CHAPTER 10

New Maritime Zones and the Law of the Sea

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Introduction

The international law of the sea is one of the oldest parts of public international law and has been—like all parts of public international—in a state of flux due to the changing needs, interests and opinions of the international community triggered by, for instance, technological, demographical and environmental developments, scarcity of resources and shifting views on how resources should be shared equitably.

Maritime zones are an important feature of the evolution of the international law of the sea. Powers that were able to claim and exercise effective control over large expanses of water—such as the Romans in the Mediterranean Sea (*mare nostrum*)—eventually had to give way to the prevailing preference for a regime based on the freedom of the seas as advocated by Grotius.[1] Particularly in the 20th century, however, this regime was increasingly eroded by the phenomenon of 'creeping coastal State jurisdiction', which led to expanded coastal State authority both substantively and geographically (further seaward), including through the establishment of various new coastal State maritime zones.[2] Various phases of efforts to codify and progressively

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1 H. Grotius "*Mare liberum sive de iure quod Batavis competit ad Indicana commercia, dissertatio*" ("The Freedom of the Seas or The Right Which Belongs to the Dutch to Take Part in the East Indian Trade" (1609), translated by R. Van Deman Magoffin (1916).

2 See R.Y. Jennings, "A Changing International Law of the Sea", 31 *Cambridge Law Journal* 32–49 (1972), at 34–36; and E. Franckx, "The 200-mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage", 48 *German Yearbook of International Law* 117–149 (2005), at 119 and 125–130. In spite of its title, B.H. Oxman, "The Territorial Temptation: A Siren Song at Sea",

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develop the international law of the sea eventually led to the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[3] which will function as the main benchmark in this chapter.

Meaning of 'New'

The objective of this chapter is to examine state practice on the establishment of new maritime zones, including its consistency with the UNCLOS. For the purpose of this chapter, 'new' maritime zones are maritime zones that (i) are not mentioned in the UNCLOS and (ii) were also not part of customary international law upon the UNCLOS' entry into force in 1994. Exclusive fishery zones (EFZs),[4] for instance, are not included in the UNCLOS but secured increasingly wider support after the 1945 Truman Coastal Fisheries Proclamation.[5] Well before the entry into force of the UNCLOS—probably by the early 1970s—a coastal State's entitlement to sovereign rights and jurisdiction for fisheries purposes within a 200 nautical mile (nm) EFZ had crystallized into customary international law. EFZs are therefore not regarded as new maritime zones in this chapter.

While the precise implications of China's so-called nine-dashed-line—or its ten-dashed-line declared in June 2014—in the South China Sea for China's claim to sovereignty, sovereign rights and jurisdiction over land territory and waters therein are uncertain, it seems that China does not claim a new maritime zone as defined above. Rather, the marine area within the nine- or ten-dashed-lines are either internal waters—whether by means of historic title or otherwise—, territorial sea, continental shelf or exclusive economic zone (EEZ).[6]

Finally, some States use the term 'territorial waters' in their domestic legal framework to denote the waters consisting exclusively of internal waters—whether exclusively marine or also freshwater—or internal waters and the

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100 *American Journal of International Law* 830–851 (2006), also examines creeping coastal State jurisdiction, and has both a geographic and a substantive balance.

3 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 *United Nations Treaty Series* 396; <www.un.org/Depts/los>.

4 Or Exclusive Fisheries/Fishing Zone, Fishing/Fisheries Zone (FZ).

5 Proclamation 2668, 'Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas', 28 September 1945; available at <www.presidency.ucsb.edu/ws/?pid=58816>.

6 See the Chinese Notes Verbales No. CML/17/2009, of 7 May 2009 (including map with the nine-dashed-line) and No. CML/8/2011, of 14 April 2011 (available at DOALOS website, note 28 *infra*).

territorial sea combined.[7] While territorial waters do not appear as a maritime zone in the UNCLOS or the 1958 Geneva Conventions[8]—even though it appears in older international instruments like the Spitsbergen Treaty[9]—such state practice is not inconsistent with the UNCLOS as such.

Meaning of 'Maritime Zones'

Also for the purpose of this chapter, 'maritime zones' first of all are limited to zones generated by a sea-coastline; therefore not zones in freshwater lakes (e.g. the North American Great Lakes and Lake Victoria), fully enclosed salt-water lakes or seas not connected to another sea or ocean (e.g. the Aral and Dead Seas), as these waters are generally accepted not to be subject to the international law of the sea.[10] The prevailing view is that the same applies to the Caspian Sea.[11]

Second, a maritime zone is regarded to belong to one of the following two categories: coastal State maritime zones on the one hand and so-called areas beyond national jurisdiction—namely the high seas and the Area—on the other hand. For the purpose of this article, the high seas consist of the water column seaward of territorial seas or—if established—EEZs or other 200 nm maritime zones consistent with international law.[12] The Area consists of the seabed and ocean floor and subsoil thereof seaward of coastal States' continental shelves.[13] Restricting maritime zones for the purpose of this chapter to these two categories excludes the wide range of essentially issue-specific multilateral area designations, whether by international bodies or not, that

7 E.g. Act No. 57, of 27 June 2003, on Norway's Territorial Waters and Contiguous Zone.

8 The International Law Commission (ILC) opted for the term territorial sea in its 1956 'Articles concerning the law of the sea' (see the 'Commentary to the articles concerning the law of the sea', *Yearbook of the International Law Commission* 1956, Vol. II, 265.

9 Treaty concerning the Archipelago of Spitsbergen, Paris, 9 February 1920. In force 14 August 1925; 2 *League of Nations Treaty Series* 7 (1920). See Art. 2.

10 See also Art. 122 of the UNCLOS.

11 The 'Table recapitulating the status of the Convention and of the related Agreements, as at 10 October 2014' (available at DOALOS website, note 28 *infra*) lists Azerbaijan, Kazakhstan and Turkmenistan as land-locked States although they border on the Caspian Sea.

12 The UNCLOS does not contain a definition for the high seas, unlike the 1958 Geneva Convention on the High Seas (HS Convention; 29 April 1958. In force 30 September 1962, 450 *United Nations Treaty Series* 11; <www.un.org/law/ilc>). See note 26 *infra* and accompanying text. Note the contradictory phrases "on the bed of the high seas" in Art. 112(1) of the UNCLOS and "beneath the high seas" in its Articles 113 and 114.

13 Art. 1(1) of the UNCLOS.

are in existence today. Examples are (a) whale sanctuaries established by the International Whaling Commission; (b) marine protected areas (MPAs) established by the Commission for the Conservation of Antarctic Marine Living Resources; (c) emission control areas established by the International Maritime Organization (IMO)'s Marine Environment Protection Committee; (d) regional, treaty-based search and rescue (SAR) regions;[14] and (e) Long-Range Identification and Tracking (LRIT) zones of a maximum width of 1,000 nm off coasts in which coastal States are entitled to receive certain information relating to ships navigating therein.

Also not regarded as maritime zones for the purpose of this chapter are area designations by coastal States aimed at implementing relatively specific rights or obligations under international law, for instance the multilateral issue-specific area designations just discussed or similar unilateral issue-specific area designations. Rather than constituting claims to maritime zones and jurisdiction, such area designations can be presumed to merely implement or apply international law, unless proven otherwise.

In light of the characteristics of the maritime zones incorporated in the UNCLOS, maritime zones only qualify as such for the purpose of this chapter if they are clearly defined in spatial terms by means of certain distances from (adjacent) land territory, enclosure by land territory or adjacency to other maritime zones. This condition is, for instance, not met by Canada's claim to enforcement jurisdiction over foreign vessels targeting straddling fish stocks in an unspecified area of (adjacent) high seas, which culminated in the arrest of the Spanish-flagged fishing vessel *Estai* in 1995.[15] Despite domestic calls in the mid-2000s to claim so-called 'custodial management' over fisheries resources

14 E.g. those specified in the Annex to the Arctic SAR Agreement (Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic, Nuuk, 12 May 2011. In force 19 January 2013; 50 *International Legal Materials* 1119; also available at <www.arctic-council.org>) and the disclaimer in Art. 3(2) of the Agreement.

