

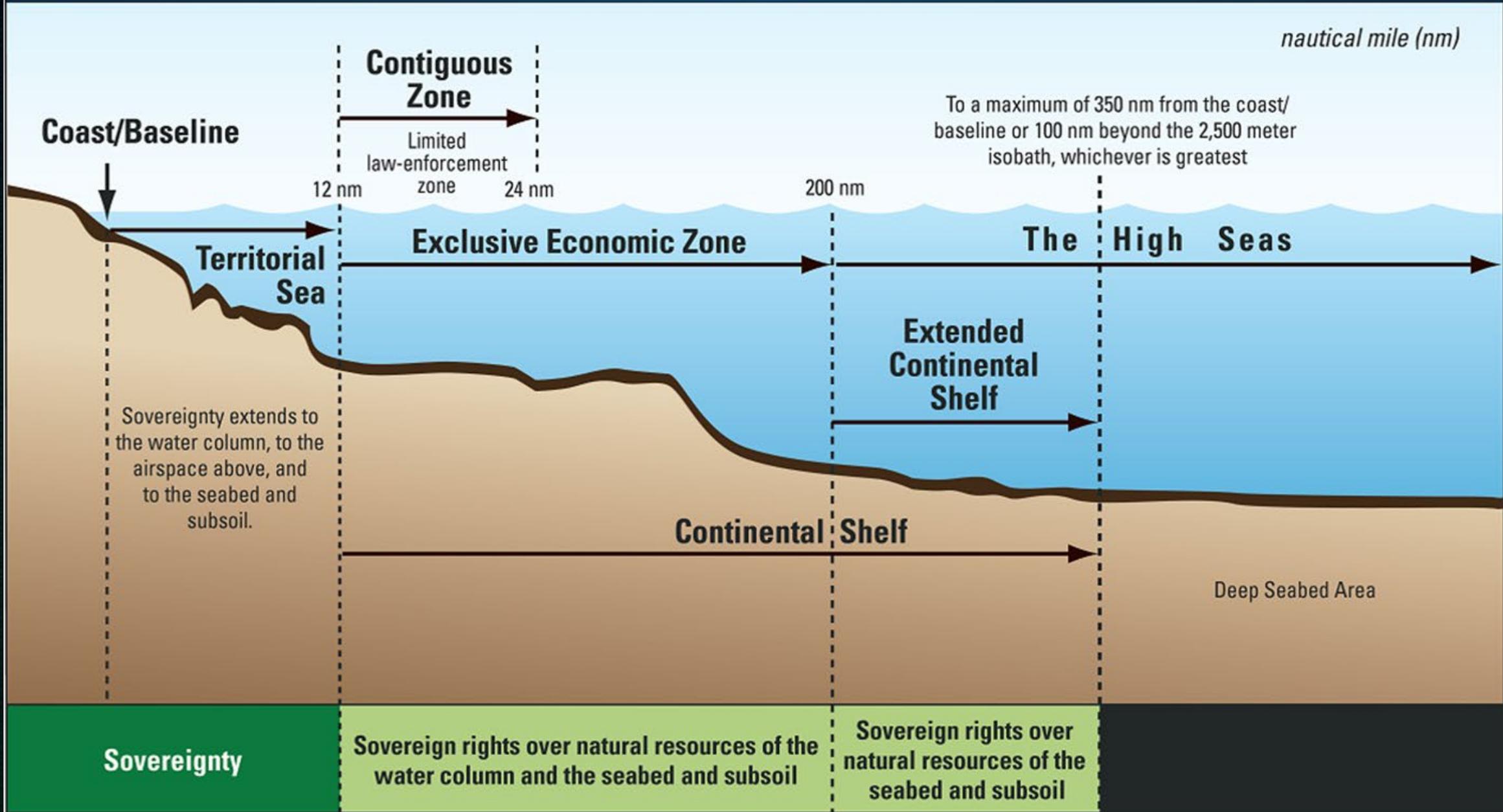


Emerging Challenges to the Regime of the Continental Shelf

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IFLOS 2022

Maritime Zones



Rights and Jurisdiction of a Coastal State over the Continental Shelf

- Exclusive sovereign rights for the purpose of exploring continental shelf and exploiting its natural resources, both living and non-living (Article 77 (1,2))
- Exclusive right to construct/authorize and regulate construction, operation and use of artificial islands, installations and structures (Articles 80, 60)
 - Right to establish safety zones-Article 60 (4)
- Jurisdiction over the submarine cables and pipelines (right to take reasonable measures for exploration/exploitation/reduction and control of pollution from pipelines (Article 79 (2)); delineation of the course for laying pipelines (Article 79 (3))
- Exclusive right to authorize and regulate drilling on CS for all purposes (Article 81)
- Jurisdiction over marine scientific research (Article 246), more limited on the ECS Article 246 (6)
- Right to permit, regulate and control dumping on CS (Article 210)

■
The term “exploitation” appears in Articles 56, 123, 266 of UNCLOS alongside “conservation” and “management”

