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Legal and policy options for the provisional joint management of maritime spaces subject to overlapping jurisdictional claims

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LEGAL AND POLICY OPTIONS FOR THE PROVISIONAL JOINT
MANAGEMENT OF MARITIME SPACES SUBJECT TO
OVERLAPPING JURISDICTIONAL CLAIMS

A thesis submitted in fulfilment of the requirements for the award of the degree

DOCTOR OF PHILOSOPHY

from

UNIVERSITY OF WOLLONGONG

by

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Australian National Centre for Ocean Resources and Security

Faculty of Law

2012
Certification

I hereby declare that this thesis – submitted in fulfilment of the requirements for the award of the degree Doctor of Philosophy from the University of Wollongong – is wholly my own work unless otherwise referenced or acknowledged. This thesis has not been submitted for qualifications at any other academic institution.

Ben Milligan,

25 June 2012.
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Abstract

In the decades following adoption of the 1982 Law of the Sea Convention coastal States have dramatically expanded the spatial extent of their respective claims to maritime zones of national jurisdiction. At present many of the world’s oceans and seas feature, and are characterised by, extensive maritime spaces where the zones of national jurisdiction claimed by two or more neighbouring coastal States have not been delimited by an international maritime boundary and thus overlap with one another. These spaces – hereinafter referred to as overlapping claims areas (OCAs) – are likely to be an enduring feature of the world’s political geography given that maritime boundary delimitation is often a lengthy or intractable process. Maritime boundary negotiations between several coastal States are impeded by long-standing and polarised negotiating positions, heightened diplomatic tensions, and/or daunting geographical and technical complexities. In several cases maritime boundary negotiations are further complicated by disputed claims to territorial sovereignty over islands and other littoral features.

As an alternative to maritime boundary delimitation, or during the period where delimitation negotiations are ongoing, several coastal States that assert overlapping claims have agreed to establish frameworks to manage the relevant OCA on a provisional and joint basis. Provisional joint management is increasingly viewed by government officials and other policymakers as a useful tool to minimise diplomatic tensions associated with OCAs, and enable the effective management of such spaces and the resources contained therein. In recent years several senior government officials, commentators and reports have highlighted a need for further consideration of options for provisional joint management of OCAs and their implementation in particular regional contexts.

The present thesis responds to this need by critically examining provisions of international law concerning the provisional joint management of OCAs, in addition to the design features of provisional joint management frameworks that have been
established to date. Drawing on the results of the examination, the thesis then proposes legal and policy options for the provisional joint management of OCAs. The proposed options are intended to inform the future negotiation of provisional joint management frameworks. The proposed options are also intended to facilitate the functionally comprehensive management of OCAs by the relevant claimant coastal States – in other words, they are intended to enable claimant coastal States to collectively implement, within the relevant OCA, all functional components of coastal State jurisdiction recognised in the 1982 Law of the Sea Convention.
# Contents

## 1 Introduction

1.1 Overlapping claim areas ........................................... 7
1.2 Provisional joint management of OCAs .......................... 20
1.3 Thesis structure and research questions .......................... 25
1.4 Contribution to existing literature ............................... 27
1.5 Study methods and challenges ................................. 31

## 2 Management of overlapping claim areas under international law 35

2.1 Introduction ......................................................... 35
2.2 National jurisdiction under the LOSC ............................. 36
2.3 Specific obligations concerning OCA management .............. 37
  2.3.1 Overlapping claims to internal waters ...................... 39
  2.3.2 Overlapping claims to territorial sea ....................... 40
  2.3.3 Overlapping claims to a contiguous zone .................... 43
  2.3.4 Claims overlapping with claimed archipelagic waters .... 45
  2.3.5 Overlapping claims to an exclusive economic zone ........... 49
  2.3.6 Overlapping entitlements to the continental shelf .......... 58
2.4 Other obligations applicable to the management of OCAs .... 60
2.5 Dispute settlement under LOSC Part XV .......................... 65
  2.5.1 General provisions and non-compulsory procedures .......... 66
  2.5.2 Compulsory procedures entailing binding decisions ........ 67
  2.5.3 Limitations and exceptions .................................. 68
2.5.4 Principles of State responsibility ........................................... 73
2.6 Conclusion ................................................................................. 76

3 Management of overlapping claim areas in current State practice 79

3.1 Introduction ............................................................................. 79
  3.1.1 Assessment criterion and coastal State jurisdiction ............. 81
3.2 Pacific Ocean excluding the Asian rim ...................................... 82
  3.2.1 Canada – United States ...................................................... 82
  3.2.2 El Salvador – Honduras – Nicaragua ................................. 88
3.3 Atlantic Ocean and Caribbean .................................................. 95
  3.3.1 Argentina – United Kingdom .............................................. 95
  3.3.2 Argentina – Uruguay .......................................................... 106
  3.3.3 Barbados – Guyana ............................................................ 110
  3.3.4 Canada – United States .................................................... 116
  3.3.5 Colombia – Jamaica .......................................................... 120
  3.3.6 Denmark (Faroe Islands) – United Kingdom ..................... 125
  3.3.7 Equatorial Guinea – Gabon .............................................. 128
  3.3.8 Guinea-Bissau – Senegal ................................................... 130
  3.3.9 Nigeria – São Tomé and Príncipe ...................................... 138
  3.3.10 Trinidad and Tobago – Venezuela ................................. 143
3.4 Red Sea and Persian Gulf .......................................................... 147
  3.4.1 Iran – United Arab Emirates (Sharjah) ............................. 147
  3.4.2 Saudi Arabia – Sudan ....................................................... 149
3.5 North East Asia .................................................................... 152
  3.5.1 Japan – People’s Republic of China (PRC) ....................... 152
  3.5.2 Japan – Republic of Korea .............................................. 155
  3.5.3 Japan – Russia ................................................................. 159
  3.5.4 People’s Republic of China – Republic of Korea .............. 161
  3.5.5 East China Sea bilateral fisheries agreements .................... 161
4.4.4 No relation between spatial coverage and OCA

4.5 Interaction of the framework with existing jurisdictional claims

4.5.1 No definition of interaction

4.5.2 Express reference to provisional nature of framework

4.5.3 Express protection of existing jurisdictional claims

4.5.4 Moratoria

4.5.5 Acknowledgment of claims

4.5.6 Approaches for highly sensitive jurisdictional disputes

4.6 Mechanism for allocating jurisdiction or competence

4.6.1 Flag-based allocation of coastal State jurisdiction

4.6.2 Discrete subzones

4.6.3 Concurrent coastal State jurisdiction

4.6.4 Allocation to joint authority

4.6.5 Operational coordination within an OCA

4.6.6 Other approaches

4.7 Mechanism for allocating resources and revenues

4.7.1 Moratorium on resource exploitation

4.7.2 Percentage shares

4.7.3 Allocation determined by institutional body

4.8 Institutional aspects of cooperation

4.8.1 New consultative institutions

4.8.2 New administrative institutions

4.8.3 Cooperation between existing institutions

4.8.4 Delegation of functions

4.9 Dispute settlement procedures

4.9.1 Non-compulsory procedures

4.9.2 Compulsory procedures (entailing non-binding decisions)

4.9.3 Compulsory procedures (entailing binding decisions)
4.10 Choice of constituent instrument ........................................ 268
  4.10.1 Formal inter-State treaty or agreement ......................... 268
  4.10.2 Inter-State legal agreement avoiding formal language ........ 270
  4.10.3 Non-binding inter-State agreements ............................ 271
  4.10.4 Executive understandings and operational agreements ........ 272
  4.10.5 Coordinated enactment of national legislation ............... 273

5 Conclusion ........................................................................ 274
  5.1 Management of overlapping claim areas under international law 275
  5.2 Management of overlapping claim areas in current State practice 276
  5.3 Legal and policy options for managing overlapping claim areas 278
  5.4 Recommendations ........................................................ 279

Reference list .................................................................... 281
List of Figures

1.1 Provisional joint management frameworks: geographic distribution . . 23

2.1 Indonesian archipelagic baselines in the vicinity of East Timor . . . . 47
2.2 Guyana – Suriname dispute: overlapping maritime claims and hydro-
carbon concessions .......................................................... 53

3.1 Canada – United States: overlapping claims near the Juan de Fuca
Strait .................................................................................. 83
3.2 Canada – United States: overlapping claims in and seaward of the
Dixon entrance ....................................................................... 84
3.3 Overlapping claims in the Gulf of Fonseca ................................. 89
3.4 Argentina – United Kingdom: certain maritime claims surrounding
the Falkland/Malvinas Islands. ............................................... 97
3.5 Argentina – United Kingdom: overlapping claims in the South At-
lantic and Southern Oceans .................................................. 98
3.6 Argentina – Uruguay: 1973 Agreement concerning boundary delimi-
tation and the Río de la Plata ................................................ 107
3.7 Barbados – Guyana: overlapping claims and Co-operation Zone . . . 111
3.8 Canada – United States: overlapping claims surrounding Machias
Seal Island and North Rock .................................................... 118
3.9 Canada – United States: boundary delimitation and overlapping claims
in the North Atlantic ............................................................ 119
3.10 Colombia – Jamaica: maritime boundary and the Joint Regime Area 122
3.11 Denmark (Faroe Islands) – United Kingdom: maritime boundary and Special Area ................................................................. 126
3.12 Equatorial Guinea – Gabon: Corisco Bay and surrounds ............ 129
3.13 Guinea-Bissau – Senegal: maritime delimitation and Joint Area . . 133
3.14 Nigeria – São Tomé and Príncipe: joint development zone ........ 139
3.15 Trinidad and Tobago – Venezuela: fisheries cooperation prior to 1990 boundary delimitation ...................................................... 145
3.16 Iran – United Arab Emirates: insular features in the Persian Gulf . 148
3.17 Saudi Arabia – Sudan: overlapping claims and the Common Zone . 150
3.18 Overlapping claims in the East China Sea .................................. 154
3.19 Japan – Russia: the Northern Territories / Southern Kuril Islands . 160
3.20 Provisional fisheries zones in the East China Sea ....................... 162
3.21 Australia – Indonesia: maritime boundaries and Timor Gap Zone of Cooperation .......................................................... 165
3.22 Australia – East Timor: Joint Petroleum Development Area and Unit Area .............................................................................. 169
3.23 Overlapping claims in the Gulf of Thailand .................................. 174
3.24 Overlapping claims in the South China Sea ................................. 179
3.25 Philippines – PRC – Vietnam: Joint Marine Seismic Undertaking Agreement Area ............................................................. 183
3.26 Indonesia – Malaysia: Celebes Sea and notional equidistance line . 186
3.27 Norway – Russia: overlapping continental shelf claims before September 2010 ............................................................... 192
3.28 Norway – Russia: overlapping EEZ claims before September 2010 . 193
3.29 Norway – Russia: Grey Zone before September 2010 .................. 194
3.30 Canada – United States: overlapping claims in the Beaufort Sea . . 196
3.31 Territorial claims to the Antarctic continent and islands .............. 200
3.32 The CAMLR Convention and Antarctic EEZ claims ................... 201
List of Tables

1.1 Global progress towards maritime boundary delimitation . 17
1.2 Index of surveyed provisional joint management frameworks . 24
2.1 Functional components of coastal State jurisdiction and relevant LOSC provisions . 38
1 Introduction

In the decades following adoption of the 1982 United Nations Convention on the Law of the Sea (LOS C) coastal States have dramatically expanded the spatial extent of their respective claims to maritime zones of national jurisdiction. At present many of the world’s oceans and seas feature, and are characterised by, extensive maritime spaces where the zones of national jurisdiction claimed by two or more neighbouring coastal States have not been delimited by an international maritime boundary and thus overlap with one another.

These spaces – hereinafter referred to as overlapping claims areas (OCAs) – are likely to be an enduring feature of the world’s political geography given that maritime boundary delimitation is often a lengthy or intractable process. Maritime boundary negotiations between several coastal States are impeded by long-standing and polarised negotiating positions, heightened diplomatic tensions, and/or daunt-

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2 For example, the 2010 delimitation agreement between Russia and Norway concerning overlapping claims in the Barents Sea is a product of negotiations that commenced in the 1960s: See Royal Norwegian Embassy in London, ‘Arctic Agreement between Norway and Russia’, Press Release (27 April 2010) and Sun Pyo Kim, Maritime Delimitation and Interim Arrangements in Northeast Asia (2004).
ing geographical and technical complexities. A number of developing coastal States also simply lack the administrative and technical capacity to engage in complex maritime boundary negotiations. In several cases maritime boundary negotiations are further complicated by disputed claims to territorial sovereignty over islands and other littoral features.

The widespread absence of delimitation agreements is also explained in part by the varied national interests that underlie and motivate overlapping maritime claims. Many coastal States are heavily and increasingly reliant on maritime space as a medium for international trade and as a source of natural resources. Maritime jurisdictional claims represent an attempt by the relevant coastal State(s) to safeguard, and assert greater control in relation to, significant national interests that may include: access to sea lanes of communication, exploitation of marine living resources, development of offshore hydrocarbon deposits, and protection of the marine environment. When the maritime claims of two or more coastal States overlap, the resulting competition between these significant national interests may create a political environment that is less than amendable to diplomatic compromise and, consequently, to successful boundary delimitation.


4Several Commonwealth developing coastal States have relied on the financial and technical support of the Special Advisory Services Unit of the Commonwealth Secretariat in order to establish maritime jurisdictional claims and boundary delimitation agreements: see Newsletter of the Commonwealth Secretariat Special Advisory Services Division, Issue 5, Spring (2009) available at <http://www.thecommonwealth.org/files/190463/FileName/ADVISORY-0309.pdf>.

5See, eg, ibid.

6For further discussion, see Section 1.2.


8See ibid for illustrative examples of boundary negotiations and underlying national interests in the Asia-Pacific region.
As an alternative to maritime boundary delimitation, or during the period where delimitation negotiations are ongoing, several coastal States that assert overlapping claims have agreed to establish frameworks to manage the relevant OCA on a provisional and joint basis. Provisional joint management is increasingly viewed by government officials and other policymakers as a useful tool to minimise diplomatic tensions associated with OCAs, and enable the effective management of such spaces and the sustainable development of resources contained therein. In recent years several senior government officials, commentators and reports have highlighted a need for further consideration of options for provisional joint management of OCAs and their implementation in particular regional contexts.9

The present thesis responds to this need by critically examining provisions of international law concerning the provisional joint management of OCAs, in addition to the design features of provisional joint management frameworks that have been established to date. Drawing on the results of the examination, the thesis proposes legal and policy options for the provisional joint management of OCAs. The proposed options are intended to inform the future negotiation of provisional joint management frameworks. The proposed options are also intended to facilitate the functionally comprehensive management of OCAs by the relevant claimant coastal States – in other words, they are intended to enable claimant coastal States to implement collectively, within the relevant OCA, all functional components of coastal State jurisdiction recognised in the Law of the Sea Convention.

This introductory Chapter contextualises the thesis and explains how it is developed in the remaining Chapters. Sections 1.1 and 1.2 provide a brief background to the emergence of OCAs, their characteristics and the development of State practice concerning the provisional joint management of such areas. Section 1.3 outlines the scope of the thesis topic, the specific research questions that it addresses, and the

structure of subsequent Chapters. Section 1.4 discusses the significance of the thesis and how it contributes to existing academic literature concerning OCAs. Finally, Section 1.5 identifies the study methods employed to produce the thesis and how these methods were adapted in response to research challenges encountered.

1.1 Overlapping claim areas

*Spatial expansion of maritime claims:*

In the decades following the end of the Second World War, the geographical scope of national maritime jurisdiction claimed by coastal States has expanded immensely. By the end of the war most coastal States had established claims to sovereignty within a territorial sea extending several miles offshore (most commonly to 3 nautical miles). A key catalyst for the subsequent expansion of claims was a proclamation made on 28 September 1945 by President Truman of the United States (*1945 Truman Proclamation*), in which the United States Government unilaterally asserted jurisdiction and control over the ‘natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States’. The 1945 Truman Proclamation prompted a quick succession of claims by other coastal States to jurisdiction over the continental shelf and/or the resources of the continental shelf subsoil and seabed. The Proclamation was also followed by a succession of coastal State claims to an expanded territorial sea, including claims extending up to 9, 12 and 200 nautical miles offshore.

Prompted by these developments, the First United Nations Conference on the Law of the Sea (*UNCLOS I*), held in Geneva from 24 February to 27 April 1958, was convened in an attempt to:

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12 See Churchill and Lowe, above n 10, 141–145.
... examine the law of the sea, taking account not only of the legal but also the technical, biological, economic and political aspects ... and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.\

The principal achievement of UNCLOS I was the four Geneva Conventions of 1958, which codified and consolidated several aspects of the law of the sea including the nature and components of coastal State jurisdiction within a territorial sea, contiguous zone and continental shelf. However, no consensus was reached concerning the spatial limits of these zones and State practice continued to evolve rapidly. A Second United Nations Conference on the Law of the Sea (UNCLOS II), held in Geneva from 17 March to 26 April 1960, failed to address this lack of consensus and did not produce amendments or modifications to the Geneva Conventions. During the 1960s and 1970s many coastal States asserted claims to fishing zones, territorial seas, and other zones of various breadths including up to 12, 50, 100, 130, 200 and 400 nautical miles.

The trend evident in the State practice discussed above – towards a dramatic expansion of coastal State jurisdiction – was given firm legal footing in 1982 at the

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17 See Anand, above n 16; Philip Jessup, ‘The Geneva Conferences on the Law of the Sea: A Study in International Law-Making’ (1958) 52 American Journal of International Law 730; and Dean, above n 13 on the preceding page, who notes that: ‘In the eyes of the world ... the major problem facing the Conference appeared to be the determination of the legal limit of the territorial sea appertaining to a coastal state.’
19 Rothwell and Stephens, above n 16, 10. See also Anand, above n 16; Churchill and Lowe, above n 10 on the previous page, 60–162; and Barbara Kwiatowska, The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989). Several new claims purported to assert sovereignty in relation to offshore natural resources generally – see, eg, the claims to a ‘patrimonial sea’ advanced by several Latin American coastal States, discussed in: Dolliver Nelson, ‘The Patrimonial Sea’ (1973) 22 The International and Comparative Law Quarterly 668.
Third United Nations Conference on the Law of the Sea (UNCLOS III), through
the adoption and opening for signature of the LOSC. The nature, components and
spatial limits of national jurisdiction recognised by the LOSC are discussed exten-
sively in other literature and will not be addressed in detail here.\textsuperscript{20} For the present
purposes, it is relevant to highlight the following:

The LOSC is now widely subscribed to: as of June 2012, the Convention has been
ratified or acceded to by a total of 161 States (and also the European Union).\textsuperscript{21}
The vast majority of coastal States – including the United States which is not
currently party to the LOSC\textsuperscript{22} – attempt to articulate maritime jurisdictional claims
in terms that correspond generally to the requirements set out in the Convention.\textsuperscript{23}
The widespread implementation of the Convention represents considerable progress
towards a global consensus regarding the jurisdictional scope and spatial limits of
national maritime claims. Indeed most of the Convention’s provisions are recognised
as being reflective of customary international law.\textsuperscript{24}

The LOSC recognises the sovereignty of a coastal State over a territorial sea ex-
tending up to 12 nautical miles from baselines designated in accordance with the

\textsuperscript{20}See generally Churchill and Lowe, above n 10 on page 7; and Rothwell and Stephens, above n 16
on the previous page.

\textsuperscript{21}See United Nations Division for Ocean Affairs and the Law of the Sea, Status of the United
Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of
Part XI of the Convention and of the Agreement for the implementation of the provisions of the
Convention relating to the conservation and management of straddling fish stocks and highly

\textsuperscript{22}The United States nonetheless accepts that LOSC provisions concerning zones of national jurisdic-
tion are customary in character. For further discussion see Ashley Roach and Robert Smith,

\textsuperscript{23}For an illustrative list of national maritime claims that correspond generally
to LOSC requirements, see United Kingdom Hydrographic Office, Admiralty Notices to Mariners: National Claims to Maritime Jurisdiction, available at
<http://www.ukho.gov.uk/ProductsandServices/MartimeSafety/AnnualNm/12.pdf>. A
notable exception is the practice of several Latin American States: See, eg, Paul Stanton Kibel,
‘Alone at Sea: Chile’s Presencial Ocean Policy’, 12 Journal of Environmental Law 43 (2000);
and Jane Dalton, ‘The Chilean Mar Presencial: a harmless concept or a dangerous precedent?’,
8 The International Journal of Marine and Coastal Law 397 (1993). Despite the widespread
acknowledgment and acceptance of the LOSC, there exists entrenched disagreement between
several coastal States concerning the interpretation and application of the Convention’s
provisions. Key areas of disagreement relate to the establishment of maximal claims to straight
and archipelagic baselines and the ability of certain littoral features to generate maritime
zones.

\textsuperscript{24}Writing in 1999, Churchill and Lowe comment that the ‘UN regime for the seas is already almost
universally accepted, and is moving steadily closer to universal subscription’: above n 10 on
page 7, 22).
Convention. Waters located landward of territorial sea baselines constitute the ‘internal waters’ of a coastal State and, with limited exception, are subject to the full territorial sovereignty of that State. The LOSC also recognises a special category of ‘archipelagic’ States that are entitled in certain circumstances to draw straight ‘archipelagic baselines’ enclosing ‘archipelagic waters’ that are subject to the sovereignty of the relevant archipelagic State. In accordance with LOSC Article 33, a coastal State is also entitled to assert national jurisdiction in defined circumstances within a contiguous zone extending not more than 24 nautical miles from territorial sea baselines.

Beyond the territorial sea, the LOSC recognises the entitlement of a coastal State to claim ‘sovereign rights’ over the sea-bed, subsoil and superjacent waters within an exclusive economic zone (EEZ) extending up to 200 nautical miles from its territorial sea baselines. Sovereign rights that do not depend on an express coastal State claim are conferred in relation to natural resources of the continental shelf, which may extend 200 nautical miles, or potentially further seaward, from territorial sea baselines in accordance with complex requirements set out in LOSC Part.

25See LOSC Part II, particularly LOSC Articles 27 and 28 regarding jurisdiction in relation to foreign ships in the territorial sea. For discussion of the Convention’s rules concerning baselines, see Rothwell and Stephens, above n 16 on page 8, 33–57.

26Territorial sovereignty over internal waters is qualified by LOSC Article 8(2), which is summarised by Churchill and Lowe as follows: ‘The single exception to this principle is that where straight baselines are drawn along a coastline that is deeply indented or fringed with islands, enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage continues to exist through those newly enclosed waters ...’: Churchill and Lowe, above n 10 on page 7, 61.

27See LOSC Part IV. Note also that the breadth of an archipelagic State’s territorial sea, the contiguous zone, EEZ and continental shelf is measured from its archipelagic baselines, provided they are designated in accordance with the Convention: LOSC Article 48.


29See LOSC Part V, particularly Articles 55–57 and Article 73. Thus, assuming a territorial sea of 12 nautical miles is claimed, an EEZ may be up to 200-12=188 nautical miles in breadth.

30See LOSC Part VI, particularly Article 77. See also Churchill and Lowe, above n 10 on page 7, 151–157.
VI and Annex II. To establish the limit of ‘outer’ continental shelf rights beyond 200 nautical miles, LOSC States Parties are required to submit information to a technical body established by the Convention – the Commission on the Limits of the Continental Shelf (CLCS) – which considers the information and makes recommendations as to the relevant limit. LOSC Article 76(8) provides continental shelf limits established by a coastal State ‘on the basis of’ CLCS recommendations ‘shall be final and binding’. It is unclear whether the phrase ‘final and binding’ applies solely to the relevant coastal State, or to LOSC States Parties in general.

Even if the former interpretation is accepted, the final and binding character of a declared continental shelf limit beyond 200 nautical miles would emerge gradually in the absence of protest (or overlapping claims) by other coastal States.

When a coastal State claims a contiguous zone and an EEZ, waters located beyond the territorial sea, but within the limit of the contiguous zone, are cumulatively subject to the different jurisdictional entitlements linked to each zone. Beyond the territorial sea and within 200 nautical miles of territorial sea baselines, there is also

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31 See in particular LOSC Article 76-77. See also Churchill and Lowe, above n 10 on page 7, 145–150 and Rothwell and Stephens, above n 16 on page 8, 109–117.


33 For further discussion and references see Rothwell and Stephens, above n 16 on page 8, 98–118. Detailed information concerning CLCS recommendations and the current status of coastal State submissions to the Commission is available at <http://www.un.org/Depts/los/clcs_new/clcs_home.htm>.


35 McDorman, above n 34. See also Rothwell and Stephens, above n 16 on page 8, 114–115.

36 Per LOSC Article 33, coastal State jurisdiction in the contiguous zone enables the exercise of control necessary to prevent or punish of infringements of customs, fiscal, immigration, or sanitary laws within a coastal State’s territory or territorial sea. Per LOSC Article 56, coastal State jurisdiction in the EEZ is focuses on the management and exploitation of natural resources. For further information see Churchill and Lowe, above n 10 on page 7.
a degree of jurisdictional overlap between the continental shelf and EEZ: In both of these zones a coastal State is attributed a package of sovereign rights concerning the seabed and subsoil.\textsuperscript{37} Consistency between both packages of sovereign rights is maintained by LOSC Article 56(3), which provides that EEZ sovereign rights with respect to the seabed and subsoil are to be exercised in accordance with LOSC Part VI (concerning the continental shelf).\textsuperscript{38}

National jurisdiction in each of the maritime zones mentioned above is curtailed by various duties and rights conferred to other States, reflecting a compromise between different negotiating interests at UNCLOS III.\textsuperscript{39} For example: Within the territorial sea, foreign vessels are afforded a right of innocent passage.\textsuperscript{40} Foreign vessels navigating in archipelagic waters are afforded a right of innocent passage\textsuperscript{41} in addition to a broader right of archipelagic sea lanes passage\textsuperscript{42} within certain sea lanes and air

\textsuperscript{37}See LOSC 56 (concerning the EEZ) and 77 (concerning the continental shelf). The Virginia Commentaries note that, during UNCLOS III, there was considerable debate ‘between those States wishing to retain the continental shelf as a legal institution and those asserting that the rights relating to the continental shelf should be absorbed into the new concept of the EEZ.’: Virginia Commentaries, Volume II, above n 1 on page 4, 844. Churchill and Lowe observe that ‘[h]ad it not been for a strong desire on the part of many coastal States, now reflected in the provisions of the Law of the Sea Convention, to include within the legal continental shelf those parts of the continental margin extending beyond 200 nautical miles, the legal regime of the continental shelf could have been subsumed within the EEZ.’: Churchill and Lowe, above n 10 on page 7, 166. The strong desire to establish an express entitlement in the LOSC to continental shelf rights beyond 200 nautical miles was in a part a consequence of the North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), in which the International Court of Justice recognised the ‘inherent rights’ of the coastal State in relation to ‘the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea ...’: see Judgment of 20 February 1969, 1969 ICJ Rep, 19.

\textsuperscript{38}The Virginia Commentaries note that this ‘dovetailing diminishes the potential for confusion between the EEZ and continental shelf’: See Virginia Commentaries, Volume II, above n 1 on page 4, 491.

\textsuperscript{39}For comprehensive documentation of the various positions and their evolution, see the Virginia Commentaries, above n 1 on page 4.

\textsuperscript{40}LOSC Article 17. For further information see Churchill and Lowe, above n 10 on page 7.

\textsuperscript{41}LOSC Article 52.

\textsuperscript{42}LOSC Article 53.
Maritime delimitation and overlapping claims:

The location of the world’s coastlines, and the manner in which they are divided politically amongst different coastal States, creates significant potential for coastal States to claim maritime zones recognised by the LOSC that overlap with one another. For example, no presently existing coastal State could claim a full-breadth EEZ that would not overlap in part with an equivalent claim of a neighbouring State. The obvious (though not necessarily straightforward) method for removing overlapping claims is maritime delimitation – the establishment of a maritime boundary (or boundaries) delineating the adjoining limits of national jurisdiction claimed by neighbouring coastal States.

Maritime boundary delimitation is subject to treaty obligations and customary rules of international law that have been analysed and applied in a large body of jurisprudence of international courts and tribunals. These rules are discussed extensively in other literature and are not the focus of this thesis. For the present purposes it is however relevant to highlight two features of the international legal framework concerning boundary delimitation:

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See LOSC Articles 56, 60. As noted previously, these rights are focused generally on the management and exploitation of natural resources. For further information see Churchill and Lowe, above n 10 on page 7.


The first noteworthy feature is that an international maritime boundary can only be established by, or in accordance with agreement between, the relevant claimant coastal States. In the 1951 Fisheries case, the International Court of Justice (ICJ) stated as follows:

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 delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends on international law ...

In the 1984 Gulf of Maine Case the Court noted that ‘no maritime delimitation between states with opposite or adjacent coasts may be effected unilaterally by one of those states.' A clear and unequivocal acceptance of unilaterally designated boundary by another coastal State may, however, prevent that State from disputing the boundary subsequently. The requirement to effect delimitation by agreement is clearly articulated in the relevant treaty obligations concerning maritime boundary delimitation, namely: Article 12 of the 1958 Territorial Sea Convention (concerning delimitation of the territorial sea); Article 6 of the 1958 Convention on the Continental Shelf (concerning delimitation of the continental shelf); and LOSC Articles

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47Note that the UN Security Council is empowered to take action in accordance with Chapter VII of the UN Charter with respect to threats to the peace, breaches of the peace and acts of aggression. This authority has been used to designate maritime boundaries in the aftermath of armed conflict. For example, UN Security Council Resolution 687 provided, inter alia, for the establishment of a maritime boundary between Kuwait and Iraq following the 1991 Gulf War. See: Jan Klabbers, "No More Shifting Lines? The Report of the Iraq-Kuwait Boundary Demarcation Commission" (1994) 43 The International and Comparative Law Quarterly 904.; Harry Brown, The Iraq-Kuwait Boundary Dispute: Historical Background and the UN Decisions of 1992 and 1993 (1994) IBRU Boundary and Security Bulletin 66. Note also that

48Fisheries Case (United Kingdom v Norway), 1951 ICJ Reports 116, 132. See also Fisheries Jurisdiction cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland), 1974 ICJ Reports 3, 22, 175, 191; and Gulf of Maine case,1984 ICJ Reports 246, 299.

49Gulf of Maine Case, above n 48.

50See Cameroon v Nigeria [1998] ICJ Rep p 275 and 303, where the International Court of Justice discussed the application of the principle of estoppel to a maritime boundary dispute. In the context of the case, the Court noted that ‘An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changes position to its own detriment or had suffered some prejudice.’ See also the Temple of Preah Vihear (Thailand v Cambodia) [1962] ICJ Rep 6,23,31-32 and discussion in Malcolm Shaw, International Law (6th ed, 2008) 517-519.
15, 74 and 83 (concerning, respectively, delimitation of the territorial sea, exclusive economic zone, and continental shelf).

The second noteworthy feature is that international legal obligations concerning maritime boundary delimitation are highly general in nature – they do not prescribe detailed principles or methods of delimitation. Indeed there are on-going disagreements between many coastal States regarding the manner in which various principles and methods should influence the course of a boundary line. A key area of ongoing disagreement concerns the application of ‘natural prolongation’ principles to delimitation of the continental shelf (see Chapter 2.3.6 for further discussion). Delimitation principles and methods proposed and debated during the UN Conferences on the Law of the Sea can be loosely divided into two opposing groups: The first sought to determine the course of a maritime boundary primarily by reference to an equidistance/median line. The second emphasised the achievement of an equitable result, taking into account a broad range of relevant circumstances.

At present, more than 200 maritime boundaries have been established either by direct agreement (i.e. negotiated designation of a maritime boundary) or indirect agreement (i.e. mutual acceptance of a boundary determined by a third-party such

51 A detailed analysis of these obligations and their implications for the provisional joint management of OCAs is undertaken in Chapter 2.


54 As mentioned above in n 37 on page 12, the natural prolongation principle was introduced by the International Court of Justice in the North Sea Continental Shelf Cases as a criterion for determining the spatial extend of coastal State rights over the continental shelf. The Court also considered the principle to be relevant to delimitation, stating that ‘delimitation is to be effected in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of another State’: Judgment of 20 February 1969, 1969 ICJ Rep, 19, [101]. For an illustrative example of disagreement concerning application of the principle to maritime delimitation in the East China Sea, see: Schofield and Townsend-Gault, above n 3 on page 5.

55 Ibid. For further discussion see Chapters 2.3.2, 2.3.5 and 2.3.6, below. The terms equidistance line and median line are used interchangeably to refer to a line every point of which is equidistant from the nearest basepoints on two coasts: see Antunes, above n 46 on page 13,152–168; and TALOS Manual, above n 53, Chapter 6.

56 Ibid. For further discussion see Chapters 2.3.2, 2.3.5 and 2.3.6, below.
as an international court or tribunal). According to recent estimates, this number represents less than half of the world’s potential maritime boundaries.

