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**Coastal States' rights in the
maritime areas under UNCLOS**

Tullio Treves

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DIREITO DO MAR E DIREITO MARÍTIMO:
ASPECTOS INTERNACIONAIS E NACIONAIS

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Stefan Kirchner

Coastal States' rights in the maritime areas under UNCLOS*

Tullio Treves**

ABSTRACT

Maritime areas (or zones) are areas of the sea for which international law prescribes spatial limits and a regime. In other words, for each maritime area, 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? Only the second question is of interest for the purposes of the present paper. While traditional international law knew only two maritime areas –the territorial sea and the high seas – in today's international law there are numerous different maritime areas, reflecting the variety of activities conducted in the seas in the present time. As UNCLOS is very widely ratified and in most parts considered to correspond to customary international law, in the present paper I will consider the maritime areas as described in it. There are, nonetheless, also maritime areas which are not envisaged in UNCLOS and whose compatibility with it may be discussed.

Keywords: Maritime areas. Law of the sea. UNCLOS. Coastal States' rights.

1. THE NOTION OF MARITIME AREAS

Maritime areas (or zones) are areas of the sea for which international law prescribes spatial limits and a regime. In other words, for each maritime area, 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?

Only the second question is of interest for the purposes of the present paper.

While traditional international law knew only two maritime areas –the territorial sea and the high seas – in today's international law there are numerous different maritime areas, reflecting the variety of activities conducted in the seas in the present time.

As UNCLOS is very widely ratified and in most parts considered to correspond to customary international law, in the present paper I will consider the maritime areas as described in it. There are, nonetheless, also maritime areas which are not envisaged in UNCLOS and whose compatibility with it may be discussed.

2. THE MARITIME AREAS UNDER UNCLOS

The approach of UNCLOS is (although with exceptions) basically a “zonal” one. It sets out the rules on the law of the sea in chapters, sometimes called “parts” and sometimes “sections”, concerning the different maritime

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areas.

The maritime areas envisaged by UNCLOS are

- a. Internal waters. They are mentioned in various articles, but their regime is not fully elaborated, probably because it was felt that it does not entirely belong to international law,
- b. The territorial sea. Specific provisions on straits complete its treatment,
- c. The contiguous zone,
- d. Archipelagic waters,
- e. The exclusive economic zone,
- f. The continental shelf,
- g. The high seas,
- h. The International Seabed Area, and
- i. An area whose limits coincide with those of the contiguous zone, in which the coastal State may submit to its approval the removal of historic and archaeological objects (sometimes called archaeological zone).
- j. It is important to distinguish between maritime areas in which the coastal States enjoys a privileged position as compared to that of other States, and maritime areas in which all States enjoy equal rights. The high seas and the International Seabed Area belong to the second category, while all the other areas listed belong to the first.

3. THE COASTAL STATES' RIGHTS IN THE VARIOUS MARITIME AREAS: SOVEREIGNTY, SOVEREIGN RIGHTS, JURISDICTION

The rights of the coastal states according to UNCLOS consist in “sovereignty” as regards the territorial sea and archipelagic waters; in “sovereign rights” as regards the continental shelf and the resources and economic activities in the exclusive economic zone; and in “jurisdiction” as regards artificial islands, installations and structures, marine scientific research and the protection of the marine environment in the exclusive economic zone. The rights of the coastal State in the contiguous zone are indicated as rights of control, and those in the archaeological zone as right to submit to

approval the removal of certain goods.

“Sovereignty”, “sovereign rights” and “jurisdiction” are rights to exclusivity, namely to conduct certain activities to the exclusion of others. They are to be seen in opposition to the freedoms recognized to States in the high seas which are rights to claim non-interference by other States.

The terminology used in UNCLOS seems to suggest that the coastal States’ rights indicated with the term “sovereignty” are more intense, more exclusive than “sovereign rights”, and that “sovereign rights” are more intense, more exclusive than “jurisdiction”. While this may be true, too much importance should not be given to a search for the difference between these concepts. The rights they entail are to be ascertained, more than by the meaning of the terms, by an analysis of the rights which specific articles of UNCLOS (for instance those set out in parts V and XIII of UNCLOS, concerning fisheries and scientific research in the EEZ) and general international law recognize to the coastal State.

