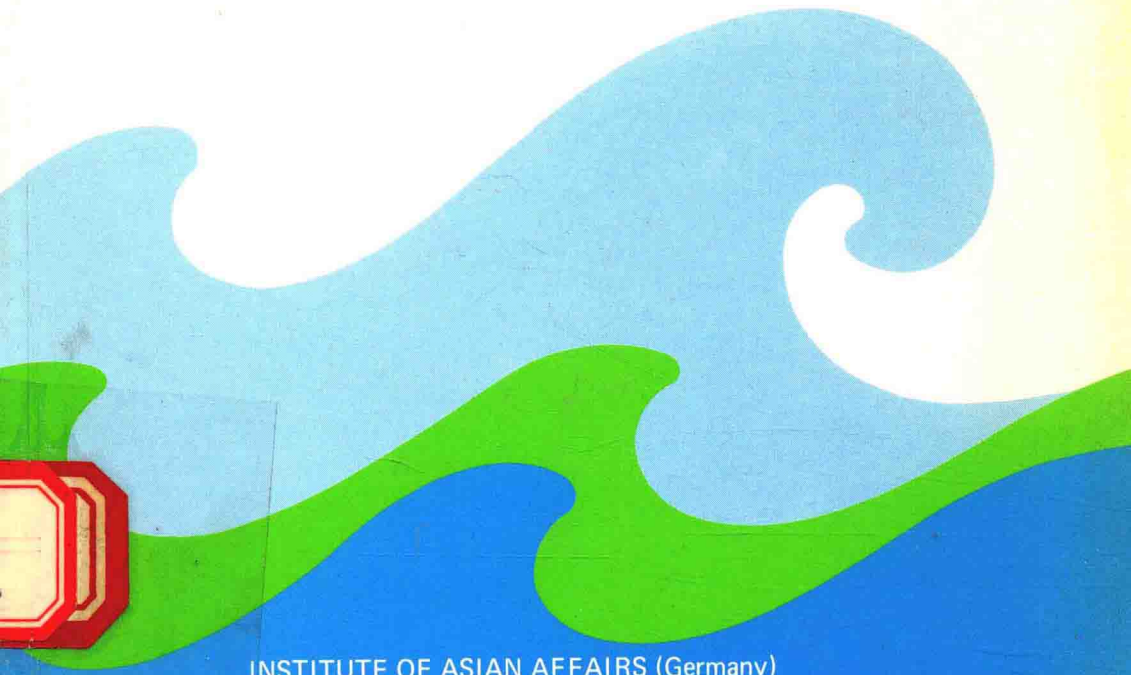
Law of the Sea Zones in the Pacific Ocean

Hanns J. Buchholz



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Introduction

The difficulty in presenting the development of the Law of the Sea in a vast area is that one has to select the necessary information from a large number of sources. In almost all areas, the Law of the Sea boundaries have not been consolidated or approved by international law. This is the reason for the lack of precise maps and descriptions. Although a number of states publish documentations, these are mainly subjective interpretations of the Law of the Sea. In order to achieve a positive outcome of future talks, a few states exaggerate or falsify their claims, because their neighbours usually have a different opinion of their sea boundaries. It was therefore essential in this study to analyse the contradictions between official, scientific and economic publications of each country, the oil industry, fishing management, scientific institutes, and the press. Thus, the maps of the Law of the Sea zones, given in this book, represent the conception of the respective states only, regardless of the recognition by neighbouring states.

The regionalization of the Law of the Sea is a dynamical process nowadays, rendering it necessary to gather up-to-date information from newspapers and magazines. However, the distance between Germany and the Pacific countries hampers the flow of information considerably. In addition, slight errors and the shortcomings of topicals are inevitable in some cases. The information in this book has been gathered up to August 1985 and in some cases up to November 1986.

In spite of this unsatisfying basis, from the scientific point of view, I wrote this geographical description and documentation because it is my opinion that the new Law of the Sea will initiate long-term structural changes which are of political significance as a result of the changing national control and jurisdiction of the sea (Böhme and Kehden 1972, Johnston and Langdon 1978).

