, 'Threats from the Global Commons: Problems of Jurisdiction and Enforcement' (2007) 8(1) *Melbourne Journal of International Law* 8.

(78) A Oude Elferink, 'The *Arctic Sunrise* Incident: A Multi-faceted Law of the Sea Case with a Human Rights Dimension' (2014) 29 *International Journal of Marine and Coastal Law* 250, 256.

(79) *'Artic Sunrise' Case (Netherlands v Russian Federation)* Order of the International Tribunal for the Law of the Sea, Case No 22 (22 November 2013).

(80) According to Art 16 of the Federal Law on Continental Shelf, adopted on 25 October 1995, the Russian Federation established safety zones around its installations extended for not more than 500 metres. The English version of the Law text is available at <www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1995_Law.pdf>. It has to be recalled that the Russian Federation's Coast Guard communicated over the radio to the M/V Arctic Sunrise that it was not permitted to enter in a radius of 3 nm around the platform, but the Greenpeace vessel did it. On the irrelevance of the excessive Russian claim to a 3 nm zone, see Oude Elferink, n 78, 250, and 256.

(81) On the regime of marine scientific research, see A Soons, *Marine Scientific Research and the Law of the Sea* (Kluwer Law The Netherlands 1982).

(82) A lost occasion for defining 'scientific research' was the judgment of the ICJ in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* Judgment of the International Court of Justice, General List No 148 (31 March 2014), available at <http://www.icj-cij.org/docket/files/148/18136.pdf>. Indeed, the Court refrained from intervening on the meaning and the limits of marine scientific research. See JJP Smith, 'A Double-edged Harpoon: The Trial of Science in the Antarctic Whaling Case before the International Court of Justice' (2014) *Ocean Yearbook* 28; and E Doussis, 'Sauver les baleines contre les baleiniers: coup de projecteur sur l'arrêt de la CIJ du 31 mars 2014' (2013) 18 *Annuaire de Droit de la Mer* 175.

(83) See Rothwell and Stephens, n 1, 328.

(84) On the matter of access to marine genetic resources, see D Farrier and L Tucker, 'Access to Marine Bioresources: Hitching the Conservation Cart to the Bioprospecting Horse' (2001) 32 *Ocean Development and International Law* 213.

(85) A Mateos and M Gorina-Ysern, 'Climate Change Guidelines for Argo Profiling Float Deployment on the High Seas' (8 April 2010) 14(8) *American Society of International Law* Insights, available at <http://www.asil.org/insights/volume/14/issue/8/climate-change-and-guidelines-argo-profiling- float-deployment-high-seas>.

(86) UNESCO Intergovernmental Oceanographic Commission, Executive Council Resolution EC-XLI.4 (30 June 2008).

(87) A Proelss and C Hong, 'Ocean Upwelling and International Law' (2012) 43 *Ocean Development and International Law* 371.

(88) Mateos and Gorina-Ysern, n 85.

(89) S Bateman, 'Hydrographic Surveying in the EEZ: Differences and Overlaps with MSR' (2005) 29 *Marine Policy* 171.

(90) The reference is to the Chinese-US dispute on US naval activities in the Chinese EEZ. See JR Crook, 'Contemporary Practice of the United States Relating to International

Law: United States Protests Chinese Interference with U.S. Naval Vessel, Vows Continued Operations' (2009) 103 *American Journal of International Law* 349.

(91) LOSC, n 3, Art 211(5).

(92) Ibid, Art 220(5) and (6).

(93) Ibid, Art 228(1).

(94) '*Fast Independence*' and '*Trans Arctic*' *Cases*, Cour de cassation [French Court of Cassation], 07-87362, 07-87931, 5 May 2009, reported in (2009) Bull Crim No 85. See G Andreone, 'Chronique de la jurisprudence' (2009) 14 *Annuaire du Droit de la Mer* 568; and JP Cot, 'International Decision' (2010) 104 *American Journal of International Law* 265.

(95) Nevertheless, this case represents only a part of the significant number of French courts decisions imposing high fines on pollutant foreign vessels. See the *Erika Case*, Cour de cassation [French Court of Cassation], No 3439, 25 September 2012. For a commentary, see G Andreone, 'Chronique de la jurisprudence' (2012) 17 *Annuaire du Droit de la Mer* 639.

(96) Also aircraft can be subject to restrictions regarding, as an example the dumping of wastes, which can be addressed in coastal State legislation or in binding treaties.

(97) LOSC, n 3, Art 60(7), indeed exclude that the placement of such construction can interfere 'with use of recognised sea lanes essential to international navigation'.

(98) JM Van Dyke, 'The Disappearing Right to Navigational Freedom in the EEZ' (2005) 29 *Marine Policy* 107.

(99) Churchill and Lowe, n 1, 174.

(100) The distinction between creeping coastal State jurisdiction and 'creeping common heritage' has been suggested by E Franckx, 'The 200-mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?' (2007) 39 *George Washington International Law Review* 467, 485.

(101) B Kwiatkowska, 'Creeping Jurisdiction beyond 200 Nautical Miles in the Light of the Law of the Sea Convention and State Practice' (1991) 22 *Ocean Development and International Law* 159.

(102) In this sense the *Estai* dispute between Spain and Canada before the International Court of Justice and the dispute between Chile and European Union brought before the ITLOS and the OMC Dispute Settlement Body have been lost opportunities for clarifying several aspects of the transboundary stocks legal regime within the EEZ and in the High Sea.

(103) The advisory request was submitted by the Sub-regional Fisheries Commission (SFFC) on the 28 March 2013.

(104) The legislation of a number of coastal States contains restrictions, and sometimes interdictions, against the navigation or military manoeuvres of foreign warships in order to protect national security interests. See Churchill and Lowe, n 1, 171–2; Kopela, n 70, 4–5.

(105) EU policy on marine environmental protection has been frequently questioned as not being in compliance with the freedom of navigation. See B Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 *American Journal of International Law* 830, 839.

(106) A recent example is the amendment of the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) to including the designation of specific portions of US, Canadian, and French waters as an Emission Control Area in order to reduce air pollution from ships. The IMO adopted the amendments to Annex VI of the MARPOL on the proposal of the concerned coastal State: JR Crook, 'Contemporary Practice of the United States Relating to International Law: International Maritime Organization Approves US-Canadian Proposal for Strengthened Controls in Air Pollution from Ships in North American Waters' (2010) 104 *American Journal of International Law* 287.

(107) See, for all, Van Dyke, n 98, 121.

(108) See, Kopela, n 70, 3.

(109) See T Stephens and DR Rothwell, 'The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On' in D Freestone (ed), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Martinus Nijhoff The Hague 2013) 35. As an example, the dispute settlement system, which is directly aimed at solving many disputes arising from the EEZ provisions, is evidently misused, and as a suggestion it is proposed to increase the recourse to the advisory function of the ITLOS. See Beckman and Davenport, n 36, 39–40.

(110) See, Oxman, n 105, 839; Kopela, n 70, 3.

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