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Introduction

The doctrine of the 'freedom of the seas' came to be accepted as a general principle of maritime law in the eighteenth century when the coastal State was recognised as having sovereignty, or at least exclusive authority, over a limited band of territorial waters (although there was no consensus on its precise breadth).[1] Since then, the history of the law of the sea has been dominated by the competition between two opposing yet complementary principles, *mare liberum* and *mare clausum*.[2] While coastal States seek to expand their rights and jurisdiction beyond the limit of territorial waters by establishing various jurisdictional zones, other States, notably States concerned with maritime transit, trade and distant-water fisheries, vie for the maximum of high seas freedoms within these zones. This competition is predominantly illustrated in the exclusive economic zone (EEZ) as established in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[3]

The EEZ is a multifunctional maritime zone where rights and duties of the coastal State and other States co-exist.[4] The EEZ, when claimed, may extend up to 200 nautical miles (NM) from the baseline and overlap to

[1] James B. Morell, *The Law of the Sea: An Historical Analysis of the 1982 Treaty and Its Rejection by the United States* (McFarland 1992) 2; Thomas Baty, 'The Three-Mile Limit' (1928) 22 Am J Int'l L 503, 503; James R. Crawford, *Brownlie's Principles of Public International Law* (9th ed., Oxford University Press 2019) 242, 281.

[2] Daniel P. O'Connell, *The International Law of the Sea*, Vol. I (Oxford University Press 1982) 1; 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, 328.

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

[4] Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007) 62–69; Alexander Proelss, 'The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited' (2012) 26 Ocean YB 87, 89.

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some degree with the contiguous zone and the continental shelf.[5] The importance of the EEZ both as a component of the modern law of the sea and in political and material terms should be acknowledged. It has been estimated that the claims of the EEZ worldwide cover the ocean surface that is mostly used for navigation and the extraction of natural resources.[6] The seabed and the water column of the EEZ will continue to provide the major focus of human activities both in the short and long terms.

The legal status of the EEZ was one of the most complex issues negotiated at the Third United Nations Conference on the Law of the Sea (Third Conference), and the provisions adopted thereafter fully reflect this tension.[7] The codification of the EEZ was achieved in a broader context of the balance that was reached by the Third Conference on UNCLOS.[8] It is one of the components in the overall package deal that included the establishment of a 12 NM maximum breadth for the territorial sea, the creation of passage rights through straits used for international navigation and archipelagic waters, the recognition of rights over the extended continental shelf, guaranteed access to and from the sea for landlocked States, the establishment of the Area and a compulsory dispute settlement mechanism.

The EEZ was adopted as a *sui generis* legal regime where 'the rights and jurisdiction of the coastal State and the rights and freedoms of other States' are provided by the relevant provisions of UNCLOS.[9] In general, the provisions relating to the EEZ reflect a heavily negotiated package of delicately balanced compromises, with substantive rules protecting the respective rights and freedoms of different States, general obligations of exercising their respective rights and freedoms, and procedural and

[5] UNCLOS, Articles 33(2), 57, 76; Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th ed., Manchester University Press 2022) 253.

[6] IILSS-International Institute for Law of the Sea Studies, Exclusive Economic Zone (EEZ) Map of the World, 23 May 2021, https://iilss.net/exclusive-economic-zoneeez-map-of-the-world/; Michele Metych, 'Exclusive Economic Zone', in Encyclopaedia Britannica, last updated 13 July 2023, www.britannica.com/topic/exclusive-economic-zone; Churchill, Lowe and Sander (2022) 294–295.

[7] 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) 508–509; Tommy Koh, *Building a New Legal Order for the Oceans* (NUS Press 2020) 32.

[8] See Tommy T. B. Koh and Shanmugam Jayakumar, 'The Negotiating Process of the Third United Nations Conference on the Law of the Sea', in Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. I (Martinus Nijhoff 1985) 29–134.

[9] UNCLOS, Articles 55–56, 58.

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substantive rules to prevent and settle disputes.[10] The EEZ regime is maintained by two legal doctrines: 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. The legal framework is, however, incomplete or left open, not only to be worked out in more detailed agreements, but also to be governed by general rules and principles of international law. In this way, the EEZ regime will continue to evolve to meet new challenges and changed circumstances.

