

The Legal Nature of Coastal States' Rights in the Maritime Areas under UNCLOS

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1

The notion of maritime areas

- Maritime areas are areas of the sea for which international law answers two questions.
- First, where does it begin and where does it end?
- Second, which are the rights that different categories of States can exercise in it (the applicable regime) ?
- In today's international law there are numerous maritime areas, reflecting the variety of activities conducted in the seas in the present time.

2

The maritime areas under UNCLOS

- The maritime areas envisaged by UNCLOS are:
- **Internal waters.** They are mentioned in various articles, but their regime is not fully elaborated
- **The territorial sea.** Specific provisions on straits complete its treatment
- **The contiguous zone**
- **Archipelagic waters**
- **The exclusive economic zone**
- **The continental shelf**
- **The high seas**
- **The International Seabed Area**
- The **"archeological zone"** whose limits coincide with those of the contiguous zone

3

The coastal States' rights in the various maritime areas: sovereignty, sovereign rights, jurisdiction

- **"Sovereignty", "sovereign rights" and "jurisdiction"** are rights to conduct certain activities to the exclusion of others, in opposition to the freedoms recognized to States in the high seas which are rights to claim non-interference by other States
- Too much importance should not be given to a search for the difference between these concepts.
- The rights they entail are to be ascertained by an analysis of the rights which specific articles of UNCLOS recognize to the coastal State.

4

Limits of coastal States' rights: (I) the rights of other States

- The rights recognized to other States in the different maritime areas are the limits of the rights of the coastal States
- *For example:*
- The coastal State's sovereignty in the territorial sea is limited by the right of innocent passage of other States
- Sovereign rights and jurisdiction of the coastal State in the EEZ are limited by the freedoms of the high seas recognized to all States under UNCLOS article 58

5

(II) Conflicts and the “due regard” rule

- The exercise of rights by the coastal State and of freedoms by other States in the EEZ may give rise to conflicts
- UNCLOS repeats for this situation a rule adopted for the conflict between the exercise of freedoms by different States on the high seas
- in the EEZ the rights of the coastal State shall be exercised with “due regard to the rights and duties of other States” (UNCLOS art. 56, para 2) and the freedoms of all States shall be exercised with “due regard to the rights and duties of the coastal State” (art. 58, para. 3).

6

(contn.) The meaning of the due regard rule

- The “due regard” rule does not grant priority to the rights of the coastal State or to the freedoms of other States.
- It is an obligation for both States to exercise their rights respecting those of the other States and to endeavour in good faith to find accommodations permitting the exercise of the rights of both
- The situations included in disputes mentioned in art. 297 pra 1 a & b, are those to which the reciprocal “due regard” rule applies.

7

Problems of classification

In light of UNCLOS articles 56, 58 and 59 the following problem of classification arises: whether a certain activity in the EEZ is included:

- among those under the coastal State's sovereign rights or jurisdiction set out in article 56
- or among those to which high seas freedoms apply under article 58,
- or whether the activity cannot be considered as included in either article, according to the “default” rule of article 59.

8

Examples

- hydrographic surveys conducted in the exclusive economic zone
- navigation by fishing vessels crossing the exclusive economic zone
- bunkering of vessels in the exclusive economic zone
- military activities in the EEZ
- removal of historical or archaeological objects from the continental shelf beyond 24 miles

9

The role of dispute-settlement

- When one of the questions exemplified above finds an answer in a judicial or arbitral decision, this is an important step in clarifying the meaning of the relevant provisions.
- This has happened as regards **bunkering** in the EEZ. The *Virginia G* 2014 judgment of ITLOS states:
- “The regulation by the coastal State of bunkering of foreign vessels fishing in the exclusive economic zone *is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the Convention read together with article 62, paragraph 4, of the Convention*”(para 217)
- However, coastal State does not have the competence it has over bunkering of foreign fishing vessels “with regard to other bunkering activities” (para 223)

10

Maritime areas requiring proclamation and not

Most maritime areas require proclamation, with the exception of the continental shelf (art. 77, para 3) and perhaps the territorial sea within three miles.

As regards the territorial sea beyond three nm and the continental shelf beyond 200 nm a form of proclamation is necessary.

For the CS beyond 200 nm, absent a proclamation at the conclusion of the procedure described in article 76, the outer limits are not “final and binding” under article 76, para 8, and other States are justified in considering that the seabed beyond 200 nm cannot be opposed to them as continental shelf.

11

Actual and potential maritime areas

- “Potential maritime areas” are areas over which the coastal State is entitled to proclaim a maritime area but has not yet done so.
- *Examples:*
- yet to be established archipelagic waters,
- the area up to 200 nm from the baselines where the coastal State has not yet proclaimed an EEZ
- the area adjacent to the territorial sea and up to 24 miles from the baselines over which the coastal State is entitled to establish a contiguous (and/or archaeological) zone.
- the continental shelf beyond 200 nm, before the delineation of its limits according to article 76 (on this some separate development below).