15 See S. 5.2 of Canada's Coastal Fisheries Protection Act (R.S.C., 1985, c. C-33) in conjunction with S. 21(2)(b)(ii) and Table III of its Coastal Fisheries Regulations (C.R.C., c. 413). Canada's jurisdictional claim has—to some extent—been addressed by the inclusion of non-flag State enforcement powers in Articles 21 and 22 of the Fish Stocks Agreement (Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. In force 11 December 2001, 2167 *United Nations Treaty Series* 3; DOALOS website, note 28 *infra*). Also, Canada has not withdrawn a relevant reservation to its acceptance of the compulsory jurisdiction of the ICJ so far (Declaration of 10 May 1994, under (2)(d); available at <www.icj-cij.org>).

on the nose and tail of the Grand Banks of Newfoundland and the Flemish Cap,[16] Canada eventually agreed to commence a negotiation-process to modernize the 1978 NAFO Convention.[17]

Finally, some area designations by coastal States should be regarded as spheres of interest or influence instead of maritime zones defined here. This will be the case when coastal States do not exercise jurisdiction related to the area or challenge the rules and procedures on outer limits of coastal State maritime zones laid down in the UNCLOS. For instance, while the Russian Federation's reliance on the sector principle or theory in the Arctic may have had some relevance for its maritime boundaries with Norway and the United States, the Russian Federation has so far respected the rules and procedures on outer limits contained in the UNCLOS.[18] It will be interesting to see, however, if this remains unchanged with regard to the Russian Federation's future actions concerning its currently still unfinished procedure before the Commission on the Limits of the Continental Shelf (CLCS) in relation to the geographic North Pole.

The next section of this chapter gives a short account of the evolution of existing maritime zones. The analysis of new maritime zones in the following section is done as much as possible in a chronological order, even though the last subsection is devoted to new maritime zones beyond 200 nm from baselines. The chapter ends with a summary and conclusions.

Existing Maritime Zones

Once the proposition of *mare liberum* had become generally accepted by the international community in the 17th century, there were in principle three

16 E.g. Custodial Management Outside Canada's 200-Mile Limit, Report of the Standing Committee on Fisheries and Oceans, March 2003, at 9 (Recommendation 1). However, the report 'Breaking New Ground. An Action Plan for Rebuilding The Grand Banks Fisheries, Report of the Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic', June 2005, eventually did not support this option.

17 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Ottawa, 24 October 1978. In force 1 January 1979, 1135 *United Nations Treaty Series* 369; <www.nafo.int>. The 'new' NAFO Convention was adopted in 2007 (Lisbon, 28 September 2007; NAFO/GC Doc. 07/4) but had not yet entered into force at the time of writing.

18 A.G. Oude Elferink "Does Recent Practice of the Russian Federation Point to an Arctic Sunset for the Sector Principle?" in S. Lalonde and T. McDorman (eds) *International Law and Politics of the Arctic Ocean; Essays in Honour of Donat Pharand* (Brill/Nijhoff, Leiden: 2015), 269–290.

types of maritime zones: (i) internal waters (including historic bays and other historic waters); (ii) a coastal zone without a uniform width or juridical status, which eventually became the territorial sea due to its inclusion in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (TSCZ Convention), even though then without an agreed maximum width;[19] and (iii) the high seas. Subsequently, state practice on specific enforcement powers beyond this coastal zone/territorial sea eventually crystallized into an entitlement to a contiguous zone under customary international law, which was then codified in Article 24 of the TSCZ Convention; at that time with a maximum width of 12 nm.[20] Soon after the 1945 Truman Continental Shelf Proclamation,[21] a coastal State's entitlement to a continental shelf became part of customary international law and was subsequently codified in the 1958 Geneva Convention on the Continental Shelf (CS Convention),[22] with a rather unclear outer limit.[23]

The inability of the first United Nations Conference on the Law of the Sea (UNCLOS I) to agree on a maximum breadth of the territorial sea and the nature and extent of special coastal State rights over fish stocks adjacent to their territorial seas,[24] led to the convening of the second United Nations Conference on the Law of the Sea (UNCLOS II) in 1960. UNCLOS II did not have an agreed outcome even though a compromise proposal for a six nm territorial sea and a six nm fishing zone failed by just one vote. 12 nm EFZs nevertheless gained increasingly further ground in state practice in the 1960s.[25]

19 Geneva, 29 April 1958. In force 10 September 1964, 526 *United Nations Treaty Series* 205; <www.un.org/law/ilc>.

20 H. Caminos "Contiguous Zone" *Max Planck Encyclopedia of Public International Law* (March 2013).

21 Proclamation 2667, 'Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf', 28 September 1945; available at <www.presidency.ucsb.edu/ws/?pid=12332>.

22 Geneva, 29 April 1958. In force 10 June 1964, 499 *United Nations Treaty Series* 311; <www.un.org/law/ilc>.

23 Ibid., Art. 1.

24 Coastal States eventually found the rights laid down in Articles 6–7 and 13 of the HS Fisheries Convention (Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958. In force 20 March 1966, 559 *United Nations Treaty Series* 285; <www.un.org/law/ilc>) and Art. 2(4) of the CS Convention to be inadequate. See also the 1956 ILC Commentary, note 8 *supra*, at 286–293.

25 D.R. Rothwell and T. Stephens *The International Law of the Sea* (Hart Publishing, Oxford/Portland: 2010), at 9–10.

Article 1 of the 1958 Geneva Convention on the High Seas (HS Convention)[26] defined the high seas as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State". The prospect of exploitation of non-living resources of the deep sea-bed beyond continental shelves then triggered a debate on the desirability of a distinct regime for the deep sea-bed. Following the famous Pardo speech in 1967, the United Nations General Assembly (UNGA) took a number of steps which eventually established 'the Area' as a distinct maritime zone from the high seas at least as from 1970.[27]

The third United Nations Conference on the Law of the Sea (UNCLOS III) formally commenced in 1973 among widespread but diverging state practice on claims to breadths of territorial seas and EFZs. An early proposal at UNCLOS III for a 200 nm EEZ soon made its way into state practice and at least its general aspects had already become part of customary international law before the end of UNCLOS III. Nothing in general international law suggests that the new customary right to an EEZ affected the pre-existing right to an EFZ. In line with the principle *in maiore stat minus* (who can do more can also do less), some coastal States continue to claim only EFZs. Others first established an EFZ and later also established an EEZ for the same waters, without revoking the EFZ (e.g. the Netherlands).[28] While this approach can be preferred for domestic legislative reasons, from the perspective of international law such a coastal State is best categorized as having established an EEZ, as this is the more comprehensive zone. Coastal States may also decide to establish an EEZ adjacent to part of their territory and an EFZ to another part. Norway, for instance, has established an Economic Zone (a *de facto* EEZ) off its mainland, a Fishery Zone (a *de facto* EFZ) off Jan Mayen, a Fisheries Protection Zone (FPZ) off Svalbard (see below), but no 200 nm maritime zones at all off its (claimed) territories in the Southern Ocean and Antarctica.[29]

The vertical extent of the EEZ was agreed to comprise the sea-bed as well as its subsoil, while the horizontal extent of the continental shelf can stretch in certain circumstances also beyond 200 nm pursuant to Article 76 of the UNCLOS. This area, which has become known as the 'extended' or 'outer'

26 See note 12 *supra*.

27 UNGA Resolution 2749 (XXV), of 17 December 1970.

28 See the 'Table of claims to maritime jurisdiction (as at 15 July 2011)', at DOALOS website (<www.un.org/Depts/los>). See also Spain's practice in note 42 *infra*.

29 These are Bouvet Island (north of 60° South), Peter I Island and Queen Maud Land (both south of 60° South). See also the Maritime Claims Table in note 28 *supra*.

continental shelf, can be regarded as a distinct maritime zone because its regime is not identical to that within 200 nm.[30]

Finally, another new maritime zone introduced during UNCLOS III are archipelagic waters. Only a State that qualifies as an archipelagic State is entitled to designate waters enclosed by archipelagic baselines drawn in accordance with the UNCLOS, as archipelagic waters. These waters then become part of that State's territory and subject to its sovereignty.[31]

New Maritime Zones

Fisheries Protection Zone off Svalbard

While Norway established a 12 nm Fishery Zone off its mainland and Jan Mayen in 1966, no such zone was established off Svalbard.[32] On 1 January 1977, Norway's 200 nm Economic Zone (a *de facto* EEZ) off its mainland came into effect,[33] followed by a 200 nm FPZ off Svalbard later in 1977[34] and a 200 nm Fishery Zone (a *de facto* EFZ) off Jan Mayen in 1980.[35] The jurisdiction claimed by Norway in the FPZ off Svalbard relates exclusively to fisheries[36] and there-

30 See, for instance, Articles 82 and 246(6) of the UNCLOS and the fact that the freedom of high seas fishing exists above the outer continental shelf. However, in its Judgment in the *Bay of Bengal* case (Dispute concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012), the International Tribunal for the Law of the Sea (ITLOS) ruled that Art. 76 of the UNCLOS "embodies the concept of a single continental shelf".

31 Articles 2, 46–47 and 49 of the UNCLOS.

32 Act No. 19, of 17 June 1966, 'relating to Norway's fishery limit and to the prohibition against fishing etc. by foreign nationals within the fishery limit', Sec. 1.

