3

The Exclusive Economic Zone in the United Nations Convention on the Law of the Sea

State practice following the Truman Proclamations revealed that the international community had reached a general consensus for coastal States to establish a separate maritime zone beyond the territorial sea to protect and preserve their economic interests over natural resources. Such consensus also extended to the preservation of vital high seas freedoms of all States in the same maritime zone. Hence, the maritime zone was to be established as a multifunctional zone in which the rights of the coastal State and the freedoms of other States would co-exist.

The basic concept of the exclusive economic zone (EEZ) was accepted early on during the Third United Nations Conference on the Law of the Sea (Third Conference), leaving negotiators the main task of making this new maritime zone a balanced legal regime that could accommodate States' competing, conflicting and overlapping demands.[1] A compromise was eventually achieved on the legal status of the EEZ. It is a *sui generis* legal regime under which the rights and duties of different States are governed by the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS or the Convention).[2] The principle rights and jurisdiction of the coastal State and the freedoms of other States are enumerated in Articles 56 and 58, which also include the reciprocal due regard obligations for all relevant parties in order to maintain a balance in the uses of the EEZ. Article 59 acknowledges the existence of residual rights in the EEZ and lays down the criteria for resolving conflicts arising from their attribution, with no presumption in

[1] Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II (Martinus Nijhoff 1993) 498; James B. Morell, *The Law of the Sea: An Historical Analysis of the 1982 Treaty and Its Rejection by the United States* (McFarland 1992) 53; Alexander Proelss, 'Article 55', in Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Hart 2017) 414–415.

[2] United Nations Convention on the Law of the Sea (10 December 1982, in force 16 November 1994) 1833 UNTS 3, Article 55 (UNCLOS).

favour of either the coastal State or other States. As an integrated part of UNCLOS, any disputes concerning the interpretation or application of the EEZ regime must be settled, albeit subject to important exclusions, according to the dispute settlement mechanism established in Part XV.

This chapter is divided into three main sections. Section 3.1 reviews the process of codification of the EEZ at the Third Conference and the recognition of its *sui generis* character as a new functional zone involving a compromise between different States and groups of States. Section 3.2 analyses the jurisdictional framework of the EEZ as established by UNCLOS. It identifies the two legal doctrines that formulate the body of flexible prescriptions to maintain a delicate balance of the jurisdictional framework. These are the principles used to attribute rights and freedoms between the coastal State and other States, and the reciprocal due regard obligations relating to their excise. These two legal doctrines also guided the principles to resolve conflicts arising from the attribution of residual rights and the procedures to settle disputes among State parties. Section 3.3 examines the customary law status of the EEZ as achieved through State practice and consensus.

3.1 The Exclusive Economic Zone as a New Legal Regime

3.1.1 Codification History

Despite the absence of a general rule of international law fixing the maximum breadth of the territorial sea or the limit of coastal State jurisdiction over fisheries, it was largely the concern over deep seabed mining that triggered the convocation of a new law of the sea conference.[3] Initiated by a Maltese proposal, the United Nations General Assembly (UNGA) established the *ad hoc* Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (Sea-Bed Committee) in 1968, consisting of 42 member States to study all related issues.[4] In 1970, the UNGA decided by

[3] Daniel P. O'Connell, *The International Law of the Sea*, Vol. I (Oxford University Press 1982) 25; Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. I (Martinus Nijhoff 1985) xxvi; Third United Nations Conference on the Law of the Sea (Third Conference) (1973–1982), Official Records, https://legal.un.org/diplomaticconferences/1973_los/.

[4] United Nations General Assembly (UNGA) Res 2467.A (XXIII), 21 December 1968, Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas beyond

Resolution 2759 C (XXV) to convene the Third United Nations Conference on the Law of the Sea in 1973 and instructed the Sea-Bed Committee to act as the preparatory body for the Third Conference.[5] The issues of coastal States' rights and jurisdiction over the natural resources in areas beyond the territorial sea were assigned to Sub-Committee II under Item 6: Exclusive Economic Zone beyond the Territorial Sea and Item 7: Coastal State Preferential Rights or other Non-Exclusive Jurisdiction over Resources beyond the Territorial Sea.[6]

During the consideration of substantive issues in the 1972 session of the Sea-Bed Committee, developing countries seeking exclusive rights over living and non-living resources widely supported the concept of the 200-mile economic zone, while developed States favoured only the preferential rights of the coastal State to fisheries to an adequate distance beyond the territorial sea.[7] Controversy with regard to different approaches continued in the 1973 session with a proliferation of proposals for a 200-mile zone.[8] However, the landlocked and geographically disadvantaged States (LL/GDS), which were also developing States, formed another group that resisted the approach of an additional maritime zone under the coastal States' jurisdiction, asserted their position of seeking access to and from the sea, and sought to participate in resource exploitation in the proposed area.[9] Therefore, when the Third Conference commenced its first session in 1973, the positions of States and groups of States in respect to an economic zone beyond the territorial sea were interrelated, overlapping and sometimes conflicting.[10]

the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind, paras 1–2.

[5] UNGA Res 2750.C (XXV), 17 December 1970, Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind, and Convening of a Conference on the Law of the Sea, paras 2, 6.

[6] Shigeru Oda, *The Law of the Sea in Our Time II: The United Nations Seabed Committee, 1968–1973* (Sijthoff Leyden 1977) 156–157, 201–203.

[7] Oda (1977) 211, 214–218; Nordquist, Nandan and Rosenne (1993) 496–497.

[8] Oda (1977) 269–276; Proelss 'Article 55' (2017) 414.

[9] UNGA, Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, A/AC.138/93, 2 August 1973, Draft Articles Relating to Land-Locked States submitted by Afghanistan, Bolivia, Czechoslovakia, Hungary, Mali, Nepal and Zambia; Oda (1977) 276–278.

[10] John R. Stevenson and Bernard H. Oxman, 'Preparations for the Law of the Sea Conference' (1974) 68 Am J Int'l L 1, 13–23.

At the first substantive session of the Third Conference in Caracas in 1974, the concept of an economic zone, with specific attribution of rights between the coastal State and other States, was virtually accepted.[11] In fact, the formula of a 12 nautical miles (NM) territorial sea and an economic zone to a maximum distance of 200 NM was the most 'acceptable accommodation for those who favored extending coastal control over resources beyond the territorial sea but were opposed to any extension of national territorial sovereignty'.[12] The real issue was how to clarify the juridical status of the zone. Major maritime States sought to characterise the zone as part of the high seas, assigning only resource-related rights to coastal States; some developing States sought to characterise it as territorial sea, with no more than navigational and related rights granted to other States; and a third grouping intended to create a new legal regime that formed neither part of the highs seas nor of the territorial sea.[13]

The negotiations under Sub-Committee II were assisted by an informal working group of juridical experts, known as the Evensen Group after its chairperson Minister Jens Evensen of Norway, to resolve the competing politics and interests of various States and groups of States with respect to the EEZ.[14] Before the third session in 1975, the Evensen Group produced a cohesive set of draft articles on this zone. The draft articles proposed to give the coastal State sovereign rights and jurisdiction for economic purposes, to reserve to all States the fundamental navigational freedoms and to require both parties to observe the due regard obligation when exercising their rights and performing their duties.[15] However, this proposal was rejected by the Group of 77 and the LL/GDS Group mainly because it failed to meet their specific needs

[11] Third United Nations Conference on the Law of the Sea (Third Conference), Official Records, Vol. III: Documents, A/CONF.62/L.8/Rev.1, 17 October 1974, Statement of Activities of the Conference during Its First and Second Sessions, Annex II, Appendix I: Working Paper of the Second Committee: Main Treads; Nordquist, Nandan and Rosenne (1993) 498; Morell (1992) 53.

[12] Nordquist, Nandan and Rosenne (1993) 550.

[13] Julio Cesar Lupinacci, 'The Legal Status of the Exclusive Economic Zone in the 1982 Convention on the Law of the Sea', in Francisco Orrego Vicuña (ed.), *The Exclusive Economic Zone: A Latin American Perspective* (Westview 1984) 93; Nordquist, Nandan and Rosenne (1993) 499; Proelss 'Article 55' (2017) 414.

[14] Tommy TB Koh, 'Negotiating Process of the Third United Nations Conference on the Law of the Sea', in Nordquist (1985) 106; Satya N. Nandan with Kristine E. Dalaker, *Reflections on the Making of the Modern Law of the Sea* (National University of Singapore 2021) 95–96.

[15] Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents*, Vol. IV (Ocean Publications 1983) 210–211.

and because it reflected a strong coastal State orientation by reserving to it sovereign rights over the resources.[16] The draft articles of the Evensen Proposal were incorporated into the Informal Single Negotiation Text (ISNT) Part II, under the title 'The Exclusive Economic Zone', adopted at the third session.[17] Essentially, it consolidated the general balance of competing interests between different States within the new maritime zone and established the extent and character of the zone.[18]

ISNT Part II had been discussed on an 'article-by-article' basis under 'a rule of silence' and revised during the fourth session in 1976 into the Revised Single Negotiating Text (RSNT) Part II.[19] There was a general agreement on the concept and breadth of the EEZ, but delegates remained divided with regard to the definition and status of the zone.[20] In the RSNT, the Chairman of Sub-Committee II stated that 'an accommodation could be found' and no changes to the text should be made to avoid upsetting the balance implicit in the ISNT, and he further declared that 'nor is there any doubt that the [EEZ] is neither the high seas nor the territorial sea. It is a zone *sui generis*'.[21] This approach was in line with the third grouping of the State negotiation positions, that of treating the economic zone as a separate maritime zone that contained no presumption in favour of either coastal States or other user States.

