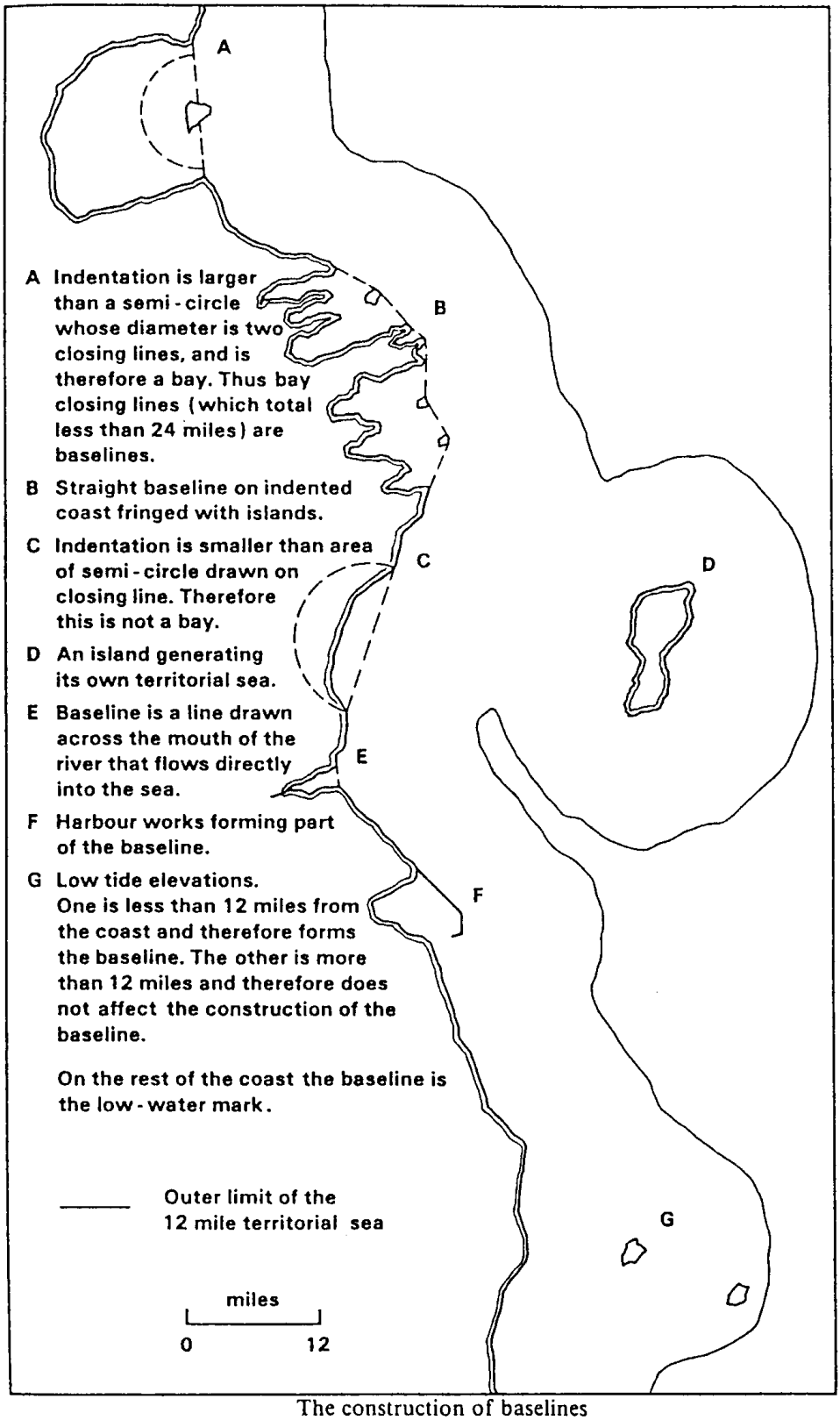
## *11.2.2 Bays*




The construction of baselines

International law has always recognised that bays have a close connection with land and that it is more appropriate for them to be considered internal waters rather than territorial sea. Customary international law therefore has long accepted that straight baselines can be drawn across the mouths of bays. The difficulty was in determining the amount of indentation required for a bay, and the maximum length of a closing line. Article 7 of the TSC established clear rules which are repeated in Article 10 of the LOSC. To establish whether an indentation is a bay, a line should be drawn across the natural entrance points of the indentation. A semi-circle should then be drawn with the line forming the diameter. The area of this semi-circle should be measured and compared with the area of the total indentation. If the area of water is greater than the semi-circle then the indentation is a bay. A closing line can then be drawn. If the closing line does not exceed 24 miles it will constitute the baseline. If the closing line is greater than 24 miles a closing line of 24 miles is drawn to enclose the greatest amount of water possible and the line forms the baseline. With respect to any part of the bay which remains unenclosed the baseline will be the low-water mark. A problem which has remained unresolved is how the natural entrance points to a bay are established. In *Post Office v Estuary Radio* (1968)[3] the UK Court of Appeal had to decide whether the Thames estuary was a bay in a case involving pirate radio broadcasting. The estuary's status as a bay depended upon where the closing line was drawn. No two points were obviously the entrance points to the estuary although the Court of Appeal found in favour of the Post Office's contention that the entrance points could be located at a point which would mean the estuary satisfied the test of a bay set down in TSC.

These rules pertaining to bays do not apply where straight baselines are used nor do they apply to historic bays. Historic bays are not dealt with in either TSC or LOSC but have long been a feature of customary international law although it is clear that the regime attaching to historic bays depends upon the particular circumstances of each case. In some situations a state may enjoy full sovereignty over an historic bay, in others it may only enjoy exclusive fishing rights. In *El Salvador v Nicaragua* (1917)[4] the Central American Court of Justice held that the Gulf of