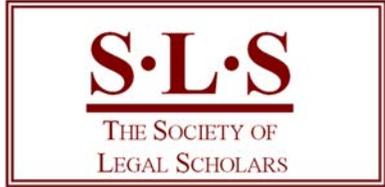




British Institute of
International and
Comparative Law



28th Annual SLS-BIICL Conference on 'Theory and International Law'

Spaces beyond Sovereignty: International Law Outside of Territorial Jurisdiction

14:00-14:45 Welcome and Keynote address

14:45-16:05 Panel 1: Conceptualising and Regulating Space Beyond Sovereignty

16:05-16:20 Coffee break

16:20-18:00 Panel 2: Regulation and Enforcement beyond Territorial Jurisdiction

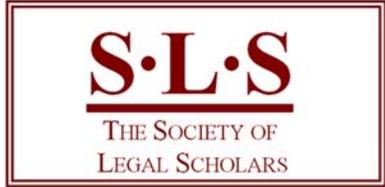
18:00-18:15 Coffee break

18:15-19:00 Closing Keynote address

19:00-20:00 Drinks Reception



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Spaces beyond Sovereignty: International Law Outside of Territorial Jurisdiction

Keynote Address

- **Professor Malgosia Fitzmaurice**, Queen Mary University of London (QMUL)

Chair: Dr Aisling O'Sullivan, Co-convenor of the SLS International Law Section,
University of Sussex

28th Annual SLS/BIICL Workshop on Theory in International Law
Spaces beyond Sovereignty: International Law Outside of Territorial
Jurisdiction

15th May 2019

Malgosia Fitzmaurice

State Jurisdiction; Environmental Law; and Non-Humans

- Traditional Approaches to Sovereignty and jurisdiction in case of environmental harm:
- 1941 Trail Smelter Arbitration:
- ‘no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence’.



- Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration):
 - ‘States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’.
- Principle 2 of the 1992 Declaration on Environment and Development (the Rio Declaration):
 - ‘States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’. See also *1966 ICJ Advisory Opinion on the Use or Threat of Use of Nuclear Weapons*).

- **New Approaches**

- On 7 February 7, 2018, the Inter-American Court of Human Rights published a landmark Advisory Opinion on the Environment and Human Rights;
- Reaffirming that human rights depend on the existence of a healthy environment;
- the Court ruled that states must take measures to prevent significant environmental harm to individuals inside—and outside—their territory;
- unlike other rights, the right to a healthy environment protects the environment itself.
- Forests, rivers, and seas, constitute protected juridical persons in themselves (e.g Amazon in Columbia)
- Therefore,
 - harm to the environment could be potentially justiciable—even absent evidence of a necessary harm to an individual
- the Court clarified the extraterritorial scope of the American Convention in environmental matters. (Maria Banda, 'Inter-American Court of Human Rights' Advisory opinion on the Environment and Human Rights' *Insights*, 22, 2018)
- **See also at the national level e.g:** 2014 Singapore's extraterritorial Transboundary Haze Pollution Act (THPA) domestic legislative measure, which imposes both civil and criminal liability on companies domiciled or operating overseas but which cause or contribute to haze pollution in Singapore.

- 2016 the Constitutional Court of Columbia ruling on the Atrato River, and
- 2018 a ruling on the by the Civil Cassation Chamber of the Supreme Court of Justice on the Amazon River and the Amazonian Rain Forest the Rapporteurship of Judge Luis Armando Tolosa

declared them

- Legal persons and fundamental right holders

- The Court then declared that
- **the National government**, together with the ethnic communities of the basin, will exercise the tutorship and legal representation of the river.
- it prescribed:
- **the creation of a Commission of Guardians** (composed of the two river representatives and a counselling team) and of
- **an Expert Panel to verify the execution of the substantive orders**, declaring the *Procuraduría General*, the *Defensoría del Pueblo* and the *Contraloría General* to be in charge of monitoring the implementation of the measures that must end the illegal mining activities that have caused brutal chemical pollution and seabed destruction.
- Proposed to sign an intergenerational agreement for the Life of Colombian Amazon (to stop an accelerated deforestation)

- Francisca Pou Giménez, *The Rights of Rivers and Forests and Apex Court Dynamics in Colombia: On Natural and Institutional Environments*, Int'l J. Const. L. Blog, June 13, 2018, at: <http://www.iconnectblog.com/2018/06/the-rights-of-rivers-and-forests-and-apex-court-dynamics-in-colombia-on-natural-and-institutional-environments-i-connect-column/>)



- Rivers been recognized as holding rights by a court ruling
- in Ecuador,
- India,
- New Zealand,
- and Colombia.
- These cases are the first judicial attempts to apply legislation that recognizes the rights of nature or to set precedence in recognizing such rights
- For example: **River Vilcabamba, Ecuador**
- The judge determined that the rights of nature had been violated—more specifically nature’s right ‘to exist, to be maintained and to the regeneration of its vital cycles, structures and functions’.
- **Whanganui River, New Zealand In 2014 settlement: the river has become ‘an entity in its own right, Te Awa Tupua’;**
- **the Uttarakhand High Court in India recognized that both the Ganges and its main tributary, the Yamuna, as well as ‘all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers’ would be ‘legal and living entities having the status of a legal person with all corresponding rights, duties and liabilities’.**
- (Lidia Cano Pecharroman , ‘Rights of Nature: Rivers That Can Stand in Court’, 2018 *Resources*)

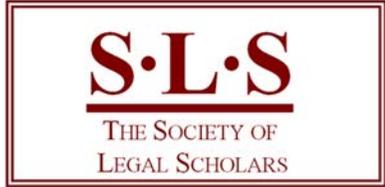
- The Court appointed legal custodians that would be the ones in charge of protecting the rivers (Paragraph 19 states: 'The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared persons in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries').
- However, the Supreme Court of India stated that India's sacred Ganges and Yamuna rivers cannot be considered 'living entities', suspending an earlier order that granted them the same legal rights as humans.
- BUT
- The Indian High Court in a separate order in 2017 April also recognised Himalayan glaciers, lakes and forests as "legal persons" in the mountainous state in a bid to curb environmental destruction.

Conclusion

- In 1972 Professor Christopher Stone, a professor from the University of Southern California wrote his famous essay:
- ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects’ (Stone, C.D. Should Trees Have Standing?—Towards Legal Rights for Natural Objects’, *South. Calif. Law Rev.* 1972), 45, 450–501)
- He introduces the topic by admitting that such a proposal might seem ‘frightening or laughable’
- However, almost 50 years later it has become a reality.



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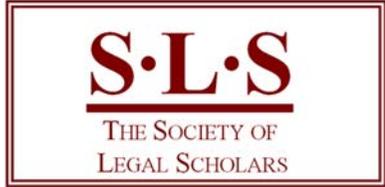
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- Professor David M. Ong, Nottingham Trent
- Dr Henry Jones, Durham
- Thomas Cheney, Northumbria

Coffee break

**Assessing the Legal Relationship between the
Biodiversity Beyond National Jurisdiction (BBNJ)
Instrument & the Continental Shelf Regime
Beyond 200 nautical miles**

David M. Ong

Research Professor of International &
Environmental Law,
Nottingham Trent University, UK.

Presentation Topics

(Proposed) BBNJ Instrument:

- a) *Geographical*** Scope: High Seas & Seabed 'Area' beyond national jurisdiction;
- b) *Material*** Scope: 'Marine Genetic Resources'.

UNCLOS, Continental Shelf Regime Beyond 200nm:

- Sedentary species/fisheries;
- Environmental protection;

Guiding Principles for Resolution of Conflicts between the Coastal State & BBNJ Regime?