During the fifth session in 1976, the President of the Third Conference 'identified as a key issue the question of the definition and status of the [EEZ]' where 'a compromise must be reached', and noted the purpose of Negotiating Group No. 1 within Sub-Committee II was to 'consider the questions of the legal status of the [EEZ] and of the rights and duties of

[16] Ibid 224, 227; Nordquist, Nandan and Rosenne (1993) 500; Proelss 'Article 55' (2017) 414.

[17] Third Conference, Official Records, Vol. V: Revised Single Negotiating Text (Part II), A/CONF.62/WP.8/PartII, 7 May 1975, Text presented by the Chairman of the Second Committee; Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents*, Vol. I (Ocean Publications 1982) 27–30.

[18] Nordquist, Nandan and Rosenne (1993) 501.

[19] Third Conference, Official Records, Vol. V: Revised Single Negotiating Text (Part II), A/CONF. 62/WP. 8/Rev. I/PartII, 6 May 1976, Text presented by the Chairman of the Second Committee; Platzöder (1982) 183–184: 'Early in its work the Committee agreed to follow "a rule of silence", whereby delegations would refrain from speaking on an article if they were essentially in agreement with the single text'.

[20] Nordquist, Nandan and Rosenne (1993) 501.

[21] Third Conference, Official Records, Vol. V: Revised Single Negotiating Text (Part II), A/CONF. 62/WP. 8/Rev. I/PartII, 6 May 1976, Introductory Note, paras 14–17; Platzöder (1982) 185; Nordquist, Nandan and Rosenne (1993) 501.

the coastal State and other States in that zone'.[22] However, no practical results were achieved, and the issue was eventually resolved through the work of a private group with 17 delegations formed at the sixth session in 1977, known as the Castañeda-Vindenes Group.[23] The Castañeda-Vindenes Group produced a comprehensive draft of articles to address the outstanding issues of the economic zone that reinforced the sovereign rights of coastal States and clarified the relative freedoms preserved for other States, emphasised the mutual obligation of due regard and suggested the inclusion of 'a new provision setting out the specific legal regime of the [EEZ]'.[24] The draft articles produced by the Castañeda-Vindenes Group provided a better basis for further negotiations and were integrated into the Informal Composite Negotiating Text (ICNT) Part V, along with the progress made on other maritime regimes at the Third Conference as a whole.[25] By then, a negotiated draft article recognising the *sui generis* legal status of the EEZ made its first appearance at the Third Conference, which was retained in subsequent revised texts and adopted in Part V of UNCLOS.[26]

3.1.2 *A* Sui Generis *Functional Zone*

A mini-package deal was achieved among the negotiated provisions on the EEZ, with a core provision that defines the legal status of the new economic zone. Article 55 of UNCLOS defined the EEZ as 'an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention'.[27] This provision was paralleled by Article 86, a definition of the high seas that excluded its

[22] Nordquist, Nandan and Rosenne (1993) 502.
[23] Koh (1985) 108; Rolf Einar Fife, 'Obligations of "Due Regard" in the Exclusive Economic Zone: Their Context, Purpose and State Practice' (2019) 34(1) Int'l J Marine & Coast L 43, 53.
[24] Nordquist, Nandan and Rosenne (1993) 503; Platzöder (1983) 419, 424, 426.
[25] Third Conference, Official Records, Vol. VIII: Informal Composite Negotiating Text, A/CONF.62/WP.10/Add.1, 22 July 1977, Memorandum by the President of the Conference on Document A/CONF.62/WP.10; Platzöder (1983) 313–317.
[26] Third Conference, Official Records, Vol. VIII: Informal Composite Negotiating Text, A/CONF.62/WP.10, 15 July 1977, Informal Composite Negotiating Text; Nordquist, Nandan and Rosenne (1993) 503–504.
[27] UNCLOS Article 55.

application to the EEZ.[28] Article 55 decisively rules out the possibility that the new maritime zone be assimilated into either the territorial sea or the high seas, and confirmed the *sui generis* status of the EEZ as a new legal regime of the law of the sea.[29]

The EEZ shares the feature of a functional zone with those that have been established before, such as the fishery zone and the contiguous zone, where the coastal State exercises certain specialised powers in a maritime area beyond the territorial sea.[30] But these previous zones differ in not affecting the high seas status where rights that were not attributed to the coastal States are continually enjoyed by all other States.[31] For example, the coastal State's right to exercise control to prevent and punish certain infringements in the contiguous zone is an exceptional power restricted in scope, a necessary extension of its enforcement jurisdiction in the territory or the territorial sea.[32] The contiguous zone and the EEZ, although overlapping in the geographical aspect, are two distinctive regimes whereby the coastal State may exercise different powers therein.[33]

The EEZ is also different from the continental shelf, which derived from the idea of the innateness of State sovereignty over the land extension to the submarine terrain. The coastal State's rights over the continental shelf are exclusive in the sense that if it does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without its express consent.[34] In contrast, the establishment of the EEZ is optional, and its existence depends on an actual claim made by the coastal State.[35] Where the coastal State chooses not to claim

[28] UNCLOS Article 86; Alexander Proelss, 'The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited' (2012) 26 Ocean YB 87, 88–90; Proelss 'Article 55' (2017) 416–418.

[29] Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports 1982, p. 18, Dissenting Opinion Oda, para 118; Nordquist, Nandan and Rosenne (1993) 514–515.

[30] Lupinacci (1984) 99; Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007) 59–60.

[31] Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff 1989) 5.

[32] UNCLOS Article 33(1).

[33] Third Conference, Official Records, Document A/CONF.62/C.2/SR.31, Summary Records of the 31st Meeting of the Second Committee, 7 August 1974, 233–234. 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, paras 161.

[34] UNCLOS Article 77(1)–(2).

[35] O'Connell (1982) 570–572; Edward Duncan Brown, *The International Law of the Sea Volume I: Introductory Manual* (Dartmouth 1994) 218; James Crawford, *Brownlie's*

an EEZ, the water column above its continental shelf continues to be the high seas. When claimed, the EEZ co-exists with the contiguous zone out to 24 NM and with the continental shelf to the maximum of 200 NM from the baselines from which the breadth of the territorial sea is measured.[36]

The EEZ breaks the dichotomy between the territorial sea and the high seas. It grants the coastal State sovereign rights over the natural resources and specified jurisdiction, preserves the right of communication to all States, and recognises the right of LL/GDS to participate in the exploitation of an appropriate part of the surplus of the living resources.[37] Additionally, it clearly recognises the existence of residual rights and declares that such rights will not be automatically attributed to either the coastal State, based on the territorial sea presumption, or to other States, based on the high seas presumption.[38] In this *sui generis* zone, States' rights and duties are attributed and exercised in a balanced manner where no one enjoys absolute authority but must give due regard to the rights and duties of others.

The functional character of the EEZ is concisely reaffirmed by international jurisprudence. For example, in the 2001 *Qatar v. Bahrain*, the International Court of Justice (ICJ) stated that '[m]ore to the north . . . the delimitation to be carried out will be one between the continental shelf and [EEZ] belonging to each of the Parties, areas in which States have only sovereign rights and functional jurisdiction'.[39] In the 2006 *Barbados v. Trinidad and Tobago*, both parties recognised that the EEZ is 'an optional elected zone' where the coastal State possesses only sovereign rights.[40] These statements confirmed that the EEZ is a specific legal regime where coastal States only have sovereign rights and functional jurisdiction.

Principles of Public International Law (9th ed., Oxford University Press 2019) 262, 264–265; Proelss 'Article 55' (2017) 409–410; Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th ed., Manchester University Press 2022) 226–227, 293.

[36] UNCLOS Articles 33(2), 57, 76(1).

[37] UNCLOS Articles 56(1), 58(1), 69–70.

[38] UNCLOS Article 59; Brown (1994) 218–220.

[39] Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports 2001, p. 40, para 170.

[40] Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Barbados and the Republic of Trinidad and Tobago, Award, 11 April 2006, PCA Case No. 2004-02, paras 175, 182 (Barbados v. Trinidad and Tobago).

The establishment of the EEZ was considered the most significant outcome of the Third Conference.[41] It first needs to be acknowledged that the codification of the EEZ was only achieved within the broader context of the Third Conference that negotiated all subjects and issues as a package deal.[42] Bearing in mind the subjects and issues are interrelated, the package deal approach allowed States to weigh their interests and make compromises and trade-offs in order to secure their core interests. The acceptance of the provisions on the EEZ as a whole was reached in the context of satisfactory outcomes on the limit of the territorial sea, the navigational issues in straits used for international navigation and archipelagic waters, the access and transit rights of LL/GDS and the continental shelf.[43] Secondly, within the mini-package deal of the EEZ, a delicate balance is maintained by its functional character. As a *sui generis* zone, the rights and freedoms are attributed between the coastal State and other States following a general principle and their exercise are guided by a mutual mandatory due regard obligation. The balance between the sovereign rights and jurisdiction of coastal States and the freedoms of all State in the EEZ is maintained in a dynamic manner and needs to be assessed in a given situation.[44]

3.2 The Jurisdictional Framework of the Exclusive Economic Zone

Two legal doctrines guide the attribution and exercise of the rights and freedoms between the coastal State and other States in the jurisdictional framework of the EEZ. On attribution of rights and freedoms, in principle, all activities relating to the economic exploitation of the zone and its resources fall within the rights pertaining to the coastal State, whereas all activities relating to the communication uses of the zone fall

[41] Horace B. Robertson, 'Navigation in the Exclusive Economic Zone' (1983–1984) 24(4) Va J Int'l L 865, 865.