**Overlapping claim areas:**

In the absence of maritime boundaries, many of the world’s oceans and seas currently feature maritime spaces where the zones of national jurisdiction claimed by two or more neighbouring coastal States overlap with one another. As noted in the introduction to this Chapter, OCAs are likely to be an enduring feature of the world’s political geography given the various complications and competing national interests that often impede maritime boundary negotiations. The total area of maritime space currently subject to overlapping claims is extensive. For example, the total area of maritime space subject to overlapping outer continental shelf entitlements is more than 2.7 million square kilometres. The global distribution of OCAs is illustrated by Table 1.1, which identifies (as of September 2010) the number and percentage of potential maritime boundaries that have not been delimited.

From a legal perspective, there are four key characteristics of these OCAs that are important to bear in mind while reading this thesis.

The first characteristic is that the nature of claimed national jurisdiction within a particular OCA may vary. Assuming that claims asserted by two or more neigh-

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59 Van de Poll and Schofield, above n 57. The total area of outer continental shelf OCAs is expected to grow considerably as the CLCS continues to issues recommendations for deposited coastal State submissions. Detailed information concerning the status of deposited submissions is published on the CLCS website: <http://www.un.org/Depts/los/clcs_new/clcs_home.htm>.
<table>
<thead>
<tr>
<th>Region</th>
<th>Potential maritime boundaries</th>
<th>Boundaries not delimited</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>141</td>
<td>92 (65.3%)</td>
</tr>
<tr>
<td>Asia</td>
<td>106</td>
<td>66 (62.2%)</td>
</tr>
<tr>
<td>Europe</td>
<td>95</td>
<td>45 (47.4%)</td>
</tr>
<tr>
<td>North America</td>
<td>122</td>
<td>78 (63.9%)</td>
</tr>
<tr>
<td>Oceania</td>
<td>34</td>
<td>23 (67.7%)</td>
</tr>
<tr>
<td>South America</td>
<td>22</td>
<td>7 (31.8%)</td>
</tr>
<tr>
<td>Total</td>
<td>520</td>
<td>311 (59.8%)</td>
</tr>
</tbody>
</table>

Table 1.1: Global progress towards maritime boundary delimitation, by continental region. Source: Van de Poll and Schofield, footnote 57 on the previous page, which documents the various assumptions on which the numbers are based.

bouring coastal States have a recognised basis in the LOSC, an OCA can arise from several scenarios, including the following: (1) overlapping claims to internal waters; (2) overlapping claims to territorial sea; (3) overlapping claims to a contiguous zone; (4) claims overlapping with claimed archipelagic waters; 60 (5) overlapping claims to an EEZ; and/or (6) overlapping entitlements to continental shelf. All of these scenarios have arisen in practice (see Chapter 3 for illustrative examples). 61 Note that there are many practical examples of OCAs in which scenarios 5 and 6 occur concurrently (i.e. each claimant coastal State asserts both an EEZ claim and continental shelf entitlement concerning a certain area). 62 Note also that, in addition to the scenarios listed above, it is possible for certain neighbouring coastal States to assert claims in a manner that generates a spatial overlap solely between an EEZ claimed by one coastal State and the continental shelf entitlement of another. This scenario has arisen in several locations as a consequence of maritime boundary agreements. 63

60 This scenario is discussed in more detail in Chapter 2.3.3 below.
61 Notionally, sufficiently proximate opposite coastal States could also assert claims in a manner that generates overlap between (1) an EEZ claimed by one coastal State and Territorial Sea, Contiguous Zone or Internal Waters claimed by another; (2) a continental shelf claimed by one coastal State and territorial sea or internal waters claimed by another. These situations could only arise if at least one of the opposite coastal States had a highly indented coast and designated straight baselines whose validity under the LOSC was disputed by the relevant opposite coastal State. As far as the author is aware, neither situation has arisen in practice.
62 See, eg: Schofield and Townsend-Gault, above n 3 on page 5, which discusses overlapping claims in the East China Sea.
and most recently as a consequence of the International Tribunal for the Law of the Sea’s judgment in the *Bangladesh/Myanmar case*. In keeping with the focus of this thesis on management of maritime spaces prior to boundary delimitation, it will not be addressed in detail.

The second key characteristic is that the spatial limits of an OCA may be unclear, or actively disputed, by the relevant claimant coastal States. The former situation arises when baselines or the spatial limits of maritime zones have not been declared by one or more of the claimant coastal States. The latter situation arises when coastal State A asserts that coastal State B has no legal entitlement to assert a claim in a particular location claimed by coastal State A. For example, coastal State A might assert that baselines designated by coastal State B are inconsistent with the relevant rules contained in the LOSC. Another example is where coastal State A asserts that an insular feature claimed by coastal State B is not capable, according

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64 Judgment of 14 March 2012, available at <http://www.itlos.org/>, which established a maritime boundary (delimiting the territorial sea, EEZ and continental shelf) between Bangladesh and Myanmar. The Tribunal’s delimitation of the continental shelf beyond 200 nautical miles gave rise to a so-called ‘Grey Area’ located beyond 200 nautical miles from Bangladesh, but within 200 nautical miles from Myanmar, and on the Bangladeshi side of the continental shelf delimitation line. The Tribunal held that this area is subject to the continental shelf entitlement of Bangladesh, and, with respect to the superjacent waters, to the EEZ of Myanmar. Citing LOSC Articles 56, 58, 78 and 79, the Tribunal also noted that, in relation to the Grey Area, ‘each coastal State must exercise its rights and perform its duties with due regard to the rights and duties of the other’: see paragraphs [463]–[476] of the Judgment. It is important to note that, pursuant to LOSC Article 56(3), the water-column rights of Myanmar are curtailed to the extent that they conflict with the seabed rights of Bangladesh, and, as noted above, both States must afford due regard to their respective rights and duties.

65 See ibid, and Herriman and Tsamenyi, above n 63, for a detailed analysis of the applicable legal issues.

66 The most common practice for establishing maritime zones is to: (1) designate territorial sea baselines; and (2) assert an ambit claim/entitlement to a particular maritime zone that is defined spatially by its maximum limit as measured from territorial sea baselines. See, for example, the Declaration by the Government of Indonesia concerning the Exclusive Economic Zone of Indonesia (21 March 1980), which declares, inter alia, that ‘The Exclusive Economic Zone of Indonesia is the area beyond the Indonesian Territorial Sea ... the breadth of which extends 200 nautical miles from the baselines from which the breadth of the Indonesian Territorial Sea is measured.’ The full text of the Declaration is reproduced at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/>. An alternative approach is to simply designate coordinates of the limits of a maritime zone: see, eg, the Malaysian Exclusive Economic Zone Act 1984 (Act No. 311), which establishes an ambit claim to a 200 nautical mile EEZ, subject to any specific limits designated by the Malaysian Government. The Act is reproduced at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MYS.htm>.

67 For further discussion concerning relevant provisions of the LOSC, see Churchill and Lowe, above n 10 on page 7, 31–59.
to LOSC rules, of generating the maritime zones projected from that feature by coastal State B.

The third key characteristic is that OCA s are not necessarily bounded by the maximum seaward limit of coastal State jurisdiction recognised in the LOSC. Claimant coastal States frequently do not claim the full extent of their respective maritime zones. For example, they may only claim waters located landward of what they assert to be the correct course of the relevant maritime boundary. In such circumstances, and assuming that all claimant coastal States agree that their respective claims are consistent with the LOSC, the limits of the OCA are defined by the competing asserted locations of the maritime boundary.

Finally, OCA s may arise from an unresolved sovereignty dispute. For example, if two or more States both claim a single piece of coastal or insular territory, any equivalent maritime zones projected from that territory by each State overlap with one another. Maritime zones projected from territory claimed by more than one coastal State may also, depending on the coastal geography of the region in question,


A practical example of this scenario occurred during a maritime boundary dispute between Romania and Ukraine, which was resolved following the designation of a maritime boundary by the International Court of Justice. During the dispute Romania disagreed with Ukraine’s assertion that a Ukrainian insular feature (‘Serpent’s Island’) was an island capable of generating an EEZ/continental shelf. See Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment of 3 February 2009, 2009 ICJ Reports, 61.

Non-equivalent zones projected from the territory would not generate an OCA. For example, if two or more States both claim sovereignty over an island, and one asserts an EEZ around that island while the other(s) does not, the claimed EEZ does not represent an OCA. The entitlement to claim an EEZ would, however, remain in question and there would still be a need to manage the waters on a provisional basis prior to settlement of the relevant sovereignty dispute. A practical example of this scenario is the dispute between Argentina and the United Kingdom concerning the Islas Aurora / Shag Rocks, which are small insular features located 150 nautical miles northwest of South Georgia in the South Atlantic Ocean. Both States claim territorial sovereignty over the features. Argentina claims that they are capable of generating an EEZ and continental shelf. The United Kingdom asserts that the features are ‘rocks which cannot sustain human habitation or economic life of their own’ that per the LOSC Article 121 are only capable of generating an EEZ or continental shelf. See International Boundaries Research Unit, ‘Claims and potential claims to maritime juris-
overlap with other zones projected from other territories whose sovereignty is not disputed.

1.2 Provisional joint management of OCAs

To the extent that they provoke diplomatic tensions and jurisdictional confusion, overlapping maritime claims have adverse implications for oceans management. The sustainable management of living marine resources and the marine environment within several OCAs has been hampered by a lack of policy coordination between coastal States, including failures to cooperatively regulate fishing activities and reluctance to apply unilateral regulatory measures for fear of inflaming diplomatic tensions. Tensions and confusion associated with several OCAs has also impeded or forestalled the exploration and exploitation of offshore hydrocarbon deposits located therein. Commentators have also noted the absence within several OCAs of...
effective marine scientific research, search and rescue, monitoring and enforcement, and provision for navigational safety.\textsuperscript{75}

These management issues are particularly serious given the widespread distribution of OCAs, the enduring character of such areas, and the potential strategic importance of OCAs for the relevant claimant coastal States. Living marine resources located in OCAs are a major contributor to the economy of many coastal States, an important source of livelihood for coastal communities, and a significant source of dietary protein for millions of people globally.\textsuperscript{76} In the context of rapidly rising global energy demand, offshore hydrocarbon resources located within OCAs represent a potential source of economic wealth for the relevant claimant coastal States and a potentially significant contributor their domestic energy security.\textsuperscript{77} Several coastal States are also highly and increasingly reliant on major sea lanes of communication passing through OCAs as a medium for international trade.\textsuperscript{78}

As an alternative to maritime boundary delimitation, or during the period where delimitation negotiations are ongoing, several coastal States that assert overlapping claims have agreed to establish frameworks to manage the relevant OCA on a provisional and joint basis. Several of these frameworks predate the LOSC, however


\textsuperscript{77}For detailed quantitative analysis of relevant global and regional energy trends, see International Energy Agency, \textit{World Energy Outlook 2011}. See also Clive Schofield et al, above n 7 on page 5, which notes that ‘International Energy Agency ... figures suggest that growth in demand in Southeast Asia and China, coupled with maturing production there, will mean that net oil imports are likely to quadruple by 2030’; in addition to Nick Owen and Clive Schofield, ‘Disputed South China Sea hydrocarbons in perspective’ (2012) 36 \textit{Marine Policy} 809.

\textsuperscript{78}For a relevant regional case studies, concerning the strategic importance of OCAs in the South China Sea and East China Sea, see: Chris Rahman and Martin Tsamenyi, ‘A Strategic Perspective on Security and Naval Issues in the South China Sea’ (2010) 41 \textit{Ocean Development and International Law} 315; and Schofield (ed), above n 7 on page 5. A report published in 2011 by the UN Conference on Trade and Development estimated that 90\% of global cargo is carried by sea. Seaborne trade has important energy security implications. For example, the combination of maturing domestic energy production and increasing domestic energy demand is predicted to dramatically increase the reliance of several coastal States on seaborne imports of oil and gas: Schofield (ed), above n 7 on page 5.
the majority have been established in the three decades following first signature of the Convention. As noted in the introduction to this Chapter, provisional joint management is increasingly viewed by government officials and other policymakers as a useful tool to minimise diplomatic tensions associated with OCAs and any associated boundary negotiations. Crucially, it offers a potential means to address pressing management concerns within such areas when the prospects of achieving delimitation are remote.

At present there are at least 25 bilateral or multilateral treaties that establish frameworks for the provisional joint management of an OCA.\textsuperscript{79} Several OCAs are also managed in accordance with a wide variety of non-binding instruments and informal political agreements.\textsuperscript{80} The central aim of the present thesis is to closely analyse this diverse and growing body of State practice, in an attempt to: (1) develop a detailed collection of legal and policy options for the management of OCAs; and (2) thereby inform the progressive development and implementation of provisional joint management frameworks. Figure 1.1 illustrates the approximate geographic distribution of provisional joint management frameworks that are surveyed in this thesis. It is immediately apparent that provisional joint management of OCAs is a global phenomenon (although there is a high concentration of relevant frameworks in the Asia-Pacific region). The numeric references in Figure 1.1 correspond to index entries in Table 1.2, which identifies the relevant participating coastal States and the thesis Chapters in which each surveyed framework is discussed in detail.

\textsuperscript{79}See Chapter 3 on page 79 for further discussion.
\textsuperscript{80}Ibid.
Figure 1.1: Approximate geographic distribution of surveyed provisional joint management frameworks
<table>
<thead>
<tr>
<th>Map ref</th>
<th>Participating coastal States</th>
<th>Thesis chapter</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Pacific Ocean excluding the Asian rim</em></td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>Canada – United States</td>
<td>3.2.1</td>
</tr>
<tr>
<td>2.</td>
<td>El Salvador – Honduras – Nicaragua</td>
<td>3.2.2</td>
</tr>
<tr>
<td></td>
<td><em>Atlantic Ocean and Caribbean</em></td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Argentina – United Kingdom</td>
<td>3.3.1</td>
</tr>
<tr>
<td>4.</td>
<td>Argentina – Uruguay</td>
<td>3.3.2</td>
</tr>
<tr>
<td>5.</td>
<td>Barbados – Guyana</td>
<td>3.3.3</td>
</tr>
<tr>
<td>6.</td>
<td>Canada – United States</td>
<td>3.3.4</td>
</tr>
<tr>
<td>7.</td>
<td>Colombia – Jamaica</td>
<td>3.3.5</td>
</tr>
<tr>
<td>8.</td>
<td>Denmark – United Kingdom</td>
<td>3.3.6</td>
</tr>
<tr>
<td>9.</td>
<td>Equatorial Guinea – Gabon</td>
<td>3.3.7</td>
</tr>
<tr>
<td>10.</td>
<td>Guinea-Bissau – Senegal</td>
<td>3.3.8</td>
</tr>
<tr>
<td>11.</td>
<td>Nigeria – São Tomé and Príncipe</td>
<td>3.3.9</td>
</tr>
<tr>
<td>12.</td>
<td>Trinidad and Tobago – Venezuela</td>
<td>3.3.10</td>
</tr>
<tr>
<td></td>
<td><em>Red Sea and Persian Gulf</em></td>
<td></td>
</tr>
<tr>
<td>13.</td>
<td>Iran – United Arab Emirates (Sharjah)</td>
<td>3.4.1</td>
</tr>
<tr>
<td>14.</td>
<td>Saudi Arabia – Sudan</td>
<td>3.4.2</td>
</tr>
<tr>
<td></td>
<td><em>North East Asia</em></td>
<td></td>
</tr>
<tr>
<td>15.</td>
<td>Japan – People’s Republic of China</td>
<td>3.5.1</td>
</tr>
<tr>
<td>16.</td>
<td>Japan – Republic of Korea</td>
<td>3.5.2</td>
</tr>
<tr>
<td>17.</td>
<td>Japan – Russia</td>
<td>3.5.3</td>
</tr>
<tr>
<td>18.</td>
<td>People’s Republic of China – Republic of Korea</td>
<td>3.5.4</td>
</tr>
<tr>
<td></td>
<td><em>South East Asia and Australia</em></td>
<td></td>
</tr>
<tr>
<td>19.</td>
<td>Australia – Indonesia</td>
<td>3.6.1</td>
</tr>
<tr>
<td>20.</td>
<td>Australia – East Timor</td>
<td>3.6.2</td>
</tr>
<tr>
<td>21.</td>
<td>Cambodia – Thailand</td>
<td>3.6.3</td>
</tr>
<tr>
<td>22.</td>
<td>Cambodia – Vietnam</td>
<td>3.6.4</td>
</tr>
<tr>
<td>23.</td>
<td>The South China Sea (several claimants)</td>
<td>3.6.5</td>
</tr>
<tr>
<td>24.</td>
<td>Indonesia – Malaysia</td>
<td>3.6.6</td>
</tr>
<tr>
<td>25.</td>
<td>Malaysia – Thailand</td>
<td>3.6.7</td>
</tr>
<tr>
<td>26.</td>
<td>Malaysia – Vietnam</td>
<td>3.6.8</td>
</tr>
<tr>
<td></td>
<td><em>Polar Regions</em></td>
<td></td>
</tr>
<tr>
<td>27.</td>
<td>Norway – Russia</td>
<td>3.7.1</td>
</tr>
<tr>
<td>28.</td>
<td>Canada – United States</td>
<td>3.7.2</td>
</tr>
<tr>
<td>29.</td>
<td>Antarctic waters (several claimants)</td>
<td>3.7.3</td>
</tr>
</tbody>
</table>

Table 1.2: Index of surveyed provisional joint management frameworks
1.3 Thesis structure and research questions

The thesis develops a response to the following research question:

1. What legal and policy options are available for coastal States to engage in provisional joint management of OCAs in a manner that fully utilises their rights, and is consistent with their obligations, under international law?

As a prerequisite for addressing this primary question, the thesis also develops responses to several underlying questions, including the following:

2. As a matter of international law, what rights does a coastal State possess to manage activity in a zone of national jurisdiction that it claims?

3. As a matter of international law, to what extent are these rights curtailed or otherwise modified within the spatial area where claims to zones of national jurisdiction have not been delimited and thus overlap?

4. To what extent does current State practice concerning the provisional joint management of OCAs enable the functionally comprehensive management of such spaces?

Chapter 2 of the thesis addresses research questions 2 and 3 by examining relevant provisions of the LOSC and customary international law. It examines the framework of national jurisdiction set out in the LOSC, concluding that in each zone of national jurisdiction recognised by the Convention, a coastal State is entrusted with a package of exclusive rights to manage human activity in one or more of the following six functional contexts, namely: artificial structures, environmental protection, marine scientific research, maritime security, navigational safety and resources exploitation. Chapter 2 also examines the impact of relevant provisions of international law on the entitlement of a coastal State to assert these functional components of its jurisdiction within an OCA. The central conclusion reached is that, unless a management agreement is concluded between the relevant claimant coastal States, international law does not establish a detailed framework for implementation within an OCA of the functional components of coastal State jurisdiction. Accordingly, it falls to
the relevant claimant coastal States to develop legal and policy frameworks enabling them to manage human activity within OCAs on a functionally comprehensive basis (thereby fully utilising their coastal State rights under international law).

Chapter 3 focuses on the development by coastal States of frameworks for the provisional joint management of OCAs. A global survey and critical analysis of 25 bilateral or multilateral treaties and other relevant State practice is presented. The design features of current State practice are analysed in order to develop a response to the research question 4.

The analysis identifies great variation in the functional coverage of surveyed provisional joint management frameworks. It concludes that several frameworks may be characterised as functionally comprehensive because they contain provisions enabling the assertion of coastal State jurisdiction within the relevant OCA in a complete set of functional contexts. In other words, these frameworks establish a clear basis for one or more of the claimant coastal States to undertake, within the relevant OCA, management activities relating to: artificial structures, environmental protection, marine scientific research, maritime security, navigational safety and resource exploitation. Chapter 3 also concludes that several provisional joint management frameworks exhibit clear functional gaps that may undermine the ability of claimant coastal States to engage in management of the relevant OCA in one or more of the functional contexts listed above.

Drawing on the responses developed in Chapters 2 and 3, Chapter 4 addresses the primary research question by proposing detailed legal and policy options for the provisional joint management of OCAs. The proposed options are intended to inform the future negotiation of provisional joint management frameworks. Each proposed option is accompanied by explanatory commentary, suggested legal drafting, and references to representative examples of current State practice. The proposed options are also intended to facilitate the functionally comprehensive management of OCAs by the relevant claimant coastal States. They offer potential avenues towards ‘filling’ the functional gaps evident in current State practice by enabling the col-
lective implementation within OCAs of all functional components of coastal State jurisdiction. The author’s intention is to be suggestive rather than prescriptive – in deference to the fact that functional gaps in provisional joint management frameworks often arise from compelling political and strategic factors that impede further cooperation concerning the management of OCAs.

Thesis findings and suggested areas of further research are consolidated in Chapter 5, which also contains concluding recommendations for coastal States that are actively engaged in the provisional joint management of OCAs, or the negotiation of prospective provisional joint management frameworks.

### 1.4 Contribution to existing literature

OCAs have been discussed and analysed by a considerable and growing body of literature. The following paragraphs contain a succinct review of this literature and identify the three key scholarly contributions made by this thesis. Sources cited in the footnotes are intended to be illustrative rather than exhaustive – many other examples of relevant literature are referenced and discussed where appropriate throughout the thesis.

The bulk of literature concerning OCAs focuses on maritime jurisdictional disputes and their resolution through maritime boundary negotiations. For example: The five-volume series *International Maritime Boundaries* contains essays on the development of international maritime boundary practice, global analyses of the design features of maritime delimitation agreements, in addition to a compendium of primary source material concerning maritime delimitation (and the management of OCAs). In *The Maritime Political Boundaries of the World*, Prescott and Schofield present a complementary study that focuses on the political geography of delimited and un-delimited maritime claims. Other works consider the substantive content

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81 Above, n 57.
82 Prescott and Schofield, above n 57.
of international law concerning maritime delimitation, analyse and document jurisprudence developed by international courts and tribunals, or investigate the conceptual foundations of relevant international obligations.

In relation to the provisional management of OCAs prior to boundary delimitation, several publications analyse State practice in specific geographic contexts and focus on the use of provisional joint management generally as a means of resolving a particular boundary dispute or disputes. Generally, this body of literature selects illustrative examples of OCA management frameworks, analysing their relevance and applicability to a particular instance of overlapping claims. For example: Sun Pyo Kim develops a detailed analysis of overlapping claims to maritime jurisdiction in North East Asia, incorporating discussion of maritime delimitation principles and the development of provisional joint management arrangements in the region. His analysis is informed by a general overview and categorisation of State practice concerning the provisional joint management of OCAs. Valencia et al, develop a detailed analysis of overlapping claims to maritime jurisdiction in the South China Sea, incorporating discussion concerning the merits of relevant territorial and maritime claims under international law, in addition to political factors underlying the various claims. The authors also propose models for cooperative management of the region’s marine resources, drawing on several examples from other regions of State practice concerning OCA management.

A growing body of literature focuses on the management of OCAs in specific functional contexts. Oil and gas development in OCAs has received the most scholarly

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83See, eg, Lagoni, above n 46 on page 13; Vignes, above n 46 on page 13; Evans, above n 46 on page 13.
84See, eg, Kolb, above n 46 on page 13.
85See, eg, Yoshifumi Tanaka, Predictability and flexibility in the law of maritime delimitation (2006); Nuno Antunes, Towards the conceptualisation of maritime delimitation: Legal and technical aspects of a political process (2003).
86Sun Pyo Kim, above n 2.
87Sun Pyo Kim proposes the following categories of State practice: Joint Development Zones, Joint Fishing Zones, Fisheries Arrangements on the Basis of De Facto Boundaries, Comprehensive Joint Exploitation Zones and Single Provisional Fisheries Boundaries.
88Mark Valencia, Jon van Dyke and Noel Ludwig, Sharing the Resources of the South China Sea (1997).
treatment in this context.\textsuperscript{89} Perhaps the most influential analysis of OCA management was written in 1989/90 by Fox \textit{et al},\textsuperscript{90} who present a detailed analysis of State practice concerning the joint development of offshore oil and gas and propose a model ‘joint development’ agreement for coastal States. The scope of the model agreement is confined to commercial oil and gas exploitation and ancillary management issues in areas of overlapping continental shelf or EEZ jurisdiction.\textsuperscript{91} Several authors develop general classifications of State practice concerning the provisional joint management of marine living resources within OCAs.\textsuperscript{92} Other publications focus on issues of environmental protection,\textsuperscript{93} maritime security and enforcement,\textsuperscript{94} or the implications for the development of customary international law of State practice concerning the provisional joint management of OCAs.\textsuperscript{95}

The research presented in this thesis makes three key contributions to the literature discussed above:

1. \textit{Detailed systematic and critical global survey of current State practice}: The thesis provides an up-to-date reference of current State concerning the provi-

\textsuperscript{89}There is also a considerable body of scholarship concerning the development of oil and gas deposits that straddle maritime boundaries. See, eg, Rainer Lagoni, ‘Oil and Gas Deposits Across National Frontiers’ (1979) 73 \textit{The American Journal of International Law} 233; Alberto Szekely, ‘The International Law of Submarine Transboundary Hydrocarbon Resources: Legal Limits to Behavior and Experiences for the Gulf of Mexico’ 26 \textit{Natural Resources Journal} 766 (1986); Schofield, above n 57; Ana Bastida \textit{et al}, ‘Cross-Border Unitization and Joint Development Agreements: An International Law Perspective’ (2006) 29 \textit{Houston Journal of International Law} 355.


\textsuperscript{91}The authors note that their ‘research and discussions have been confined to the joint sharing of oil and gas. This term covers joint commercial exploitation of oil and gas, and ancillary questions of security, jurisdiction, title, navigation, taxation, health and safety, and environmental matters relating to that development.’ Fox \textit{et al}, above n 90, Volume I, 12.


\textsuperscript{93}See, eg, David Ong, ‘The Progressive Integration of Environmental Protections within Offshore Joint Development Agreements’ in M Fitzmaurice and M Szuniewicz (eds), \textit{Exploitation of Natural Resources in the 21st Century} (2003).

\textsuperscript{94}See Schofield, above n 75.

sional joint management of OCAs. In contrast to previous works, it attempts to develop (1) a global systematic survey of provisional joint management frameworks; and (2) a critical assessment of the functional coverage and specific design features of those frameworks. In order to avoid replication of existing literature, the spatial characteristics of overlapping claims, and legal or technical issues associated with maritime delimitation, are only addressed to the extent they are contextually relevant. In comparison to the model agreement developed by Fox et al in 1989/1990, the thesis does not contain a ‘narrow and deep’ treatment of oil and gas development within OCAs. Rather, it contains a ‘shallow and broad’ analysis of OCA management in a range of functional contexts (including living resources management, maritime security and environmental protection). Another distinctive contribution of the thesis is that it identifies the considerable growth and diversification of relevant State practice that has occurred in the two decades following the model agreement’s publication.

2. Detailed legal and policy options for provisional joint management: The thesis is the first study since the Fox et al model agreement to undertake a fine-grained global examination and identification of different approaches to drafting legal and policy frameworks for the provisional joint management of OCAs. Existing analyses of OCA management are either fine-grained and regionally or functionally focused (e.g. Valencia et al, above n 88 on page 28), or coarse-grained and globally focused (e.g. Schofield, above n 58 on page 16). A distinctive contribution of the thesis is that it attempts to develop a globally-relevant template for designing particular components of OCA management.

96 Above n 90.
97 Above n 90.
98 Granularity is the extent to which something is divided into subcomponents, or the level of detail or complexity at which something is described: see Mehdi Khosrowpour, Dictionary of Science and Technology (2007), 290. A commonly used example of increasingly fine-grained descriptions is: A list of UN member States, a list of all provinces in those States, a list of all counties in those provinces, etc.
99 SP Kim’s work, above n 2 on page 4, engages in both types of analysis – it contains a fine-grained examination of relevant State practice in North East Asia, contextualised by a coarse-grained analysis of relevant State practice globally.
3. *Focus on functionally comprehensive management:* The thesis is the first global study of OCA management that focuses holistically on all aspects of human interaction with such spaces, as opposed to the targeted management of particular functional contexts or resources. A distinctive contribution of the thesis is that it identifies functional gaps in existing frameworks for OCA management and proposes template options for filling those gaps.

### 1.5 Study methods and challenges

The thesis presents a typical example of qualitative document analysis.\(^{100}\) The objects of analysis are primary and secondary documents concerning a defined body of international law and associated State practice (relating to the provisional joint management of OCAs). The document analysis is argument-based, falling within the field of applied doctrinal legal research.\(^{101}\) The analysis not, however, doctrinal in the strict sense of that term – extraneous technical, policy and political considerations are frequently taken into account.\(^{102}\) The analysis is ‘applied’ in character because it was developed primarily to serve the needs of a professional (as opposed to purely academic) constituency, and has a particular purpose in mind (i.e. to develop a set of legal and policy options for coastal States).\(^{103}\) The following paragraphs provide an overview of document collection methods and the context in which documents were analysed. They also discuss how the scope of the thesis and associated research methods were adapted in response to challenges encountered.

International law and State practice concerning the provisional joint management of OCAs was identified by collection and review of publicly available primary and secondary sources. Primary source material that was identified includes bilateral and

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\(^{100}\) For a detailed overview of this research method see Glenn Bowen, ‘Document Analysis as a Qualitative Research Method’ (2009) 9(2) *Qualitative Research Journal* 27.

\(^{101}\) For further discussion concerning doctrinal legal research methods see Paul Chynoweth, ‘Legal Research’ in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (2008).

\(^{102}\) See ibid.

\(^{103}\) See ibid.
multilateral international instruments (both binding and non-binding), legislation and policy documents promulgated by national governments, and official documents published by international organisations. Secondary source material that was identified includes books, journal articles, conference papers and reports written by academic commentators and other relevant experts. The collection and review process was undertaken in the following manner:

In the first instance, an attempt was made to develop a list of all currently existing OCAs by reference to reliable secondary sources. To this end the author reviewed the contents of *The Maritime Political Boundaries of the World*\(^\text{104}\) in addition to all reports published in the *International Maritime Boundaries* series\(^\text{105}\) and the International Boundaries Research Unit *Boundary News*.\(^\text{106}\)

For each OCA identified in the above manner, the author undertook an internet and physical library search in order to identify primary and secondary sources of documentary information concerning provisional joint management of that area. Primary and secondary sources of documentary information were also obtained through iterative unstructured consultation with government officials and other experts working in relevant fields. In contrast to structured interviews, the use of unstructured consultations allowed for source material to be obtained without pre-imposing limitations on the range and interpretation of that material.\(^\text{107}\) Unstructured consultations were undertaken via email, in person in a variety of informal settings, and in person at: the 2011 International Law Association Asia-Pacific Regional Conference (Taipei, 29 May – 1 June 2011); 2011 International Conference on Joint Development and the South China Sea (National University of Singapore, 16 – 17 June 2011); 2011 UC Berkley Law of the Sea Institute Conference (Wollongong, 28 November – 2 December 2011); and a ‘Visiting Fellows’ Roundtable’ hosted by the

\(^{104}\) Prescott and Schofield, above n 57.
\(^{105}\) Above, n 57.
\(^{107}\) See A Fontana and JH Frey, ‘The Interview: From Structured to Negotiated Text’ in NK Denzin and YS Lincoln (eds), *Handbook of Qualitative Research* (2nd edition, 2000), who also note that structured interviews seek to collect data of a codable nature.
Lauterpacht Centre for International Law (University of Cambridge, 18 November 2009).

During internet and physical library searches, attempts were made to obtain primary source material in the United Nations Treaty Collection database, the *International Maritime Boundaries* series, and in official reports published by relevant governments and international organisations. When primary source material could not be obtained, the author relied exclusively on secondary literature. To the extent possible, the accuracy of secondary source material was critically appraised by: (1) comparison to relevant primary source material; and (2) the aforementioned iterative unstructured consultation with government officials and other experts working in relevant fields. No systematic attempt was made to obtain information concerning the management of OCAs that was not publicly disclosed or whose publication would depend on the consent of government officials. Any information obtained by the author and satisfying those exclusionary criteria has not been disclosed in this thesis.

Document analysis was undertaken at various locations, including the Australian National Centre for Ocean Resources and Security, University of Wollongong, Australia; British Institute of International and Comparative Law, London, United Kingdom; Lauterpacht Centre for International Law, University of Cambridge, United Kingdom; Centre for International Law, National University of Singapore; and The George Washington University Law School, Washinton DC, USA.

The methods discussed above were progressively refined in response to challenges encountered during the course of the research. Two challenges had a significant impact on the eventual scope of the thesis and the manner in which research was conducted:

First, in order to develop options for OCA management, the author originally planned to conduct a detailed global analysis of the extent to which OCA man-

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108 This database is available online at <http://treaties.un.org/>.
109 Above, n 57.
agement frameworks have implemented in practice by the relevant claimant States. It became apparent at an early stage of the research that this approach would require a combination of extensive consultation with government officials and/or extensive travel and fieldwork. Both of these data collection methods are clearly impractical given the funding constraints of a PhD candidature. To address this challenge, the scope of the thesis and associated data collection methods were narrowed. The thesis in its present form focuses primarily on the *de jure* characteristics of OCA management frameworks, as evidenced by, and developed by reference to, publicly disclosed legal instruments and policy documents. *De facto* characteristics of OCA management frameworks are only examined to the extent that they are: (1) documented in publicly disclosed primary or secondary sources; or (2) may be reasonably inferred given publicly identified socio-political circumstances in relevant claimant coastal States. Issues, challenges and options relating specifically to the *de facto* implementation of OCA management frameworks are significant potential areas of further (interdisciplinary) study.

