Chapter 5
Territorial Sea and Exclusive Economic Zone

Classification of the Sea: Territorial Sea, High Seas, and Exclusive Economic Zone

The seas that cover the earth are classified as those that are the territory of a nation (territorial sea), those that no nation can lay claim to and that cannot be subject to sovereignty (high seas), and those that lie between the territorial sea and high seas, and that no nation can lay claim to but that can be subject to sovereign rights and jurisdiction (exclusive economic zone (EEZ)).

Territorial Sea

Territorial sea, in a broad sense, includes all the seas that are the territory of a State. This also includes ports, bays, and inland seas, which these days are referred to as internal waters (also used to refer to lakes, rivers, and other such waters within a territory). The baseline is the line that separates internal waters and territorial sea; normally this is the low-water line along the coast, as marked on the large-scale charts officially recognized by a coastal State (the spring tide is the lowest tide, but this is generally understood to be the coastline in nautical charts). However, if the coastline is deeply indented or cut into, or if there is a series of islands along the coast in its immediate vicinity, the straight baseline method may be used to join appropriate points along the coastline.

The sovereignty of a coastal State extends, beyond its land territory and internal waters, to an adjacent belt of the sea, described as the territorial sea, and to the air space over the territorial sea as well as its seabed and subsoil. The coastal State has the right to prohibit foreign nations from fishing in its territorial sea, to restrict coastal transport (also called coastal trade; at present, it generally refers to transport between the ports of that nation) to only its national citizens, and to exercise police

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authority in those seas. Furthermore, if any foreign ship violates the laws of the coastal State while in its territorial sea or internal waters, the nation may engage in continuous pursuit of that foreign ship and arrest it on the high seas (even if the ship itself is on the high seas, when the boats and crew on board are in the territorial sea, the ship on the high seas is also deemed as being in the territorial sea). This is referred to as the right of hot pursuit.[1]

This is how territorial sea is subject to the sovereignty of its coastal State, although, since ancient times, the seas have been used for international transport, and hence the sovereignty of a coastal State over its territorial sea is restricted for the purpose of international transport. As such, a system has been established to allow for innocent passage[2] in the seas that balances the interests of coastal States with the interest of international transport. Accordingly, a coastal State must allow the continuous and expeditious passage of foreign ships in its territorial sea, provided that such passage does not harm the nation's peace, good order, or security. Correspondingly, a foreign ship is naturally prohibited from engaging in military training exercises, as well as fishing, research, communication jamming, and other

[1] The right of hot pursuit: This action can only commence once a ship or aircraft of the coastal State has launched a visual or audio stop signal from a distance that the suspicious ship can confirm by sight or sound. The pursuit must continue without interruption, and it is to end if the suspicious ship is no longer in sight or if it enters the territorial sea of its flag State or that of another country. The pursuit is usually carried out by an ordinary ship that issues warnings and intimidations while pursuing the suspicious ship, but pursuit by aircraft may also be used. In that case, the aircraft must pursue the suspicious ship by taking active measures to alert the ship of its presence and pursuit, such as by buzzing, whereby the aircraft repeatedly swoops near the ship, etc. Relay pursuit may also be used, whereby the pursuit alternates between a high-speed ship and ordinary ship, etc.; however, the suspicious ship may not be ambushed during the pursuit. During a March 1999 incident, Japan Coast Guard patrol ships and Japan Maritime Self Defense Force escort ships engaged in pursuit of a suspicious ship detected in the territorial sea of the Noto Peninsula while firing warning shots, and an aircraft was also used in the pursuit. The pursuit ended, however, when the suspicious ship left Japan's Air Defense Identification.

The United Nations Convention on the Law of the Sea (UNCLOS) recognizes the right of hot pursuit of a coastal State, also in the event of the violation of the laws and regulations of the coastal State by a foreign ship in the EEZ and continental shelf—including the safety zone surrounding the equipment in the continental shelf—to which those laws and regulations apply. A suspicious ship, thought to be a remodeled fishing ship, was detected in the EEZ off the coast of Amami Ōshima Island in Kagoshima Prefecture in December 2001. It was pursued by a Japan Coast Guard patrol ship to 4,000 km offshore in China's EEZ of the East China Sea; after an exchange of fire between the suspicious ship and the patrol ship, the suspicious ship sank. See Serita, Kentarō. 2001. "Heiwa ya jinken ni somukanu kokusai kyōchō o (International Cooperation that Does not Infringe upon Peace or Human Rights)," *Kōbe Shimbun*, January 30.

[2] It has long been debated whether warships have the right of innocent passage, but the provisions of UNCLOS can be positively interpreted that they do. If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately. Refer to the Soviet Nuclear Submarine Incident on August 21, 1980, in which a Soviet nuclear submarine caught fire on the high seas to the east of Okinawa while forcefully passing through the territorial sea (strait) of Japan between Okinoerabu Island and Yoron Island, amid protests by the Japanese government.

such activities in that sea; additionally, it must also not engage in the loading and unloading of any commodity, currency, and person that violates the coastal State's current customs, fiscal, immigration, or sanitary laws and regulations. Furthermore, a coastal State may designate sea lanes and prescribe navigation and traffic separation schemes, and require foreign ships to use them, in order to prevent accidents from occurring in its territorial sea in the event of maritime traffic congestion.

The authority of a coastal State in its inland waters is more exclusive than that in its territorial sea; it is virtually the same as the authority it has in its territory. Accordingly, a coastal State is not subject to any duty similar to that of innocent passage. The Seto Naikai of Japan is an inland sea, and while foreign ships are able to pass through it, it does not mean they have the right of innocent passage.

In the 1958 Convention on Territorial Sea and the Contiguous Zone, innocent passage is permitted for a ship passing through a strait used for international navigation, in other words an international strait being a body of water that is a territorial sea; and unlike in other territorial seas, innocent passage was never suspended in those waters. However, when the breadth of the territorial sea is expanded from 3 to 12 nautical miles, the section of the high seas which foreign ships and aircraft can freely pass through under the existing freedom of the high seas then newly becomes part of the territorial sea of the coastal State bordering the strait. A foreign ship has the right of innocent passage in territorial seas; however, the air space over a territorial sea is territorial air space, and hence a foreign aircraft must obtain permission from a coastal State in order to fly in that air space. This substantially impedes the freedom of movement of not only private aircraft but also carrier-based aircraft, and it requires submarines to navigate on the sea surface. Furthermore, a coastal State can block the passage of non-innocent foreign ships, and this may also interrupt international transport in the seas if there is no other way for the ships to pass.

A regime of passage through straits used for international navigation was newly established in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to recognize the right of transit passage that is unimpeded by the ship or aircraft of any country. This regime also takes into consideration the military strategy of the United States and the Soviet Union, and it is separate from the regime of innocent passage in territorial seas, insofar as it endeavors to ensure the effective freedom of passage on the high seas. In Japan's case, when its territorial sea was expanded to 12 nautical miles, five of the approximately 70 straits included within this geographic scope (the Sōya Strait, Tsugaru Strait, the East and West Channels of the Tsushima Strait, and the Ōsumi Strait) were stipulated as "the designated areas" based on the fact that they were key points in international transport for connecting major seas, and because they were third State routes through which many foreign ships pass. Limiting the breadth of the territorial sea to 3 nautical miles in these areas opens up a path for securing freedom in international navigation and flight.

High Seas: International Waters

The high seas do not belong to any country (freedom from possession) and are open to the citizens of all nations to be used freely (freedom of use). The typical freedom referred to here is freedom of navigation and fishery on the high seas, and the traditional order of the ocean is precisely this freedom of the high seas. Oceanic States have so far been able to enjoy freedom of the high seas within a narrow 3 nautical mile territorial sea amid the vast ocean. This also applies to Japan. During the era of the 3 nautical mile territorial sea, each State aimed to monopolize its offshore fishery area for its own citizens and shut out foreign fishing vessels from it. This was known as the 12 nautical mile fishery zone.

The 1982 UNCLOS established the system of a 12 nautical mile territorial sea and 200 nautical mile EEZ under the jurisdiction of a coastal State. Subsequently, in the era of the 3 nautical mile territorial sea, there was an overwhelmingly large number of near-coastal voyages navigating the offshore high seas within a distance of 4 or 5 to 10 nautical miles and from which land and the outline of any islands are still visible. As such, ships could freely navigate the high seas then. These days, however, ships navigate these waters under the system of innocent passage. In the past, Japan freely caught most of its fish in waters within a 200 nautical mile range. Now, however, these waters have come under the jurisdiction of a coastal State. So, in that sense, the traditional high seas system has been laid to rest and replaced with a new high seas system that has internationalized the waters. Freedom of fishery is no longer, and other freedoms have been recognized to facilitate international transport, including freedom of navigation and overflight, and the laying of submarine cables and pipelines.

So, what about the seabed of the high seas? The exploitation of offshore petroleum fields was already being debated in the 1930s. In September 1945, immediately after World War II, the US government issued the Truman Proclamation on the Continental Shelf, which declared that the area under the high seas is contiguous with the US coast and the natural resources in its seabed belong to the United States and are under its jurisdiction and regulation. Many other nations followed suit, and countries in Latin America and the Caribbean quickly asserted their claim to the marine resources offshore from their coast. Another example of this is the Syngman Rhee Line (the Presidential Proclamation of Sovereignty over the Adjacent Seas on January 18, 1952) that dominated the fishery negotiations held between Japan and the Republic of Korea (ROK) from February 1952 to June 1965. This is how the continental shelf regime, which recognizes the sovereign rights of a coastal State for the exploration and exploitation of natural resources, was approved in the Convention on the Continental Shelf adopted at the United Nations Conference on the Law of the Sea I in 1958. The Convention is the basis for establishing the current EEZ, and it recognizes the sovereign rights of a coastal State over the seabed and area subjacent to it within 200 nautical miles from its coast; hence, this is of significance for continental shelves that extend beyond 200 nautical miles offshore.

The high seas do not belong to any nation; therefore, to maintain order of the high seas, any ship on the high seas is under the exclusive jurisdiction of the ship's nationality (the ship navigates on the high seas while raising the flag of its country of registration, which is referred to as the flag State). In other words, the laws and regulations of the flag State apply to that ship, and any incident involving it is deliberated at the courts and government ministries and agencies of the flag State. This is known as the flag State doctrine, which rules out interference from any other country, apart from the flag State, in the matters of a ship on the high seas. However, a warship of any nation has the right to board and inspect a ship suspected of engaging in piracy or slave trade.[3]

Expansion of the Territorial Sea Breadth from 3 to 12 Nautical Miles

In the 1960s, Japan, as a pelagic fishery nation looking for fish as far up as offshore the coastline of foreign countries, did not recognize the 12 nautical mile fishery zone system established in international law. In reality, however, in order to ensure trouble-free fishery in the offshore waters of partner countries, Japan concluded "similar circumstances but different objectives" or "shelving-style" fishery agreements with each nation. Then, in 1965, Japan concluded the Agreement on Fisheries Between Japan and the Republic of Korea (Japan-ROK Fishery Agreement), based on the 12 nautical mile fishery zone.[4] This was followed by Japan's adoption of the 1977 Territorial Waters Act stipulating a 12 nautical mile territorial sea, and the Fishery Zone Temporary Measures Act stipulating a 200 nautical mile fishery zone. Subsequently, Japan adopted the Act on the Exclusive Economic Zone and Continental Shelf in 1996.

The Declaration of Neutrality that Japan issued in the Franco-Prussian War on July 28, 1870 states Japan's territorial sea to be "not only within the harbor and inland sea, but also within a distance of 3 nautical miles from the open sea, in which the passage of warships and commercial ships of both countries is to be permitted."[5] Later, on August 29, the Grand Council of State Proclamation No. 546 revised "within a distance of three *ri*" to be "within a distance of three *ri* from any point of land, such that it could be reached by a cannonball." This was the start of prohibiting the combat of warring nations within 3 nautical miles from the coast. Notably, there

[3] UNCLOS, Article 110.

[4] On January 23, 1998, the Japanese government announced a Cabinet decision to end the Agreement and duly notified the ROK side of its decision. The Agreement was subsequently terminated one year later, and in this state of no agreement, both Japan and the ROK actively proceeded with negotiations that resulted in the signing of a new Japan-ROK Fishery Agreement on November 28, 1998, which came into effect on January 22, 1999. See Chapter 6.

[5] Grand Council of State Proclamation No. 492.

was no law in existence at that time which stipulated the territorial sea breadth to be 3 nautical miles. Japan's expansion of the territorial sea breadth to 12 nautical miles was triggered by the approach of foreign fishing vessels, particularly from the former Soviet Union, to the coastal waters of Japan.[6] Then-Minister of Agriculture, Forestry and Fisheries Abe Shintarō had already proposed to the Diet in 1975 the necessity of expanding the territorial sea breadth to 12 nautical miles. Subsequently, a Cabinet decision was made in January 1977 to formulate the Territorial Waters Act, and the decision to present the Territorial Waters Draft Bill to the Diet was made at the Cabinet meeting on March 29, 1977.