As provided in Article 56 of UNCLOS, the coastal State has 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources' and 'with regard to other activities for the economic exploitation and exploration of the zone'. Moreover, the coastal State has specific jurisdiction 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' as provided for in the relevant provisions of UNCLOS. Article 58 states that all States, including the coastal State, 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 sum, the general principle of allocating uses in the EEZ is to reserve those that may affect economic interests to the coastal States, while minimising the erosion of the communicational freedoms enjoyed by all States, and to preserve these freedoms to all States insofar as they are compatible with this specific legal regime. The rights of coastal States co-exist with those of other States.

The general principle of exercising these co-existing rights is the mutual obligation of due regard as explicitly required in both Articles 56(2) and 58(3), whereby no State may exercise their rights or freedoms in an absolute manner.[11] Both the coastal State and other States undertake the mutual obligation of having due regard to the rights and duties

[10] Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff 1989) xx; Mohamed Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (Martinus Nijhoff 1987) 22; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005) 133.

[11] 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.

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of the other party when exercising their rights and performing their duties within the EEZ, together with the general duty to fulfil their obligations in good faith and not to abuse their rights, jurisdiction and freedoms.[12]

Article 59 has been considered as a statement that UNCLOS has not fully attributed all rights and jurisdiction in the EEZ.[13] If a conflict arises between a coastal State and another State regarding the attribution of such a right or jurisdiction in the EEZ, it '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'.[14] This provision serves as a guide for resolving conflicts between the relevant States before the judicial settlement of a dispute. The basis of equity may also be adopted by a dispute settlement body to resolve the dispute *ex aequo et bono* if the parties agree.[15] This vague formula of 'relevant circumstances' echoes the general principle of allocating different uses in the EEZ. Moreover, the general principles for attributing and exercising co-existing rights and freedoms in the EEZ apply to all residual rights and jurisdiction. Combined, they create a dynamic system to assess and achieve a flexible balance of power between different user States in the EEZ, with each case to be decided on its own merits.

As a general principle of international law, State parties are obligated to settle disputes regarding the uses of the EEZ by peaceful means.[16] If the States parties cannot reach a settlement through the means of their choice, any party to the dispute may submit such dispute to the compulsory procedures entailing binding decisions established by Part XV of UNCLOS.[17] The application of the compulsory procedures to disputes relating to the EEZ is subject to specified limitations and exceptions that reflect the specific interests of the coastal State and other States.[18]

This delicate balance in the EEZ is not uncontroversial. The activities in the EEZ involve different, overlapping and often conflicting interests relating to the increasingly intensive use of the ocean and its resources by

[12] UNCLOS, Articles 56(2), 58(3), 300.
[13] Nordquist, Nandan and Rosenne (1993) 569; Churchill, Lowe and Sander (2022) 291–292.
[14] UNCLOS, Article 59.
[15] UNCLOS, Article 293(2).
[16] Charter of the United Nations (26 June 1945, in force 24 October 1945) 1 UNTS XVI, Article 2(3); UNCLOS, Article 279.
[17] UNCLOS, Articles 280–281, 286.
[18] UNCLOS, Articles 297, 298.

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different States.[19] It is the intention here to analyse the general juridical nature of the EEZ and its residual status, and to determine if the EEZ legal regime established in UNCLOS is sufficiently flexible to allow the international community to respond to the new challenges created in subsequent State practice. The allocation of rights and duties between the coastal State and other States are analysed, and the manner in which a balance is struck between different interests in the light of State practice in the last four decades since the conclusion of UNCLOS is explored. The creation of the EEZ reflects the general agreement of States to sacrifice, at least to a certain degree, their long-established high seas freedoms in order to obtain exclusive economic rights in the extensive areas adjacent to their coasts. As a consequence, the freedoms of the high seas, as preserved in Article 58, cannot be viewed as an extension or a continuation of such freedoms within the EEZ. The preserved freedoms in the EEZ are subject to significant restrictions in an effort to accommodate the rights and jurisdiction of the coastal State. With this understanding in mind, States are developing a *sui generis* system for the attribution and exercise of rights and freedoms in the EEZ, in order to strike a dynamic balance between the two competing needs.

The analysis here is centred on the interpretation of the substantive provisions relating to the EEZ in UNCLOS. In doing so, the principles of treaty interpretation as recognised by international law are applied, with a particular focus on selected State practices that not only drove the development of the EEZ prior to the conclusion of UNCLOS but also influenced its interpretation and application over the past four decades.[20] Without going into details on the rules of treaty interpretation, which has a rich pool of literature, the general principles that have been used in this analysis are outlined below.[21]

[19] 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, 326–327.