Article 56

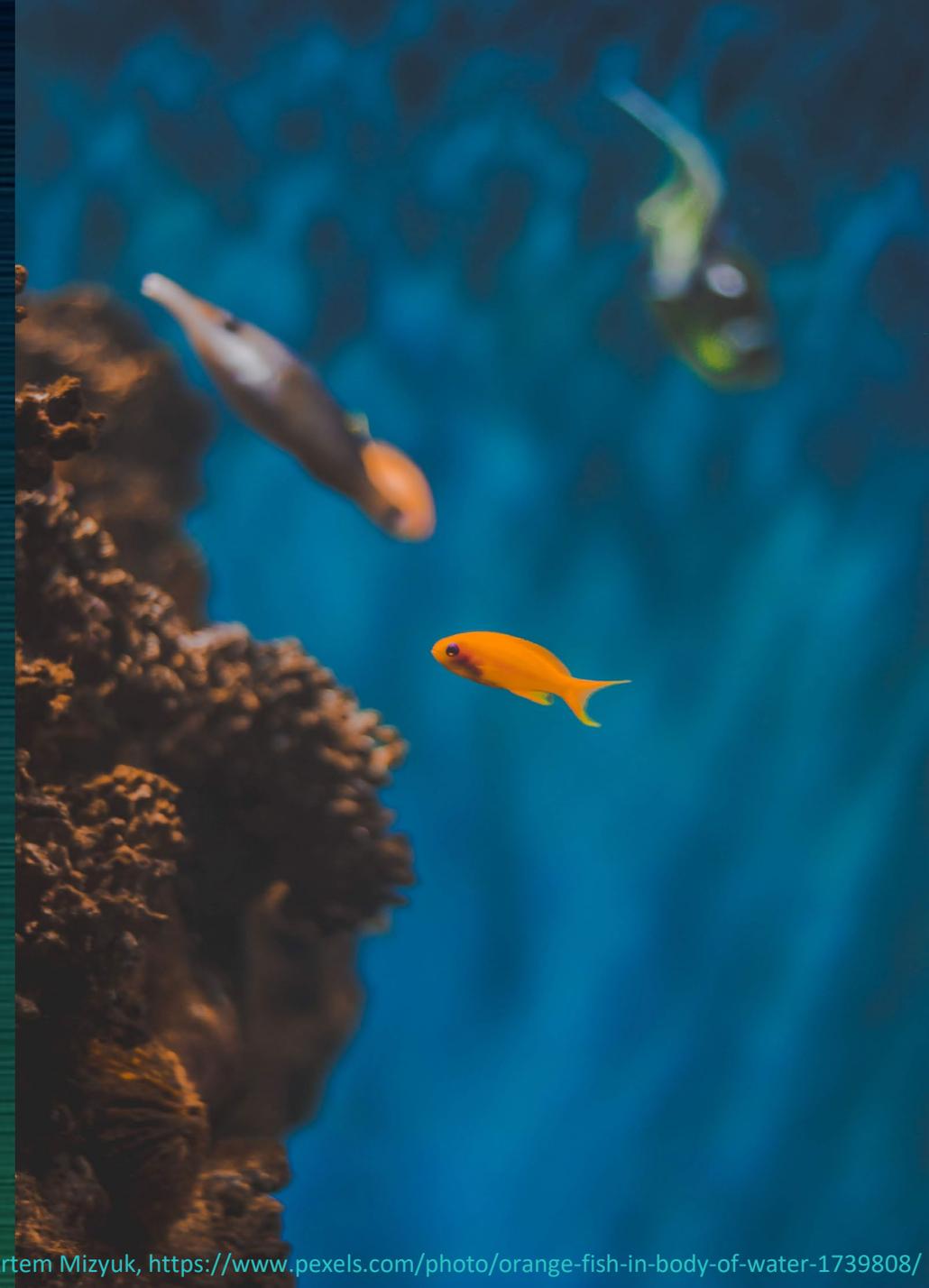
Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

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, such as the production of energy from the water, currents and winds;

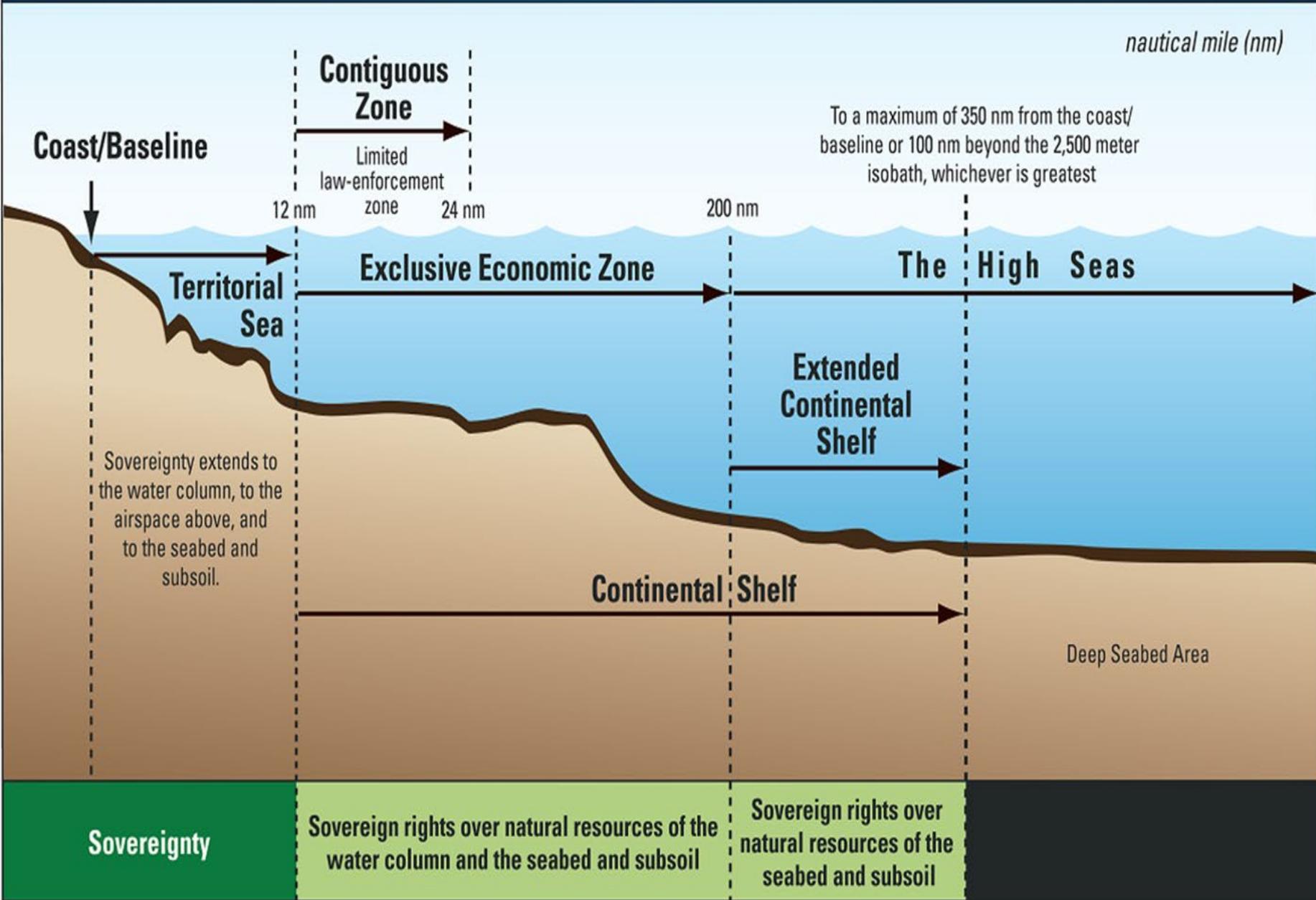
Gap in the protection of sedentary species?