Foncesa, which is surrounded by Nicaragua, Honduras and El Salvador and which is about 19 miles across at its mouth was 'an historic bay possessed of the characteristics of a closed sea' over which the three states held joint sovereignty. In 1973 Libya claimed the Gulf of Sidra as an historic bay and drew a closing line across it which is 296 miles in length. Several states objected to Libya's claims and the USA sent a naval squadron into the area to emphasise the point that it considered the Gulf to constitute high seas. In 1981 US shot down two Libyan aircraft flying over the Gulf and there seems little evidence that the bay is a historic bay.

The general rules applying to bays do not apply where the bay is bordered by more than one state, for example Lough Foyle which is bordered by Ireland and the UK. Such situations will normally be resolved by agreement between

3 [1968] 2 QB 740.

4 (1917) *AJIL* 674.

the states concerned but the general view seems to be that the baseline follows the low-water mark and no closing line is drawn.

### *11.2.3 River mouths*

Both Article 13 of the TSC and Article 9 of the LOSC provide that if a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low water line of its banks. No limit is placed on the length of such a closing line. The rule applies only to rivers which flow directly into the sea. It does not apply to rivers which flow into the sea via estuaries although this is not always an easy distinction. Estuaries occur where the river valley becomes flooded by the sea and the mouth of the river takes on a characteristic funnel shape. Estuaries are treated as bays as was seen in *Post Office v Estuary Radio* (1968).[5] Sometimes a river will carry down solid material which, if they cannot be removed by the action of the tides, form alluvial deposits at the mouth of the river. As the deposits build up the river will divide and sub-divide as it flows into the sea and a delta will be formed. If the river enters the sea via a delta, baselines will be calculated by the low-water line or by straight baselines.

### *11.2.4 Harbour works*

Article 8 TSC provides that the outermost permanent harbour works such as piers and breakwaters which form an integral part of the harbour system are to be regarded as forming part of the coast and can therefore act as the baseline. This provision is repeated in Article 11 of the LOSC, although LOSC makes it clear that harbour works must be attached to the coast. Off-shore installations and artificial islands are not to be considered as harbour works.