So why was it considered necessary to formulate a statute law such as the Territorial Waters Act? Prime Minister Miki Takeo, at a plenary session of the House of Representatives on January 26, 1976, indicated the government's policy of a 12 nautical mile territorial sea. Then, at a meeting of the House of Representatives Budget Committee on February 2, he stated his intent to resolve this issue within the year, irrespective of the conclusions reached at UN Conference on the Law of the Sea sessions, and to uphold the three non-nuclear principles of Japan. There, the government outlined its reasoning for requiring a legal basis to expand the territorial sea breadth:[7]

> *At present, there is no international law that has set the territorial sea breadth at 12 nautical miles . . . so it is only natural that Japan make a decision to this end. Incidentally, the existing territorial sea breadth of 3 nautical miles is an international law that is also recognized as law in Japan. Therefore, our new decision aims to change this standard territorial sea breadth of 3 nautical miles . . . we deem that realizing such a change is not the sole domain of the executive branch.*
>
> *Expanding the territorial sea will also naturally widen the scope covered by Japan's domestic laws; however, the scope of application of these laws is, of course, to be stipulated in the laws themselves, provided there is no express mandate otherwise. Such an expansion of the territorial scope of application of Japan's domestic laws will directly impact the rights and duties of Japanese citizens and as such needs to be referred to the legislative branch. The positive acceptance of the need for a new law to this effect is therefore anticipated.*

Put simply, if a 12 nautical mile territorial sea were established in international law, then there would perhaps be no need to formulate a law specifically for it. However, as it is a 3 nautical mile territorial sea that has been established in international law, it is necessary for a State to unilaterally establish a new law for setting its territorial sea breadth at 12 nautical miles. It should be noted that in 1976, there was already a permissible rule in international law for a 12 nautical mile territorial sea, and a State was able to unilaterally expand its territorial sea breadth to 12 nautical miles. Furthermore, although in international law it is acceptable for the executive branch of a State to unilaterally declare the expansion of its territorial sea breadth, widening the application scope of domestic law will impact the rights and duties of its national citizens. As such, it is necessary to formulate a new law. In other words, the existence of a 3 nautical mile territorial sea that is established in international law

[6] Mizukami, Chiyuki. 1995. *Nihon to kaiyōhō* (Japan and UNCLOS). Tokyo: Yūshindō Kōbunsha.

[7] House of Representatives Budget Committee, No. 9, February 6, 1976, 10.

requires no further action by a State, as all countries naturally have a 3 nautical mile territorial sea breadth. Conversely, the fact that a 12 nautical mile territorial sea has not been established in international law requires further action by a State in order to establish a 12 nautical mile territorial sea breadth; moreover, a State cannot be denied the right to freely determine its territorial sea breadth up to a maximum of 12 nautical miles. To reiterate, there is a permissible rule in international law for a 12 nautical mile territorial sea. This customary international law is codified in the 1982 UNCLOS as, "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles . . ."

The 1977 Territorial Waters Act established a 12 nautical mile territorial sea breadth; however, the five designated waters of the Sōya Strait, Tsugaru Strait, the East and West Channels of the Tsushima Strait, and the Ōsumi Strait have a territorial sea with a limit of 3 nautical miles. The 12 nautical mile fishery zone stipulated in the 1965 Japan-ROK Fishery Agreement was only relevant to Japan in terms of these designated areas; the ROK did not object otherwise. Incidentally, in 1977, the global trend towards setting a zone of 200 nautical miles also saw Japan enacting the Fishery Zone Temporary Measures Act, which in one sweep stipulated a 200 nautical mile fishery zone that so far had not been recognized as a system in international law. The Act also set the fishery zone to be the whole of the Pacific Ocean and only east of the Sea of Japan from a longitude of 135° east. Furthermore, the Act only applied to the former Soviet Union and its fishing vessels.[8]

Japan ratified UNCLOS in 1996, while also adopting the straight baseline method for its territorial sea and establishing its own EEZ. With these actions, Japan entered the era of a new maritime order.

As for bilateral treaties, in addition to the Japan-ROK Fishery Agreement, there is the Convention on the Continental Shelf, and also the Japan-China Fishery Agreement.[9] In regard to general issues between Japan and the ROK and China, as has already been briefly mentioned, these concern the territories of Takeshima and the Senkaku Islands.

There is also the issue of the status of the 200 nautical mile fishery zone established off the far south Okinotorishima Island.

Unless all of these issues are fully understood and coordinated by all sides, it is difficult to declare the beginning of a new maritime order. Therefore, prior to discussing EEZs, it is perhaps useful to review the background of establishing the EEZ regimes in the international law of the sea, and to clarify the implication of the issues in this area of law.

Furthermore, new fishery agreements and treaties have been concluded between Japan, and the ROK, and China. According to precedent and the prevailing view,

[8] For further details see the section on the 1977 Act on Temporary Measures Concerning Fishery Waters in this chapter.

[9] A new Agreement was signed on November 11, 1997, which the Japanese Diet approved in April 1998. However, delays with procedures in China resulted in the Agreement only coming into effect on June 1, 2000. See Chapter 6.

under the duty to observe international law as stipulated in Article 98 (2) of the Japanese Constitution, legal force follows the order of the Constitution, then treaties, and then laws, which would lead to the partial suspension of the binding force of domestic laws such as those on EEZs. In regard to issues in international law, consistency with the following Article 311 (3) of UNCLOS would become a moot point:

> *Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.*

The 200 Nautical Mile Fishery Zone and 1977 Fishery Zone Temporary Measures Act

The International Nature of the Delimitation of Maritime Areas

On December 18, 1951, the International Court of Justice (ICJ) ruled on a dispute between the United Kingdom and Norway, known as the Fisheries Case, concerning the method Norway used to draw a baseline to delimit the fishery zone for its fishermen. The following is an excerpt from the ruling:

> *The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delineation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delineation with regard to other States depends upon international law.*[10]

Incidentally, the Territorial Waters Act and the Fishery Zone Temporary Measures Act, Japan's two maritime laws that were promulgated on May 2, 1977 and took effect on July 1, were valid until the revision, abolition, and formulation of domestic laws related to UNCLOS of June 1996; each had established the territorial sea and fishery zone of Japan to be from the baseline to a breadth of 12 nautical miles and 200 nautical miles, respectively. The abovementioned domestic legislation stipulated the sovereignty and fishery jurisdiction of Japan, and also had an evident effect on international law. How legislation is evaluated in light of international law depends on the interpretation of relevant international law currently in force. This section therefore first examines the trends of postwar international law of the sea, while considering the issues of territorial sea, continental shelves, and fishery zones.

[10] International Court of Justice. 1951. *Reports of Judgments, Advisory Opinions and Orders*, p. 132.

It will then look at what constitutes unilateral measures under international law and their significance, and finally, review the two now-lapsed maritime laws of 1977.

Trends in the Law of the Sea Leading Up to the Emergence of a 200 Nautical Mile Fishery Zone

1. Overview

   It was the Truman Proclamation that spurred other countries to assert their maritime claims after World War II, and subsequently to successively issue their respective statements on continental shelves that highlighted the dependence of their coastal citizens on marine resources or stressed the urgency of protecting their fishery resources from destructive exploitation by foreign pelagic fisheries. Moreover, once it became evident that calls for placing the seabed resources of continental shelves under the rule of coastal States would likely be gradually integrated into international law as new rules and without any opposition from major marine nations, the claims of coastal States moved toward new and strong demands expanding their jurisdiction in fisheries.

   The International Law Commission (ILC), which organized the UN Conference on the Law of the Sea I, first deliberated the issue of continental shelves and fishery on the high seas. However, faced with the reality of the postwar claims of coastal States on continental shelves and fishery being merely one aspect of a move towards expanding their territorial sea, the issue was addressed in its entirety. Consequently, the ILC draft of the law of the sea included rules on a general system for territorial seas and high seas. Regrettably, despite 8 years of studies on the matter, the ILC left several issues unresolved, the most important of which, it goes without saying, was the issue of the territorial sea breadth. The draft of the law of the sea recognized that each country had varying customary practices in regard to its territorial sea breadth, while also clarifying that expanding the territorial sea to beyond 12 nautical miles was not permitted in international law.

   The UN Conference on the Law of the Sea I and II, held in 1958 and 1960, respectively, failed to produce a consensus on the issue of territorial sea breadth, which can be regarded as the core of the maritime system. Despite this, the conferences achieved landmark results in the history of international law with the formation of four key conventions covering all areas of the law of the sea. As for the issue of the territorial sea breadth, given the fact that the interests of fisheries and strategic interests were closely entwined, it is well known that several compromises were proposed including a combined territorial sea and fishery zone within 12 nautical miles of the coast. The United States and Canada put forth an amended proposal at the 1960 Conference; it was approved by 54 States and opposed by 28, with 5 States abstaining from voting. Although this proposal fell just short of the majority vote required, the fact that it was

approved in such large numbers indicated that the institutionalization of the 12 nautical mile fishery zone contained in the proposal had considerable support. The codification of the continental shelf regime in the 1958 convention therefore turned the interest of other nations toward fishery zones.

2. Legal nature of the 12 nautical mile fishery zone

The following is an excerpt from the ICJ's judgment in the Fisheries Jurisdiction Case, which the United Kingdom filed against Iceland in July 1972 in regard to a dispute over the expansion of an exclusive fishery jurisdiction to 50 nautical miles.

Legislation developed from State practices based on the discussions and near-agreements at UN Conference on the Law of the Sea II, namely "Two concepts have crystallized as customary law in recent years . . . The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the concept of preferential rights of fishing."[11] This fishery zone was specified by the Court as a "*tertium genus* between the territorial sea and the high seas."

Incidentally, the ICJ gave no grounds for its judgment in the July 1974 case, most likely because it regarded such grounds as irrelevant considering the concepts were firmly established as customary law. However, here several customary practices of States shall be described in order to understand the facts supporting this judgment.

The countries that unilaterally established a 12 nautical mile fishery zone from 1960 onwards are listed below. It should be noted that at the time Japan's two laws of the sea were enacted in 1977, about half of these countries established a 12 or 200 nautical mile territorial sea. The following countries successively established a 12 nautical mile fishery zone: Albania (1960); Norway, Senegal (1961); Mauritania, Morocco, Tunisia (1962); Uruguay, South Africa, Yemen (1964); Denmark, New Zealand (1965); Pakistan, Portugal, the United States, Brazil, Mexico (1966); Spain, France, Australia, Dominican Republic, Côte d'Ivoire, Monaco (1967); Nauru, Sweden (1968); Poland (1970); and Malta (1971).

On May 18, 1966, 5 months prior to the establishment of the United States' own 12 nautical mile fishery zone, the US State Department expressed its view that, in light of the progression of international practices from 1960 onwards, establishing a 12 nautical mile fishery zone was not in violation of international law. This view was not solely based on such unilateral domestic legislation; rather, it had taken into consideration international practices including international treaties such as the Great Britain-Norway Fishery Agreement of November 17, 1960, the Soviet Union-Norway Fishery Agreement of 1961, the European Fisheries Convention of March 9, 1964, and the agreement concluded with

[11] International Court of Justice. 1974. *Reports of Judgments, Advisory Opinions and Orders*, p. 23.

Norway and exchange of notes between the UK, Poland, and the Soviet Union to facilitate the approval of a British 12 nautical mile fishery zone that became effective on September 30, 1964.

Against this backdrop Japan negotiated with other countries and concluded the following agreements: the Japan-US Fisheries Agreement on May 9, 1967; the Japan-New Zealand Fisheries Agreement on July 12, 1967; the Japan-Mexico Fisheries Treaty on March 7, 1968; and the Japan-Australia Fisheries Agreement on November 17, 1968. However, each of these agreements carefully avoided approving the 12 nautical mile fishery zone of the partner country (a shelving style of agreement). The only exception to this was the Japan-ROK Fisheries Agreement concluded on June 22, 1965. Japan took a different position to the US and did not recognize a 12 nautical mile fishery zone as an established system in international law.

Incidentally, the territorial sea and fishery zone are interconnected in a rather interesting way. The establishment of a 12 nautical mile fishery zone peaked in 1966 and 1967, while the setting of a 12 nautical mile territorial sea became prevalent after that, namely in 1966 with three countries, 1967 with eight countries, 1968 with three countries, 1969 with eight countries, and 1970 with three countries; and as previously mentioned, some countries switched over from a fishery zone to a territorial sea. Hence, the regulations on territorial sea in international law in the 1970s included a permissible rule that allowed each country to unilaterally establish a fishery zone from 3 to 12 nautical miles.

In light of this, even the unilateral establishment of a 12 nautical mile fishery zone, which was initially considered to be illegal, was on an individual level an infringement of the rights and interests of other nations while also seemingly in violation of the high seas regime. However, it came to constitute a new customary law as a result of being practiced widely and being given tacit approval by other states.