Article 77

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of **exploring** it and **exploiting** its natural resources.
2. The rights referred to in paragraph 1 are **exclusive** in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.



Maritime Zones

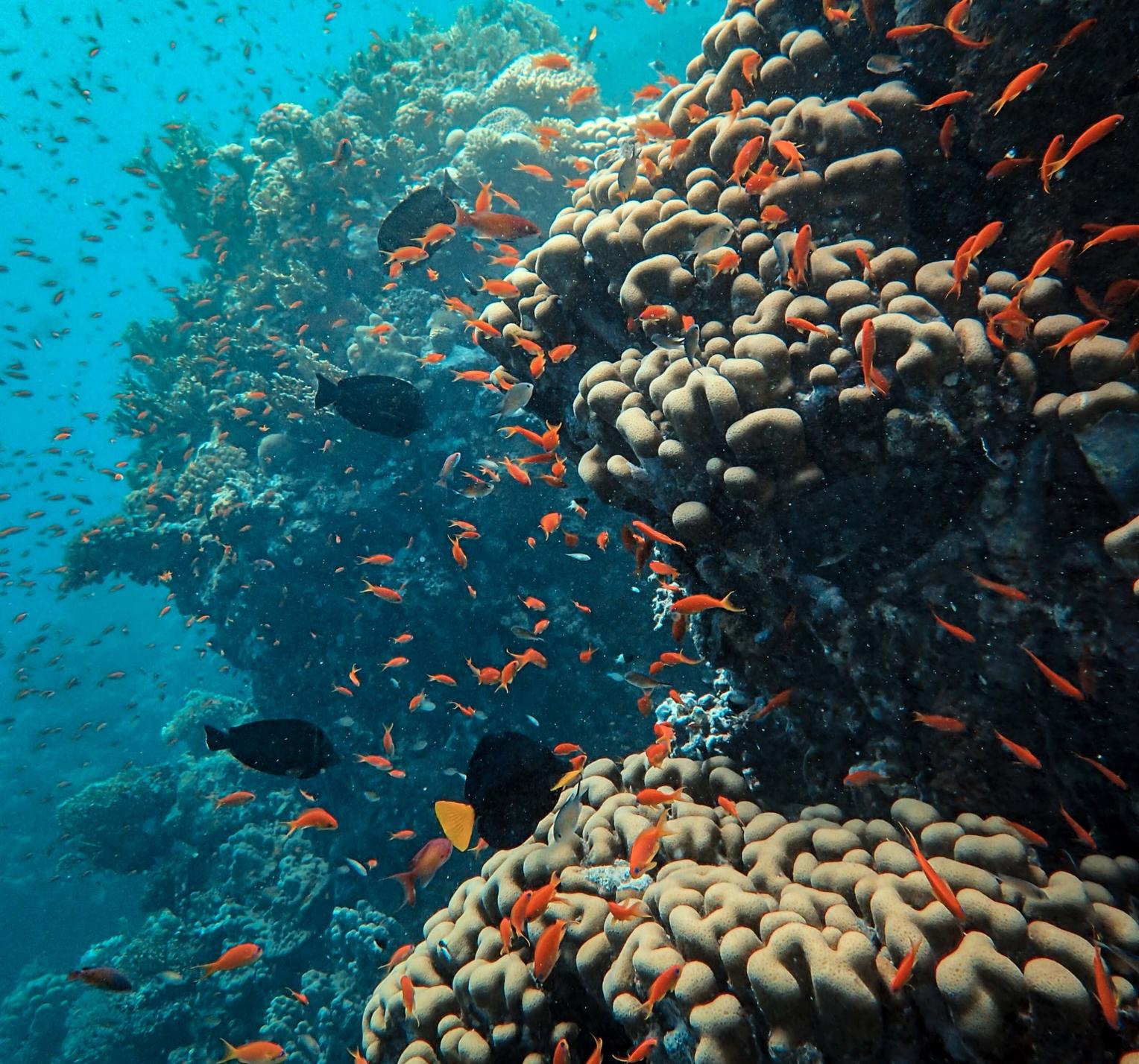


Within 200 M:

Article 68

Article 61 (4)
maintaining or restoring populations of species associated with or dependent upon harvested species

Article 78 (2): The exercise of the rights of the coastal State over the continental shelf **must not infringe** or result in any **unjustifiable interference** with navigation and other rights and freedoms of other States.