Sovereignty on the territorial sea “is exercised subject to the Convention and other rules of international law” (UNCLOS art. 2, para. 3). Sovereignty on archipelagic waters “is exercised according to this Part”, namely Part IV (UNCLOS art. 49, para. 3). Sovereign rights in the exclusive economic zone and on the continental shelf are recognized for “the purpose” of exploring and exploiting resources (UNCLOS art. 56, para. 1a, and 77, para. 1) or “with regard to other activities for the exploration and exploitation of the [exclusive economic] zone” (UNCLOS art. 56, para. 1(a)).

The minor importance of distinguishing between sovereign rights and jurisdiction is confirmed by article 297. This article defines limitations to compulsory jurisdiction for disputes concerning the exclusive economic zone and the continental shelf, indirectly contributing to the definition of the regime of the exclusive economic zone. Paragraph 1 considers together disputes having to do with “the exercise of sovereign rights or jurisdiction”. Paragraphs 2 and 3, dealing respectively with disputes concerning marine scientific research, a subject for which the coastal State’s rights are denominated “jurisdiction” in article 56, and disputes concerning fisheries, a subject included in the notion of “sovereign rights” under the same article, provide for a limitation to compulsory jurisdiction in very similar terms.

4. LIMITS OF COASTAL STATES' RIGHTS: THE RIGHTS OF OTHER STATES, THE "DUE REGARD" RULE

The rights of the coastal States find their limit in the rights recognized to other States in the different maritime areas. The coastal State's sovereignty in the territorial sea is limited by the right of innocent passage of other States. The archipelagic State's sovereignty in its archipelagic waters is limited by the rights of innocent passage and of archipelagic sea lanes passage of other States. Sovereign rights on the continental shelf for the purpose of the exploration and exploitation of mineral resources, find a limit (in the absence of an overlapping exclusive economic zone) in the freedom to conduct other activities on the seabed and in the overlaying high seas waters. Sovereign rights and jurisdiction of the coastal State in the exclusive economic zone are limited by the freedoms of the high seas recognized to all States in the economic zone under article 58. The freedoms recognized to all States in the high seas are limited by the freedoms recognized therein to all States.

The exercise of rights by the coastal State and of freedoms by other States in the exclusive economic zone may, in practice, give rise to conflicts. For instance, the intensive exercise by the coastal State of its exclusive right to fishing or to explore and exploit oil and gas resources, may conflict with the freedom of navigation or of laying cables and pipelines recognized in the same area to all States.

UNCLOS repeats for this situation a rule adopted for the conflict between the exercise of freedoms by different States on the high seas (Geneva High Seas Convention, art. 2, UNCLOS, art. 87, para. 2): in the exclusive economic zone 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). The obligation of the coastal State to exercise its rights over the continental shelf in a manner that does "not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention" set out in UNCLOS article 78, para. 2, (repeating in part art. 5, para. 1, of the Geneva Continental Shelf Convention) should, in my view, be read as equivalent to art. 56, para.

2 of UNCLOS quoted above.

This reciprocal "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. Rules granting priority to one or the other are usually adopted by agreement, as for instance it happens for the freedom of navigation of vessels of different degree of manoeuvrability on the high seas in the rules prescribed by the COLREGS.

The policy to avoid granting a preference, in the exclusive economic zone, to either the sovereign rights and jurisdiction of the coastal State or the freedoms of the other States is reflected in article 297, para. 1, of UNCLOS, one of the key rules concerning the settlement of disputes. While excluding from compulsory settlement disputes concerning the exercise by the coastal State of its sovereign rights or jurisdiction, this provision makes an exception to this exception – in other words: submits them to compulsory settlement – for disputes concerning alleged contraventions by the coastal State in regard to the freedoms recognized in article 58, and for disputes concerning the alleged action by a State exercising such freedoms in contravention of the Convention or of laws and regulations adopted by the coastal State. The situations included in these disputes are those to which the reciprocal "due regard" rule applies.

5. PROBLEMS OF CLASSIFICATION: ROLE OF THE SETTLEMENT OF DISPUTES

As regards the regime of the exclusive economic zone, one of the most difficult questions raised by the rules of UNCLOS is to determine which activities belong to the categories for which the Convention attributes sovereign rights or jurisdiction to the coastal State, and which fall under the categories to which the freedoms of the high seas are applicable in the exclusive economic zone. This is a problem of classification. In light of the relevant provisions of UNCLOS (articles 56, 58 and 59), the problem consists in determining whether a certain activity in the exclusive economic zone is included in the list of activities under the coastal

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

The problem arises for issues such as the following.