The 12 nautical mile fishery zone system has countervailing power against all nations, and it is a zone of a coastal State in which it can exercise its jurisdiction for the purpose of its fisheries. While there are examples of interpreting this system to permit foreign fisheries inside this zone for an indefinite or fixed period (phase out style), nevertheless these foreign fisheries were still under the jurisdiction of the coastal State.[12]

3. Emergence of a 200 nautical mile fishery zone

The claims of coastal States on marine resources were not, however, confined to within a 12 nautical mile fishery zone. In 1972, Kenya proposed the concept of an economic zone, and various Caribbean countries put forth the Patrimonial Sea Concept; these were some of the assertions that emerged at the time for jurisdiction over resources in a 200 nautical mile zone. The concept of an economic zone was first advocated as a single draft and revised draft at UN Conference on the

[12] Oda, Shigeru. 1971. *Umi no shigen to kokusaihō* (Ocean Resources and International Law) I. Tokyo: Yūhikaku.

Law of the Sea III, which commenced its substantive session in 1974. The following is a list of countries that unilaterally established a 200 nautical mile zone before May 1977, when Japan's two maritime laws were promulgated.

A total of 28 countries: Bangladesh in 1974 (economic zone; EZ); Costa Rica, Iceland in 1975 (fishery zone; FZ); Senegal (FZ), Benin (formerly the Republic of Dahomey, territorial sea), Mexico, Guatemala, Mozambique, Pakistan, Liberia, Angola (all EZ) in 1976; and by May 1997, seven countries in the European Community (EC) (the UK, France, West Germany, the Netherlands, Belgium, Denmark, Ireland: FZ); Norway (FZ); Canada (FZ); India, Sri Lanka, Cuba (all EZ); the US, the Soviet Union, Burma, Japan (all FZ); and Vietnam (EZ). Adding to this the ten countries with a 200 nautical mile territorial sea before the economic zone concept emerged (Chile, Peru, El Salvador, Ecuador, Panama, Argentina, Uruguay, Brazil, Sierra Leone, Somalia), as well as Nicaragua (which had a 200 nautical mile fishery zone), meant that 39 countries actually had, in some way, unilaterally established a 200 nautical mile zone at the time Japan's two maritime laws were enacted in 1977.

In a word, this trend can be summarized as the unilateral measures exemplified by the establishment of a 200 nautical mile zone by the EC, the US, the Soviet Union, and Japan. While these measures dominated the discussions at UN Conference on the Law of the Sea III, they were fundamentally different to the economic zone concept. The following is an examination of why this was the case.

The first crucial point to note here is that conserving and securing marine resources was becoming a matter of urgency. At the first substantive session of UN Conference on the Law of the Sea III in 1974, just 1 month after the judgment on the Iceland Fisheries Jurisdiction Case, a 200 nautical mile economic zone received clear and overwhelming majority support at the close of the Caracas session. A single informal negotiation draft was subsequently distributed at the Geneva session in 1975, and after 8 weeks of discussions at the New York spring session in 1976, relevant sections of the single draft were kept as is.

According to the second section of the revised single draft at the New York spring session in 1976, the rights exercised by a coastal State in an economic zone were: (1) sovereign rights over the exploration, exploitation, conservation, and management of all living and non-living resources in the seabed, soil, and waters of the zone, (2) exclusive jurisdiction over the installation and usage of artificial islands, equipment, and structures, (3) exclusive jurisdiction over the economic exploitation and exploration of the zone, along with other activities and scientific research, and (4) jurisdiction over the preservation of the marine environment. Hence, the legal standing of an economic zone was stipulated as a third zone that is different from the high seas and territorial sea.[13] To summarize this simply and somewhat boldly, this was an assertion of the jurisdiction of coastal States over marine and mining resources, and their right to carry out

[13] Articles 44 and 75.

scientific research and preserve the marine environment (the other side of the coin being, the right to regulate navigation).

When broken down in this way, in terms of positive law, the jurisdiction over mining resources noted in the second section means that each nation can actually access these resources based on the current international law of the continental shelf regime. Canada established an antipollution zone in 1970, with the US moving towards similar legislation without any apparent sense of urgency to make it a domestic law. That said, the general postwar trend was to settle the issues concerning continental shelves, and so the remaining issue to be addressed was the coastal States' assertion of their jurisdiction over fishery resources. Such was the urgency of this fishery issue that it could not wait for the conclusions reached at the UN Conference on the Law of the Sea sessions, which is why from 1973 to 1974 major States took legislative action. In the US, a bill was submitted to the two chambers of Congress proposing an expansion of the country's fishery jurisdiction to beyond 12 nautical miles; it was an interim measure until a consensus was reached on an international agreement. Supreme Soviet law and Japanese legislation followed suit with provisional measures taken as a unilateral act under international law.

Incidentally, each nation's legislation limited the rights that could be exercised within a 200 nautical mile zone as exclusive fishery jurisdiction over all living creatures in the zone[14] and jurisdiction over fisheries and the like.[15] It did not include jurisdiction over the exploitation of mining resources in continental shelves, scientific research, or the prevention of marine pollution. Even if such areas were included, they would be handled as secondary to other rights. Hence, this could be interpreted as enabling the expansion of the 12 nautical mile fishery zone established in customary law to 200 nautical miles.

However, the problem remained of whether a State could unilaterally act to expand its 12 nautical mile fishery zone to 200 nautical miles, or establish a new 200 nautical mile fishery zone; in other words, was the establishment of a 200 nautical mile fishery zone regarded as customary law? If a 200 nautical mile fishery zone was deemed a system in customary law, then each nation had the right to unilaterally establish a 200 nautical mile fishery zone.

1977 Act on Temporary Measures Concerning Fishery Waters

On April 13, 1976, US President Gerald Ford signed the Fishery Conservation and Management Act of 1976, Public Law 94-265. The US then began to exercise its fishery regulatory authority in its 200 nautical mile zone on March 1, 1977. The US Coast Guard carried out an on-board inspection on April 9 of a Soviet trawler

[14] 1976 US Law Article 102 (1).

[15] Act on Temporary Measures Concerning Fishery Waters, Article 1.

suspected of fishing more than the regulated quantity and detained the ship. It has been pointed out that this law has several problematic areas, and the unilateral expansion of a fishery zone by a coastal State (as per in this law) is noted as being a violation of international law. Moreover, this point was also discussed in the US Congress, citing the July 1974 ICJ judgment on the Iceland Fisheries Jurisdiction Case.

At the time of Japan's enactment of the 1977 Act on Temporary Measures Concerning Fishery Waters, as previously mentioned, there were already 28 countries (39 when including the countries with a 200 nautical mile territorial sea) that had unilaterally set a 200 nautical mile zone, including the US, the Soviet Union, Japan, and the EC (the nations that stood to gain the most from doing so). Moreover, the conclusion of agreements such as those between the US and the Soviet Union, the US and Japan, and Japan and the Soviet Union, meant that upon the enactment of Japan's two laws of the sea of 1977 which recognized a 200 nautical mile zone, the 200 nautical mile fishery zone had become a system in customary law.

However, at the time the US had established its 200 Nautical Mile Fishery Conservation and Management Act, there were only a few nations with 200 nautical mile zones, and so it was difficult to consider that such a system had become customary law. Hence, by making a 200 nautical mile zone a domestic law, the US can be regarded as violating customary law, namely, the freedom of the seas principle noted in Article 2 of the Convention on the High Seas in international law. The US held countervailing power against other nations it had concluded bilateral treaties with and that approved its 200 nautical mile zone, or that gave their tacit consent by not protesting it. In international law, as long as a State does not violate *jus cogens* (the freedom of the seas principle is not *jus cogens*), all types of treaties, even those that violate general international law, can be concluded and are hence valid.[16] Therefore, the aforesaid comments on the US 200 nautical mile zone legislation can be applied similarly to the Soviet Union 200 nautical mile zone.

That being the case, how does this apply to Japan's two laws, the Territorial Waters Act and the Fishery Zone Temporary Measures Act (the Fishery Zone Act)? As for the former, although issues can arise with the interpretation and setting of baselines, such as in Sagami Bay and the West Channel of the Tsushima Strait, these are not notable problems in international law. Therefore, the discussion from hereon

[16] See the Vienna Convention on the Law of Treaties, Article 53.

will focus on the latter.[17, 18] The main fishery nations in the waters surrounding Japan are the Soviet Union (at the time; now Russia), the ROK, and China. These are all concerned nations of the past and present.

In short, this legislation, when read together with the draft Cabinet Order, can be regarded as having been only applicable to the Soviet Union and its citizens, which can also be gleaned from the fact that it emerged as a part of negotiations between Japan and the Soviet Union.

Incidentally, the legal system of a fishery zone is, as has already been discussed, *opposable à tous* towards all other nations as an area under the jurisdiction of a coastal State. The US Fishery Conservation and Management Act was in violation of international law at the time of its establishment and had no general countervailing power; despite this, the US insisted on such a power *erga omnes* (towards all other nations). So, if a 200 nautical mile zone had been confirmed as becoming customary law in 1977, this fishery zone would also have general countervailing power towards all other nations.

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[17] Structure of the Fishery Zone Act: Article 3(3) of the Act stipulates Japan's fishery zone to be the waters from the baseline to a breadth of 200 nautical miles; however, Cabinet Order-designated waters are not a fishery zone. This means that Japan's fishery zone is wholly determined by a Cabinet Order, under a system in which it may suddenly change in size one day as the government decrees. The waters designated by a draft Cabinet Order and that do not constitute Japan's fishery zone are the area westward off the coast of Fukui Prefecture on the Sea of Japan side and westward off the coast of Kagoshima Prefecture on the Pacific Ocean side (*Yomiuri Shimbun*, April 20, 1977 edition), or the western section of the Sea of Japan, the Eastern Sea, the Yellow Sea, and part of the south-western section of the Pacific Ocean contiguous to the Eastern Sea side (*Mainichi Shimbun*, April 27, 1977 edition). Also, the areas included in the aforementioned fishery zone within the designated waters noted in Clause 2 of the Territorial Waters Act supplementary provisions are only the Sōya Strait and Tsugaru Strait; these designated waters form the 12 nautical mile exclusive fishery zone (EFZ) that foreign fisheries are prohibited from entering (Article 5(1)). Foreign fisheries are able to operate in the other designated waters within the 12 nautical mile area. However, Article 1 of the 1965 Japan-ROK Fishery Agreement stipulates these waters to also be an EFZ.

It should be noted that the regulations on foreign fishery in the fishery zone (Articles 5 to 11) do not apply to Koreans or Chinese (Article 14 and the draft Cabinet Order). Moreover, neither do they apply to the waters of the four Northern Islands (*Asahi Shimbun*, May 25, 1977 edition).

[18] Legality of the Fishery Zone Act: It is difficult to simply brand this unilateral measure by Japan as a violation of international law, as is the case with the United States and the Soviet Union. This is mainly because the two superpowers established a 200 nautical mile zone, while Japan did not recognize this zone and alleged the illegality of the 1976 US law right up until the first and second rounds of negotiations with the United States in August and November 1976, respectively.

However, Japan appeared to have accepted the US claims at the third round of negotiations in December 1976 in Washington, D.C. Subsequently, it signed an interim agreement on February 10, 1977 (an exchange of notes, Ministry of Foreign Affairs Notification No. 50, Official Gazette of March 3, 1977, No. 15042), which was followed by the provisional signing of a long-term agreement on March 18. Then, at the House of Representatives Foreign Affairs Committee on April 27, 1977, Director-General Nakajima of the Treaties Bureau of the Ministry of Foreign Affairs commented, "A new norm in international law is gradually emerging; it is now possible to set not a 12 nautical mile but a 200 nautical mile fishery zone, as has become the common international practice."

Furthermore, as Japan's Fishery Zone Act was only applicable to the then Soviet Union and its citizens by Cabinet Order (mandated by national law), it seems to have been designed to only have countervailing power towards the Soviet Union. If, however, the unilateral establishment of a 200 nautical mile zone was in violation of international law at the time of its enactment in Japan as well, then Japan would have also established an illegal 200 nautical mile zone just as the Soviet Union had done, by a Cabinet Order that was only applicable to the Soviet Union.

Hence, in this view, Japan carried out a unilateral measure generally recognized as a reprisal in international law. Of course, the Cabinet Order mandate also took into consideration the interests of Japan's fisheries in the waters surrounding the ROK and China, as well as the territorial issue of the attribution of Takeshima and the Senkaku Islands. However, when the Cabinet Order of Article 14 in the Fishery Zone Act is included, Japan's unilateral measure appears to be an act of self-help in the nature of reprisals in international law. In that sense, Japan's unilateral establishment of a 200 nautical mile zone ensures legality towards the Soviet Union, as well as countervailing power. This is no more than a trump card for use in diplomatic negotiations, however; it is not an assertion of a fishery zone in the general sense. It therefore loses all significance once diplomatic negotiations are concluded.