### *11.2.5 Low-tide elevations*

Article 11(1) of the TSC and Article 13(1) of the LOSC define a low-tide elevation as a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Such elevations are sometimes referred to as drying rocks. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. Where the elevation is situated beyond the limits of the territorial sea, it cannot be used for the purposes of drawing baselines. Low-tide elevations are also often used in the drawing of straight baselines.

### *11.2.6 Islands*

Article 10(1) of the TSC and Article 121(1) of the LOSC define an island as a naturally formed area of land surrounded by water which is above water at high tide. There is no condition as to size nor habitation, although as regards isolated islands which are incapable of sustaining habitation the rules on

5 [1968] 1 QB 740.

acquisition of territory discussed in Chapter 6 may be relevant. The general rules applying to baselines will apply to islands and this clearly poses no problems in the case of large islands such as Britain. With the development of the regimes of the continental shelf and EEZ the significance of small islands vastly increased. It is accepted that every island, no matter how small, is capable of possessing a territorial sea but doubts have been expressed as to whether small islands have continental shelves or EEZs. Article 121(2) of the LOSC provides that islands will possess baselines for all maritime zones, but an exception is made in the case of rocks which are incapable of sustaining human habitation or economic life of their own. Such islands can only serve as the baseline for the territorial sea and contiguous zone and not for the continental shelf and EEZ. In practice most uninhabitable island rocks lie immediately offshore and will be dealt with under the provisions relating to straight baselines and archipelagic states. Regimes applying to rocks which lie a long way offshore, such as Rockall which lies 240 miles west of the Outer Hebrides, tend to be or have been the subject of specific agreement or dispute resolution.

### *11.2.7 Reefs*

A reef is formed by a ridge of rocks or coral which lies near the surface of the sea. An atoll is a reef which forms in the shape of a horseshoe or ring, usually enclosing an island. Reefs and atolls may be permanently submerged or, if exposed at low tide, may be situated from the mainland at a distance greater than the breadth of the territorial sea. They would therefore not come within the definition of low-tide elevations and could not therefore be used for the purposes of drawing baselines. However, there are strong ecological reasons for holding that the sea on the land side of the reef, the lagoon, has the status of internal waters.

There was discussion about the status of reefs at UNCLOS I but no provisions were included in TSC. The emergence during the 1960s of many independent states in the Caribbean and the Indian and Pacific Oceans possessing reefs disclosed a need to establish clear rules with respect to reefs and atolls. Article 6 of the LOSC provides that:

> ... in the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef.

The provision suggests that the rules will only apply to reefs which are exposed at low tide although the ILC draft prepared for UNCLOS I provided that 'the edge of the reef as marked on charts should be accepted as the low-water line'. It also remains unclear as to whether there is any limit to how far from an island a fringing reef can lie, although most geographical works refer to fringing reefs as lying near the shore of an island, with corals growing out from the shore to a depth of about 50 metres. Fringing reefs are to be distinguished from barrier reefs which lie at some distance from the shore. Thus Article 6 would not apply to the Great Barrier Reef which in places is 150 miles from the coast of Australia. The environmental concerns relating to the Great Barrier Reef have partly been dealt with under the World Heritage Convention 1975 which is discussed in Chapter 17.

### *11.2.8 Archipelagos*

Archipelago is the term used to refer to a group of islands and a question arises as to whether the baseline should follow the low-water mark of every island or whether straight baselines can be used to connect the outermost parts of the group of islands to enclose the archipelago. The question was discussed at UNCLOS I but no final agreement was reached although Article 4 of the TSC did allow the use of straight baselines in the case of coastal archipelagos, ie groups of islands fringing a coast. In 1957 Indonesia announced that its territorial sea would henceforth be measured from straight baselines drawn between the outermost points on the islands forming the Republic of Indonesia. The waters within the baselines would be regarded as internal waters although the peaceful passage of foreign vessels through them would be guaranteed. A similar measure was adopted by the Philippines. A number of states protested but the issue was not authoritatively settled. The concern of the major maritime states was that many of the archipelagic states straddled important shipping lanes and they feared that the adoption of straight baselines and creating large areas of internal water might lead to a considerable loss of navigational freedom.