Second, it became apparent at an early stage of the research that a global study of OCA management would be difficult to complete solely through desk-based study at a single academic institution: such an approach would reduce opportunities to obtain relevant primary and secondary source material, and, more importantly, would preclude close interaction and consultation with a global community of relevant experts. To address this challenge the author arranged visiting fellowships at academic institutions with a strong record of research in the thesis topic area,\(^{110}\) and secured opportunities to present preliminary thesis findings at relevant international conferences.\(^{111}\)

\(^{110}\)The relevant institutions are listed in the sixth paragraph of this Sub-section.
\(^{111}\)The relevant conferences are listed in the fourth paragraph of this Sub-section.
2 Management of overlapping claim areas under international law

2.1 Introduction

This Chapter examines the entitlement of claimant coastal States to manage activity within OCAs in the context of relevant international law. As a necessary preliminary matter, Section 2.2 focuses on the framework of national jurisdiction set out in the LOSC, identifying key functional components of a coastal State’s jurisdiction to manage activity within its maritime zones. The remaining Sections analyse the impact of relevant provisions of international law on the entitlement of a coastal State to assert the functional components of its jurisdiction on a provisional basis within an OCA. Section 2.3 identifies and analyses several obligations that relate most specifically to this issue, including LOSC Articles 15, 74 and 83. As noted in Chapter 1.1, these obligations are primarily concerned with boundary delimitation but specifically address the issue of OCA management to varying extents. Section 2.4 identifies and discusses the general features of several other legal obligations that do not relate specifically to the management of OCAs but prescribe certain modes of conduct that remain applicable in that context. Section 2.5 provides an overview of the dispute settlement mechanism set out in LOSC Part XV and

1 Unless otherwise indicated, material in this Chapter has been adapted from the author’s contribution to a previous work: Ben Milligan and Clive Schofield, ‘Filling governance gaps in the Asia-Pacific: Legal and policy options for achieving functionally comprehensive management of maritime spaces subject to overlapping jurisdictional claims’ (Paper presented at the International Law Association Asia-Pacific Regional Conference, Taipei, 29 May – 1 June 2011).
examines the implications of this mechanism (and the relevance of principles of State responsibility) for OCA management. The provisions of LOSC Part XV are relevant because they determine the ability of international dispute settlement bodies to influence or prescribe modalities of OCA management (for example through the publication of legally binding judgments or provisional measures).

2.2 National jurisdiction under the LOSC

As noted in Chapter 1.1, the LOSC recognises several zones of national jurisdiction that can be claimed by coastal States (or to which they are automatically entitled) in accordance with rules set out in the Convention. The relevant zones are: internal waters, the territorial sea, archipelagic waters; the contiguous zone, EEZ, and continental shelf. Within each of these zones, the LOSC attributes rights and obligations to coastal States that enable them to regulate activity on an exclusive basis in one or more of the six functional contexts listed in the first column of Table 2.1. The regulatory competence of a coastal State within its maritime zones has both a ‘prescriptive’ component (i.e. the jurisdictional entitlement under international law to establish laws and regulations that apply in the relevant zone) and an ‘executive’ or ‘enforcement’ component (i.e. the jurisdictional entitlement under international law to take action to enforce applicable laws and regulations, including via domestic judicial procedures).  

2 Throughout this Thesis, unless otherwise stated, reference to the ‘exercise’ of jurisdiction by a coastal State refers to implementation of the enforcement component of that jurisdiction, supported by the relevant prescriptive national laws and regulations.  

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3 An OCA represents the extent of spatial overlap between the respective prescriptive jurisdictions of the claimant coastal States. This Thesis focuses on the issue of how OCAs can be managed through agreed implementation, on a provisional joint basis, of the enforcement jurisdiction.
The second column of Table 2.1 identifies provisions of the LOSC that enable (or restrict) the entitlement a coastal State to exercise jurisdiction in each listed functional context. For example, the fourth row of the second column identifies LOSC provisions bearing upon the right of coastal State to manage marine scientific research in each maritime zone recognised by the Convention. In practice, each of the listed functional contexts are closely interrelated. For example, the entitlement to exercise coastal State jurisdiction concerning maritime security (including surveillance, vessel interdiction and enforcement of criminal laws) has implications for the effectiveness of environmental protection and exploitation of marine living resources.

The functional competence of a coastal State is most extensive within internal waters, the territorial sea and archipelagic waters: In these zones the LOSC recognises the sovereignty of a coastal State, which provides a basis for managing all functional components of human activity subject to various navigational freedoms and duties owed to other States. The functional competence of a coastal State is more limited in zones where it does not enjoy sovereignty, namely: the contiguous zone, EEZ or the continental shelf. Rather, the functional components of coastal State jurisdiction in these zones are specifically enumerated, with high seas freedoms prevailing in all other contexts.

### 2.3 Specific obligations concerning OCA management

In the spatial area where claims to zones of national jurisdiction have not been delimited and thus overlap, to what extent are each of the claimant coastal States entitled to manage the OCA on a provisional basis by implementing the various functional components of their jurisdiction? The following paragraphs identify, and examine the meaning and application of, several international legal obligations that relate most specifically to this question. As noted in Chapter 2.1, the identified obligations are primarily concerned with boundary delimitation, but address the
<table>
<thead>
<tr>
<th><strong>Functional context</strong></th>
<th><strong>Relevant LOSC provisions</strong></th>
</tr>
</thead>
</table>
| **Artificial structures:** including oil and gas installations, artificial islands, submarine cables and renewable energy infrastructure. | **Territorial sea:** Articles 2, 19, 21  
**Archipelagic waters:** Articles 49, 51, 52  
**Exclusive economic zone:** Articles 56, 58, 60  
**Continental shelf:** Articles 77, 79, 80, 81, 85 |
| **Environmental protection:** including management of marine pollution and the preservation of marine biodiversity. | **Territorial sea:** Articles 2, 19, 21  
**Archipelagic waters:** Articles 49, 52, 54  
**Contiguous zone:** Article 33  
**Exclusive economic zone:** Articles 56, 60, 61  
**Continental shelf:** Articles 79, 80  
**Generally:** Part XII concerning protection and preservation of the marine environment |
| **Marine scientific research:** including hydrographic surveys and biological research. | **Territorial sea:** Articles 2, 19, 21  
**Archipelagic waters:** Articles 49, 52, 54  
**Exclusive economic zone:** Articles 56, 62  
**Continental shelf:** Article 77, 78  
**Generally:** Part XIII concerning marine scientific research |
| **Maritime security:** including surveillance, vessel interdiction and enforcement of criminal laws. | **Territorial sea:** Articles 2, 27, 28, 30  
**Archipelagic waters:** Articles 49, 52, 54  
**Contiguous zone:** Article 33  
**Exclusive economic zone:** Articles 58, 73  
**Continental shelf:** Article 77, 78  
**Generally:** Part XII Section 6, concerning enforcement with respect to the protection and preservation of the marine environment |
| **Navigational safety:** including the designation of sea lanes and traffic separation schemes, and the conduct of maritime search and rescue. | **Territorial sea:** Articles 2, 21, 22, 24, 25  
**Archipelagic waters:** Articles 49, 52, 53, 54  
**Exclusive economic zone:** Articles 56, 58, 60  
**Continental shelf:** Articles 77, 80 |
| **Resources exploitation:** including exploitation of living resources such as fisheries and non-living resources such as offshore hydrocarbon deposits. | **Territorial sea:** Articles 2, 21  
**Archipelagic waters:** Articles 49, 51, 54  
**Exclusive economic zone:** Articles 56, 61–72  
**Continental shelf:** Articles 77, 78, 80–82 |

Table 2.1: Functional components of coastal State jurisdiction and relevant LOSC provisions
issue of OCA management to varying extents. A separate investigation and analysis is conducted for each of the following scenarios that, as noted in Chapter 1.1, each give rise to an OCA: (1) overlapping claims to internal waters; (2) overlapping claims to territorial sea; (3) overlapping claims to a contiguous zone; (4) claims overlapping with claimed archipelagic waters; (5) overlapping claims to an EEZ; and/or (6) overlapping claims to continental shelf.

### 2.3.1 Overlapping claims to internal waters

Several adjacent coastal States have designated straight territorial sea baselines in a manner that generates overlapping claims to internal waters. For illustrative examples of this scenario see Chapter 3.3.2 (concerning overlapping claims asserted by Argentina and Uruguay) and Chapter 3.6.4 (concerning overlapping claims asserted by Cambodia and Vietnam). The LOSC contains only limited references to internal waters, none of which concern delimitation or OCA management. The absence of detailed provisions in this context flows from the characterisation of internal waters under customary law: Such waters appertain to the land territory of a coastal State and are subject, with limited exception, to full territorial sovereignty. The absence in the law of the sea of detailed rules concerning internal waters is a deliberate deference to the territorial rights of coastal States.

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4 For an overview of these references see Churchill and Lowe, above n 10 on page 7, 60–70; Rothwell and Stephens, above n 16 on page 8, 52–57.
5 Churchill and Lowe, above n 10 on page 7, 61. Key exceptions to coastal State sovereignty over the territorial sea are noted in Chapter 1.1 on page 7.
6 Rothwell and Stephens note that prior to the 1958 Geneva Conventions, being ‘[s]ensitive to the fact that these [internal] waters had traditionally not been the subject of international concern and had overwhelmingly been the subject only of municipal legal systems, the [International Law Commission] was careful in its considerations not to attempt to suggest the development of a distinctive regime for this area.’: Rothwell and Stephens, above n 16 on page 8, 52. This caution was maintained during UNCLOS II and III.
2.3.2 Overlapping claims to territorial sea

Many opposite and adjacent coastal States assert overlapping claims to territorial sea. Such areas are subject to LOSC Article 15, which provides as follows: 7

**Delimitation of the territorial sea between States with opposite or adjacent coasts**

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

This provision in a near-verbatim reproduction of the equivalent provision of the 1958 Territorial Sea Convention. 8 It reflects a compromise reached at UNCLOS I – and again at UNCLOS III – between two general proposed methods of delimitation. 9

The first proposed method emphasised application of an equidistance/median line; while the second emphasised application of equitable principles taking into account range of relevant circumstances. 10 The compromise language does not prescribe a particular method of delimitation. 11

LOSC Article 15 also stipulates that territorial sea boundaries are to be delimited by agreement between the coastal States advancing overlapping claims. This is consistent with the long-standing position of customary international law that a

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7 For background, see Virginia Commentaries, Volume II, above n 1 on page 4, 132–143.
8 See 1958 Territorial Sea Convention, Article 12(1).
9 See Virginia Commentaries, Volume II, above n 1 on page 4, 132–143.
10 Ibid. Relevant negotiations at UNCLOS III appears to have been quite circular in result: The UNCLOS I compromise reflected in Article 12(1) of 1958 Territorial Sea Convention was re-opened and delimitation of the territorial sea was a live issue. The final compromise between competing proposals returned to the original language contained in the 1958 Territorial Sea Convention. Advocates of equitable approaches had more success during negotiations concerning EEZ and continental shelf delimitation: As noted in Chapters (2.3.5) and (2.3.6), the provisions concerning delimitation of these zones (LOSC Articles 74 and 83 respectively) contain no express reference to equidistance-based approaches.
11 However, in contrast to Articles 74 (concerning delimitation of the EEZ) and 83 (concerning delimitation of the continental shelf), the equidistance method is preferred unless departure from that line is justified: (57).
unilateral determination of a maritime boundary by a coastal State is not binding upon other coastal States.\textsuperscript{12}

LOSC Article 15 does not establish detailed substantive or procedural obligations concerning the provisional management of a territorial sea OCA.\textsuperscript{13} Proposals by several States to include such obligations were not incorporated into the final text of the Convention.\textsuperscript{14} However, the first sentence of LOSC Article 15 does not prohibit a coastal State from extending its territorial sea on a unilateral basis within an OCA, provided that the zone is not extended beyond the relevant equidistance line between opposite or adjacent coasts. Accordingly, it notionally facilitates provisional management of a territorial sea OCA on a unilateral basis and prevents unilateral management measures from overlapping spatially.\textsuperscript{15} In such circumstances, an equidistance line would act as a provisional de facto territorial sea boundary.

The second sentence of LOSC Article 15 excludes the application of the first sentence (concerning extension of the territorial sea within an OCA) where the presence of historic title or ‘other special circumstances’ renders it ‘necessary’ to designate a boundary that departs from the equidistance line. This exclusion dramatically curtails the ability of a coastal State to rely on Article 15 as a basis for undertaking unilateral management measures within a territorial sea OCA, for the following two reasons:

First, the exclusion is framed in broad terms and the LOSC does not elaborate upon the range of ‘special circumstances’ necessitating the departure of a boundary from an equidistance line. Consequently, Article 15 provides offers little guidance

\textsuperscript{12}For further discussion see above, n 48 on page 14.
\textsuperscript{13}However, disputes concerning a territorial sea OCA are subject to several procedural dispute settlement obligations set out in LOSC Part XV. These obligations are discussed further in Chapter 3.4.
\textsuperscript{14}See, eg, the proposals and statements by Morocco, Argentina and Venezuela documented in the Virginia Commentaries, Volume II, above n 1 on page 4, 139–141)
\textsuperscript{15}This also provides a notional basis for coastal States to comply with various duties imposed by international law relating to management of the territorial sea. Such duties include the provision of basic navigational services such as lighthouses and rescue facilities: See Churchill and Lowe, above n 10 on page 7, 100. However, it is important to note that opposite or adjacent coastal States may disagree in relation to the baselines employed by each other as a basis for generating maritime claims, and consequently in relation to the location of the equidistance line between them.
regarding the locations in which claimant coastal States are entitled to implement unilateral provisional management measures. During UNCLOS III several States proposed the inclusion of additional procedural and substantive rules that would apply in the context of historic title or other special circumstances.\textsuperscript{16} However, these proposals were not incorporated into the final text of the Convention. Nonetheless, international courts and tribunals – in particular the International Court of Justice – have developed an increasingly clear and consistent approach to determining when a boundary should depart from an equidistance line.\textsuperscript{17} The approaches used by these bodies to delimit the territorial sea, continental shelf and EEZ are also increasingly convergent.\textsuperscript{18} In recent cases international courts and tribunals have first determined a presumptive equidistance line and then proceeded to enquire whether relevant or special circumstances warrant a change in that line in order to achieve an ‘equitable result.’\textsuperscript{19} Relevant or special circumstances identified and applied by international courts and tribunals are diverse, and, critically for the present purposes, may have countervailing effects on the course of a maritime boundary. They include the configuration and length of relevant respective coastlines, the existence of islands, security considerations and the prior conduct of parties.\textsuperscript{20}

Second, LOSC Article 15 conceptually links obligations concerning unilateral provisional management with obligations concerning boundary delimitation. This linkage arises because the principles that determine the course of the delimitation line (i.e. the presumptive median line, with broadly framed exceptions for ‘historic title or

\textsuperscript{16}See, eg, the proposals by Morocco, documented in the Virginia Commentaries, Volume II, above n 1 on page 4, 139–140.


\textsuperscript{18}See ibid.


\textsuperscript{20}Ibid.
other special circumstances’) also determine the spatial extent of a State’s entitlement to undertake unilateral management measures on a provisional basis. As a result, any disagreement between coastal States concerning the location of a territorial sea boundary (involving disagreement concerning the extent to which historic title or other special circumstances justify departure from the median line) automatically entails disagreement concerning the locations in which the claimant coastal States are entitled to undertake unilateral provisional management measures.

2.3.3 Overlapping claims to a contiguous zone

LOSC Article 33 addresses the scope and spatial limits of national jurisdiction in the contiguous zone,21 but does not contain specific obligations concerning the provisional management of OCAs or the delimitation of overlapping claims. The effect of this silence has been explained as follows:

There is no provision in the Convention for the delimitation of contiguous zones. Such a zone cannot, by definition, be extended into the territorial sea of another state. Since the nature of control to be exercised in the contiguous zone does not create any sovereignty over the zone or its resources, it is possible for two states to exercise control over the same area if their zones should overlap, for the purpose of prevention of or punishment for infringement of their respective customs, fiscal, immigration or sanitary laws and regulations within their respective territories or territorial sea.22

A paragraph concerning delimitation of the contiguous zone and based on Article 24(3) of the 1958 Territorial Sea Convention was removed from the early negotiating texts at UNCLOS III.23 There does not appear to be a single clear rationale that

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21 LOSC Article 33(1) sets out the entitlement to claim a contiguous zone and enumerates the jurisdictional competencies associated with the zone. LOSC Article 33(2) provides that the contiguous zone may not extend beyond 24 nautical miles from the territorial sea baselines.

22 Commonwealth Group of Experts, Ocean Management: A Regional Perspective-The Prospects for Commonwealth Maritime Co-operation in Asia and the Pacific 39 (Chaired by Satya Nandan, 1984), quoted in Virginia Commentaries, Volume II, above n 1 on page 4, 273–274. Cf Antunes, above n 85 on page 28, 100–102, who discusses difficulties associated with concurrent exercise of jurisdiction and argues that the exclusive nature of powers set out in LOSC Article 303(2) concerning archaeological and historical objects found at sea impedes their concurrent exercise.

23 For an overview of the negotiating process, see Virginia Commentaries, Volume II, above n 1 on page 4, 266–275.
contributed to its removal.\textsuperscript{24} Antunes identifies three contributing factors: (1) a reluctance to further complicate difficult negotiations concerning maritime delimitation; (2) a view that provisions concerning delimitation of the contiguous zone were unnecessary given the existence of specific obligations concerning delimitation of the EEZ (which as noted in Chapter 1.1 overlaps spatially with the contiguous zone); and (3) a view that in light of the nature of jurisdictional powers in the contiguous zone, such powers could overlap.\textsuperscript{25}

Article 24(3) of the 1958 Territorial Sea Convention provides as follows:

Where coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of the two States is measured.

The above provision employs a strict equidistance approach to maritime delimitation and does not prohibit a coastal State from extending its contiguous zone on a unilateral basis within an OCA, provided that the zone is not extended beyond the relevant equidistance line between opposite or adjacent coasts. In contrast to LOSC Article 15 (discussed above, concerning delimitation of the territorial sea), it does not limit the ability of a coastal State to undertake unilateral provisional management measures within an OCA in the context of historic title or other circumstances.\textsuperscript{26}

For States Parties to both the 1958 Territorial Sea Convention and the LOSC, the effect of Article 24(3) of the former Convention on management of a contiguous zone

\textsuperscript{24} Indeed, there does not appear to have been explicit and official discussion during UNCLOS III relating to the removal of Article 24(3): see Virginia Commentaries, Volume II, above n 1 on page 4, 274.

\textsuperscript{25} Antunes, above n 85 on page 28, 100.

\textsuperscript{26} However, it is important to keep in mind that opposite or adjacent coastal States often disagree in relation to other issues impacting upon the ability of a coastal State to undertake unilateral management measures in a territorial sea OCA. Common disagreements of this nature include: competing claims to territorial sovereignty, disputes concerning the applicability of LOSC Article 121 to certain insular features (concerning the ability of such features to generate an EEZ and continental shelf), and disputes concerning the baselines employed by each claimant State as a basis for generating maritime claims. All of these circumstances would entail disagreement concerning the spatial limits and location of an OCA, preventing clear determination of an equidistance line.
OCA is unclear.\textsuperscript{27} LOSC Article 311(1) provides in general terms that the Convention ‘shall prevail, as between States Parties’ over the 1958 Geneva Conventions. On one hand it could be argued that silence in LOSC Article 33 is insufficient to ‘prevail’ over the express provision set out in Article 24(3) of the 1958 Territorial Sea Convention. However, it could also be argued that Article 24(3) of the 1958 Territorial Sea Convention is inconsistent with the LOSC because it employs a strict equidistance approach to delimiting and managing OCAs that was clearly rejected at UNCLOS III.

If the former interpretation is accepted Article 24(3) provides a basis for unilateral provisional management of a contiguous zone OCA on each side of the relevant equidistance line. If the latter approach is accepted the LOSC establishes concurrent jurisdiction within a contiguous zone OCA for the reasons quoted above.

The uncertainty discussed in the previous paragraphs is of little practical relevance in the many situations where a contiguous zone OCA also consists of overlapping claims to an EEZ or continental shelf. In such situations LOSC Articles 74 and 83 establish specific obligations concerning maritime delimitation and the provisional management of OCAs. These provisions are discussed in further detail in Chapters 2.3.5 and 2.3.6.

2.3.4 Claims overlapping with claimed archipelagic waters

As noted in Chapter 1.1, LOSC Part IV recognises a special category of ‘archipelagic’ States and provides the rules under which these States may draw straight ‘archipelagic baselines’ around their constituent islands.\textsuperscript{28} Waters enclosed by archipelagic baselines, described as ‘archipelagic waters’, are subject to the sovereignty of the relevant archipelagic State, which is qualified by certain navigational rights afforded to for-

\textsuperscript{27}For further discussion see Antunes, above n 85 on page 28, 100–102.

eign vessels.\textsuperscript{29} LOSC Part IV has not been comprehensively implemented to date. Many coastal States with notional or claimed archipelagic status have not declared, or have only partially declared, archipelagic baselines enclosing archipelagic waters.\textsuperscript{30}

There are two notional scenarios where an archipelagic State could claim archipelagic waters in a manner that generates an OCA. First, an archipelagic State could declare archipelagic baselines that encircle or intersect claims of another coastal State to other maritime zones. This scenario has arisen in the waters surrounding Timor Island, where a 2009 revision by Indonesia of its archipelagic baseline system produced an overlap between Indonesian archipelagic waters and maritime zones claimed by East Timor appertaining to the Oecussi District (see Figure 2.1 for an illustrative map).\textsuperscript{31}

The second notional scenario is where two opposite or adjacent archipelagic States declare archipelagic baselines in a manner that generates overlapping claims to archipelagic waters. As far as the author is aware, this scenario has not arisen globally.

LOSC Article 47 contains two paragraphs of relevance to the provisional management of archipelagic OCAs. Both paragraphs were drafted in order to ‘to reduce the impact of the claiming of straight archipelagic baselines and the establishment of archipelagic waters on the rights and interests of neighboring States’.\textsuperscript{32}

Article 47(5) provides that a system of archipelagic baselines ‘shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State’. This provision limits the potential

\textsuperscript{29}Ibid. Apart from the traditional right of innocent passage through some parts of archipelagic waters, there is also the broader right of ‘archipelagic sea lanes passage’.

\textsuperscript{30}See Ibid, for an overview of State practice.


\textsuperscript{32}Virginia Commentaries, Volume II, above n 1 on page 4, 431.
Figure 2.1: Indonesian archipelagic baselines in the vicinity of East Timor. Source: Arsana and Schofield, note 31 on the preceding page.

size of an OCA subject to an archipelagic waters claim by restricting the ability of a coastal State to claim archipelagic waters that encircle or intersect with maritime zones claimed by another coastal State. It is unclear whether the provision prohibits the declaration of encircling or intersecting archipelagic baselines, or merely the ability of declared baselines to generate archipelagic waters in a particular area.\(^{33}\)

As shown in Figure 2.1, Indonesia’s archipelagic baselines completely encircle East Timorese maritime claims projected from the Oeccussi District, and are thus more consistent with the latter interpretation.

Article 47(6) provides that ‘If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, exist-

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\(^{33}\)This uncertainty would be an interesting area of further research, particularly in the context of relations between Indonesia and East Timor. The Virginia Commentaries do not document any detailed discussion during UNCLOS III of the meaning and scope of LOSC Article 47(5). Rather, they note that the provision echoes the general language found in LOSC Article 7(6) (concerning the declaration of straight baselines) that was inherited from the Article 4(5) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone: Virginia Commentaries, Volume II, above n 1 on page 4, 103, 431. LOSC Article 7(6) was drafted in order ‘to protect the access of a coastal State to any open sea area where it enjoys the freedom of navigation’: Virginia Commentaries, Volume II, above n 1 on page 4, 103. This policy rationale is narrower than that informing LOSC Article 47(5), which also seeks to protect the ability of a neighbouring coastal State to claim zones of national jurisdiction.
ing rights and all other legitimate interests which the latter State has traditionally
exercised in such waters and all rights stipulated by agreement between those States
shall continue to be respected. This provision prevents a coastal State from in-
voking claims to archipelagic waters to invalidate or prevail upon within an OCA
certain rights and interests of another coastal State.\textsuperscript{34} In relation to the provisional
management of an archipelagic OCA, it supports the continuation of prior practice
between adjacent coastal States. Malaysia was key proponent of including LOSC
Article 47(6) in the Convention. It was concerned about the potential for Indonesia,
through the declaration of archipelagic baselines, to assert jurisdiction in the waters
between the Malay Peninsula and Malaysian territory in Northern Borneo.\textsuperscript{35}

\textsuperscript{34}It is unclear what exactly interests are protected because the meaning of the term ‘traditionally’
was not discussed or negotiated during UNCLOS III: Virginia Commentaries, Volume II, above
n 1 on page 4, 432.

\textsuperscript{35}Virginia Commentaries, Volume II, above n 1 on page 4, 421. Malaysia’s concerns were also
addressed on a bilateral basis through the Jakarta Treaty, which was signed by Indonesia and
Malaysia on February 25 1982 and entered into force on 25 May 1984. The Treaty is an example
of a bilateral implementation of LOSC Article 47(6) – it designated areas in which Malaysian
traditional fishermen could continue to exercise their traditional fishing rights and guaranteed
rights of access and communication for Malaysian ships operating in Indonesian archipelagic
waters between peninsular Malaysia and Sabah/Sarawak: see Barbara Kwiatkowska and Etty
\textit{Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Regime}
(1991); and Barbara Kwiatkowska, ‘The Archipelagic Regime in Practice in the Philippines
and Indonesia – Making or Breaking International Law?’ (1991) 6 \textit{The International Journal
of Estuarine and Coastal Law} 1.
2.3.5 Overlapping claims to an exclusive economic zone

During UNCLOS III, several frameworks were proposed for managing overlapping claims to the EEZ.\(^\text{36}\) The framework that was eventually incorporated into the LOSC for managing overlapping EEZ claims forms part of Article 74 of the Convention, which provides as follows:

**Delimitation of the exclusive economic zone between States with opposite or adjacent coasts**

1. The delimitation of the exclusive economic zone 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.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV [regarding the settlement of disputes].

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

LOSC Article 74 is a product of a difficult compromise at UNCLOS III between two approaches to delimitation of the EEZ – one emphasizing application of an equidistance/median line, the other emphasizing the use of equitable principles.\(^\text{37}\) The language of the provision was famously characterised by the Permanent Court of Arbitration in the *Eritrea/Yemen* case as ‘a last minute endeavour ... to get agreement on a very controversial matter’, having been ‘consciously designed to decide as little as possible’.\(^\text{38}\) Reflecting the position of customary international law discussed

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\(^{36}\) For background, see Virginia Commentaries, Volume II, above n 1 on page 4, 796–816 and Sun Pyo Kim, above n 2 on page 4, 32–37.

\(^{37}\) See Virginia Commentaries, Volume II, above n 1 on page 4, 796–816.

in Chapter 1.1, LOSC Article 74(1) requires in general terms that delimitation of the EEZ must be effected ‘by agreement’ based on ‘international law’. The requirement to effect delimitation by agreement necessitates entry into meaningful negotiations where modification of negotiating positions is contemplated.39

At UNCLOS III several proposals were advanced to deal with deadlocked negotiations concerning delimitation of overlapping EEZ claims, including provision for a compulsory conciliation procedure or compulsory dispute settlement.40 The wording eventually incorporated in LOSC Article 74(2) refers to LOSC Part XV, which, as discussed in Chapter 2.5, provides for compulsory dispute settlement procedures but enables States to exclude their operation for disputes concerning maritime delimitation.41

In the early stages of UNCLOS III several States advocated the use of a median line as an interim maritime boundary pending agreement on overlapping claims.42 Other competing proposals included a moratorium on resource exploitation pending delimitation of an EEZ boundary,43 and a requirement that States implement provisional measures in a disputed zone taking into account equitable principles.44 Reference to an interim median line was removed from the 1976 Part II of the Revised Single Negotiating Text, Part II.45 Introducing this text, the Chairman of the Second Committee noted as follows:

39Virginia Commentaries, Volume II, above n 1 on page 4, 813. See also North Sea Continental Shelf cases, 1969 ICJ Rep 3, 47.

40See, eg, proposal by the Netherlands documented in the Virginia Commentaries, Volume II, above n 1 on page 4, 804.

41The application of LOSC Part XV to OCAs is discussed in detail in Chapter 2.5.


44Sun Pyo Kim, above n 2 on page 4, 33-35.

45See UN Doc A/CONF./.62/WP./.8/Rev.1/Part II.
However, paragraph 3 of former articles 61 and 70 [of the 1975 Informal Single Negotiating Text] posed a problem. Since the Conference may not adopt a compulsory jurisdictional procedure for the settlement of delimitation disputes, I felt that the reference to the median or equidistant line as an interim solution might not have the intended effect of encouraging agreements. In fact such reference might defeat the main purport of the article as set out in paragraph 1 [by preferring a median line approach over an equitable principles approach]. Nonetheless, the need for an interim solution was evident. The solution was, in my opinion, to propose wording in paragraph 3 which linked it more closely to paragraph 1.  

The final wording that was eventually incorporated into LOSC Article 74(3) establishes a general framework for the provisional management of maritime spaces subject to overlapping EEZ claims. It was drafted in an attempt two fulfil aims: the first to encourage management of the OCA; and the second to limit activity within an OCA having a detrimental impact on negotiation of a final delimitation agreement.

The meaning of LOSC Articles 74(3) was analysed in detail by the Arbitral Tribunal tasked with resolving certain legal aspects of a long running maritime boundary dispute between Guyana and Suriname. A flashpoint of this dispute was the so-called ‘CGX incident’ of June 2000 which involved a confrontation between Suriname naval vessels and the C.E. Thornton, a mobile drilling rig operated by a CGX Resources Inc. (CGX), a Canadian company. In 1998 Guyana granted an oil exploration concession to CGX, part of which was located in an area subject to overlapping continental shelf and EEZ claims promulgated by Guyana and Suriname.

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name. Figure 2.2 depicts the relevant OCA, bounded in this case by competing asserted positions as to the correct course of the maritime boundary, in addition to associated hydrocarbon concessions.

In 1999 CGX arranged for seismic testing and exploratory drilling to be conducted in the concession area and in May 2000 Suriname demanded that Guyana and CGX cease all oil exploration activities in the OCA. On June 3 2000 two Suriname naval vessels approached the C.E. Thornton, which at the time was operating within the portion of the concession area subject to overlapping claims, and ordered the rig and its service vessels to leave ‘Suriname waters’ within twelve hours. The crew of the C.E. Thornton subsequently detached the rig from the sea floor and withdrew from the OCA.

In the arbitral proceedings both Guyana and Suriname claimed that the other party had failed to comply with LOSC Articles 74(3) and 83(3). As discussed in Chapter 2.3.6, LOSC Article 83 (concerning delimitation of the continental shelf) is identical in substance, mutatis mutandis, to LOSC Article 74. The Tribunal made the following comments about both articles in an award published 17 September 2007:

Articles 74(3) and 83(3) of the Convention impose two obligations upon States Parties in the context of a boundary dispute concerning the continental shelf and exclusive economic zone respectively. The two obligations simultaneously attempt to promote and limit activities in a dispute maritime area. The first obligation is that, pending a final delimitation, States Parties are required to make “every effort to enter into provisional arrangements of a practical nature.” The second is that the States Parties must, during that period, make “every effort ... not to jeopardize or hamper the reaching of the final agreement.”

49 The factual background of the dispute is summarised in Guyana–Suriname Award, above n 48, [137 – 156].
50 Ibid.
51 Ibid. In communications between the rig crew and the naval vessels, Suriname naval personnel threatened unspecified consequences if the order was not complied with, stating: ‘This is the Suriname Navy. You are in Suriname waters without authority of the Suriname Government to conduct economic activities here. I order you to stop immediately with these activities and leave the Suriname waters.’ See the witness statement of Mr Edward Netterville discussed at Guyana–Suriname Award, above n 48, [433 – 434].
52 Ibid.
53 Guyana–Suriname Award, above n 48, [459].
Figure 2.2: Guyana – Suriname dispute: overlapping maritime claims and hydrocarbon concessions. Source: Hoyle, note 48 on page 51.
In relation to the first obligation set out in LOSC Articles 74(3) and 83(3), concerning provisional arrangements of a practical nature, the Tribunal noted as follows (footnotes omitted):\(^{54}\)

Although the language “every effort” leaves “some room for interpretation by the States concerned, or by any dispute settlement body”, it is the opinion of the Tribunal that the language in which the obligation is framed imposes on the Parties a duty to negotiate in good faith. Indeed, the inclusion of the phrase “in a spirit of understanding and cooperation” indicates the drafters’ intent to require of the parties a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement. Such an approach is particularly to be expected of the parties in view of the fact that any provisional arrangements arrived at are by definition temporary and will be without prejudice to the final delimitation.