The continually widening gap between the industrialized countries and the developing countries was meant to be reduced by the Law of the Sea, but this has not been achieved. Nevertheless, jurisdictional application of the Law of the Sea brings along innovations in economic, political and military matters. Therefore, one is surprised how little this topic is known to the public and also to the politicians in many countries. It is hoped that this book will interest the reader in further scientific research (Archer and Beazley 1975; Paffen 1964; Prescott 1975) and increased political engagement on the subject.

Contents

chapter 1

Conditions and Contents of the New Convention on the Law of the Sea

The Sea and Its Unlimited Resources

The politico-geographical distribution of land seemed to have been resolved and consolidated on a long-term basis after the colonial era. Except in a few cases (for example, Israel/Jordan) state borders have not been altered. Changes amounted to incorporation of the entire country with its former borders, or a change in the political system. Expansion beyond a border would only be possible by means of war because nowhere on earth is there a totally uninhabited region that does not belong to anyone, and at the coast living space comes to an end.

In the past, the sea was used as a waterway or for fishing, and it seemed endless and inexhaustible; everyone had sufficient space and fish (Fulton 1911). Hugo Grotius[1] defined the principle of the *mare liberum* in 1609. A territorial sea with a width of three nautical miles[2] under the jurisdiction of a coastal state was only established under the growing influence of Great Britain, the Netherlands and other European sea-powers. Beyond three nautical miles nobody could claim national rights. At that time large areas of the sea were not of value except for strategically important straits. Unlike on dry land, it was possible to use its resources without marking out claims. In 1702, Bynkershoek added an auxiliary quality to the principle of the three-nautical-mile territorial sea as a juridical

[1] Or Huig de Grot.
[2] 1/20 of the difference between two parallels of latitude (or 3 minutes).

support: the distance a cannon can fire, because the sea cannot be fully occupied and therefore it cannot be part of a country (Kent H.S.K. 1954). Of course, there have always been attempts to mark off territorial seas, particularly if these seas are surrounded by land on a few sides. The reasons given were either on security or on economic grounds (for example, Denmark, Norway, and Iceland were a union since 1381, but when Greenland was rediscovered in 1585 Denmark claimed exclusive fishing rights in the northern North Atlantic, as they now ruled over the opposite coast). These attempts turned out to be only as fortunate as their military execution as their claims were never acknowledged. Nunez de Balboa led an expedition across today's Panama in 1513. On reaching the west coast he claimed the entire Pacific Ocean as *mar do sur* for the King of Spain, without a knowledge of its size. Naturally, Spain could not cope with this vast area, and it was never legally accepted as Spanish property.

In the high seas because of the large expanse there were hardly any major conflicts between countries which would have called for the distribution of certain national sea-zones. At the beginning of the colonization period a few islands were annexed, indicating the little interest the sea was at that time. Even at the end of the nineteenth century when almost every large group of islands had been colonized or at least was governed by a protector, these states seldom went to the inconvenience of declaring precise borders. Today, one will find a map of the Pacific Ocean in every atlas, in many cases only showing a specific section because, in the traditional European conception of the world, the Pacific region is not understood as a unity. These maps show a system of straight rectangular borders separating the South Pacific Islands and territories in spite of the actual state borders. On a continent, such a presentation could possibly result in a political dispute.

Some further examples from the Pacific region illustrate the relatively little interest in the sea by a number of people: in 1887 the King of Tonga proclaimed a rectangular border (see Figure 23) with the co-ordinates 15°S, 23°30'S, 173°W, 177°W.[3] The distance between this border in the sea and the land varied between 200 and 300 kilometres. In those days, as a matter of fact, nobody argued about this rather generous archipelagic regulation. The Tongan border from the year 1887 enclosed all the inhabited islands in the vicinity. The Minerva Reef (24°S, 179°W; 500 km to the southwest of the main island Tongatapu) could have potentially been claimed but it was regarded as useless. Only on 15 June 1972 did the Minerva Reef (Teleki Tonga and Teleki Tokelau) become part of the Kingdom of Tonga. A flag was raised by the Tongans because a group of Americans wanted to annex the islands which did not belong to anyone (*terra nullius*) at that time (cf. Prescott 1985, p.199).

