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General Conclusions

The modern law of the sea, codified in the twentieth century through customary international law and State practice, has its roots deep in the past.[1] Its main objective is to establish legal order over the ocean space by setting up a framework of doctrines to determine the attribution and exercise of the rights and duties of States in respect of their uses of the ocean. Throughout its history, the law of the sea has been characterised by a tension between the concepts of *mare liberum* and *mare clausum*, and this tension has had a profound influence on its development.[2] As such, a central feature of the evolving framework responding to this tension is the division of the ocean into distinct maritime zones, each with its own specific legal regime of rights and duties of States.

The Third United Nations Conference on the Law of the Sea (Third Conference), which began in 1973 and concluded in 1982, produced a treaty that become the pre-eminent source of the law of the sea today.[3] The United Nations Convention on the Law of the Sea (UNCLOS) has been called a 'Constitution for the Oceans' because it provides a comprehensive legal and policy framework for conduct on, over and under ocean spaces which cover more than 70 per cent of the globe.[4] To understand UNCLOS in general, and particularly the *sui generis* exclusive economic

[1] Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff 1989) 30–32; Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th ed., Manchester University Press 2022) 10–20.

[2] Tullio Treves, 'Historical Development of the Law of the Sea', in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 3–6; James R. Crawford, *Brownlie's Principles of Public International Law* (9th ed., Oxford University Press 2019) 241–243.

[3] United Nations, 'Third United Nations Conference on the Law of the Sea (1973–1982)' https://legal.un.org/diplomaticconferences/1973_los/.

[4] United Nations Convention on the Law of the Sea (10 December 1982, in force 16 November 1994) 1833 UNTS 3 (UNCLOS); Tommy T. B. Koh, 'A Constitution for the Oceans', in Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. I (Martinus Nijhoff 1985) 14–15.

zone (EEZ) that is at the centre of the tension between *mare liberum* and *mare clausum*, it is necessary to appreciate the politically charged nature of this area of law.[5] The respective rights and duties of States over the ocean have huge cultural, economic, societal, strategic, military and security implications. Under UNCLOS, the concept of *mare liberum*, embodied in the notion of freedom of the high seas, has been subject to a certain degree of erosion, particularly by the recently developed EEZ concept. Today, in the international arena, the historical debate continues between two opposing political groups. The predominant interest of the coastal States is to preserve the integrity of their rights over their coastal waters and, at times, to extend those rights, whereas the flag States (or other States as used in the EEZ context) want to preserve their communicational freedoms so that their merchant and military fleets can move freely about the globe.

This book has examined the EEZ regime as provided by the relevant provisions of UNCLOS, from its origins to contemporary State practice. The rights and duties of the coastal State and other States are the most fundamental aspects that form the integrated legal regime and reaffirm the *sui generis* character of the EEZ. UNCLOS seeks to maintain a careful balance among these vital interests by establishing the general doctrines for the attribution and exercise of these rights and duties. The coastal State is granted sovereign rights over the natural resources and jurisdiction over specified activities, while all States enjoy the freedoms of navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms.[6] In exercising their rights and performing their duties, both the coastal State and other States are obliged to have due regard to the rights and duties of the other party and to act in a manner compatible with other provisions of UNCLOS.[7] With respect to rights or jurisdiction that are not explicitly attributed to either the coastal State or other States, conflicts must be resolved on the basis of equity and in the light of all

[5] Philip Allott, 'Power Sharing in the Law of the Sea' (1983) 77 Am J Int'l L 1, 1–3; Alan Beesley, 'The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners – A Pattern for Future Multilateral International Conferences?' (1983) 46(2) Law & Contemp Probs 183, 183–184; Deborah Cass, 'The Quiet Revolution: The Development of the Exclusive Economic Zone and Implications for Foreign Fishing Access in the Pacific' (1987–1988) 16 Melb U L Rev 83, 83–84.

[6] UNCLOS Articles 56(1), 58(1).

[7] UNCLOS Articles 56(2), 58(3), 300–301.

relevant circumstances.[8] Furthermore, the above doctrines of the attribution and exercise of co-existing rights apply to residual rights and jurisdiction. This regime is safeguarded by the dispute settlement procedures established under Part XV of UNCLOS. Although a range of coastal State discretionary powers are exempted from mandatory third-party review, disputes arising from the most common conflicting uses of the EEZ are subject to compulsory procedures entailing binding decisions with optional exceptions.[9] The dispute settlement mechanisms are necessary to give greater definition to the vague provisions contained in Articles 56, 58 and 59 and reinforce the continuing balance of powers in the EEZ.

However, significant disagreement remains in the interpretation and application of the EEZ regime.[10] This is because the EEZ reduced a large area from the transnational commons and set the stage for an evolving battle between core economic interests of coastal States and communicational freedoms of all States. Additionally, there is the issue of how to identify and address a number of residual rights that are not specifically included in the regime itself and remain for further discussion. In the law of the sea, the uses of the EEZ have become one of the most difficult and complex issues to give rise to international disputes. Subsequent agreements and State practice have shown that the EEZ regime has sufficient flexibility and resilience, and a dynamic balance could be maintained on an *ad hoc* basis to accommodate the growing and changing needs of States.