- Due Regard = Duty to Consult (per *Chagos MPA Arb Trib Award*): ***Threshold/Standard for Consultation?***

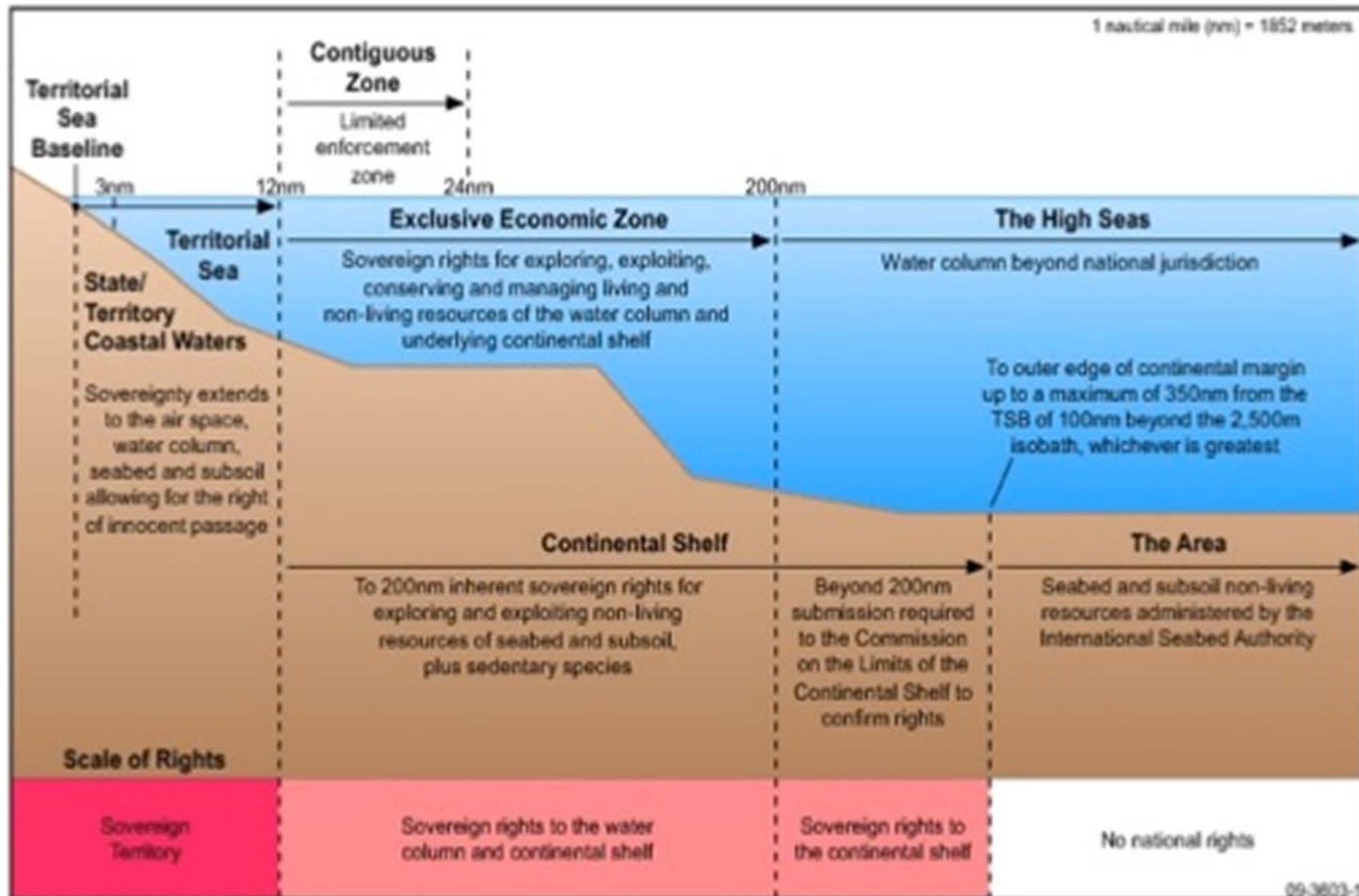
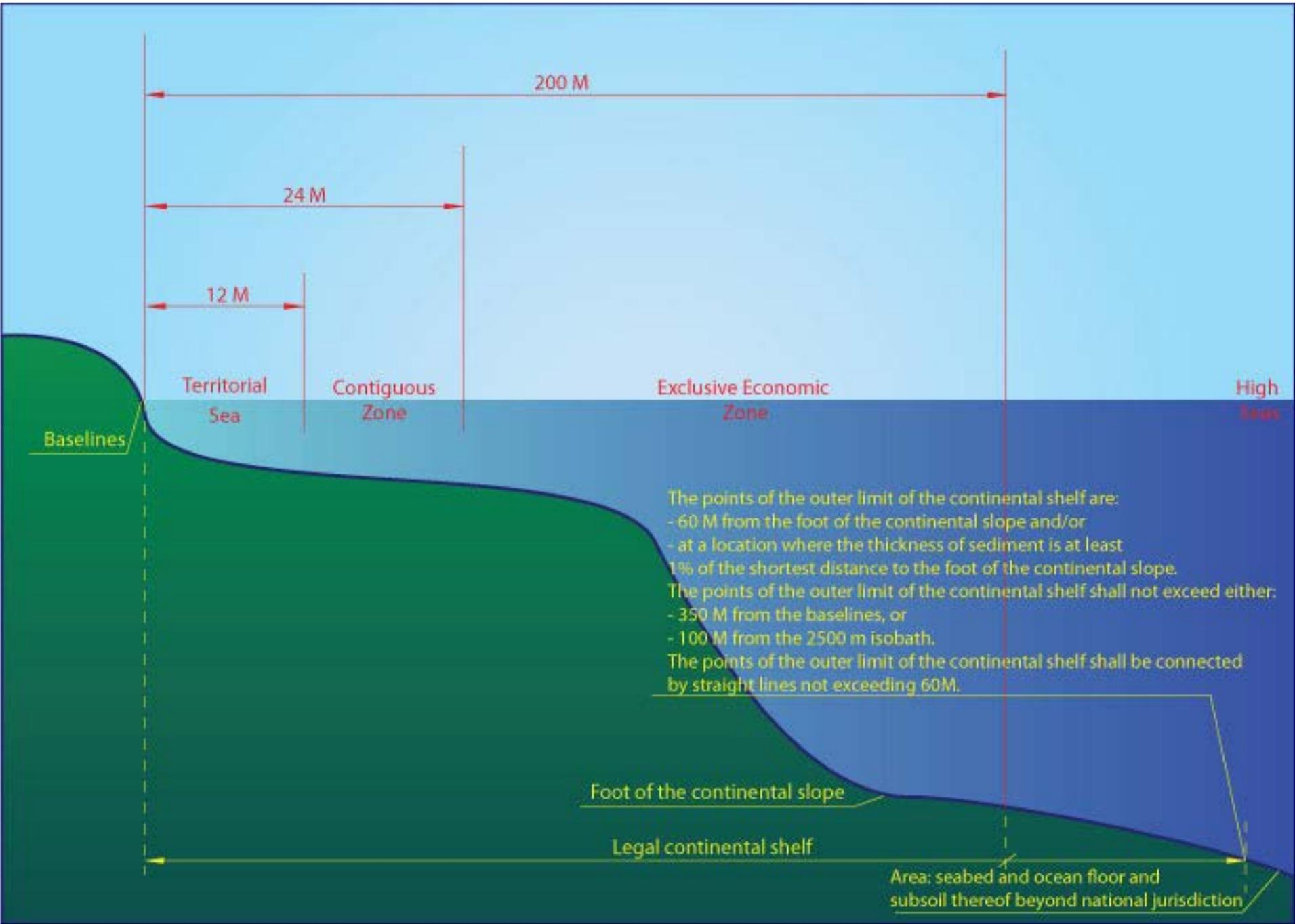