- Are hydrographic surveys conducted in the exclusive economic zone to be considered "scientific research" and thus included in the coastal State's jurisdiction and require the coastal State's consent under art. 246?
- Is navigation by fishing vessels crossing the exclusive economic zone in order to reach the high seas to be considered as "navigation" and thus free from any obligation of prior notification or authorization under article 58, para. 1, or assimilated to fishing under article 56, para. 1?
- Is the bunkering of vessels in the exclusive economic zone to be considered as the exercise of freedom of navigation under article 58 or must it be assimilated to the activity conducted by the vessel receiving bunker so that, for instance, bunkering fishing vessels would be assimilated to fishing and fall under the sovereign rights of the coastal State under art. 56, para. 1, while bunkering a cargo vessel, or a pipeline or cable laying vessel would be assimilated to navigation or laying of cables and pipelines and thus fall under the freedom of the high seas under art. 58, para. 1? Or is bunkering an activity not attributed under UNCLOS to the coastal State or to other States thus falling under the "default" article 59?
- Are military activities (or certain military activities) included in the notion of "other internationally lawful uses of the seas related" to the freedoms of navigation, overflight and laying of cables and pipelines "such as those associated with the operation of ships, aircraft and submarine cables and pipelines and compatible with the other provisions" of UNCLOS under article 58 para. 1? Or do they fall under the coastal State's jurisdiction, or are they to be considered as included in those envisaged by article 59?
- Are activities for the removal of historical or archaeological objects from the continental shelf

beyond 24 miles from the baselines to be considered as included in the freedoms of the high seas mentioned in article 58, or within the sovereign rights and jurisdiction of the coastal State under article 56, para. 1, or are they an example of non-attributed activities envisaged in article 59?

It is well known that each of the questions just exemplified, and similar others that could be raised, have been discussed by States and learned writers and that different opinions have been expressed. I will not enter into the substance of each of them. I would just like to observe that the answer depends on the interpretation of terms and expressions whose ambiguity was the result of compromise at the Third UN Conference on the Law of the Sea. The difficulties raised by this ambiguity – and by the consequent possibility of States to rely on their preferred interpretation – may, nonetheless, be substantially reduced by the fact that these questions of interpretation may, in most cases, be submitted – and submitted unilaterally by one party – to a judge or an arbitrator. The judgments and awards so adopted are, it is true, binding only for the parties to the dispute and for that particular dispute (UNCLOS art. 296, para. 2, and Annex VI, art. 33, paras. 1 and 2). It cannot be denied, however, that States, the international lawyers that counsel them, and, especially, judges and arbitrators called to adjudge future disputes, look at them with great respect.

So it is that when one of the questions exemplified above finds an answer in a judicial or arbitral decision, this answer enjoys authority and can be seen as an important step in clarifying the meaning of the relevant provisions.

This has happened as regards the question concerning bunkering in the exclusive economic zone which the International Tribunal for the Law of the Sea has had the opportunity to examine. In the early *M/V Saiga* and *M/V Saiga Nr. 2* cases the Tribunal clearly identified solutions that may be envisaged to answer the question: bunkering under the jurisdiction of the coastal State, bunkering as a freedom of the high seas, bunkering to follow the regime of the activities conducted by the vessel receiving bunker, bunkering as a non-attributed activity under article 59. The Tribunal did not, however, consider it necessary to make a choice, as it was able to settle the dispute submitted to it on another basis. The answer came in the *Virginia G* judgment

of 14 April 2014. The Tribunal focused on bunkering of fishing vessels, which was the subject matter of the dispute submitted to it. The Tribunal decided that:

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;

and added that:

This view is also confirmed by State practice which has developed after the adoption of the Convention (para. 217 of the Judgment).

The Tribunal does not generalize its decision on bunkering of fishing vessels by stating that in general bunkering is submitted to the regime applicable to the ship receiving bunker. It takes nonetheless a position – which certain judges regretted – according to which the coastal State does not have the competence it has over bunkering of foreign fishing vessels “with regard to other bunkering activities, unless it is otherwise determined in accordance with the Convention” (para. 223 of the Judgment).