Meanwhile, the Cabinet Order of Article 3(3) in the Fishery Zone Act states that if waters are not designated, then Japan's fishery zone will be the waters (including the exclusive fishery zone in the designated zone) that are 200 nautical miles (or, according to the situation, up to the median line or agreed upon line) from the territorial sea baseline away from the coast. This fishery zone asserts an *erga omnes* countervailing power, which is congruent with the legal principles of the fishery zone system in customary law.

This analysis of Japan's Fishery Zone Act has revealed its two-tiered structure of a reprisal-like nature entwined with an assertion of a general fishery zone system, through its linkage with Cabinet Orders. Furthermore, the reprisal-like nature of the Act came to the forefront during fishery negotiations between Japan and the Soviet Union. However, it was already predicted that the general fishery zone assertion would surface in light of the foreseen issues of ROK fishing vessels operating in Japanese waters and Soviet Union fishing vessels operating in a Cabinet Order-designated zone in the not too distant future. From that perspective, Japan's Fishery Zone Act had a different legal nature due to its linkage with Cabinet Orders. Moreover, as of June 6, 1977, when I had finished the special feature article on the law of the sea that *Hōritsu no Hiroba*, a general law journal, asked me to contribute and the June Cabinet Order had not yet been issued, the impression I was left with was that the Act was a quick-fix without any principles, although it was difficult to determine.

Regarding the legality of a 200 nautical mile fishery zone, the US Fishery Conservation and Management Act was the trigger for a succession of unilateral measures to establish such a zone, which Japan also recognized for the US in the Japan-US Fishery Agreement on March 18 and for the Soviet Union in the Japan-Soviet Union Fishery Provisional Agreement on May 24. Such actions were taken between superpowers, with each nation taking what it called interim measures within

its domestic law. Underlying this was the general consensus reached on economic zones in the legal sense at UN Conference on the Law of the Sea III. Furthermore, the 200 nautical mile fishery zone also had the subjective element of being established in international customary law, namely *opinio juris sive necessitatis* (an opinion of law or necessity), as well as the objective element of a rapid succession of individual practices that at first were in violation of the freedom of the high seas. Despite this, a new customary law had been established. This fishery zone was positioned as a third category (*tertium genus*) between the high seas and territorial sea.

Need for Review from the Perspective of Securing and Distributing Protein Resources of the World

If the 200 nautical mile fishery zone were to become a system in customary law as a zone under the jurisdiction of a coastal State, then ensuring Japan's fishery in the 200 nautical mile zone of countries such as Australia, New Zealand, the ROK, and China would thus be a political issue centering on diplomatic negotiations.

A general issue warranting additional discussion is the fishery resources that belong to a coastal State once a 200 nautical mile zone is established. It is preferable to review this from the perspective of securing and distributing protein resources of the world, rather than only taking the view that these are simply resources of a coastal State.

EEZ Enclosing Marine Resources

United Nations Conferences on the Law of the Sea

As previously mentioned, it was the Truman Proclamation issued by the US immediately after World War II that triggered further claims from a number of countries, including countries in Latin America and the Caribbean, asserting their rights to the marine resources offshore from their coast and declaring a 200 nautical mile territorial sea. Another example of this is the Syngman Rhee Line that was the main issue at the fishery negotiations held between Japan and the ROK from 1952 to 1965.[19] As a result, the traditional maritime order—namely a narrow territorial sea and vast high seas, based on the freedom of the high seas—was in disarray. Hence, the UN held the UN Conference on the Law of the Sea I in 1958, at which the

[19] Oda, Shigeru. 1972. *Kaiyōhō no genryū o saguru* (Exploring the Origins of UNCLOS). Tokyo: Japan Fisheries Association; and Kawakami, Kenzō. 1972. *Sengo no kokusai gyogyō seido* (The Postwar International Fisheries System). Tokyo: Japan Fisheries Association.

following four conventions of the law of the sea were adopted: Convention on the Territorial Sea and Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of Living Resources of the High Seas, and Convention on the Continental Shelf. The first two Conventions were a codification of customary law, while the latter two were new international legislation put in place to address new circumstances that had arisen.

Agreement on the breadth of the territorial sea could not be reached, however, owing to a clash of fishery interests as well as differences between the United States and the Soviet Union stemming from their military strategies; and so, the UN Conference on the Law of the Sea II in 1960 also ended without a successful outcome. During this period, the 12 nautical mile fishery zone system was being established, as described earlier in this chapter.

As space exploration progressed in the 1960s, the interest of developed nations naturally turned toward marine exploration. Remarkable advancements in science and technology also meant the seabed was in danger of being partitioned among developed nations, as pointed out by the small Mediterranean country of Malta. At the 1967 United Nations General Assembly (UNGA), Malta proposed the peaceful use of the seabed and ocean floor, as well as their resources, as a "common heritage of mankind," while also taking into consideration the interests of developing nations. Then, the Committee on the Peaceful Uses of the Seabed and Ocean Floor was set up the following year, and issues concerning the exploration and exploitation of these areas in the sea were discussed at the UN. In 1969, Malta proposed a conference to review the Convention on the Continental Shelf, although the US, the Soviet Union, Western European nations, and Japan were not so keen on the proposal. Developing countries in Asia, Africa, and Latin America, many of which gained independence in the 1960s, called for a comprehensive revision of the law of the sea to take into account the interests of developing nations, considering that the 1958 Conventions are codification of the traditional law of the sea, which favors developed nations. As a result, a resolution was passed at the 25th UNGA in 1970 to hold UN Conference on the Law of the Sea III in 1973.

Incidentally, as described earlier, the reference to a 200 nautical mile zone was seen first in the assertions for a 200 nautical mile territorial sea made by countries in Latin America and the Caribbean. However, it wasn't until 1972 that the concept of an economic zone was proposed, as a claim for jurisdiction over resources in a 200 nautical mile zone. That year, at the Yaoundé Convention held by African nations, these countries adopted the recommendation to establish an EEZ outside of the territorial sea where a State can exercise its exclusive jurisdiction over the exploration and exploitation of all living and non-living resources. Furthermore, the Santo Domingo Declaration was adopted at the 1972 Specialized Conference of Caribbean Countries on Problems of the Sea; a sub-section of that Declaration entitled the "patrimonial sea" established waters in which a coastal State has sovereign rights over all natural resources in a 200 nautical mile zone from the outer edge of its territorial sea.

This formed the basis for the proposal put forward in 1972 to the Committee on the Peaceful Uses of the Seabed and Ocean Floor. At the first substantive session of

UN Conference on the Law of the Sea III in 1974, most nations advocated with one voice the establishment of a 200 nautical mile EEZ; only Japan stood out for its opposition to the proposal. This led to many nations enacting domestic legislation, with such names as the 200 nautical mile Exclusive Economic Zone Act or 200 nautical mile Exclusive Fishery Zone Act, and establishing a 200 nautical mile fishery zone enclosing fishery resources. Although debate on such a zone went through a difficult process at UN Conference on the Law of the Sea III, UNCLOS was established in 1982.

EEZ as a System Derived from Fishery Zones

The Convention comprehensively covers the bulk of the law of the sea in 17 sections with 320 articles and is supplemented with the following nine annexes: Highly Migratory Species; Commission on the Limits of the Continental Shelf; Basic Conditions of Prospecting, Exploration and Exploitation; Statute of the Enterprise; Conciliation; Statute of the International Tribunal for the Law of the Sea; Arbitration; Special Arbitration; and Participation by International Organizations. UNCLOS was adopted on April 30, 1982, as was a resolution[20] to set up a Preparatory Commission for the International Seabed Authority and the International Tribunal on the Law of the Sea, and a resolution on preliminary investment in multiple metallic masses. However, the US, the UK, (the former) West Germany, and a number of other countries, expressing dissatisfaction over Part XI of the Convention on the deep seabed, did not sign it. The world underwent dramatic political and economic upheaval in the years after the adoption of the Convention. In particular following the conclusion of the Cold War, there was a growing dependence on market economy principles primarily by former socialist countries and developing nations. Hence, nations held unofficial talks from 1990 to 1994, presided over by the UN Secretary General, with the aim of modifying Part XI of the Convention. These talks led to the Agreement Relating to the Implementation of Part XI of the Convention on the Law of the Sea to revise Part XI, which was adopted on July 28, 1994 and came into effect on July 28, 1996.

UNCLOS includes provisions on EEZs and the continental shelf in Part V (Articles 55 to 75) and Part VI (Articles 76 to 85), respectively. The provisions on the continental shelf stipulate the distance to be 200 nautical miles from the baseline to a maximum of 350 nautical miles, and they outline the establishment of a Commission on the Limits of the Continental Shelf for determining the outer limit of those shelves that exceed 200 nautical miles, as well as state the allocation of proceeds from the exploitation of that section of the continental shelf. While basically following the Convention on the Continental Shelf, UNCLOS contains

[20] The resolution on a preparatory commission for the deep seabed authority.

highly detailed provisions on EEZ, as it is a newly created concept with an outer limit of 200 nautical miles (Article 55).

Article 56 stipulates the following rights of a coastal State in an EEZ:

1. *In the exclusive economic zone, the coastal State has:*

   (a) *sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone. . .;*
   (b) *jurisdiction as provided for in the relevant provisions of this Convention with regard to:*

      (i) *the establishment and use of artificial islands, installations and structures;*
      (ii) *marine scientific research;*
      (iii) *the protection and preservation of the marine environment.*

In summary, a coastal State firstly has sovereign rights over living and non-living resources, secondly has jurisdiction over the establishment and use of artificial islands, installations and structures, and thirdly has the right to marine scientific research[21] and the protection and preservation of the marine environment.[22] As for the sovereign rights over non-living resources, from the perspective of positive law, each nation already has access to these resources via vested interests, in accordance with the continental shelf system in current international law. Hence, the scope of application of the newly established Part XI of the Convention on the deep seabed system—namely, the issue arising from delimiting the border of the deep seabed that is a "common heritage of mankind" and the continental shelf of each nation—is newly regulated in Part VI on the continental shelf (although fundamentally, it does not differ from the Convention on the Continental Shelf).[23] Provisions on coordinating the rights of other countries in an EEZ are specified in Articles 58 and 59, while Article 60 contains relatively detailed provisions on artificial islands, etc. Furthermore, the provisions on EEZs are quite specific in regard to living resources.

The provisions on fisheries in the EEZ of the Convention from the draft stage include those relating to maximum sustainable yield, optimal usage, total catch, surplus, catch quota, and fishing fees that had been invoked in fishery negotiations of some states. Hence, historically, the EEZ is a system derived from fishery zones, as described above.

[21] UNCLOS, Part XIV, Articles 238 to 265.

[22] UNCLOS, Part XII, Articles 192 to 237.

[23] For further discussion of this parallel principle, see Nakamura, Kō. 1986. "Haitateki keizai suiiki to tairikudana no kankei (The Relationship between EEZs and Continental Shelves)" in Yamamoto, Sōji (ed). *Kaiyōhō no rekishi to tenbō* (The History and Developments of UNCLOS, Oda Shigeru 60th birthday edition). Tokyo: Yūhikaku.

Japan-ROK Agreement on the Continental Shelf and EEZ

Oda Shigeru pointed out early on that the parallel principle of the UNCLOS provisions on an EEZ (Part V) and continental shelf (Part VI) was a problem;[24] it remains an issue that is relatively difficult to resolve of two regimes occurring within and outside an EEZ. Outside an EEZ, the coastal State can establish the outer edge of the continental margin to a maximum of 350 nautical miles wherever the margin extends beyond 200 nautical miles.[25] It is in this area that the continental shelf regime exists.

Even if within an EEZ, because the Convention itself defines the continental shelf as "the seabed and subsoil of the submarine areas that extend . . . to the outer edge of the continental margin, or to a distance of 200 nautical miles. . .," there exist such seabed and subsoil without the topography and geological features of a continental shelf.[26] Hence, "An EEZ and continental shelf each have different origins, and therefore cannot be assumed to have the same breadth." This is due to the Convention stipulating the delimitation of an EEZ and continental shelf to achieve an "equitable resolution" of this issue. "However, the 'equity' of a continental shelf border and EEZ border are not necessarily always the same."[27] Accordingly, if seeking to set the same border for both an EEZ and continental shelf, logically this will give rise to the problem of which "equity" should take precedence.

Incidentally, in 1974 Japan and the ROK concluded two agreements on the continental shelf adjoining both countries. These are the Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries (Northern Part Agreement), which is considered to be based on an equidistant median line, and the Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries (Southern Part Agreement).