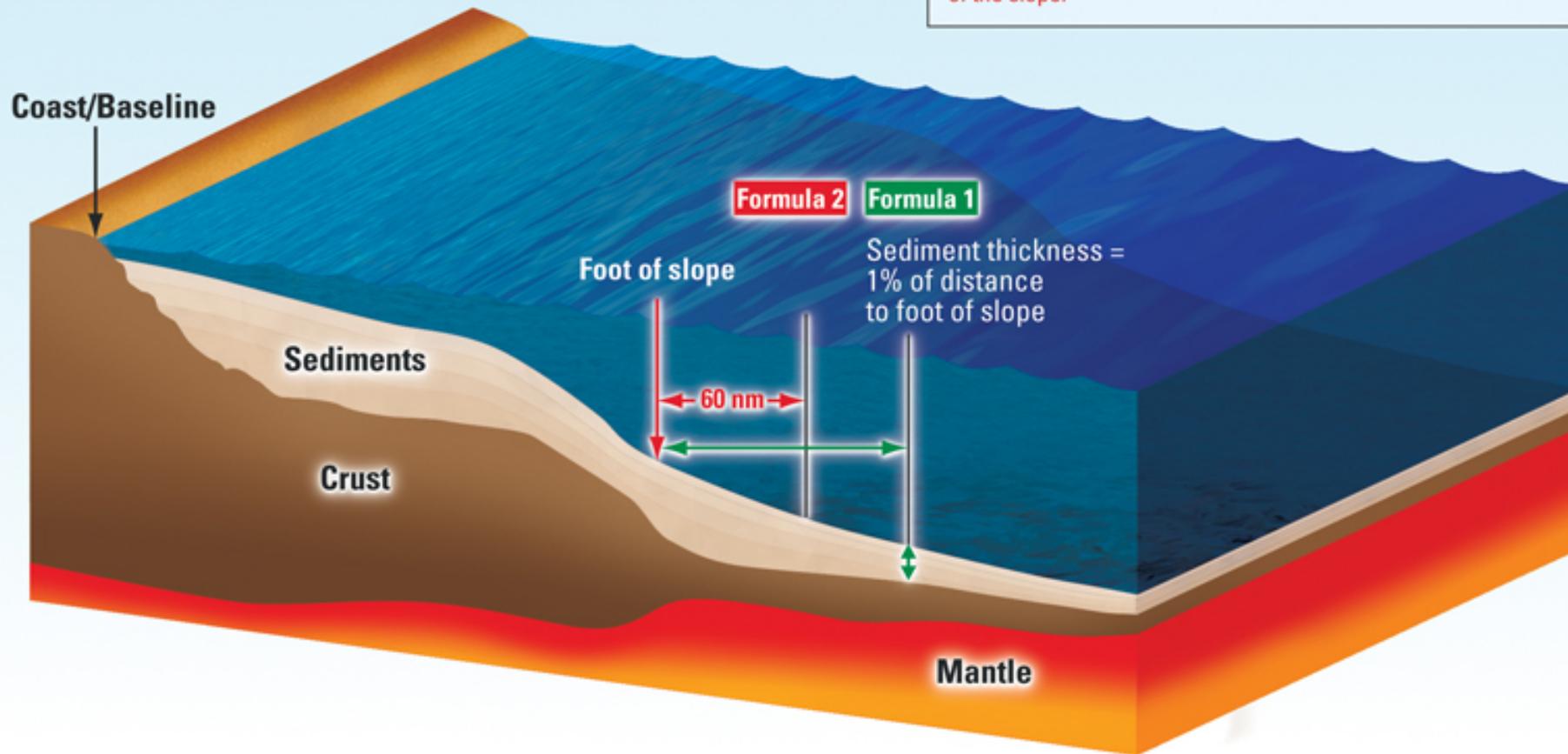
Figure 1: Offshore extent of the maritime zones recognized under international law



Extended Continental Shelf Formula Lines

nautical mile (nm)

Formula 1: Sediment thickness formula. Line where thickness of sediment is at least 1% of distance to foot of the slope. OR
Formula 2: Bathymetric formula. Line 60 nm seaward from foot of the slope.



Continental Shelf beyond 200nm, EEZ/High Seas & Deep Sea-bed 'Area'

- Unique Conjunction of Maritime Jurisdiction Zones: Coastal State Sovereign Rights over Continental Shelf, against superjacent High Seas or EEZ of another State (Grey Zone)
- For example: Offshore oil drilling installation on continental shelf beyond 200nm - licensed by coastal State but located within High Seas or even the EEZ of another State
- Does pre-eminence of coastal State interests in continental shelf regime carry on beyond 200nm in the face of other States' interests in High Seas freedoms, or their EEZs?

Article 77: Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

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

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to *sedentary species*, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

DO: Significantly, there are no coastal State conservation/management duties over these natural resources within UNCLOS Part VI on the continental shelf

Functional Jurisdiction in the EEZ/Continental Shelf

- Within the 200nm EEZ, Article 56(1) of Part V applies & provides that the term: 'natural resources' includes both living and non-living resources in the superjacent waters, as well as the seabed and subsoil.
- Part VI then governs the continental shelf, both within and beyond 200nm, comprising the sea-bed and subsoil but not the superjacent waters over this continental shelf area.
- Article 77(1) provides that in the continental shelf, both within and beyond the 200nm limit, the coastal State exercises sovereign rights for the purpose of exploring it and exploiting its 'natural resources'.
- Article 77(4) then defines the 'natural resources' referred to in this Part as consisting of the mineral and other non-living resources of the seabed and subsoil.
- Thus, 'natural resources' in this context are limited to 'non-living resources', although this phrase has a broader meaning than just minerals and includes organic (hydrocarbons) and inorganic minerals, as well as other non-living resources.

Functional Jurisdiction in the EEZ/Continental Shelf

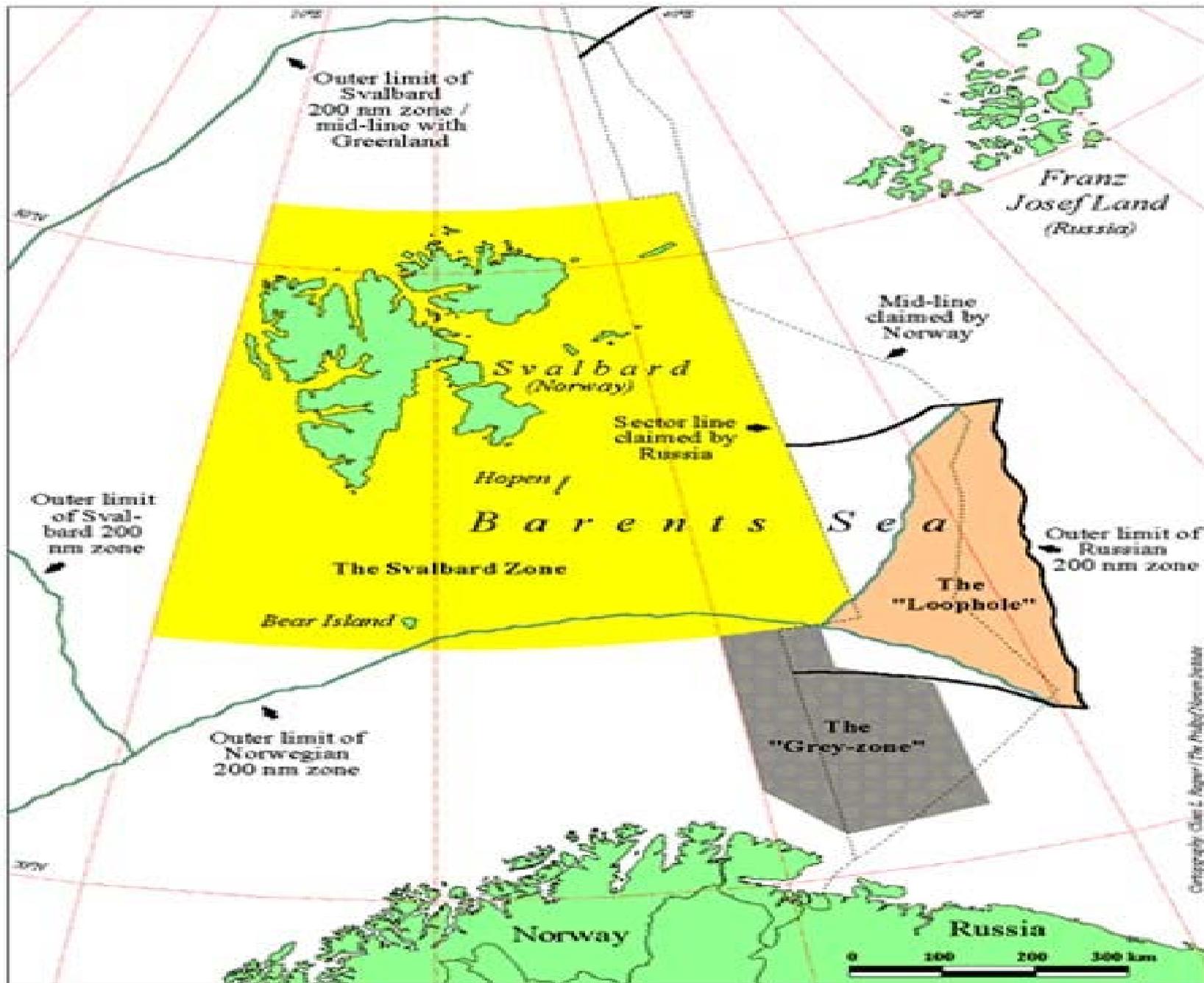
- On the other hand, an exceptional category to the otherwise ‘non-living’ quality of the definition of ‘natural resources’ in Article 77(4) of the continental shelf regime is included, in the form of ‘living organisms belonging to *sedentary species*, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.’
- The inclusion of these un-defined ‘sedentary species’ within the continental shelf (Part VI) rather than EEZ (Part V) regime is confirmed by the fact that Article 68 provides that Part V does not apply to sedentary species as defined in Article 77, paragraph 4.
- Leary: What about marine life near/ in hydrothermal vents? Are they ‘living resources’ subject to EEZ (Part V) jurisdiction?
- Or ‘sedentary species’ under continental shelf (Part VI) regime?