Sedentary Species

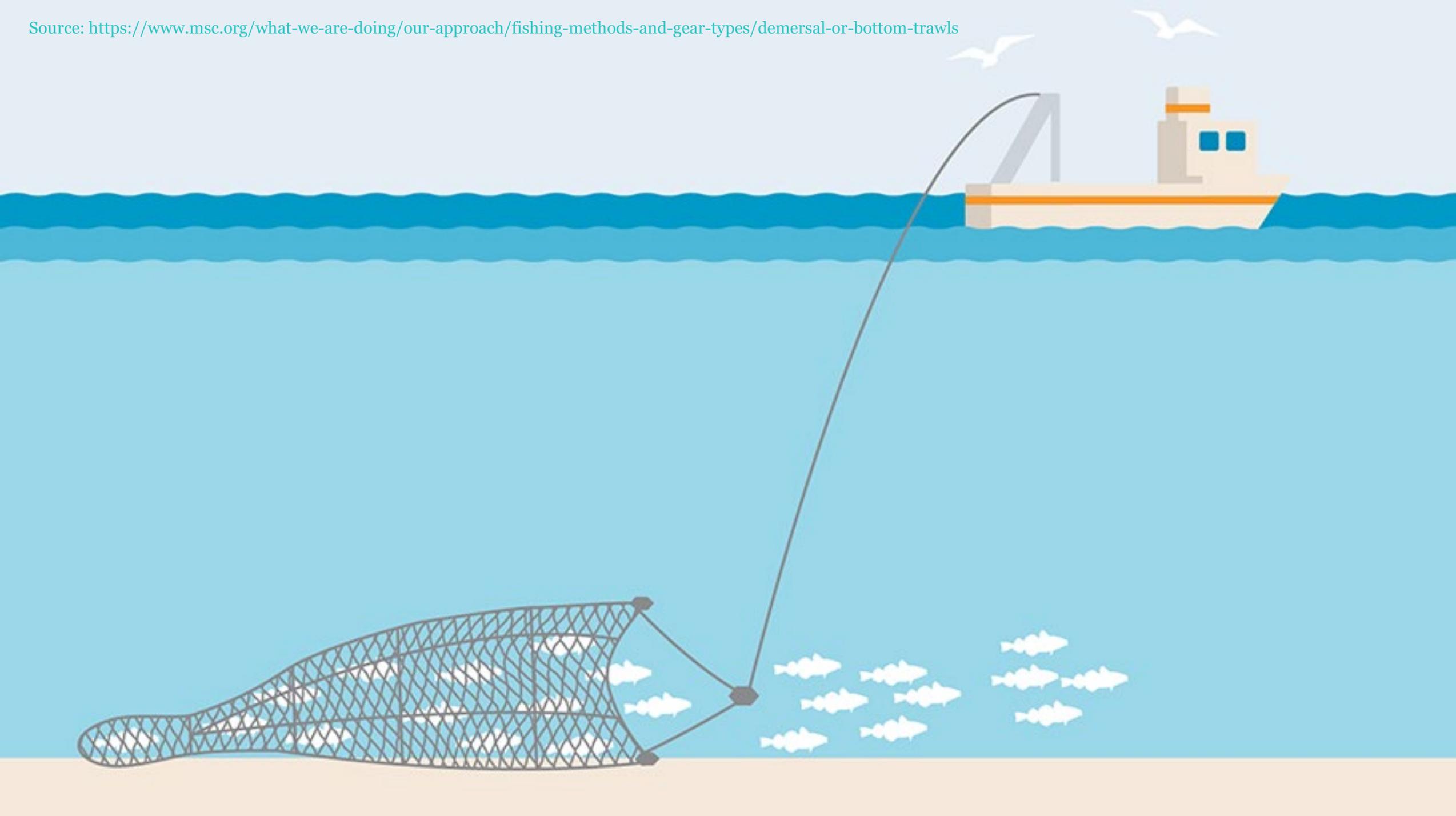
Article 77 (4):

Organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil

Why is it important to protect sedentary species?

Conflicts of rights:

- 1) Freedom of fishing v coastal state right to conserve SS
- 2) Freedom of scientific research v coastal state right to conserve SS
- 3) Right to lay submarine cables and pipelines on CS v coastal state right to conserve SS
- 4) RFMOs v coastal state right to conserve SS

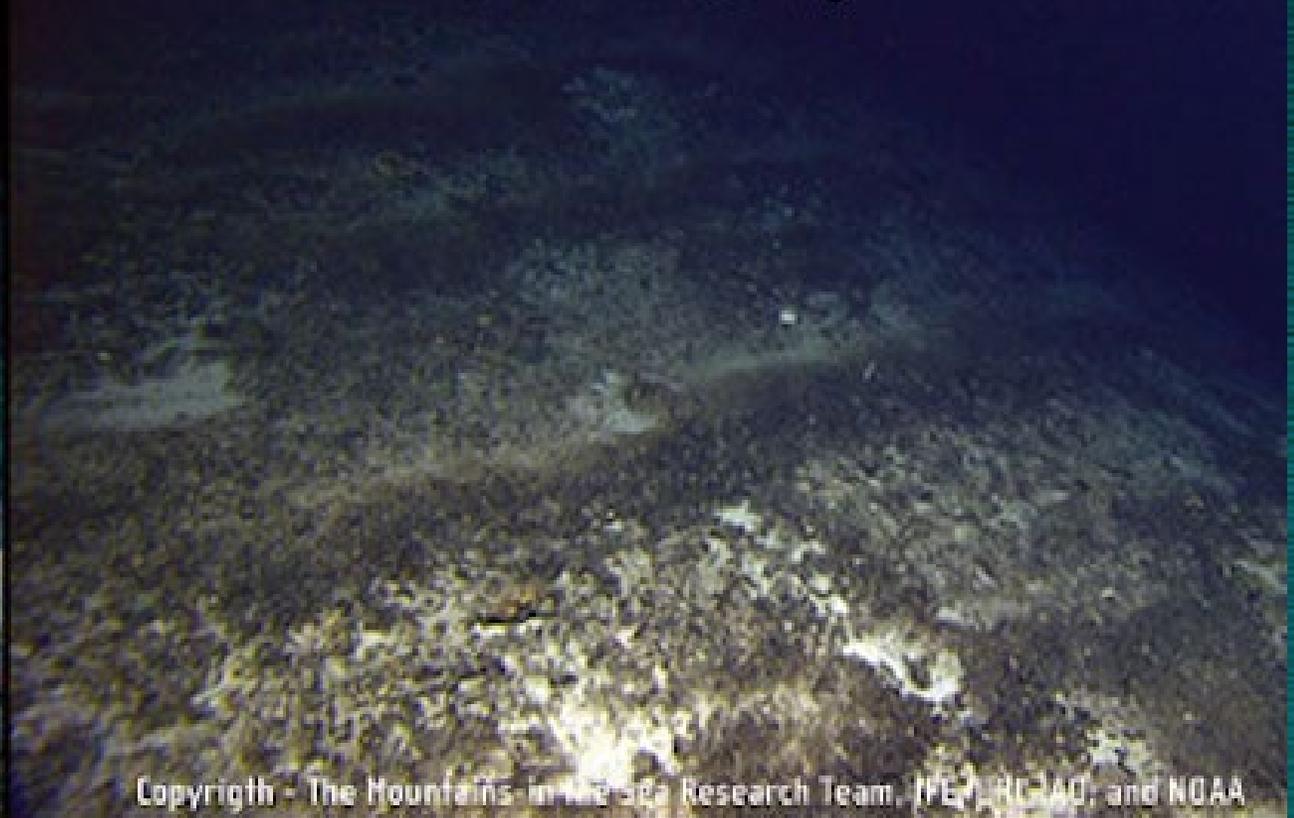


Before trawling



Copyright - A. Freiwald

After trawling



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Freedom of Fishing

Is not absolute.