6. MARITIME AREAS REQUIRING PROCLAMATION AND NOT

Another important distinction to be drawn between maritime areas in which the coastal State exercises exclusive rights is that between maritime zones that are automatically appurtenant to the coastal State and maritime zones which require that the coastal State has to claim or proclaim.

UNCLOS contains only one provision explicitly addressing this question. This is article 77, paragraph 3, according to which:

The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

It seems, however, difficult to deny that the rights of the coastal State on the territorial sea (at least up to 3 miles) are, as those on the continental shelf, automatically dependent on the exercise of the coastal State’s sovereignty on its territory.

To the contrary, the coastal State’s rights on archipelagic waters, on the contiguous zone, on the exclusive

economic zone and on the archaeological zone cannot be exercised unless there is a proclamation, in other words, unless the claim is made known to the other States. States’ practice is clear in this. These maritime areas, which are relatively new, are proclaimed by the coastal State, and no exclusionary right is claimed unless such proclamation has been made.

This distinction requires to be nuanced. In fact, the automatic right to exercise coastal State’s rights raises no difficulty only for the continental shelf up to 200 nm from the baselines. As regards sovereignty on the territorial sea (at least beyond a minimum of three nm) and the continental shelf beyond 200 nm a form of proclamation is necessary. Absent such a proclamation, the other States cannot know whether an area say 9 nm from the baseline is part of the territorial sea of the coastal State. In fact, States normally indicate in their legislation the width of their territorial sea. Absent a proclamation made at the conclusion of the procedure described in article 76 and in Annex II of UNCLOS, 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.

7. ACTUAL AND POTENTIAL MARITIME AREAS

We may call “potential maritime areas” areas over which the coastal State is entitled to proclaim a maritime area but has not yet done so. This is the case of yet to be established archipelagic waters, of the area up to a distance of 200 nm from the baselines where the coastal State has not yet proclaimed an exclusive economic zone, of 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. This is also the case of a 200 nm fishery zone which the coastal State may transform into an exclusive economic zone. This is also the case of the continental shelf beyond 200 nm, before the delineation of its limits according to article 76 (on this case some separate development below).

What is the regime applicable to potential maritime areas of a coastal State?

The answer, in principle, is that the regime applicable is that of the maritime area existing at present.

So the regime of the waters overlaying the continental shelf (we consider for the time being the shelf within 200 nm) in case no exclusive economic zone has been proclaimed, remains the same high seas regime applicable beyond the 200 mile limit, consistently with article 78, para. 1, of UNCLOS.

There are, however, certain peculiarities which must be noted. They concern: (i) the coexistence between the activities conducted under the regime of the area under the coastal State's jurisdiction and that of the activities conducted in the areas in which the coastal State's jurisdiction is only potential, and (ii) the question as to whether the fact that a certain area is an area potentially under the coastal State's jurisdiction has an impact on the application of the "due regard" rule.

As regards the first peculiarity, two examples seem interesting. The first concerns marine scientific research, the second, fisheries. As is well known, the freedom to conduct marine scientific research beyond the limits of the exclusive economic zone is limited to the water column (UNCLOS art 257), while research on the continental shelf falls under the consent regime set out in article 246 of UNCLOS. In concrete cases it may be difficult to distinguish research on the water column from research on the shelf. For instance, is research on the impact of sea-floor vents on water temperature and currents research on the shelf or research on the water column? Conflicts may arise in case the coastal State claims the right to authorize this kind of research and the State conducting the research project claims that no authorization is required.

As regards fisheries, fishing is typically conducted in the water column and falls squarely within the freedoms of the high seas. Still, international attention has recently been drawn to the so-called "deep-sea" fisheries conducted with gear that is likely to contact the seafloor with possible damage for vulnerable ecosystems. FAO Guidelines and a European Council Regulation (N. 734/2008) have been adopted in 2008 on this subject. The freedom of deep-sea fishing cannot be exercised in the waters overlying the continental shelf without taking into due consideration that the coastal State has sovereign rights concerning sedentary species and jurisdiction for the protection of the environment.

Coming now to the second peculiarity, in determining their attitudes third States must take into account the difference between activities that are free on the

high seas and cannot become submitted by decision of the coastal State to the coastal States' sovereign rights or jurisdiction and those that can. Third States may consider potential EEZs as not changing their high seas nature even in case an EEZ is established as regards those freedoms of the high seas that are mentioned in article 58 UNCLOS. In this case the application of the "due regard" rule is appropriate and sufficient. As regards activities that are free but may in the future fall under the coastal States' jurisdiction, it may be considered that something more is required.