12

The regime applicable to potential maritime areas of a coastal State

- The regime applicable is that of the maritime area existing at present.
- So the regime of the waters overlaying the continental shelf (within 200 nm) in case no EEZ has been proclaimed, remains the same high seas regime applicable beyond the 200 mile limit, consistently with article 78, para 1, of UNCLOS.
- the fact that a certain area is potentially under the coastal State's jurisdiction has an impact on the application of the "due regard" rule
- As regards activities that are free but may in the future fall under the coastal States' jurisdiction, something more than due regard may be required: third States should behave in such a way as not to jeopardize legitimate expectations of the coastal States.

13

The special case of the continental shelf beyond 200 nm

- The peculiarity of the CS beyond 200nm is that while its proclamation belongs to the sovereign decision of the coastal State, the delineation of its external limit, in order to be "final and binding" (opposable to all States parties to UNCLOS) requires a procedure involving the CLCS and that the outer limits must be "established" "on the basis" of the CLCS recommendation
- The procedure verifies whether the conditions concerning the outer edge of the continental margin required by article 76 are met.

14

Follows (1)

- The procedure is not limited to the determination of the external limit of the continental shelf. It also concerns the conditions for the coastal State's entitlement to that part of the shelf.
- The need for proclamation establishes an exception to the general rule of article 77, para 3.

15

Follows (2): The regime: A) once the outer CS is established

- Once established through a proclamation on the basis of the CLCS recommendation, the regime of the continental shelf beyond 200 nm is the same as that of the continental shelf within 200 nm.
- There are, however, two differences:
- 1) the coastal State is bound to make payments or contributions under article 82;
- 2) the coastal State has (article 246, para 6) its discretion excluded in granting consent for scientific marine research of direct significance for the exploration or exploitation of marine resources, unless research is to be conducted in "designated areas" in that part of the shelf.

16

Follows (3): B) before the outer CS is established under art. 76.

- As for other potential maritime areas, the regime is that of the areas existing at present: the seabed is the seabed of the high seas and part of the International Seabed Area.
- Research on it remains free and open to the Authority under article 143, para 2. The specific rules for the laying of cables and pipelines on the CS of art. 79 do not apply and freedom of laying cables and pipelines in the high seas remains applicable. Manganese nodules and other mineral resources fall under the regime of the Area
- Pending the procedure and up to proclamation on the basis of the recommendations of the CLCS the regime remains the same as described above. Still, it may be argued that the other States' conduct should be inspired by prudence

17

Overlapping maritime areas. Grey areas

- "The Convention is replete with provisions that recognize to a greater or lesser degree the rights of one State within the maritime zones of another" (*Bangladesh/ India* award of 7 July 2014 para 507)
- A special type of overlap of maritime areas are the "**grey areas**" which are the consequence of lateral delimitation of maritime areas continuing beyond the 200 nautical mile limit, and effected by a line different from the equidistant one. These zones lie within 200 nm from one of the States in dispute and beyond 200 nm from the other
- "the boundary identified by the Tribunal delimits only the parties' sovereign rights to explore the continental shelf and to exploit "the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species" as set out in article 77 of the Convention. Within this area, however, the boundary does not otherwise limit India's sovereign rights in the exclusive economic zone in the superjacent waters (*Bangladesh/India* award para 505).

18

Grey areas regime

- As regards the applicable regime, the Bay of Bengal judgment and award recall: (a) the due regard rule; and (b) the possibility of cooperative arrangements between the two States
- The *Bangladesh/Myanmar* judgment specifies: "There are many ways in which the Parties may ensure the discharge of their obligations in this respect, including the conclusion of specific agreements or the establishment of appropriate cooperative arrangements. It is for the Parties to determine the measures that they consider appropriate for this purpose" para 476).

19

Disputed maritime areas (1)

- Disputed maritime areas are portions of the seas over which two (or sometimes more) States' claims of sovereign rights or jurisdiction overlap
- What is the regime of the disputed maritime area pending agreement or judicial settlement?
- *As regards the States whose claims overlap*, they may assume two different attitudes: A) they may try to establish as many facts as possible that strengthen their claim; B) they may give priority to avoiding the escalation of the dispute, abstaining from acts that may cause incidents.
- Arts. 74, para 3, and 83, para 3 envisage this situation. They are inspired by the general idea of good faith and may provide criteria useful for assessing the conduct of the contending States.

20

Disputed maritime areas (2)

- *For third States* the disputed area must be considered as under the sovereign rights or jurisdiction of a coastal State, although whether such coastal State is one or the other disputing ones is not yet determined.
- To behave as if the disputed area belonged to one of the disputing States, for instance, by submitting to it requests for fishing or scientific research authorizations, may give rise to incidents as it may be seen, and often is seen, an unfriendly act by the other disputing State.

21

Conclusions

In today's international law there is a variety of maritime areas in which the coastal State exercises sovereignty, sovereign rights or jurisdiction to the exclusion of other States

- While every maritime area described in UNCLOS has its own regime consisting of rights and obligations of different categories of States, the interpretation of the provisions defining the activities to which these rights and obligations apply may give rise to difficulties.
- The picture of the different areas and of their regime in UNCLOS is a static one.
- Difficulties arise when transformation occurs or may occur and the picture becomes dynamic. The due regard rule and good faith concepts – together with the possibility of submitting the question to adjudication – may be helpful.

22