To what extent does the obligation to negotiate in good faith set out in LOSC Articles 74(3) and 83(3) limit the ability of claimant coastal States to undertake provisional management measures within an OCA on a unilateral basis? Both Guyana and Suriname were found by the Tribunal to have breached their respective obligations to negotiate in good faith concerning the establishment of provisional arrangements of a practical nature.\(^{55}\) Suriname was found to have breached its obligation due to, \textit{inter alia}, the lack of active attempts to maintain or seek negotiations with Guyana concerning the overlapping claim area and the oil exploration activities of CGX, and the failure to engage in a last-minute dialogue proposed by Guyana prior the CGX incident.\(^{56}\) Guyana was found to have breached its obligation due to, \textit{inter alia}, the failure to directly inform Suriname of plans for exploratory drilling in the OCA, and the failure to seek to engage Suriname in discussions concerning any drilling operations.\(^{57}\) The Tribunal proceeded to specify several actions that

\(^{54}\)Guyana–Suriname Award, above n 48, [461].

\(^{55}\)Guyana–Suriname Award, above n 48, [461].

\(^{56}\)Guyana–Suriname Award, above n 48, [476], where the Tribunal noted: ‘Instead of attempting to engage Guyana in a spirit of understanding and cooperation as required by the Convention, Suriname opted for a harder stance. Even though Guyana attempted to engage it in a dialogue which may have led to a satisfactory solution for both Parties, Suriname resorted to self-help in threatening the CGX rig, in violation of the Convention.’ Note also that the Tribunal held that the actions of the Suriname Navy during the CGX incident ‘constituted a threat of the use of force in contravention of the [Law of the Sea] Convention, the UN Charter and general international law.’ Guyana–Suriname Award, above n 48, [445].

\(^{57}\)Guyana–Suriname Award, above n 48, [477].
Guyana could have been taken in accordance with the obligation to negotiate in good faith concerning provisional management of the OCA. These included:

(1) giving Suriname official and detailed notice of the planned activities, (2) seeking cooperation of Suriname in undertaking the activities, (3) offering to share the results of the exploration and giving Suriname an opportunity to observe the activities, and (4) offering to share all the financial benefits received from the exploratory activities.  

The approach of the Arbitral Tribunal to interpreting and applying the obligation to ‘make every effort to enter into provisional arrangements of a practical nature’ does not prohibit unilateral provisional management of an OCA, provided that active and continuous steps are taken to (1) inform the other claimant State of proposed actions and (2) engage that State in discussions concerning the proposed actions. These steps notwithstanding, a refusal to modify unilateral provisional management measures would likely be inconsistent with the conciliatory approach that was mandated by the Tribunal.

In relation to the second obligation set out in LOSC Articles 74(3) and 83(3), concerning actions that may jeopardise or hamper the reaching of the final agreement, the Tribunal noted as follows:

The second obligation ... is an important aspect of the Convention’s objective of strengthening peace and friendly relations between nations and of settling disputes peacefully. However, it is important to note that this obligation was not intended to preclude all activities in a disputed maritime area ...

The Tribunal’s interpretation of Article 74(3) and 83(3) provides scope for coastal States asserting overlapping EEZ or continental shelf claims to undertake certain provisional management measures on a unilateral basis within the OCA. Only activities that may jeopardise or hamper the reaching of a final delimitation agreement

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58 Ibid.
59 Interestingly, both Guyana and Suriname had been issuing fishing licenses and patrolling the waters within the OCA: Guyana–Suriname Award, above n 48, [149].
60 Guyana–Suriname Award, above n 48, [465].
61 At [465] the Tribunal also quoted the following observation made in the Virginia Commentaries: ‘[the obligation] does not exclude the conduct of some activities by the States concerned within the disputed area, so long as those activities would not have the effect of prejudicing the final agreement’: Virginia Commentaries, Volume II, above n 1 on page 4, 815.
are prohibited. Drawing on jurisprudence of international courts and tribunals on the application of provisional measures, the Tribunal proposed an analytical framework for determining what unilateral management activities are permitted within an OCA, noting that:

It should not be permissible for a party to a dispute to undertake any unilateral activity that might affect the other party’s rights in a permanent manner. However, international courts and tribunals should also be careful not to stifle the parties’ ability to pursue economic development in a disputed area during a boundary dispute, as the resolution of such disputes will typically be a time-consuming process. This Tribunal’s interpretation of the obligation to make every effort not to hamper or jeopardise the reaching of a final agreement must reflect this delicate balance. It is the Tribunal’s opinion that drawing a distinction between activities having a permanent physical impact on the marine environment and those that do not, accomplishes this and is consistent with other aspects of the law of the sea and international law.

Applying this distinction (between activities having a permanent physical impact on the marine environment and those that do not) to oil exploration activities, the Tribunal held that Guyana’s authorisation of exploratory drilling was contrary to the obligation not to jeopardise or hamper the reaching of a final delimitation agreement. The Tribunal also took pains to emphasise that oil exploration activities having a non-permanent environmental impact were generally permissible, noting that, in contrast to exploratory drilling, ‘[s]eismic activity on the other hand should be permissible in a disputed area.’

For reasons unrelated to environmental impact, Suriname was also found by the Tribunal to have acted contrary to the obligation not to jeopardise or hamper the reaching of a final delimitation agreement. The Tribunal noted that ‘Suriname had a number of peaceful options to address Guyana’s authorisation of exploratory drilling’, namely entry into discussions with Guyana concerning provisional joint

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63 Guyana–Suriname Award, above n 48, [470].

64 See Guyana–Suriname Award, above n 48, [479 – 481, 486].

65 Guyana–Suriname Award, above n 48, [481]. See also [466 – 467].

66 Guyana–Suriname Award, above n 48, [483 – 484].
management of the OCA and recourse to the compulsory and binding dispute settlement procedures set out in LOSC Part XV. In this context the actions of the Suriname navy during the CGX incident, which were characterised as a ‘threat of force’, were deemed to have jeopardised the reaching of a final delimitation agreement between Guyana and Suriname.

To what extent does the obligation not to jeopardise or hamper the reaching of a final delimitation agreement limit the ability of claimant coastal States to undertake provisional management measures within an OCA on a unilateral basis? The approach of the Arbitral Tribunal to interpreting and applying this obligation clearly proscribes unilateral activities within the OCA having a permanent physical impact on the marine environment – including exploratory drilling but excluding seismic surveys. The Tribunal’s approach is arguably permissive of environmentally damaging activities, including unsustainable fishing practices and high levels of marine pollution, that are not manifestly permanent. Also, it is unclear whether the use of the word *physical* was intended to proscribe only certain *non-biological* impacts.

As noted above, the actions of the Suriname navy during the CGX incident were proscribed because, in the opinion of the Tribunal, there were several less-confrontational options available for responding to Guyana’s actions in the context of the dispute. This finding implicitly recognises an ill-defined category of activities that jeopardise the reaching of a final delimitation agreement due to their *detrimental effect on relations* between the claimant States. It is unclear whether actions falling short of a threat to use force fall within this category. As discussed in Chapter 4, claimant coastal States are often highly sensitive to activities conducted by another claimant coastal State within or relating to the relevant OCA. A wide variety of coastal State actions, including the enactment of domestic legislation, fisheries regulation, issuing of hydrocarbon concessions, and operations conducted within OCAs by law-

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67Ibid. LOSC Part XV is discussed in detail in Chapter 2.5, below.
68Ibid.
69Such activities are, however, prohibited to varying degrees by other international legal obligations, including those set out in LOSC Part XII (concerning protection and preservation of the marine environment). For further discussion of other relevant obligations see Chapter 2.4.
enforcement and military vessels, have attracted strong diplomatic protests from other coastal States asserting an overlapping jurisdictional claim.\textsuperscript{70}

2.3.6 Overlapping entitlements to the continental shelf

LOSC Article 83 establishes a framework for managing continental shelf OCAs\textsuperscript{71} that, as discussed above, is identical in substance, \textit{mutatis mutandis}, to LOSC Article 74 (concerning delimitation of the EEZ). The consistency between LOSC Articles 74 and 83 is a sensible drafting choice given the jurisdictional overlaps and functional relationship between the EEZ and continental shelf: As noted in Chapter 1.1, in both of these zones a coastal State is attributed a package of sovereign rights concerning the seabed and subsoil, with both packages of sovereign rights being expressly harmonised by LOSC Article 56(3).

Negotiations at UNCLOS III concerning LOSC Articles 74 and 83 were conducted together and similar negotiating positions were applied to both articles.\textsuperscript{72} In particular, long-standing positions on the delimitation of the continental shelf were determining influences in the negotiation of provisions concerning delimitation of the exclusive economic zone.\textsuperscript{73}

Despite the consistency between LOSC Articles 74 and 83, the legal framework concerning overlapping continental shelf entitlements retains distinct components. Several coastal States continue to claim continental shelf entitlements based on the principle of natural prolongation.\textsuperscript{74} In addition to obligations set out in the LOSC,

\textsuperscript{70}For indicative examples of State practice from the South China Sea see: Robert Beckman, ‘Scarborough Shoal: Flashpoint for Confrontation or Opportunity for Cooperation?’ (24 April 2012) \textit{RSIS Commentaries} No. 072/2012, available at <http://cil.nus.edu.sg/>; Schofield et al, 7 on page 5. For another regional example (involving Argentina and the United Kingdom) see Chapter 3.3.1.

\textsuperscript{71}For background, see Virginia Commentaries, Volume II, above n 1 on page 4, 948–985.

\textsuperscript{72}See Virginia Commentaries, Volume II, above n 1 on page 4, 801.

\textsuperscript{73}The concept of an EEZ was developed during UNCLOS III and provisions concerning its delimitation could have been approached de novo: Virginia Commentaries, Volume II, above n 1 on page 4, 801.

\textsuperscript{74}The People’s Republic of China, for example, relies on the natural prolongation principle as the basis of its claims concerning continental shelf boundaries in the East China Sea: see Schofield and Townsend-Gault, above n 3 on page 5.
States Parties to the 1958 Convention on the Continental Shelf are also subject to the following obligation concerning the delimitation of overlapping claims:

Article 6

1. Where the same continental shelf boundary 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 line is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. ....

The language quoted above notionally permits a coastal State to unilaterally manage the part of a continental shelf OCA located seaward of an equidistance line, unless ‘special circumstances’ justify the designation of an alternative boundary. For the same reasons discussed in Section 2.3.2 (in relation to territorial sea OCAs), the broad reference to ‘special circumstances’, and the diverse range of such circumstances recognised in ICJ jurisprudence, dramatically curtail the ability of a coastal State to rely on Article 6 of the Convention on the Continental shelf as a basis for undertaking unilateral management measures within a continental shelf OCA.75

In any event, and as noted in Chapter 2.3.3, LOSC Article 311(1) provides in general terms that the Convention ‘shall prevail, as between States Parties’ over the 1958 Geneva Conventions. Accordingly, for States Parties to both the 1958 Convention on the Continental Shelf and the LOSC, the provisions concerning maritime delimitation and management of OCAs set out in LOSC Article 83 prevail over those set out in Article 6 of the Convention on the Continental Shelf.

75Cf Sun Pyo Kim, above n 2 on page 4, 28 – 29.
2.4 Other obligations applicable to the management of OCAs

The obligations discussed in Section 2.3 are supplemented and qualified by several obligations that do not relate specifically to the management of OCAs but are nonetheless relevant because they prescribe certain modes of conduct that remain applicable in that context. The following paragraphs identify and discuss the general features of these obligations.

The fundamental principles of international law set out in the UN Charter prescribe general modalities of behaviour for coastal States engaged in a dispute concerning an OCA. Article 2(3) of the UN Charter provides that ‘All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.’ The effect of UN Charter obligations on cooperation between States is addressed in the following paragraph of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:76

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

Coastal States are therefore obliged to conduct their international relations concerning OCAs in a peaceful cooperative manner without prejudice to international peace and security.

The LOSC contains several obligations concerning the conduct of international relations that impact upon the management of OCAs. LOSC Article 300 incorporates customary principles of good faith into the LOSC, providing that ‘States Parties

76General Assembly Resolution 2625 (XXV), 24 October 1970.
shall fulfill 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." LOSC Article 301 reiterates UN Charter obligations in the context of the law of the sea, providing as follows:

**Peaceful uses of the seas**

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.

The LOSC also contains a wide variety of obligations that emphasise, call for or mandate cooperation in specific functional and geographic contexts. These obligations remain applicable in the context of overlapping jurisdictional claims and thereby impact upon the management of OCAs by the relevant claimant coastal States. Of particular relevance is LOSC Article 123, which establishes an obligation concerning cooperation, including in specific functional contexts, relating to the management of enclosed or semi-enclosed seas (including those that contain OCAs). It provides as follows:

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

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77 See, eg, LOSC, Article 41 ‘Sea lanes and traffic separation schemes in straits used for international navigation’; Article 43 ‘Navigational and safety aids and other improvements and the prevention, reduction and control of pollution’; Article 61 ‘Conservation of the living resources’; Articles 64-66 regarding living resources located in the exclusive economic zone; Articles 69,70 regarding ‘landlocked’ and ‘geographically disadvantaged’ states; Article 98 ‘Duty to render assistance’; Article 100 ‘Duty to cooperate in the repression of piracy’; Article 123 ‘Cooperation of States bordering enclosed or semi-enclosed seas’; Articles 192-237 regarding protection and preservation of the marine environment; Articles 242-244 regarding marine scientific research; and Article 303 ‘Archaeological and historical objects found at sea’.

78 LOSC Article 122 defines the term ‘enclosed or semi-enclosed sea’ as follows: ‘... a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.’ A large number of maritime spaces consistent with this definition contain areas subject to overlapping claims to zones of national jurisdiction. For further discussion of LOSC Article 122 and associated negotiations at UNCLOS III, see Virginia Commentaries, Volume III, 346–353. See also Ian Townsend-Gault, ‘Maritime Cooperation in a Functional Perspective’ in Schofield (ed), above n 32 on page 11.
a. to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

b. to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

c. to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

d. to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

The language quoted above encourages States bordering an enclosed or semi-enclosed sea to cooperate but does not include language mandating them to do so. Rather, States ‘should cooperate’ to establish cooperative measures and, through the use of the phrase ‘shall endeavour’, are required to attempt to do so in the specifically enumerated functional contexts. The Virginia Commentaries characterise LOSC Article 123 as being ‘couched in the language of exhortation’. During UNCLOS III a proposal to replace the word ‘should’ in the first sentence of the Article with ‘shall’ was not accepted.

Another relevant provision is LOSC Article 197, which requires States to cooperate in relation to the protection and preservation of the marine environment (including the marine environment within OCAs). It provides as follows:

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79 Virginia Commentaries, Volume III, above n 1 on page 4, 366. Referring to the use of the phrase ‘shall endeavour’ in LOSC Article 207 (concerning marine pollution from land based sources), Erik Franckx notes that provisions of the Article are ‘couched in cautious language which tries to accommodate the territorial sovereignty of states.’: Erik Franckx, ‘Regional Marine Environment Protection Regimes in the Context of UNCLOS’ (1998) 13 The International Journal of Marine and Coastal Law 307, 314. While discussing LOSC provisions concerning marine environmental protection, he offers the following assessment of LOSC Article 123: ‘Part IX is moreover drafted with extremely vague wording, containing no substantive obligations whatsoever for the states involved. Contrary to what might have been the original idea of some states, Part IX does not really add anything substantial to the discussion. Instead of being highly relevant, therefore, the conclusion must be that Part IX does not establish a concrete regime for a specific regional approach [to marine environmental protection].’: Ibid, 314 – 315.

80 See Virginia Commentaries, Volume III, above n 1 on page 4, 364, referring to a proposal by ‘Korea’.

Cooperation on a global or regional basis

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.


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(SUA Convention) and associated Protocols;\textsuperscript{88} and International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention).\textsuperscript{89}

A detailed discussion of these instruments and their implementation within OCAs falls beyond the scope of this thesis, and is a potential area of further research. For the present purposes it is relevant to note that they contain several obligations to exercise particular functional components of coastal State jurisdiction, including coastal State jurisdiction within an OCA, in a specified manner. In contrast to the specific obligations discussed above in Section 2.3 they have no bearing on the \textit{spatial or functional entitlement} to exercise coastal State jurisdiction within an OCA (or elsewhere). Critically, none of the instruments listed in the previous paragraph contain specific guidance concerning how they are to be implemented in the context of overlapping claims and/or within OCAs. Accordingly, the presence of OCAs creates significant ambiguities concerning the implementation of a wide variety of international instruments.


2.5 Dispute settlement under LOSC Part XV

States Parties to the LOSC are obliged to conduct any dispute concerning maritime delimitation and OCA management in accordance with the framework set out in LOSC Part XV. As noted in Section 2.1, the provisions of LOSC Part XV (and any applicable principles of State responsibility) are relevant to consider because they determine the ability of international dispute settlement bodies to influence or prescribe modalities of OCA management (for example through the publication of legally binding judgments or provisional measures). Part XV contains a complex series of provisions that are divided into the following sections:

- Section 1 – General provisions (including non-compulsory procedures);
- Section 2 – Compulsory procedures entailing binding decisions;
- Section 3 – Limitations and exceptions to the applicability of Section 2.

The procedures set out in Part XV Section 2 are of particular interest because they empower international dispute settlement bodies (including the International Court of Justice and the International Tribunal for the Law of the Sea (ITLOS)) to mandate modalities of coastal State behaviour concerning OCAs in certain circumstances. The following paragraphs provide an overview of each Section of the dispute settlement mechanism set out in LOSC Part XV and examine their implications for OCA management.

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2.5.1 General provisions and non-compulsory procedures

LOSC Part XV Section 1 reiterates fundamental obligations of peaceful dispute settlement set out in the UN Charter\textsuperscript{92} and establishes a framework of non-compulsory dispute settlement procedures. States Parties to the Convention are subject to an obligation to exchange views\textsuperscript{93} and may resolve their dispute by recourse to a non-compulsory conciliation procedure.\textsuperscript{94} In accordance with LOSC Articles 280-282, States Parties are afforded considerable flexibility to resolve a dispute by peaceful means of their own choice and thereby preclude the operation of dispute settlement procedures in the Convention.

Article 282 of the Convention establishes a specific deferral to compulsory and binding procedures in other international agreements by providing that such procedures apply in lieu of LOSC procedures unless the Parties otherwise agree. In accordance with Article 281 of the Convention, States Parties may have recourse to LOSC dispute settlement procedures where no settlement has been reached under an alternative procedure, ‘unless agreement between the parties excludes any further procedure.’ As discussed in further detail in Chapter 4.9, the meaning of these Articles and their interaction with ‘compulsory procedures entailing binding decisions’ set out in the LOSC has been a central issue in several international disputes and is the subject of considerable scholarly debate.\textsuperscript{95}

\textsuperscript{92}LOSC, Article 279, which refers to the following Charter obligations: Article 2(3) of the UN Charter establishes a fundamental obligation of members States to ‘settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.’ Article 33(1) of the UN Charter refers to an indicative list of peaceful means, providing in full: ‘The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.’

\textsuperscript{93}LOSC, Article 283.

\textsuperscript{94}LOSC, Article 284.

2.5.2 Compulsory procedures entailing binding decisions

LOSC Part XV Section 2 sets out a number of such procedures, which become operative in accordance with Articles 286 and 287 of the Convention where no settlement has been reached by recourse to the procedures referred to in Part XV Section 1. Article 287 refers to four alternative fora for compulsory dispute settlement procedures, namely: the International Tribunal for the Law of the Sea (ITLOS); the International Court of Justice; an arbitral tribunal constituted in accordance with Annex VII of the Convention; and a special Arbitral Tribunal constituted in accordance with Annex VIII of the Convention.

States are entitled to choose, by means of a written declaration, one or more of these dispute settlement fora at any time on or after becoming party to the Convention. State Parties that have not made a declaration indicating their choice of fora are deemed to have accepted arbitration in accordance with Annex VII of the Convention. If the parties to a dispute have chosen the same forum for dispute settlement under Article 287, the dispute may be submitted only to that forum unless the parties otherwise agree. If the parties to a dispute have not chosen the same forum for dispute settlement under Article 287, the dispute may be submitted only to ‘Annex VII’ arbitration unless the parties otherwise agree.

If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under Part XV or Part XI, Section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision. ITLOS is empowered to prescribe, modify or revoke provisional measures pending the constitution of the court or tribunal to which the dispute has been submitted.

Article 292 of the LOSC establishes a specific compulsory procedure for disputes concerning LOSC article 73, which requires the prompt release of vessels and crews

\[96\text{LOS}C\text{, Article 290.}\]
\[97\text{LOS}C\text{, Article 290(5).}\]
detained in exercise of a coastal State’s right to enforce its laws and regulations regarding the conservation and management of living resources in its EEZ. Where the authorities of a coastal State have detained a vessel flying the flag of another State, disputes regarding the requirement of prompt release may be heard by ITLOS or a tribunal accepted by the detaining State under article 287. The tribunal hearing the dispute is empowered to determine, without prejudice to the merits of any case before national fora, a reasonable bond or security and order the release of the detained vessel or its crew.99

2.5.3 Limitations and exceptions to the applicability of Section 2 of Part XV

The requirement set out in Part XV Section 2 of the LOSC to participate in compulsory procedures entailing binding decisions is subject to a number of exceptions. The exceptions described below are particularly relevant to disputes concerning the management of OCAs. They can be invoked by claimant coastal States in order to limit the ability of dispute settlement bodies referred to in LOSC Part XV Section 2 to prescribe modalities of OCA management.100

Article 298 of the LOSC enables States to exclude the application of compulsory dispute settlement procedures by opting out of such procedures in relation to one or more of three categories of dispute, namely:

(a) disputes concerning the interpretation and application of LOSC Articles 15, 74 and 83 ‘relating to’ the delimitation of maritime boundaries and claims to historic waters;

(b) disputes concerning military and law enforcement activities;101

98 LOSC, Article 292(1).
99 LOSC, Article 292(4).
100 These are set out in LOSC Part XV Section 3, entitled ‘Limitations and Exceptions to Applicability of Section 2’.
101 It is unclear whether the optional exception regarding law enforcement activities by a coastal State may be invoked in relation to disputes where law enforcement activities of one coastal State intrude into the territorial sea of an adjacent or neighbouring coastal State (for example
disputes in respect of which the UN Security Council is exercising the functions assigned to it by the UN Charter.

A State may invoke an optional exception by special declaration, at or after ratification of the LOSC.\(^\text{102}\) Exception (a) has been invoked by many coastal States that assert overlapping claims to maritime jurisdiction.\(^\text{103}\) It encompasses all disputes ‘relating to’ the delimitation of territorial sea, EEZ or continental shelf OCAs.\(^\text{104}\) Exception (a) does not explicitly refer to disputes concerning the management of OCAs, or the entitlement to exercise jurisdiction within such areas. However, such matters are in practice very closely associated with maritime boundary disputes, and do not appear to have been treated as distinct issues during the negotiation of Article 298 at UNCLOS III.\(^\text{105}\) In the author’s view, such matters are therefore ‘related to’ maritime boundary delimitation for the purposes of exception (a), and may be excluded by declaration from compulsory binding dispute settlement.

Disputes relating to delimitation of maritime boundaries (per LOSC Articles 15, 74 and 83) and claims to historic waters remain subject to a compulsory conciliation procedure under Section 2 of Annex V of the LOSC that may be initiated at a disputant’s request.\(^\text{106}\) States are obliged to negotiate an agreement on the basis of the report presented by the conciliation commission.\(^\text{107}\) The commission is prohibited from accepting submissions concerning a dispute that ‘necessarily involves the con-

\(^{102}\) LOSC Article 298(1).


\(^{104}\) A dispute between Indonesia and East Timor concerning LOSC Part IV and the designation by Indonesia of archipelagic baselines (discussed in Chapter 2.3.4) would not be excluded by Article 298 from compulsory and binding dispute settlement.

\(^{105}\) See Virginia Commentaries, Volume V, above n 1 on page 4, 107–141.

\(^{106}\) See LOSC, Article 298(1)(a)(i)-(iii).

\(^{107}\) LOSC, Article 298(1)(a)(ii).
current consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory.\textsuperscript{108} This language is indicative of an important jurisdictional limitation of LOSC procedures: To the extent that a dispute concerning the management of an OCA is linked to questions of sovereignty, such a dispute would fall beyond the subject matter jurisdiction of the LOSC and the compulsory and binding dispute settlement procedures set out in the Convention.\textsuperscript{109}

LOSC Article 297 also exempts certain disputes from the application Part XV Section 2 procedures. Article 297(1) provides that disputes concerning ‘the exercise by a coastal State of its sovereign rights or jurisdiction’ shall not be subject to the compulsory procedures entailing binding decisions set out in LOSC Part XV Section 2 except in the following cases:

\begin{enumerate}[(a)]
\item when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;
\item when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
\item when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and
\end{enumerate}

\textsuperscript{108}LOSC, Article 298(1)(a)(i).
\textsuperscript{109}Note that LOSC Article 293(1) provides that ‘A court or tribunal having jurisdiction under this section [Part XV Section 2] shall apply this Convention and other rules of international law not incompatible with this Convention.’ Could a court or tribunal use this provision as a basis for adjudicating a territorial sovereignty dispute? In the author’s opinion, no. The jurisdiction of a court or tribunal seized of a matter pursuant to the compulsory binding procedures set out in LOSC Part XV Section 2 would, in accordance with LOSC Article 286, be confined to disputes concerning the interpretation and application of the LOSC. None of the rules and principles set out in the Convention impact upon the validity of claims to territorial sovereignty.
which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

To what extent does this exemption cover disputes concerning activity within OCAs?

The default component of Article 297(1) is broadly framed, covering the ‘exercise’ by a coastal State of ‘sovereign rights or jurisdiction’ both within and outside of OCAs. However, compulsory binding procedures remain available if one or more claimant coastal States were alleged to have infringed, within an OCA, the navigational and other freedoms referred to in exceptions (a) and (b) above. Similarly, exception (c) does not prohibit compulsory binding settlement of certain disputes concerning marine environmental protection in OCAs. However, it is difficult to see how a dispute settlement body could pass judgment on the allegations referred to in exceptions (a), (b), and (c), without first determining which coastal State was entitled to exercise jurisdiction in the relevant area. For disputes relating to territorial sea, EEZ and continental shelf OCAs, the dispute settlement body would lack jurisdiction to make this determination on a compulsory binding basis if one or more of the State Parties had invoked the optional exclusion set out in LOSC Article 298(1)(a).

Paragraph 2 of Article 297 provides that disputes concerning marine scientific research (including such activity within OCAs) shall be subject to Part XV Section 2 procedures. This provision is heavily qualified by a requirement that States shall not be ... obliged to accept the submission to such settlement of any dispute arising out of: (i) the exercise by the coastal State of a right or discretion in accordance with article 246 [concerning maritime scientific research in the EEZ and on the continental shelf]; or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.

Paragraph 3 of Article 297 establishes a basic position that disputes with regard to fisheries shall be settled in accordance with the procedures set out in Part XV
Section 2 of the Convention. This basic position is qualified by a requirement that States shall not be . . .

obliged to accept the submission to such settlement [compulsory procedures under article 287] of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary power for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

However, in three specified circumstances where sovereign rights are flagrantly exercised to the detriment of other States, a ‘compulsory conciliation’ procedure under Section 2 of Annex V of the LOSC may be initiated at a disputant’s request.\textsuperscript{110} The three specified circumstances comprise areas of potential dispute concerning the OCA management, namely allegations that:

a) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered; or

b) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or

c) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

\textsuperscript{110}\text{LOS\textasciitilde; Article 297(3)(b).}
2.5.4 Principles of State responsibility

If an OCA management dispute is subject to compulsory binding dispute settlement per LOSC Part XV, the ability of the international court or tribunal to prescribe modalities of OCA management is also influenced by principles of State responsibility. Essentially, these principles determine whether or not the States Parties, as a matter of international law, are (1) responsible for particular acts that form the subject matter of the dispute, and (2) are obliged to make reparation (e.g. modalities of OCA management) to the extent that particular acts are unlawful. At a conceptual level, the responsibility of a State arises from two cumulative factors: First, the State must owe an international legal obligation to another State or States (e.g. the various obligations surveyed previously in this Chapter); second, an act or omission must occur which violates that obligation, and which is imputable to the State.

111 Shaw, above n 50 on page 14, notes that ‘State responsibility is a fundamental principle of international law arising out of the nature of the international legal system and the doctrines of State sovereignty and equality of States. It provides that whenever one State commits an internationally unlawful act against another State, international responsibility is established between the two. A breach of an international obligation gives rise to a requirement for reparation.’ See also Spanish Zone of Morocco Claims (1923) 2 RIAA 615, 641, where it is commented that ‘responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.’ See also Chorzów Factory (Merits) (1928) PCIJ (Series A) No. 17, 29, where the Permanent Court of International Justice emphasised that ‘it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation.’

112 See Articles 1 and 2 of the International Law Commission’s Draft Articles on State Responsibility: ‘Responsibility of States for Internationally Wrongful Acts’ (2001) available at <http://untreaty.un.org/ilc/>. See also James Crawford, The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries (2002). See also Shaw, above n 50 on page 14, 696. Shaw identifies a third requisite factor, namely, that ‘loss or damage has resulted from the unlawful act or omission.’ A general requirement of loss or damage is arguably redundant, as, in the context of relations between States, the ‘loss or damage’ suffered may be the breach of a legal duty itself. The violation of jurisdictional rights conferred by the LOSC, for example illegal navigation in the territorial sea, or the illegal boarding of a foreign-flagged vessel on the high seas, is an example of such loss or damage: see Brownlie above n 2 on page 36, 441–442. In Total S.A v Argentine Republic, an arbitral tribunal convened pursuant to the ICSID Convention commented that ‘[a] basic issue in the present dispute is whether Argentina has committed an internationally wrongful act, that is whether it has breached the international obligations contained in the BIT by conduct attributable to it . . . these two conditions are sufficient to establish such a wrongful act giving rise to international responsibility. Having caused damage is not an additional requirement, except if the content of the primary obligation breached has an object or implies an obligation to cause damages’: (ICSID Case No. ARB/04/01), Decision on Objections to Jurisdiction, 25 August 2006, Para 89.
A variety of principles have been formulated to address the question of whether acts or omissions are imputable to a State, notwithstanding the lawfulness of such actions. The International Law Commission’s Draft Articles on State Responsibility (ILC Articles) represent the most substantial contribution to the development of principles of this nature.\textsuperscript{113} On the basis of an extensive review of State practice, the ILC Articles set out various principles of imputability, including tests that identify whether acts or omissions are capable of being ‘attributed’ to a State, independently of the conduct of other States.\textsuperscript{114} Key principles include the following:

ILC Article 4 provides that the conduct of any State organ or official is considered an act of the State concerned under international law, whether the organ or official exercises legislative, executive or judicial functions.\textsuperscript{115} ILC Articles 5 and 6 set out principles which would impute to a coastal State, respectively, the conduct of persons or entities exercising elements of government authority,\textsuperscript{116} and or the conduct of organs placed at the disposal of the coastal State by another State.\textsuperscript{117} ILC Article 7, which is ‘firmly established ... by international jurisprudence, State practice and the writings of jurists’\textsuperscript{118} provides that:

\begin{quote}
The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered as an act of the State under international law if the organ, person or entity acts in that capacity, even if its exceeds authority or contravenes instructions.
\end{quote}

The above principles significantly curtail the ability of States involved in an OCA management dispute to distance themselves from activities undertaken or authorised by their respective governments and government officials.

\textsuperscript{113}ILC Articles, above n 112 on the previous page. See also Gillian Triggs, \textit{International Law: Contemporary Principles and Practices} (2005) 417–421.
\textsuperscript{114}See ILC Articles, above n 112 on the preceding page, Articles 4–11. See also Crawford, above n 112 on the previous page, 91–123, 145.
\textsuperscript{115}Shaw, above n 50 on page 14, 701–702. See also Crawford, above n 112 on the previous page, 94–99.
\textsuperscript{116}See Crawford, above n 112 on the preceding page, 100–102, regarding ILC Article 5 and associated State practice.
\textsuperscript{117}See ibid, 103–105, regarding ILC Article 6 and associated State practice.
\textsuperscript{118}Ibid, 107.
Although principles of imputability set out in the ILC Articles are derived from State practice, their relevance, in the present context, as indicia of the legal responsibility of a State (and the ability of a court or tribunal to prescribe modalities of OCA management) is limited by the factors outlined below:

Redundant nature of principles of imputability:

The nature of a breach of an international legal obligation by a State may render an enquiry into questions of imputability unnecessary of redundant.\(^{119}\) As Brownlie notes:

> In general, broad formulae on state responsibility are unhelpful ... it is often said that responsibility only arises when the act or omission complained of is imputable to a state. Imputability would seem to be a superfluous notion, since the major issue in a given situation is whether there has been a breach of duty: the content of ‘imputability’ will vary according to the particular duty, the nature of the breach, and so on.\(^{120}\)

This observation is especially pertinent for any disputes concerning the obligations surveyed previously in this Chapter, many of which contain positive duties, which if breached would be inherently imputable to the relevant State. For example, a key breach of duty at issue in the Guyana–Suriname dispute – the obligation under LOSC Article 74(3)/83(3) to make every effort to develop provisional management arrangements and refrain from jeopardising the final delimitation – was alone sufficient to establish Guyana and Suriname’s legal responsibility.\(^{121}\) In cases where acts or omissions are not inherently imputable to a State (e.g. the threat of force by a patrol vessel in the Guyana–Suriname dispute) international courts and tribunals have also preferred to consider State responsibility as arising implicitly from unlawful conduct alone.\(^{122}\) In such cases, concepts of imputability are most commonly

\(^{119}\) See, generally, Brownlie, above n 2 on page 36, 419–456.