The latter Southern Part Agreement is based on an overlap of Japan's assertion of an equidistant median line and the ROK's assertion of a natural prolongation of the shelf, which created a zone for joint development within the Japan-side of the median line of the continental shelf adjoining both countries; the agreement was reached "[d]esiring to promote the friendly relations existing between the two countries; [c]onsidering their mutual interest in carrying out jointly exploration and exploitation of petroleum resources in the southern part of the continental shelf adjacent to the two countries, [and] [r]esolving to reach a final practical

[24] In his dissenting opinion in the ICJ judgment on the 1982 Tunisia-Libya Continental Shelf Incident.

[25] UNCLOS, Article 76.

[26] Ibid.

[27] Oda, Shigeru. 1985. *Chūkai kokuren kaiyōhō jōyakujō* (Commentary on UNCLOS). Tokyo: Yūhikaku.

solution to the question of the development of such resources."[28] The Southern Part Agreement was signed on January 30, 1974 and came into effect on June 22, 1978, 4 years before UNCLOS was adopted. Although it will remain valid for 50 years, Article 28 of the Agreement stipulates, "Nothing in this Agreement shall be regarded as determining the question of sovereign rights over all or any portion of the Joint Development Zone, or as prejudicing the positions of the respective Parties with respect to the delimitation of the continental shelf." Hence, it does not address the delimitation issue.

Furthermore, until the conclusion of the new Japan-ROK Fishery Agreement that came into effect in 1999, the original Fishery Agreement concluded in 1965 designated a 12 nautical mile fishery zone and jointly regulated waters. However, due to the enactment of the 1977 Territorial Sea Act that set Japan's territorial sea at 12 nautical miles, and the absence of protests from the ROK to this, the fishery zone of this Agreement only applied to the designated zone that set Japan's territorial sea to be no more than 3 nautical miles. The ROK also took similar measures to Japan in accordance with the 1977 Territorial Sea Act. It should be noted that both Japan and the ROK are parties to the 1982 UNCLOS.

So, based on these facts, how should the relation between an EEZ and continental shelf be viewed? The Northern Part Agreement sets out 35 coordinates, with the straight lines connecting those coordinates in sequence being the boundary line of the continental shelves appertaining to both countries. Furthermore, Article 7(1) of the new Japan-ROK Fishery Agreement that came into effect in 1999 stipulates the EEZ border in the northern part of the Japan-ROK continental shelf as being the line that connects the same 35 coordinates in Article 1(1) of the Northern Part Agreement. Why is it, however, that the border of the new EEZ and the border of the continental shelf are the same? Although it is not entirely clear from the details of the negotiations, it can only be surmised that at the very least, upon the conclusion of the 1974 Convention, the same continental shelf existed in the northern waters; and as there were no special circumstances then, it was considered "equitable" to base delimitation on an equidistant median line. Moreover, at the 1998 Convention, as there were also no special circumstances during the delimitation of the EEZ based on distance, it can only be surmised that both Japan and the ROK agreed that an equidistant median line was "equitable."

Now, with regard to the situation in the southern waters, as already mentioned, the Southern Part Agreement was concluded amid opposing views of the two sides, and was based on an overlap of both countries' claims that created a joint development zone; it did not address the delimitation issue. Subsequently, the diplomatic negotiations on delimitation of an EEZ in the new Japan-ROK Fishery Agreement were in accordance with UNCLOS, to which both countries are parties. The

[28] No. 19778 Japan and Republic of Korea: Agreement concerning joint development of the southern part of the continental shelf adjacent to the two countries (with map, appendix, agreed minutes and exchanges of notes). Signed at Seoul on 30 January 1974. https://treaties.un.org/doc/Publication/unts/Volume%201225/volume-1225-I-19778-English.pdf. Accessed on December 3, 2022.

Convention stipulates that delimitation of an EEZ shall be done by consensus and in accordance with international law, in order to achieve an equitable resolution.

In international law, an equitable delimitation is achieved when a delineation is reached based on "a combined equidistance-special circumstances rule."[29] Therefore, if both countries reach consensus on an equidistant median line or on an amended equidistant line taking into account special circumstances, then the continental shelf within the EEZ is defined by joint development, not by the drawing of a border based on the Southern Part Agreement in 1974. Hence, an EEZ and continental shelf exist as two separate regimes. In reality, however, Japan and the ROK were unable to reach a consensus on the border, and Article 9(2) of the new Japan-ROK Fishery Agreement established a "provisional measures zone." The northwest line of this "provisional measures zone" (that Japan asserted was an equidistant median line) ran slightly along the north of the ROK-side line stipulated in the Southern Part Agreement. Meanwhile, the southeast line (that the ROK asserted was an equidistant median line) ran through the joint development zone of which over three-quarters was drawn as being on the Japan side. Based on paragraph 2 of Annex II, each country's zone marked by these lines was deemed to be an EEZ. Accordingly, for Japan, the seabed of the EEZ stipulated in the new Japan-ROK Fishery Agreement (in other words, part of the continental shelf) remained as a continental shelf zone for joint development based on the Southern Part Agreement and throughout the period of its validity.

This is reflected in the fact that throughout the world there are agreements on continental shelf delimitation and joint development. However, in reality it is not likely that any issues will arise, primarily because petroleum development is being carried out in these zones based on agreements reached between nations, or prospecting there reveals no petroleum to be exploited.

As is well known, prospecting was previously carried out in the joint development zone stipulated in the Southern Part Agreement concluded between Japan and the ROK, but no successful outcome was reported. It is generally said that non-renewable petroleum resources will dry up within the next 50 years, and once that happens the continental shelf regime will no longer be significant in reality. In that sense, signs of the end of the continental shelf regime are already being seen. From that perspective, the current concomitant systems of the EEZ and continental shelf are not so much a newly posed problem arising from unclear provisions on the relationship between them as stipulated in UNCLOS, but rather an issue of the relationship between the systems established in the agreements of each nation, such as the current agreement on continental shelf delimitation and joint development, and the newly established EEZ regime in accordance with UNCLOS.

In fact, prior to the new Japan-ROK Fishery Agreement that entered into force in January 1999, there was also the Japan-ROK Fishery Agreement concluded in 1965. This agreement emerged from negotiations on fisheries, which was one of the key

[29] Serita, Kentarō. 1999. *Shima no ryōyū to keizai suiiki no kyōkai kakutei* (Sovereignty over Islands and the Delimitation of Economic Zones). Tokyo: Yūshindo Kōbunsha.

issues of the talks on normalizing bilateral relations between Japan and the ROK that commenced in February 1952, along with basic relations, claims, and the legal status of ROK nationals living in Japan. The central theme of these fishery negotiations was how to handle the Syngman Rhee Line.[30] At the time, Japanese fishermen who would fish in the waters on the ROK side experienced problems due to these provisions. The Japan-ROK Fishery Agreement was effective for 5 years, and included stipulations such as "[d]esiring that the maximum sustained productivity of the fishery resources in waters of their common interest be maintained; [b]eing convinced that the conservation of the said resources and their rational exploitation and development will serve the interest of both countries; [and c]onfirming that the principle of the freedom of the high seas shall be respected unless otherwise specifically provided in the present Agreement . . ." It was agreed to terminate the Agreement 1 year after a notification of intent to do so was issued; in January 1998, Japan issued a notification of termination to that effect (Fig. 5.1).

First of all, the Agreement stated the territorial sea of both countries is 3 nautical miles and established a fishery zone spanning up to 12 nautical miles from the respective coastal baselines offshore on the high seas. Secondly, the Agreement went even further to establish a "joint regulation zone" in the ROK coastal waters where fishery is regulated. Furthermore, both countries are to consult with each other if either one uses the straight baseline method to establish its fishery zone, and an exchange of notes was effected concerning the straight baseline of the ROK fishery zone. Thirdly, the Agreement also implies that a coastal State naturally has the right of regulation and jurisdiction in its fishery zone, but that as the waters outside the zone constitute the high seas, these waters fall under the flag State doctrine.[31] Either way, the Agreement took into consideration the disparate fishery capacity of Japanese and ROK fishing vessels. The ROK's fishery industry continued to develop, and as the fishery environment was changing with trouble between local fishermen and ROK fishing vessels operating along the Hokkaidō coast, along with the deteriorating situation of resources in the waters around the ROK's Jeju Island, both Japan and the ROK agreed to self-regulate activities in the waters from October 1980 to January 1998. It should be noted that the ROK also expanded the breadth of its territorial sea in 1977 to 12 nautical miles in accordance with the Territorial Sea Act (using the straight baseline method); subsequently, until Japan's full application of the EEZ regime in January 1997, the remaining fishery zone for both countries covered only specified parts of the West Channel of the Tsushima Strait and of the area around Jeju Island.[32]

Diplomatic negotiations between the Japan and the ROK based on the EEZ regime fully took into account the provisions stipulated in the original Japan-ROK Fishery Agreement and the two nations' fishery relations, including self-regulation

[30] Oda, Shigeru. 1956. *Kaiyō no kokusaihō kōzō* (The International Legal Structure of the Oceans). Tokyo: Yūshindō Kōbunsha; and Kawakami, op. cit.

[31] See the section on the flag State doctrine earlier in this chapter.

[32] See Fig. 5.1 depicting the relations outlined in the original Japan-ROK Fishery Agreement.

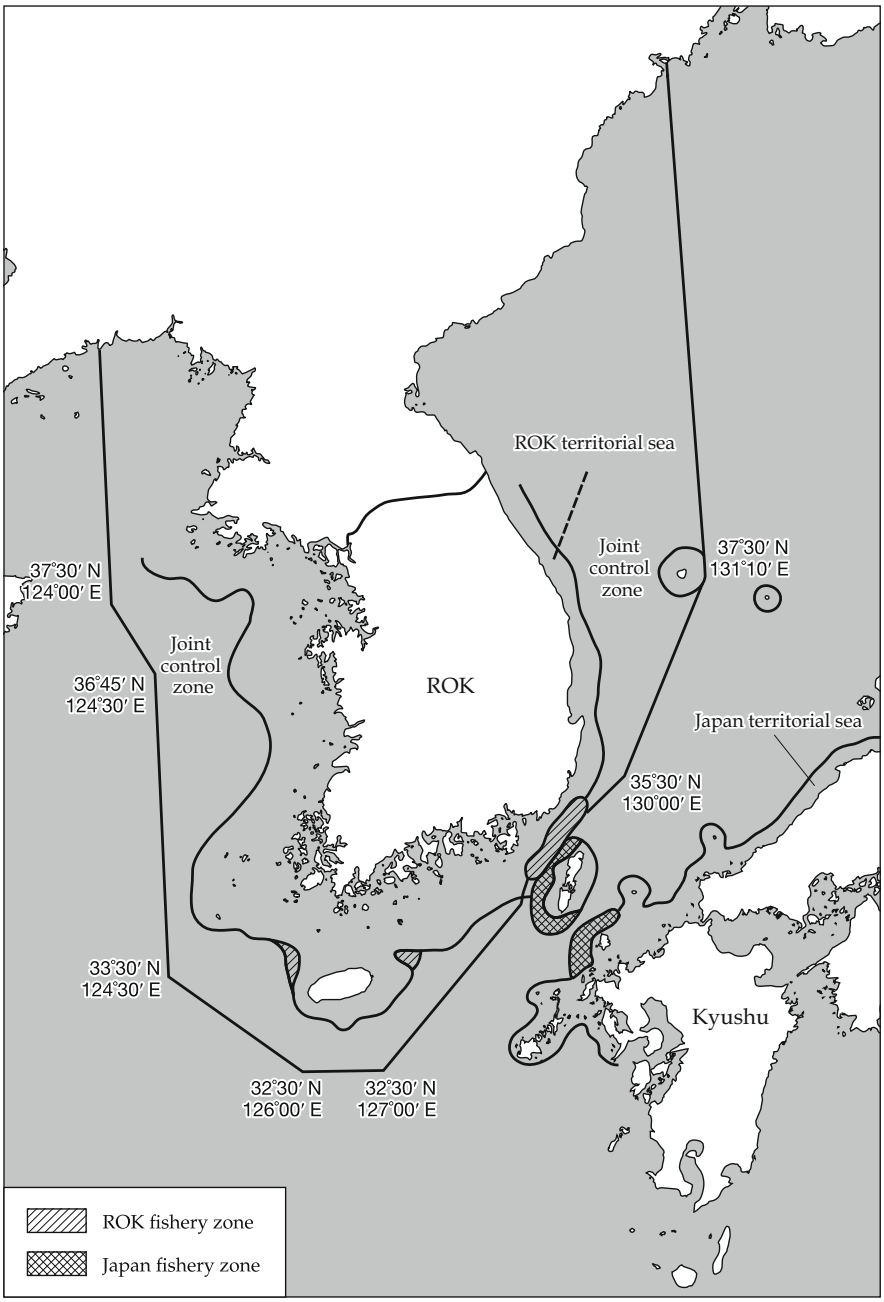

Fig. 5.1 Relationship diagram of the original Japan-ROK fishery agreement

on both sides, as described above. When read together with the previously analyzed continental shelf relations of Japan and the ROK, one could say that fishery considerations take precedence over those of the continental shelf. Within the international rulings on fisheries, one case worth highlighting is the Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway; Jan Mayen) case, in which the ICJ ruled that among access to resources, population, socio-economic factors, and security, access to resources was the only relevant matter that should be taken into consideration in delimitation. Furthermore, although there was scarce information on seabed mining resources, saltwater (smelt) fishery was covered in detail, and the ICJ ruled it was necessary to ensure such fishery so as not to impart a catastrophic effect on the welfare of the citizens of the nations concerned. Also, in the Delimitation of the Maritime Boundary in the Gulf of Marine Area (Canada/United States; US-Canada Gulf of Maine) case, regarding the second section of the sea for delimitation, the ICJ ruled that fishery, navigation, defense, and the exploration and exploitation of petroleum could not be considered as relevant matters in delimitation. It should be noted that the Court also examined whether there is no fundamental inequality that will have a catastrophic effect on the welfare and daily lives of the citizens of the nations concerned.[33]

What is particularly important when considering the state of resources in the future is that, more than non-renewable resources, the focus should be on how to utilize the renewable resources of fisheries, which relates not only to Japan and the ROK, but the world in general. From that viewpoint as well, rather than exploiting mining resources and several years' worth of petroleum, priority should be placed on living resources that can potentially provide a perpetually sustainable yield so long as there is no imminent danger of overfishing or environmental degradation. Furthermore, due consideration should be paid to vulnerable fishing communities, in which the daily lives and welfare of the residents are affected by the reserves of their fish species and performance of their fishery industry.