[42] 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 UL Rev 83, 87; Tommy Koh, *Building a New Legal Order for the Oceans* (National University of Singapore 2020) 70–71; Nandan (2021) 47–66.

[43] Tommy Koh, 'A Constitution for the Oceans', in Nordquist (1985) 14–15; John R. Stevenson and Bernard H. Oxman, 'The Third United Nations Conference of the Law of the Sea: The 1975 Geneva Session' (1975) 69 Am J Int'l L 763, 764–765, 770.

[44] Ivan A. 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.

within the freedoms pertaining to all States.[45] On the exercise of rights and freedoms, both the coastal State and other States undertake the reciprocal mandatory due regard obligations, as well as the general obligations of peaceful uses of the sea and non-abuse of rights. These two legal doctrines are also applied in resolving conflicts regarding the residual rights in the EEZ, and the settlement of disputes relating to the uses of the EEZ.

3.2.1 The Attribution of Rights and Freedoms

3.2.1.1 Economic Interests Consideration

Article 56 states in general terms the rights, jurisdiction and duties of the coastal State, supplemented by other provisions in different Parts of the Convention. Article 56 is the essence of the EEZ, as it confirms the original purpose of establishing this zone, which is to reserve the economic interests, present or future, exclusively to the coastal State. Additionally, it indicates that the sovereign rights of the coastal State pertain only to the natural resources of the zone rather than to the zone itself.[46]

The notion of 'sovereign rights' of the coastal State over natural resources in adjacent maritime zones beyond the territorial sea limit appeared in the Articles Concerning the Law of the Sea developed by the International Law Commission in 1956 (ILC Draft Articles), and was retained in the 1958 Convention on the Continental Shelf and later in UNCLOS.[47] The coastal State's sovereign rights in the EEZ refer in the first instance to the conservation and management of the living resources of the water column superjacent to the seabed. In exercising such rights, the coastal State is expected to take the measures necessary to maintain the sustainable use of these natural resources, and to share the surplus with LL/GDS of the same subregion or region on an equitable basis.[48] The coastal State's sovereign rights with respect to the exploration and

[45] Tullio Scovazzi, '"Due Regard" Obligations, with Particular Emphasis of Fisheries in the Exclusive Economic Zone' (2019) 34 Int'l J Marine & Coast L 56, 59.

[46] J. C. Phillips, 'The Exclusive Economic Zone as a Concept in International Law' (1977) 26 Int'l & Comp LQ 585, 587; Alexander Proelss, 'Article 56', in Proelss (2017) 420–421.

[47] 'Report of the International Law Commission to the United Nations General Assembly, A/3159, Articles Concerning the Law of the Sea' (1956) 2 YB ILC 256, Article 68 (ILC Draft Articles); Convention on the Continental Shelf (29 April 1958, in force 10 June 1964) 499 UNTS 311, Article 2(1); UNCLOS Article 56(1)(a).

[48] UNCLOS Articles 62(1)–(3), 69–70.

exploitation of the natural resources of the seabed and its subsoil are to be exercised in accordance with the regime of the continental shelf.[49]

The exclusive nature of the coastal State's sovereign rights over living and non-living natural resources demonstrates a clear presumption in favour of the plenary powers and jurisdiction of the coastal State. It also became the founding principle for allocating rights between the coastal State and other States, whereas activities that directly relate to natural resources rest with the coastal States.

Moreover, the coastal State has been given jurisdiction over certain specific matters. The connotational difference between 'sovereign rights' and 'jurisdiction' represents the grading in the intensity of the rights of the coastal State. Jurisdiction is a central feature of State sovereignty, for it describes the limits of the legal competence of a State to adopt and enforce rules of conduct upon persons and entities under international law.[50] The change of terminology also reflects a change in the balance between the coastal State and other States whereas considerable safeguards are written into the exercise of the jurisdiction in the interests of protecting the communicational freedoms.[51]

The coastal State has jurisdiction 'as provided for in the relevant provisions of this Convention' with regard to the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment.[52] The content, scope, exercise and safeguards in relation to these jurisdictions are further illustrated in other provisions of, *inter alia*, Parts V, VI, XII and XIII of UNCLOS. In addition, many of these provisions are supplemented and implemented by international rules and standards contained in other international instruments developed by States through the competent international organisation or diplomatic conferences.[53]

Furthermore, the coastal State has 'other rights and duties provided for' in UNCLOS.[54] This refers to those contained in other provisions of UNCLOS that are applicable and compatible with the EEZ regime, which provide for the maximum benefit for the coastal State to enjoy and

[49] UNCLOS Article 56(3).
[50] Malcolm N. Shaw, *International Law* (8th ed., Cambridge University Press 2017) 483; Christopher Staker, 'Jurisdiction', in Malcolm D. Evans (ed.), *International Law* (5th ed., Oxford University Press 2018) 289.
[51] Brown (1977) 334.
[52] UNCLOS Article 56(1)(b).
[53] Nordquist, Nandan and Rosenne (1993) 542–543.
[54] UNCLOS Article 56(1)(c).

exercise its economic rights and jurisdiction. For example, coastal States are entitled to exercise the right of visit to ensure the orderly use of the sea, and to adopt and enforce special rules for vessel-source pollution in ice-covered areas within the limits of the EEZ to better protect the ecological balance.[55]

In order to safeguard the exercise of sovereign rights and specific jurisdictions, the coastal State may exercise enforcement jurisdiction over alleged violations.[56] The enforcement jurisdiction of sovereign rights over living resources and jurisdiction over the protection and preservation of the marine environment are explicitly provided under UNCLOS.[57] The coastal State's enforcement jurisdiction for the exploration and exploitation of non-living resources and other economic activities is derived from the competence of its sovereign rights and jurisdiction and has been widely accepted in State practice.[58] The coastal State's enforcement jurisdiction is secured by the right of hot pursuit that applies *mutatis mutandis* to violations in the EEZ.[59]

3.2.1.2 Communicational Interests Consideration

As the concept of the EEZ was developed, many of the early proposals that described the adjacent jurisdictional zone emphasised establishing the rights of the coastal State first, with a requirement that it must be carried out 'with reasonable regard' and/or 'without prejudice to' the rights and freedoms of other States as a safeguard.[60] At the same time, the need to safeguard the right of free communication within practicable limits has been a constant theme throughout the evolution of the EEZ.[61] The protection of communication interests is primarily afforded in

[55] UNCLOS Articles 110–111, 234.
[56] ILC Draft Articles Article 68 Commentary 2; Churchill, Lowe and Sander (2022) 271.
[57] UNCLOS Articles 73(1), 213–216, 220–221.
[58] Nordquist, Nandan and Rosenne (1993) 791–794; Gemma Andreone, 'The Exclusive Economic Zone', 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) 170; Churchill, Lowe and Sander (2022) 244, 263; M/V 'Virginia G' Case (Panama/Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014, p. 4, para 211; In the Matter of the Arctic Sunrise Arbitration before An Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Kingdom of the Netherlands and the Russian Federation, Award on the Merits, 14 August 2015, PCA Case No. 2014-02, paras 283–284, 324.
[59] UNCLOS Article 111(2).
[60] Nordquist, Nandan and Rosenne (1993) 556.
[61] Ibid; Alexander Proelss, 'Article 58', in Proelss (2017) 445.

Article 58, which addresses the freedoms and duties of other States that co-exist with the rights and duties of the coastal State in the EEZ.

It first needs to be acknowledged that the so-called *jus communicationis* is something in which all States, including the coastal State and landlocked States, have an interest.[62] The coastal State, as a member of 'all States', would rely on Article 58 to enjoy the freedoms 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 in the EEZ. The formulation of 'other internationally lawful uses of the sea' is intended to accommodate other possible uses of the ocean by all States in the EEZ, but embraces only those related to the exercise of these named freedoms. Nevertheless, there is no universal agreement on what uses may be considered 'other internationally lawful uses', and there is significant variation in State practice.[63] These freedoms, though customarily recognised, are not absolute in scope and must be compatible with the EEZ regime as well as other relevant provisions of UNCLOS.[64]

By cross-reference in Article 58(2), Articles 88–115 apply to the EEZ insofar as they are compatible with this legal regime. The effect is preservation of the right of all States to engage in a series of non-economic activities in the EEZ. These activities relate to the assistance and recue of persons and ships, the repression of piracy, the suppression of illicit trade in narcotic drugs and psychotropic substances, the suppression of unauthorised broadcasting, the right of hot pursuit, the right of visit and the protection of submarine cables and pipelines.

In sum, the basic principle to attribute rights and freedoms in the EEZ is assessing whether or not the essential interests at question link with the natural resources and economic interests. If affirmed in the positive, the balance of principles weighs heavily in favour of the coastal State. It is also worth noting that States can have rights in the EEZ other than those listed in Articles 56 and 58 of UNCLOS if they derive from other conventions and international agreements or customary international law compatible with UNCLOS, or have been agreed to by the parties of concern through bilateral or regional arrangements.[65] These rights and

[62] Nordquist, Nandan and Rosenne (1993) 496; Proelss 'Article 58' (2017) 449.