\(^{120}\) Ibid, 422.

\(^{121}\) See also discussion in Brownlie, above n 2 on page 36, 11–18.

\(^{122}\) The threat of force undertaken by the patrol vessel was only imputable to Suriname to the extent that, for example, the patrol vessel was exercising elements of Suriname government authority. If available evidence was supportive, it would have been open to Suriname to argue that the vessel was not doing so. For further discussion regarding the use of imputability principles by international courts and tribunals see Rosalyn Higgins, ‘Issues of State Responsibility before the International Court of Justice’ in Malgosia Fitzmaurice and Dan Sarooshi (eds) Issues of State Responsibility before International Judicial Institutions (2004) 1, 7-8. See also Military
employed to determine a breach of substantive law, rather than develop a ‘free-standing’ finding that State responsibility is incurred as a consequence of unlawful conduct.\textsuperscript{123}

*Principles of imputability unlikely to be relevant or a matter of dispute:*

In practical terms it is extremely unlikely that a judicial / arbitral dispute concerning OCA management would focus on anything other than the lawfulness of an unambiguous exercise (and/or alleged infringement) of coastal State jurisdiction by one or more of the relevant claimant States.\textsuperscript{124} In such cases the application of principles of imputability would not be relevant and or disputed by the States Parties during arbitral / judicial proceedings. In any event, as discussed above, the principles set out in ILC Articles 5–7 significantly curtail the ability of States to distance themselves from activities undertaken or authorised by their respective governments and government officials.

### 2.6 Conclusion: management implications of the international legal framework

This Chapter has examined the entitlement of claimant coastal States to manage activity within OCAs in the context of relevant international law. The key conclusions of the Chapter are as follows:

Within each zone of national jurisdiction recognised by the LOSC, a coastal State is entrusted with a package of exclusive rights to manage human activity in one

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\textsuperscript{123} Ibid.

\textsuperscript{124} Indeed none of the disputes submitted to compulsory binding settlement under LOSC XV have involved a disagreement between the States Parties about whether coastal State jurisdiction was in fact exercised.
or more of the following six functional contexts, namely: artificial structures, environmental protection, marine scientific research, maritime security, navigational safety and resources exploitation. This Chapter has demonstrated that provisions of international law concerning the assertion of these rights within OCAs are general in nature, emphasising restraint, peaceful cooperation and commitment to negotiations. They do not establish a detailed or functionally comprehensive template for the provisional and cooperative implementation within an OCA of the functional components of coastal State jurisdiction. Rather, international law defers to claimant coastal States to reach agreement enabling them to manage activity within OCAs on a functionally comprehensive basis.

In the absence of such a management agreement, international law does not establish clear entitlements to undertake provisional management of an OCA on a unilateral basis. Within an OCA arising from territorial sea claims, LOSC Article 15 notionally permits each claimant coastal State to undertake unilateral OCA management up to the limit of the relevant equidistance line, except in the context of ‘historic title or other special circumstances’. The ‘historic title or other special circumstances’ exception dramatically curtails the ability of coastal States to rely on LOSC Article 15 as a basis for unilateral OCA management because: (1) it is drafted in broad ambiguous terms that do not clearly define the locations in which unilateral OCA management is permitted; and (2) claimant States will inevitably disagree about the application of the exception, because it is also determinative of the course of the maritime boundary. In relation to the contiguous zone, the LOSC Article 33 does not contain specific obligations concerning the provisional management of OCAs or the delimitation of overlapping claims. Concerning archipelagic waters, LOSC Articles 47(5) and (6) limit the impact of archipelagic baseline claims on the rights and interests of neighbouring States but do not contain specific obligations concerning overlapping claim areas or maritime delimitation. Within an OCA arising from claims to an EEZ and/or continental shelf, LOSC Articles 74(3) and 83(3) each contain two obligations that simultaneously attempt to promote and limit activity
undertaken or authorised by the claimant coastal States. Unilateral management of an OCA is constrained, but not prohibited, by the requirement to make ‘every effort to enter into provisional arrangements of a practical nature’ and by the requirement to make ‘every effort ... not to jeopardize or hamper the reaching of the final agreement.’ As discussed in Chapter 2.3.5, the Guyana–Suriname Award provides some analytical guidance to coastal States concerning the interpretation and application of LOSC Articles 74(3) and 83(3) to specific factual circumstances.

The dispute settlement framework set out in LOSC Part XV – and in particular the popular optional exclusion set out in LOSC Article 298 – allow coastal States involved in disputes concerning OCAs to insulate themselves from the Convention’s compulsory and binding dispute settlement procedures. Consequently, in the absence of consent between the relevant claimant coastal States, there is limited scope for international court and tribunals to prescribe modalities for OCA management in particular cases. Furthermore, any territorial sovereignty disputes associated with an OCA fall beyond the subject matter jurisdiction of the Convention’s compulsory and binding dispute settlement procedures. In the event that an OCA management dispute was submitted to compulsory binding dispute settlement under LOSC Part XV, principles of State responsibility are unlikely to be a significant feature of the judicial or arbitral proceedings.

Chapter 1.1 highlighted several serious management issues associated with OCAs. The absence of a clear legal entitlement to engage in OCA management is problematic in this context. The next Chapter will examine efforts to address this problem, focusing on the development by coastal States of legal and policy frameworks for the provisional joint management of OCAs.
3 Management of overlapping claim areas in current State practice

3.1 Introduction

As noted in Chapter 1.2, several coastal States have attempted to address the practical management challenges associated with OCAs and difficulties associated with maritime boundary negotiations by supplementing the international legal framework through development of frameworks for the provisional joint management of OCAs. This Chapter identifies current State practice concerning the provisional joint management of OCAs and critically evaluates the effectiveness of current provisional joint management frameworks.

Sections 3.2 – 3.8 present a global survey of provisional joint management frameworks that have been established to date through 25 bilateral or multilateral treaties, a wide variety of non-binding instruments, and informal political agreements. The survey identifies key design features of each provisional joint management framework and briefly discusses the regional context in which each framework operates. It also evaluates the holistic effectiveness of each framework – with the primary assessment criterion being the extent to which each framework enables the functionally comprehensive management of activity within the relevant OCA (see below for further details). The findings of the survey – including several different types of functional gaps that are evident in the surveyed provisional joint management frameworks – are summarised in Section 3.8. In the interest of avoiding repetition, additional
comparative assessment of the strengths and weaknesses of specific design features common to several of the surveyed frameworks is presented in Chapter 4.

As highlighted in Chapter 1.5, the evaluation undertaken in this Chapter focuses on \textit{de jure} characteristics of OCA management frameworks, as evidenced by, and developed by reference to, publicly disclosed legal instruments and policy documents. The \textit{de facto} implementation of OCA management frameworks (including their implementation status and degree of acceptance by third States) is only examined to the extent that it is: (1) documented in publicly disclosed primary or secondary sources; or (2) may be reasonably inferred given publicly identified socio-political circumstances in relevant claimant coastal States. Attention is drawn to gaps evident in provisional joint management frameworks that may undermine the ability of the claimant coastal States to assert, within the relevant OCA, particular functional components of their coastal State jurisdiction.

The surveyed OCA management frameworks cannot be neatly categorised according to their functional coverage. Indeed several of the surveyed frameworks exhibit different combinations of multiple types of functional gaps, which are strongly influenced by their regional geographic and geopolitical context. To clearly illustrate this context, the results of the survey are organised geographically, with relevant State practice being divided into the following regional groups: Pacific Ocean excluding the Asian Rim; Atlantic Ocean and Caribbean; Red Sea and Persian Gulf; North East Asia; South East Asia and Australia; and the Polar Regions. Within each of these regional groups, provisional joint management frameworks are categorised according to the specific OCAs to which they relate.
3.1.1 Assessment criterion and coastal State jurisdiction

Taking into account the findings of Chapter 2, the primary assessment criterion is satisfied when a provisional joint management framework features:

- **Comprehensive participation:** The framework must involve all of the relevant claimant coastal States. If one or more claimant coastal States do not participate in the provisional joint management framework, ambiguities of the international legal framework concerning the exercise of coastal State jurisdiction within OCAs continue to impact upon relations between all claimant coastal States and, consequently, on management of the relevant OCA.

- **Comprehensive allocation of coastal State jurisdiction:** The framework must enable each of the claimant coastal States to clearly identify the circumstances (and locations) in which they are entitled (or not entitled) to implement all LOSC rights and obligations concerning: artificial structures, environmental protection, marine scientific research, maritime security, navigational safety and resource exploitation.¹

As discussed in Chapter 2.2, the regulatory competence established by the LOSC rights and obligations referred to above has both a ‘prescriptive’ component (i.e. the jurisdictional entitlement under international law to establish laws and regulations that apply in the relevant zone) and an ‘executive’ or ‘enforcement’ component (i.e. the jurisdictional entitlement under international law to take action to enforce applicable laws and regulations, including via domestic judicial procedures). Throughout this Chapter, unless otherwise stated, reference to the ‘exercise’ of jurisdiction by a coastal State refers to implementation of the enforcement component of that jurisdiction, supported by the relevant prescriptive national laws and regulations.

¹In other words, a mutually agreed basis must be established for the exercise of all functional, prescriptive and enforcement components of coastal State jurisdiction in the relevant OCA.
3.2 Pacific Ocean excluding the Asian rim

3.2.1 Canada – United States

Background:

Canada and the United States assert overlapping claims to maritime jurisdiction in two locations adjacent to their Pacific coastline:

- west of the maritime boundary terminus in the Juan de Fuca Strait, adjacent to Vancouver Island, British Columbia and Washington State (see Figure 3.1);
- in and seaward of the Dixon Entrance, between and adjacent to the Alexander Archipelago of Alaska and the Queen Charlotte Islands, and mainland, of British Columbia (see Figure 3.2).

Design features and analysis of functional coverage:

Activity in the OCAs generated by these overlapping claims is managed in accordance with diverse array of functionally specific management frameworks that also apply to contiguous areas of non-overlapping jurisdiction. Several government agencies from each State cooperate closely within their field of operational responsibility and have developed detailed cooperative management arrangements in this context.

The Canadian and United States Governments have also formalised several cooper-

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3For additional illustrative maps and further information concerning the specific jurisdictional claims, see McDorman (both publications), above n 2 and David Gray, ‘Canada’s Unresolved Maritime Boundaries’ (1997) *IBRU Boundary and Security Bulletin, Autumn*. See also Prescott and Schofield, above n 57 on page 16, 418–421. For background on jurisdictional questions in the Dixon Entrance, see: C.B. Bourne and D.M. McRae, ‘Maritime Jurisdiction in the Dixon Entrance: The Alaska Boundary Re-Examined’ (1976) 14 *Canadian Yearbook of International Law* 175.

4The OCAs in question are relatively small in area (see Figures 3.1 and 3.2) and are thus readily integrated into more general cooperative management frameworks.

5For example, McDorman observes that ‘Overall, the Canadian and U.S. Coast Guards, the government agencies with the direct operational responsibilities regarding shipping, have a close relationship fostered through memoranda of understanding and regular meetings, regarding, for instance, search and rescue and oil spill response.’: McDorman, Salt Water Neighbours, above n 2, 210.
In 1974 both States agreed to establish a Joint Marine Pollution Contingency Plan (JCP) concerning spills of oil and other noxious substances. The JCP applies in

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Figure 3.2: Canada – United States: overlapping claims in and seaward of the Dixon entrance. Source: Gray, note 3 on page 82.
several specified areas of ‘contiguous waters’ in the Atlantic, Pacific (including the Juan de Fuca region), Great Lakes and the Dixon Entrance\(^7\) and is expressed to apply without prejudice to the maritime claims of both States.\(^8\) The purpose of the Plan is expressed as follows:

... to provide for a coordinated system for planning, preparedness and responding to harmful substance incidents in the contiguous waters. The plan does so by supplementing the existing national response system of each Party for areas covered by the JCP by ensuring cooperative bilateral response planning at the local and national level.\(^9\)

The JCP contains Geographic Annexes that set out detailed procedures and information concerning the Plan’s implementation in each of the specified areas of contiguous waters.\(^10\) The Plan is explicitly characterised as an implementation of Canada and the United States’ obligations arising under the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation.\(^11\)

A 1979 Agreement establishes a detailed framework for cooperative vessel traffic management in the Juan de Fuca region\(^12\) that applies without prejudice to the maritime claims of both States.\(^13\) Joint traffic separation schemes implemented in accordance with the Agreement have been submitted and adopted by the IMO.\(^14\)

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\(^7\)JCP, above n 6, Section 104 contains detailed geographic descriptions of these waters.

\(^8\)See Exchange of Notes, above n 6. The relevant paragraph reads: ‘Maintenance of the Plan and actions thereunder would be without prejudice to the positions of the Governments of the United States and of Canada, with respect to coastal State jurisdiction over pollution, and without prejudice to any other positions of the two Governments regarding the extent of territorial or maritime jurisdiction.’

\(^9\)JCP, above n 6, Section 103.1.


\(^11\)JCP, above n 6, Section 101.2. For citation of the Convention see above, n 89 on page 64.

\(^12\)Exchange of Notes constituting an Agreement on Vessel Traffic Management for the Juan de Fuca Region, signed 19 December 1979, entered into force 19 December 1979, 1221 UNTS 67, CTS 1979/28. See McDorman in Seoung-Yong Hong and Van Dyke, above n 2, 185–188. Note that the area of ‘Applicable Waters’ specified in Section 101 of the Agreement only covers part of the OCA. However, McDorman observes that ‘Since the Canada-U.S. maritime boundary discussions of the late 1970s, the small area of disputed waters seaward of the Juan de Fuca Strait has caused little concern and has not been the subject of Canada-U.S. discussions.’: McDorman, Salt Water Neighbours, above n 2, 175.

\(^13\)Article 205.1 of the Agreement, above n 12, provides: ‘This Agreement and actions hereunder shall be without prejudice to the position of the Government of the United States and Canada with respect to the character of, the nature and extent of coastal state jurisdiction over the applicable and adjacent waters.’

Canada and the United States have also established an understanding concerning the passage of US submarines through the Dixon entrance to a noise measurement facility in Behm Canal, Alaska.\textsuperscript{15}

Management of shared living marine resources in waters adjacent to the Pacific coast has been a longstanding point of both cooperation and contention in Canada–US relations.\textsuperscript{16} At present, a series of bilateral agreements establish complex cooperative management frameworks for salmon,\textsuperscript{17} halibut,\textsuperscript{18} hake/whiting\textsuperscript{19} and albacore tuna.\textsuperscript{20} As mentioned above, each of these frameworks applies both within OCAs and more broadly to contiguous areas of non-overlapping jurisdiction.

Enforcement jurisdiction within the OCAs is allocated by reference to the flag State of the vessel: Canada and the United States have an understanding that the two States will only exercise jurisdiction within OCAs over vessels flying their respective flags.\textsuperscript{21} This understanding is articulated in at least two legal instruments. In relation to the Dixon Entrance, Canada and the United States exchanged notes in August 1980 ‘reaffirming that each side would continue to observe flag State enforcement respecting fisheries.’\textsuperscript{22} A 1979 Protocol concerning the northern Pacific and

\begin{flushright}
Salt Water Neighbours, above n 2, 276–278. See also Article 202 of the Agreement, above n 12, setting out an obligation to submit joint traffic separation schemes and harmonise relevant regulations.
\textsuperscript{15}See State practice discussed in McDorman in Seoung-Yong Hong and Van Dyke, above n 2, 184–185.
\textsuperscript{16}For an detailed overview, see McDorman, Salt Water Neighbours, above n 2, 281–320.
\textsuperscript{18}See, eg, Convention between Canada and the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, signed 2 March 1953, CTS No. 14 (1953); Protocol Amending the Convention between Canada and the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, signed 29 March 1979, CTS No. 44 (1980).
\textsuperscript{21}McDorman, Salt Water Neighbours, above n 2, 172, 285.
\end{flushright}
Bering Sea halibut fishery establishes a flag-based enforcement mechanism and also permits the concurrent exercise of enforcement jurisdiction against vessels flagged to third parties.\textsuperscript{23} Article 16 of the Protocol’s Annex provides as follows:\textsuperscript{24}

Pending delimitation of maritime boundaries between Canada and the United States in the Convention area, the following principles shall be applied as interim measures in the boundary region:

\begin{itemize}
  \item[a.] as between the Parties, enforcement of the Convention shall be carried out by the flag State;
  \item[b.] neither Party shall authorise fishing for halibut by vessels of third parties;
  \item[c.] either Party may enforce the Convention with respect to fishing for halibut, or related activities, by vessels of third parties.
\end{itemize}

Regular consultations between law enforcement agencies of each State take place on an annual basis in accordance with a 1990 Agreement on Fisheries Enforcement,\textsuperscript{25} which, inter alia, obliges both States to consult in relation to ‘standard fisheries law enforcement practices in the vicinity of maritime boundaries.’\textsuperscript{26}

The United States and Canada engage in cooperative management of their Pacific OCAs in accordance with a complementary collection of international legal instruments, cooperative management arrangements developed by equivalent government agencies in each State, and coordinated national policy-making. When viewed in isolation, each of these frameworks exhibits functional gaps, focusing on a particular functional context or management challenge (e.g. marine pollution, navigational safety, maritime law enforcement, and marine resources management). However, the coherent and spatially overlain application of the various frameworks establishes a functionally-broad allocation of coastal State jurisdiction within the relevant OCAs. It is also worth noting that the issue of OCA management is not addressed in an

\textsuperscript{23}McDorman notes that the Protocol ‘addressed specific fishing matters up to 1981 and was not renewed, although the ... [Protocol] ... did not contain a termination clause’: McDorman, Salt Water Neighbours, above n 2, 172.

\textsuperscript{24}Article 16 of the Annex to the 1979 Protocol amending the 1953 Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, above n 18

\textsuperscript{25}Agreement on Fisheries Enforcement, signed 26 September 1990, entered into force 16 December 1991, CTS 1991/36, TIAS 11753.

\textsuperscript{26}Agreement on Fisheries Enforcement, Article II(c). For further discussion see McDorman, Salt Water Neighbours, above n 2 on page 82, 151.
isolated fashion. It is instead integrated into a broader cooperative response to transboundary oceans management. For further discussion of this design feature, see Chapter 4.4.

3.2.2 El Salvador – Honduras – Nicaragua

Background:

El Salvador, Honduras and Nicaragua have engaged in a series of territorial and maritime jurisdictional disputes that date back to the formation of the three States following the chaotic dissolution of the Federal Republic of Central America in the 1830s.\(^{27}\)

The three States have adjacent coastlines bordering the Gulf of Fonseca, a bay located on the Pacific coast of Central America (see Figure 3.3). In 1900 Honduras and Nicaragua established a maritime boundary terminating in the central portion of the Gulf (see Figure 3.3).\(^{28}\) In 1916 El Salvador commenced proceedings in the Central American Court of Justice, alleging that Nicaragua was infringing upon co-ownership rights it possessed in the waters of the Gulf.\(^{29}\) Impugned Nicaraguan actions in this context included an agreement with the United States authorising the construction of a US naval base in the Gulf.\(^{30}\) In a 1917 Judgment\(^{31}\) the Court held that the Gulf of Fonseca was an ‘historic bay’ and declared that El Salvador, Nicaragua and Honduras were co-owners of its waters.\(^{32}\)

In 1986 El Salvador and Honduras concluded an agreement (Special Agreement) requesting that a Chamber of the ICJ be established to (1) delimit undefined segments of the two States’ land boundary and (2) determine the legal status of certain


\(^{28}\) See Prescott and Schofield, above n 57, 422–425.

\(^{29}\) Malcolm Evans, ‘Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras)–The Nicaraguan Intervention’ (1992) 41 *International and Comparative Law Quarterly* 896.

\(^{30}\) Ibid.

\(^{31}\) The text of the judgment is reproduced at (1917) 11 *American Journal of International Law* 674.

\(^{32}\) (1917) 11 *American Journal of International Law* 674, 716.
Figure 3.3: El Salvador – Honduras – Nicaragua: overlapping claims in the Gulf of Fonseca. Source: Prescott and Schofield, note 57 on page 16.
islands and waters in the general area of the Gulf of Fonseca. Nicaragua filed an application to intervene in the proceedings on 17 November 1989 and was permitted to do so in relation to certain issues concerning the legal status of waters in the Gulf of Fonseca.

Four findings of the Chamber’s Judgment of 11 September 1992 are relevant to the present discussion. The first relates to the legal status of waters in the Gulf of Fonseca. The Chamber characterised the Gulf as an ‘historic bay’ consisting of certain waters subject to a sui generis legal regime of ‘condominium’ or ‘co-ownership’. It held that all waters located landward of a defined closing line (Gulf closing line), and beyond a 3 nautical mile zone subject to the exclusive and sole sovereignty of each of the three States (Coastal belt), were ‘held in sovereignty by the Republic of El Salvador, the Republic of Honduras and the Republic of Nicaragua, jointly ... unless and until a delimitation of the relevant maritime area be effected’. Reliance was placed on the 1917 judgment of the Central American Court of Justice, which was deemed to be ‘a relevant precedent decision of a competent court’.

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33 The agreement referring the dispute to the Court (signed 24 May 1986, entered into force 1 October 1986, filed with the Court Registry 11 December 1986) is reproduced in Spanish in the Chamber’s Judgment of 13 September 1990: Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment [1990] ICJ Reports 92. See also Evans, above n 29.

34 See Judgment of 13 September 1990, above n 33 and Evans, above n 29.


37 The closing line was defined as extending ‘between a point on a line 3 miles (1 marine league) from Punta Amapala and a point on that line 3 miles (1 marine league) from Punta Cosiguina’; Judgment of 11 September 1992, above n 35, 616. See also Prescott and Schofield, above n 57 on page 16, 422–423.

38 Judgment of 11 September 1992, above n 35, 616–617. The Gulf closing line and 3 nautical mile limit of the Coastal belt are depicted in Figure 3.3.

entitled to a 12-mile territorial sea subject to delimitation in accordance with LOSC Article 15. 40

The second relevant finding relates to navigational freedoms in the Gulf of Fonseca. The Chamber held that the claimant coastal States each enjoyed a right of innocent passage in the Coastal belt, and that vessels of other States also enjoyed a right of innocent passage in the waters seaward of the Coastal belt in order to provide those vessels with ‘access to any one of the three coastal States’. 41

The third relevant finding concerns maritime delimitation of waters enclosed by the Gulf closing line. After examining the Special Agreement between El-Salvador and Honduras, the Chamber concluded that the Agreement not establish jurisdiction to ‘effect any delimitation of ... maritime spaces, whether within or outside the Gulf’. 42

The fourth relevant finding relates to waters located seaward of the Gulf closing line. The Chamber held that the three claimant coastal States were entitled to claim maritime zones measured from a 13-mile central portion of the Gulf closing line. 43 It noted that:

Since the legal situation on the landward side of the closing line is one of joint sovereignty, it follows that all three of the joint sovereigns must have entitlement outside the closing line to territorial sea, continental shelf and exclusive economic zone ... Whether this situation should remain in being, or be replaced by a division and delimitation into three separate zones is, as inside the Gulf also, a matter for the three States to decide. 44

40 See Shaw, above n 36.
41 Judgment of 11 September 1992, above n 35, 605. Shaw, above n 36, highlights uncertainties associated with the Chamber’s findings concerning innocent passage, noting that ‘it is unclear whether each of the three States has the right to challenge the innocence of a vessel’s passage in the Gulf, irrespective of its port of destination. Similarly, it is unclear whether the right can be suspended, and if so, by whom, or whether each of the three States is entitled to exercise legislative and enforcement jurisdiction.’
43 Two 3nm portions of the Gulf closing line (one at each extremity) represented the seaward boundary of the Coastal belt. The Chamber noted that ‘the problem, whether of the territorial sea, the contiguous zone, the continental shelf, or the exclusive economic zone, must be confined to the area off the baseline but excluding a 3-mile, or 1 -marine-league, strip of it at either extremity, corresponding to the existing maritime belts of El Salvador and Nicaragua respectively:’ Judgment of 11 September 1992, above n 35, 608.
In a dissenting opinion, Judge Oda argued that, as a consequence of coastal geography, Honduras was not entitled to claim a continental shelf or exclusive economic zone outside the Gulf.45

There are several ambiguities in the Chamber’s judgment, which generate considerable legal uncertainties concerning maritime claims both landward and seaward of the Gulf closing line.46 Concerning claims located landward of the Gulf closing line, Prescott and Schofield identify several problems with the Chamber’s judgment, noting as follows:

The first [problem] concerns the statement that each state is entitled to a belt of presumably internal waters 3nm wide which is subject to the 1900 delimitation. Honduras and Nicaragua are affected by this delimitation, but it is not clear whether they may claim as far as the line of delimitation, which is up to 6nm from the coast of both states, or whether the delimitation is only recognised up to 3nm from the coast. Part of the 1900 boundary lies less than 3nm from the coast of Nicaragua. The second problem arises from the statement about waters in the mouth of the bay adjacent to the closing line. Those waters are defined as lying between points 3nm from Punta Amapala and Punta Cosiguina. In fact, if Nicaragua is entitled to a belt of waters 3nm wide, that belt intersects the closing line 4nm from Punta Cosiguina.47

Concerning claims located seaward of the Gulf closing line, Shaw notes the following:

Once again, the Chamber gave no indication as to how three States can simultaneously exercise the rights of a coastal State in a territorial sea or exploit the seabed and subsoil resources of the continental shelf. Can one or two of the three States claim an exclusive economic zone seawards of the entire line if a second or third does not? How can a claim by one third of the presence at the closing line generate an entitlement to the entire seawards area? Certainly, these sorts of problems can be resolved by the parties but the Chamber’s failure to work fully through the consequences of its sui generis approach may well generate difficulties. This might be compared with the solution of Judge Oda, who thought that Honduras was not entitled to a continental shelf or exclusive economic zone outside the Gulf. This, he felt, simply reflected geographic reality.48

45 See Shaw, above n 36.
46 Concerning passage rights in waters enclosed by the Gulf closing line, see above n 41 on the previous page. More generally, Shaw, above n 36 on page 90, notes that ‘In indicating a sui generis regime, the Chamber has, arguably, increased, rather than lessened, the potential for future disputes.’
47 Prescott and Schofield, above n 57, 422–425.
48 Shaw, above n 36 on page 90.
These uncertainties have not been addressed by subsequent delimitation agreements\(^{49}\) and Nicaragua is not legally bound to adhere to the Chamber’s judgment.\(^{50}\) For El Salvador and Honduras, a key implication of the legally binding judgment is that landward of the Gulf closing line, there exists overlapping claims to 3-mile belts of exclusive jurisdiction, in addition to a zone in which sovereignty is shared by the three States.\(^{51}\) Seaward of the closing line defined in the Judgment, the three States assert overlapping claims to a contiguous zone, EEZ and continental shelf.\(^{52}\)

*Design features and analysis of functional coverage:*

The author is not aware of any cooperative frameworks developed by the three States for the provisional joint management of OCAs located seaward of the Gulf closing line. For waters located landward of the Gulf closing line, the legal regime of condominium and co-ownership prescribed by the Chamber’s judgment provides a basic, ambiguous and incomplete jurisdictional basis for cooperative management. Key ambiguities include the following:

- Does the condominium arrangement and/or the 1917 Judgment of the Central American Court of Justice automatically entitle each of the three States to exercise jurisdiction in the Gulf’s waters on a concurrent basis?

- Alternatively, do the three States require each others’ consent before exercising jurisdiction within the waters subject to the condominium / co-ownership?

\(^{49}\)See ibid.

\(^{50}\)See Shaw, above n 36. However, Nicaragua remains bound by the 1917 Judgment of the Central American Court of Justice providing for co-ownership of the Gulf’s waters.

\(^{51}\)See discussion and maps in Prescott and Schofield, above n 57, 422–425.

• How would the unilateral exercise of jurisdiction by one or more of the three States in the waters subject to condominium / co-ownership impact upon their legal obligations owed to each other?

The condominium and co-ownership arrangement has however been supplemented by more concrete subsequent management frameworks, including:

• the 1993 Amapala Agreement – affirming the three States’ mutual interest in, and commitment to, conserving and preserving the Gulf of Fonseca on a cooperative basis;

• ‘PROGOLFO’ – a project established in 1999 concerning cooperative coastal ecosystem conservation in the Gulf of Fonseca, involving regional cooperation between environment ministries of the three States;

• the July 2003 Memorandum of Understanding establishing the Mesoamerican Sustainable Development Initiative, under which the Gulf of Fonseca was designated as a priority area.\(^{53}\)

In 2004 the three States requested support from the Inter-American Development Bank and the Global Environment Facility, which subsequently established a project entitled ‘Integrated Ecosystem Management of the Ecosystems of the Gulf of Fonseca’.\(^{54}\) A central objective of the project is to enhance and develop inter-agency and institutional mechanisms concerning cooperative management of the Gulf’s waters.\(^{55}\)

The condominium / co-ownership arrangement applicable to parts of the Gulf of Fonseca does not clearly allocate functional components of coastal State jurisdiction within the area(s) concerned. Accordingly, it does not add clarity to the general and ambiguous provisions of international law concerning the assertion of coastal State jurisdiction within OCAs. However, it is perhaps arguable that the condominium / co-ownership arrangement entitles El Salvador, Honduras and Nicaragua to exercise jurisdiction within relevant waters on a concurrent, unilateral and func-


\(^{54}\)Ibid.

\(^{55}\)Ibid.
tionally comprehensive basis. Alternatively, it could be argued that the presence of an agreement between the Parties may be a precondition for the exercise of jurisdiction within the relevant waters. The surveyed cooperative arrangements that supplement the condominium / co-ownership arrangement are functionally limited to the contexts of environmental management in the Gulf of Fonseca. Implementation of other functional components of coastal State jurisdiction is not explicitly enabled or contemplated.

3.3 Atlantic Ocean and Caribbean

3.3.1 Argentina – United Kingdom

Background:

Argentina and the United Kingdom both claim sovereignty over the Falkland/Malvinas Islands, South Georgia and the South Sandwich Islands, and assert a variety of overlapping maritime claims appertaining to these South Atlantic features (see Figure 3.5). Several features currently occupied and administered by the United Kingdom and were the focus of an armed conflict between the two States in 1982. In the immediate aftermath of the conflict the United Kingdom declared a 150 nautical mile ‘Falkland Island Protection Zone’ (FIPZ) designed to restrict and control the navigation of Argentinean vessels in waters surrounding the Islands. In 1986 the


57 For background, see Evans, above n 56 and Churchill, above n 56.


59 Argentina was requested to ensure that its military vessels did not enter the FIPZ. Further, Argentinean civilian vessels were also requested not to enter the zone without the prior consent of the United Kingdom. The FIPZ replaced a 200-mile ‘total exclusion zone’ that was declared
United Kingdom supplemented its 3 nautical mile territorial sea claim around the Falkland Islands by (1) declaring an ‘Interim Conservation and Management Zone’ (FICZ) projected 150 nautical miles from a fixed point located in the centre of the Islands, and (2) reiterating its claim to the continental shelf surrounding the Islands. The limits of the FIPZ and FICZ are illustrated in Figure 3.4.

The primary concern influencing the declaration of the FICZ was the rapid and unsustainable escalation of commercial fishing in waters surrounding the Islands between 1982 and 1986. The declaration of the FICZ and reiterated continental shelf claim prompted Argentina to issue a protest note reaffirming its sovereignty claim to the Islands and ‘its rights of sovereignty and jurisdiction over the surrounding maritime waters, sea-bed and marine sub-soil, rights which it will continue to exercise in its capacity as a coastal State in accordance with international law.’ In 1989 both States entered into negotiations with a view to normalising diplomatic relations after they were broken off during the 1982 conflict.

**Design features and analysis of functional coverage:**

Following talks held in Madrid in October 1989, both States issued a Joint Statement (1989 Joint Statement) concerning the sovereignty dispute, consular rela-
Figure 3.4: Argentina – United Kingdom: certain maritime claims surrounding the Falkland/Malvinas Islands. Source: Symmons, note 56 on page 95.
Figure 3.5: Argentina – United Kingdom: overlapping claims in the South Atlantic and Southern Oceans. Source: International Boundaries Research Unit, note 100 on page 105.
tions and several cooperative measures. Paragraph 2 of the 1989 Joint Statement contains a ‘formula on sovereignty’ (Madrid formula on sovereignty) reflecting an agreement to set aside and protect overlapping claims to sovereignty and maritime jurisdiction. It provides as follows:

Both Governments agreed that:

1. Nothing in the conduct or content of the present meeting or of any similar subsequent meetings shall be interpreted as:

2. A change in the position of the United Kingdom with regard to sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas;
   a) A change in the position of the Argentine Republic with regard to sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding areas;
   b) Recognition of or support for the position of the United Kingdom or the Argentine Republic with regard to sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas.