Sedentary Species within the Continental Shelf Beyond 200nm

Reconciling Coastal State jurisdiction & regulation over 'sedentary species' in the continental shelf areas beyond 200nm, with BBNJ Instrument governing deep seabed 'Area' beyond national jurisdiction & superjacent high seas waters over Area & Continental Shelf beyond 200nm?

At least THREE problems:

- 1) Definition of 'Sedentary Species' for the purposes of coastal State sovereign rights & jurisdiction for exploitation?
- 2) Duties of Conservation & Management of these Resources?
 - See 'Snow Crab' dispute between the EU (Lithuanian/Latvian fishing vessel) & Norway in continental shelf/seabed of the Svalbard Archipelago
 - On Valentine's Day this year (14/2/19), the Norway Supreme Court ruled that Norway has exclusive sovereign rights over 'Snow Crab' as these species are to be considered as falling within the definition of 'sedentary species', under Art.77(4) of the 1982 UNCLOS.
- 3) Are 'sedentary species' also 'marine genetic resources' & therefore subject to BBNJ Instrument? IGC Negotiations are trying distinguish between commercial fisheries, subject to coastal State jurisdiction & 'marine genetic resources'



Disputes between the Coastal State & BBNJ Regime: Principles for Reconciliation/ Resolution

- UNCLOS, Art.2 (3) & Art.300: ***Good Faith***;
- UNCLOS, Art.56: ***Due Regard***;

See Annex to President's Statement to 2nd Session of BBNJ negotiations which noted that view differed on, *inter alia*, provisions for 'conducting activities with respect to resources of areas beyond national jurisdiction that are also found in areas within national jurisdiction with due regard to the rights and interests of coastal States under the jurisdiction of which such resources are found.'

- UNCLOS, Art.194: ***Refrain from unjustifiable interference***;

The Annex (above) noted 'convergence towards the inclusion of a "without prejudice" clause relating to the rights and jurisdiction of States under the Convention.'

- See also UNCLOS, Art.142: ***Consultations***, including prior notification & prior consent of the coastal State (to any resource exploitation within continental shelf beyond 200nm)

UNCLOS, Article 142

Article 142: Rights and legitimate interests of coastal States

1. Activities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with ***due regard*** to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie.
2. ***Consultations, including a system of prior notification, shall be maintained with the State concerned, with a view to avoiding infringement of such rights and interests.*** In cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the ***prior consent*** of the coastal State concerned shall be required.
3. Neither this Part nor any rights granted or exercised pursuant thereto shall affect the rights of coastal States to take such measures consistent with the relevant provisions of Part XII as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline, or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the Area.

Threshold Issues for Consultation: Chagos MPA Arb Trib Award

Para.519: In the Tribunal's view, the ordinary meaning of *of "due regard"* (in Art.56(2)) calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights.

The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights.

Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches.

In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.

Threshold Issues for Consultation: Chagos MPA Arb Trib Award

UNCLOS, Art.194(4): In taking measures to prevent, reduce or control pollution of the marine environment, States shall ***refrain from unjustifiable interference*** with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

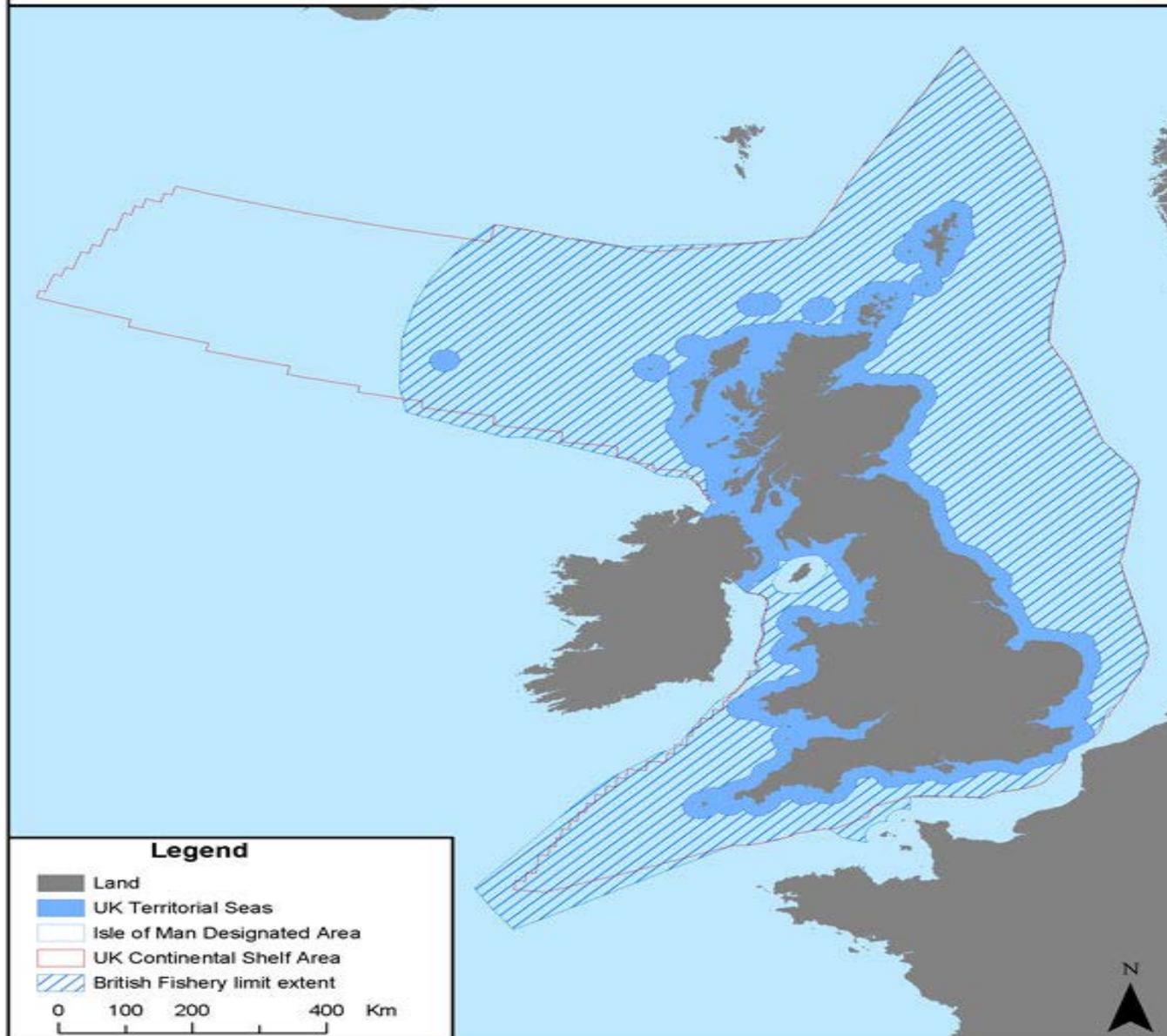
Chagos MPA Arb Trib Award, para.540:

The Tribunal considers the requirement that the United Kingdom ***“refrain from unjustifiable interference”*** to be ***functionally equivalent*** to the obligation to give ***“due regard”***, set out in Article 56(2), or the obligation of ***good faith*** that follows from Article 2(3).