[63] Proelss 'Article 58' (2017) 452–454; J. Ashley Roach, *Excessive Maritime Claims* (4th ed., Brill 2021) 442–482.

[64] UNCLOS Article 58(1).

[65] UNCLOS Article 311; In the Matter of the Chagos Marine Protected Area Arbitration before an Arbitral Tribunal Constituted under Annex VII to the United Nations Convention on the Law of the Sea between the Republic of Mauritius and the United

freedoms are, nevertheless, not absolute, but must be exercised with a number of duties with the aim to maintain the dynamic balance of the jurisdictional framework of the EEZ.

3.2.2 *The Exercise of Rights and Freedoms*

Both Articles 56 and 58 contain an obligation that the acting State, while exercising its rights and performing its duties, 'shall have due regard to the rights and duties' of the other party. For the coastal State, the obligation extends to 'shall act' in a manner compatible with UNCLOS, and for the other State, they 'shall comply with' the laws and regulations duly adopted by the coastal State.[66] Additionally, all activities taking place in the EEZ must comply with the general obligations of use of the sea, including acting in good faith and non-abuse of rights, and for peaceful purposes.[67]

3.2.2.1 The Reciprocal Obligations of Due Regard

The phrase 'due regard' was first used as 'reasonable regard' in Article 2 of the Convention on the High Seas, and later was incorporated into UNCLOS to balance different uses among States by introducing a basic principle of self-restraint.[68] However, nowhere does UNCLOS give a clear definition of the phrase 'due regard', and there are no agreed criteria to determine whether the acting State has fulfilled this obligation. It is unclear what kind of activities may have such an effect of breaching this obligation, and the level of interference they may cause, from potential interference to minor or substantive damage, to the concerned State's rights and interests to determine the breach.

There are a number of judicial decisions that addressed the due regard obligation within a given context that would contribute to the understanding of the phrase. In the *Fisheries Jurisdiction* cases, upon

Kingdom of Great Britain and Northern Ireland, Award, 18 March 2015, PCA Case No. 2011-03, paras 293–294 (Chagos MPA Arbitration); Churchill, Lowe and Sander (2022) 273–276, 286–287.

[66] UNCLOS Articles 56(2), 58(3).

[67] UNCLOS Articles 300–301.

[68] Convention on the High Seas (29 April 1958, in force 30 September 1962) 450 UNTS 11, Article 2; UNCLOS Preamble, Articles 27(4), 39(3)(a), 56(2), 58(3), 60(3), 66(3), 79(5), 87 (2), 142(1), 147(1) and (3), 148, 234, 267; Bernard H. Oxman, 'The Principle of Due Regard', in ITLOS (eds.), *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016* (Brill 2017) 108–113.

recognising the co-existence of the preferential rights of the coastal State and the traditional rights of other fishing States, the ICJ emphasised the duty of both parties to have due regard to the rights of the other party, and declared that neither right is an absolute one; rather, such rights are limited according to the special considerations of the circumstances and the needs of conservation.[69]

In the *Chagos Marine Protected Area* case, the arbitral tribunal declined to find in the formulation of due regard any universal rule of conduct. Instead, it stated that the extent of the regard required would depend upon the nature of the rights held by one side, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the other side, and the availability of alternative approaches.[70] Most importantly, the tribunal indicated that in the majority of cases, the assessment of regard by the acting State would 'necessarily involve at least some consultation with the rights-holding state'.[71]

The same consideration of the due regard obligation was applied by the arbitral tribunal in the *Enrica Lexie* case. The tribunal observed that the ordinary meaning of due regard 'does not contemplate priority for one activity over another'; rather, its object and purpose was to 'ensure balance between concurrent rights belonging to coastal and other States'.[72] The tribunal further declared that the 'extent of the "regard" required by the Convention depends, among others, upon the nature of the rights enjoyed by a State', and the reciprocal obligations 'are structured so as to guarantee observance of the concurrent respective rights of coastal and other States'.[73]

As highlighted in these judicial decisions, there are a few key elements that could be identified as requirements of the due regard obligation. First, the due regard obligations are imposed upon States as a compulsory

[69] Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, ICJ Reports 1974, p. 3, paras 67–72; Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, ICJ Reports 1974, p. 175, paras 60–64.

[70] Chagos MPA Arbitration para 519.

[71] Ibid.

[72] In the Matter of an Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea the Italian Republic and the Republic of India concerning the 'Enrica Lexie' Incident, Award, 21 May 2020, PCA Case No. 2015-28, paras 973, 975.

[73] Ibid para 978.

duty, as indicated by the word 'shall'. Second, both Articles 56(2) and 58 (3) require due regard only to the relevant State's 'rights and duties', but not to its interests more generally. Third, the due regard obligation represents an express recognition of the general need to accommodate different uses and to balance the rights, jurisdiction and duties of the coastal State with the freedoms and duties of other States in the EEZ.[74] Hence, neither the rights nor the freedoms exercised in the EEZ are absolute and neither side has the power to prohibit activities undertaken by the other party unilaterally.

The due regard obligation is triggered when there is a collision of rights and duites that requires accommodation.[75] It functions as a modifying norm to establish the relationship between the two principle norms, suh as the particular rights and freedoms as held by two State parties when they are in conflict.[76] The obligation requires, at a minimum, that the acting States be cognisant of the rights of others and to 'refrain from activities that unreasonably interfere with the exercise of the rights' of the other State.[77] It also could be argued that the due regard obligation presents both procedural and substantive aspects. The acting State, in principle, should not engage unilaterally in the 'balancing exercise' in assessing without any exchange or consultation with the counter State whether the activity in question may or may not infringe its right.[78] When balancing the collision of rights, the due regard obligation imports the notions of equity, fairness, reasonableness and justice which contribute to the assessment of the level of regard required in light of the

[74] Julia Gaunce, 'On the Interpretation of the General Duty of "Due Regard"' (2018) 32 Ocean YB 27, 37–38.

[75] Fife (2019) 45.

[76] Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments', in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development* (Oxford University Press 1999) 33–35.

[77] Message from the President of the United States Transmitting United Nations Convention on the Law of the Sea, with Annexes, Done at Montego Bay, December 10, 1982 (The "Convention"), and the Agreement Relating to the Implementation of Part XI of The Convention, Adopted at New York, July 28, 1994, and Signed by the United States, Subject to Ratification, on July 29, 1994, Senate 103rd Congress 2nd Session, Treaty Doc 103-39, 26, www.foreign.senate.gov/imo/media/doc/treaty_103-39.pdf; Moritaka Hayashi, 'Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms' (2005) 29(2) Marine Policy 123, 133; Albert J Hoffmann, 'Freedom of Navigation', in *Max Planck Encyclopedia of Public International Law* (April 2011) para 15.

[78] Scovazzi (2019) 63; Ioannis Prezas, 'Foreign Military Activities in the Exclusive Economic Zone: Remarks on the Applicability and Scope of the Reciprocal 'Due Regard' Duties of Coastal and Third States' (2019) 34(1) Int'l J Marine & Coast L 97, 105–107.

circumstances and by the nature of those rights.[79] However, since there is no definite order of priority with respect to coastal and other States' rights and freedoms in the EEZ, 'it is only when due regard obligations can be subjected to third-party procedures that the possibility exists for these duties to have a meaningful application that would take into account the differing circumstances'.[80]

The significance of the reciprocal due regard obligations is that they serve to emphasise that the EEZ is not an instrument that grants a large bundle of undefined rights to either the coastal State or other States, but rather is a set of precisely defined rights that cannot be separated from a corresponding set of international obligations.[81] Together with the general principle to attribute rights and freedoms among States, they confirm the *sui generis* character of the EEZ. The object and purpose of the due regard obligation contributes to the establishment of the 'legal order for the seas' and is 'a fundamental principle on which the Convention is built'.[82]

3.2.2.2 Other Obligations for Uses of the Sea

Article 56(2) further requires the coastal State to 'act in a manner compatible with the provisions of this Convention'. This could be viewed from two perspectives. First, the exercise of its sovereign rights and jurisdiction must be compatible with relevant provisions that give content to these rights in Parts V, VII, XII and XIII. Second, the coastal State must comply with the other general obligations for uses of the sea that are applicable to all States.

On the second point, these obligations apply to any State undertaking activities in the EEZ. These general obligations include that all 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right'.[83] Historically, this obligation 'has a remote origin in

[79] Edward Duncan Brown, 'The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts between Different Users of the EEZ' (1977) 4 Marit Pol Mgmt 325, 334, 340.

[80] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005) 139.

[81] Robertson (1983–1984) 883.

[82] UNCLOS, Preamble; Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, Joint declaration of Judges ad hoc Hossain and Oxman.

[83] UNCLOS Article 300.

the negotiations on the status of the [EEZ] conducted in the Castañeda-Vindenes Group in 1977 and the settlement of disputes thereon'.[84] These general obligations further include that all 'States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations'.[85] As the negotiation history indicates, there are disagreements about the meaning and scope of this obligation. Particular with regard to the EEZ, it is unclear whether the obligation of 'peaceful purposes' would prohibit all military activities in the EEZ.[86]

Article 58(3) requires other States to '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'. Compared with the reciprocal due regard obligation where there is no hierarchy between the rights and freedoms of the coastal State and other States, this obligation explicitly recognises the higher status of the coastal State's rights. However, this is not a blank authorisation to the coastal State that would render the freedoms preserved in the EEZ meaningless.