[20] It should be made clear that the object of this book is not to provide an exhaustive account of State practice, nor indeed to present a prospectus on the current state of the implementation of the EEZ. Rather it selects those distinctive examples that contribute to the doctrinal construction of rules of the EEZ and represent the character of underlying discourses that structure the legal interventions.

[21] See Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008); Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years* (Martinus Nijhoff 2011); Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2013) 205–226; Sean D. Murphy, 'The Relevance

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Treaty interpretation is a delicate matter. In order to understand the meaning of treaty provisions on the EEZ, one needs to be aware that there are fundamental rules of treaty interpretation. The key rules are set out in Articles 31 and 32 of the Vienna Convention.[22] Article 31(1) states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Paragraph 2 makes it clear that the 'context' of a treaty includes the whole of the text and its preamble and annexes, as well as any agreement or instrument concerning the treaty which was made, or agreed to, by all the parties. Article 31(3) further provides that account shall also be taken, together with the context, of any subsequent agreement, subsequent practice and other rules of international law that are relevant to the parties. In addition to the ordinary meaning of the treaty provisions, according to Article 31(4), '[a] special meaning shall be given to a term if it is established that the parties so intended'. When the interpretation of treaty provisions, after applying the rules of Article 31, results in an undesirable result such as ambiguity or unreasonableness, other resources may be used to assist the interpretation. Article 32 provides that 'the preparatory work of the treaty and the circumstances of its conclusion' may be used to confirm or determine the meaning of the treaty provisions. It is also clear from Articles 31 and 32 that recourse to the preparatory work and the circumstances of the conclusion of the treaty is a supplementary means of interpretation only.

The negotiation of UNCLOS represented an effort in both codifying pre-existing customary law and progressively developing international law. With respect to the progressive development of international law, the consensus process that formed the basis of the treaty negotiation led to

of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties', in Georg Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press 2013) 82–94; Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014); Richard Gardiner, *Treaty Interpretation* (2nd ed., Oxford University Press 2015); Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge University Press 2015); Chang-Fa Lo, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties: A New Round of Codification* (Springer 2017); Malcolm N. Shaw, *International Law* (8th ed., Cambridge University Press 2017) 706–711; Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation', in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (2nd ed., Oxford University Press 2020) 459–488; Eirik Bjorge and Robert Kolb, 'The Interpretation of Treaties over Time', in Hollis (2020) 489–503.

[22] Vienna Convention on the Law of Treaties (23 May 1969, in force 27 January 1980) 1155 UNTS 331.

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a situation where State practice and the formation of *opinio juris* went hand-in-hand in such a way that many of the rules of the EEZ were reflected in customary law by the time of the adoption of UNCLOS.[23] State practice, both unilateral and regional initiatives, relating to the claims over a jurisdictional zone beyond the territorial sea played a defining role in the development of the EEZ prior to the conclusion of UNCLOS in 1982.[24] Subsequent State practice since the adoption of UNCLOS, recognised as the authentic means of treaty interpretation, contributes to the formation of agreement among State parties regarding the interpretation of the provisions of the EEZ.[25] The State practice broadly speaking includes unilateral domestic implementation of the EEZ, implementation of rules involving another State, as well as multilateral decision-making and lawmaking processes that relate to the use of the EEZ.[26]

With such thoughts in mind, it is convenient to set out the structure of this book and the topics discussed. Besides the Introduction and Conclusion, this book is divided into three parts comprising seven chapters.

Part I, 'The Development and Status of the Exclusive Economic Zone', reviews the historical development and codification of the EEZ. Chapter 2 reflects on the origins and evolution of the notion of a functional maritime zone in favour of the coastal State for economic

[23] Statute of the International Court of Justice (26 June 1945, in force 24 October 1945) 1 UNTS 21, Article 38(1)(b); Vaughan Lowe, *International Law* (Oxford University Press 2007) 83–86; James Harrison, *Making the Law of the Sea* (Cambridge University Press 2011) 51–59; Shaw (2017) 412; Malcolm D. Evans, 'The Law of the Sea', in Malcolm D. Evans (ed.), *International Law* (5th ed., Oxford University Press 2018) 637–638; Churchill, Lowe and Sander (2022) 35–36.