Like these provisions, Article 194(4) requires a balancing act between competing rights, based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue.

International & National Legal Implications of Brexit for the UK & Law of the Sea

- UK reverts to being a State party to the 1982 UN Convention on the Law of the Sea (UNCLOS);
- Relationship with neighbouring countries governed by UNCLOS & regional/bilateral treaties;
- Possible enforcement by CJEU/ECJ, either 1) by the EU Comm, or 2) thru' the reference procedure, will be replaced by resort by UNCLOS parties to its dispute settlement procedures (under Part XV);
- The UK-EU Withdrawal Agreement, Annex 4, provides for an 'independent body' under Part 2, Article 3, para.2, which *inter alia*, has 'the right to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure, with a view to seeking an adequate remedy.'



Legend

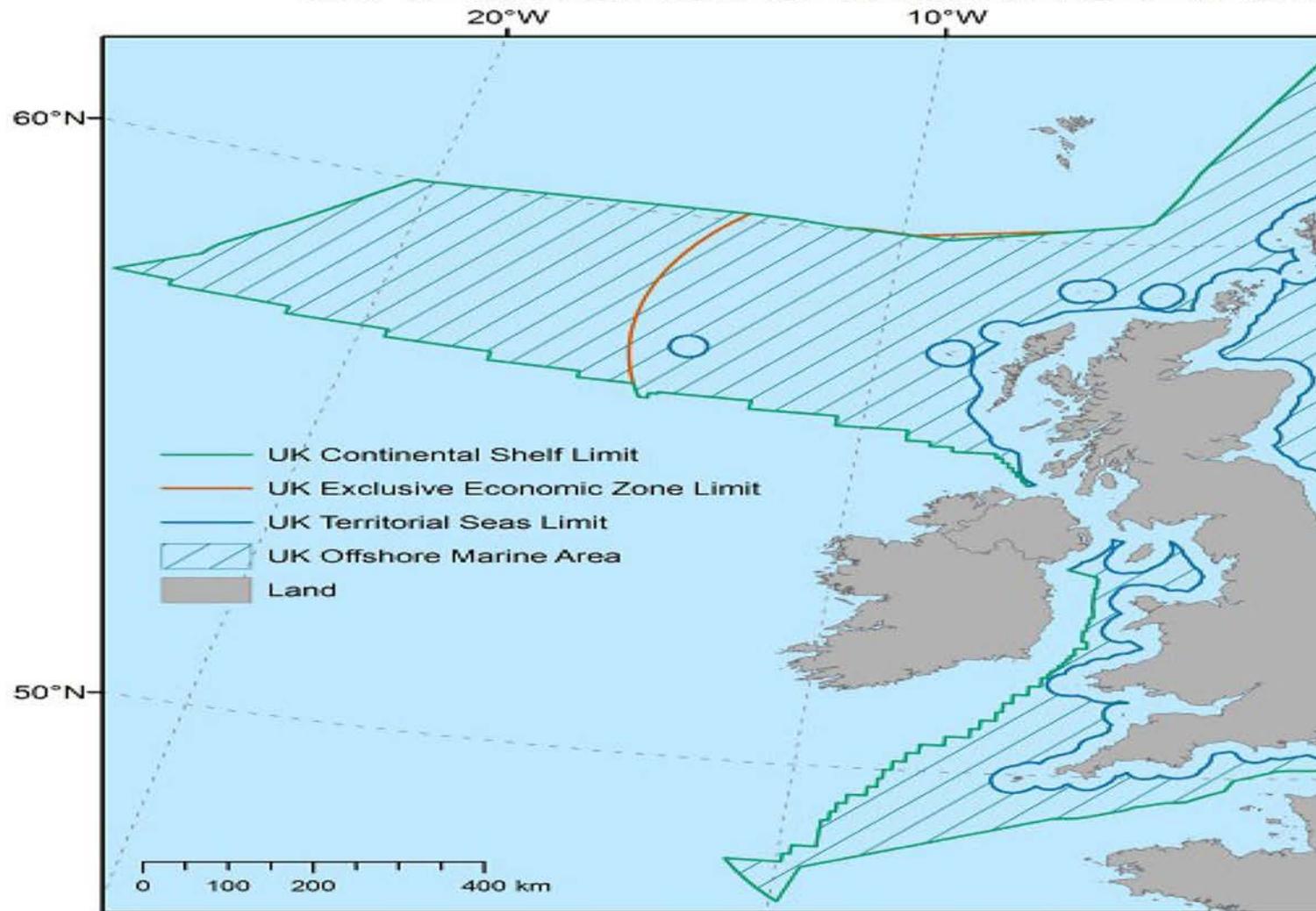
- Land
- UK Territorial Seas
- Isle of Man Designated Area
- UK Continental Shelf Area
- British Fishery limit extent

0 100 200 400 Km

Acknowledgements: World Vector Shoreline © US Defense Mapping Agency. The exact limits of the UK Continental Shelf are set out in orders made under section 1(7) of the Continental Shelf Act 1964 (© Crown Copyright). Map copyright JNCC 2004.

Map version & date
Version 2 12/3/04

UK Offshore Marine Area



© JNCC 2015

UK marine administrative boundaries. Contains public sector information, licensed under Open Government Licence v2.0, from the United Kingdom Hydrographic Office. © Crown copyright. World Vector Shoreline © US Defence Mapping Agency. Not to be used for navigation. Map creation date 06/07/2015

Continental Shelf Beyond 200nm: Environmental Protection?

- In November 1999, the UK High Court found in favour of Greenpeace in its case against the UK Government regarding implementation of the Habitats Directive offshore (CO/1336/99).
- The court found that "the Habitats Directive applies to the **UK continental shelf (incl beyond 200nm)** and to the superadjacent [sic] waters up to a limit of 200 nautical miles from the baseline from which the territorial sea is measured". **(emphasis added)**
- Prior to this judgement, the UK Government view was that the Habitats Directive did not apply outside UK territorial waters (12 nm from the coast).
- The UK Government is now implementing the Directive in the UK offshore area (waters beyond 12 nautical miles, within 200nm EEZ, and **the seabed within the UK Continental Shelf Designated Area both within & beyond 200nm (emphasis added)** (Source: JNCC)

But will this commitment to EU standards continue post-Brexit?

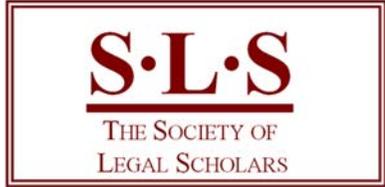
- Cf. The BBNJ/ABNJ Instrument negotiations currently before the UN where Marine Protected Areas (MPAs) & Environmental Impact Assessment (EIA) is envisaged in Areas Beyond National Jurisdictions (ABNJ).