Similar examples are the Matthew and Hunter islands (known in the language of Vanuatu as Umaenupnae and Umaeneag), 0.3 and 0.4 square kilometres in size respectively, and approximately 450 kilometres east of the main island of New Caledonia, or 350 kilometres southeast of Aneityumua (Vanuatu). Their attachment either to the French territory of New Caledonia or to the former New Hebrides (since 1980: Vanuatu) is uncertain but was never the cause for argument because of a lack

[3] *Tonga-Government Gazette*, Vol. II., No. 55 (Nuku'alofa, 24 August 1887): 1.

of interest in these two islands. The actual value of such remote islands was only recognized at the beginning of the first discussions on the new Convention on the Law of the Sea. In December 1975, France took possession of the two islands for New Caledonia although this was contrary to the maps of the New Hebrides produced by France which showed them as belonging to the Kondominium government; until 1980 the New Hebrides were governed by Britain and France. On 9 March 1983 Vanuatu proclaimed sovereignty over these two islands and hoisted the flag in support. This issue has not yet been solved.

There have rarely been such extreme cases involving seas in the vicinity of large continents, and therefore large states, although it is also possible to find some examples of the relatively low regard for the sea at the time a number of countries took possession of land. In the South China Sea, the Paracel and Spratly Islands have been disputed territory for over 150 years between China, Vietnam and the French colonists. Depending on the state of power, one country or another has claimed possession of these uninhabited islands. Since it has become possible to allocate large areas of the sea (assuming that there are islands in this area) to a country, the disputes have multiplied and there was military action near the Paracel Islands between South Vietnam and the People's Republic of China (PRC) in January 1974. The dispute over the Spratly Islands involves Vietnam, the PRC, the Republic of China (Taiwan), the Philippines, Indonesia and Malaysia. If interest were focused on the islands only, a solution would be easy to reach because, except for a small amount of phosphate on the Paracel Islands and the possibility of using the islands as harbours for the native fishermen, the nearly 100 scattered islands in this part of the South China Sea offer no economic potential. The prospect of finding oil and gas on the sea-bed near these islands and the fact that the region of the Spratly Islands is located in the shipping lane between East Asia, Singapore and Europe have made these islands more attractive to the surrounding countries. This shipping lane is of strategic importance because, according to the new Law of the Sea, the territory of states would be crossed.

In the future it is unlikely that there will be another event like the presentation of an island to another country, such as Australia did to Papua New Guinea on the latter's day of independence: the Pocklington Reef, part of the Australian Coral Sea Islands. On the contrary, states such as the PRC (in which corals in the the Macclesfield Bank in the South China Sea are being built up at a rate of 10 centimetres per year, some of which are still submerged) or Japan (which has underwater volcanoes south of the Japanese mainland almost reaching sea-level) are waiting for the formation of new islands that will be used as a basis for new Sea Law Zones.

The Growing Importance of the Sea

Since World War II, the significance of the sea has rapidly changed (see, for example, Meinecke 1977, Vallega 1985). Until that time, one only regarded the infinite amounts of water, the excessive supply of space for shipping routes, the reproductive quantities of all kinds of fish and sea animals, the almost inexhaustible capacity of the sea to take up rubbish of all kinds, and the barely accessible and

only scientifically useful sea-bed. Almost all economic exploitation was limited to the coastal zones under the sovereignty of each country. Fishing and shipping on the high seas, with few exceptions, were not disturbed by any rivalry among different states, which would have made regional nationalization necessary. With advancing technology, the increasing need for resources and food, the rapidly growing number of states with the ability to use the resources of the sea, the rising amount of rubbish that was dumped into the sea, and as the increasing traffic on, in and above the sea became more and more noticeable, the natural limitation of this seemingly infinite resource became evident. Sophisticated fishing methods — for instance, the introduction of electro-magnetic search methods for whaling or the use of large nets to locate and catch fish — led to needlessly intensive fishing of a number of species and in certain areas. The unscrupulous dumping of poison and rubbish soon reached extreme limits of the marine ecosystem, especially of completely or partly enclosed seas. The need for mineral resources and also politically aggravating circumstances directed the search for ore, sand and hydrocarbon further out to sea. After obtaining sand, especially ore-sand (titanium-sand, monazite, magnetite, and so forth) in shallow waters, and coal and metal ore were made accessible by means of tunnels from land to beneath the sea, the new inventions of fixed and, eventually, swimming drilling, and production platforms enabled man to work at extending distances from the land and to greater depths. In the second half of the 1950s the interest in manganese nodules (first found in the Atlantic Ocean in 1873) began to develop. These metal and manganese concentrations also contained nickel, copper, cobalt, molybdenum, vanadium and other minerals in different quantities (Chaziteodorou and Wienen 1977; Dorstewitz et al. 1971; Drolet 1980; Dubs 1978, 1981; Kausch 1971; McKelvey 1980; Mero 1972; Morgenstein 1973; Platzöder 1979; Schneider 1981).