33 Regulations of 17 December 1976, No. 15, 'on the implementation of the Economic Zone. Delegation of authority', effective from 1 January 1977. These Regulations were adopted pursuant to the Act of 17 December 1976, No. 91, 'relating to Norway's economic zone', as amended.

34 Regulations of 3 June 1977, No. 6, 'relating to a fisheries protection zone around Svalbard', as amended, established pursuant to Sec. 5 of the 1976 EEZ Act, note 33 *supra*. The English translation of Sec. 5 of the original text of the Act (available at DOALOS website, note 28 *supra*) stipulates: "Prior to the implementation of the Norwegian economic zone, the King may, for areas referred to in paragraph 1, lay down interim provisions for the protection of fish stocks, for the limitation of foreign fishing and for the rational and proper conduct of fishing activities."

35 Regulations of 23 May 1980, No. 4, 'establishing the fishing zone around Jan Mayen. Delegation of authority'.

36 Sec. 1 of the 1977 Regulations, note 34 *supra*.

fore relies on the customary right to an EFZ. Norway's choice for an FPZ instead of an EFZ was motivated by the diverging views among States on the spatial scope of the Spitsbergen Treaty. The Treaty was adopted in 1920—well before the start of the process of creeping coastal State jurisdiction—and, as already mentioned, only refers to 'territorial waters'. This raised the question as to how Norway's absolute sovereignty over Svalbard accorded by the Treaty, as well as the rights of equal access and non-discrimination accorded to all parties, should be interpreted in the light of the evolution of coastal State entitlements to new maritime zones under international law since the Treaty's adoption in 1920.

Norway takes the position that the Treaty does not apply seaward of the outer limit of the territorial sea. According to Norway, the usual law of the sea regime applies seaward thereof and entitles Norway to a continental shelf and EEZ and their associated sovereign rights and jurisdiction. No other parties to the Treaty support Norway's position, however, and an important number of them take the view that Svalbard generates—or can generate—all the usual coastal State maritime zones but that the Treaty applies to all of these. In view of these different positions, Norway established a FPZ off Svalbard—while insisting on its right to establish an EEZ (or EFZ)—and has granted certain allocations of fishing opportunities to a limited number of parties, largely based on historic track records.[37]

The Supreme Court of Norway never made a determination on the Treaty's spatial scope so far, even though it had several opportunities to do so. Most recently, in the *Kiel* case, both the District Court of Nord-Troms[38] and the Court of Appeals of Hålogaland[39] ruled that the Treaty does not apply beyond Svalbard's territorial waters. When a ruling from the Supreme Court was also sought, however, the Supreme Court decided to reverse the order of the questions put before it. Rather than first ruling on the Treaty's spatial scope—as the two other courts had done in the same case—it decided to first give a ruling on the question as to whether or not the specific regulations alleged to have been violated were discriminatory, and would thereby be inconsistent with the Treaty if the Treaty would also be applicable beyond Svalbard's territorial

37 For a discussion see E.J. Molenaar "Fisheries Regulation in the Maritime Zones of Svalbard" (2012) 27 *International Journal of Marine and Coastal Law* 3–58.

38 Judgment of 10 December 2012 in Case No. 12-141874MED-NHER.

39 Judgment of 7 July 2013 in Case No. 13-050194AST-HALO.

waters.[40] As the Supreme Court ruled that the regulations were not discriminatory, it thereby also avoided a ruling on the Treaty's spatial scope.[41]

Based on the above, it can be concluded that the FPZ established by Norway off Svalbard is a new maritime zone as defined in this chapter. It relies on the customary right to an EFZ but also takes account of the diverging views among States on the spatial scope of the Spitsbergen Treaty. In view of the uniqueness of the situation—in particular the fact that sovereignty over Svalbard was granted by, and subject to, the Spitsbergen Treaty—no other coastal States will feel compelled or have an incentive to establish a similar maritime zone off part or all of their territory. While several other coastal States have also established FPZs, for instance Spain in 1997 relating to most of its coast in the Mediterranean Sea,[42] and Libya in 2005,[43] their enactments show that they are really *de facto* EFZs.[44]

200 NM Zones off British Overseas Territories

The diversity of the United Kingdom's practice with respect to 200 nm zones is in part a result of the fact that it has (claimed) territory in all oceans except the

40 See the posts by I. Dahl and T. Henriksen on the Blog of the K.G. Jebsen Centre for the Law of the Sea at <en.uit.no/forskning/forskningsgrupper/gruppe?p_document_id=355759>.

41 Judgment of 21 March 2014 in HR-2014-00577-A, (Case No. 2013/1772).

42 Royal Decree No. 1315/1997, of 1 August 1997, 'establishing a Fisheries Protection Zone in the Mediterranean Sea' (*Boletín Oficial del Estado* No. 204, of 26 August 1997; as amended; English translation available at DOALOS website, note 28 *supra*). In 2013, Spain also established an EEZ off its coast in the Mediterranean Sea (Royal Decree No. 236/2013, of 5 April 2013, 'establishing the Exclusive Economic Zone of Spain in the northwestern Mediterranean' (*Boletín Oficial del Estado* No. 92, of 17 April 2013)) but without formally revoking its FPZ. Neither the FPZ nor the EEZ apply to the Spanish coast in the Alboran Sea.

43 Pursuant to the 'Declaration of a Libyan Fisheries Protection Zone in the Mediterranean Sea', of 24 February 2005 (English translation available at DOALOS website, note 28 *supra*). Whereas Libya also proclaimed an EEZ in 2009 ('General People's Committee Decision No. 260 of A.J. 1377 (AD 2009) concerning the declaration of the exclusive economic zone of the Great Socialist People's Libyan Arab Jamahiriya', of 27 May 2009 (English translation available at DOALOS website, note 28 *supra*), its FPZ was not revoked.

44 See also C. Chevalier *Governance of the Mediterranean Sea. Outlook for the Legal Regime* (Málaga (Spain), IUCN-Med: 2005), 45–46. In 2002, the European Commission encouraged other EU Member States to establish FPZs for their Mediterranean coasts (*Communication from the Commission to the Council and the European Parliament laying down a Community Action Plan for the conservation and sustainable exploitation of fisheries resources in the Mediterranean Sea under the Common Fishery Policy*, COM (2002) 535 final, of 9 October 2002, at 14), but no other EU Member States have so far done this.

Arctic Ocean. While the United Kingdom only established an EEZ off its metropolitan territory in the North Atlantic in 2013 (North Atlantic EEZ),[45] it had already established an EEZ off Pitcairn, Henderson, Ducie and Oeno Islands in the Pacific in 1997.[46] Except for its overseas territories discussed below, most of its overseas territories have a 200 nm EFZ. Prior to the establishment of its North Atlantic EEZ, it claimed off its metropolitan territory: (a) a 200 nm EFZ;[47] (b) jurisdiction to control dumping of waste;[48] (c) jurisdiction over marine scientific research up to 200 nm;[49] (d) jurisdiction over vessel-source pollution pursuant to Part XII of the UNCLOS in the so-called 'controlled waters' above its continental shelf up to 200 nm;[50] (e) jurisdiction over the exploration and exploitation of offshore energy production in the so-called 'Renewable Energy Zone' which also went out to 200 nm;[51] and (f) a 200 nm gas importation and storage zone.[52] All these issue- or sector-specific maritime zones and jurisdictional claims relied on the customary status of EFZs and EEZs, the United Kingdom's accession to the UNCLOS in 1997, and the principle *in maiore stat minus*. All North Atlantic zones and claims were revoked upon the coming into force of the North Atlantic EEZ, which thus amounts to a major simplification.

Some special maritime zones are nevertheless maintained off some British overseas territories. As regards South Georgia and the South Sandwich Islands, a 200 nm 'Maritime Zone' was established in 1993.[53] Within the Maritime Zone, the United Kingdom claims some, but not all, of the sovereign rights and jurisdiction to which it would be entitled pursuant to Article 56 of the UNCLOS.[54] As regards the Falkland Islands, an 'Interim Fishery Conservation

45 Pursuant to 'The Exclusive Economic Zone Order 2013', of 11 December 2013, *Statutory Instruments* 2013 No. 3161. In force on 31 March 2014 (available at DOALOS website, note 28 *supra*).

46 Proclamation No. 1, of 28 November 1997, 'establishing an Exclusive Economic Zone (Pitcairn, Henderson, Ducie and Oeno Islands)'.