Article 87 (1)(e): Freedom of fishing on the high seas, subject to the conditions laid down in Section 2 (Articles 116-119)

Article 87 (2): due regard obligations

Article 116: All States have the right for their nationals to engage in fishing on the high seas subject to:

- (a) their treaty obligations;
- (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in Article 63 (2) and Articles 64-67;
- (c) and the provisions of Articles 117-119

Marine Scientific Research

Article 246

5. Coastal States may however **in their discretion withhold their consent** to the conduct of a marine scientific research project ... if that project:

(a) is of direct significance for the **exploration and exploitation of natural resources**, whether living or non-living;

6. Notwithstanding the provisions of paragraph 5, coastal States **may not exercise their discretion to withhold consent under subparagraph (a)** ...in respect of marine scientific research projects to be undertaken in accordance with the provisions of this Part on the continental shelf, **beyond 200 nautical miles** ..., outside those **specific areas** which coastal States may at any time **publicly designate** as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time.

7. The provisions of paragraph 6 are without prejudice to the rights of coastal States over the continental shelf as established in Article 77.

Right to Lay submarine cables and pipelines

Article 87 (1): high-seas freedom, subject to Part VI

Article 79 (1): right to lay submarine cables and pipelines

Article 87 (2): Due regard for the interests of other states



Vulnerable Marine Ecosystems Database

A global inventory of fisheries measures to protect vulnerable marine ecosystems in areas beyond national jurisdiction.



Advanced Search | Legend | EmbedLink

VME closed areas

Other access regulated areas

Bottom fishing areas

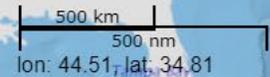


Reset

Year selection

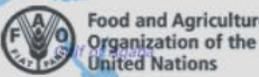
Management Body/Authority (ies)

Change projection



lon: 44.51, lat: 34.81

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Arguments in favour of coastal states' rights

“Exclusive sovereign rights”: Right to protect and manage is implied

Object and Purpose of UNCLOS

Part XII of UNCLOS

State Practice (Article 32 VCLT)

The Convention on Biological Diversity

Customary law

An underwater photograph showing a vibrant coral reef on the left side. Several fish are swimming in the clear blue water. In the foreground, a bright orange fish is swimming towards the left. Above it, a larger, more complex fish with white and orange markings is swimming. In the background, another fish with a white body and a dark stripe is visible. The overall scene is a healthy marine ecosystem.

Exclusivity

If a coastal State does not explore the CS or exploit its natural resources, no one may undertake these activities without its express consent.

The right not to use, or conserve, and the right to manage sedentary species is implicitly incorporated in the sovereign rights for the purpose of exploitation

Object and Purpose

“Recognizing the desirability of establishing through this Convention...a legal order for the seas and oceans which will promote **the conservation** of their living resources, and the study, **protection and preservation of the marine environment**”

Part XII

Article 192

General obligation to protect and preserve the marine environment.

Advisory Opinion of the ITLOS to the Sub-Regional Fisheries Commission 2015, ITLOS Reports 2015, para. 120: obligation applies to “all maritime areas.”

Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, para. 70: The conservation of the living resources of the sea is an element in the protection and preservation of the marine environment”

South China Sea Arbitration (Award, 2016), para. 941: positive obligation to take active measures to protect and preserve the marine environment

Para. 944: Due diligence obligation

Article 193

Duty to protect and preserve the marine environment during exploitation of States' natural resources.

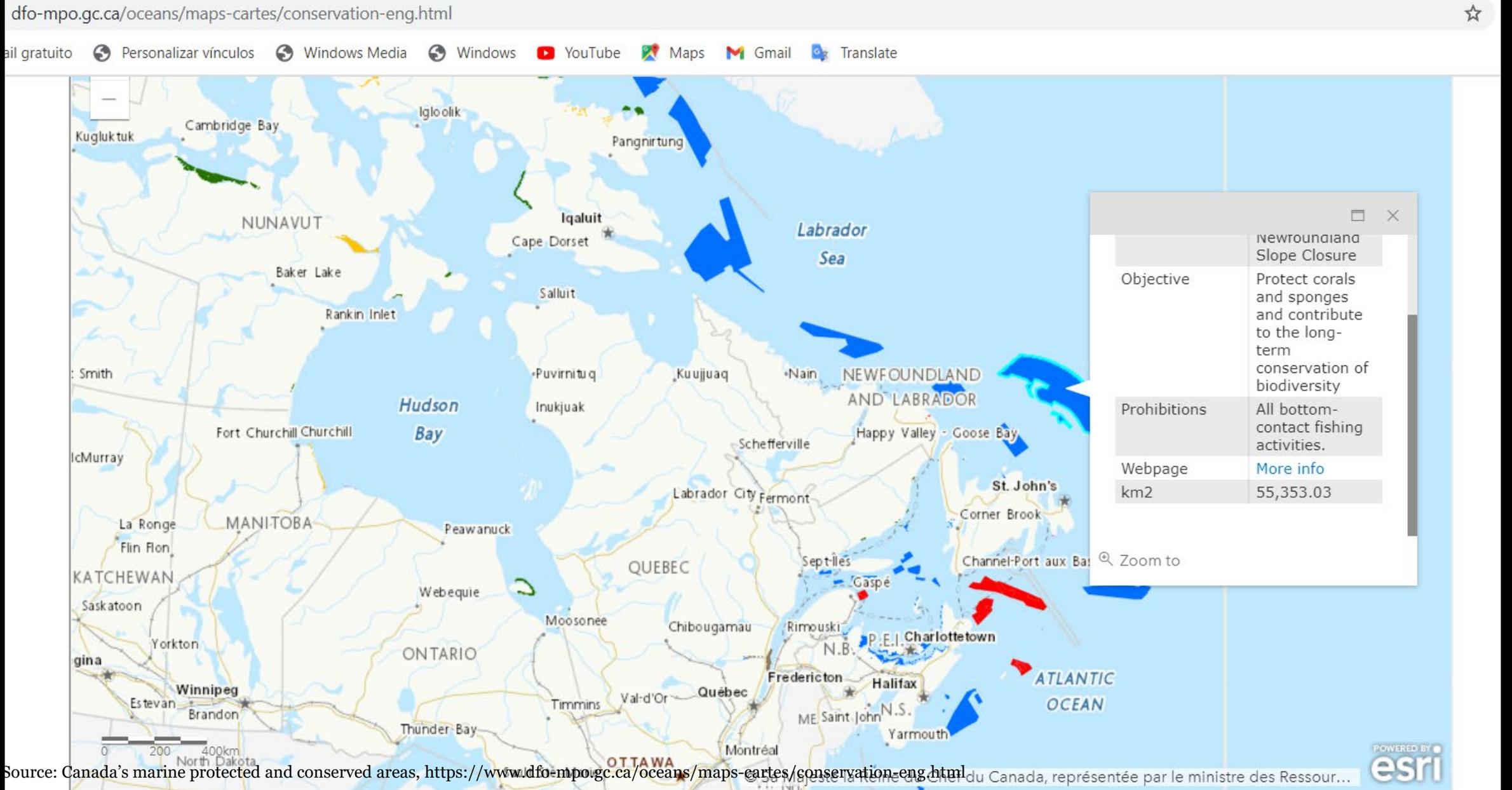
Article 194 (5)