3. No act or activity carried out by the United Kingdom, the Argentine Republic or third parties as a consequence and in implementation of anything agreed to in the present meeting or in any similar subsequent meetings shall constitute a basis for affirming, supporting, or denying the position of the United Kingdom or the Argentine Republic regarding the sovereignty or territorial and maritime jurisdiction over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas.

In accordance with the 1989 Joint Statement and a subsequent Joint Statement of 15 February 1990 (1990 Joint Statement on Diplomatic Relations), both States agreed to establish a number of cooperative measures, including: working groups to consider fisheries conservation and military-related incident avoidance; the replacement of the FIPZ with an ‘Interim reciprocal information and consul-

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tation system;\textsuperscript{67} notice periods applicable to the movement of military vessels;\textsuperscript{68} rules concerning the conduct of naval and air force units operating in proximity to each other,\textsuperscript{69} adherence to international conventions concerning civil aviation and collisions at sea;\textsuperscript{70} co-ordination of search and rescue operations;\textsuperscript{71} and the exchange of information relevant to the enhancement of flight safety.\textsuperscript{72}

Negotiations in the working group concerning fisheries conservation produced an agreement to exchange information on a wide range of relevant issues and culminated in the conclusion of another Joint Statement in November 1990.\textsuperscript{73} (1990 Joint Statement on Fisheries) Paragraph 1 of the 1990 Fisheries Joint Statement provides that both ‘this Statement and its results’ are subject to the Madrid formula on sovereignty.\textsuperscript{74} Paragraph 2 establishes two key cooperative measures and notes that their purpose is ‘to contribute to the conservation of fish stocks’ and to ‘open the way for cooperation in this field on an ad-hoc basis’.\textsuperscript{75}

The first measure is the establishment of the ‘South Atlantic Fisheries Commission’ composed of delegations from both States.\textsuperscript{76} The Commission is entrusted with several functions relating to the ‘conservation of the most significant offshore species’ in ‘waters between latitude 45°S and latitude 60°S’.\textsuperscript{77} Key functions include: collection and analysis of information received from both States concerning the operation of fishing fleets, catch and effort statistics, and the status of stocks; submission to

\begin{itemize}
  \item[\textsuperscript{67}]1990 Joint Statement on Diplomatic Relations, Paragraph 5 and Annex I. This system established direct communication links and information sharing between the armed forces of both States: Evans, above n 56 on page 95.
  \item[\textsuperscript{68}]Ibid.
  \item[\textsuperscript{69}]1990 Joint Statement on Diplomatic Relations, Annex II.
  \item[\textsuperscript{70}]1990 Joint Statement on Diplomatic Relations, Annex IV.
  \item[\textsuperscript{71}]1990 Joint Statement on Diplomatic Relations, Annex III.
  \item[\textsuperscript{72}]1990 Joint Statement on Diplomatic Relations, Annex IV. For a more comprehensive discussion of cooperative measures established by the 1989 and 1990 Joint Statements see Evans, above n 56 on page 95.
  \item[\textsuperscript{73}]Joint Statement of 28 November 1990 establishing the South Atlantic Fisheries Commission, available at \texttt{<http://www.falklands.info/history/90fishjoint.html>}. \textsuperscript{74}The Madrid formula on sovereignty is also reiterated in full.
  \item[\textsuperscript{75}]1990 Fisheries Joint Statement, Paragraph 2.
  \item[\textsuperscript{76}]1990 Fisheries Joint Statement, Paragraph 2(a). Paragraph 3 stipulates, inter alia, that the SAFC ‘will meet at least twice a year, alternatively in Buenos Aires and London. Recommendations shall be reached by mutual agreement.’
  \item[\textsuperscript{77}]1990 Joint Statement on Fisheries, Paragraphs 3 and 4. As noted by Churchill, above n 56 on page 95, this is a broadly defined area that extends North to the Golfo San Jorge and South below the tip of South America.
\end{itemize}
both States of recommendations for the conservation of the most significant offshore species; and submission to both States of proposals concerning joint scientific work. Operation of the South Atlantic Fisheries Commission resulted in the implementation several cooperative conservation measures including joint research cruises, reductions in the number of fishing licences and the shortening of permitted fishing seasons.78

The second measure is the temporary total prohibition of commercial fishing within a defined area for conservation purposes.79 This measure was intended to combat unregulated fishing taking place beyond the 150 nautical mile limit of the FICZ but within 200 nautical miles of the Falkland Islands. The ‘half-doughnut’ shaped defined area extends from the 150 nautical mile limit of the FICZ to a distance of 200 nautical miles from Falkland Islands, excluding areas within the 200 nautical mile zone of territorial sea claimed by Argentina (see Figures 3.5 and 3.4).80 The prohibition was not renewed in 1993.81

In December 1990 the United Kingdom designated an Outer Fishing Conservation Zone (OFCZ) corresponding to the area defined in the 1990 Joint Statement on Fisheries and extended its territorial sea claim around the Falkland Islands from 3 to 12 nautical miles.82 Responding to concerns regarding the overexploitation of fish stocks near the South Georgia and the South Sandwich Islands, the United Kingdom also declared a 200 nautical mile ‘maritime zone’ around those Islands (see Figure 3.5).83 Within the maritime zone, jurisdiction was claimed:

78See Churchill, above n 56 on page 95
791990 Joint Statement on Fisheries, Paragraphs 2(b).
801990 Joint Statement on Fisheries, Annex. See also Churchill above n 56 on page 95.
82See Proclamation No. 2 of 1990 (of the Falkland Islands Government), reproduced in (1991) 62 British Yearbook of International Law 647. See also Churchill, above n 56 on page 95, who notes that ‘At the time of the Joint Statement, the area to which the prohibition applied was high seas and it obviously would have been very difficult, if not impossible, to justify enforcing the prohibition against foreign vessels.’
in accordance with the rules of international law over the exploration and exploitation and the conservation and management of the natural resources (whether living or non-living) and over the protection and preservation of the marine environment subject to such provisions as may hereafter be made by law for such matters. 84

The maritime zone claim around the South Georgia and the South Sandwich Islands prompted a protest from Argentina and a subsequent response note from the United Kingdom. 85 A joint statement was also issued in which both States expressed a commitment to improve management of fish stocks surrounding the South Georgia and the South Sandwich Islands through the framework set in the Convention for the Conservation of Antarctic Living Marine Resources (CAMLR Convention). 86

In 1991 both States issued a Joint Statement establishing a cooperative framework for search and rescue operations in the South West Atlantic. 87 Another Joint Statement concerning search and rescue operations was issued in 1993. 88 In 1994, the OFCZ was extended into an area located within 200 nautical miles of the Falkland Islands but beyond the EEZ claimed by Argentina in 1991. 89 Argentina issued a strongly worded protest in response, noting that ‘British action implies a departure

84 Ibid. Churchill, above n 56 on page 95, notes that the maritime zone is ‘in not a full EEZ because jurisdiction is not claimed in respect of economic exploitation other than for natural resources, the construction and regulation of artificial islands, installations and structures, or marine scientific research. The 200-mile maritime zone of South Georgia and the South Sandwich Islands thus lies between a traditional fishing zone and an EEZ.’


86 Churchill, above n 56 on page 95. The spatial jurisdiction of the CAMLR Convention applies to waters surrounding the South Georgia and the South Sandwich Islands. For further discussion of the CAMLR Convention see Chapter 4.7.3.2 below.


88 Ibid.

89 Proclamation No. 1 of 1994 (of the Falkland Islands Government), reproduced in (1995) 27 Law of the Sea Bulletin 79. This proclamation also expands the claimed scope of subject matter jurisdiction within the OFCZ to cover ‘protection and preservation of the marine environment’ in accordance with international law. Argentina’s EEZ claim replaced its previous claim to a 200 nautical mile territorial sea. In 1990 Argentina had not declared coastal baselines – the UK’s initial OFCZ claim was constructed conservatively because the limits of Argentinian claims were not clear. See Churchill, above n 56 on page 95.
from the Joint Statement and the bilateral understandings reached from 1990 until now regarding the South-West Atlantic'.

Despite this setback in diplomatic relations, both States issued a Joint Declaration in 1995 concerning the management of both States’ overlapping continental shelf claims. (1995 Joint Declaration) Paragraph 1 of the 1995 Joint Declaration sets out a ‘formula on sovereignty’ that ‘applies to this Joint Declaration and to its results’. The formula is identical to the Madrid formula on sovereignty but includes two additional sentences. The first additional sentence provides that the ‘areas subject to the controversy on sovereignty and jurisdiction will not be extended in any way as a consequence on this Joint Declaration or its implementation.’ The second stipulates that the Joint Declaration ‘does not apply to the maritime areas surrounding South Georgia and the South Sandwich Islands.’

The remainder of the Declaration sets out a detailed cooperative framework concerning the development of hydrocarbon resources within up to six defined ‘tranches’, the first of which were to be located in a defined area of ‘sedimentary structure’ located South West of the Falkland Islands (see Figure 3.5). The focal point of cooperation is a Joint Commission composed of delegations from both States. Functions entrusted to the Joint Commission include: submission to both States of recommendations concerning protection of the marine environment of the South West Atlantic; coordination through subcommittees of several commercial and regulatory aspects of hydrocarbon development (including potential unitisation of deposits, and health and safety requirements); collection and promotion of relevant scientific

90 Note dated 22 August 1994 from the Ministry of Foreign Affairs, International Trade and Worship of Argentina, addressed to the Embassy of the United Kingdom of Great Britain and Northern Ireland, reproduced in (1995) 27 Law of the Sea Bulletin 81. Note also that Argentina had previously issued a diplomatic protest responding to a Proclamation of 22 November 1991 (by the Governor of the Falkland Islands) clarifying the United Kingdom’s continental shelf claims surrounding the Falkland Islands: See Churchill above n 56 on page 95.


92 1995 Joint Declaration, Paragraph 2(b) and Annex. If a maritime boundary equidistant from the Falkland Islands and the Argentinian mainland were designated, the defined area would straddle this boundary.

93 1995 Joint Declaration, Paragraphs 2(a) and 3. Recommendations of the Joint Commission are to be reached by mutual agreement.
research; and recommendation to both States of additional tranches for hydrocarbon development.\textsuperscript{94} Paragraph 5 of the 1995 Joint Declaration provides that the arrangements developed in 1991 and 1993 concerning search and rescue operations, or any future arrangements on the same subject, will apply to ‘offshore activities’. Paragraph 6 requires each State to take appropriate administrative measures concerning hydrocarbon development and to ‘abstain from taking action or imposing conditions designed or tending to inhibit or frustrate the possibility of carrying out hydrocarbon development’ in the relevant areas.

In 1999 both States issued a Joint Statement establishing several additional confidence-building measures, including further commitments concerning the cooperative management of fish stocks in the South Atlantic.\textsuperscript{95} The 1999 Joint Statement has been described as a ‘highpoint’ in relations between both States concerning their overlapping territorial and jurisdictional claims.\textsuperscript{96} With the exception of limited hydrocarbon licensing and exploration, the 1995 Joint Declaration was not implemented in subsequent years\textsuperscript{97} and the Kirchner administration in Argentina (elected in 2003)

\textsuperscript{94}1995 Joint Declaration, Paragraph 4. Concerning protection of the marine environment of the South West Atlantic, the Commission is required to take into account ‘relevant international conventions and recommendations of competent international organisations’: See Paragraph 4(a).


\textsuperscript{96}Klaus Dodds and Matthew Benwell, ‘More unfinished business: the Falklands/Malvinas, maritime claims, and the spectre of oil in the South Atlantic’ (2010) 28 \textit{Environment and Planning D: Society and Space} 571.

\textsuperscript{97}In 1997 Churchill commented that the 1995 Joint Declaration ‘appears not to have got off to the most promising starts. At the same time as the Joint Declaration was issued, Argentina made a statement in which it said that it would introduce non-discriminatory legislation to impose charges on national and foreign companies operating in the area subject to the dispute over sovereignty, and that the Joint Declaration should not be interpreted as an “acceptance of a claimed right to call for a licensing round for the development of hydrocarbons in the maritime areas surrounding the Malvinas Islands”. This evoked from the British government a statement that it did “not accept any Argentinian claim to impose such charges on companies by reason only of their activities on the continental shelf around the Falkland Islands under Falklands licence. HMG will be working with the Falkland Islands Government in the development of the forthcoming licensing round.”’: Churchill, above n 56 on page 95. The diplomatic statements Churchill refers to are: Statement by the Argentine Government with regard to the Joint Declaration signed by the Foreign Ministers of Argentina and the United Kingdom on Explorations and Exploitation of Hydrocarbons; and Declaration of the British Government with regard to the Joint Declaration signed by the British and Argentine Foreign Ministers on Co-operation over Offshore Activities in the South West Atlantic. Both documents are reproduced in (1996) 11 \textit{The International Journal of Marine and Coastal Law} 118.
adopted a harder diplomatic stance than its predecessor. In March 2007 Argentina withdrew from several cooperative arrangements, including the 1995 Joint Declaration and cooperative measures concerning fisheries. Both States have also issued competing submissions to the CLCS regarding the outer limits of the continental in the South West Atlantic (see Figure 3.5) and the United Kingdom government has unilaterally authorised hydrocarbon development in waters to the North, East and South East of the Falkland Islands.

The provisional joint management frameworks established by Argentina and the United Kingdom each focus on the cooperative management of specific resources or the cooperative exercise of coastal State jurisdiction in functionally-specific contexts, including hydrocarbon development, fisheries cooperation, and arrangements concerning navigational safety. Had they been implemented by the respective governments, and not fallen victim to a deteriorating bilateral relationship, they would have operated in tandem with one another to establish functionally-broad allocation of coastal State jurisdiction within the relevant OCA.

98 See Dodds and Benwell, above n 96 on the preceding page.
100 International Boundaries Research Unit, ‘Claims and potential claims to maritime jurisdiction in the South Atlantic and Southern Oceans by Argentina and the UK’ available at <http://www.dur.ac.uk/resources/ibru/south_atlantic_maritime_claims.pdf>.
3.3.2 Argentina – Uruguay

**Background:**

In 1973 Argentina and Uruguay concluded an agreement\(^{102}\) (1973 Agreement) concerning overlapping claims to the Río de la Plata and maritime zones seaward of a closing line at the mouth of the river.\(^{103}\) Seaward of the closing line, the 1973 Agreement establishes a ‘lateral maritime boundary’\(^{104}\) and boundary of the continental shelf, which are both defined by a single equidistance line.\(^{105}\) The closing line and lateral maritime boundary are depicted in Figure 3.6. The lateral maritime boundary delimits several jurisdictional competencies recognised in the Agreement, which relate to: the exploration, conservation, and exploitation of resources; control and supervision of fishing activities; protection and preservation of the environment; scientific research; and construction and emplacement of installations.\(^{106}\) Viewing this delimitation of competencies in light of LOSC Part V, it is reasonable to regard the lateral maritime boundary as a delimitation of the EEZ and associated coastal state jurisdiction.

**Design features and analysis of functional coverage:**

The 1973 Agreement also establishes a ‘common zone’ straddling the lateral maritime boundary, with a framework of cooperation regarding fishing activities, scientific research and environmental protection.\(^{107}\) Provisions concerning management of the maritime area landward of the closing line (the river area) are subject to

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\(^{103}\) The closing line is defined by Argentina and Uruguay per the Joint Declaration on the External Limit of the Río de la Plata of 1961, which provides that the river extends to an imaginary straight line joining Punta del Este (Uruguay) and Punta Rasa del Cabo San Antonio (Argentina).

\(^{104}\) Translation from Charney and Alexander (1993), above n 57 on page 16, 771. The UNTS translation uses the term ‘maritime lateral limit’.

\(^{105}\) See 1973 Agreement, Article 70.

\(^{106}\) See 1973 Agreement, Articles 72, 76 and 79.

\(^{107}\) See 1973 Agreement, Articles 73–82.
Figure 3.6: Argentina – Uruguay: 1973 Agreement concerning boundary delimitation and the Río de la Plata. Source: Charney and Alexander (1993), note 57 on page 16.
overlapping claims to internal waters. The jurisdictional status of the river area is not, however, clear given that (1) several States dispute the river area’s characterisation as internal waters\textsuperscript{108} and (2) in response to these protests, Argentina and Uruguay have confirmed their respect for the freedom of navigation in the river area.\textsuperscript{109}

Article 2 of the 1973 Agreement establishes a ‘coastal belt’ of exclusive jurisdiction of variable width adjacent to each Party’s coast within the river area. Articles 3-6 employ a complex combination of several criteria to determine the existence of national jurisdiction beyond these coastal belts (see Chapter 4.6 for further discussion).

The Articles provide as follows:

**Article 3.**

Outside the coastal belts, each Party’s jurisdiction shall also apply to vessels flying its flag. The same jurisdiction shall also apply to vessels flying the flags of third parties involved in accidents with that Party’s vessels. Notwithstanding the provisions of the first and second paragraphs, the jurisdiction of one Party shall apply in all cases in which its security is affected or in which unlawful acts are committed which have effect in its territory, regardless of the flag flown by the vessel involved. Where the security of both Parties is affected or the unlawful act has effect in both territories, the jurisdiction of the Party whose coastal belt is closer than that of the other Party to the place where the vessel was apprehended shall apply.

**Article 4.**

In cases not covered in article 3 and without prejudice to the specific provisions of other articles of this Treaty, the jurisdiction of either Party shall apply according to the criterion of greater proximity of one or the other coastal belt to the place in which the events in question occur.

**Article 5.**

The supervising authority which discovers an unlawful act may pursue the offending vessel up to the limit of the coastal belt of the other Party.

\textsuperscript{108}The closing line and associated internal waters have been protested by several States. See Charney and Alexander (1993), above n 57 on page 16, 758-759. See also Roach and Smith, above n 52 on page 93, 35, 129, 143.

\textsuperscript{109}See Charney and Alexander, pp 758–759 (1993). Article 11 of the 1973 Agreement provides that ‘In shared waters the navigation of public and private vessels of the countries of the Rio de la Plata Basin and public and private merchant vessels flying the flags of third countries shall be permitted, without prejudice to the rights already granted by the Parties under existing treaties. Furthermore, each Party shall permit the passage of warships flying the flags of third countries and authorized by the other Party, providing that this does not adversely affect its public policy or security.’
If the offending vessel enters that coastal belt, the co-operation of the other Party shall be sought and that Party shall in all cases hand over the offender so that he can be brought before the authority which initiated the pursuit.

**Article 6.**

The authorities of one Party may seize a vessel flying the flag of the other Party when the latter is caught in flagrant violation of the provisions governing fishing, conservation and preservation of living resources, and pollution, in force in their shared waters and shall notify that Party immediately and place the offending vessel at the disposal of its authorities.

The 1973 Agreement also establishes cooperative frameworks concerning the joint management of navigation and works in the river area, vessel pilotage, search and rescue operations, vessel salvaging, pollution, fishing, and marine scientific research. A joint Administrative Commission with international legal personality is empowered to perform several functions concerning the implementation and operationalisation of these cooperative frameworks. The Commission is also empowered to consider disputes arising between the Parties ‘concerning the Rio de la Plata’ in accordance with a compulsory conciliation procedure.

Article 41 of the 1973 Agreement designated a delimitation line for the seabed and subsoil of the river area. Each Party is entitled to explore and exploit the resources of the seabed and subsoil on their respective side of the delimitation line.
provided that installations or other works do not interfere with navigation in the river area. Mineral deposits found to be straddling the delimitation line are to be shared ‘proportionally’ between the two States. (1973 Agreement, Article 43.)

In 1988, the Parties concluded an agreement entrusting the Administrative Commission with the task of designating a maritime boundary between two small islands (Martin Garcia Island and Timoteo Dominguez Island, located near Buenos Aires) in the river area. The author is not aware if this designation has been effected.

The provisions of the 1973 Agreement discussed above allocate coastal State competence and/or jurisdiction within the relevant OCA in a complete set of functional contexts. They specify the terms on which Argentina and Uruguay are to implement within the relevant OCA all of the functional components of their coastal State jurisdiction.

3.3.3 Barbados – Guyana

Background:

Barbados and Guyana assert overlapping EEZ claims and continental shelf entitlements in an OCA located opposite the North East coast of continental South America (see Figure 3.7). As discussed in the following paragraphs, the jurisdictional entitlements of Barbados and Guyana in this area are contested by Venezuela.

Design features and analysis of functional coverage:

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119 1973 Agreement, Articles 41–42.
Figure 3.7: Barbados – Guyana: overlapping claims and Co-operation Zone. Source: Colson and Smith, Volume V, note 57 on page 16.
In December 2003 both States concluded a treaty establishing a detailed framework for the cooperative management of this area\textsuperscript{122} (2003 Treaty). The 2003 Treaty is expressly characterised as an implementation of the LOSC, and LOSC provisions concerning provisional management of overlapping EEZ claims.\textsuperscript{123} The preambular text of the 2003 Treaty recognises ‘the relevance and applicability’ of LOSC Article 74(3) in addition to emphasising the ‘universal and unified character’ of the LOSC ‘and its fundamental importance for the maintenance and strengthening of international peace and security, as well as for the sustainable development of the oceans and seas’.

Article 1(1) of the 2003 Treaty establishes a ‘Co-operation Zone’ for the ‘exercise of joint jurisdiction, control, management, development, and exploration and exploitation of living and non-living natural resources, as well as all other rights and duties’ established in the LOSC. The remaining paragraphs of Article 1 contain language designed to protect the legal positions of both States concerning delimitation of the OCA and the extent of their respective coastal State jurisdiction. They provide as follows:

2. This Treaty and the Co-operation Zone established thereunder are without prejudice to the eventual delimitation of the Parties’ respective maritime zones in accordance with generally accepted principles of international law and the Convention.

3. The Parties agree that nothing contained in the Treaty nor any act done by either Party under the provisions of the Treaty will represent a derogation from or diminution or renunciation of the rights of either Party within the Co-operation Zone or throughout the full breadth of their respective exclusive economic zones.

The Co-operation Zone consists of defined triangular area that is declared to be co-extensive with the area of bilateral overlap between the EEZ claims of both


\textsuperscript{123}Relevant LOSC provisions are discussed in Chapter 2.3.5.
The Zone is located (1) on the Venezuelan side of a comprehensive maritime boundary established by Venezuela and Trinidad & Tobago\(^{125}\) and (2) beyond 200 nautical miles from the undisputed portions of the coastlines of those States (see Figure 3.7).\(^{126}\) The Zone is however defined by reference to a point located within 200 nautical miles of Guyana-administered territory west of the Essequibo River, which is also claimed by Venezuela (see ‘Point G’ in Figure 3.7).\(^{127}\) Venezuela has actively protested the maritime claims of Barbados and Guyana in the vicinity of the ‘Co-operation Zone’, and both Barbados and Guyana have expressed concern that the Trinidad & Tobago – Venezuela delimitation agreement infringes upon their claims to an EEZ and extended continental shelf.\(^{128}\) Accordingly, the 2003 Treaty may be viewed as a diplomatic response by both Parties to maritime claims promulgated by their regional neighbours.\(^{129}\) Nonetheless, the Treaty does make some effort to accommodate the positions of other States, both through the preambular acknowledgment LOSC delimitation provisions and through Article 4 which provides that:

The Parties shall have due regard to the rights and duties of other States in the Co-operation Zone in accordance with generally accepted principles of international law and the [Law of the Sea] Convention, and in particular the provisions of Article 58 of the Convention [concerning rights and duties of other States in the EEZ].

\(^{124}\)See 2003 Treaty, Article 2. Coordinates of the triangular area are defined in Annex 1 of the Treaty.


\(^{126}\)See Colson and Smith, Volume V, above n 57 on page 16, 3578–3597.

\(^{127}\)Carl Dundas notes that ‘The coast of no other state is within 200 n.m. of the area of the Cooperation Zone (unless Venezuela’s claim to the Essequibo Region is taken into account). While the treaty took account of the outer limits of the exclusive economic zones of other states to a distance of 200 n.m. measured from the baselines from which their territorial sea is measured, it may be noted that the Cooperation Zone may overlap with the extended continental shelf claims of third states [Venezuela] ... and that Guyana’s 200 n.m. limit to form the Cooperation Zone is measured from coastline contested by Venezuela.’: ibid.

\(^{128}\)Ibid.

\(^{129}\)Anderson notes that: ‘The treaty between Barbados and Guyana appears to represent a diplomatic response by the two parties to the claims of third states. This may be the first example of the use of the concept of the joint area as a means of cooperation directed against the claims of third states.’: David Anderson, Modern Law of the Sea: Selected Essays (2008), 413–414.
The 2003 Treaty contains detailed provisions concerning management of the Co-operation Zone and the exercise of national jurisdiction within it. Article 5 addresses jurisdiction over living natural resources, providing for the exercise by both States of ‘joint jurisdiction’ in accordance with a ‘Joint Fisheries Licensing Agreement’, coordinated national measures and relevant international law. Negotiations to establish the Joint Fisheries Licensing Agreement are required to commence within three months of the Treaty’s entry into force. In the event of a failure to reach agreement concerning ‘the exercise of their joint jurisdiction over living resources’ in the Co-operation Zone, neither State is entitled exercise jurisdiction on a unilateral basis.

Article 6 of the 2003 Treaty addresses jurisdiction over non-living natural resources, providing for the exercise by both States of ‘joint jurisdiction’ in accordance with relevant international law. The exercise of jurisdiction over non-living natural resources is to be managed by a ‘Joint Non-Living Resources Commission’ established ‘at such time as agreed’ by both States. In the absence of an agreement concerning ‘the exercise of their joint jurisdiction over non-living resources’ in the Co-operation Zone, neither State is entitled to exercise jurisdiction on a unilateral basis.

Article 6 of the 2003 Treaty also contains provisions concerning the cooperative conduct of marine scientific research; information exchange; unitisation of non-living natural resources that straddle the boundary of the Co-operation Zone; and the sharing of non-living natural resources located within the zone.

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130 2003 Treaty, Article 5(1) provides, inter alia, that ‘the Parties shall act at all times in accordance with generally accepted principles of international law and the [Law of the Sea] Convention, including the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.’ Concerning enforcement of the Joint Fisheries Licensing Agreement, Article 5(4) provides that ‘Either Party shall be entitled to enforce the provisions of the Joint Fisheries Licensing Agreement against any persons through the application of its relevant national law. Each Party undertakes to inform the others in writing of such enforcement.’

131 2003 Treaty, Article 5(3).
132 2003 Treaty, Article 5(5).
133 2003 Treaty, Article 6(1).
134 2003 Treaty, Article 6(2)-(3).
135 2003 Treaty, Article 6(4).
136 2003 Treaty, Article 6(5)-(9).
Article 7 of the 2003 Treaty obliges both States to reach agreement concerning the cooperative exercise within the Co-operation Zone of jurisdiction over ‘Security Matters’. Negotiations to establish a security agreement are required to commence within three months of the Treaty’s entry into force. The following entitlement applies prior to the entry into force of the security agreement:

... unless otherwise provided for in this Treaty, each Party shall unilaterally exercise defence and criminal jurisdiction within and in relation to the Co-operation Zone to the same extent that it may do so within and in relation to that part of its exclusive economic zone that lies outside the Co-operation Zone.

The 2003 Treaty also establishes cooperative frameworks concerning protection of the marine environment in the Co-operation Zone and ongoing consultation between both States. Article 10 provides for recourse to the dispute settlement framework (including compulsory and binding procedures) set out in the LOSC in the event that direct diplomatic negotiations have failed to resolve a dispute concerning the interpretation or application of the 2003 Treaty.

The provisions of the 2003 Treaty surveyed above establish a clear basis for allocating coastal State competence and/or jurisdiction within the relevant OCA in a complete set of functional contexts – they specifies the terms on which Barbados and Guyana are to implement within the relevant OCA all of the functional components of their coastal State jurisdiction. However, 2003 Treaty does not provide for the exercise of jurisdiction by other States (namely Venezuela) asserting claims to the Co-operation Zone. Because Venezuela is not party to the 2003 Treaty and is not bound by the

137 See 2003 Treaty, Article 7(2), which also sets out a list of matters that may be addressed in the security agreement, namely: Enforcement of regulations over natural resources; terrorism; prevention of illicit narcotics trafficking; trafficking in firearms, ammunition, explosives and other related materials; smuggling; piracy; trafficking in persons; and maritime policing and search and rescue.

138 2003 Treaty, Article 7(3).

139 See 2003 Treaty, Article 8. Article 8(1) provides for the coordination of national measures in order to ‘adopt all measures necessary for the preservation and protection of the marine environment in the Co-operation Zone.’ Article 8(2) requires each State to inform the other as soon as possible ‘with information about actual or potential threats to the marine environment in the Co-operation Zone.’

140 See 2003 Treaty, Article 9. Article 9(1) provides that ‘Either Party may request consultations with the other Party in relation to any matter arising out of this Treaty or otherwise concerning the Co-operation Zone.’

141 For further discussion of relevant LOSC provisions, see Chapter 2.5 above.
Treaty’s obligations, ambiguities of the international legal framework concerning the exercise of coastal State jurisdiction within OCAs continue to impact upon relations between all claimant coastal States and management of the relevant OCA.

3.3.4 Canada – United States

Background:

In 1979 the Canada and the United States agreed to empower a Chamber of the ICJ to designate a single seabed and water-column boundary in the Gulf of Maine. The Chamber’s 1984 Judgment establishes a segmented boundary that commences at an offshore point mutually agreed by both States (Point A) and terminates at the point of intersection with the United States’ 200 nautical mile limit (see Figure 3.9). McDorman notes that, prior to the conclusion of the 1979 agreement, Canadian and US negotiators had proposed several options concerning provisional joint management of overlapping claims in the Gulf of Maine. These proposals did not gain traction because delimitation issues proved difficult to set aside. In particular, the location of competing boundary claims influenced political views concerning the fair division of fisheries and potential hydrocarbon resources.

The 1984 Judgment did not delimit two areas that have remained subject to overlapping jurisdictional claims. The first OCA (see Figure 3.8) consists of waters located landward of Point A surrounding Machias Seal Island and North Rock (between Maine and Nova Scotia). These features are claimed by both States and Point

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142 Agreement to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine, signed 29 March 1979, reproduced in Myron Nordquist and KR Simmonds (eds), New Directions in the Law of the Sea, Volume IX (1980) 167. For discussion of the negotiations preceding the agreement, see McDorman, Salt Water Neighbours, above n 2 on page 82, 131.
143 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States) [1984] ICJ Reports 246.
144 For illustrative maps see McDorman, Salt Water Neighbours, above n 2 on page 82 and Gray, above n 3 on page 82.
145 Ibid.
146 Ibid.
147 Ibid.
148 For illustrative maps and further information concerning the specific jurisdictional claims, see McDorman, Salt Water Neighbours, above n 2 on page 82 and Gray, 3 on page 82.
A was chosen in order to separate territorial sovereignty-related issues from the maritime delimitation undertaken by the ICJ.\textsuperscript{149} The second OCA is located seaward of the terminal point of the boundary designated in the 1984 Judgment (see Figure 3.9). This area is subject to overlapping continental shelf claims promulgated by both States.\textsuperscript{150} A sub-component of the OCA (commonly referred to as ‘the gray area’) is also subject to an EEZ claim promulgated by Canada.\textsuperscript{151}

\begin{center}{\textit{Design features and analysis of functional coverage:}}\end{center}

Activity in the OCAs described above is managed in accordance with several functionally specific formal and informal cooperative arrangements. As discussed in Chapter 3.2.1, several government agencies from each State cooperate closely within their field of operational responsibility and have developed detailed cooperative management arrangements that apply to both OCAs and contiguous areas of non-overlapping jurisdiction.\textsuperscript{152}

Enforcement jurisdiction in the OCAs is allocated by reference to the flag State of the vessel. As discussed in 3.2.1, Canada and the United States only exercise jurisdiction within OCAs over vessels flying their respective flags and law enforcement agencies of each State engage in regular consultations. There have been several attempts to harmonise the domestic regulations of both States concerning fisheries activities in the OCAs. Both States have adopted informal processes of technical and inter-agency communication in order to manage and allocate fish stocks in the Gulf of Maine and surrounding waters.\textsuperscript{153} A key measure in this context is the

\begin{footnotesize}
\begin{enumerate}
\item[{\textsuperscript{149}}]\textsuperscript{149} McDorman, Salt Water Neighbours, above n 2 on page 82, 145.
\item[{\textsuperscript{150}}]\textsuperscript{150} See McDorman, Salt Water Neighbours, above n 2 on page 82, 175–181.
\item[{\textsuperscript{152}}]\textsuperscript{152} See in particular the commentary concerning the Joint Marine Pollution Contingency Plan and the Joint Radiological Emergency Response Plan.
\item[{\textsuperscript{153}}]\textsuperscript{153} For further discussion see EJ Pudden and DL VanderZwaag, ‘Canada–USA Bilateral Fisheries Management in the Gulf of Maine: Under the Radar Screen’ (2007) 16 Review of European
\end{enumerate}
\end{footnotesize}
Figure 3.8: Canada – United States: overlapping claims surrounding Machias Seal Island and North Rock. Source: Gray, note 3 on page 82.
Figure 3.9: Canada – United States: boundary delimitation and overlapping claims in the North Atlantic. Source: Gray, note 3 on page 82.
Transboundary Management and Guidance Committee, which recommends a total allowable catch for several species. Domestic regulations concerning lobster fishing in the OCA surrounding Machias Seal Island and North rock remain somewhat divergent. Hydrocarbon exploration and exploitation within the OCAs and surrounding waters is currently subject to moratoria established in accordance with domestic legal procedures in each State.