Hence, an EEZ can still be cultivated as a regime for conserving and utilizing fishery resources including sedentary fish species (which are currently regarded as continental shelf resources). This is still possible even when viewed concomitantly with the continental shelf regime for the time being, and even after the eventual end of the continental shelf as a regime for the exploitation of non-living resources. In that sense, in the present day, whereby in UNCLOS living resources are also recognized as a common heritage left to mankind, it is incumbent on the wisdom of mankind to once again give consideration to the next generation by shifting from a stance of enclosing resources to the joint use of resources.

[33] For more details on these incidents see Serita, op. cit.

Military Use and Scientific Research in EEZs

UNCLOS stipulates the rights of a coastal State in an EEZ in the following three categories:

1. *Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.*
2. *Jurisdiction as provided for in the relevant provisions of this Convention with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.*
3. *The Convention also states that a coastal State must give due regard to the rights and duties of other States in exercising its rights and performing its duties. This section does not cover the rights and duties of a coastal State in regard to the use and conservation of living resources, and particularly focuses on the authority of a coastal State concerning provisions on scientific research and navigation.*

In regard to the rights of other States in an EEZ, the Convention first stipulates the freedom "of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms . . . and compatible with the other provisions of this Convention."[34] It then outlines the right to conduct marine scientific research.[35] These freedoms are the rights of all nations in the high seas. However, the Convention states an EEZ is neither territorial sea nor the high seas, but a "specific legal regime."[36] Therefore, the high seas regime for these freedoms in an EEZ is not a suitable approach to take. Moreover, marine scientific research in the EEZ is subject to Part XIII of the Convention.

Military Use

While it goes without saying that the freedom of navigation that causes marine pollution in a country's EEZ is out of the question, the issue here is military use, such as for fleet exercise and live-fire training. Military use in the high seas has traditionally been recognized alongside the four archetypal freedoms cited as the freedom of the high seas in the 1958 Convention on the High Seas, as "[other freedoms] which are recognized by the general principles of international law." However, as was evident in the 1954 incident involving the *Daigo Fukuryū Maru*,[37] the setting of an

[34] Article 58.

[35] Article 238.

[36] As positioned in Article 55.

[37] The *Daigo Fukuryū Maru*, a tuna fishing boat from the Port of Yaizu in Shizuoka Prefecture, was exposed to nuclear fallout on March 1, 1954 from the US *Castle Bravo* thermonuclear weapon test at Bikini Atoll in the South Pacific Ocean. At the time, the boat was outside the extensive danger

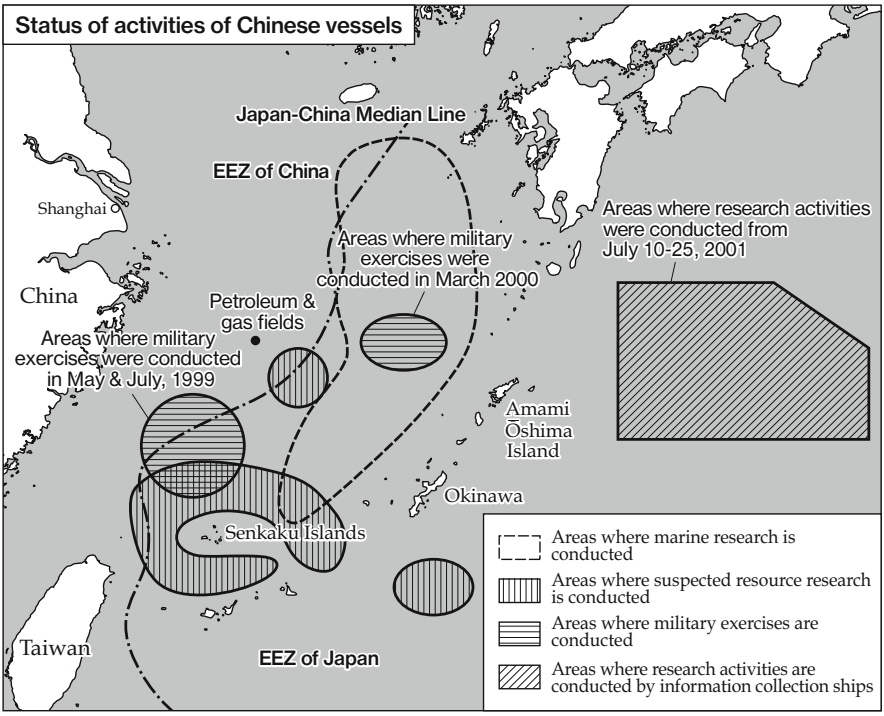

Fig. 5.2 China has repeatedly carried out marine research and military exercises in the high seas

extensive and long-term danger zone for nuclear tests is considered an abuse of rights and therefore problematic. Hence, the 1958 Convention on the High Seas restrictively legalized military use, stating that such freedoms "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas" (Fig. 5.2).

Similar provisions were outlined in UNCLOS, in addition to generally stipulating the *bona fides* (good faith) principle. UNCLOS also states, "In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations,"[38] and particularly notes in a separate Article that "the high seas shall be reserved for peaceful purposes."[39]

zone that the United States set up in the high seas for carrying out the hydrogen bomb test. One of the Japanese crew died as a result of exposure to the nuclear fallout. This incident led to heightened debate in Japan on banning atomic and hydrogen bombs. Meanwhile, in order to quell the backlash from the *Bravo* test, the US expressed its remorse over the incident on April 9 that year, and paid compensation to the victims the following year.

[38] Article 301.

[39] Article 88.

Therefore, it is questionable as to whether the freedom of military use is included as is within the conventional freedom of the high seas. (That said, without the context of the Convention's provisions, and commenting only on the interpretation of the phrase "peaceful usage," similar to the Outer Space Treaty and the like, it can be interpreted as such. In other words, it can be said that the interpretation that all military use is not for peaceful purposes is the minority view. Thus, it must stand that the prevailing interpretation is that military use that does not violate the UN Charter is consistent with peaceful purposes. Nevertheless, there needs to be further consideration of the significance of incorporating Article 88, in addition to the general provision of Article 301.)

As already discussed, although an EEZ is a superjacent zone, it is not regarded as having the same features as the high seas, and so military use of an EEZ by a foreign country cannot be regarded as fundamentally the same as the right of all countries for military use, as per the freedom of the high seas. Essentially, since it is not clear if military exercises conducted in another country's EEZ can be described as for "internationally lawful uses," countries must not conduct exceedingly dubious military exercises in an EEZ. Any military exercises carried out in an EEZ without prior consent will, at the very least, be viewed as unfriendly acts.

Scientific Research

The other principal freedom of the high seas stipulated in the 1958 Convention on the High Seas is the freedom of scientific research. Part XIII was included in UNCLOS from the perspective of international cooperation in marine research and publishing and disseminating the findings resulting from it. All countries have the right to conduct marine scientific research, provided it is "exclusively for peaceful purposes." However, scientific research itself does not constitute legal grounds for asserting the claim to the marine environment and its resources.

The high seas stipulated in the 1958 Convention on the High Seas is all of the sea not including the 3 nautical mile territorial sea of each nation and the internal waters. However, as discussed earlier, a coastal State is able to expand its territorial sea breadth up to 12 nautical miles, and furthermore, establish an EEZ up to 200 nautical miles from the baseline. Consequently, the conventional zone for scientific research is now primarily the EEZ of a coastal State, and hence the provisions of UNCLOS exclusively apply to scientific research in an EEZ and continental shelf. In principle, all countries and international organizations with the authority to conduct scientific research have the right to carry out marine scientific research;[40] such international organizations include the Food and Agriculture Organization; Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and

[40] Article 238.

Cultural Organization; United Nations Environment Programme; International Maritime Organization; and the World Meteorological Organization.

First, coastal States have the right to regulate, authorize, and conduct scientific research in their EEZ and on the continental shelf, and that research can only be carried out with the consent of the coastal State. It has always been the case that coastal States grant consent "in normal circumstances," which may exist in spite of the absence of diplomatic relations between the coastal State and the researching State. It should be noted that coastal States may at their discretion withhold their consent to the conduct of a marine scientific research project that has direct impact on the exploration and exploitation of natural resources in its EEZ and continental shelf.[41]

Next, research States and international organizations have a duty to provide information to a coastal State at least 6 months prior to the scheduled start date of the marine scientific research project. This information must fully describe the project and include: the nature and objectives of the project; the method and means to be used, including name, tonnage, type, and class of vessels, and a description of scientific equipment; the precise geographical areas in which the project is to be conducted; the expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate; the name of the sponsoring institution, its director, and the person in charge of the project; and the extent to which it is considered that the coastal State should be able to participate or to be represented in the project. The research States and international organizations may proceed with a marine scientific research project 6 months after the date upon which the required information was provided to the coastal State.[42] Furthermore, the research States and international organizations must ensure the right of the coastal State, if it so desires, to participate or be represented in the marine scientific research project, especially on board research vessels and other craft or scientific research installations, when practicable.[43]

This is how marine scientific research is carried out in an EEZ and continental shelf, namely by striking a balance between the rights of coastal States and the rights of research States. In essence, however, a coastal State has sovereign rights in its EEZ and continental shelf, and so a research State must act in accordance with the principle of respecting its sovereign rights and jurisdiction.

Above all, it is paramount that marine scientific research is carried out not for the national interest of one country, but for the interest of all humankind.

As for marine scientific research carried out in Japan's EEZ and continental shelf, domestic legislation on this matter requires the research States to publish the research project details and results; this is both a right and a duty. Furthermore, a coastal State has the right to request the suspension or completion of a research project, and it can board a research vessel in its waters to check if the research is

[41] Article 246.
[42] Article 252.
[43] Article 249.

being conducted in accordance with the information provided by the research country.

1996 Exclusive Economic Zone and Continental Shelf Act

Enactment, Revision, and Abolition of Domestic Legislation Pursuant to Japan's Ratification of UNCLOS

In preparation to ratify UNCLOS, Japan first amended its 1977 Territorial Sea Act, established a contiguous zone, and then established the Act on Amending the Act on Territorial Waters and Contiguous Water Area[44] which entered into force on July 20, 1996. The designated areas were set at the standard territorial sea breadth of 3 nautical miles, and the straight baseline method was newly adopted.[45] The current ordinance on the straight baseline method was put into force across the board on January 1, 1997.

Japan then successively enacted the following legislation: Act on the Exclusive Economic Zone and Continental Shelf;[46] Act on the Exercise of the Sovereign Right for Fishery, etc. in the Exclusive Economic Zone;[47] and Act on the Preservation and Control of Living Marine Resources.[48] The Act on the Exercise of the Sovereign Right for Fishery, etc. in the Exclusive Economic Zone led to the abolishment[49] of the aforementioned Act on Temporary Measures Concerning Fishery Waters.[50] All of these laws were put into force from July 20, 1996, when UNCLOS entered into force in Japan (Fig. 5.3).

In short, all of these laws led to Japan adopting the straight baseline method for its territorial sea, and fully establishing an EEZ. As for the living resources in the waters and continental shelf on the perimeter of the EEZ designated in the Act on the Exclusive Economic Zone and Continental Shelf, according to the Act on the Exercise of the Sovereign Right for Fishery, etc. in the Exclusive Economic Zone, "the provisions of Article 3 through to the preceding Article shall apply *mutatis mutandis* to the Fishery, the harvest of aquatic animals and plants, and the Survey pertaining to sedentary species,"[51] and "Japan shall have the primary interest and responsibility under 1 of Article 66 of the United Nations Convention on the Law of

[44] June 14, 1996, Act No. 73.