During the 1960s a number of archipelagic states achieved independence and it became clear that there was a need for some agreement on the drawing of baselines in respect of such states. A new regime was introduced in Part IV LOSC. The new regime allows straight baselines to be drawn between the outermost points of the islands but would only apply in the case of 'archipelagic states'. An archipelagic state is defined in Article 46 as a state constituted wholly by one or more archipelagos. This definition does not include mainland states with non-coastal archipelagos, for example Portugal which possesses the archipelago of the Azores, lying 900 miles west of Lisbon. Nor would it apply to the Azores themselves since they do not constitute a state on their own. The definition would seem to include states such as the UK and New Zealand although they would not consider themselves to be archipelagic states. In any event Article 47 of the LOSC merely provides that archipelagic states may draw straight baselines; it imposes no obligation to do so.

A number of conditions are set down regarding the drawing of straight baselines. They can only be drawn round the archipelago in such a way as the ratio of land to water is not more than 1:1 and not less than 1:9. This condition would itself exclude the UK and New Zealand and also the very widely scattered archipelagos. The baselines must not exceed 100 miles in length and must not depart from the general configuration of the archipelago.

## 11.3 Internal waters

Internal waters are those which lie on the landward side of the baseline from which the territorial sea and other maritime zones are calculated. As has already been seen, internal waters may include bays, estuaries and ports and waters enclosed by straight baselines. Internal waters constitute an integral part of the coastal state and the coastal state enjoys full sovereign rights over them. There is

no right of innocent passage through internal waters such as exists through the territorial sea. Two particular aspects of a coastal state's sovereignty over internal waters have given rise to much discussion: the right of access to ports and other internal waters; and the exercise of jurisdiction over foreign ships in ports. It should also be noted that a special regime applies to archipelagic waters.

### *11.3.1 Rights of access to ports and other internal waters*

The rules of sovereignty over internal waters mean that there is no general right in customary law for foreign ships to enter a coastal state's ports. This point was confirmed by the ICJ in the *Nicaragua* case (1986). Although coastal states will normally allow the entry of foreign merchant ships into their ports, there is no indication that such practice is supported by sufficient *opinio juris* to create a rule of customary international law. The only situation in which a foreign ship would be entitled as of right to enter internal waters would be where it was in distress and seeking safety. Such a situation would give rise to application of the general defences to state responsibility discussed at 9.9. It is clear that there are no general rights of entry to foreign warships.

Normally states will nominate those of their ports which are open to international trade and will so designate such ports of entry for customs and immigration purposes. Customary international law allows states to close their international ports to protect their vital interests and it is for the state itself to define what constitutes its vital interests. States also have a wide discretion to prescribe conditions for access to their ports. It is usual for states to enter into bilateral treaties, usually known as Treaties of friendship, navigation and commerce (FCN Treaties), which will set down rights and conditions of access to internal waters and ports. Among EU member states access to internal waters is governed by the general rules relating to freedom of movement and the free movement of goods.

Questions relating to the access of foreign ships will also arise in respect of navigable rivers and canals which also constitute internal waters. Access here will generally be much more restricted although as was mentioned at 6.6 most international rivers and canals, ie those which flow through the territory of more than one state, will be subject to specific international agreement.

### *11.3.2 Exercise of jurisdiction over foreign ships in internal waters*

Since internal waters constitute an integral part of the territory of a state, application of the territorial rules of jurisdiction would imply that a state is entitled to enforce its laws against all ships and those on board within its internal waters, subject to the rules of sovereign and diplomatic immunity. However, since ships are more or less self-contained units and are subject to the laws of the flag state at all times, coastal states will usually only enforce their laws in cases where their particular interests are involved. Local jurisdiction will be asserted when the offence affects the peace or good order of the port, for example in the case of customs or immigration offences.