8. THE SPECIAL CASE OF THE CONTINENTAL SHELF BEYOND 200 NM

The peculiarity of the potential maritime area that is the part of the continental shelf laying beyond 200nm from the baselines, 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 intervention of an international body set up within the framework of UNCLOS, the Commission for the Limits of the Continental Shelf (CLCS), and that the outer limits must be proclaimed ("established" in the language of art. 76, para. 8) "on the basis" of the CLCS recommendation.

The procedure aims at determining whether the conditions required in article 76 are met. These conditions concern the determination of the outer edge of the continental margin according to rules of paragraphs 4 to 6 of that article. The procedure is thus not limited to the determination of the external limit of the continental shelf. As clarified in the CLCS Scientific and Technical Guidelines (para. 2.2), it also concerns the conditions for the coastal State's entitlement to that part of the shelf. The need for proclamation should, in my view, be seen as an exception to the general rule of article 77, para. 3, which states that the rights of the coastal State over the continental shelf do not depend on any express proclamation.

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; and 2) the coastal State has, under 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.

What is the regime of the continental shelf beyond 200 nm before its external limits have been delineated according to art. 76? As for other cases of 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 continental shelf set out in article 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.

The conclusion that the high seas regime applies is strengthened by the consideration that – contrary to the situation, considered above, of a potential exclusive economic zone above the continental shelf within 200 nm – in this case the potential continental shelf underneath the high seas is not something the coastal State may unilaterally proclaim making it opposable to all States parties in any case. The conditions set out in article 76 may not be satisfied and a corresponding recommendation of the CLCS may never be granted. Moreover, the outer limit will remain uncertain until proclamation under article 76 (8).

Once the coastal state has submitted its application to the CLCS, it has made clear to the world that it has a claim to an area of the seabed beyond 200 nm. 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' behaviour in that part of the seabed and in the overlying waters should be inspired by prudence.

9. OVERLAPPING MARITIME AREAS: GREY AREAS

The recent *Bangladesh/ India* delimitation award (7 July 2014) observes that: “The Convention is reple-

te with provisions that recognize to a greater or lesser degree the rights of one State within the maritime zones of another” (para. 507). We have already discussed examples of such overlapping maritime areas as regards UNCLOS articles 56 and 58 concerning the freedoms of all states in the exclusive economic zone, and the limits to the sovereign rights and jurisdiction of the coastal State in the same zone, and mentioned other examples.

Judicial and arbitral decisions, and especially those concerning the Bay of Bengal (*Bangladesh v. Myanmar*, decided by ITLOS in 2012, and *Bangladesh v. India*, decided by an Annex VII arbitral Tribunal in 2014) highlight the existence of a special type of overlap of maritime areas. This overlap characterizes the so-called 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. In the *Bangladesh v. India* case, the delimitation line adopted divides an area which is part of Bangladesh's continental shelf beyond 200 nm from Bangladesh's baselines, and which is comprised within 200 miles from the Indian baselines and is consequently included in India's exclusive economic zone.

The Arbitral Tribunal (similarly to what ITLOS had decided in 2012) decided that:

Within the area beyond 200 nm from the coast of Bangladesh and within 200nm of the coast of India, 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 (para. 505).

As regards the applicable regime, the Tribunal recalls the due regard rule and mentions the possibility of cooperative arrangements between the two States. In doing so it follows, in a briefer form, the ITLOS *Bangladesh v. Myanmar* Judgment, which had stated:

The Tribunal recalls in this respect that the legal regime of the continental shelf has always coexisted with another legal regime in the same area. Initially that other regime was that of the high seas and the other States concerned were those exercising high seas freedoms. Under the Convention, as a result of

maritime delimitation, there may also be concurrent exclusive economic zone rights of another coastal State. In such a situation, pursuant to the principle reflected in the provisions of articles 56, 58, 78 and 79 and in other provisions of the Convention, each coastal State must exercise its rights and perform its duties with due regard to the rights and duties of the other. (para. 475)

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)

10. DISPUTED MARITIME AREAS

There are portions of the seas over which two (or sometimes more) States claim sovereign rights or jurisdiction, where, in other words, their claims overlap. This situation can give rise to negotiations and eventually to a delimitation agreement, or to a dispute settled by a judicial or arbitral decision which draws the delimitation line.