Conclusions

- Geographical and Material Scope of BBNJ Instrument still uncertain:
- Continental shelf resources beyond 200nm, there is a need to ensure which 'sedentary species' fall within coastal State jurisdictional remit & which species are subject to the high seas regime under BBNJ instrument;
- Marine environmental protection, EU law standards (& the UK's post-Brexit unilateral commitment to continue within the draft Environment (Principles & Governance) Bill (Cm9751) reflect 'international best practice'
- Principles to Reconcile between Coastal State & BBNJ Instrument : Good Faith, Due Regard, Unjustifiable Interference



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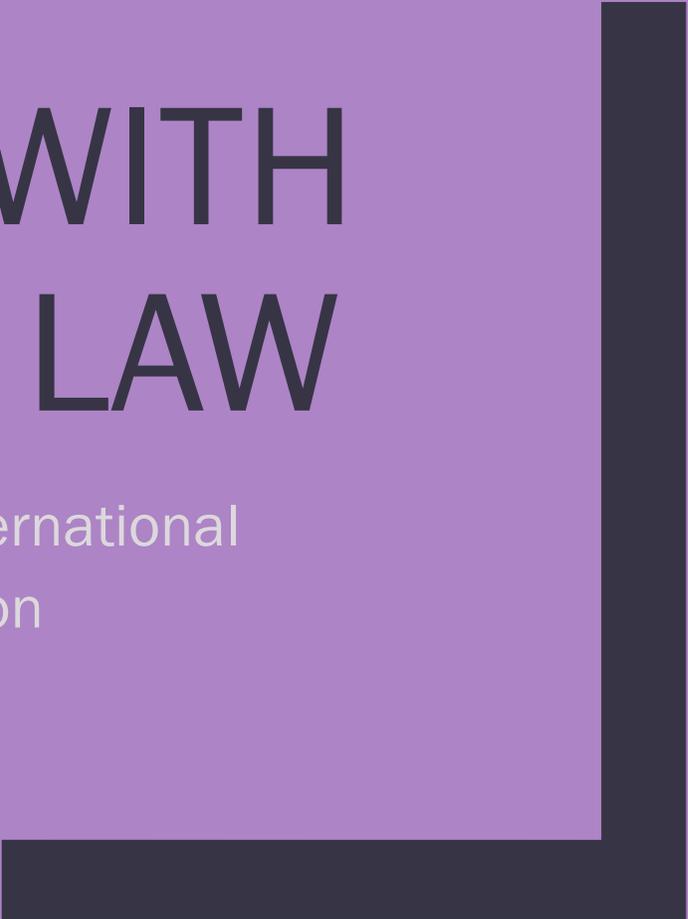
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MAKING SPACE WITH INTERNATIONAL LAW

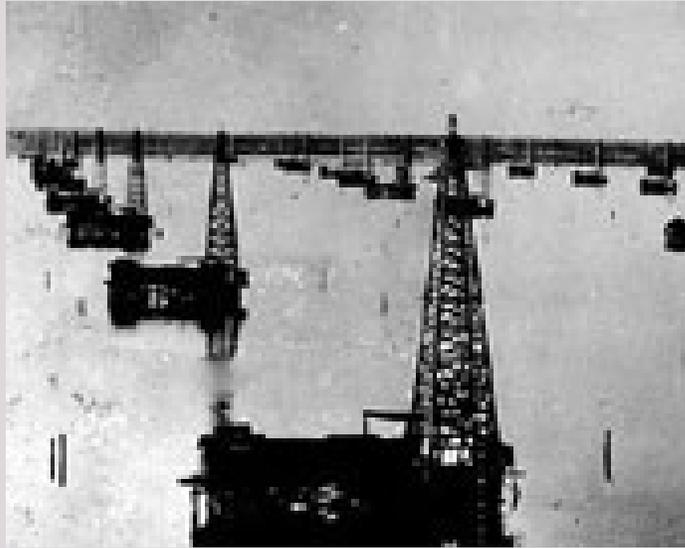
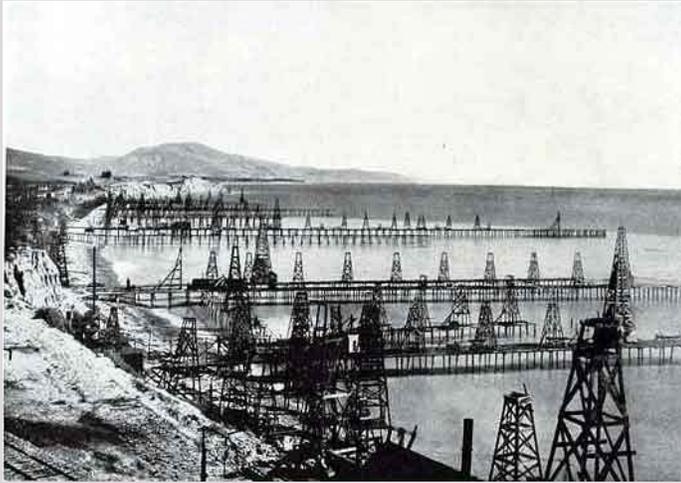
SLS/BIICL Spaces beyond Sovereignty: International
Law Outside of Territorial Jurisdiction



A: TWO HISTORIES OF MARITIME SPACE

Off shore drilling and the invention of the Continental Shelf



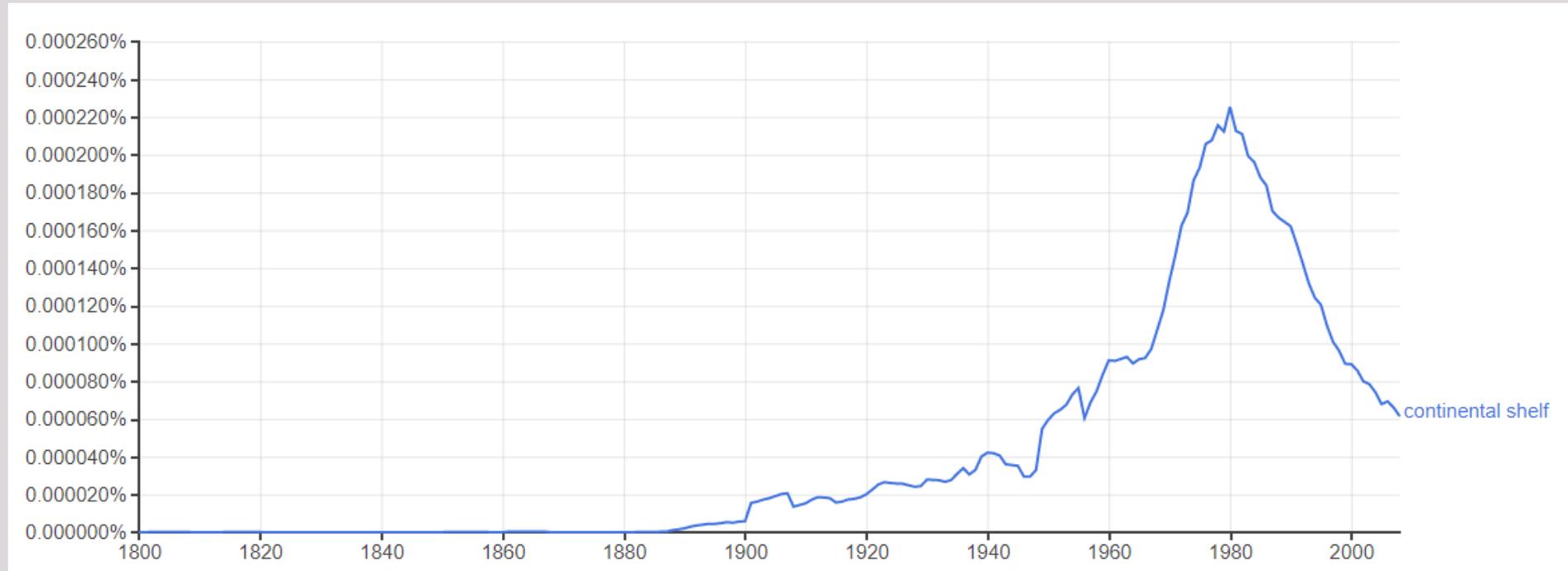


Drill baby, drill!

1. c.1901 oil rigs connected by piers to a beach Santa Barbra, California
2. C.1911 rigs on a Louisiana lake, without piers
3. 1947, the first oil platform out of sight of land, 10 miles from land and 20 feet deep
4. Today, Shell's Perdido platform is the deepest oil well, 8,000ft, just under 200nm



Meanwhile, international lawyers...



First rise correlates with the first off shore drilling, then we get a clear Truman Proclamation rise, leading in to a Geneva Convention rise, right through to an UNCLOS peak. Maybe some role for the 70s oil crises in there too.