[24] See L. D. M. Nelson, 'The Patrimonial Sea' (1973) 22 Int'l & Comp LQ 668; F. V. Garcia-Amador, 'The Latin American Contribution to the Development of the Law of the Sea' (1974) 68 Am J Int'l L 33; Lewis M. Alexander and Robert D. Hodgson, 'The Impact of the 200-Mile Economic Zone on the Law of the Sea' (1974–1975) 12(3) San Diego L Rev 569; Duke E. Pollard, 'The Exclusive Economic Zone: The Elusive Consensus' (1974–1975) 12(3) San Diego L Rev 600; Robert B. Krueger and Myron H. Nordquist, 'The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin' (1978–1979) 19(2) Va J Int'l L 321; Lewis M. Alexander, 'The Ocean Enclosure Movement: Inventory and Prospect' (1983) 20(3) San Diego L Rev 561.

[25] Vienna Convention on the Law of Treaties, Article 31(3)(b); International Law Commission (ILC), 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, 2018' (2018) 2(2) YB ILC Conclusions 2, 3.

[26] 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* (Brill 2005) 93–95; Lowe (2007) 42–46; Harrison (2011) 55–56; ILC (2018) Conclusions 4, 5.

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purposes. Early expansion of the rights of the coastal State began with claims of jurisdiction over the natural resources found in the adjacent marine areas, both in the water column and on the seabed. The claim of a distance-based maritime zone gained strength after the Second World War associated with decolonisation and was supported by many newly independent States from Latin America, the Caribbean, Asia and Africa. The resulting concept of the EEZ is the culmination of this jurisdictional expansion over economic interests. Chapter 3 examines the jurisdictional framework of the EEZ as codified in UNCLOS. The coastal States' intention to claim exclusive rights in the EEZ was resisted by many maritime States in an effort to preserve the freedoms of navigation and overflight at the Third Conference. The negotiation resulted in a compromised *sui generis* legal regime consisting of substantive rules of the attribution and exercise of respective rights and duties and a dispute resolution mechanism to balance the competing demands of States.

Part II, 'Competing Uses of the Exclusive Economic Zone', examines how a dynamic balance of power between the coastal State and other States may be maintained through the two legal doctrines that guide the allocation and exercise of rights and duties in the EEZ. It analyses how the freedoms of navigation and overflight (Chapter 4) and the freedom to lay submarine cables and pipelines (Chapter 5) have been interpreted and implemented in the EEZ, with a focus on how the exercise of the coastal States' rights and jurisdiction may affect their enjoyment. Although there is a tendency to broaden the interpretation of the coastal State's rights and jurisdiction exercised in the EEZ, this is not sufficient to overturn the general freedoms preserved for all States. The communicational freedoms preserved in the EEZ are not absolute, and the primary obligation for all States exercising their freedoms is to have due regard for the interests of both the coastal State and the other States in exercising their rights and performing their duties within the EEZ. The same mandatory obligation is also laid on the coastal State to have due regard for the rights and duties of other States and to act in a manner compatible with UNCLOS as safeguards to the enjoyment of the preserved communicational freedoms.

Part III discusses means of 'Resolving Conflicts Regarding Unattributed Rights and Jurisdiction in the Exclusive Economic Zone'. It focuses on three issues over which there are unexplicitly attributed rights and jurisdiction in the EEZ: military activities (Chapter 6), maritime security (Chapter 7) and underwater archaeological and historical objects (Chapter 8). While applying the principles stated in Article 59 of UNCLOS, the general principles for allocating uses and exercising co-

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existing rights apply to these three issues. Chapter 6 addresses the complexities regarding the conduct of military activities in the EEZ with a focus on analysing the conflicts arising from the activities undertaken by a foreign State. Chapter 7 explores both the unilateral and multilateral responses taken by States to combat maritime security threats within the EEZ, and examines the emerging practice of promoting collaboration between the coastal State and other States to achieve collective security at sea. Chapter 8 discusses the protection of underwater archaeological and historical objects found in the EEZ, with a particular focus on a subsequent agreement that partially clarified the legal gap left by the UNCLOS.

Chapter 9 sets out the conclusions of this analysis. The establishment of the EEZ represents a success on the part of coastal States in securing their economic interests in the adjacent marine areas at the cost of encroaching, to some degree, on traditional high seas freedoms. However, the battle over freedom erosion and restraint continues as to other issues in an increasingly interdependent law of the sea environment. The overall balance between the economic interests of coastal States and the communicational interests of all States, as established in UNCLOS, represents a body of flexible prescriptions for dynamic adjustment, and State practice has for the most part been operating within, rather than significantly diverging from, the EEZ regime.

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