But what is the regime of the disputed maritime area pending agreement or judicial settlement?

As regards the States whose claims overlap, two opposing concerns may inspire their attitude. On the one hand, they may try to establish as many facts as possible that strengthen their claim, for instance, granting oil exploration or exploitation licences or authorizations for fishing or conducting marine scientific research. On the other hand, they may give priority to avoiding the escalation of the dispute, abstaining from acts as those mentioned above that may cause incidents.

The first attitude is likely to prevail when one State denies all validity to the other's claims, while the second is likely to be followed by States that acknowledge that there is a dispute.

UNCLOS articles on delimitation of the exclusive economic zone and of the continental shelf contain two identical provisions (arts. 74, para. 3, and 83, para. 3) which envisage this situation. These provisions set out two obligations the parties in dispute "shall make every effort" to comply with, pending agreement on delimitation in a spirit of understanding and cooperation:

1. to enter provisional arrangements of a practical nature; and

2. during this transitional period not to jeopardize or hamper the reaching of the final agreement.

These provisions are inspired by the general idea of good faith and may provide criteria useful for assessing the conduct of the contending States. A question of interpretation of this provisions concerns the meaning of "pending agreement": does the provisions concern all the time during which there is no agreement, or only the time since negotiations have started? Further questions, which seem to deserve consideration, are whether these provisions correspond to customary law and whether they could apply also to a contested area pending delimitation of maritime zones different from the exclusive economic zone and the continental shelf.

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 and it may be seen, and often is seen, an unfriendly act by the other disputing State.

11. SUMMING-UP AND CONCLUSIONS

In today's international law there is a variety of maritime zones in which the coastal State exercises sovereignty, sovereign rights or jurisdiction to the exclusion of other States. The rights of the coastal State are nevertheless limited by the rights of other States to conduct certain activities in the same areas. In the exclusive economic zone, the key rule to ensure the coexistence of the rights of the coastal State and those of other States is the "due regard" rule.

Difficulties may arise in order to classify certain activities as belonging to the category of those falling under the coastal States' rights or to those that are free for all States. The intervention of dispute-settlement bodies can be very important to solve this problem, as it has happened as regards bunkering.

Certain maritime areas are automatically appurtenant to the coastal State, others require proclamation. Also for certain parts of areas included among those not requiring proclamation, such as the territorial sea

beyond a minimum of three nm or the continental shelf beyond 200 nm, a form of proclamation is nevertheless necessary.

“Potential” maritime areas, namely areas in which the coastal State is entitled to establish a maritime area, but has not done so, are under the regime of that part of the sea as it is at present, but in the application of the due regard rule States should take into account the other State is entitled to transform the potential area in an actual one. The continental shelf beyond 200 nm is a special case of potential area because the transformation from potential into actual, so that the eventual proclamation becomes “final and binding”, requires a procedure, involving the CLCS, whose end result is uncertain as to whether the edge of the continental shelf margin is beyond 200 nm and, if so, as to where the external limit is.

Lateral delimitations, as those in the Bay of Bengal decisions of 2012 and 2014, adopting lines different from the equidistant one, give rise to “grey areas” lying within 200 nm from one State and beyond from the other. These are areas in which the delimitation line divides the continental shelf between two States while the overlying waters remain subject to the exclusive economic zone sovereign rights and jurisdiction of the State for which the grey area lies within 200 nm. The due regard rule, and, possibly, cooperative arrangements

should play a role for shaping the regime applicable to these areas.

Disputed areas may be the subject of delimitation agreements or of judicial or arbitral decisions. Pending delimitation, States in dispute sometimes try to develop practice so as to accumulate evidence of their rights and some other times abstain from exacerbating the dispute. Third States should consider the area not as free but under the jurisdiction of a State, and avoid conduct recognizing one State as entitled to rights to the exclusion of the other, lest the latter consider their attitude hostile. Articles 74, para. 3, and 83, para. 3, indicate various forms of good faith conduct the contending States shall “make every effort” to follow pending a delimitation agreement.

It may be observed, as a conclusion, that while every maritime area described in UNCLOS has its own regime consisting in 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. Further 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.

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