There are two preconditions embedded in this obligation. First, the coastal State may adopt and implement laws and regulations in accordance with 'other rules of international law' such as rules contained in other treaties, customary international law or non-binding instruments. These would primarily include the 'generally accepted international rules and standards' on ship-source pollution established under the auspice of the International Maritime Organization.[87] Second, these domestic laws and regulations must be compatible with the EEZ and be complementary to the coastal State's sovereign rights and specified jurisdiction. As stated by the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Saiga* case, the coastal State does not have the right to enforce general custom laws in the EEZ by characterising such activities as affecting 'its

[84] Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Martinus Nijhoff 1989) 151.

[85] UNCLOS Articles 58(2), 88, 301; Charter of the United Nations (26 June 1945, in force 24 October 1945) 1 UNTS XVI, Article 2(4).

[86] Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III (Martinus Nijhoff 1995) 88–91; see also Chapter 6 of this volume.

[87] UNCLOS Article 211(5); see also Chapter 4 of this volume.

economic "public interest" or entail "fiscal losses" for it' because this would 'curtail the rights of other States' in the EEZ.[88]

It could be argued that this obligation under Article 58(3) is a confirmation that the reserved freedoms are subject to restrictions to accommodate the demands of the coastal State. Such restrictions must be reasonable and proportionate, and the extent of impact is determined according to the 'purpose for which the question is asked'.[89] For example, a foreign fishing vessel may be subject to boarding, inspection or detention if the coastal State has reasonable grounds to suspect such vessel violated its laws or regulations governing the conservation and management of the living resources in the EEZ.[90] Moreover, the foreign ship is subject to the coastal State's jurisdiction of pollution prevention and control, regulation of marine scientific research, and may be affected by the presence and use of offshore infrastructure.[91]

The obligation of all States to comply with duly adopted coastal laws and regulations has been regarded as a duty of conduct, not result, thus there is a due diligence obligation for States to take all necessary measures to ensure compliance by their nationals and ships flying their flags.[92] ITLOS in the Fishery Advisor Opinion read Article 58(3) together with other provisions laying down the general obligation of the flag State to determine that the flag State carries a 'responsibility to ensure . . . compliance by vessels flying its flag with the laws and regulations concerning conservation measures adopted by the coastal State'.[93] ITLOS further declared that the responsibility 'to ensure' may be characterised as an obligation of 'due diligence' such that the flag State must take all necessary measures to ensure compliance, including 'a certain level of vigilance in their enforcement and the exercise of administrative control applicable

[88] M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, paras 127, 129, 131; see also Chapter 4 of this volume.

[89] Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea: the 1977 New York Session' (1978) 72 Am J Int'l L 57, 74.

[90] UNCLOS Articles 60(6), 62(4), 63–67, 73(1); see also Chapter 4 of this volume.

[91] UNCLOS Articles 56(1)(b), 210, 211(5)–(6), 214, 216, 220–221, 248–249; see also Chapter 4 of this volume.

[92] Proelss 'Article 58' (2017) 456–457.

[93] Request for An Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 4, paras 111, 115, 122–127. The provisions that contain these obligations are Articles 62, 91, 92, 94, 192 and 193.

to public and private operators'.[94] It should be highlighted that the obligation of due diligence entails an evolving standard of rules and regulations as they are continually developed by the coastal State and relevant international regulatory bodies.[95]

It is important to remember that the rights and freedoms in the EEZ are not absolute, but are subject to a number of limitations and corresponding duties upon which their legal exercise is preconditioned. These conditions are designed not to limit or restrict the rights or freedoms, but to safeguard their exercise in the interests of the entire international community.[96] Unfortunately, these duties and conditions tend to be forgotten or manipulated.[97] As will be discussed in subsequent chapters, many of the activities taking place in the EEZ are facing competition and challenges from concurrent activities, and it is crucial for all States to diligently fulfil their obligations to ensure the peaceful use of the sea.

3.2.3 *Resolving Conflicts Regarding Residual Rights*

Recognising that the EEZ is a *sui generis* zone in which not all uses of the zone could be clearly attributed to either the coastal State or other States, Article 59 was introduced to provide a formula to resolve conflicts regarding the attribution of residual rights and jurisdiction in the EEZ.[98] Article 59 requires that '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'. This formula is often considered to be the main evidence of the *sui generis* character of the EEZ and the cornerstone of the construction of the EEZ legal regime.[99] It represents the ultimate exposition that UNCLOS does not attribute the residual rights to either the coastal State or the other

[94] Ibid paras 128–140.
[95] Alan Boyle and Catherine Redgwell, *Birnie, Boyle and Redgwell's International Law and the Environment* (4th ed., Oxford University Press 2021) 165–167.
[96] ILC Draft Articles Article 27 Commentary.
[97] David Freestone, 'Modern Principles of High Seas Governance: The Legal Underpinnings' (2009) 39(1) Environmental Policy and Law 44, 45.
[98] Kwiatkowska (1989) 5; Extavour (1979) 266; Alexander Proelss, 'Article 59', in Proelss (2017) 459.
[99] Kwiatkowska (1989) 228; Erik Franckx, 'American and Chinese Views on Navigational Rights of Warships' (2011) 10 Chinese J Int'l L 187, 200–201.

State, but rather each case, as it arises, will have to be decided on its own merits on the basis of the criteria set out in Article 59.[100]

If interpreted strictly, Article 59 may only be applicable in situations where UNCLOS does not attribute rights or jurisdiction, hence referring to uses that cannot be assimilated to any attributed uses of the EEZ.[101] Taken together, Articles 56 and 58 constitute the essence of the regime of the EEZ, and it is clear that most of the conventional uses have been covered.[102] However, there may be new uses of the sea resulting from future scientific and technological developments. More importantly, it could be argued that the formula and criteria contained in Article 59 could be used to resolve conflicts regarding various uses or activities that have not been explicitly included in Part V. Thus, Article 59 may play a role in resolving conflict regarding the conduct of military activities, the use of installations and structures that are not for the purpose of the exercise of coastal State rights, ship wrecks, the recovery of archaeological and historical objects, the designation of traffic separation schemes and other activities to enhance maritime safety, pure marine scientific research and the promotion of maritime security.[103]

In contrast to the due regard obligation that is guided towards the 'rights and duties' of the counter State, Article 59 applies to a conflict that arises between the 'interests' of the coastal State and any other State or States, and the resolution involves taking into account the respective importance of the 'interests' involved to the parties. The negotiation history does not illustrate a particular discussion on why the term 'interests' was chosen. 'Interests' is a more general term that could be used to include any activities or connections with something that affects the State, especially if it may benefit from them in some way that invokes its willingness to protect them. The interests of a State could be grouped into political, security, historical, economic, social and cultural perspectives, and a certain activity may involve multiple perspectives of interests.

Article 59 is the only provision in UNCLOS that directly refers to '"equity" in a normative text for the resolution of conflicts regarding the

[100] Tommy Koh, 'The Exclusive Economic Zone' (1988) 30 Malayan L Rev 1, 32–33; Churchill, Lowe and Sander (2022) 292.
[101] Proelss 'Article 59' (2017) 460.
[102] Nordquist, Nandan and Rosenne (1993) 556.
[103] Brown (1994) 239–240; Kwiatkowska (1989) 228; Churchill, Lowe and Sander (2022) 291–293.

attribution of rights and jurisdiction in the [EEZ]'.[104] However, the meaning of the term 'equity' is not clear.[105] The term has been interpreted by the ICJ as 'a matter of abstract justice'[106] and 'a general principle directly applicable as law'[107] as opposed to the phrase 'equitable principles', which are 'actual rules of law' based on 'a foundation of very general precepts of justice and faith'.[108] Thus 'equity', when used as an independent basis of decision, must be understood in the light of the circumstances peculiar to the case in question in order to fulfil the requirements of justice to a given dispute.[109] The application of 'equity' as a basis to resolve conflicts calls for the consideration of fairness, reasonableness and individualised justice that is specific to that conflict.[110]

In Article 59, the norm of 'equity' is qualified by substantive criteria for finding the most appropriate solution, among which are the assessment of 'all the relevant circumstances' and 'the respective importance of the interests' for the parties involved and for the international community.[111] This assessment should take into consideration the parallel existence of the reciprocal due regard obligation and the general principle of attributing rights and freedoms laid down in Articles 56 and 58.[112] As such, as a precondition, there is no general presumption in favour of either the coastal State or any other State in a specific circumstance. It is reasonable to argue that, since all the resource and economic originated rights are exclusively attributed to the coastal State, the Article 59 formula would tend to favour the coastal State if the rights and jurisdiction in dispute are of economic interests or concern, and would tend to favour the interests

[104] Nordquist, Nandan and Rosenne (1993) 569. A similar phrase 'equitable basis' is used in Articles 69–70 for the right of landlocked and geographically disadvantaged States, and in Article 266 for the promotion of the transfer of marine technology; another phrase 'equitable solution' is used in Articles 74 and 83 for the delimitation of the EEZ/continental shelf between States with opposite or adjacent coasts.

[105] Masahiro Miyoshi, *Considerations of Equity in the Settlement of Territorial and Boundary Disputes* (Martinus Nijhoff 1993) 11–12.

[106] North Sea Continental Shelf Cases (Federal Republic of German v. Netherlands; Federal Republic of Germany v. Denmark), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, para 85.