[45] Enforcement ordinance of the Act on Territorial Waters and Contiguous Water Area (1977 Ordinance No. 210, last revised on December 28, 2001 Ordinance No. 434).

[46] June 14, 1996, Act No. 74.

[47] June 14, 1996, Act No. 76.

[48] June 14, 1996, Act No. 77.

[49] Article 3 of the Annex of the same Act.

[50] 1977, Act No. 31.

[51] Article 14.

Fig. 5.3 Japan's Straight Baseline

the Sea even in the sea area outside the Exclusive Economic Zone with regard to anadromous stock that lay eggs in Japan's inland water."[52]

[52] Article 15.

Adoption of the Straight Baseline Method for the Territorial Sea

The straight baseline method came into force in Japan from January 1, 1997. As discussed previously, the outer limit of the territorial sea line at any point is the line that is equidistant from the closest point above the baseline. Normally, the baseline is the low-water line along the coast, as marked on the large-scale charts officially recognized by a coastal State. However, if the coastline is deeply indented or cut into, or if there is a series of islands along the coast in its immediate vicinity, straight baselines may be used to join appropriate points along the coastline. The principle behind this is the ICJ ruling on the 1951 Fisheries Case concerning a conflict of interests between the Norwegian coastal fishery and the UK pelagic trawler fishery.

The particular problem in this case was Norway's two coves with an entrance of over 40 nautical miles. It was ruled that the baseline of these waters was within a rational limit from the general direction of the coast, and furthermore the fishery in these waters was indispensable to the livelihood of the citizens and a long-established customary practice. The wording of this ruling was adopted as is in the 1958 Convention on the Territorial Sea and the Contiguous Zone; it was also emulated in the 1982 UNCLOS. Japan did not adopt the straight baseline method until the law was revised in 1996. The Convention established a category for archipelagic nations, including both coastal archipelagos and oceanic archipelagos such as Indonesia, and recognized the adoption of a maximum 125 nautical mile straight baseline (archipelagic baseline) for such countries.

Incidents Involving Foreign Fishing Vessels Operating in New Territorial Seas

On September 11, 1998, the Hiroshima High Court ruled on nine incidents involving ROK fishing vessels that were detained by the Japan Coast Guard for operating in the new territorial sea off the Hamada coast in Shimane Prefecture, which extended to 12 nautical miles from the straight baseline. In five of these cases a summary order for the payment of a fine was issued, in two cases a suspended indictment was issued, and the remaining two cases are currently still on trial for the violation of foreign fishery regulations.[53]

Regarding the August 15, 1997 ruling of the Hamada branch of the Matsue District Court on the incident involving an ROK fishing vessel that was detained in the new territorial sea off the Hamada coast in Shimane Prefecture, although the waters in which the vessel was operating became part of the territorial sea from January 1997 onwards, the area was still outside Japan's fishery zone stipulated in

[53] *Sankei Shimbun*, September 11, 1998, evening edition.

the 1965 Japan-ROK Fishery Agreement. Hence, as the Agreement stated that the flag State has the right of regulation in the waters outside the fishery zone, the Court concluded "the treaty of the Japan-ROK Fishery Agreement takes precedence over the domestic legislation of the amended Territorial Sea Act; therefore, the jurisdiction does not cover the waters in which the vessels were detained"; the case was then dismissed.[54]

Conversely, in the June 24, 1998 ruling of the Nagasaki District Court on the incident involving an ROK fishing vessel that was detained while operating in the new territorial sea off the Gotō coast in Nagasaki Prefecture, irrespective of the Japan-ROK Fishery Agreement, Japan was deemed to have the right of regulation and jurisdiction in the new territorial sea that had been extended by adopting the straight baseline method in accordance with Article 2(1) of the enforcement ordinance of the new Territorial Sea Act that came into effect in January 1997.[55] Although the defendant appealed the ruling, the appeal was dismissed by the Fukuoka High Court on April 28, 1999.

The prosecutor appealed the ruling of the Hamada branch of the Matsue District Court. The ruling of the Matsue branch of the Hiroshima High Court on September 11, 1998 stated, "the jurisdiction of Japan in the new territorial sea is a matter of course under international law, and is not subject to the limitations of the Japan-ROK Fishery Agreement"; consequently, the first ruling was annulled, and the trial returned to the Matsue District Court, upon which the defendant immediately filed a final appeal.

Although the ruling of the Hamada branch of the Matsue District Court recognized the right of a coastal State to exercise its sovereign right in the territorial sea, it also interpreted Article 4(1) of the Japan-ROK Fishery Agreement as a provision that limits Japan's right of regulation and jurisdiction, despite the fact that it was only later on that the waters outside the fishery zone were designated part of the territorial sea. In other words, in cases limited only to fishery, the ruling interpreted this provision as renouncing Japan's right to exercise its sovereign right in the territorial sea in the waters outside the fishery zone.

However, as was also stated by the Hiroshima High Court, this interpretation is incorrect. As it stands now, until an EEZ is systemized, in international law the ocean is divided into the territorial sea under the sovereignty of a coastal State, and the high seas that are open for use by all people as a free zone which no country can claim as its territory. It was also stipulated that a coastal State is able to establish a fishery zone, where it can exercise exclusive jurisdiction in fishery, in a certain area of the high seas that is contiguous to its territorial sea. Accordingly, as was recognized by the Hiroshima High Court, it is not possible for this fishery zone to overlap with the territorial sea. Within this certain area of the high seas that is contiguous to its territorial sea, in addition to a fishery zone, a coastal State is able to establish a

[54] See the morning editions of various Japanese newspapers on August 16, 1998 for more details.

[55] *Asahi Shimbun*, June 25, 1998, morning edition; for details on the verdict see *Hanrei jihō* (Chronicle of Legal Rulings) 1648: p. 158, and *Hanrei taimuzu* (Legal Ruling Times) 998: p. 279.

contiguous zone where it can exercise authority to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea."

At any rate, although a fishery zone creates some restriction of movement in the high seas, it does not do so in a territorial sea, nor does it form an exception to the territorial sea. The Japan-ROK Fishery Agreement regulates the high seas, and the right of regulation and jurisdiction in the waters outside the fishery zone, namely the high seas, are in accordance with the flag State doctrine as per the freedom of the high seas principle. As such, the Agreement only confirmed that which is a matter of course in international law.

In regard to Japan's current use of the straight baseline method, the ruling of the Hamada branch of the Matsue District Court raised some questions on legality in its relation to the duty of consultation stipulated in the provision of Article 1 of the Japan-ROK Fishery Agreement. However, the ROK is also a party to UNCLOS, and hence follows the Convention in legally expanding its territorial sea. Therefore, there are no particular problems in terms of the procedures taken. There are currently over 70 countries around the world (compared to only 21 in 1977 when the original Territorial Sea Act was enacted), including Japan's neighbors the ROK and China, that have adopted the straight baseline method. Although, as was stated in the ruling on the previously discussed Norway Fisheries Case, "The delimitation of waters is normally of an international nature, and therefore cannot be in accordance solely with the intentions of a coastal State as expressed in its domestic law." In that sense, it does not mean one cannot argue whether Japan's adoption of the straight baseline method is appropriate in light of international law.

However, in this incident, it was also stated in the opposing argument to the appellant's (original defendant) written reason for an appeal on January 27, 1998 (1997, c., no. 32), "As a lawyer, in this appeal I will not argue if the Act on Territorial Waters and Contiguous Water Area is legal in accordance with the provisions of UNCLOS." Therefore, since the use of the straight baseline method was not argued, it was deemed a matter of course in international law for a coastal State to exercise its sovereign right in its territorial sea within a set zone from the baseline. As such, the ruling of the Hamada branch of the Matsue District Court was deemed an incorrect interpretation due to insufficient knowledge of rudimentary treaty law and the law of the sea.

In the final appeal, the defendant completely reversed his position and argued the legality of Japan's adoption of the straight baseline method, stating, "At present (1998), Japan's straight baseline consists of a total 194 points spanning the country's entire coast. When analyzing this by similar examples, 60% are baselines set mostly due to the existence of islands, 32% are baselines set according to the complexity of the coastline, and 8% are baselines set by the closing line of a bay entrance. In terms of length, the most common is baselines of under 10 nautical miles with 100 points, while baselines of 40 nautical miles and over have 21 points, baselines of 24 nautical miles and under have 117 points, and baselines over 24 nautical miles have 46 points." Furthermore, the defendant asserted that the straight baseline of the zone in question in this incident was not set in accordance with the standards

stipulated in UNCLOS, and hence could not be regarded as legal in international law. However, the Supreme Court dismissed the final appeal with the ruling of "the appeal is simply a claim of the violation of the law, including a breach of the Constitution, and therefore does not constitute a grounds for appeal in accordance with Article 405 of the Criminal Procedure Code."[56]

Treatment of the Seabed Zone in the Act on the Exclusive Economic Zone and Continental Shelf

Article 1(1) of the Act on the Exclusive Economic Zone and Continental Shelf states, "In accordance with the United Nations Convention on the Law of the Sea (UNCLOS), there is hereby established the exclusive economic zone, as a zone in which Japan exercises its sovereign rights and other rights as a coastal State as prescribed in Part V of UNCLOS." This is clearly a provision stipulating the new establishment of an EEZ. Meanwhile, Article 2 confirms the content of a continental shelf, stating "The continental shelf over which Japan exercises its sovereign rights and other rights as a coastal State in accordance with UNCLOS (the continental shelf) comprises the seabed and its subsoil subjacent to the following areas of the sea."

According to Article 1(2) of the Act, an EEZ "comprises the areas of the sea extending from the baseline of Japan (as defined in the amended Act on the Territorial Sea and the Contiguous Zone) to the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan (excluding therefrom the territorial sea) and its subjacent seabed and its subsoil." It also states the median line to be the line between Japan and the foreign coast that is opposite the coast of Japan. Furthermore, if there is such a median line (or a substitute line for the median line, which is agreed upon between Japan and a foreign country), an EEZ is the area of the sea extending up to the agreed upon line and its subjacent seabed and subsoil. Article 2 first stipulates the continental shelf to be the seabed and its subsoil extending 200 nautical miles from the baseline of Japan, or the median line (or a substitute line for the median line) as mentioned in Article 1. Article 2 also stipulates the continental shelf to be "the areas of the sea adjacent seaward to the areas of the sea referred to in the preceding subparagraph (limited to the part of the sea delimited by the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan), as prescribed by Cabinet Order in accordance with Article 76 of UNCLOS" (Fig. 5.4)[57]

[56] Supreme Court of Japan. *Saikōsai keiji hanrei shū* (Collection of Supreme Court Rulings) 53, No. 8, p. 1045.

[57] With regard to the continental shelf that extends beyond 200 nautical miles, Japan conducted scientific research and submitted a report to the Commission on the Limits of the Continental Shelf on November 12, 2008. In the August/September session of the Commission, a subcommittee was

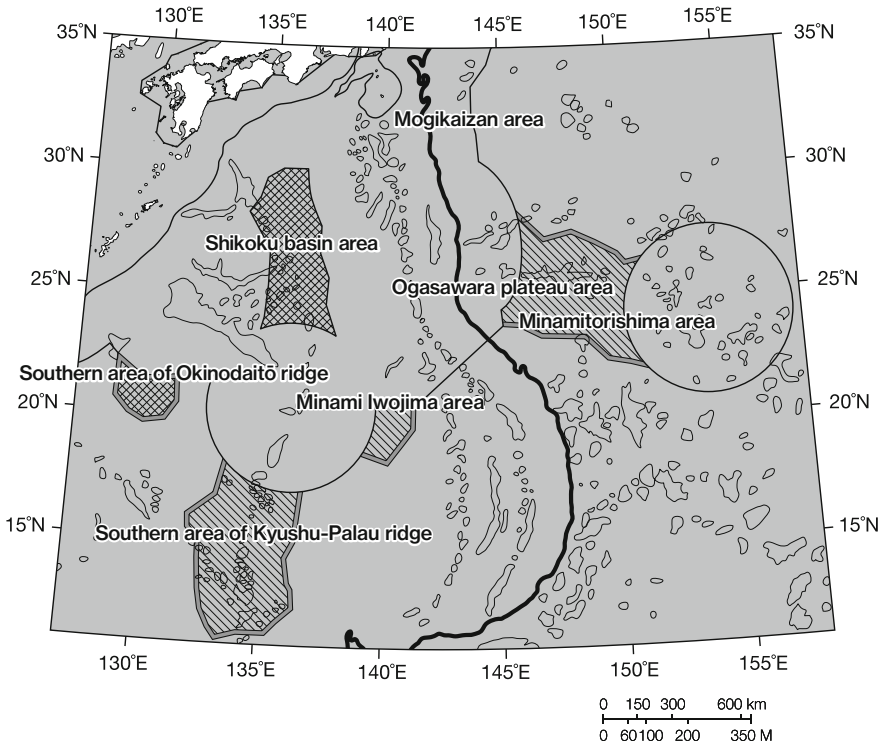

Fig. 5.4 Japan's Continental Shelf Zone Beyond 200 Nautical Miles

According to the above, the continental shelf as stipulated in Japanese law is firstly a designated area of the sea, and the seabed and subsoil subjacent to it. This is different from the continental shelf of a coastal State as stipulated in Article 76(1) of UNCLOS, which "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." Basically, in Japanese law, the continental shelf is positioned as the seabed and subsoil of the designated superjacent area of the sea; in that sense, it is based on the assumption of this superjacent area being an EEZ.