In addition to these facts came a political aspect: learning from the past, even those countries which could not engage in high-sea fishing or marine mining up to now, were not willing to give away these resources to the more developed countries. They wanted to secure their share of the sea by means of unilateral declarations and demands towards a settlement on the basis of international laws. However, on 28 September 1945, the United States (as the first state in the past) proclaimed the right of usage of all the "natural resources of the subsoil and seabed of the continental shelf".[4] An exact borderline was not established although an accompanying statement made the intention clear of claiming an area to a depth of 100 fathoms (183 metres) as the national shelf. Therefore, this shelf-zone is, at the maximum, about 250 nautical miles wide and has a total area of about 750,000 square nautical miles. The actual area of water above the shelf was not specified in this proclamation. Here, the old rights of fishery and navigation (that is, the rights of the high seas) continued to exist.

At the same time, the first steps were taken to establish a regional classification of the fishing zones in an enlarged coastal zone without declaring any

[4] So-called "Truman Proclamation": Presidential Proclamation 2667, 28 September 1945: Natural Resources of the Subsoil and Seabed of the Continental Shelf, 10. Fed. Reg. 12303 (1945), 59 Stat. 884.

national interest; it was rather a matter of delivering a decree on the preservation and the regulation of fishing[5] (Alexander 1977; Amacher and Sweeney 1976; Darman 1977; Henkin 1974; Vitzthum 1976,1978,1981). Only one month later, on 28 October 1945, Mexico formulated a law claiming sovereignty over its continental-shelf zone, which came into force in 1949 (cf. Boggs 1951; Klemm 1976; Tobar 1972). On 1 March 1946, Panama followed suit. Both states did not define exact borders of their shelves like the United States. Chile also proclaimed its coastal sea zones (23 June 1947: Proclamacion Presidencial de 23 de Junio de 1947) as well as the entire continental shelf at its coast (Fed. Reg. 12304 [1945], 59 Stat. 885) (with the aim of securing a section of the Antarctic) and finally declared sovereignty over a 200-nautical-mile zone, which means that Chile expanded its territorial sea to a width of 200 nautical miles (or a so-called *mar patrimonial*). Within this 200-nautical-mile zone along the west coast of South America one finds an area of ecological importance for commercial fisheries as it has a cold current and drifting nutritive substances from the land. In many parts of the world the 200-nautical-mile distance very often corresponds to the 200 metre-depth line, so that it became later a standard measure of codified Law of the Sea. Peru decided to act similarly on 1 August 1947,[6] giving the reason that their important guano production by specific sea-birds relied on their finding certain fish at various times of the year within an area 80–250-nautical mile distance from the coast (cf. Eitel 1979, p.7). These last two mentioned states did not claim their continental shelf-zone but a 200-nautical-mile zone because of a geomorphological reason: the continental shelf along the Pacific coast of South America is narrow and the sea-floor drops rapidly.

The separate attempts of the Latin American countries were not co-ordinated at that time: on 29 November 1947 Guatemala demanded as a right the oil-concession for its entire continental shelf (without giving precise borders); Guatemala had already marked off a territorial sea with a width of 12 nautical miles with Law No. 2535 of 21 April 1941. The next to follow was Nicaragua on 22 January 1948 with a proclamation of its sovereignty over the continental shelf and placed the border-line at the 200-metre-depth line in 1949. Costa Rica declared a 200-nautical-mile zone on 27 July 1948 (Decreto-Ley No. 116 de la Junta Fundadora de la Segunda Republica, Julio 27 de 1948) but it was reduced to the continental shelf on 2 November 1949. In the same year, Honduras, too, claimed its continental shelf, and Ecuador followed on 21 February 1951 (with the border-line corresponding to the 200-metre-depth line); simultaneously, the Galapagos (Colon) Islands took on the status of an archipelago with a territorial sea of 12 nautical miles width. El Salvador, on the contrary, enlarged its territorial sea to a width of 200 nautical miles (Constitucion Politica, Art. 7, Septiembre 14 de 1950). By 1951, all the Latin American countries along the Pacific Ocean had proclaimed their legitimate sea or continental shelf territories following the Truman Proclamation of the United States.