The United States and Canada engage in cooperative management of their Atlantic OCAs in accordance with a complementary collection of international legal instruments, cooperative management arrangements developed by equivalent government agencies in each State, and coordinated national policy-making. When viewed in isolation, each of these frameworks exhibits functional gaps, focusing on a particular functional context or management challenge. However, the coherent and overlaid application of the various frameworks establishes a functionally-broad allocation of coastal State jurisdiction within the relevant OCAs.

### 3.3.5 Colombia – Jamaica

**Background:**

In 1993 Colombia and Jamaica concluded a treaty (1993 Treaty) concerning their overlapping claims to a continental shelf and EEZ in the Caribbean Sea. Ar-
Article 1 of the 1993 Treaty establishes a maritime boundary between the two States.\textsuperscript{159} Immediately to the west of the boundary, the 1993 Treaty also establishes a ‘\textbf{Joint Regime Area}’ in which, ‘pending the determination of the jurisdictional limits of each Party ..., the Parties agree to establish ... a zone of joint management, control, exploration and exploitation of living and non-living resources’.\textsuperscript{160} Article 3(1), sub-paragraphs (b) and (c) of the 1993 Treaty exclude two circular areas of 12 nautical miles radius from the Joint Regime Area. One circular area surrounds the cays of the Seranilla Bank and the other surrounds the cays of Bajo Nuevo. Both of these groups of features are claimed by Colombia - a claim that has been disputed on various occasions by Honduras, Jamaica, Nicaragua and the United States.\textsuperscript{161} Sensitivity on the part of Jamaica to these overlapping sovereignty claims is evident in the text of the 1993 Treaty, which does not contain an explicit recognition of Colombian sovereignty over the features.\textsuperscript{162} However, the chart attached to the Treaty does refer to the two circular areas as ‘Colombia’s territorial sea in Serranilla and Bajo Nuevo’. Relevant spatial characteristics of the 1993 Treaty are illustrated in Figure 3.10.

\textit{Design features and analysis of functional coverage:}

Articles 3(2)–(6) of the 1993 Treaty establish a framework for the cooperative exercise of national jurisdiction within the Joint Regime Area. Article 3(2) sets out a list of activities that each State is entitled to carry out. These correspond to the functional components of jurisdiction attributed by the LOSC to both coastal States in their respective EEZ and continental shelf (for further discussion see Chapter 4.6.3).\textsuperscript{163} Activities within the Joint Regime Area concerning development of non-

\textsuperscript{159}1993 Treaty, Article 1.
\textsuperscript{161}Ibid.
\textsuperscript{162}Ibid.
\textsuperscript{163}Article 3(2) of the 1993 Treaty also entitles both States to carry out ‘Such measures as are authorized by this Treaty, or as the Parties may otherwise agree for ensuring compliance with and enforcement of the regime established by this Treaty.’
Figure 3.10: Colombia – Jamaica: maritime boundary and the Joint Regime Area.
Source: Charney and Alexander, Volume III, note 57 on page 16.
living resources, marine scientific research, and protection and preservation of the marine environment are required to be undertaken on ‘on a joint basis agreed by the Parties.’

National jurisdiction within the Joint Regime Area is allocated by reference to nationality and the flag State of a vessel – Article 3(5) stipulates that ‘each Party has jurisdiction over its nationals and vessels flying its flag or over which it exercises management and control in accordance with international law.’ Each Party is required to take certain steps when its nationals or vessels have been alleged by the other Party to have breached either the provisions of the 1993 Treaty or any measures adopted for their implementation. Article 3(6) sets out an agreement to ‘adopt measures for ensuring that nationals and vessels of third States comply with any regulations and measures adopted by the Parties’ that concern activities within the Joint Regime Area.

Article 4 of the 1993 Treaty provides for the establishment of a ‘Joint Commission’, consisting of one representative of each Party, that is required to develop ‘conclusions’ concerning (1) ‘modalities’ of the Treaty’s implementation, (2) the carrying out of activities in the Joint Regime Area, (3) the adoption of measures concerning vessels and national of third States, and (4) any other relevant functions assigned.

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164 1993 Treaty, Article 3(3). Both States are also prohibited from authorising third States, international organisations, or the vessels of such entities to carry out these activities; although leases, licenses, joint ventures and technical assistance programmes are, subject to procedures set out in Article 4, permitted.

165 The meaning of this provision is uncertain in several respects: Is the intention to draw a distinction between nationals and vessels? If so, how is jurisdiction allocated when persons holding the nationality of one Party are aboard a vessel flagged to the other Party? Perhaps the reference to ‘nationals’ attempts to ensure that both Parties can exercise jurisdiction within the Joint Regime Area over their own nationals when they are not aboard a flagged vessel? Further, what is the effect of allocating jurisdiction to a Party in respect of national and vessels ‘over which it exercises management and control in accordance with international law’? Perhaps this is intended to enable either Party to exercise coastal State jurisdiction over vessels flagged to third States? That interpretation would complement the specific provision in Article 3(6) concerning the adoption of regulations and measures relating to nationals and vessels of third States.

166 1993 Treaty, Article 3(5). The relevant passage provides that ‘the Party alleging the breach shall forthwith commence consultations with a view to arriving at an amicable settlement within 14 days. On receipt of the allegation, the Party to whose attention the allegation has been brought shall, without prejudice to the consultations referred to in the above paragraph: (a) In relation to an allegation that a breach has been committed, ensure that the activities, the subject-matter of the allegation, do not recur; (b) In relation to an allegation that a breach is being committed, ensure that the activities are discontinued.’
to it by the Parties. The Commission not entrusted with ongoing functions. Rather, it is required to complete the tasks assigned to it ‘within six months from the commencement of its work.’

The 1993 Treaty does not contain a specialised mechanism for settling disputes concerning its interpretation and application. Rather, Article 7 of the Treaty provides for dispute settlement ‘by agreement between the two countries in accordance with the means for the peaceful settlement of disputes provided for by international law.’

Provisions of the 1993 Treaty discussed above, in particular Article 3, allocate coastal State competence and/or jurisdiction within the relevant OCA in a complete set of functional contexts. It specifies the terms on which Colombia and Jamaica are to implement within the relevant OCA all of the functional components of their coastal State jurisdiction. However, the continued sovereignty disputes concerning Seranilla Bank and the cays of Bajo Nuevo are serious impediments to jurisdictional clarity concerning management of the Joint Regime Area. The claims of Honduras and the United States to these features are no longer actively asserted. In December 2001 Nicaragua submitted an application to the International Court of Justice which requested, inter alia, a judgment recognising Nicaraguan sovereignty over both features. The Court is currently deliberating on the merits of this issue, which form part of a broader territorial and maritime dispute. The outcome of proceedings will be keenly observed.

167 Article 4(3) of the 1993 Treaty provides that that conclusions of the Joint Commission are to be reached by consensus. It also provides that conclusions are non-binding unless they are ‘adopted’ by the Parties.
169 Note that as of 30 August 2011 Colombia has yet to ratify the LOSC (Jamaica has signed and ratified the Convention): see above n 21 on page 9. Consequently, the compulsory and binding procedures set out in LOSC Part XV would be inapplicable to a dispute concerning the 1993 Treaty.
3.3.6 Denmark (Faroe Islands) – United Kingdom

Background:

In May 1999 Denmark and the United Kingdom concluded an agreement\textsuperscript{171} (1999 Agreement) concerning their overlapping claims to fisheries zones and continental shelf in North Atlantic waters located between the Faroe Islands and Scotland.\textsuperscript{172} The 1999 Agreement designates continental shelf and fisheries zone boundaries\textsuperscript{173} in addition to a ‘Special Area’ of water column that remains subject to the overlapping jurisdictional claims both States (see Figure 3.11).\textsuperscript{174}

Design features and analysis of functional coverage:

Within the Special Area each State ‘is entitled to exercise its jurisdiction and rights in accordance with the provisions of Articles 5, 6 and 7’ of the Agreement. Article 5 of the 1999 Agreement establishes a framework for the cooperative exercise of fisheries jurisdiction within the Special Area. Both States are required to apply within the Special Area their respective rules and regulations concerning the management and conduct of fisheries.\textsuperscript{175} They are also required to refrain within the Special Area from (1) inspection and control of vessels operating under a licence issued by the other State;\textsuperscript{176} and (2) taking ‘any action that would disregard or infringe upon the exercise of fisheries jurisdiction by the other Party or the conduct of fisheries under license issued by the other Party.’\textsuperscript{177}


\textsuperscript{172}For further discussion see Charney and Smith, Volume IV, above n 57 on page 16, 2955–2977.

\textsuperscript{173}1999 Agreement, Articles 1 and 3.

\textsuperscript{174}Schofield notes that ‘[t]he Special Zone straddles the continental shelf boundary but does so in an unequal manner, the majority of it being located on the UK side of the seabed boundary line. This reflected the overwhelming dependence of the Faroe Islands economy on fisheries.’: Schofield, above n 58 on page 16, 9. See also Charney and Smith, Volume IV, above n 57 on page 16, 2956.

\textsuperscript{175}1999 Agreement, Article 5(a).

\textsuperscript{176}1999 Agreement, Article 5(b).

\textsuperscript{177}1999 Agreement, Article 5(c).
Figure 3.11: Denmark (Faroe Islands) – United Kingdom: maritime boundary and Special Area. Source: UK Government, *Command Paper* No. CM 4373 reproduced in Sun Pyo Kim, above n 2 on page 4.
Article 6 of the 1999 Agreement contains several obligations designed to prevent the exercise of continental shelf jurisdiction by both States from impacting upon fishing activities within the Special Area. Both States are obliged, inter alia, to (1) ‘take all possible steps to prevent and eliminate pollution’ from the their ‘offshore activities, in accordance with the Convention for the Protection of the Marine Environment of the North-East Atlantic ...’;\(^{178}\) and (2) provide timely notification to the other State of any activity that may have an adverse impact on the marine environment.\(^{179}\)

Article 7 of the 1999 Agreement contains a provision designed to restrain the unilateral exercise of several aspects of coastal State jurisdiction within the Special Area. It provides as follows:

> With regard to the exercise in the Special Area of jurisdiction and rights which are conferred on coastal States by international law, other than such jurisdiction or rights that follow directly from continental shelf or fisheries jurisdiction, each Party shall refrain from exercising such jurisdiction or rights without the agreement of the other Party and shall cooperate with the other Party, notably on measures to protect the marine environment.

The 1999 Agreement does not contain a provision protecting the legal positions of both States concerning their overlapping claims in the Special Area. Rather, the 1999 Agreement is expressed to ‘be without prejudice to any claim of either Party’ \(^{180}\) outside of ‘the area between the Faroe Irelands and the United Kingdom within 200 nautical miles from the baselines from which the territorial sea of each Party is measured’.\(^{180}\) The clear omission of a clause protecting claims within the Special Area is suggestive of an intention to cooperatively manage this OCA on a permanent basis.

The 1999 Agreement is functionally focused on fisheries cooperation in the Special Area and contains only general provisions concerning the other important aspect of coastal State jurisdiction beyond 24 nautical miles, namely protection of the marine environment. Environmental management in the Special Area is, however, managed

\(^{178}\)1999 Agreement, Article 6(a).
\(^{179}\)1999 Agreement, Article 6(d).
\(^{180}\)See 1999 Agreement, Article 11 and the associated definition in the Agreement’s Preambular text.
in accordance with detailed provisions set out in the Convention for the Protection of the Marine Environment of the North-East Atlantic, to which both Denmark and the United Kingdom are party.

3.3.7 Equatorial Guinea – Gabon

Background:

Equatorial Guinea and Gabon assert overlapping claims to maritime jurisdiction in and adjacent to the Corisco Bay (located in the Gulf of Guinea: see Figure 3.12).\textsuperscript{181} In May 2003 Gabon submitted a document to the UN Secretariat, purporting to be an agreement with Equatorial Guinea delimiting land and maritime boundaries between the two States.\textsuperscript{182} Equatorial Guinea has subsequently submitted several letters to the UN Secretariat disputing the existence of this agreement and the authenticity of the document submitted by Gabon.\textsuperscript{183} The two States also assert rival territorial claims to several Corisco Bay islands.\textsuperscript{184} In 2003 both States agreed to engage in talks mediated by the UN Secretary General in order to resolve long-standing diplomatic and military tensions associated with their competing jurisdictional claims.\textsuperscript{185}

Design features and analysis of functional coverage:

In July 2004 both States concluded a Memorandum of Understanding that reportedly contains a framework for future negotiations and an agreement-in-principle to engage in joint development of hydrocarbon resources in waters claimed by both


\textsuperscript{182} See Convention demarcating the land and maritime frontiers of Equatorial Guinea and Gabon, signed and entered into force 12 September 1974, reproduced at (2005) 2248 UNTS 93.


\textsuperscript{184} Dzurek, above n 181.

\textsuperscript{185} Diplomatic and military tensions concerning the Corisco Bay and its islands have existed since the 1970s. For further discussion see International Boundaries Resarch Unit, ‘UN, Equatorial Guinea and Gabon discuss next phase of mediation over Corisco Bay dispute’ (11 June 2008) Boundary News available at <http://www.dur.ac.uk/ibru/news/>.
Figure 3.12: Equatorial Guinea – Gabon: Corisco Bay and surrounds. Source: NationMaster Maps Online.
States.\textsuperscript{186} Mediated talks between Equatorial Guinea and Gabon are ongoing.\textsuperscript{187}

As far as the author is aware, these talks have not resulted in the further development of the formative framework concerning the provisional joint management of waters claimed by both States.

The 2004 Memorandum of Understanding apparently contains only general commitments to engage in, and discuss the establishment of, cooperative management of the relevant OCA. It does not appear to allocate functional components of coastal State jurisdiction within the area concerned.

### 3.3.8 Guinea-Bissau – Senegal

**Background:**

An exchange of letters on 26 April 1960 between France and Portugal (\textit{1960 Boundary Agreement}) established a maritime boundary between Senegal and the Portuguese Province of Guinea for overlapping claims to territorial sea, contiguous zone and continental shelf (see Figure 3.13).\textsuperscript{188} The independent Republic of Guinea-Bissau subsequently disputed the legal status of the Agreement.\textsuperscript{189} The independent Republic of Senegal maintained that the Agreement was legally binding on both

\textsuperscript{186}Reportedly, the Memorandum of Understanding provides that ‘The parties will abstain from all behaviour and all acts that could compromise, impede, or endanger the negotiation and execution of the accord.’ It also reportedly contains an agreement hold formal negotiations concerning joint development of the relevant OCA, providing that ‘[t]he maritime area in question as well as the terms and conditions of its joint development will be determined’. See ‘Equatorial Guinea and Gabon to jointly explore offshore waters’ (8 July 2004) \textit{Energy-pedia news}, available at <http://www.energy-pedia.com/article.aspx?articleid=106011>. Other relevant news reports include: ‘Gabon, Equatorial Guinea resolving border crisis’ (27 February 2006) \textit{Afrol News}, available at <http://www.afrol.com/articles/18259>; ‘Gabon–Equatorial Guinea: Annan repoens talks on territorial dispute’ (28 February 2006) \textit{Irin News}, available at <http://www.irinnews.org/printreport.aspx?reportid=58282>.


\textsuperscript{188}See Ministry of Foreign Affairs (France), Decree No. 60-504 of May 23, 1960, Publishing the Exchange of Notes between France and Portugal Regarding the Maritime Boundary between Senegal and Portuguese Guinea, Signed April 26, 1960 in Charney and Alexander, Volume I, above n 57, 872–874.

Parties and the resulting boundary dispute was submitted to arbitration in March 1985.\textsuperscript{190} In an award published 31 July 1989 (\textit{1989 Arbitral Award}), the tribunal held by a majority of two to one that the 1960 Boundary Agreement was legally binding on both Parties, albeit solely in relation to the territorial sea, contiguous zone and the continental shelf.\textsuperscript{191} Accordingly, the 1960 Boundary Agreement did not bind the parties in relation to delimitation of the EEZ. In a Separate Declaration, one member of the Tribunal noted that his preferred approach would have been to answer the first question put to the Tribunal ‘partially’ in the negative – i.e. by finding that the 1960 Boundary Agreement lacked force of law in relation to the EEZ.\textsuperscript{192} He went on to note that such an approach would have enabled the Tribunal to designate an EEZ boundary line, thus settling ‘the whole of the dispute’.\textsuperscript{193}

Guinea-Bissau promptly instituted proceedings against Senegal in the ICJ, requesting a declaration that the Arbitral Award was null and void. Guinea-Bissau’s argument focused on the Separate Declaration of Julio A. Barberis\textsuperscript{194} – the ICJ was requested, \textit{inter alia}, to adjudge and declare that the 1989 Arbitral Award was ‘inexistent in view of the fact that one of the two arbitrators making up the appearance of a majority in favour of the text of the ‘award’, has, by a declaration appended to it, expressed a view in contradiction with the one apparently adopted by the vote.’\textsuperscript{195} Guinea-Bissau submitted a subsequent application to the court on 12 March 1991, asking the court to determine a line delimiting all maritime zones of Guinea-Bissau and Senegal.\textsuperscript{196} In a judgment issued 12 November 1991, the Court rejected Guinea-Bissau’s submissions concerning the non-validity of the 1989 Arbi-

\textsuperscript{190} Ibid. The arbitral tribunal was presented with two questions: (1) whether Guinea-Bissau and Senegal were legally bound by the Agreement; and (2) ‘in the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?’: Award of Arbitral Tribunal of 31 July 1989, ibid, 5.
\textsuperscript{191} Award of Arbitral Tribunal of 31 July 1989, ibid, 72.
\textsuperscript{192} Award of Arbitral Tribunal of 31 July 1989, ibid, Declaration of Mr Julio A. Barberis, 74–75.
\textsuperscript{193} Ibid.
\textsuperscript{194} See above, n 192.
\textsuperscript{196} Ibid.
Further proceedings were discontinued after negotiations between the parties produced a **Management and Cooperation Agreement** in October 1993 and a supplementary **Protocol** in June 1995.

**Design features and analysis of functional coverage:**

The Management and Cooperation Agreement establishes a wedge-shaped ‘Area of joint exploitation’ (**Joint Area**) that straddles the delimitation line defined in the 1960 Boundary Agreement and also consists of an OCA produced by overlapping EEZ claims that are not delimited in that Agreement (see Figure 3.13). The apex of the wedge is the point of intersection of the low water mark and the Guinea-Bissau–Senegal land boundary. Areas of territorial sea bounded by the wedge are excluded from the Joint Area. The outer limit of the Joint Area is not defined – assumedly, it would extend to the outer limit of the States’ respective maritime claims.

Article 2 of the Management of Cooperation Agreement allocates to each Party a proportion of resources from the Joint Area, providing as follows:

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197 Ibid.
201 Article 1. For further discussion, and illustrative maps, of the spatial characteristics of the zone, see Charney and Alexander, Vol III, above n 57, 2252–2253.
202 Ibid.
204 Ibid.
205 Article 1. However Article 1 permits certain small scale fishing within this area: see Charney and Alexander, Vol III, above n 57, 2252–2253 for discussion.
206 For further discussion, see Charney and Alexander, Vol III, above n 57, 2252.
207 Note also that Article 3 of the Management of Cooperation Agreement provides for the reimbursement of previous spending by each State for petroleum prospecting in the Joint Area.
Figure 3.13: Guinea-Bissau – Senegal: maritime delimitation and Joint Area.
Source: Charney and Alexander, Volume I, note 57 on page 16.
Resources from the exploitation of the Area shall be shared in the following proportions:

*Fishery resources*
Fifty per cent to Senegal, Fifty per cent to Guinea-Bissau;

*Resources from the continental shelf*
Eighty-five per cent to Senegal, Fifteen per cent to Guinea-Bissau.

In the event of new discoveries, these proportions shall be revised, and such revisions shall depend on the quantity of resources discovered.

The allocation of sedentary species of living marine resources is unclear - such species arguably fall under both resource categories set out in Article 2.\textsuperscript{208}

The Agreement mandates the establishment by subsequent agreement of an *International Agency* to exploit the Joint Area.\textsuperscript{209} The International Agency is conferred with very broad powers. Article 5 of the Management and Cooperation Agreement provides that the Agency ‘shall succeed Guinea-Bissau and Senegal in the rights and obligations deriving from the Agreements concluded by each State and relating to the exploitation of the resources in the Area.’ The use of the term ‘succeed’ in this provision suggests that both States intended to delegate the entire scope of their respective national jurisdiction in the Joint Area to the International Agency. This intention is reinforced by Article 6, which provides as follows:

Under this Agreement, the Parties shall pool the exercise of their respective rights, without prejudice to the rights in law previously acquired by each Party and confirmed by judicial decisions, or to any claims previously formulated by them in respect of areas that have not been delimited.

Through use of a ‘without prejudice’ qualifier, Article 6 also prevents the Management and Cooperation Agreement from impacting upon the legal positions of both States concerning delimitation of the OCA and the extent of their respective underlying coastal State jurisdiction.

The Management and Cooperation Agreement remains in force for 20 years, and is ‘automatically renewable’ thereafter, although the term of the Agreement upon

\textsuperscript{208} For further discussion of international law concerning sedentary species, see Ronan Long, *Marine Resources Law* (2007).

\textsuperscript{209} Management of Cooperation Agreement, Article 4.
renewal is not specified.\textsuperscript{210} The Parties are required to resolve disputes concerning the Agreement or the subsequent agreement establishing the International Agency – initially by direct negotiations or, if no resolution is reached within six-months, by an arbitral tribunal or recourse to the ICJ.\textsuperscript{211} Upon suspension or expiration of the Agreement, both Parties have recourse to arbitration or the ICJ ‘for such parts of the delimitations as have not been settled.’\textsuperscript{212}

The Protocol sets out detailed provisions concerning the form, organisation and operation of the International Agency envisioned in the Management and Cooperation Agreement. The Agency is established as an international organisation, entrusted in broad terms with responsibility for promoting cooperation between States and for managing the resources of the joint Area.\textsuperscript{213} Article 5 of the Protocol establishes several functions of the International Agency, which are enumerated under three categories. The first category relates to mineral and petroleum resource development, including associated scientific studies and marketing. The second category relates to the field of marine fisheries, including the evaluation and management of fisheries resources, monitoring of the marine ecosystem, and regulation and control of fishing activities in the Joint Area. The third general category contains functions relating to: (1) the control of rational exploitation of the Joint Area’s resources and (2) cooperation with the Parties and relevant international organisations concerning security, regulatory control and surveillance, protection of the marine environment, and pollution prevention and control. Article 5 also expressly entitles the Agency to ‘act alone or in association with other companies or with international organisations in any activity’ in the Joint Area.

Articles 6–15 of the Protocol relate to the organisational and administrative characteristics of the International Agency. The Agency is vested with exclusive rights in

\footnotesize{\textsuperscript{210}Management and Cooperation Agreement, Article 8.}  
\footnotesuperscript{211}Management and Cooperation Agreement, Article 9.  
\footnotesuperscript{212}Ibid.  
\footnotesuperscript{213}Article 4. It is unclear whether the responsibility for promoting cooperation relates to Guinea-Bissau and Senegal or to States in general. The Protocol defines the terms ‘States Party’ and ‘Third State’ singularly and in plural. However, neither or these terms is used in Article 4.}
relation to mineral and petroleum titles and fishing activities in the Joint Area.\textsuperscript{214} It consists of several sub-bodies, including a High Authority (composed of senior political representatives of each State and entrusted with several decision-making, regulatory and enforcement responsibilities),\textsuperscript{215} a Secretariat (led by a Secretary-General vested with various executive and management functions, including implementation of tasks determined by the High Authority),\textsuperscript{216} and the Enterprise (a corporate structure open to private investment but subject to the majority ownership of both States, designed to facilitate development of hydrocarbon and fisheries resources in the Joint Area).\textsuperscript{217}

Articles 16–23 of the Protocol relate to cooperation between the International Agency and both States in several functional contexts. These contexts correspond generally to the functional components of jurisdiction attributed by the LOSC to both coastal States in their respective EEZ and continental shelf. Article 16 obligates both States and the International Agency to cooperate in respect of ‘scientific research, security, surveillance, rescue, protection of the marine environment, and transport’ in the Joint Area. It also requires both States and the Agency to ‘regularly exchange information they obtain in the course of any activities they may carry out’ in these functional contexts. Articles 17–23 contain more detailed articulations of the general obligations set out in Article 16. Article 17 also delegates security-related rights back from the Agency to both States, providing that ‘[a]s part of their security operations, the State Parties have policing and control rights in the Area on behalf of the Agency.’

Articles 24 and 25 of the Protocol allocate prescriptive jurisdiction in the Joint Area and establish a mechanism for dispute settlement. Senegalese law in force upon signature of the Protocol applies to ‘mineral and petroleum resource prospecting, exploration and exploitation activities and to surveillance and scientific research

\textsuperscript{214}Protocol, Article 6.
\textsuperscript{215}Protocol, Articles 9 and 10.
\textsuperscript{216}Protocol, Article 11.
\textsuperscript{217}Protocol, Articles 6 and 12–15. The capital of the enterprise is fixed at US$100,000 (Article 13). 67.5 percent is allocated to Senegal and 32.5 percent to Guinea-Bissau (Article 14). Up to 49 percent of shares may be transferred to the private sector (Article 14).
in the mining and petroleum sphere.\textsuperscript{218} The law of Guinea-Bissau in force upon signature of the Protocol applies to ‘fisheries resource prospecting, exploration and exploitation activities and to surveillance and scientific research in the sphere of fisheries’.\textsuperscript{219} The International Agency is entrusted with competence to amend certain laws concerning the development of hydrocarbon resources.\textsuperscript{220} It is also entitled generally to recommend modifications or amendments to the laws applicable in the Joint Area.\textsuperscript{221} The Parties are required to resolve disputes concerning the interpretation or implementation of the Protocol – initially by direct negotiations or, if no resolution is reached within three-months, by arbitration.\textsuperscript{222} All conventions, fisheries agreements and contracts concluded by the Enterprise are required to contain specific provisions concerning dispute settlement.\textsuperscript{223}

The 1993 Management and Cooperation Agreement, as supplemented by the 1995 Protocol, contain provisions allocating coastal State competence and/or jurisdiction within the relevant OCA in a complete set of functional contexts. These instruments set out the terms on which Guinea-Bissau and Senegal are to implement within the relevant OCA all of the functional components of their coastal State jurisdiction. Although both instruments establish a comprehensive management framework on paper, it appears that very little progress has been made towards their implementation in practice.\textsuperscript{224}

\textsuperscript{218}Protocol, Article 24(1).
\textsuperscript{219}Protocol, Article 24(2).
\textsuperscript{220}See Protocol, Articles 10.4(b) and 24.1.
\textsuperscript{221}See Protocol, Articles 11.1 and 24.3.
\textsuperscript{222}Protocol, Article 25. This dispute settlement provision is different to the equivalent provision in the Management and Cooperation Agreement. There is a shorter temporal trigger for dispute settlement by an independent body and no recourse is provided to the ICJ. The intended relationship between dispute settlement provisions in the Management and Cooperation Agreement and in the Protocol is unclear – note that Article 27.1 of the Protocol provides that the Protocol is ‘an integral part’ of the Management and Cooperation Agreement.
\textsuperscript{223}Protocol, Article 25.4, which interestingly does not specify what such provisions should contain!
\textsuperscript{224}Personal communication with John Donaldson, International Boundaries Research Unit, Wednesday November 30 2011.
3.3.9 Nigeria – São Tomé and Príncipe

Background:

Nigeria and São Tomé and Príncipe assert overlapping EEZ and continental shelf claims in the Gulf of Guinea. In 2001 the two States entered into a treaty (2001 Treaty) designed primarily to facilitate the joint development of ‘Petroleum and other Resources’ within the area subject to these overlapping claims. The Treaty was negotiated in the context of concerted efforts by Nigeria to conclude maritime boundaries with several of its neighbours. In Colson and Smith it is noted that negotiations between Nigeria and São Tomé and Príncipe ‘took place over a remarkably short period of time’ and were motivated ‘in part by the uncertainties regarding the extent of Nigeria’s oil licensing blocks in an area that was becoming increasingly prospective.’

Design features and analysis of functional coverage:

Subject to termination procedures and unless otherwise agreed, the 2001 Treaty remains in force for a period of 45 years.

The preambular text of the 2001 Treaty expressly acknowledges the relevance and applicability of the LOSC. It refers in particular to LOSC Article 74(3), concerning the provisional management of overlapping EEZ claims.

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227 See Colson and Smith, Volume V, above n 57 on page 16, 3640–3641.
228 Ibid.
229 For further discussion of political and strategic factors contributing to the negotiation of the 2001 Treaty, see Tanga Biang, above n 225. The text of the Treaty is heavily influenced by the model joint development agreement published by the British Institute of International and Comparative Law in 1989 (and revised in 1990): see above n 90 on page 29.
230 2001 Treaty, Article 51. Note than Article 51(1) provides, inter alia, that the Treaty shall ‘be reviewed by the States Parties in year thirty’.
231 This and other relevant LOSC provisions are discussed in Chapter 2.3.5 above.
Figure 3.14: Nigeria – São Tomé and Príncipe: joint development zone. Source: Colson and Smith, Volume V, note 57 on page 16.
Article 2 of the 2001 Treaty establishes a ‘joint development zone’ (the Zone) that consists of ‘the seabed, subsoil and the superjacent waters’ in a defined area, which is depicted in Figure 3.14. The Zone is currently the largest of its kind worldwide, enclosing an area of approximately 34,540 square kilometres (10,070 square nautical miles). The Zone is subject to several general principles, including the following: Both States are to exercise ‘joint control’ of resource development within the Zone for the purpose of ‘achieving optimum commercial utilization’ of the Zone’s resources. All ‘benefits and obligations’ arising from development activities undertaken in the Zone are shared 60 percent by Nigeria and 40 percent by São Tomé and Príncipe. Resources within the Zone are required to be ‘exploited efficiently ... having due regard to the protection of the marine environment, and in a manner consistent with generally accepted good oilfield and fisheries practice.’

Article 4 of the 2001 Treaty contains two provisions designed to protect the jurisdictional claims of both States within the Zone. The first provision relates to the Treaty’s interpretation, providing as follows:

Nothing contained in this Treaty shall be interpreted as a renunciation of any right or claim relating to the whole or any part of the Zone by either State Party or as recognition of the other State Party’s position with regard to any right or claim to the Zone or any part thereof.

The second provision relates to the legal effect of subsequent practice by both States. It provides as follows:

232 Schofield, above n 58 on page 16.
233 Note that Article 5 of the 2001 Treaty establishes a ‘Special Regime Area’ within the Zone, in which most provisions of the Treaty, particularly those concerning resources development, do not apply. This provision of the Treaty does not appear to have been implemented by both States: See Colson and Smith, Volume V, above n 57 on page 16, 3639, which notes that although Article 5 of the 2001 Treaty ‘refers to a Special Regime Area within the zone, to which the principle of joint development would generally not apply, it is understood that the state Parties have in fact agreed to treat this area as part of the Zone. This is evident from the fact that the acreage included in the JDA’s 2003 licensing round included the entire Special Regime Area. The Special Regime Area consisted of a highly prospective seabed area immediately adjacent to the Akpo field, which formed part of an existing Nigerian petroleum licence.’
234 2001 Treaty, Article 3.1.
235 Ibid.
236 2001 Treaty, Article 3.4.
No act or activities taking place as a consequence of this Treaty or its operation, and no law operating in the Zone by virtue of this Treaty, may be relied on as a basis for asserting, supporting or denying the position of either State Party with regard to rights or claims over the Zone or any part thereof.\textsuperscript{238}

Articles 9–35 of the 2001 Treaty establish a detailed framework for the cooperative management of resources located in the Zone. A ‘\textbf{Joint Ministerial Council}’ lacking separate legal personality is entrusted with several decision-making functions in addition to ‘overall responsibility for all matters relating to the exploration for and exploitation of the resources in the Zone, and such other functions as the States Parties may entrust to it.’\textsuperscript{239} The Council is composed of high-level representatives (ministers or persons of equivalent rank) appointed by each State.\textsuperscript{240} It is required to meet at least twice per year and its decisions are adopted by consensus.\textsuperscript{241}

A ‘\textbf{Joint Authority}’ possessing ‘juridical personality under international law and under the law of each of the States Parties’ is empowered, subject to the direction of the Joint Ministerial Council, to undertake various administrative and regulatory functions.\textsuperscript{242} These include: preparation of development plans concerning living and non-living resources, management of the commercial aspects of hydrocarbon development; preparation of regulatory and taxation regimes concerning hydrocarbon development, control of movements into, within and out of the Zone; data collection and exchange; and regulation of environmental matters, health and safety, and marine scientific research.\textsuperscript{243} Decision making within the Joint Authority is undertaken by a Board composed of representatives appointed by both States.\textsuperscript{244}

Articles 36–46 of the 2001 Treaty contain detailed ‘miscellaneous’ provisions that address the following matters within the Zone: employment and training; health and safety; prevention of pollution and protection of the marine environment; applicable

\textsuperscript{238}2001 Treaty, Article 4.2.
\textsuperscript{239}2001 Treaty, Article 8.
\textsuperscript{240}2001 Treaty, Article 6.2.
\textsuperscript{241}2001 Treaty, Article 7.
\textsuperscript{243}Ibid. See also 2001 Treaty, Article 19, concerning preparation and approval of the ‘Zone Plan’; Articles 21–31, concerning the regime for petroleum development in the Zone; and Articles 32–33, concerning non-hydrocarbon resources in the Zone.
\textsuperscript{244}2001 Treaty, Article 10. Board decisions are reached by consensus.
private law; criminal law and jurisdiction; compliance and enforcement; civil and administrative jurisdiction; security and policing in the Zone; review of applicable law and enforcement arrangements; rights of third States; and dealings with third persons prior to the adoption of the Treaty. Both Parties are entitled within the Zone to exercise jurisdiction in relation to vessels and national of third States.\(^\text{245}\) This entitlement is subject to several obligations (e.g. mandating continued cooperation and consultation) that are designed to coordinate the exercise by both States of national jurisdiction within the Zone.\(^\text{246}\) Criminal law and jurisdiction within the Zone over nationals of either State is allocated on the basis of their nationality.\(^\text{247}\) The framework used to allocate prescriptive and enforcement jurisdiction within the Zone is discussed in further detail in Chapter 4.6 below.