Duty to protect and preserve rare or fragile ecosystems as well as the habitat of **depleted, threatened or endangered species** and other forms of marine life.

Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, paras. 320, 538; South China Sea Arbitration (Award, 2016), para. 945:
not limited to measures aimed strictly at controlling marine pollution

South China Sea Arbitration (Award, 2016), para. 944: Articles 192 and 194 set forth obligations not only in relation to activities directly taken by States and their organs, but also in relation to ensuring that activities within their jurisdiction and control do not harm the marine environment.

State Practice (supplementary means of interpretation under VCLT Art. 32)



Source: Canada's marine protected and conserved areas, <https://www.dfo-mpo.gc.ca/oceans/maps-cartes/conservation-eng.html>

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The Convention on Biological Diversity (CBD)

South China Sea Arbitration (Jurisdiction and Admissibility), para 284: Art. 194 may include the protection and preservation of the biological diversity represented by coral reefs.

Article 6 (a): obligation to develop national strategies, plans, or programmes for the conservation and sustainable use of biological diversity

Article 7: obligation to identify and monitor components of biological diversity as well as activities which have or are likely to have significant adverse impacts on their conservation and sustainable use

Article 8: obligation to adopt regulations to protect threatened species and populations

Balancing Test

Chagos Marine Protected Area Arbitration, para 540:

The balancing test:

- evaluation of the extent of the interference
- the availability of alternatives
- and the importance of the rights and policies at issue



The Obligations Not to Infringe or Unjustifiably Interfere v. The Obligation of Due Regard

Article 78 (2): The exercise of the rights of the coastal State over the continental shelf **must not infringe** or result in any **unjustifiable interference** with navigation and other rights and freedoms of other States.

Article 87 (2): These freedoms shall be exercised by all States with **due regard** for the interests of other States.

The Chagos Marine Protected Area Arbitration, para. 540:

“functionally equivalent”

Coastal States v. Flag States

Issues to consider	Environmental Obligations	Good Faith
<p>Obligations: Article 78 (2) v. Article 87 (2)</p> <p>Extent of interference</p> <p>Fishing practices in the area</p> <p>Availability of alternatives</p> <p>Endangered species</p>	<p><i>The South China Sea Arbitration:</i></p> <p>A flag State is under the obligation to ensure its fishing vessels not be involved in activities that will undermine a flag State's responsibilities under the UNCLOS in respect of the conservation of living resources and the obligation to protect and preserve the marine environment.</p> <p>8.4.2 of the FAO Code of Conduct for Responsible Fisheries: calls on States to prohibit destructive fishing practices UNGA Resolution 59/25</p>	<p>Article 300</p> <p>States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.</p>

Non-endangered sedentary species

Rare or fragile ecosystems as well as the habitat of threatened or endangered species

Does the protection depend on a will of a coastal state? Articles 192, 193

The obligation of a coastal state Article 194 (5)

The protective measures must relate to the sedentary species (cannot protect benthic organisms beyond 200 M)

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What is the minimum concentration of species required?

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Can be established for the whole extent of the ECS?

Can prohibit all human activities?

The protective measures should not be excessive (prohibition of all human activities)

No discrimination of vessels flying under a foreign flag

No discrimination of vessels flying under a foreign flag

Measures may differ within and beyond 200 M?

Is it possible to establish protective measures only beyond 200 M?

Precautionary approach

Precautionary approach

Conclusions

Coastal States have rights to conserve, manage, and protect sedentary species within the continental shelf due to the exclusivity of the right to exploit natural resources of the continental shelf, object and purpose of UNCLOS and provisions of Part XII of the UNCLOS.

These rights are not absolute

Coastal States will need to balance their rights with the rights of other stakeholders