With respect to navigation, by and large, this freedom has been subjected to moderate changes under the EEZ regime compared with its application on the high seas. In contrast, the freedom of overflight has been less affected by the establishment of the EEZ. On navigation, the coastal State shares limited concurrent jurisdiction over foreign vessels in

[8] UNCLOS Article 59.

[9] UNCLOS Articles 297, 298(1)(b).

[10] Ivan Shearer, 'Ocean Management Challenges for the Law of the Sea in the First Decade of the 21st Century', in Alex G. Oude Elferink and Donald R. Rothwell (eds.), *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff 2004) 10–13; Robin R. Churchill, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention', in Alex G. Oude Elferink (ed.), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff 2005) 126–136; Alexandre Pereira da Silva, 'From the First Claims to the Exclusive Economic Zone: Reviewing Latin America's 200-Nautical Mile Sea Seventy Years On' (2019) 33 Ocean YB 131, 140–159; J Ashley Roach, *Excessive Maritime Claims* (4th ed., Brill 2021) 163–175, 442–482.

its EEZ. This is notable in relation to vessel-source pollution triggered by a violation of applicable international rules and standards, and fisheries and activities ancillary to fishing that violate applicable domestic laws.[11] Where the foreign vessel is subject to the concurrent jurisdiction of both the coastal State and the flag State, it is conceivable that the former could only exercise jurisdiction for explicitly assigned activities while the latter maintains primary responsibility for the conduct of the vessel within the EEZ. However, in the case of marine environmental protection from vessel-source pollution, and sometimes for the safety of navigation, the coastal State is increasingly gaining prescriptive jurisdiction through the development of generally accepted international rules and standards, which signals the expanding nature of the jurisdiction of the coastal State in the EEZ.

With regard to the freedom to lay submarine cables and pipelines in the EEZ, the coastal State is given explicit rights and jurisdiction to take reasonable measures to protect its economic interests, particularly with regard to pipelines for environmental protection purposes, provided that such measures do not impede the laying or maintenance of such cables or pipelines.[12] On the one hand, while the competition between uses continues, a review of State practice indicates that some States have made certain inconsistent and excessive claims over activities related to submarine cables and pipelines, a finding that highlights the necessity of each State obeying the due regard obligation in exercising its co-existing rights. On the other hand, with the growing awareness of the importance of submarine cables and pipelines, States are expected to enhance their efforts, individually and jointly, to protect their safety and security. The coastal State, in particular, must regulate competing uses under its jurisdiction with due diligence and ensure its nationals or vessels flying its flag do not interfere, maliciously or unreasonably, with the submarine cables and pipelines laid in its EEZ.

Driven by various motivations, States are pressing their claims in the EEZ, in particular with respect to the residual rights of security concerns, with many States adopting numerous military, diplomatic, policy and legal measures to serve their own interests. Security interests at sea originated from the inherent right of States to defend and resist any possible violation, interference, destruction and damage coming from the ocean space against their sovereignty, territorial integrity, internal affairs

[11] UNCLOS Articles 56(1)(a) and (b)(iii), 58(3), 62(4), 73(1), 211(5), 220(3) and (5)–(6).
[12] UNCLOS Articles 58(1), 79(1)–(4).

and social order, and their nationals' lives and property abroad.[13] The protection of security interests is reflected in the activities of naval and air forces, maritime enforcement and ocean management, which combine the functions of the military, police and administrative agencies of the State. The security rights enjoyed by States are manifested not only in the maritime zones under their jurisdiction but also in the jurisdictional zones of other States and on the high seas as the freedom of safe transit. Within the EEZ, both traditional military interests and non-traditional non-military interests of the coastal State co-exist with those of other States. As such, in theory, all States could assert the right to conduct military activities and address threats to maritime security in an established EEZ, provided that there is a jurisdictional basis under international law. The key to finding a dynamic balance in the EEZ is the obedience of the mutual due regard obligation and non-abuse of rights.[14] It has been observed that special consideration should be given to the coastal State to ensure their sovereign rights over natural resources and recognized jurisdiction are not unduly affected. States will continue to use the EEZ for military and security purposes despite different interpretations and practices on their legal basis. It is in the interests of all States to find a balance between maximising their individual rights and jurisdiction in adjacent maritime areas and maintaining the common interest of all States to use the multifunctional EEZ.[15] Moreover, there has been an emerging trend of treating maritime security as collective security for which multilateral cooperation and collaboration among States are needed to secure the peaceful use of the ocean. Where there is a conflict that arises between the asserted right and another use of the ocean, the dispute should be resolved on the basis of equity and take into account all relevant circumstances and interests.[16]

UNCLOS provides little guidance on the rights and jurisdiction of archaeological and historical objects found in the EEZ, except for the general duties of all States to protect and cooperate to protect them.[17]

[13] Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 6–7.
[14] UNCLOS Articles 56(2), 58(3), 300.
[15] Tim Stephens and Donald R. Rothwell, 'The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On' (2012) 27 Int'l J Marine & Coastal L 701, 705–706; Yoshifumi Tanaka, *The International Law of the Sea* (3rd ed., Cambridge University Press 2019) 471–472.
[16] UNCLOS Article 59.
[17] UNCLOS Article 303(1).