47 Fishery Limits Act, 1976.

48 Food and Environment Protection Act, 1985, Part II, as amended by the Environmental Protection Act 1990, S. 146.

49 See *National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction* (UN/DOALOS: 1989), at 270.

50 Merchant Shipping (Prevention of Pollution) (Law of the Sea Convention) Order 1996, S.I. No. 282.

51 S. 84 of the Energy Act, 2004.

52 S. 32 of the Energy Act, 2008.

53 Proclamation (Maritime Zone) No. 1, of 1993 (available at DOALOS website, note 28 *supra*).

54 See Sec. 3 of the 1993 Proclamation, which does not refer, among other things, to marine scientific research. The legislation listed at <www.sgisland.gs/index.php/%28d%29Legi

and Management Zone' was established in 1986[55] and an 'Outer Fishery Conservation Zone' in 1994.[56] In these zones the United Kingdom claims broader jurisdiction than merely for fisheries purposes but not all of the sovereign rights and jurisdiction to which it would be entitled pursuant to Article 56 of the UNCLOS.[57] It is likely that this can to a considerable extent be attributed to the disputes on title to territory between the United Kingdom and Argentina over South Georgia and the South Sandwich Islands as well as the Falklands Islands.

The most recent special maritime zone claimed by the United Kingdom is the 200 nm 'Environment Zone' established off the British Indian Ocean Territory (BIOT) in 2003.[58] Within the Environment Zone, the United Kingdom claims sovereign rights and jurisdiction with regard to the protection and preservation of the environment.[59] The Environment Zone complements the 200 nm 'Fisheries Conservation and Management Zone' established off the BIOT in 1991.[60] These two zones combined thus claim less than what Article 56 of the UNCLOS allows. This too, seems related to a dispute on title to territory, namely that between the United Kingdom and Mauritius on title to the BIOT. In this regard, mention should be made of the establishment of a 200 nm MPA off the BIOT in 2010, which led Mauritius to institute proceedings against the United Kingdom pursuant to the UNCLOS.[61]

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slation?useskin=edu> suggests that only fisheries jurisdiction has been exercised in the Maritime Zone.

55 'Falkland Islands—The Fisheries (Conservation and Management) Ordinance of 1986' (available at DOALOS website, note 28 *supra*). The Interim Zone is 150 nm in breadth measured from a single point in the middle of the Falkland Islands (See Proclamation No. 4 of 1986, 'Interim Fishery Conservation and Management Zone', *Law of the Sea Bulletin* No. 9 (1987), at 19).

56 'Proclamation No. 1, of 1994' (available at DOALOS website, note 28 *supra*).

57 Ibid., at Sec. 2.

58 Proclamation No. 1, of 17 September 2003, 'establishing the Environment (Protection and Preservation) Zone for the British Indian Ocean Territory' (available at DOALOS website, note 28 *supra*).

59 Sec. 3 of the 2003 Proclamation, note 58 *supra*.

60 Since repealed. The currently applicable legislation is 'The British Indian Ocean Territory—The Fisheries (Conservation and Management) Ordinance 2007', Ordinance No. 5, of 21 December 2007 (available at <faolex.fao.org>).

61 For information see <www.pca-cpa.org>.

200 NM Zones in the Mediterranean Sea

If all Mediterranean coastal States were to establish an EFZ, EEZ or a 200 nm maritime zone derived therefrom, no pockets of high seas would remain in the Mediterranean Sea.[62] Among the reasons why many Mediterranean coastal States initially opted for not establishing these maritime zones and why some still not have established them today, are the potential consequences of the many overlaps of claimed maritime zones—often by more than two States—that would be generated. However, lack of agreement on maritime boundaries between adjacent or opposite States does not prevent them from claiming such maritime zones as such, but only restrains their exercise of the associated sovereign rights and jurisdiction vis-à-vis each other in the overlapping area. Continued refraining to claim 200 nm maritime zones is therefore more likely caused by various (geo-)political reasons, including accession to the EU and historic fishing patterns.[63]

Responding in part to encouragement from the EU and the parties to the Barcelona Convention,[64] [65] the overall size of the high seas area in the Mediterranean Sea has continued to decrease with more and more Mediterranean coastal States claiming an EFZ or EEZ—with either a specified width of less than 200 nm[66] or an outer limit to be agreed with opposite States—or other 200 nm maritime zones derived from the EEZ.

These other 200 nm maritime zones include the FPZs of Libya and Spain, which were not formally revoked but may now in practice be subsumed in their EEZs.[67] As noted above, these are *de facto* EFZs. In 2003, France authorized the establishment of an Ecological Protection Zone (EPZ), which was eventually established in 2004[68] but then subsequently repealed in 2012 upon

62 T. Scovazzi "Harlequin and the Mediterranean" in *Liber Amicorum B. Vukas* (forthcoming in 2014). Bosnia and Herzegovina is not able to claim a 200 nm maritime zone because its territorial sea is enclosed by the internal waters of Croatia.

63 See, *inter alia*, D. Vidas "The UN Convention on the Law of the Sea, the European Union and the Rule of Law: What is going on in the Adriatic Sea?" (2009) 24 *International Journal of Marine and Coastal Law* 1–66.

64 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, Barcelona, 10 June 1995. In force 9 July 2004, <www.unepmap.org>.

65 Cf. Scovazzi, note 62 at 17; Vidas, note 63 at 10; and A. Del Vecchio Capotosti "In Maiore Stat Minus: A Note on the EEZ and the Zones of Ecological Protection in the Mediterranean Sea" (2008) 39 *Ocean Development & International Law* 287–297, at 290–291.

66 E.g. the EFZs of Algeria, Malta and Tunisia (cf. Scovazzi, note 62).

67 See notes 42 and 43 *supra*.

68 The EPZ was established by means of Decree No. 2004–33, of 8 January 2004 (as amended), as authorized by Law No. 2003-346, of 15 April 2003 (*relative à la creation d'une*

the establishment of its EEZ off its Mediterranean coast.[69] Also in 2003, Croatia established an Ecological and Fisheries Protection Zone (EFPZ).[70] Slovenia established an EPZ seaward of its territorial sea in 2005.[71] Subsequently, it designated the 'sea fishing area' of Slovenia under its Marine Fisheries Act in 2006, consisting of three zones, one of which is defined as encompassing the EPZ and the high seas in the Adriatic Sea.[72] It is not clear, however, if this definition is meant to claim a *de facto* EFZ within its EPZ. As a result of Croatia's challenge to Slovenia's entitlement to maritime zones seaward of its territorial sea, both States agreed to submit their territorial and maritime disputes to arbitration.[73] Finally, after Italy authorized the establishment of an EPZ in 2006,[74] it established an EPZ off part of its land territory in 2011.[75]

At the time of writing, the Croatian EFPZ and the Slovenian and Italian EPZs remained in force. All three zones are less than *de facto* EEZs, even though this is not equally evident for all. The Italian EPZ, for instance, explicitly excludes fisheries jurisdiction[76] and it was already noted above that the Slovenian EPZ does not necessarily encompass a *de facto* EFZ. Moreover, Italy claims jurisdiction within its EPZ over archaeological and historical heritage, while

zone de protection écologique au large des côtes du territoire de la République; available at <legifrance.gouv.fr>).

69 Cf. Art. 3 of Decree No. 2012-1148, of 12 October 2012.

70 Decision by the Croatian Parliament of 3 October 2003 'on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea', as amended on 3 June 2004 (available at DOALOS website, note 28 *supra*). The application of the EFPZ to EU Member States—in essence Italy and Slovenia—was postponed several times (cf. Vidas, note 63 *supra*; and G. Andreone and G. Cataldi, "Sui generis zones", in D. Attard, M. Fitzmaurice and N.A. Martínez Gutiérrez (eds), *IMLI Manual on International Maritime Law, Vol. I: Law of the Sea* (Oxford University Press, Oxford: 2014) 217–238, at 228.

71 Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act, of 22 October 2005; (2006) *Law of the Sea Bulletin* No. 60, 56.

72 Decree on designation of the sea fishing area of the Republic of Slovenia (*Official Gazette of the Republic of Slovenia*, No. 2/06, of 5 January 2006).

73 For information see <www.pca-cpa.org>.

74 Law No. 61, of 8 February 2006, 'on the establishment of an ecological protection zone beyond the outer limit of the territorial sea' (available at DOALOS website, note 28 *supra*).

75 Presidential Decree No. 209, of 27 October 2011, 'Regulation establishing the ecological protection zone in the north-west Mediterranean, the Ligurian Sea and the Tyrrhenian Sea' (available at DOALOS website, note 28 *supra*).

76 Cf. Art. 2(3) of the 2006 Law, note 74 *supra*.

emphasizing consistency with the UNCLOS and the UCH Convention[77].[78] The three States seem to have opted for these maritime zones because of various issues with each other—including unresolved territorial and maritime disputes—and—in particular Italy—various issues and interests vis-à-vis other Mediterranean coastal States.[79] In conclusion, the Croatian EFPZ and the Slovenian and Italian EPZs are new maritime zones as defined in this chapter. Their consistency with international law relies on the customary international law status of EFZs and EEZs as well as the principle *in maiore stat minus* and the fact that the relevant States were parties to the UNCLOS when the zones were designated.