[107] Continental Shelf (Tunisia v. Libyan Arab Jamahiriya) para 71.

[108] North Sea Continental Shelf para 85.

[109] Miyoshi (1993) 13, 17; Continental Shelf (Tunisia v. Libyan Arab Jamahiriya) para 71.

[110] Francesco Francioni, 'Equity in International Law', in *Max Planck Encyclopedia of International Law* (November 2020); Proelss 'Article 59' (2017) 461.

[111] UNCLOS Article 59; Nordquist, Nandan and Rosenne (1993) 569.

[112] Proelss (2012) 95; Boyle and Redgwell (2021) 133.

of other States or the international community if the issue does not involve the exercise of resource rights.[113]

It is noteworthy that States hold different interpretations of the formula adopted in Article 59. For example, Ecuador declared that 'it has the exclusive right to regulate uses or activities not expressly provided for in the Convention (residual rights and jurisdiction) that relate to its rights within the 200 nautical miles, as well as any future expansion of the said rights'.[114] Both Cabo Verde and Uruguay claimed jurisdiction over 'the uses and activities not provided for expressly' but are related to the sovereign rights and jurisdiction of the coastal State.[115] Some States, notably Belgium, Germany, Italy, the Netherlands, Sweden and the United Kingdom, refute arguments that the coastal State enjoys other residual rights in the EEZ.[116]

Article 59 is a due-regard-type provision that can be considered 'a skillful diplomatic device which tries to reconcile opposing positions by means of an elastic formulation'.[117] It has been described as 'surely the most loosely worded [provision] of the entire Convention' and can only be clarified through subsequent State practice.[118] In circumstances where a conflict arises regarding the attribution of rights or jurisdiction in the EEZ, the parties must attempt to reach a solution based on the criteria provided under Article 59. If this is unsuccessful, then they may resolve such dispute using the dispute settlement procedures provided in Part XV of UNCLOS. Third-party adjudication will be critical to determining the normative content of Article 59 and thus the limits of the rights and duties of any specific State in the EEZ.[119]

3.2.4 Settlement of Disputes

Historically, international disputes have been settled through diplomatic efforts, economic sanctions or by force, and only submitted to third-party

[113] Nordquist, Nandan and Rosenne (1993) 504, 569; Proelss 'Article 59' (2017) 461–463.
[114] UNCLOS, Declarations and Statements, Ecuador, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.
[115] UNCLOS, Declarations and Statements, Cabo Verde and Uruguay.
[116] UNCLOS, Declarations and Statements, Germany, Italy, the Netherlands and the United Kingdom.
[117] Scovazzi (2019) 60; Churchill, Lowe and Sander (2022) 292.
[118] Shearer (2004) 10.
[119] Klein (2005) 140; Nordquist, Nandan and Rosenne (1993) 569; Proelss 'Article 59' (2017) 459; Churchill, Lowe and Sander (2022) 293.

processes with the expressed consent of the State parties involved.[120] UNCLOS is one of the few international conventions that provide mandatory jurisdiction entailing binding decisions for disputes arising from its interpretation and application.[121] This has been hailed 'as one of the most significant developments in dispute settlement in international law'.[122] The achievement has, nonetheless, been somewhat undercut by the embedded exceptions and limitations to the compulsory procedure, in particular with regard to those relating to the EEZ.[123]

At an early stage of the negotiations during the Third Conference, it was recognised that the dispute resolution system would only be acceptable on the condition that certain issues be excluded from the obligation to submit to a compulsory procedure entailing binding decisions.[124] Moreover, the controversy relating to the exercise of the coastal States' sovereign rights in the EEZ was one of the 'hard-core' issues in the negotiation of the dispute settlement procedures.[125] The compromise achieved in UNCLOS is that disputes relating to the coastal State's 'sovereign right or jurisdiction' in the EEZ are *ipso facto* excluded from the compulsory dispute settlement procedures and disputes relating to the freedoms of navigation, overflight and the laying of submarine cables and pipelines are subject to compulsory procedures.[126] Such a formula essentially reflects the delicate balance between the rights and freedoms of the coastal State and other States in the EEZ.

The choice of forum follows the general provisions whereby the dispute will be submitted to the same procedure chosen by both parties, otherwise to arbitration in accordance with Annex VII, unless otherwise agreed.[127] The introduction of arbitral tribunals as the default

[120] Charter of the United Nations Article 33(1); Klein (2005) 2.
[121] UNCLOS Articles 279–280, 286.
[122] Klein (2005) 2; Alan E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 Int'l & Com LQ 37, 37; Louis B. Sohn, 'Settlement of Law of the Sea Disputes' (1995) 10(2) Int'l J Marine & Coastal L 205, 205–206.
[123] Klein (2005) 3; Shigeru Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 Int'l & Comp LQ 863, 863.
[124] Nordquist, Rosenne and Sohn (1989) 87–88; Andrew Serdy, 'Article 297', in Proelss (2017) 1911.
[125] Nordquist, Rosenne and Sohn (1989) 91–103; Chagos MPA Arbitration para 309.
[126] UNCLOS Articles 297, 298(1)(b); Günther Jaenicke, 'Dispute Settlement under the Convention on the Law of the Sea' (1983) 43 Heidelberg J Int'l L 813, 817; Klein (2005) 140–141; Churchill, Lowe and Sander (2022) 866; Serdy 'Article 297' (2017) 1908–1909.
[127] UNCLOS Article 287(3)–(5).

compulsory procedure, where the composition of the tribunal is determined in consultation with the parties, presumably gives parties more confidence in using the compulsory third-party dispute settlement.[128] Such flexibility as to the choices of fora and the priority of consent of the parties mirrors States' general position toward dispute settlement, and serves to narrow down the scope of compulsory procedures.[129]

The core to the comprised formula is articulated in Article 297. It first acknowledges that three types of disputes concerning the interpretation or application of the EEZ regime with regard to the exercise of a coastal State's rights and jurisdiction are subject to compulsory procedures. Not only may the coastal State confront other States' wrongful use of the preserved freedoms, but Article 297 also enables other States to challenge the actions of the coastal State if they have unduly affected the exercise of preserved freedoms in the EEZ.[130] In addition, the coastal State's actions to implement and enforce specified international rules and standards for the protection and preservation of the marine environment may also be challenged.[131]

Article 297 further states that disputes concerning the interpretation and application of relevant provisions relating to marine scientific research and fisheries shall be subject to the compulsory procedures except in certain cases. In the case of marine scientific research, the exercise by the coastal State of a right or discretion to grant or withhold consent, or a decision by the coastal State to order suspension or cessation of a research project in its EEZ, is exempted.[132] In the case of fisheries, disputes relating to the coastal State's sovereign rights with respect to the living resources in the EEZ or their exercise' are exempted.[133] Only in limited cases, where there is alleged manifest non-compliance with UNCLOS or abuse of a right by the coastal State, and the parties cannot reach a settlement, may the dispute be submitted to conciliation.[134] The scope of the exemption for fisheries has been interpreted to be narrow and closely linked with the utilisation and management of the living resources rather than excluding all disputes concerning living resources.[135]

[128] Kwiatkowska (1989) 224; UNCLOS Annex VII, Article 3; Annex VIII, Article 3.
[129] Oda (1995) 863.
[130] UNCLOS Article 297(1)(a)–(b); M/V Saiga (No. 2) para 30.
[131] UNCLOS Articles 56(1)(b)(iii), 192, 211(5)–(6), 220(3), (5)–(6), 297(1)(c).
[132] UNCLOS Articles 246, 253, 297(2)(a)(i)–(ii).
[133] UNCLOS Article 297(3)(a).
[134] UNCLOS Article 297(2)(b), (3)(b).
[135] Serdy 'Article 297' (2017) 1918; Chagos MPA Arbitration, Dissenting and Concurring Opinion, Judge James Kateka and Judge Rüdiger Wolfrum, paras 58–60.

It is important to recognise that the enumerated types of cases in Article 297 do not restrict a court or tribunal from considering disputes concerning the coastal State's exercise of sovereign rights and jurisdiction in other cases. Where a dispute concerns 'the interpretation or application' of relevant provisions of UNCLOS, and 'provided that none of the express exceptions to jurisdiction set out in Article 297(2) and 297(3) are applicable, jurisdiction for the compulsory settlement of the dispute flows from Article 288(1)'.[136] Although it is recognised that certain sovereign rights and exclusive jurisdiction of the coastal States in the EEZ are not to be questioned by a third party, the manner of their exercise 'should be [justiciable] before an appropriate forum' to avoid unreasonable interference with the *jus communicationis* of other States.[137]

Additionally, Article 298 gives all States the right to make optional exceptions to the compulsory dispute settlement procedure by unilateral declaration.[138] In relation to the exercise of rights and duties in the EEZ, States may declare that they do not accept compulsory jurisdiction regarding disputes concerning military activities, disputes concerning coastal State's law enforcement activities over living resources and marine scientific research, and disputes in respect of which the United Nations Security Council is exercising its assigned functions.[139] Consequently, the coastal State further secures sole discretion over a number of important uses of the EEZ. With an effective declaration under Article 298, the coastal State may argue that disputes of whether military activities or security matters fall under attributed rights or residual rights (and in the latter case, how to attribute such rights) are exempted from the compulsory third-party settlement procedures. It is likely that such an argument would be successful. However, a complication may arise when the exception relates to law enforcement powers of the coastal State, as this may clash with the freedom of navigation of other States.[140] The coastal State is given explicit enforcement jurisdiction over living resources in the EEZ and is entitled to board, inspect, arrest and institute judicial proceedings against a suspected foreign