Truman vs. Geneva



‘the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but **contiguous** to the coasts of the United States as appertaining to the United States, subject to its **jurisdiction and control.**’

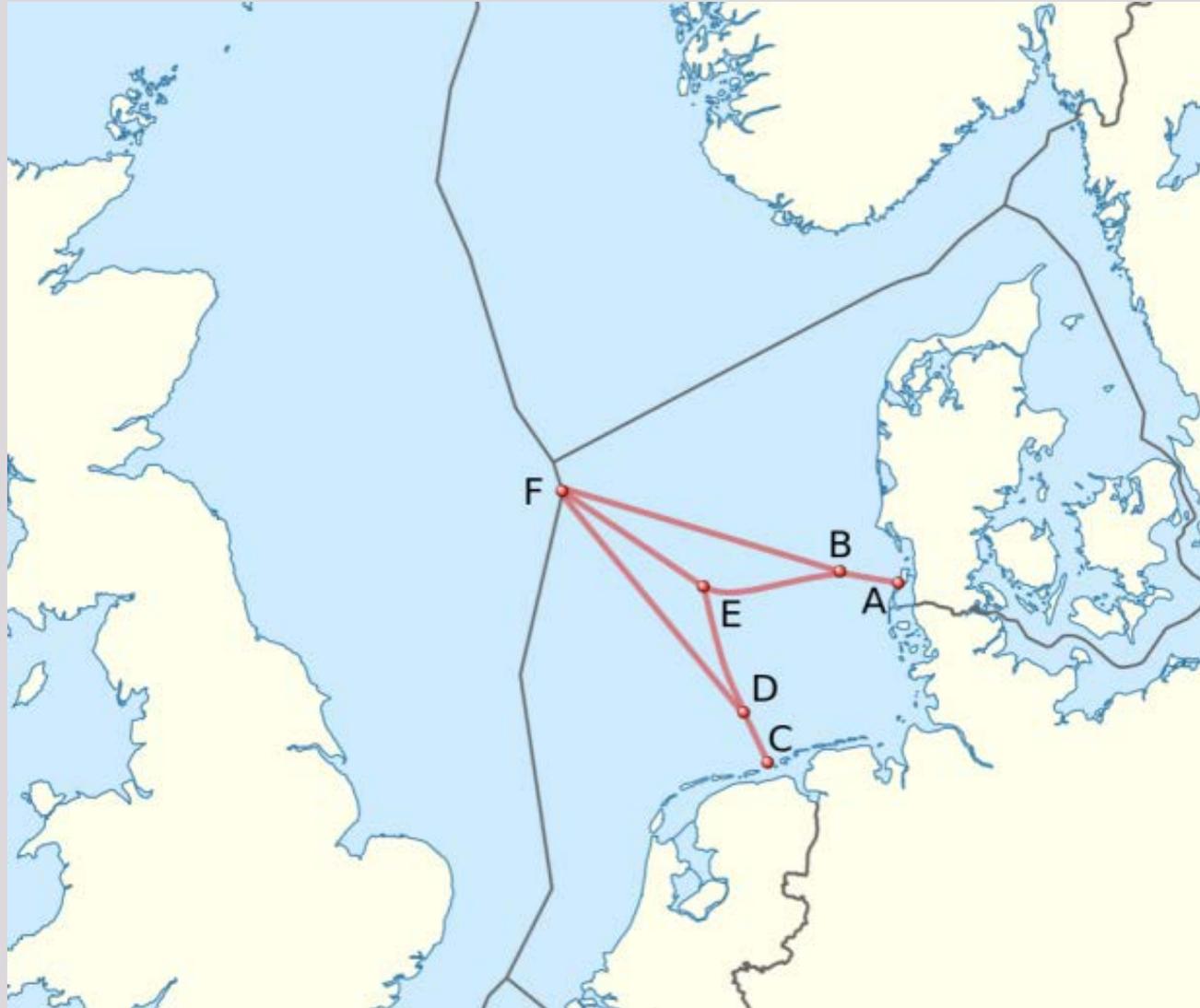


‘the term “continental shelf” is used as referring (a) to the seabed and subsoil of the submarine areas **adjacent** to the coast but outside the area of the territorial sea, to a **depth of 200 metres** or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas’

BACK TO SCHOOL

The North Sea
Continental Shelf
cases

“An originally geological and geographical concept ... by reason of its intrinsic economic interests which have become susceptible of exploration and exploitation as the result of recent technological development, has been vested with legal interest and presents itself as a subject matter of rights and duties subject to the rule of law and constituting an institution belonging to international law”



North Sea Continental Shelf Cases (German/Denmark: Germany/Netherlands) 20/02/1969

- Historical context:
 - 1964 UK Continental Shelf Act
 - 1965 -1968 gas discovered, but no commercial exploitation
 - December 1969 oil discovered at Ekofisk, about 170nm from Norway

The Judgment

- [3] In the North Sea ‘the whole seabed consists of continental shelf at a depth of less than 200 metres’
- [18] Limits itself to the question of delimitation, not apportionment
- [19] ‘[R]ights of the coastal state in respect of the area of continental shelf that constitutes a **natural prolongation of its land territory** ... exist *ipso facto* and *ab initio*, by virtue of its **sovereignty** over the land [...] an **inherent right** [...] Its existence can be **declared** but does not need to be **constituted**. ... the right does not depend on its being exercised’.
- [42] ‘no necessary ... identity between the notions of **adjacency** and **proximity**’
- [43] Continental shelf ‘**actually part of the territory** over which the coastal State **already has dominion**’ ‘a prolongation of continuation of the territory’
- [45] Ignore the Norwegian Trough
- [91] curvature of coastline ‘an incidental special feature from which an unjustifiable difference of treatment could result’
- [96] continental shelf is ‘submerged land’

The Separate Opinions

- Bustamante Y Rivero emphasises that the Continental Shelf is separate to the water
- Jessup emphasises how novel exploitation of the continental shelf is, and that this is really all about oil and gas, and that should be the focus for negotiation.
- Fouad Ammoun questions what the continental shelf is, and emphasises that the continental shelf a geological fact, not a legal fiction.
- Padilla Nervo focuses on clarifying why the Geneva Convention is not binding on Germany

The Dissents

- Koretsky held that the Geneva Convention should be applied, as at least representing General Principles of international law
- Tanaka demands ‘the rule of law, not anarchy’, and first argues that the principle of equidistance is custom, then that it can be ‘deduced from the fundamental concept of the continental shelf’.
- Morelli argues that the apportionment of continental shelf is automatic, by equidistance, and you can negotiate from there.
- Lachs also goes for the Geneva Convention representing a General Principle of international law
- Sorensen again finds the Geneva Convention to represent general international law

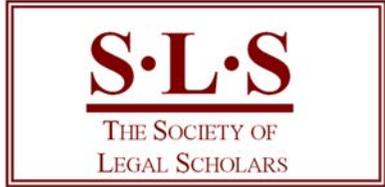
STOP! THEORY TIME!

What does it mean to say space is produced? What is law's role in territory and space? Where does jurisdiction fit in? What can we learn for new spaces?





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Coffee break



Space Mining: Regulating Activity and Property Beyond Sovereignty

28th Annual SLS/BIICL Workshop on Theory in
International Law

Thomas Cheney

Thomas.Cheney@Northumbria.ac.uk
Twitter: @thomcheney



Northumbria
University
NEWCASTLE

Overview of Space Law

- Outer Space Treaty
- Rescue Agreement
- Liability Convention
- Registration Convention
- Moon Agreement



Overview of Space Law

- **Outer Space Treaty**
 - **Article I**
 - Freedom of exploration and use
 - Province of all mankind
 - To be carried out for the benefit and in the interests of all countries
 - Freedom of access to all areas of celestial bodies
 - **Article II – Non-appropriation principle**
 - **Article III – Maintain peace and security; UN Charter applies in space**
 - **Article VI – States responsible for activities of their nationals**
 - **Article VII – Launching State liable for damage**
 - **Article VIII – States retain jurisdiction and control over objects and personnel on their registry**
 - **Article IX – Due regard for corresponding interests of other States Parties**





Overview of Space Law

Moon Agreement

- Article 4
 - Due regard for interests of present and future generations
- Article 11
 - The Moon and its natural resources are the Common Heritage of Mankind
 - Establish an international regime
 - Equitable sharing of benefits





UNCLOS and Antarctica

- UNCLOS negotiated around the same time as Moon Agreement
- Shares 'Common Heritage of Mankind'
- UNCLOS far more detailed on workings of seabed mining
- Antarctic treaty also model
- Article II OST goes further
- Cross fertilization regarding mining regimes likely





Space Beyond Sovereignty

- Non-Appropriation
 - Article II OST & UNGA Res 1962 Declaration of Legal Principles
 - ‘Cardinal principle’
 - Custom and some have argued *ius cogens*
 - Prohibits national appropriation of outer space, the Moon and other celestial bodies by means of use, occupation or any other means
 - What’s national appropriation?
 - Private/Non-governmental actors?
 - Article VI – responsible, authorise and supervise
 - Article VIII – jurisdiction and control
 - What’s a celestial body?