Contiguous Archaeological Zones

Article 33 of the UNCLOS entitles a coastal State to exercise jurisdiction for customs, fiscal, immigration or sanitary purposes in its contiguous zone. Jurisdiction can only be used for "the control necessary" to prevent or punish infringements of the coastal State's laws and regulations within the specified four substantive domains, that may occur or have occurred in the coastal State's territory or territorial sea; including thereby also its internal waters and archipelagic waters.[80] Article 33 therefore does not authorize prescriptive jurisdiction in the contiguous zone. Article 303(2) of the UNCLOS, however, *does*, with respect to archaeological and historical objects. It reads as follows:

> In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

77 Convention on the Protection of the Underwater Cultural Heritage, Paris, 1 November 2001. In force 2 January 2009; 2562 *United Nations Treaty Series* 3 (2009); <www.unesco.org>.

78 Art. 2(1) of the 2006 Law, note 74 *supra*; and Art. 3(1) of the 2011 Decree, note 75 *supra*. The fact that Art. 2(2) of the 2006 Law specifies that national and international law relating to marine pollution will also be applied to foreign vessels and nationals could mean that—*a contrario*—national and international law on other substantive domains will not be so applied.

79 See also S. Wolf "Ecological Protection Zones" *Max Planck Encyclopedia of Public International Law* (November 2008).

80 For this latter clarification see, for instance, Sec. 13 of the Maritime Zones Act of Mauritius (Act No. 2 of 2005; 62 *Law of the Sea Bulletin* 52 (2006).

This provision has been criticized, among other things due to the odd linkage to laws and regulations for customs, fiscal, immigration or sanitary purposes as well as its limitation to "traffic" and "removal", thus offering no remedy to damage or destruction. Moreover, the saving clause in paragraph (3) of Article 303 also comprises "the law of salvage or other rules of admiralty", which has been interpreted in some States in support of the law of finds, thereby allowing treasure-seekers and looters to proceed largely on a first-come, first-served basis.[81]

Such criticisms and shortcomings have to a considerable extent been addressed by the UCH Convention, even though quite a large number of the States participating in its negotiation eventually voted against its adoption (four) or abstained from voting (15).[82] Aznar convincingly argues, however, that the concerns of this group were principally related to coastal State authority in the EEZ and continental shelf (Articles 9 and 10) rather than the contiguous zone (Article 8), and that this latter provision currently reflects customary international law.[83] Article 8 is entitled 'Underwater cultural heritage in the contiguous zone' and acknowledges the right of coastal States to "regulate and authorize activities directed at underwater cultural heritage within their contiguous zone".

While a sizeable number of coastal States claim jurisdiction over archaeological and historical objects or underwater cultural heritage within the contiguous zones established by them,[84] or claim such jurisdiction up to 24 nm from their baselines without establishing a contiguous (archaeological) zone,[85] some coastal States have designated dedicated contiguous zones for that purpose. Mauritius,[86] South Africa[87] and Tonga[88] have established 'maritime cultural zones' in which they claim general jurisdiction over archaeological and historical objects or underwater cultural heritage. It is submitted that such contiguous archaeological zones are new maritime zones as defined in this

81 T. Scovazzi "Underwater Cultural Heritage" *Max Planck Encyclopedia of Public International Law* (February 2009).

82 M.J. Aznar "The Contiguous Zone as an Archaeological Maritime Zone" (2014) 29 *International Journal of Marine and Coastal Law* 1–51, at n. 48.

83 Ibid., at 51.

84 Ibid., at 22–23.

85 E.g. Italy by means of Art. 94 of its Legislative Decree No. 42, of 22 January 2004, 'Code of the Cultural and Landscape Heritage'.

86 Sec. 25 of the Maritime Zones Act, No. 2 of 2005; 62 *Law of the Sea Bulletin* 52.

87 Sec. 6 of the Maritime Zones Act, No. 15 of 1994 (available at DOALOS website, note 28 *supra*).

88 Sec. 20 of the Maritime Zones Act, No. 10 of 2009.

chapter and that they are consistent with the UCH Convention and customary international law.

Colombia's Integral Contiguous Zone

Following its rejection of the Judgment of the International Court of Justice (ICJ) in the *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) case,[89] Colombia established a so-called 'Integral Contiguous Zone' (*Zona Contigua Integral*) adjacent to the territorial sea around several of its islands and rocks in the Caribbean Sea.[90] In several areas, the outer limit of this maritime zone extends beyond the maritime boundary established by the ICJ in the above-mentioned case—thus overlapping with Nicaragua's EEZ—and/or beyond 24 nm from the baselines. Moreover, within its Integral Contiguous Zone, Colombia—which was not a party to either the UNCLOS, the TSCZ Convention or the UCH Convention at the time of writing—claims jurisdiction in domains other than those mentioned in these treaties, for instance in relation to security at sea, the national maritime interests and the preservation of the environment.[91]

The Integral Contiguous Zone proclaimed by Colombia is undeniably a new maritime zone, both in geographical extent and in substantive scope. At least in some respects, however, the zone is clearly inconsistent with (the) current international law (of the sea). This is likely to be due to the overlap between one State's contiguous zone and another State's EEZ in conjunction with the fact that the contiguous zone extends beyond a maritime boundary established by the ICJ and applicable to the States involved. Moreover, inconsistency seems obvious when Colombia claims jurisdiction that is also covered by Nicaragua's sovereign rights and jurisdiction pursuant to Article 56 of the UNCLOS. A similar conclusion relates to those parts of the zone that are beyond 24 nm from the baselines—whether or not overlapping with another State's EEZ—where a coastal State claims jurisdiction along the lines of Article 33 of the UNCLOS. Finally, whereas the claimed environmental and fisheries jurisdiction is not problematic in areas that do not overlap with Nicaragua's EEZ, the

89 Judgment of 19 November 2012, *ICJ Reports* 2012, 624.

90 Art. 5(2) of the Presidential Decree No. 1946, of 9 September 2013. This Decree was amended by Presidential Decree No. 1119, of 17 June 2014. Both are available at <wsp.presidencia.gov.co/Normativa/Decretos>.

91 Art. 5(3)(a) of Presidential Decree No. 1946, as amended (note 90 *supra*). Before its amendement, this provision also referred to the exercise of historic fishing rights belonging to Colombia ("el ejercicio de los derechos históricos de pesca que ostenta el Estado colombiano"). The 2014 amendments include a reference to historic fishing rights in Art. 1(3).

claim is remarkable as such jurisdiction is already covered by Colombia's EEZ established in 1978;[92] thus also creating overlap between domestic legislation possibly resulting in legal uncertainty. The ICJ will have an opportunity to rule on many of these matters in the case brought by Nicaragua against Colombia in response to Colombia's proclamation of the zone as well as other actions.[93]

Peru's Maritime Domain

Peru is one of the three signatories—together with Chile and Ecuador—of the 1952 Santiago Declaration,[94] by which they claimed "exclusive sovereignty and jurisdiction" over all resources of the water column, seabed and subsoil within 200 nm of their coasts. Within their 'maritime zone', they nevertheless acknowledged the right of "innocent and inoffensive passage" for all States.

Article 54 of the Political Constitution of Peru[95] is modeled on the Santiago Declaration, but contains some important differences. It specifies that the territory of Peru includes its 200 nm 'maritime domain', in which Peru has "sovereignty and jurisdiction, without prejudice to the freedoms of international communication, in accordance with the law and the treaties ratified by the State." Based on this and the fact that it is not a party to the UNCLOS or the TSCZ Convention, Peru can be categorized as a State claiming a 200 nm territorial sea[96] although Peru does not explicitly do so. Ecuador, however, explicitly claims a 200 nm territorial sea as part of its "national domain".[97] Even though Ecuador acceded to the UNCLOS in 2012, it had still not brought its maritime zones into conformity with the UNCLOS at the time of writing. Chile already did so, apart from its mar presencial (see below). The prospect for Peru to formally follow suit has become more likely as a consequence of the ICJ proceedings it brought against Chile, which were concluded in 2014.[98] The Judgment notes the following:

92 Act No. 10, of 4 August 1978, 'establishing rules concerning the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf and regulating other matters' (available at DOALOS website, note 28 *supra*).

93 See the information on the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*) case available at <www.icj-cij.org>.

94 Declaration on the Maritime Zone, Santiago, 18 August 1952. In force same day; 1006 *United Nations Treaty Series* 323 (1976).