Subsequent State practice and international agreements, most importantly the 2001 Convention on the Protection of Underwater Cultural Heritage (CPUCH), have provided some clarity on this issue.[18] For the first 12 nautical miles (NM) of the EEZ, based on its rights over the contiguous zone when declared, the coastal State has the 'power of control with respect to archaeological and historical objects' found therein.[19] Compared with the right to 'control traffic' in such objects by 'their removal from the seabed' as stated in UNCLOS, this right has been further developed by CPUCH, State practice and acknowledged by the International Court of Justice.[20] For the remaining 176 NM of the EEZ, the coastal State has the right to take necessary measures over activities that affect these objects, both directly and incidentally, undertaken by its nationals or ships flying its flag. This right will be reduced to concurrent jurisdiction over activities undertaken by foreign nationals or vessels when such activities interfere with its sovereign rights or recognized jurisdiction. Among States parties to the CPUCH, the coastal State may assume the role of a Coordinating State to coordinate the consultation process and implementation of agreed measures for the protection of underwater cultural heritage found in its EEZ or on the continental shelf.[21]

Compared to when the ocean was clearly divided between the territorial sea and the high seas, under UNCLOS there has been a major change in favour of the coastal State in terms of natural resources. The establishment of the EEZ puts an end to the chaotic situation of inconsistent unilateral claims, known as creeping jurisdiction, that had prevailed from the late 1940s to the late 1970s.[22] Since then, there have been no attempts by the coastal State to extend their jurisdiction over the water column beyond the 200 NM limit.[23] There has been some inconsistent interpretation and

[18] Convention on the Protection of the Underwater Cultural Heritage (2 November 2001, in force 2 January 2009) 2562 UNTS 3 (CPUCH).

[19] Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 21 April 2022, ICJ Reports 2022, p. 266, para 186.

[20] UNCLOS Article 303(2); CPUCH Article 8; Nicaragua v. Colombia (2022) para 185; Mariano J. Aznar, 'The Contiguous Zone as an Archaeological Maritime Zone' (2014) 29 Int'l J Marine & Coastal L 1, 30–38.

[21] CPUCH Articles 9–10.

[22] Tommy Koh, *Building a New Legal Order for the Oceans* (National University of Singapore Press 2020) 25–33; Satya N. Nandan with Kristine E. Dalaker, *Reflections on the Making of the Modern Law of the Sea* (National University of Singapore Press 2021) 124–128.

[23] Gemma Andreone, 'The Exclusive Economic Zone', in Rothwell, Oude Elferink, Scott and Stephens (2015) 178–180; Churchill, Lowe and Sander (2022) 297–299.

application of certain subject matters, and some occasional conflicts between the exercise of certain rights and freedoms in the EEZ, but these are limited to a relatively small number of States. The confluence of different approaches to coordinate and harmonise State practice has and will continue to shape the development of the EEZ regime.

For any legal system to be able to respond to the evolving needs of States, it must have the capability to adapt to changing circumstances that affect the reality it purports to regulate, and the international law of the sea is no exception.[24] In the forty years since its establishment under UNCLOS, the EEZ regime still stands out as a robust legal framework, containing clearer doctrines than often thought and, notwithstanding the need to interpret its provisions in light of serious factual challenges, remains well suited for continuing to balance the different interests between coastal State and other States.[25] It is the responsibility of all State parties to ensure the continued relevance of the EEZ regime by bearing in mind the spirit and substance underlying this regime. Only when the rights and freedoms are exercised on the basis of mutual respect and due regard and in the spirit of multi-level cooperation will the national interests and communicational freedoms be safe and secure, and the EEZ enjoy peace, security and good order.

[24] Jose Luis Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 Int'l J Marine & Coastal L 363, 382; Malcolm D Evans, 'The Law of the Sea', in Malcolm D. Evans (ed.), *International Law* (5th ed., Oxford University Press 2018) 637–638.

[25] Shanmugam Jayakumar, 'UNCLOS – Two Decades On' (2005) 9 Singapore YB Int'l L 1, 6; Alexander Proelss, 'The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited' (2012) 26 Ocean YB 87, 87; Margaret A. Young, 'A Quiet Revolution: The Exclusivity of Exclusive Economic Zones', in Kim Rubenstein (ed.), *Traversing the Divide: Honouring Deborah Cass's Contributions to Public and International Law* (Australian National University Press 2021) 86.