[136] Chagos MPA Arbitration para 317.
[137] Nordquist, Rosenne and Sohn (1989) 91–92; Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (Cambridge University Press 1989) 123–124.
[138] UNCLOS Article 298(1).
[139] UNCLOS Article 298(1)(b)–(c).
[140] Klein (2005) 310–311.

vessel.[141] The exercise of such powers has a direct impact on the freedom of navigation and disputes relating to the interference of freedom of navigation are explicitly included under Article 297. UNCLOS does not provide a direct solution on how to harmonise conflicts between Articles 297 and 298, but it would seem there is support for the view that navigation disputes are included under the compulsory procedures, since the exceptions to law enforcement activities are only optional and should be interpreted narrowly.[142]

In order to limit the impact of coastal States' enforcement jurisdiction over foreign vessels in the EEZ, coastal States are obligated to promptly release arrested vessels and their crews for violations of laws and regulations with regard to fishery or environmental protection upon the posting of reasonable bond or other security.[143] If the detaining State fails to comply with prompt release procedures, the flag State may submit such a dispute to any mutually agreed court or tribunal, or to ITLOS, unless otherwise agreed.[144] The court or tribunal will 'deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew'.[145] Although prompt release is an independent procedure, the issue of detention is 'inevitably linked with the content of the rules and regulations of the coastal State concerning the fisheries in its [EEZ], and the way in which these rules are enforced'.[146] This requires that the court or tribunal must exercise 'restraint' in examining these interlinked merits to the extent that is necessary for it to reach a decision on the question of release.[147]

The elaborate system for the settlement of disputes is at the heart of the UNCLOS package deal to provide some assurance that the delicate equilibrium of rights and duties established in the Convention will be respected in practice.[148] Within the *sui generis* EEZ system, where there

[141] UNCLOS Article 73(1).
[142] Klein (2005) 310–311; Serdy 'Article 297' (2017) 1917–1918; Andrew Serdy, 'Article 298', in Proelss (2017) 1930.
[143] UNCLOS Articles 73(2), 226(1)(b); Tullio Treves, 'Article 292', in Proelss (2017) 1882; see also Chapter 4 in this volume.
[144] UNCLOS Article 292(1).
[145] UNCLOS Article 292(3).
[146] Oda (1995) 866.
[147] Treves 'Article 292' (2017) 1891–1892; M/V 'Saiga' Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release, Judgment of 4 December 1997, ITLOS Reports 1997, p. 16, para 50.
[148] Churchill, Lowe and Sander (2022) 851.

is no explicit order of priorities between the rights of the coastal State and those of other States, a compulsory dispute settlement scheme entailing binding decisions is 'an important procedural guarantee for maintaining a proper balance'.[149] The dispute settlement procedures as applicable to the EEZ essentially reflect the compromise of power achieved in the substantive provisions of Part V. On the one hand, issues that touch on the interests of all States, namely navigational freedoms and marine environmental protection, are subject to compulsory procedures entailing binding decisions. On the other hand, the establishment of the EEZ regime itself 'signals a prevalent trend in favour of coastal State authority over the traditional *mare liberum* system', which resulted in the exclusion of a range of coastal State discretions from the compulsory third-party processes.[150]

3.3 The Status of the Exclusive Economic Zone

The comprehensive legal framework established by UNCLOS, comprising 320 articles and nine annexes, known as 'a Constitution for the Oceans', is the result of the codification and progressive development of the international law of the sea.[151] In order to maintain the integrity of UNCLOS, States must exercise their rights and perform their duties in good faith and cannot make any reservations or exceptions except those expressly permitted.[152] As of July 2024, there are 170 parties to UNCLOS, of which many States have made declarations or statements upon signing, ratifying or acceding, but none of them could validly 'exclude or modify the legal effect of the provisions of this Convention in their application to that State'.[153] The concept of the EEZ is one of the most important pillars of UNCLOS, and the legal regime created for the EEZ is perhaps the most complex and multifaceted in the whole Convention.[154]

[149] Klein (2005) 139; Kwiatkowska (1989) 223.
[150] Kwiatkowska (1989) 146; Klein (2005) 225; Natalie Klein, 'Legal Implications of Australia's Maritime Identification System' (2006) 55 Int'l & Com LQ 362.
[151] Koh (1985) 14–15.
[152] Vienna Convention on the Law of Treaties (23 May 1969, in force 27 January 1980) 1155 UNTS 331, Article 26; UNCLOS Articles 300, 309; Crawford (2019) 363.
[153] UNCLOS Article 310; United Nations Treaty Collection, United Nations Convention on the Law of the Sea, Status as at 25 July 2024, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.
[154] Nordquist, Nandan and Rosenne (1993) 508; Crawford (2019) 259.

There is a wide and growing area of overlap between customary law and UNCLOS, in particular with regard to the EEZ regime.[155] As defined in Article 38 of the Statute of the ICJ, international custom refers to the 'evidence of a general practice accepted as law'.[156] The existence of custom is determined by three elements: widely adopted practice among States, general acceptance of the legal binding force of the practice (*opinio iuris sive necessitatis*) and consistency of such practice over a considerable period of time.[157] The issue of whether the *sui generis* EEZ has found acceptance in customary international law is also decided by these three elements. The material sources of custom are manifold and include diplomatic correspondence, official statements, executive decisions and orders, domestic legislation, treaties and other international agreements, and national and international judicial decisions and awards.[158]

The customary law status of the EEZ has been discussed and stated by numerous judges, counsels and scholars.[159] As early as in the 1982 *Tunisia v. Libya* case, the ICJ declared that the concept of the EEZ 'may be regarded as part of modern international law'.[160] In the 1984 *Gulf of Maine Area* case, the Chamber stated that the dispute was 'a delimitation between the different forms of partial jurisdiction, i.e., the "sovereign rights" which, under current international law, both treaty-law and general law, coastal States are recognized to have in the marine and submarine areas lying outside the outer limit of their respective territorial seas, up to defined limits'.[161] Furthermore, in the 1985 *Libya v. Malta* case, the ICJ asserted firmly that '[i]t is in the Court's view incontestable that ... the institution of the [EEZ], with its rule on

[155] Tullio Treves, 'UNCLOS at Thirty: Open Challenges' (2013) 27 Ocean YB 49, 51; Attard (1987) 287.

[156] Statute of the International Court of Justice (in force 24 October 1945) Article 38(1)(b), www.icj-cij.org/statute.

[157] Crawford (2019) 21–25.

[158] Ibid 23; Attard (1987) 278.

[159] Barbara Kwiatkowska, *Decisions of the World Court Relevant to the UN Convention on the Law of the Sea: A Reference Guide* (Kluwer Law International 2002) 42–43; Charles Quince, *The Exclusive Economic Zone* (Vernon Press 2019) 199–217; Shani Friedman, 'The Concept of Entitlement to an Exclusive Economic Zone as Reflected in International Judicial Decisions' (2020) 53(1) Israel Law Review 101, 104–108.

[160] Continental Shelf (Tunisia v. Libyan Arab Jamahiriya) para 100.

[161] Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment of 12 October 1984, ICJ Reports 1984, p. 246, para 19.

entitlement by reason of distance, is shown by the practice of States to have become a part of customary law'.[162] After the entering into force of UNCLOS in 1994, the domestic implementation of the Convention became the reference points of the EEZ.[163] For example, the ICJ in *Nicaragua v. Honduras* acknowledged that both parties had established their maritime zones through legislation.[164] Similarly, the arbitral tribunal in *Barbados v. Trinidad and Tobago* recognised that both parties had claimed an EEZ through domestic legislation.[165] Most recently, in *Nicaragua v. Colombia*, the ICJ declared that '[c]ustomary rules on the rights and duties in the [EEZ] of coastal States and other States are reflected in several articles of UNCLOS, including Articles 56, 58, 61, 62 and 73'.[166]

The entry into force of UNCLOS and the subsequent enactment of national legislation on the EEZ by a large number of States have provided further evidence of a general practice accepted as customary law, at least in its essentials.[167] As of 2024, 140 States have claimed an EEZ (see Table 3.1), with more than 100 of them claimed for the full distance of 200 NM.[168] Most States established the EEZ regime verbatim as set out in Part V of UNCLOS, which balances the sovereign rights and jurisdic-

[162] Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, ICJ Reports 1985, p. 13, para 34.

[163] Friedman (2020) 116–119.

[164] Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports 2007, p. 659, paras 50–51.

[165] Barbados v. Trinidad and Tobago paras 47, 49.

[166] Nicaragua v. Colombia (2022) paras 57, 61.

[167] Attard (1987) 308; Brown (1994) 245; Kwiatkowska (1989) 27–28; David Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (8th ed., Sweet & Maxwell 2015) 391–392; 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, 704; 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) 96; Churchill, Lowe and Sander (2022) 256; Proelss 'Article 55' (2017) 410.

[168] There are currently 193 Member States (two observer States) of the United Nations, of which 43 are landlocked States. Member States of the United Nations, www.un.org/en/about-us/member-states. List of Landlocked Developing Countries, https://unctad.org/topic/landlocked-developing-countries/list-of-LLDCs; United States Central Intelligence Agency, 'The World Factbook: Countries', www.cia.gov/the-world-factbook/countries/.