95 Available at DOALOS website, note 28 *supra*.

96 See Maritime Claims Table in note 28 *supra*.

97 Art. 609 of the Civil Code of Ecuador (Código Civil, available at <www.derechoecuador.com>).

98 *Maritime Dispute* case (*Peru v. Chile*), Judgment of 27 January 2014.

> Peru's Agent formally declared on behalf of his Government that "[t]he term 'maritime domain' used in [Peru's] Constitution is applied in a manner consistent with the maritime zones set out in the 1982 Convention". The Court takes note of this declaration which expresses a formal undertaking by Peru.[99]

It may therefore well be that Peru changes its domestic legislation and/or accedes to the UNCLOS in the near future. At any rate, the Peruvian declaration implies that its maritime domain can now be interpreted as a generic term rather than a maritime zone as such.[100]

Maritime Zones Beyond 200 NM

Chile's Mar Presencial

The origin of the mar presencial—which can be translated as "the sea in which we are present"[101]—can be traced back to a speech given by the Chilean Admiral Jorge Martínez Busch in 1990.[102] It was incorporated in Chile's General Law on Fisheries and Aquaculture one year later,[103] defined as the area of high seas in an expansive quadrangle between Chile's coast, Easter Island and Antarctica.[104] This area can to some extent be perceived as 'enclosed' by Chilean territory, thereby invoking a rationale that is akin to that of archipelagic waters. The spatial delimitation of the mar presencial is nevertheless also inspired by the 'sector' approach. A meridian and a parallel have been used for the area's

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99 Ibid., at para. 178.

100 See also the 'Separate, Partly Concurring and Partly Dissenting, Opinion of Judge *Ad Hoc* Orrego Vicuña' to the ICJ's Judgment in the *Maritime Dispute* case, note 98 at paras. 8–11.

101 J.G. Dalton "The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?" (1993) 8 *International Journal of Marine and Coastal Law* 397–418, at 397.

102 As noted by F. Orrego Vicuña "Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea", (1993) 24 *Ocean Development and International Law* 81–92, at 87.

103 General Law No. 18.892 on Fisheries and Aquaculture (*Ley N° 18.892 General de Pesca y Acuicultura*), of 1989. This was done through Law No. 19.080, of 6 September 1991. Both enactments are available at <www.leychile.cl>.

104 The definition in Art. 2 provides: "*Es aquella parte de la alta mar, existente para la comunidad internacional entre el límite de nuestra zona económica exclusiva continental y el meridiano que, pasando por el borde occidental de la plataforma continental de la Isla de Pascua, se prolonga desde el paralelo del hito N° 1 de la línea fronteriza internacional que separa Chile y Perú, hasta el Polo Sur.*"

western and northern boundaries respectively, and the chosen meridian lies significantly west of the 90 W meridian used by Chile for the western boundary of its claim to the Antarctic continent. It is also worth noting that Chile has, among other things, search and rescue responsibilities under the SAR Convention[105] in a sector-based area whose western and northern boundaries are somewhat similar to those of the mar presencial.[106] However, even if this would indeed have inspired the spatial scope of the mar presencial, this does not necessarily mean that Chile would limit itself to complying with its obligations and not claim some rights and jurisdiction as well.

While two other references to the mar presencial were included in the General Law on Fisheries and Aquaculture in 1991 as well,[107] the legislation did not offer a general clarification as to which rights or jurisdiction Chile claimed in the area.[108] Further inclusions of the mar presencial into legislation occurred in the 1994 Law on the Environment,[109] in 2002 in the Law on Nuclear Security[110] and in 2006 in the General Law on Fisheries and Aquaculture,[111] but such a general clarification still does not seem to be incorporated in Chilean legislation at the time of writing.[112] Specific enactments nevertheless include a requirement for all vessels carrying nuclear substances or radioactive materials to obtain authorization prior to transit through the mar presencial.[113] Current international law offers no basis for such a right. It is nevertheless unclear if Chile has enforced non-compliance with the requirement by means of at-sea enforcement, port State jurisdiction or otherwise.

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105 International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979. In force 22 June 1985; 1405 *United Nations Treaty Series* 118, as amended.

106 See the maps in Chilean Ministry of Defense's 2010 publication *El Libro de la Defensa Nacional de Chile* (available at <www.defensa.cl/libro-de-la-defensa-nacional-de-chile/libro-de-la-defensa-2010>), 1st Part 'El Estado De Chile', at 37 and 44.

107 These references are now included in Articles 43 and 172 (cf. consolidated text of the General Law General Law No. 18.892, note 103 *supra*, as from 1 January 2013; available at <www.leychile.cl>).

108 Orrego Vicuña, note 102 *supra*, at 88–89.

109 *Ley No. 19.300 Sobre Bases Generales Del Medio Ambiente*, of 1 March 1994; consolidated version available at <www.leychile.cl>). See Art. 33(2).

110 *Ley No. 18.302 de Seguridad Nuclear*, of 16 April 1984. A reference to the mar presencial in Art. 4(1) was included by means of Law No. 19.825, of 1 October 2002 (see <www.leychile.cl>).

111 Art. 124(2).

112 The description in *El Libro de la Defensa Nacional de Chile*, note 106 *supra*, at 39–40 merely emphasizes Chile's special interests and responsibilities in the mar presencial, rather than claiming rights or jurisdiction.

113 Art. 4(1) of the Law on Nuclear Security, note 110 *supra*.

It is submitted that the mar presencial has above all had influence in the domain of fisheries management. Upon ratifying the UNCLOS in 1997, Chile issued various declarations which, among other things, asserted Chile's special interests with regard to straddling and highly migratory fish stocks in the high seas area adjacent to its EEZ. In the absence of agreement with high seas fishing States on the conservation and management of these stocks in the high seas, Chile reserved the right to exercise what it perceived to be its rights pursuant to Article 116 and other provisions of the UNCLOS as well as under general international law.[114] At the time, the negotiations on the Fish Stocks Agreement[115] had already been concluded, but not to Chile's satisfaction, which made it decide to not even sign the Agreement. Chile's 1997 position seemed more reminiscent of the special coastal State rights over fish stocks adjacent to its territorial sea under the HS Fisheries Convention,[116] despite the emergence of EEZs since then.

Also in 1997, a process began in the Permanent South Pacific Commission (CPPS) among Chile and its three other Members—Colombia, Ecuador and Peru—towards a regional fisheries agreement compatible with Chile's position as described above.[117] The other Members had not signed the Fish Stocks Agreement at the time either, and had in fact not even become parties to the UNCLOS. Ecuador finally became a party to the UNCLOS in 2012, while submitting a declaration that contains the same text as Chile's 1997 text described above.[118] In 2000 the CPPS Members adopted the Galapagos Agreement,[119] which gave coastal States a preferential role in high seas fisheries management. This could be regarded as the CPPS's regional implementation of the mar presencial. However, for a number of reasons—including opposition from

114 The Chilean declarations are available at <www.un.org/Depts/los>. Orrego Vicuña, note 108 *supra*, at 88 also links this position to the mar presencial.

115 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. In force 11 December 2001, 2167 *United Nations Treaty Series* 3; <www.un.org/Depts/los>.

116 See note 24 *supra*.

117 M.A. Orellana "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO" (2002) 71 *Nordic Journal of International Law* 55–81, at 63.

118 See <www.un.org/Depts/los>.

119 Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the Southeast Pacific, Santiago, 14 August 2000. Not in force, *Law of the Sea Bulletin*, 70–78, No. 45 (2001).

high seas fishing States and the EU—the Agreement never entered into force.[120] Chile's decision in 2005 to join Australia and New Zealand as co-initiators of the negotiations that culminated in the SPRFMO Convention,[121] implied that it no longer regarded the Galapagos Agreement's entry into force as realistic or desirable. As the SPRFMO Convention's Preamble indicates, it implements not only the UNCLOS but also the Fish Stocks Agreement. In early 2014, Chile seemed to be heading towards becoming a party to the Fish Stocks Agreement.[122]

This gradual change in Chile's position towards the Fish Stocks Agreement and the fact that Chile did not invoke the mar presencial in the ICJ proceedings instituted against it by Peru in 2008,[123] does not mean that Chile has abandoned the mar presencial, however. The zone remains included in its legislation and Chile continues to exert influence on fishing in the mar presencial by foreign vessels—in particular those targeting swordfish and jack mackerel—by exercising port State jurisdiction.[124] Whether or not Chile's practice is consistent with in particular international trade law remains an unresolved question. It could have been addressed by two separate but related dispute settlement procedures on swordfish between the EU and Chile under the World Trade Organization (WTO) and the UNCLOS instituted in 2000,[125] but these were discontinued in 2010 and 2009 respectively.[126] Another opportunity to shed some light on the question arose in 2013 when Denmark in respect of

120 See E.J. Molenaar "Non-Participation in the Fish Stocks Agreement. Status and Reasons" (2011) 26 *International Journal of Marine and Coastal Law* 195–234, at 202.