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[5] Presidential Proclamation 2668, 28 September 1945: Coastal Fisheries in Certain Areas of the High Sea, 10.

[6] Decreto Supreme No. 781 de 1 de Agosto de 1947.

In 1952, delegates from Chile, Ecuador and Peru met in Santiago (Chile) for a conference on the exploitation and preservation of the natural resources of the sea in the South Pacific (Primera Conferencia Sobre Explotacion y Conservacion de las Riquezas Maritimas del Pazifico sur) and passed the so-called "Declaration of the Law of the Sea of Santiago" (Declaracion Sobre Zona Maritima). They defended their claims of the 200-nautical-mile zones (1 nautical mile = 1,852.8 metres) at their coast including total sovereignty and jurisdiction over the waters, the sea bed and its subsoil; they also agreed to peaceful passage in this area. Chile and Peru had already passed laws to legitimize their claims; Ecuador followed suit in 1966 (Decreto No. 1542, de 10 de Noviembre de 1966). Nicaragua (Decreto Presidencial No. 1 - L, de 5 Abril de 1965) and Panama (Ley No. 31 de la Assambla Nacional, Febrero 2 de 1967) also enlarged their areas of sovereignty to cover a distance of 200 nautical miles.

The remaining countries along the Pacific Ocean did not demand such extreme expansions of their sovereign power. Until the beginning of the 1950s these nations, with the exception of the Philippines, delayed this matter and finally claimed only the continental shelf. The reason for this was that the larger seafaring states objected to such an expansion of the former territorial sea (3 nautical miles width) because even a width of 12 nautical miles would have meant that coastal states would govern 120 to 150 international straits (cf. Platzoder and Vitzthum 1974, p.218).

In 1953, Australia declared sovereignty over its continental shelf (on the basis of the Fisheries Act and the Pearl Fisheries Act of 1952, especially to safeguard specific fauna like pearl oysters, trochus-shells, sea cucumber/*bêche-de-mer*, and so forth); in 1954 Brunei annexed its continental shelf.

There were considerable legal and political doubts among many states regarding the method of drawing baselines connecting the outermost capes of an entire island-group using an imaginary line, and therefore giving an enclosed sea area the same legal status as the land. After a few preliminary legal examples dating back to before World War II, such an archipelagic act of this kind was passed for the Galapagos (Colon) Islands by Ecuador in 1951, and in 1955 as an intentional declaration by the Philippines, and in 1957 by Indonesia. The decree on the Galapagos Islands was generally tolerated in order to protect the rare and preservable fauna and because of its remote location. On the other hand, the proclamations of the Philippines and Indonesia were the cause of several protests, as both archipelagos are situated in the main shipping lanes between East Asia and Europe, quite apart from the fact that space for the navies of the great powers would be greatly reduced.

All of these events, which naturally did not only occur in the Pacific Ocean, led to an unsatisfactory situation in respect of international law because they were unilateral demands by each coastal state which were not recognized by the other countries. Furthermore, each proclamation contained a different statement on the determination of the zones and on national privileges. The first Conference on the Law of the Sea, convened by the United Nations, was held eventually in Geneva in 1958, with the aim of establishing a common law. The outcome of this conference was issued in four Conventions,[7] which did not find the approval of every member of

the United Nations. It can be generally summarized that the customary laws on the *mare liberum* were maintained but some important innovations on matters concerning international law, which had resulted from the doctrine of the right to the natural resources within the continental shelf of every coastal state, were added and codified. For the first time the so-called "Geneva Continental Shelf" was defined as the area of the shelf up to the 200-metre-depth line (which also applied in the case of islands), in which the coastal state had the right to exploit both mineral and living resources. In other words, it was thought that this line reached the utmost attainable depth and therefore allowed the coastal states, granted that their technology was advanced enough, to expand their activities to this line. A solution on the expansion of the territorial seas beyond the 3-nautical-mile limit could not be reached. On the contrary, most of the conference members wanted to maintain the 3-nautical-mile zone. Apart from this, only the suggestion that there should be a 12-nautical-mile zone enjoyed any support worth mentioning (cf. Henkin 1974, p.50).