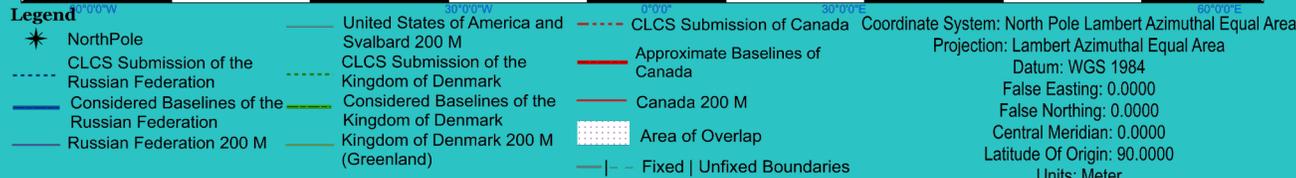
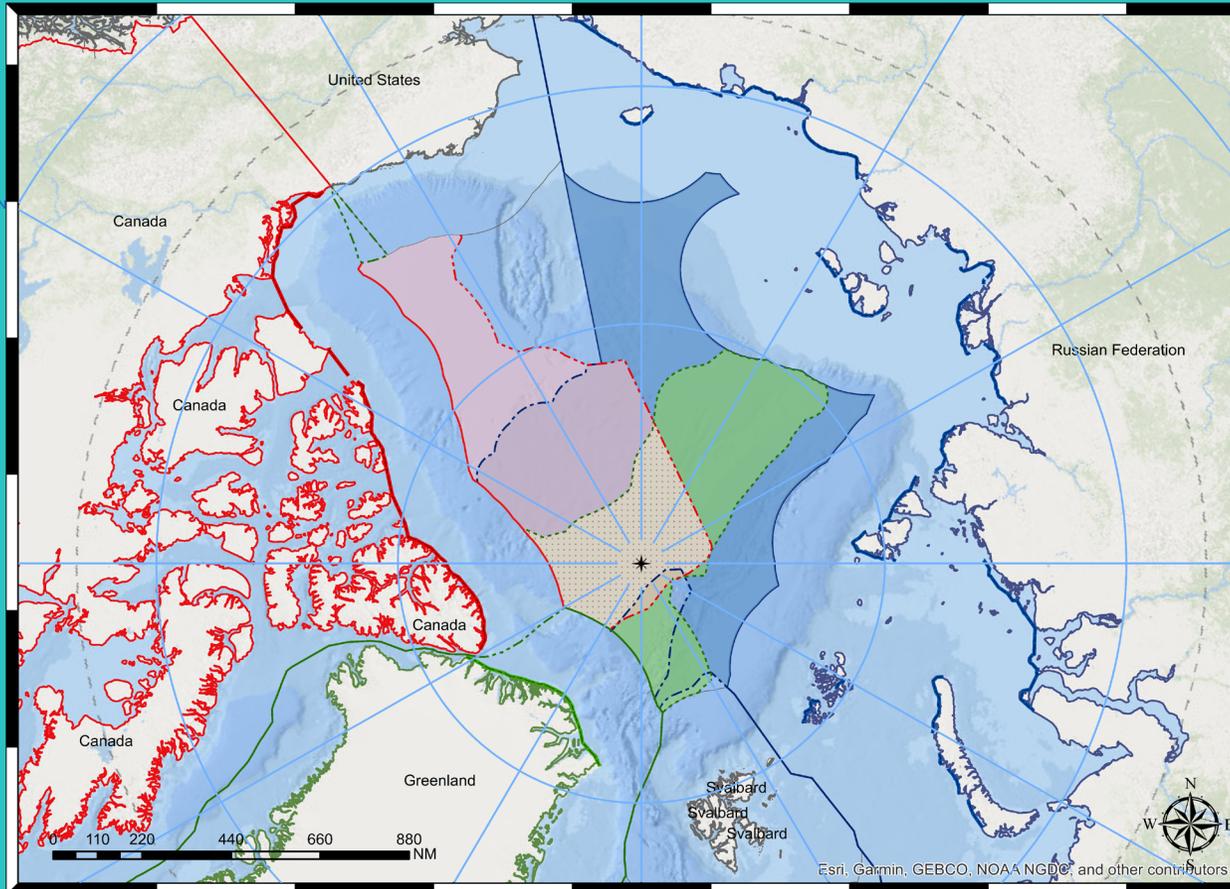
Environmental considerations could justify the infringement on the freedoms of the high seas

Coastal States have obligations to conserve and protect sedentary species, including ECS



Thank You!

CONTINENTAL SHELF SUBMISSIONS TO THE CLCS OF CANADA, THE KINGDOM OF DENMARK, AND THE RUSSIAN FEDERATION IN THE ARCTIC OCEAN



Extended Continental Shelves

Extended continental shelves - continental shelves beyond 200 nautical miles.

Delineation is the establishment of the extended continental shelf's outer limits.

The Commission on the Limits of the Continental Shelf (CLCS) - technical body for evaluation of coastal states' submissions on the delineation of the outer limits of the continental shelf