### *11.3.3 Archipelagic waters*

The concept of archipelagic waters was created at UNCLOS III to deal with the situation arising where archipelagic states made use of straight baselines to enclose the archipelago. Although archipelagic waters form an integral part of the territory of the archipelagic state in the same manner as internal waters, they are subject to certain rights enjoyed by foreign states which are set out in Articles 51 to 53 of the LOSC. These articles provide that existing agreements and traditional rights must be respected and that foreign ships enjoy a right of innocent passage through the archipelagic waters, although the archipelagic state may designate reasonable sea lanes. Within the archipelagic baselines, a state may draw closing lines across river mouths, bays and ports on individual islands and thereby create internal waters.

## 11.4 Territorial sea

Throughout the history of modern international law it has been accepted that coastal states enjoy certain rights in the seas adjoining their coasts. A distinction has long been made between the freedom of the high seas over which no claims to sovereignty could be made and territorial waters over which coastal states enjoyed particular rights and undertook certain duties. What was not settled was the question of the breadth of the territorial waters and the precise nature of the rights and duties which existed there. There was also a question as to whether states automatically possessed a territorial sea or whether it had to be specifically and expressly claimed. Debate on these issues continued during the first half of this century and the question did not begin to be settled until the 1950s.

### *11.4.1 The breadth of the territorial sea*

The breadth of the territorial sea has been a matter of controversy throughout history. Early writers used criteria of visibility whilst Grotius and other 17th and 18th century writers suggested that territorial waters extended up to a point at which those waters could be controlled by a shore-based cannon. There were differences as to whether this rule meant that territorial sea followed parallel to the coast or only existed where cannon were actually mounted. Towards the end of the 18th century it was suggested that it made more sense for states to adopt a three-mile limit along the whole of the coast rather than to depend on the existence in particular places of coastal batteries. The three-mile limit was chosen as a matter of reasonableness and convenience, contrary to a popular myth it was not chosen as the actual range of cannon. The three-mile rule gained widespread and rapid approval although it was never unanimously accepted, for example, the Scandinavian countries consistently claimed four miles. During this century there have been repeated attempts to reach agreement on the breadth of the territorial sea which have failed. At UNCLOS II a six-mile territorial sea with an additional six-mile fishing limit was proposed but failed to be adopted by a single vote. By the time UNCLOS III was convened many states were claiming territorial seas of 12 or more. Article 3 of the LOSC sets the limit of the territorial sea at 12 miles. Since there has been no state which has persistently objected to 12-mile limits and a large number of

states, including the UK, have now adopted the 12-mile limit, it would be fair to assume that the 12-mile limit has now been accepted as indicative of customary international law on the matter.

### *11.4.2 Delimitation of maritime boundaries*

A major cause of disputes between states is the delimitation of maritime boundaries. Problems can arise in determining the extent of one state's territorial sea or disputes may arise between adjacent or opposite states as to how maritime territory is to be apportioned. It is extremely difficult to set down any universally accepted rules since each case will usually depend very much on its own particular facts. Very often maritime boundaries will be agreed between neighbouring states in specific bilateral agreements. There are however a number of guidelines that can be identified.

In the case of delimitation between opposite states the normal practice has been to agree upon the median line. Practice in delimiting the boundary between adjacent States has been less consistent. Considerable use has been made of the equidistance principle which involves drawing a median line outwards from the boundary on the shore. Other criteria have been used, for example, by drawing a line perpendicular to the general direction of the coast. Some maritime boundaries follow the line of latitude passing through the point where the land boundaries meet the sea. In all cases it is possible that special circumstances, such as the presence of offshore islands or the general configuration of the coast, or claims based on an historic title will demand the adoption of some other boundary line by agreement between the states. These general principles are reflected in Article 12 of the TSC and Article 15 of the LOSC.

### *11.4.3 The right of innocent passage*

The principal restriction on the exercise of sovereignty by the coastal state over its territorial sea is the customary rule of international law allowing foreign ships the right of innocent passage. The right clearly has two aspects which can be discussed further:

*Passage*: this includes not only actual passage through the territorial sea, but also stopping and anchoring in so far as this is incidental to ordinary navigation or rendered necessary by *force majeure* or distress. This point is reflected in Article 14(3) of the TSC. Article 18 of the LOSC expressly extend the distress provision to cover cases where one ship seeks to assist another ship, person or aircraft in distress. Apart from permitted stopping and anchoring, passage must be continuous and expeditious and foreign ships have no right to hover or cruise around the territorial sea. All submarines must navigate on the surface.