The rather negative outcome of this conference (for example, there was no solution on the expansion of the fishing and economic zones) led to the second United Nations Conference on the Law of the Sea (UNCLOS II) in Geneva in 1960. Unfortunately, this conference also did not accomplish any fundamental progress. The attempt to enlarge the territorial sea to 6 nautical miles and to add another 6 nautical miles as exclusive fishing-zone failed.

Implications of the Convention of the Law of the Sea

With increasing demands for specific areas of the sea and the continental shelf, the basis for conflicts also grew, mainly between developed and less developed countries (Studier 1980; Wolf 1983). The third United Nations Conference on the Law of the Sea (UNCLOS III) began in December 1973 with this background. In order to gain advantage at the beginning of the talks, some countries had set new borderlines beforehand and, therefore, the Convention was handicapped from the start (Eitel 1979; Gündling 1983; Hollick 1974; Kehden 1971; Luard 1974b; Oda 1977; Yaroslavtsev 1975; Young and Johnson 1973). The talks lasted until 30 April 1982. Delegates of more than 150 countries were present. Despite the combination of extremely different opinions from industrial and developing countries, from insular and continental countries, from military counterparts of both east and west, from coastal states with a long shore-line, from geographically disadvantaged and inland countries, from military great powers and from countries without strategical interests, it was surprising that 130 delegates approved the final outcome (Brown and Fabian 1974; Buzan 1978; Couper 1978). Apart from 17 abstentions (including the Federal Republic of Germany), 4 countries rejected the Convention, including the United States, which had reservations towards deep-sea mining. The remaining

[7] Convention on the High Sea; Convention on the Territorial Seas and the Contiguous Zone; Convention on the Continental Shelf; Convention on Fishing and Conservation of the Living Resources of the High Seas (Hoog 1961; Sorensen 1958).

3 countries (Israel, Turkey and Venezuela) based their denial on individual political arguments.

In the new Convention, regulations are stated for almost every form of sea utilization — from navigation to fishing and deep-sea mining, from maritime research to ecological problems. The regulations come into force for those countries which become members of the Convention, if at least 60 states have signed and ratified the Convention within one year. The Convention could be signed within a period of two years (from 10 December 1982) by any nation whether or not it is a member of the United Nations (in the Pacific region the non-members are: Democratic People's Republic of Korea, Republic of Korea, Kiribati, Nauru, Tonga and Tuvalu) or if it is a self-governing associated state (such as Cook Islands and Niue).

Although the new Convention on the Law of the Sea has not yet been enforced, it seems acceptable to use it as the basis for presenting the regionalization of the Pacific Ocean as far as maritime law is concerned. This is because all the countries bordering the Pacific Ocean (except the United States) have agreed to it or, as in the case of Thailand and the USSR (both refrained from voting), have not excluded their approval at a later date.

It is not possible to present the entire new Convention on the Law of the Sea here. For this information it is necessary to study the document on the Convention on the Law of the Sea (Document A/CONF. 62/121) consisting of 320 articles and 9 annexes in order to fully understand the difficulties involved in defining the new sea-zones and the complex economic and political background (Dokumente . . . 1983; Platzöder 1982; Vitzthum 1976, 1978, 1981).