121 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, Auckland, 14 November 2009. In force 24 August 2012; <www.southpacificrfmo.org>.

122 Report of the Tenth round of Informal Consultations of States Parties to the Fish Stocks Agreement (April 2014; available at <www.un.org/Depts/los>), at para. 14.

123 See note 98 *supra*.

124 See, *inter alia*, Art. 165 of the General Law No. 18.892, note 103 *supra*, as implemented in part by Decree No. 123, of 3 May 2004 (*Aprueba Política de uso de Puertos Nacionales por Naves Pesqueras de Bandera Extranjera que Pescan en Alta Mar Adyacente*), as amended; and Chile's declaration of 28 August 2012 upon ratification of the PSM Agreement (Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, 22 November 2009. Not in force; <www.fao.org/Legal>).

125 See Orellana, note 117 *supra*; A. Serdy "See You in Port—Australia and New Zealand As Third Parties in the Dispute Between Chile and the European Community over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas" (2002) 3 *Melbourne Journal of International Law* 79–119; and E.J. Molenaar "Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage" (2007) 38 *Ocean Development & International Law* 225–257, at 237–239.

126 For information see <www.wto.org> and <www.itlos.org>.

the Faroe Islands instituted two separate but related dispute settlement procedures on Atlanto-Scandian herring against the EU under the WTO and the UNCLOS, but these were terminated in 2014.[127]

In line with the key purpose of this chapter, the question is whether or not Chile's mar presencial qualifies as a new maritime zone defined at the outset. It is submitted that it does. The mar presencial has a clear spatial definition based on adjacency and enclosure by land territory and maritime zones. Moreover, as Chile explicitly exercises jurisdiction within the area, it is more than just a sphere of interest or influence. This conclusion is not affected by the fact that such jurisdiction does not seem to have been exercised by means of at-sea enforcement in the mar presencial but apparently exclusively by means of port State jurisdiction. In view of the unresolved question as to the consistency of port State jurisdiction with, in particular, international trade law and as there are no indications that Chile has imposed port State enforcement measures that are more onerous than denial of entry or use, the mar presencial as applied in practice is not necessarily inconsistent with international law.

Grey Areas

In case a maritime boundary between adjacent States is not based entirely on equidistance and delimits the water column as well as continental shelves beyond 200 nm without changing direction, it creates a so-called grey area.[128] Grey areas are for the purpose of this chapter defined as areas located within 200 nm from the baselines of one State but situated on the other State's side of the maritime boundary. From the perspective of the other State, they are beyond 200 nm from its baselines even though they are situated on its side of the maritime boundary. In case the two States do not make an arrangement, the water column of such waters is therefore subject to the regime of the high seas.

An example of a grey area is the 'Special Area' in Figure 10.1 below; this figure *inter alia* depicts the maritime boundary in the Barents Sea and Arctic Ocean agreed between Norway and the Russian Federation by means of the

127 For information see <www.wto.org> and <www.pca-cpa.org>.

128 A.G. Oude Elferink "Does Undisputed Title to a Maritime Zone Always Exclude Its Delimitation: The Grey Area Issue" (1998) 13 *International Journal of Marine and Coastal Law* 143–192. A similar situation applies to the territorial sea. See also paras. 464–474 of the ITLOS Judgment in the *Bay of Bengal* case, note 30 *supra*, which led to an overlap between the outer continental shelf of Bangladesh and a residual EEZ of Myanmar.

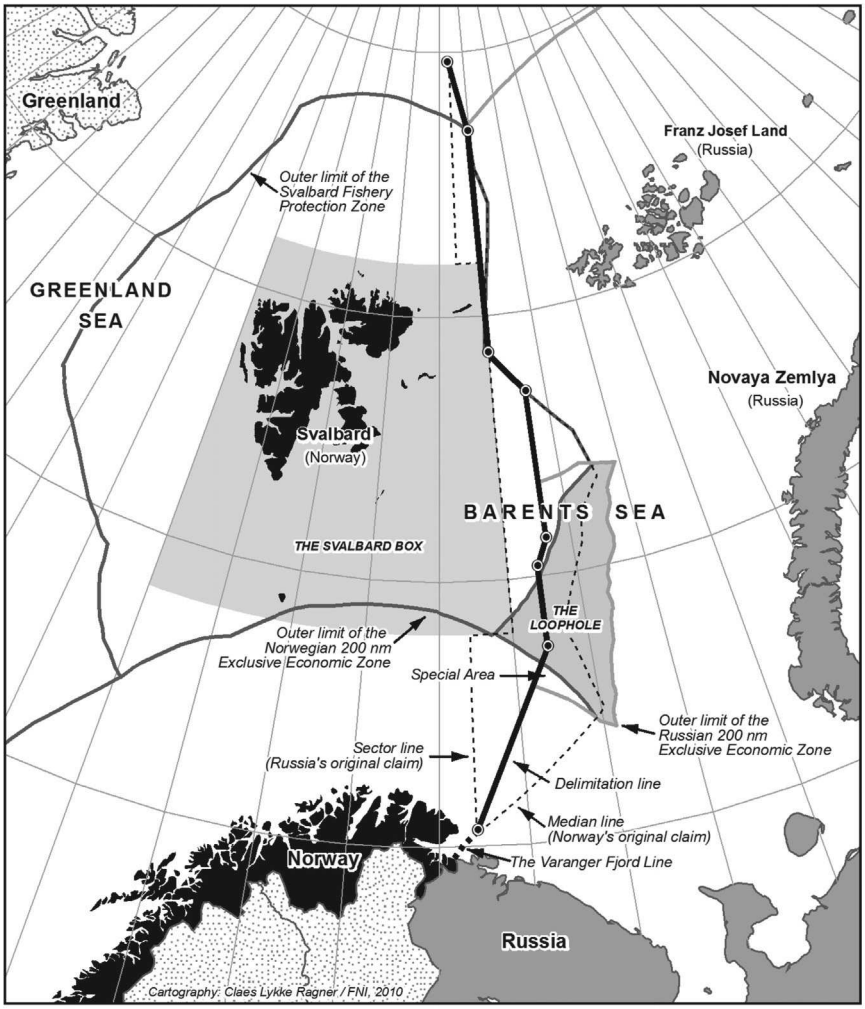

FIGURE 10.1 *Maritime boundaries around Svalbard.*[129]

Murmansk Treaty.[130] The agreed maritime boundary—which comprises both the water column and the continental shelf—creates on the eastern side two areas which are within 200 nm from Norwegian baselines but beyond 200 nm

129 Map reprinted with permission from Claes Lykke Ragner, the Fridtjof Nansen Institute, who created the map which appeared in the article by Ø. Jensen "The Barents Sea" (2011) 26 *The International Journal of Marine and Costal Law* 151–168, at 154.

130 Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (Murmansk,

from Russian baselines. Within one of the two areas—namely the one that is within 200 nm of the Norwegian mainland—the Russian Federation is entitled pursuant to Article 3 of the Murmansk Treaty to the sovereign rights and jurisdiction "derived from exclusive economic zone jurisdiction that Norway would otherwise be entitled to exercise under international law".[131] These spatially defined Norwegian sovereign rights and jurisdiction are thus ceded to the Russian Federation by means of the Murmansk Treaty.

As no such arrangement has been made for the more northerly area—which lies within 200 nm of Svalbard's baselines—its waters have become part of the high seas. The spatial scope of the so-called Loophole (i.e. the high seas pocket in the Barents Sea) is therefore enlarged with this more northerly area. It can be assumed that the absence of a similar arrangement for the more northerly area is directly linked to the Spitsbergen Treaty and the diverging views of Norway and other contracting parties on the Treaty's spatial scope.

As far as could be ascertained, the only other example where EEZ-derived sovereign rights and jurisdiction within grey areas have been ceded by one coastal State to another concerns the maritime boundary between the United States and the Soviet Union in the Bering Sea and the Arctic Ocean laid down in the Washington Agreement.[132] The Agreement is not yet in force but has been provisionally applied from 15 June 1990.[133] By means of Article 3 of this Agreement—whose key phrases are identical to those in the Murmansk Treaty—the United States ceded its EEZ-derived sovereign rights and jurisdiction in one small grey area to the Russian Federation and the Russian Federation ceded its EEZ-derived sovereign rights and jurisdiction in three larger grey areas to the United States.[134] To compensate for this, the maritime boundary was shifted somewhat to the east in the central part of the Bering Sea.[135]

Grey areas are not mentioned in the UNCLOS and can also not be convincingly argued to be new maritime zones for the purpose of this chapter. After all, the sovereign rights and jurisdiction that can be exercised within grey

15 September 2010. In force 7 July 2011; *United Nations Treaty Series* Reg. No. 49095. English text available at <www.un.org/Depts/los>).