Jurisdiction in Outer Space

- Article II OST means no territorial jurisdiction
- Article VI OST – States responsible for activities of their nationals
- Article VII OST – Launching State liable for damage
- Article VIII OST – States retain jurisdiction and control over objects and personnel on their registry
- Often have overlapping and/or multiple jurisdictions



Space Mining



Asteroid Mining

Has the bubble burst?



The Moon

ISRU to support return



Water or Metals?

Water then metals?





Legality of Space Resource Activities

- Freedom of use
- Resources appropriable once extracted
- COPUOS developments since 2016
- Authorisation of activities not granting 'property'
- Exclusion or 'safety zones' could cause issue



National Legislation

- US and Luxembourg
 - US law says US citizen entitled to resources obtained
 - Luxembourg says resources can be appropriated
 - Luxembourg law mainly about authorisation of space resource activities
 - US law light on details calls on Federal government to promote industry and 'discourage barriers' to development
 - Focus has been on activity rather than 'property rights'





Source of conflict

- Availability of resources
 - Lots of resources in total
 - Potential shortage of 'ore bearing' bodies
- 'Strategic' resources
- Space Force(s)



An International Regime?

- Required for Moon Agreement States
- Provide coordination
- Mutual recognition of property rights
- Possibility of making allowances for developing countries
- The Hague International Space Resources Governance Working Group

Concluding Thoughts

Space mining permitted

Personal not territorial jurisdiction

International regime

- Coordination
- Mutual recognition
- Forum/registry



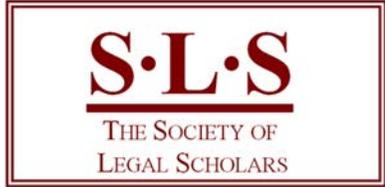
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28th Annual SLS-BIICL Conference on 'Theory and International Law'

Spaces beyond Sovereignty: International Law Outside of Territorial Jurisdiction

Panel 1: Conceptualising and Regulating Space Beyond Sovereignty

Chair & Discussant: Dr Aisling O. Sullivan, Co-convenor of the SLS International Law Section, University of Sussex

- Professor David M. Ong, Nottingham Trent
- Dr Henry Jones, Durham
- Thomas Cheney, Northumbria

Coffee break



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Spaces beyond Sovereignty: International Law Outside of Territorial Jurisdiction

Panel 2: Regulation and Enforcement beyond Territorial Jurisdiction

Chair & Discussant: Dr Richard Collins, Co-convenor of the SLS International Law Section, University College Dublin

- Dr Jane Rooney, Bristol
- Dr Maria Varaki, KCL
- Dr Ricardo Pereira, Cardiff
- Professor Mari Takeuchi, Kobe

Coffee break



Regulating Investigations in Cyberspace

— Blurring the Boundary between Public and Private?

@28th Annual SLS/BIICL Workshop on Theory in International Law

15May2019

Mari Takeuchi (Kobe University)

Introduction

- Category of Jurisdiction
: prescriptive, adjudicative, enforcement [investigation, seizure, arrest]

- Territoriality of Enforcement Jurisdiction

“[A State] may not exercise its power **in any form** in the territory of another State. ”

SS ‘Lotus’ (France v Turkey) (1927) PCIJ Series A, No 10, p. 19.

“Sovereignty in the relations between state means independence. Independence in relation to area of the globe is **the right to exercise his functions within the state, excluding any other State**”

Island of Palmas case (U.S. v. Netherlands), RIAA, vol.2, 1928, p.838.

- New modalities of investigation related to cyberspace

Ex. the Clarifying Lawful Oversea Use of Data Act (CLOUD Act) [2018]

“A provider of electronic communication service or remote computing service shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider’s possession, custody, or control, **regardless of whether such communication, record, or other information is located within or outside of the United States.**”



Q. Can this be captured by the existing framework of territoriality of enforcement? How can this modalities of investigation be regulated?

Background to the CLOUD Act: Microsoft Ireland case

- Uncertainly about the territorial scope of the Stored Communication Act [SCA]
- Difference between Parties
 - Government : an SCA warrant akin to a subpoena; no extraterritoriality
 - Microsoft: a traditional warrant; unlawful extraterritorial application of SCA
- *Microsoft v. US*, 829 F.3d 197 (2nd Cir. 2016)
 - the SCA does not apply abroad, and
 - the SCA's focus is customer privacy, and in this case, the conduct that falls within the focus of the SCA would occur outside the United State, Ireland, where the data is located.

1. Bypassing Sovereignty (1)

- Territoriality of enforcement still matters?
 - Providers' disclosure of data
 - retrieve of data → hardly affect the sovereignty of territorial state
 - providers' internal access to data → no element of public authority
 - : not meeting the threshold of attribution of conduct to a State
- Ex. ILC Articles on Responsibility, Art.8



Difficult to be captured by the principle of territoriality of enforcement

1. Bypassing Sovereignty (2)

- Shift of the Focus from State to Persons
 - protection of the rights of the person (e.g. a right to privacy) to whom such data or communications belong
- Further Questions
 - Under which law are such rights protected?
 - At what stage and by who are those rights considered and claimed?
 - To whom should the violation of rights be attributed?

1. Bypassing Sovereignty (3)

- Regulation by Domestic or Regional Law

Ex. EU's General Data Protection Regulation (GDPR) [2016]

Art.48 : Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner **if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State,** without prejudice to other grounds for transfer pursuant to this Chapter.

- Conflict of Law Situations

→Emerging Practice of the Activation of Comity Consideration

2. Complementing Sovereignty (1)

- Comity Considerations under the CLOUD Act

- **Providers** could move to quash or modify

- (i) if the target is not a US person and does not reside in the US, and

- (ii) if the compliance would conflict with the law of a foreign state

- **Court would be required to conduct a comity analysis**, in considering such a motion

- : the possibility of accessing the data via other means, the relative degree of US interest in the data, and the interests of the foreign government and its laws

2. Complementing Sovereignty (2)

- Possible Derogations under Article 49 of the GDPR

Case 1: A transfer “necessary for important reasons of **public interest.**” ➤ GDPR art.49 (1)(d)

- including the interest in the fight against serious crime
- public interest shall be recognized in Union law or in the law of MS

Case 2: A transfer “**necessary for the purposes of compelling legitimate interests pursued by the controller** which are not overridden by the interests or rights and freedoms of the data subject” ➤ GDPR art.49 (1)

- including the interest of the controller in not being subject to legal action
- **controller's task:**
 - to assess all the circumstances and to provide suitable safeguards
 - to inform the supervisory authority and the data subject of the transfer

Concluding Remarks

- Shift from Territory to Individuals
 - Public IL (exclusion) to Conflict of Law (mutual respect)
- Activation of the Comity Doctrine
 - incorporation of the factors in the body of law
 - private entities' involvement
- Need for Shared Understanding on Interests Involved (public interest etc.) to Facilitate Comity Dialogue
 - possible role of Public IL to give guidance in comity consideration



Thank you !

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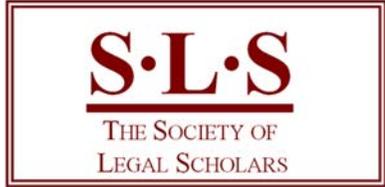
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Closing Keynote Address

- **Professor Alex Mills**, University College London (UCL)

Drinks reception