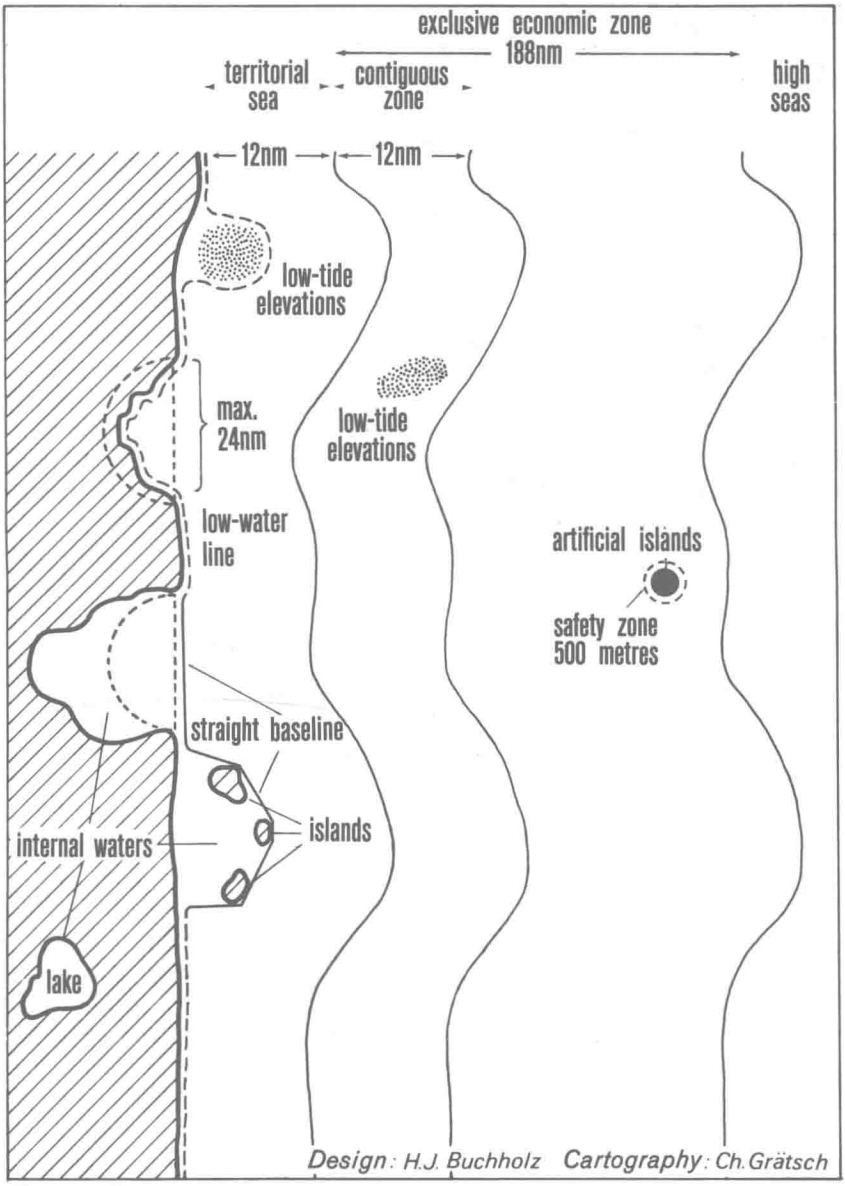
According to Article 3 of the Convention on the Law of the Sea (1982), every country has the right to claim a territorial sea with a maximum width of 12 nautical miles (22.224 kilometres).[8] The distance must be measured from the low-water line at the coast or from so-called "straight" baselines if the coast is highly irregular.

The territorial sea, together with the airspace above and the sea-bed and subsoil below the surface, are subject to the sovereignty of the coastal state. All foreign ships, even battleships, have the right of "innocent passage" (Article 17). The right to overfly this area is not given, and submarines must surface before continuing their journey.

The low-water line has been used for some time now as a baseline for measuring maritime law zones: only the king of Hawaii applied the high-water line for this 3-nautical-mile territorial sea in 1850. A problem of determining the baselines arises at coasts which have an irregular shape because of bays, reefs or outlying islands. The Law of the Sea states that the seaward low-water line of the reef is the baseline for measuring the breadth of the territorial sea (Article 6). Bays may be closed by straight baselines if they have an area as large, or larger than, that of a semi-circle whose diameter is a line joining the low-water marks of the bay's natural entrance points. This line must not exceed 24 nautical miles. If the bay is larger, a straight baseline of 24 nautical miles shall be drawn within the bay where it touches

[8] All mentioned Articles originate from the Convention on the Law of the Sea (1982).

Fig. 1: Law of the Sea Zones (Scheme)



Source: H. J. Buchholz, 1983 b.