Incidentally, Japan has not ratified the Convention on the Continental Shelf, although the continental shelf regime has been established as customary law and appears to apply the concept of natural prolongation as grounds in the establishment

set up and deliberations were initiated. The final decision will be made after consultations with the Commission.

of a continental shelf.[58] However, as previously mentioned, this concept does not exist in Japanese law, and a continental shelf is simply defined as the seabed and subsoil subjacent to an EEZ. Thus, if nothing else, it can be said that a continental shelf within a 200 nautical mile area has no relevance as a continental shelf in customary law.

Principle of Delimitation in the Act on the Exclusive Economic Zone and Continental Shelf

According to Article 1(2) of the Act, an EEZ "comprises the areas of the sea extending from the baseline of Japan (as defined in the amended Act on the Territorial Sea and the Contiguous Zone) to the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan (excluding therefrom the territorial sea) and its subjacent seabed and its subsoil." It also states the median line to be the line between Japan and the foreign coast that is opposite the coast of Japan. Furthermore, if there is such a median line (or a substitute line for the median line, which is agreed upon between Japan and a foreign country), an EEZ is the area of the sea extending up to the agreed upon line and its subjacent seabed and subsoil. Furthermore, Article 2 states the continental shelf to be the seabed and its subsoil extending 200 nautical miles from the baseline of Japan, or the median line (or a substitute line for the median line) as mentioned in Article 1. Article 2(2) also stipulates the continental shelf to be "the areas of the sea adjacent seaward to the areas of the sea referred to in the preceding subparagraph (limited to the part of the sea delimited by the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan), as prescribed by Cabinet Order in accordance with Article 76 of UNCLOS."

Although the Act does not include any specific clauses on delimitation, Articles 1 and 2 clearly specify the median line to be "the line every point of which is equidistant from the nearest point on the baseline of Japan, and the nearest point on the baseline from which the breadth of the territorial sea pertaining to the foreign coast which is opposite the coast of Japan is measured." Originally, the median line has also been defined in parentheses as "a substitute line for the median line, which is agreed upon between Japan and a foreign country"; hence, although it is a median line in principle, it can be regarded as a line that is determined through diplomatic negotiations and by taking into consideration a range of circumstances.

This has been a traditional assertion of Japan, and one that is clearly adopted in domestic legislation as a delimitation method for defining borders with adjacent countries. In that sense, the concept of natural prolongation has no longer been regarded as relevant since the emergence of a 200 nautical mile EEZ. As is known, Articles 74 (EEZ) and 83 (continental shelf) of UNCLOS include provisions on

[58] See the ICJ judgment on the North Sea Continental Shelf cases.

delimitation that state in paragraph 1, "the delimitation of the exclusive economic zone (continental shelf) between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Changing Relevance of the "Median Line" Claim

In regard to the issue of delimitation of the continental shelf, Japan belongs to the "equidistant median line" group, as opposed to the "natural prolongation principle" group with the ROK and other countries.

Article 6 of the 1958 Convention on the Continental Shelf stipulates that delimitation of the continental shelf as being determined by the agreement of the concerned States. Specifically, "[w]here the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line . . ."[59] In reality, however, until the 1969 ICJ rulings on the North Sea Continental Shelf cases, and even afterwards, there have been numerous international agreements concluded on the basis of an equidistant median line.[60]

Incidentally, although agreements based on an equidistant median line were concluded between countries for the North Sea continental shelf, in the course of negotiations involving West Germany and its neighbors Denmark and the Netherlands, West Germany asserted the just and equitable share of an undelimited area, while the other two countries insisted on using the equidistance method. The three-nation dispute reached the ICJ in 1967, with the Court ruling that the continental shelf is the appurtenance of a coastal State, and in accordance with its rights, the continental shelf comprises the area of natural prolongation in the direction of the sea of the coastal State's land domain. The Court ruled that this fact is rooted in the sovereignty of the coastal State's land territory, and it has always been as such. Moreover, if the seabed area is not a part of the natural prolongation of the coastal State's territory, it does not belong to the coastal State irrespective of how close it may be to the State's territory. Accordingly, the equidistance method was clarified as not being inherent to the continental shelf regime.[61]

[59] https://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf. Accessed on December 10, 2022.

[60] For further details on a combined equidistance-special circumstances rule, see Serita, op. cit.

[61] International Court of Justice. 1969. *Reports of Judgments, Advisory Opinions and Orders*, p. 3.

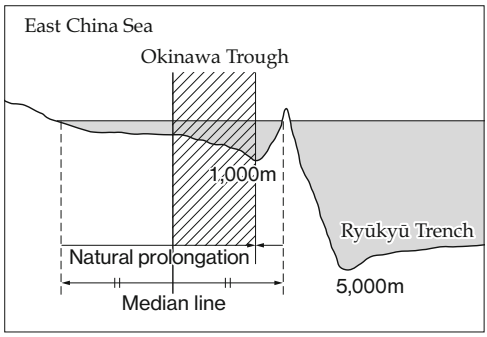

Fig. 5.5 Median Line of the Okinawa Trough

As for the East China Sea, its continental shelf extends out from the continent until the Pacific Ocean side beyond the Ryūkyū Islands spanning the southern tip of Kyūshū to Taiwan. At the northeast end of the East China Sea on the northwest side of the Amami Islands lies the approximately 1000 m deep Okinawa Trough, while on its northwest side facing the Pacific Ocean is the Ryūkyū Trench reaching a depth of 5000 m (Fig. 5.5).

"This continental shelf extends from the direction of China and the Korean Peninsula towards Japan in the east and right in front of the Ryūkyū Islands. It is a large, initial back-arc rifting basin stretching out toward the Pacific Ocean, and beyond it lies the Ryūkyū Islands. This is Japan's understanding of this single continental shelf" . . . hence, "Japan regards the median line method as appropriate for delimitation."[62] The ROK's response was to assert its continental shelf to be the area extending to the Okinawa Trough, in accordance with the principle of natural prolongation of land territory; namely, the continental shelf ended at the large, initial back-arc rifting basin, as described by Japan. A joint development zone was subsequently set up in the overlapping area based on the assertions of Japan and the ROK, with both countries then concluding the Southern Part Agreement.[63]

This is how the median line used in the delimitation of a continental shelf became a marker denoting the boundary beyond which a coastal State could not assert its rights. Correspondingly, Article 57 of UNCLOS recognized the right of a coastal State to extend its EEZ up to 200 nautical miles, and the overlapping area in which

[62] House of Representatives Committee on Foreign Affairs, April 1, 1977.

[63] Mizukami, op. cit.

both countries could assert their rights for up to 200 nautical miles is the appropriate area for delimitation. The median line method is one method of dividing the area of overlapping claims.

Japan's domestic legislation of the Act on the Exclusive Economic Zone and Continental Shelf states that an EEZ is the area of the sea extending up to 200 nautical miles from the baseline of Japan; it also stipulates that it extends up to the median line or agreed upon line between Japan and an adjacent foreign country. However, this median line is merely a line provisionally drawn in the absence of an agreement, as was expressed in the ICJ ruling on the Jan Mayen case[64] that the conjoint conduct of both Parties of restraining the exercise of jurisdiction beyond the median line cannot be interpreted to mean that a delimitation line has already been defined. Accordingly, the ICJ independently determined the delimitation line for both countries in this case.

In the case that the countries concerned are unable to reach an agreement, the median line used in the delimitation of a continental shelf effectively becomes a line for limiting a country's claim. In contrast, the median line used in the delimitation of an EEZ is the line that curtails the exercise of a country's jurisdiction. This difference in the nuance of assertions on the median line must be recognized in discussions of this matter (Fig. 5.6).

[64] A delimitation dispute over an approximately 250 nautical mile area of water between Denmark's territory of Greenland and Norway's territory of the solitary Jan Mayen Island (no resident population). In June 1980, Denmark extended its 200 nautical mile fishery zone, which it partially established in 1976, as far as the east coast of Greenland. Although it did not exercise its fishery jurisdiction beyond the median line in accordance with its relation to Jan Mayen Island, in 1981 Denmark fully asserted its rights in the entire 200 nautical mile fishery zone. Meanwhile, in May 1980, Norway established a 200 nautical mile fishery zone surrounding Jan Mayen Island; however, in accordance with its relation to Greenland, Norway did not extend its zone beyond the median line. Subsequently, from June 1980 to August 1981, the median line was the effective delimitation line for both countries in exercising their fishery jurisdiction.

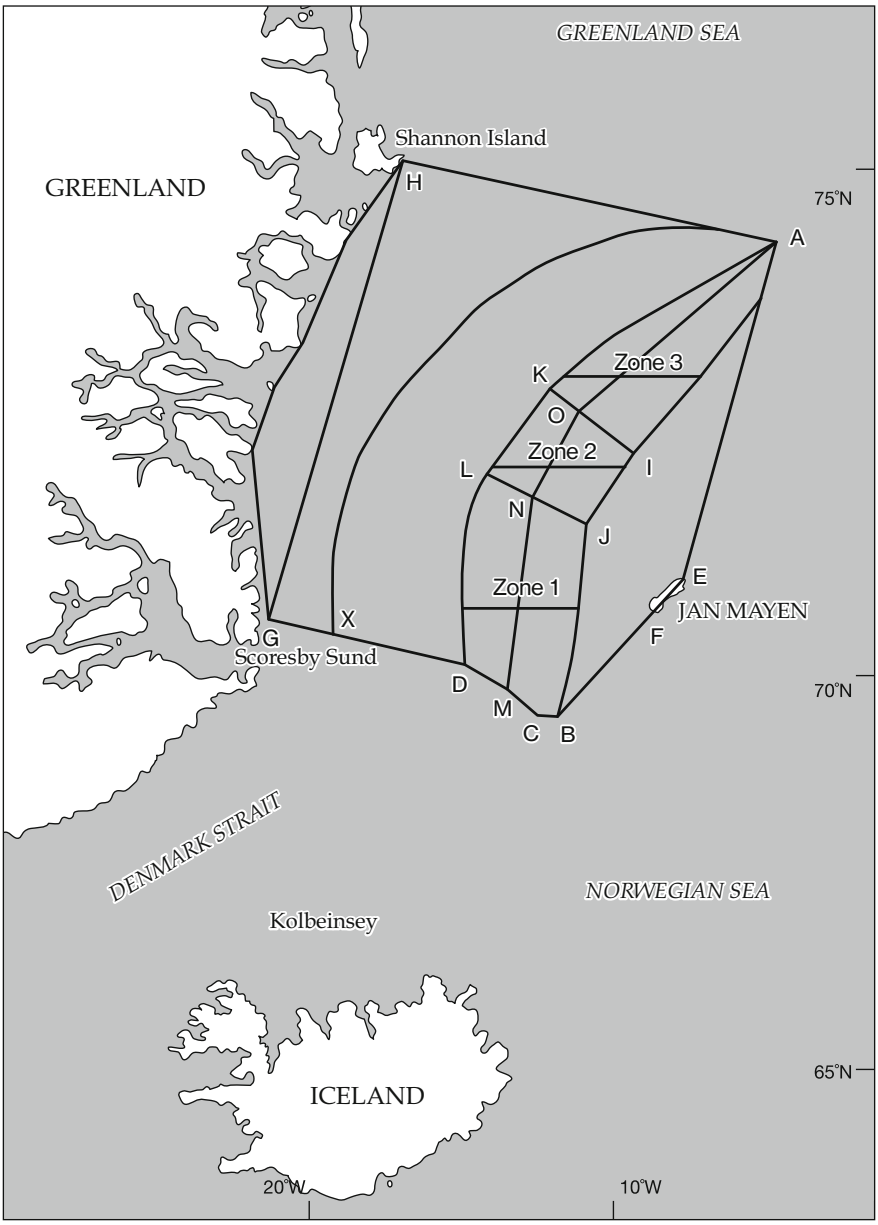

Fig. 5.6 Border between Greenland and Jan Mayen. Created by Serita from maps 1 and 2 of the lines drawn in the Judgment. A-X represents the 200 nautical mile line from Jan Mayen, A-I-J-B represents the 200 nautical mile line from Greenland, and A-K-L-D represents the median line

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