Table 3.1 *Table of claims to the EEZ*[a]

State	Breadth (NM)	State	Breadth (NM)	State	Breadth (NM)
Albania	DLM	Algeria	COORD	Angola	200
Antigua and Barbuda	200	Argentina	200	Australia	200
Bahamas	200	Bahrain	DLM[a1]	Bangladesh	200
Barbados	200	Belgium	COORD	Belize	200
Benin	200	Brazil	200	Brunei Darussalam	200
Bulgaria	200	Cabo Verde	200	Cambodia[c]	200
Cameroon	DLM[a2]	Canada	200	Chile	200
China, People Republic of	200	Colombia[c]	200	Comoros	200
Congo	200	Cook Islands[b]	200	Costa Rica	200
Côte d'Ivoire	200	Croatia	DLM	Cuba	200
Cyprus	200	Democratic People's Republic of Korea[c]	200	Democratic Republic of the Congo	200
Denmark	200	Djibouti	200	Dominica	200
Dominican Republic	200	Ecuador	200	Egypt	DLM
El Salvador[c]	200	Equatorial Guinea	200	Eritrea[c]	DLM[a3]
Estonia	COORD	Fiji	200	Finland	DLM
France	200	Gabon	200	Gambia, Republic of the	200, DLM
Georgia	DLM	Germany	COORD, DLM	Ghana	200
Greece	COORD, DLM	Grenada	200	Guatemala	200
Guinea	200	Guinea-Bissau	200	Guyana	200
Haiti	200	Honduras	200	Iceland	200

Table 3.1 (*cont.*)

State	Breadth (NM)	State	Breadth (NM)	State	Breadth (NM)
India	200	Indonesia	200	Iran, Islamic Republic of[c]	DLM
Iraq	DLM	Ireland	200	Israel[c]	DLM
Italy	DLM	Jamaica	200	Japan	200
Jordan	DLM	Kenya	200	Kiribati	200
Kuwait	DLM	Latvia	DLM	Lebanon	COORD
Liberia	200	Libyan Arab Jamahiriya[c]	200	Lithuania	COORD
Madagascar	200	Malaysia	200	Maldives	200
Malta	DLM	Marshall Islands	200	Mauritania	200
Mauritius	200	Mexico	200	Micronesia, Federated States of	200
Monaco	DLM	Montenegro	COORD	Morocco	200
Mozambique	200	Myanmar	200	Namibia	200
Nauru	200	Netherlands, Kingdom of the	COORD	New Zealand	200
Nicaragua	200	Nigeria	200, DLM[a2]	Niue[b]	200
Norway	200	Oman	200	Pakistan	200
Palau	200	Panama	200	Papua New Guinea	200
Peru[c]	200[d]	Philippines	200	Poland	DLM
Portugal	200	Qatar	DLM[a1]	Republic of Korea	200
Romania	200	Russian Federation	200	Saint Kitts and Nevis	200

Saint Lucia	200	Saint Vincent and the Grenadines	200	Samoa	200
São Tomé and Príncipe	200	Saudi Arabia	DLM	Senegal	200
Seychelles	200	Sierra Leone	200	Singapore	DLM
Slovenia	DLM	Solomon Islands	200	Somalia	200
South Africa	200	Spain	200	Sri Lanka	200
Sudan	DLM	Suriname	200	Sweden	DLM
Syrian Arab Republic[c]	200	Tanzania, United Republic of	200	Thailand	200
Timor-Leste	200	Togo	200	Tonga	200
Trinidad and Tobago	200	Tunisia	DLM	Türkiye, Republic of[c]	200
Tuvalu	200	Ukraine	200	United Arab Emirates[c]	200
United Kingdom of Great Britain and Northern Ireland	200	United States of America[c]	200	Uruguay	200
Vanuatu	200	Venezuela, Bolivarian Republic of[c]	200	Viet Nam	200
Yemen	200, DLM[a3]				

[a] This reference table also includes claims made by States to only certain elements of the EEZ that are indicated in the respective footnotes. Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd ed., Manchester University Press 1999), Appendix 1: Claims to Maritime Zones, 463–472; Brown (1994) 246–247; UN DOALOS, *The Law of the Sea: National Legislation on the Exclusive Economic Zone*; UN DOALOS, Table of Claims to Maritime Jurisdiction (as at 15 July 2011, currently under review); UN DOALOS, *Maritime Space: Maritime Zones and Maritime Delimitation*; Barbara Kwiatkowska, '200-Mile Exclusive Economic/Fishery Zone and the Continental Shelf – An Inventory of Recent State Practice: Part 1' (1994) 9 Int'l J Marine & Coastal L 199; Barbara Kwiatkowska,

'200-Mile Exclusive Economic/Fishery Zone and the Continental Shelf – An Inventory of Recent State Practice: Part 2' (1994) 9 Int'l J Marine & Coastal L 337; Barbara Kwiatkowska, '200-Mile Exclusive Economic/Fishery Zone and the Continental Shelf – An Inventory of Recent State Practice: Part 3' (1995) 10 Int'l J Marine & Coastal L 53; Robert W. Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (Martinus Nijhoff 1986) 29–40; United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Limits in the Seas, No. 36 National Claims to Maritime Jurisdictions (8th Revision, 2000), www.state.gov/wp-content/uploads/2020/01/LIS-36.pdf; Roach (2021) 160.

Legend: COORD: defined by coordinates; DLM: delimitation

[a1] *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, ICJ Reports 2001, p. 40

[a2] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p. 303.

[a3] *Sovereignty and Maritime Delimitation in the Red Sea (Eritrea v. Yemen),* Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation of 17 December 1999, PCA Case No. 1996-04.

[b] Not a party of the United Nations as at 2024.

[c] Not a party to UNCLOS as at 2024.

[d] *Maritime Dispute (Peru v. Chile)*, Judgment, ICJ Reports 2014, p. 3.

tion of the coastal State with preserved freedoms by all other States.[169] In addition, there are approximately twenty States and territories, including some of which have claimed an EEZ, an exclusive fisheries zone or an ecological protection zone with only some of the rights accorded to coastal States in the EEZ under UNCLOS.[170]

The EEZ has come a long way since the United States made revolutionary claims through the Truman Proclamations to the natural resources in the marine areas beyond and adjacent to the narrow limit of the territorial sea.[171] Nearly eight decades of State practice, particularly through national legislation and international juridical decisions, and the codification and development of UNCLOS have safely proven that the EEZ, as a *sui generis* functional zone, forms part of international customary law.[172]

3.4 Conclusion

With the establishment of the EEZ, it is anticipated that the preserved freedoms applicable in the *sui generis* regime, as compared to those exercised on the high seas, are circumscribed to varying extents to allow for the exercise of the coastal State's sovereign rights and specific jurisdiction. The EEZ has become a specific model to address, and it may be hoped to resolve, the classic *mare liberum/mare clausum* controversy, where rights and duties of different users co-exist in a dynamic balance and no rights or freedoms can be exercised in an absolute manner. For current or foreseen uses of the EEZ, UNCLOS attempts to prescribe limits that allow accommodation with other uses by other States. In the case of uses that are not explicitly included, provisions of Part V provide a set of general criteria and procedures for resolving conflicts that might occur.

[169] Churchill (2005) 127; United Nations Division for Ocean Affairs and the Law of the Sea (UN DOALOS), *The Law of the Sea: National Legislation on the Exclusive Economic Zone* (United Nations 1993); UN DOALOS, *Maritime Space: Maritime Zones and Maritime Delimitation*, www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionslist.htm; Churchill, Lowe and Sander (2022) 293–295.

[170] Roach (2021) 161; Churchill, Lowe and Sander (2022) 295–297.

[171] 'Official Documents – United States: Proclamation by the President with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf', 'Proclamation by the President with Respect to Coastal Fisheries in Certain Areas of the High Seas' (1946) 40 Am J Int'l L Sup 45–47.

[172] Shaw (2017) 434; Crawford (2019) 262; UNCLOS, Declarations and Statements, Slovenia.

The body of flexible prescriptions to maintain such a delicate balance can be summarised as follows. As a general rule of attributing rights and freedoms, all economic-related activities and interests are reserved exclusively to the coastal State while essential communicational freedoms are preserved to all States. By way of a mechanism for preventing and resolving potential conflicts between the different categories of co-existing rights, all States are required to exercise their rights and perform their duties in good faith, and to have due regard to the rights and duties of another party or parties. Moreover, as a safeguard, the integrity of the balanced legal system is protected by compulsory third-party dispute resolution which recognises the special interests of both the coastal State and other States. If applied in good faith, these prescriptions should provide acceptable solutions that will accommodate the conflicting interests of coastal and other States.[173]

In addition to the treaty law provisions, the concept of the EEZ has been widely accepted and recognised as part of customary law that is binding on all States. However, the interpretation and implementation of detailed aspects of the *sui generis* regime have shown significant diversity in State practice. Both coastal States and other States have on occasion stretched this special legal regime to accommodate their own needs. State practice has shown examples of States making excessive claims on their rights or freedoms within the EEZ and/or exercising their rights and duties without paying due regard to the other party. It is important for States to find a certain flexibility to accommodate different interests in a given context, which will in turn further develop the EEZ legal regime. The following chapters will examine how the body of flexible prescriptions have worked in practice in specific circumstances.

[173] Robertson (1983–1984) 888.

Figure 3.1 Map showing 200 NM maritime zones and associated boundaries.
Source: Dr Robin Cleverly, Marbdy Consulting Ltd