*Innocence*: for a long time the criterion of innocence lacked any clear definition. In 1930 the Hague Conference which was convened to consider codification of the law of the territorial sea adopted a text which read: 'Passage is not innocent when a vessel makes use of the territorial sea of a coastal state for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that state.' It was not possible, however, for a convention to be agreed.

The definition of innocent passage received full discussion in the *Corfu Channel* case (1949) which concerned the passage through the Corfu Channel of British warships. The ICJ considered that the manner of passage was the decisive criterion, holding that as long as the passage was conducted in a fashion which presented no threat to the coastal state it was to be regarded as innocent. Innocence itself was regarded as incapable of objective determination.

There was much discussion of various definitions in the lead up to UNCLOS I and a compromise was reached with Article 14(4) of the TSC. A more precise definition has been achieved in Article 19 of the LOSC.

One particular issue which has raised controversy has been the extent to which the passage of foreign warships can ever be considered innocent. State practice is inconclusive and although in the majority of cases foreign warships request and are given prior authorisation for passage by the coastal state it is unclear whether this is a simple act of courtesy or amounts to sufficient *opinio juris* to create a binding rule of customary international law. A related problem arises with regard to nuclear powered vessels and ships carrying hazardous materials. The general rule would seem to be that such vessels do have a right of innocent passage although there are a number of conventions which set down requirements of notification and documentation. This topic will be discussed further in Chapter 17.

### *11.4.4 The right to deny and suspend passage*

The territorial sea is subject to the sovereignty of the coastal state, and the only right which foreign ships have, apart from any specific treaty provision, is the right of innocent passage. Consequently once a ship ceases to be innocent, or steps outside the scope of passage, it may be excluded from the territorial sea. It also follows that a coastal State has the right to suspend or deny passage altogether where the passage of any ship would be prejudicial to peace, good order or security. Coastal states may also require ships to confine their passage to a particular sea lane.

### *11.4.5 Straits*

A strait is a narrow stretch of water connecting two more extensive areas of sea. It is not defined in any of the law of the sea conventions but reference is made to particular rules which apply in the case of straits. Where straits form part of the high seas then all states will enjoy freedom of navigation. Problems arise where the strait forms part of the territorial sea. As has already been seen coastal states are able to suspend innocent passage through their territorial sea in certain situations. If the strait connects two areas of the high seas such suspension of passage through the strait would affect the freedom of navigation on the high seas. The rule therefore developed and was reflected in Article 16(4) of the TSC that innocent passage could not be suspended in straits used for international navigation connecting one part of the high seas with another.

By the time of UNCLOS III the extension of the breadth of the territorial sea in many cases to 12 miles and the creation of other rights for coastal states led to the issue of straits being considered again. The result is to be found in Part III LOSC which concerns straits used for international navigation. The most

significant development is the introduction of a new concept of transit passage. It has been argued by the majority of maritime states that the right of transit passage is now part of customary international law.

The rules on transit passage do not oust those applicable under long-standing conventions which regulate passage through particular straits, for example the Montreux Convention 1936 which concerns the Turkish straits of the Dardenelles and the Bosphorus.

## 11.5 The exclusive economic zone (EEZ) and the contiguous zone

Following the Second World War an increasing number of states made claims to extend their authority over ships in waters beyond the territorial sea. Such zones were known as 'contiguous zones' and the rights within them had to be positively established in each case. In 1958 contiguous zones were given more widespread recognition in Article 24 of the TSC. This allowed states to claim contiguous zones up to a maximum of 12 miles (the territorial sea distance was still generally accepted as three miles at this time) for customs, fiscal, immigration and sanitary purposes. With the extension of the territorial sea, LOSC extended the limits of the contiguous zone to 24 miles and this is generally accepted to be the customary law position.