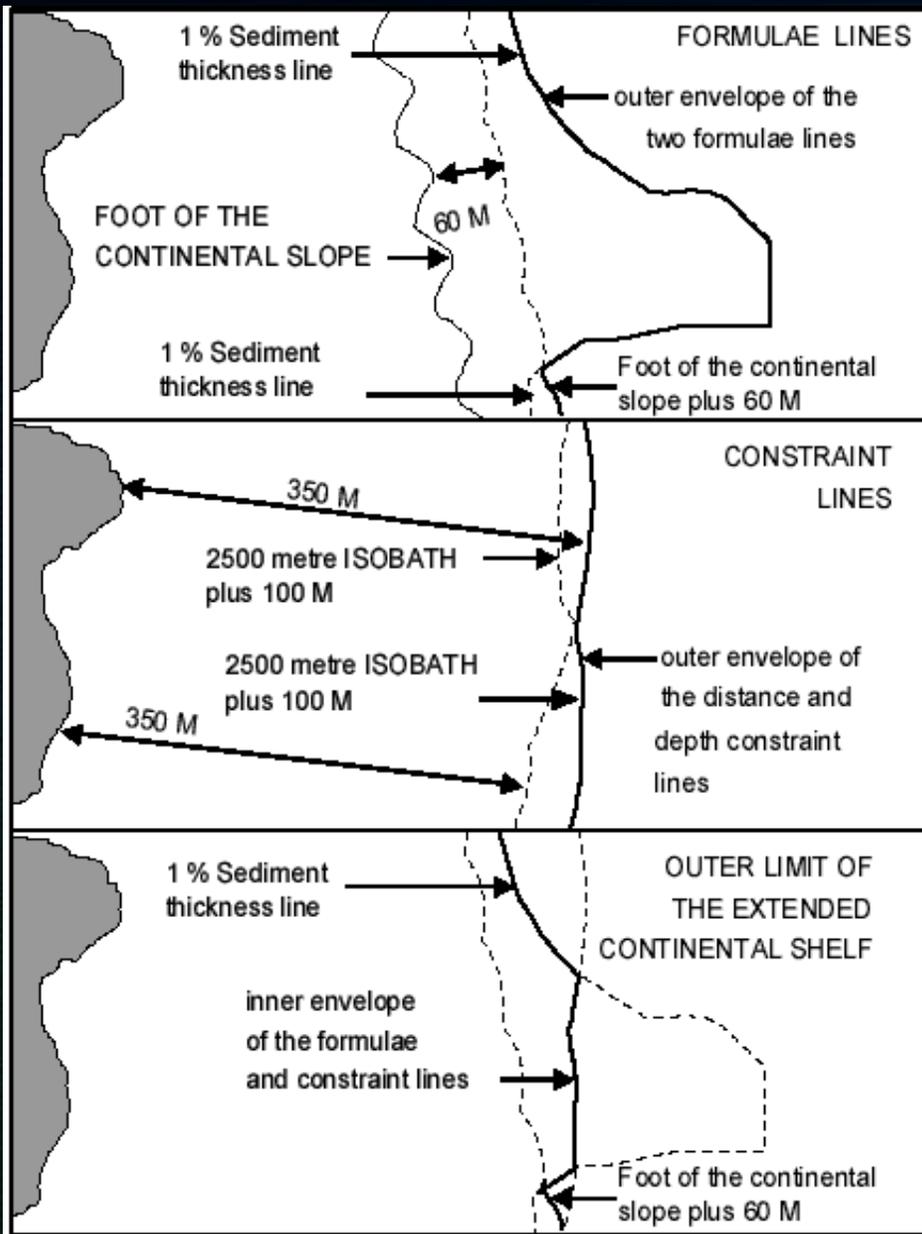
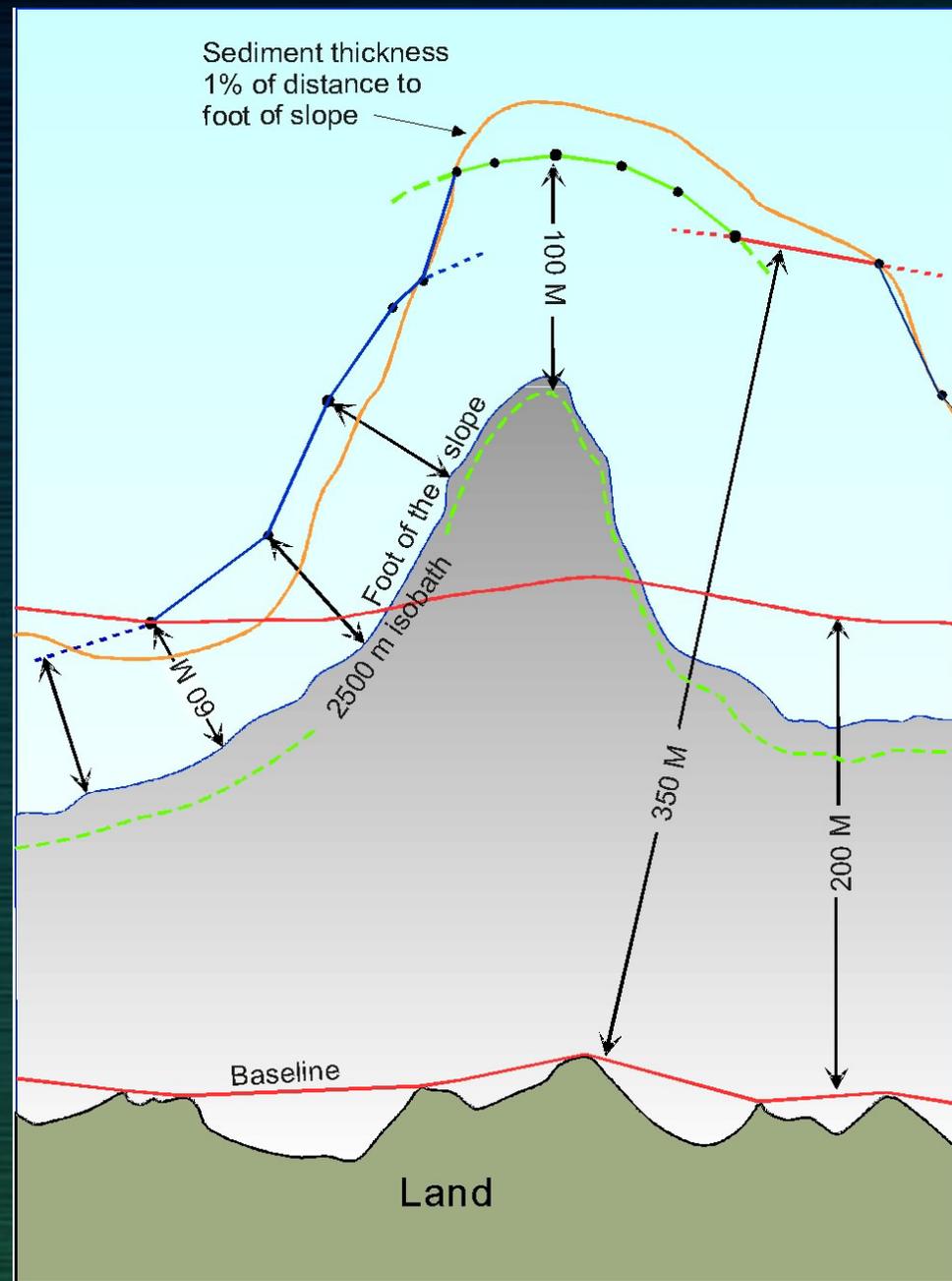


Figure 2.7 Delineation of the outer limits of the extended continental shelf



Source: Judge Heidar, Presentation at Rhode's Academy, 2021.



Continental Shelf

Legal and Geomorphological
Continental Shelf

Wide and Narrow
Continental Margins

Google

Differences between extended continental shelves (ECSs) and continental shelves within 200 M

International Tribunals maintain that there is no difference between continental shelves within and beyond 200 M (*Arbitration between Barbados and the Republic of Trinidad and Tobago*, para. 213; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, paras. 361-362, etc.).

- 1) Delineation, Article 76 (4-8).
- 2) Article 82
- 3) MSR, Article 246 (6)

Competing Rights of Coastal States with Overlapping ECS Entitlements

Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire):

Para. 592: Maritime activities of concerned states cannot be considered to violate the sovereign rights of another state if those activities were carried out before the delimitation.

Activities v. the prohibition of activities.

Article 83 (3): Obligations to make every effort to enter into provisional arrangements and not to jeopardize or hamper the reaching of the final agreement.

Enforcement Jurisdiction

The Arctic Sunrise Arbitration (Netherlands v. Russia), Award, 14 August 2015, PCA Case No. 2014-02, para 284, at p. 70:

Even though Part VI does not have specific provisions similar to Article 73, the existence of the enforcement jurisdiction over non-living resources of the shelf is not questioned, a point that was confirmed in the Arctic Sunrise case.