131 See in this context also Art. 2 of the Murmansk Treaty.

132 Agreement between the United States of America and the Union of Soviet Socialist Republics on the maritime boundary (Washington D.C., 1 June 1990. Not in force, 90 *International Legal Materials* 942 (1990); <www.un.org/Depts/los>).

133 Ibid.

134 See the Map in *International Maritime Boundaries. Vol. 1*, J.I. Charney and L.M. Alexander (eds), (Martinus Nijhoff Publishers, Dordrecht/Boston/London: 1993) 453.

135 Oude Elferink, note 128 at 158.

areas by the receiving coastal States are derived from the EEZ. Rather than the principle *in maiore stat minus*, 'derived' refers here to acquisition of title from another coastal State based on the latter's entitlement under international law. Moreover, the grey areas are incorporated in the geographical scope of the receiving coastal State's EEZ while noting their treaty-based acquisition.[136] The cession of the EEZ-derived sovereign rights and jurisdiction can be a concession by the 'granting State' in exchange for the receiving State's concession to accept a maritime boundary that is not based on equidistance, but can also be the result of the two States agreeing that equidistance is not an appropriate method in the case at hand.

Summary and Conclusions

This chapter has shown that state practice since the entry into force of the UNCLOS in 1994 has culminated in various maritime zones that are not mentioned in the UNCLOS and that were also not part of customary international law in 1994. Practically all of these new maritime zones are entirely consistent with current international law. Maritime concepts such as Peru's maritime domain arguably do not—or at any rate no longer—qualify as new maritime zones as defined in this chapter.

Most of the new maritime zones are 200 nm maritime zones derived from the EEZ. Their consistency with international law is ensured by the claiming States' being parties to the UNCLOS and/or the customary status of EEZs and EFZs, as well as the principle *in maiore stat minus* (who can do more can also do less). Current state practice consists of the Croatian EFPZ, the Slovenian and Italian EPZs and the 200 nm maritime zones designated by the United Kingdom off some of its overseas territories. Their designation reflects a lack of ability and/or willingness to exercise all the sovereign rights and jurisdiction offered by the EEZ, which can be explained by a wide range of reasons, including disputes on title to territory.

The FPZ established by Norway off Svalbard is derived from the EFZ and relies on its customary status. Rather than designating an EFZ or even an EEZ, however, Norway opted for an FPZ to take account of the diverging views among States on the spatial scope of the Spitsbergen Treaty. A limited number of parties to the Spitsbergen Treaty have fisheries access to the Svalbard FPZ, largely based on historic track records. In view of the uniqueness of the

136 See Art. 3(3) of the Washington Agreement, note 132 *supra*, and Art. 3(2) of the Murmansk Treaty, note 129 *supra*.

situation—in particular the fact that sovereignty over Svalbard was granted by, and subject to, the Spitsbergen Treaty—no other coastal States will feel compelled or have an incentive to establish a similar maritime zone off part or all of their land territory. Despite their identical names, the Spanish and Libyan FPZs are really *de facto* EFZs.[137]

Contiguous archaeological zones are new maritime zones that do not rely on the principle of *in maiore stat minus*, but rather build on Article 303(2) of the UNCLOS, Article 8 of the UCH Convention and customary international law. Current state practice includes the 'maritime cultural zones' established by Mauritius, South Africa and Tonga up to 24 nm from their baselines in which they claim general jurisdiction over archaeological and historical objects or underwater cultural heritage. Further state practice could follow, for instance by States that already claim such jurisdiction without explicitly designating a dedicated maritime zone.[138] States may also rename their existing contiguous zone in order to reflect its broader substantive scope.

Colombia arguably went far beyond the discretion it has in this regard by establishing an Integral Contiguous Zone in 2013. This is undeniably a new maritime zone—both in geographical extent and in substantive scope—but it is at least in some respects clearly inconsistent with the current international law (of the sea). This includes the fact that the zone overlaps with Nicaragua's EEZ in conjunction with the fact that it extends beyond a maritime boundary established by the ICJ. The ICJ will have an opportunity to rule on these matters in the case brought by Nicaragua against Colombia in response to Colombia's proclamation of the zone as well as other Colombian actions.

Leaving aside the grey areas obtained by the Russian Federation and the United States through treaty-based cession, only one State has established a maritime zone beyond 200 nm: Chile by means of its mar presencial. The mar presencial has a clear spatial definition based on adjacency and enclosure by land territory and maritime zones. Moreover, Chile explicitly claims prescriptive jurisdiction over vessels carrying nuclear substances or radioactive materials transiting through the mar presencial and exerts influence on foreign vessels fishing in the mar presencial by exercising port State jurisdiction. Accordingly, the mar presencial qualifies as a maritime zone rather than a sphere of interest or influence. It is submitted that this conclusion is not affected by the fact that such jurisdiction does not seem to have been exercised by means of at-sea enforcement in the mar presencial but apparently exclusively by means of port

137 The Spanish FPZ has not been formally revoked but may in practice be subsumed in its EEZ (see note 42 *supra*).

138 For instance Italy (see note 85 *supra* and accompanying text).

State jurisdiction. In view of the unresolved question as to the consistency of port State jurisdiction with in particular international trade law and as there are no indications that Chile has imposed port State enforcement measures that are more onerous than denial of entry or use, the mar presencial is not necessarily inconsistent with international law.

A more general conclusion is that none of these new maritime zones are exclusively meant to regulate shipping. While both Canada and the United Kingdom had adopted specific enactments over shipping up to 100 or 200 nm from their baselines before they established EEZs, their approach arguably falls short of explicitly designating a dedicated maritime zone. As noted above, the United Kingdom's jurisdiction over vessel-source pollution related to the so-called 'controlled waters' but has been revoked upon the coming into force of its North Atlantic EEZ. Canada's 1970 Arctic Waters Pollution Prevention Act (AWPPA)[139] continues to apply to the defined 'Arctic waters' without making mention of a so-called 'pollution prevention zone', although this was in reality established. While the AWPPA was undoubtedly inconsistent with international law at the time of its enactment, it is now largely consistent with Article 234 of the UNCLOS. If Canada's 2010 Northern Canada Vessel Traffic Services (NORDREG) Regulations[140] and the NORDREG Zone established by its Section 2 are also consistent with Article 234 of the UNCLOS, is nevertheless disputed.[141] For the purpose of this chapter, it is submitted that the NORDREG Zone can be categorized as an issue-specific area designation rather than a maritime zone.

Another general conclusion based on the state practice discussed here is that the package-deal of the division of seas and oceans in maritime zones laid down in the UNCLOS has remained essentially unaltered during the period of more than three decades since its adoption. Creeping coastal State jurisdiction by means of establishing new maritime zones thus largely came to a standstill at the end of UNCLOS III. However, creeping coastal State jurisdiction can also occur without establishing new maritime zones. Coastal States could for instance expand their maritime zones significantly by adopting unscrupulous interpretations of the UNCLOS, provisions on straight baselines, islands and rocks, and the outer limits of the continental shelf, or claim broader enforce-

139 Act of 26 June 1970, as amended; currently R.S.C., 1985, c. A-12 (available at <laws-lois.justice.gc.ca>).

140 SOR/2010-127 (available at <laws-lois.justice.gc.ca>).

141 See E.J. Molenaar "Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region" (2014) 45 *Ocean Development & International Law* 272–298, at 277–278.

ment jurisdiction in the high seas adjacent to their maritime zones than what they are entitled under international law.

Part of the reason why the UNCLOS package-deal on maritime zones has withstood the test of time, are the alternatives for unilateral coastal State jurisdiction that have been developed. One such alternative is the mechanism of so-called 'cooperative legislative competence', which allows coastal or strait States to impose specific standards on ships in lateral passage through EEZs or straits used for international navigation subject to the transit passage regime after having secured IMO approval.[142]

The UNCLOS package-deal on maritime zones has been exceptionally stable for more than three decades and may also remain so in the foreseeable future. One upcoming issue relates to the impact of climate change on entitlement to maritime zones. Pursuant to current international law, rising sea-levels will, *inter alia*, change the legal status of insular formations (islands, rocks and low-tide elevations) and thereby their entitlement to maritime zones. International law could nevertheless be changed—whether by means of treaties, decisions of intergovernmental organizations or (other) state practice—to address the inequity which would otherwise materialize for in particular small island developing States that bear little or no responsibility at all for global climate change. Rather than creating new maritime zones, such progressive development of international law would accept that entitlement to maritime zones at an agreed critical date would be definite and not susceptible to sea-level rise.

142 Ibid., at 282–283.