The contiguous zone has lessened in importance with the development of the exclusive economic zone (EEZ). The concept developed from the view that fishery resources are not inexhaustible and a widespread concern at the failure to deal adequately with resource management issues at UNCLOS I and II. The Fishing and Conservation of the Living Resources of the High Seas Convention 1958 (FC) had attempted to deal with the conservation of living marine resources but confirmed that all states had the right to engage in fishing on the high seas and only imposed a duty on states to co-operate in adopting such measures as may be necessary for the conservation of resources. The FC set down a procedure for settling disputes and only permitted states to take unilateral action where there was an urgent need for the application of conservation measures. In any event, such unilateral action could not discriminate against foreign fishermen.

In the meantime many states had been seeking to establish exclusive fishing zones outside their territorial waters. In 1945 US President Truman had issued two declarations one of which related to the continental shelf which will be discussed at 10.6; the other, the Proclamation with Respect to Coastal Fisheries in Certain Areas of the High Seas, proposed the establishment of fishery conservation zones in waters beyond the US territorial sea. In fact, this proclamation was never applied but a number of other states developed their own fishing limits, and the twelve-mile fishing zone was recognised as a rule of customary law by the ICJ in the *Fisheries Jurisdiction* case (1974). Many states were claiming much larger exclusive fishing areas and the ICJ left unanswered in that case whether Iceland's 50-mile claim was legitimate. On the particular facts it held that Iceland's unilateral extension was contrary to international law.

Negotiation at UNCLOS III led to fairly widespread acceptance of the concept of a maximum 200-mile EEZ and the ICJ in the *Continental Shelf* case

(1985) and the arbitral tribunal in the *Guinea/Guinea-Bissau* case (1985) have indicated that the EEZ now forms part of customary international law.

### *11.5.1 Rights within the EEZ*

Article 57 of the LOSC provides that the EEZ can extend to a distance of up to 200 miles from the baseline. The regime of the EEZ provides that coastal states do not enjoy full sovereign rights but only sovereign rights for the purpose of exploiting and exploring, conserving and managing the natural resources, whether living or non-living, of the sea bed and subsoil and the superjacent waters. So, for example, a coastal state can set fishing quotas within its EEZ with a view to conserving resources. If the coastal state is unable to catch the amount of fish allowed by the quota then other states will be allowed access to take the remaining amount. The coastal state is not the owner, but rather the guardian of the natural resources of the EEZ. Within the EEZ the coastal state can construct artificial islands and other installations for the purpose of exploring and exploiting the zone which are subject to the coastal state's exclusive jurisdiction. Although such installations are not to be regarded as islands and do not therefore possess territorial seas of their own, it is permissible for the coastal state to establish reasonable safety exclusion zones around them. Other states enjoy the right of free navigation, overflight, pipe-laying and cable-laying provided they respect the rights of the coastal state, which is under a duty to ensure the safety of navigation.

It should be noted that the EEZ has to be specifically claimed; it is not inherent in statehood. At the present time over 70 states have claimed an EEZ. There is further reference to the issue of marine resource management and conservation in Chapter 17.

## 11.6 The continental shelf

Strictly speaking the continental shelf is a geographical term to describe the sea bed, which is covered by shallow water of generally less than 200 metres, projecting from the coast before a relatively steep descent (the continental slope) to the deep sea bed. The breadth of the continental shelf varies enormously: off some parts of the Pacific coast of the USA the continental shelf extends for less than five miles, while in contrast the whole of the North Sea constitutes continental shelf.

The traditional freedom of the high seas meant that all states enjoyed the rights to explore the sea bed. Disputes began to arise as the oil reserves of the continental shelf became exploitable. In 1945 President Truman claimed exclusive rights to the resources of the contiguous continental shelf in the Proclamation with respect to the natural resources of the subsoil and sea bed of the Continental Shelf. No outer limit to the claim was specified in the Proclamation although an accompanying press release indicated that the continental shelf was only considered to exist to a depth of 200 metres. A large number of similar claims followed and it became clear that there was an urgent need for the law to be clarified and settled.