Articles 47–49 of the 2001 Treaty set out detailed procedures for the resolution of disputes (1) between the Joint Authority and private interests; (2) arising in the work of the Joint Authority or the Joint Ministerial Council; and (3) between the States Parties. Subject to several temporal and procedural conditions, disputes between the States Parties are subject to final and binding arbitration.\(^\text{248}\) Article 52 provides for unilateral termination of the Treaty in the event of certain categories of continued dispute.\(^\text{249}\) The dispute settlement framework set out in the 2001 Treaty is discussed in further detail in Chapter 4.9.

Provisions of the 2001 Treaty discussed above allocate coastal State competence and/or jurisdiction within the relevant OCA in a complete set of functional contexts. They specify the terms on which Nigeria and São Tomé and Príncipe are to implement within the relevant OCA all of the functional components of their

\(^{245}\) See 2001 Treaty, Articles 40–43.
\(^{246}\) Ibid.
\(^{247}\) 2001 Treaty, Article 40.1. Dual-nationals are subject concurrently to the criminal law and jurisdiction of both States.
\(^{248}\) 2001 Treaty, Article 49.
\(^{249}\) The relevant categories are: (1) any dispute falling under Article 49(1) of the 2001 Treaty; (2) any case where one State remains for more than 180 consecutive days in material breach of an arbitral award issued in accordance with the Treaty’s dispute settlement procedures: see 2001 Treaty, Article 52(1). The disputes falling under Article 49(1) of the Treaty are: (1) certain disputes whose existence is verified by a written agreement between the Heads of State of both States; and (2) disputes left unresolved by arbitral proceedings undertaken in accordance with the Treaty’s dispute settlement procedures.
coastal State jurisdiction. The Treaty is at present being actively implemented by both States, and the Joint Authority has completed several hydrocarbon licensing rounds (although production does not appear to have commenced).250 Given the size the Zone, and acute lack of offshore administrative capacity on the part of São Tomé and Príncipe (a least developed country with a population of 166,000),251 the task of managing the Zone on a functionally comprehensive basis falls, at present, almost entirely to Nigeria.

3.3.10 Trinidad and Tobago – Venezuela

Background:

In 1990 Trinidad and Tobago and Venezuela concluded a Treaty252 (1990 Delimitation Treaty) that finalised the delimitation of their respective claims to a territorial sea, exclusive economic zone and continental shelf in the Caribbean Sea and North Atlantic Ocean.253 For more than a decade prior to the conclusion of the 1990 Delimitation Treaty both States engaged in provisional and cooperative management of living marine resources within defined ‘Areas’ subject to overlapping claims (see Figure 3.15).254 Provisional and cooperative management was undertaken in accordance with two agreements: The first255 (1977 Fisheries Agreement) was concluded in 1977 and was subsequently renewed on two occasions.256 The sec-

251 See Human Rights Watch, ibid.
253 Partial delimitations were effected by agreements concluded in 1942 and 1989 – for further discussion see Charney and Alexander, Volume I, above n 57 on page 16 639–689.
254 For further discussion see Sun Pyo Kim, above n 2 on page 4, 117–118; Kaldone Nweihed, ’EEZ (uneasy) delimitation in the semi-enclosed Caribbean sea: Recent agreements between Venezuela and her neighbors’ (1980) 8 Ocean Development and International Law 1.
256 Charney and Alexander, Volume I, above n 57 on page 16, 658.
(1985 Fisheries Agreement) was concluded in 1985 and appears to have been allowed to expire. Nweihed notes that:

Both fishery agreements ... were not meant to construct maritime boundaries within the purpose of defining and separating fishery jurisdictions. Rather, they were conducted to regulate artisanal fishing, practiced by both sides but chiefly by Trinidad coastal fisherman in jurisdictional waters that include some ‘pocket areas’ within Venezuela’s interior waters.

Design features and analysis of functional coverage:

The 1977 Fisheries Agreement designated two Areas in which vessels flying the flags of both States were granted access for the exclusive purpose of fishing. Access was subject to detailed conditions, including those concerning the: location of fishing activities; number and construction of fishing vessels; and percentage of catch to be sold in each State. A Fisheries Commission composed of three representatives from each State was entrusted, inter alia, with the task of developing further conditions concerning the cooperative management of fisheries resources in the two Areas.

The 1977 Fisheries Agreement also contained provisions concerning the coordination of oceanographic research (particularly in the fields of conservation, mariculture and marine biology), in addition to several obligations to undertake a range of measures concerning the protection of species and preservation of the marine environment.


258 Per Article XIII, the duration of the 1985 Fisheries Agreement was set at two years, with provision for an extension of one additional year.


260 For an illustrative map of the two Areas (one located north of Trinidad, the other located south of Trinidad and north of Venezuela), and for further discussion, see Nweihed, above n 254 on the preceding page, 17.

261 See, eg, 1977 Fisheries Agreement, Articles III–VI. For further discussion of specific provisions see Nweihed, above n 254 on the previous page, 17.

262 See, eg, 1977 Fisheries Agreement, Article XIII.

263 1977 Agreement, Article IX.

264 See, eg, 1977 Fisheries Agreement, Article XII.
Figure 3.15: Trinidad and Tobago – Venezuela: fisheries cooperation prior to 1990 boundary delimitation. Source: Nweihed, note 254 on page 143.
The 1985 Fisheries Agreement revised and expanded upon several aspects of the management framework set out in the 1977 Fisheries Agreement and established two additional Areas – including a ‘Special Fishing Area’ located in Venezuelan internal waters – in which vessels flagged to both States were granted access for the purpose of ‘exploiting fisheries resources’.

Fishing activities in the existing and additional Areas were subject to detailed ‘operating conditions’, including catch limitations for vessels flagged to both States.

Article XI of the 1985 Fisheries Agreement, which reiterates in part Article XIV of the 1977 Fisheries Agreement, was designed to protect the competing jurisdictional claims of both States. It provides as follows:

Nothing in this agreement is to be considered as a diminution or limitation of the rights of either Contracting Party in relation to the limits of its internal waters, archipelagic waters, territorial sea, continental shelf or exclusive economic zone nor shall anything contained in this agreement in respect of fishing in the marine areas of either Contracting Party be invoked or claimed as a precedent.

Disputes concerning the interpretation or application of both Fisheries Agreements were to be resolved through direct negotiations. Neither of the Agreements contained express provisions concerning (1) the exercise of enforcement jurisdiction within the Areas or (2) the exercise of jurisdiction within the Areas in relation to vessels flagged to third States.

The 1977 and 1985 Fisheries Agreements are functionally limited to the context of marine living resources management. Implementation within the relevant OCA of
other functional components of coastal State jurisdiction was not explicitly enabled or contemplated.

3.4 Red Sea and Persian Gulf

3.4.1 Iran – United Arab Emirates (Sharjah)

**Background:**

Iran and the United Arab Emirates assert overlapping jurisdictional claims in Persian Gulf waters surrounding the islands of Abu Musa, Lesser Tunb (Jazireh-ye Nabi Tunb) and Greater Tunb (Jazireh-ye Tomb-e Bozorg). Both States also claim sovereignty over these three islands, the location of which is illustrated in Figure 3.16. In November 1971, Iran and the Emirate of Sharjah concluded a short Memorandum of Understanding (1971 MoU) that addresses the competing sovereignty claims and provides for the provisional joint development of marine resources.

**Design features and analysis of functional coverage:**

The preamble of the 1971 MoU preserves the legal positions of both Parties by noting that '[n]either Iran nor Sharjah will give up its claim to Abu Musa nor recognise the other’s claim.' Articles 1 and 2 of the MoU provide for the joint occupation of Abu Musa by both Parties and refer to land areas in which each Party ‘will have

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269 This section will not discuss cooperation undertaken within the Kuwait–Saudi Arabia ‘Offshore Neutral Zone’, taking into account the unique circumstances of the Zone’s creation. Interested readers may consult Charney and Smith, Volume IV, above n 57 on page 16, 2825–2840 for a general overview of relevant State practice. See also Agreement between the State of Kuwait and the Kingdom of Saudi Arabia Regarding the Submerged Zone Contiguous to the Partitioned Zone, signed 2 July 2000, entered into force 30 January 2001, reproduced at (2001) 36 Law of the Sea Bulletin 83.

270 For further details of both States’ respective claims, see Table of claims to maritime jurisdiction, above n 52 on page 93.

271 Chris Carleton, ‘Red Sea / Persian Gulf Maritime Boundaries’ in Colson and Smith, Volume V, above n 57 on page 16, 3474

Figure 3.16: Iran – United Arab Emirates: key insular features in the Persian Gulf. Source: Ahmadi, note 275 on the following page.
full jurisdiction’. Article 3 of the 1971 MoU provides that both Parties recognise the existence of a 12 nautical mile territorial sea around Abu Musa. Within this zone, the MoU provides for the exploitation of hydrocarbon resources by a private contractor under an existing concession agreement, the terms of which must be acceptable to Iran. The private contractor is required to pay half of the ‘governmental oil resources hereafter attributable to said exploitation’ to each Party. Article 5 of the 1971 MoU addresses the management of fisheries resources, providing that the national of both Parties ‘shall have equal rights to fish in the territorial sea of Abu Musa.’

The 1971 MoU is functionally limited to the context of marine resources management. Implementation within the relevant OCA of other functional components of coastal State jurisdiction is not explicitly enabled or contemplated. Note also that the extent to which the 1971 MoU is currently being implemented is unclear, given Iran currently exercises full control over the three islands.

3.4.2 Saudi Arabia – Sudan

Background:

Saudi Arabia and Sudan assert overlapping continental shelf claims in the Red Sea. In 1974 both States concluded an agreement relating to the joint exploitation of natural resources in the resulting OCA.

Design features and analysis of functional coverage:

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274 Ibid.
275 For further discussion (and detailed coverage of the relevant political and historical context) see Kourosh Ahmadi, Islands and International Politics in the Persian Gulf: The Abu Musa and Tunbs in Strategic Context (2008).
276 According to United Nations records, both States have not formally claimed an EEZ and/or fisheries jurisdiction: See Table of Claims to Maritime Jurisdiction, above n 52 on page 93. However, Saudi Arabia appears to have issued some form of general claim to a fisheries zone and/or EEZ in 1974: See Maritime Claims Reference Manual, above n 52 on page 93. For further discussion see Daniel Dzurek, ‘Parting the Red Sea: Boundaries, Offshore Resources and Transit (2001) 3(2) IBRU Maritime Briefing.’
277 Agreement between the Government of the Democratic Republic of the Sudan and the Government of the Kingdom of Saudi Arabia relating to the joint exploitation of the natural resources.
Figure 3.17: Saudi Arabia – Sudan: overlapping claims and the Common Zone.
Source: International Boundaries Research Unit
Article II of the 1974 Agreement sets out a general cooperative obligation, providing that ‘[t]he two Governments covenant to co-operate through all ways and means to explore and exploit the natural resources of the sea-bed of the Red Sea.’ The term ‘natural resources’ is defined narrowly, referring only to ‘non-living substances including hydrocarbon and ... mineral resources.’

Articles III – V of the 1974 Agreement address the overlapping jurisdictional claims of both States. Articles III and IV establish mutual recognition of both States’ claims to adjacent sea-bed located landward of the 1000 metre isobath. Article V establishes a ‘Common Zone’ consisting of the area of sea-bed lying between the two States respective coasts and seaward of the 1000 metre isobath. The 1974 Agreement does not establish northern or southern limits of the Common Zone, which creates confusion concerning the Zone’s limits given the 1000 metre isobath extends northward beyond Egypt–Sudan land boundary, and southward beyond the land boundary between Ethiopia–Sudan (see Figure 3.17). Within the Common Zone both States enjoy exclusive and equal sovereign rights over (non-living) natural resources.

Articles VII of the 1974 Agreement establishes a Joint Commission that is constituted as a ‘body corporate’ in both States and is composed of an equal number of representatives from each State. The Joint Commission is entrusted with a variety of administrative and regulatory competencies concerning the resource development of the sea-bed and subsoil of the Red Sea in the Common Zone, signed 16 May 1974, reproduced at (1974) 952 UNTS 197.

Schofield notes that the agreement’s ‘primary objective was to allow for the joint exploration for and exploitation of the seabed mineral resources, notably metalliferous sediments rich in heavy metal such as copper, manganese, zinc, iron and silver, known to exist in the Red Sea deeps, especially off Sudan.’: Schofield, above n 58 on page 16, 16. See also Prescott and Schofield, above n 57 on page 16, 488.

Article III recognises the claims of Saudi Arabia and Article IV recognises the claims of Sudan. The phrase used in both Articles is that the exclusive sovereign rights of each State extends eastward (for Sudan) or westwards (for Saudi Arabia) ‘to a line where the depth of the superjacent waters is uninterrupted one thousand metres.’

Note that Article V also provides that ‘No part of the territorial sea of either Government shall be included in the Common Zone.’

The corresponding maritime boundaries have not been delimited.

See also 1974 Agreement, Articles VIII and IX.
in the Common Zone, including: surveying, delimitation and demarcation of the Common Zone; conduct of scientific studies concerning resource development; resource development licensing; unitisation of deposits straddling the Common Zone, and supervision and regulation of resource development and production.\textsuperscript{285}

Article XVI of the 1974 Agreement contains a dispute settlement mechanism. Disputes concerning the interpretation or implementation of the 1974 Agreement are to be settled in the first instance ‘by amicable means’. Disputes that cannot be settled by such means are subject to compulsory and binding settlement by the ICJ. Either State may also ask the ICJ to indicate interim measures.

The provisions discussed above are functionally limited to the context of non-living marine resource development. Implementation within the relevant OCA of other functional components of coastal State jurisdiction is not explicitly enabled or contemplated. As far as the author is aware, there has also been little progress achieved concerning practical implementation of the 1974 Agreement.\textsuperscript{286}

### 3.5 North East Asia\textsuperscript{287}

#### 3.5.1 Japan – People’s Republic of China (PRC)

*Background:*

Japan and PRC assert overlapping EEZ and continental shelf claims in the East China Sea (see Figure 3.18).\textsuperscript{288} The two States also assert competing sovereignty claims to seven uninhabited islands located in the southern East China Sea (the

\textsuperscript{285}1974 Agreement, Article VII, XIII, XIV.

\textsuperscript{286}Schofield notes that ‘Although a Saudi-Sudanese Red Sea Commission was established in 1975, it is understood that little exploration activity has in fact taken place and no commercial discoveries or developments have eventuated.’: Schofield, above n 58 on page 16, 14. See also Colson and Smith, Volume V, above n 57 on page 16, 3470, which notes that the Common Zone has not been exploited to date and that the current status of the 1974 agreement is unclear.

\textsuperscript{287}Material in this sub-Chapter is drawn from a previous work by the author: Milligan and Schofield, above n 1 on page 35.

\textsuperscript{288}For further discussion and illustrative maps see Schofield and Townsend-Gault, above n 3 on page 5.
Design features and analysis of functional coverage:

Design features and functional coverage of the 1997 Agreement are appraised in Chapter 4.4.5 below.

The 2008 Cooperation Consensus consists of three short paragraphs and represents a realisation of public political pledges made by both States concerning joint development in the East China Sea. In the first paragraph the two States express an agreement to ‘conduct cooperation in the transitional period prior to delimitation without prejudicing their respective legal positions’ with a view to making the East China Sea a ‘sea of peace, cooperation and friendship’. The second paragraph outlines a general commitment to establish and engage in joint development of a defined area of seabed that straddles the median line between the two States’ coasts (see Figure 3.18). The third paragraph outlines a general agreement to allow a ‘Japanese legal person’ to invest in the Chinese entity undertaking development of the Chunxiao gas field (referred to in Japan as the Shirakiaba gas field). This field is located close to the median line on the Chinese side.

The 2008 Cooperation Consensus is an agreement-in-principle. It contains only general commitments to engage in, and discuss the establishment of, cooperative

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289 Ibid. These features are currently administered by Japan.
293 The vast majority of the proposed zone is located on the Japanese side of the median line with only the north-western corner of the joint area on the Chinese side of the line.
294 Schofield and Townsend-Gault, above n 3 on page 5.
Figure 3.18: Overlapping claims in the East China Sea. Source: Schofield and Townsend-Gault, note 3 on page 5.
management of the relevant OCA. It does not specifically allocate functional components of coastal State jurisdiction within the area concerned, and does not add clarity to the general and ambiguous provisions of international law concerning the exercise of coastal State jurisdiction within OCAs. At the time of writing, there is little sign that the general commitments set out in the 2008 Cooperation Consensus have translated into concrete steps toward OCA management. Indeed significantly varying interpretations of the instrument appear to have arisen – with ‘Japan claiming that the two countries were carrying out joint development of the Chunxiao gas field, and China claiming that the consensus only covered capital participation and that Japan had acknowledged China’s sovereign rights’ over the field.

3.5.2 Japan – Republic of Korea

Background:

Japan and the Republic of Korea assert overlapping claims to EEZ and continental shelf in the East China Sea and Sea of Japan/East Sea (see Figure 3.18 in relation to the East China Sea). The two States also assert competing sovereignty claims to insular features (the Liancourt Rocks/Dokdo/Takeshima) located in the Sea of Japan/East Sea. The resulting OCAs are managed in accordance with a 1974 agreement concerning joint development of hydrocarbon resources (1974 Agreement between Japan and the Republic of Korea concerning joint development of the southern part of the continental shelf adjacent to the two countries, signed 30 January 1974, entered into force 22 June 1978, UNTS No. 19778, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/ja p-kor1974south.pdf>. See also Sun Pyo Kim, above n 2 on page 4, 282–285 and Charney and Alexander, Volume I, above n 57 on page 16, 1057–1089.

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296 Davenport, n 313 on page 158.
297 For further discussion see Sun Pyo Kim, above n 2 on page 4, and Schofield and Townsend-Gault, above n 3 on page 5.
298 Ibid.
Agreement) and a 1998 agreement concerning fisheries management.300 (1998 Agreement)

Design features and analysis of functional coverage:

The 1998 Agreement is discussed further in Chapter 4.4.5 below.

The 1974 Agreement concerns overlapping claims to continental shelf located south-east of Jeju Island (Korea) and south-west of Fukue Island (Japan).301 It establishes a ‘Joint Development Zone’ designed to facilitate the exploration for and exploitation of seabed oil and gas resources.302 As illustrated in Figure 3.18, part of the Joint Development Zone is also subject to a continental shelf claim promulgated by PRC. The 1974 Agreement applies for an initial term of 50 years,303 without prejudice to ‘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.’304

The Joint Development Zone was initially divided into nine Subzones.305 Each Party is required to authorise ‘concessionaires’ for each Subzone and concessionaires are required to enter into an operating agreement to carry out joint exploration and/or exploitation of natural resources.306 Within each Subzone a single ‘operator’ is designated from among the concessionaires to conduct operations.307 The designation of an operator is determinative of the laws and regulations that apply within the relevant Subzone – Japanese law applies to Japanese operators and Korean law

301 For an illustrative map see UNTS No. 19778, 124.
302 Note that the People’s Republic of China also asserts maritime jurisdictional claims over part of the Joint Development Zone: Charney and Alexander, Volume I, above n 57 on page 16, 1058. For an illustrative map and further discussion see also Schofield and Townsend-Gault, above n 3 on page 5.
303 The 1974 Agreement may be extended if no maritime boundary is delimited, and can be terminated by either side with three years’ notice: Article XXXI(2).
304 1974 Agreement, Article XVIII.
305 See 1974 Agreement, Article III and the associated Appendix. Schofield notes that ‘the number of sub-zones was reduced to six following surveys indicating that the likelihood of seabed hydrocarbons being present was limited.’: Schofield, above n 58 on page 16.
306 1974 Agreement, Articles IV and V.
307 1974 Agreement, Article VI.
applies to a Korean operator.\textsuperscript{308} Costs and revenues associated with hydrocarbon development in each Subzone are shared equally by the concessionaires authorised by each State.\textsuperscript{309}

Although the agreement primarily focused on the cooperative exercise of coastal State competencies relating to the exploitation of seabed hydrocarbon resources,\textsuperscript{310} there are several articles concerning the exercise of coastal State jurisdiction in other functional contexts. Article XX of the 1974 Agreement requires the Parties to ‘agree on measures to be taken to prevent collisions at sea and to prevent and remove pollution of the sea resulting from activities relating to the exploration or exploitation of natural resources in the Joint Development Zone.’ In an exchange of notes accompanying the agreement, the Parties agree that ‘[e]ither Government may take necessary measures to prevent and remove pollution of the sea when measures are not taken ... or when that Government considers that such measures are not sufficient to prevent or remove pollution of the sea.’\textsuperscript{311}

Article XXIV establishes a Japan–Republic of Korea Joint Commission as a means for consultation regarding implementation of the agreement and the application of national jurisdiction within the joint development zone. The Joint Commission is required, \textit{inter alia}, to ...

study problems, including those relating to the application of laws and regulations of the Parties, unexpected at the time of entry into force of this Agreement, and, when necessary, recommend to the Parties appropriate measures to solve such problems.\textsuperscript{312}

\textsuperscript{308}1974 Agreement, Article XXIX provides that ‘the laws and regulations of one Party shall apply with respect to matters relating to exploration and exploitation of natural resources in the sub-zones with respect to which the Party has authorised concessionaires designated and acting as operators.’

\textsuperscript{309}Schofield notes that ‘To date, exploration activities have failed to result in the discovery of commercially viable oil and gas reserves’: Schofield, above n 58 on page 16.

\textsuperscript{310}See, eg, 1974 Agreement, Article XIX regarding applicable law ‘with respect to matters relating to exploration and exploitation of natural resources’ and Article XXI regarding liability for damage resulting from exploration or exploitation of natural resources in the Joint Development Zone. The Agreement and accompanying exchange of notes set out technical regulations regarding several aspects of oil and gas exploration and development.

\textsuperscript{311}Diplomatic note from the Ambassador Extraordinary and Plenipotentiary of Japan to the Republic of Korea, paragraph IV, UNTS No. 19778, 134.

\textsuperscript{312}See 1974 Agreement, Article XXV(1)(e). Article XXV(2) provides that ‘The Parties shall respect to the extent possible recommendation made by the Commission under paragraph 1 of this Article.’
Article XXVII of the 1974 Agreement addresses the potential impacts of hydrocarbon development on other functional uses of the joint development zone, providing that...

exploration and exploitation of natural resources in the Joint Development Zone shall be carried out in such a manner that other legitimate activities in the Joint Development Zone and its superjacent waters such as navigation and fisheries will not be unduly affected.

The 1974 Agreement is actively implemented by both Japan and the Republic of Korea. However, its implementation has not yet resulted in the discovery of commercially viable hydrocarbon deposits.313

The 1974 Agreement is functionally limited to the context of non-living marine resource development and associated pollution control measures. The 1988 Agreement is functionally limited to the context of marine living resources management. Implementation within the relevant OCA of other functional components of coastal State jurisdiction is not explicitly enabled. However, OCA management in other functional contexts is clearly contemplated. Article XVII of the 1974 Agreement refers to navigation (and fisheries) in the Joint Development Zone but does not establish a basis for cooperation in those contexts. Article XX of the 1974 Agreement provides for further agreement concerning provisional joint management of certain aspects of navigational safety. Article XXIV of the 1974 Agreement provides a basis for continued discussion concerning management of human activity in the JDZ, including functional management problems that may have been unexpected upon the Agreement’s entry into force.

The 1974 Agreement does not contain provisions concerning the assertion of coastal State jurisdiction by PRC in the parts of the Joint Development Zone claimed by that State. Accordingly, ambiguities of the international legal framework concerning the exercise of coastal State jurisdiction within OCAs continue to impact upon the part of the Joint Development Zone claimed by PRC. PRC has persistently

313 Tara Davenport, ‘Joint Development in Asia: Some Valuable Lessons Learned’ in Schofield (ed), above n 32 on page 11.
communicated its objections to the Agreement, citing its claim to a continental shelf entitlement within part of the Joint Development Zone.\footnote{Davenport, n 313 on the previous page, notes that PRC claims have not appeared to significantly undermine investment and resource exploration in the Zone, but observes that: ‘If significant discoveries are eventually made in the [Zone] China is very likely to protect, and this reaction will have consequences for the certainty that the JDA is supposed to create for investors and oil companies.’ See also Choon-Ho Park, ‘The Sino-Japanese-Korean Sea Resources Controversy and the Hypothesis of a 200 Mile Economic Zone,’ (1975) 16 Harvard International Law Journal 44.}

### 3.5.3 Japan – Russia

**Background:**

Russia and Japan assert overlapping claims to maritime jurisdiction in areas adjacent to their Pacific Coasts and in the Sea of Japan.\footnote{See, eg, Alex Oude Elferink, *The law of maritime boundary delimitation: a case study of the Russian Federation* (1994).} The two States also assert competing sovereignty claims to a small group of islands (the Northern Territories/Southern Kuril Islands) located north of the Japanese island of Hokkaido (see Figure 3.19).\footnote{For detailed discussion of the sovereignty dispute, see Seokwoo Lee, ‘Towards a Framework for the Resolution of the Territorial Dispute over the Kurile Islands’ (2001) 3(6) *IBRU Boundary and Territory Briefing*. For general historical background and a discussion of recent negotiations (including joint development proposals) concerning the islands, see The Carter Center, *Approaches to Solving Territorial Conflicts: Sources, Situations, Scenarios, and Suggestions* (May 2010), available at <http://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/Solving_Territorial_Conflicts.pdf>.}

**Design features and analysis of functional coverage:**

Fisheries management within the resulting OCAs has been undertaken in accordance with several short term agreements, including a formal treaty concluded in 1984.\footnote{For further discussion see Sun Pyo Kim, above n 2 on page 4, 129–130.} The author has not been able to obtain the text of these agreements. A noteworthy design feature identified by other commentaries is the use, for the purposes of fisheries management, of a provisional maritime boundary between undisputed Japanese territory and the Northern Territories/Kuril Islands.\footnote{Ibid.} Notwithstanding...
Figure 3.19: Japan – Russia: the Northern Territories / Southern Kuril Islands. Source: Andy Proehl Design (at http://www.flickr.com).
the existence of the provisional boundary, Japanese fishing vessels have reportedly been granted access to the territorial sea surrounding the disputed islands.\textsuperscript{319}

The provisional joint management frameworks discussed above appear to be functionally limited to the context of living marine resources development. Implementation within the relevant OCA of other functional components of coastal State jurisdiction does not appear to be enabled or contemplated.

\section*{3.5.4 People’s Republic of China – Republic of Korea}

PRC and the Republic of Korea assert overlapping EEZ and continental shelf claims in the East China Sea.\textsuperscript{320} In 2000 the two States concluded an agreement\textsuperscript{321} (2000 Agreement) concerning the fisheries management in areas subject to the overlapping jurisdictional claims of both States. This agreement is discussed further in Chapter 3.5.5 immediately below, alongside several other bilateral agreements concerning fisheries management in the East China Sea.

\section*{3.5.5 East China Sea bilateral fisheries agreements}

The agreements in question are the Japan – PRC 1997 Agreement,\textsuperscript{322} Japan – Republic of Korea 1998 Agreement,\textsuperscript{323} and PRC – Republic of Korea 2000 Agreement.\textsuperscript{324} These agreements were concluded following the ratification of the LOSC and subsequent declaration of overlapping EEZs by the three States.\textsuperscript{325}

*Design features and analysis of functional coverage:*

\textsuperscript{319}Ibid.
\textsuperscript{320}For further discussion and illustrative maps see Schofield and Townsend Gault, above n 3 on page 5.
\textsuperscript{321}Signed 3 August 2000, entered into force 30 June 2001. The text of the agreement is reproduced in Sun Pyo Kim, above n 2 on page 4.
\textsuperscript{322}Above n 290 on page 153
\textsuperscript{323}Above n 300 on page 156.
\textsuperscript{324} 321
\textsuperscript{325}For further discussion see Sun Pyo Kim, ‘The UN Convention on the Law of the Sea and New Fisheries Agreements in North East Asia’ (2003) 27 Marine Policy 97.
Figure 3.20: Provisional fisheries zones in the East China Sea. Source: Schofield et al, note 7 on page 5.
The design features of the agreements are similar – they are all expressed to apply without prejudice to the international legal positions (e.g. maritime claims) of the relevant Parties and establish provisional zones in which fishing activities are managed on a cooperative basis in accordance with mutually agreed measures (see Figure 3.20).

None of the agreements provide a clear basis for the exercise within these zones of the coastal State jurisdiction, including against vessels flagged to third States. Prescriptive and enforcement jurisdiction is instead applied on the basis of the flag of the vessel. Notification procedures apply in the event that one Party identifies a vessel flagged to the other Party acting contrary to agreed management measures. However, the PRC – Republic of Korea 2000 Agreement does provide that the Parties may undertake ‘joint surveillance measures’ within defined ‘transitional zones’, including ‘joint boarding, stopping and inspection.’

The Japan – PRC 1997 Agreement, Japan – Republic of Korea 1998 Agreement, and PRC – Republic of Korea 2000 Agreement are functionally limited to the context of living marine resources development. Implementation within the relevant OCA of other functional components of coastal State jurisdiction is not explicitly enabled or contemplated. Note also that these frameworks allocate certain functional competencies to the relevant parties on a bilateral basis, but do not involve the Republic of China / Taiwan (ROC), which also asserts maritime claims and operates a large fishing fleet in the East China Sea. Further, the bilateral fishing agreements concerning the East China Sea allocate jurisdiction on an inter-se basis only and do not provide a clear basis for the assertion of coastal State jurisdiction against vessels flagged to third States (or the ROC).

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327 For further discussion see Sun Pyo Kim, above n 325 on page 161.
328 The lack of such provisions is problematic given that many vessels registered and/or licensed by the Republic of China/Taiwan are active in the provisional zones established by the agreements.
330 See, eg, Japan – Republic of Korea 1998 Agreement, Annex I Articles 2e, 3e.
3.6 South East Asia and Australia\textsuperscript{332}

3.6.1 Australia – Indonesia

\textit{Background:}

Prior to the separation of East Timor from Indonesia in 2002, Australia and Indonesia asserted overlapping continental shelf claims in the ‘Timor Gap’ – an area located between previously established discontinuous seabed boundaries in the Timor Sea.\textsuperscript{333} The resulting OCA was managed in accordance with a \textit{1989 Treaty} that defined a ‘Zone of Cooperation’ in the Timor Gap (see Figure 3.21) and established a highly detailed framework for the cooperative management of the Zone by both States.\textsuperscript{334} The initial term of the 1989 Treaty was set at 40 years, followed by successive terms of 20 years unless agreed otherwise.\textsuperscript{335} The Treaty is no longer in force, having been replaced by agreements between Australia and East Timor\textsuperscript{336} that is discussed in Section 3.6.2 below.

\textit{Design features and analysis of functional coverage:}

The 1989 Treaty is expressly characterised as an implementation of the LOSC and the provisions of the Convention concerning provisional management of overlapping continental shelf claims.\textsuperscript{337} Article 2 of the Treaty contains provisions designed to protect the legal positions of both States, providing as follows:

\textsuperscript{332}Material in this sub-Chapter is drawn from the author’s contribution to a previous work: Milligan and Schofield, above n 1 on page 35.
\textsuperscript{334}Schofield notes that the management framework established by the 1989 Treaty ‘was widely regarded as the most sophisticated and comprehensive maritime joint development zone in the world.’ Schofield, above n on page 16, 15.
\textsuperscript{335}1989 Treaty, Article 33.
\textsuperscript{336}The newly independent East Timor indicated that it would not consider itself bound by agreements entered into by the Indonesian government: Schofield, above n on the current page..
\textsuperscript{337}1989 Treaty, Preamble. Relevant LOSC provisions are discussed in Chapter 2.3.6 above.
Figure 3.21: Australia – Indonesia: maritime boundaries and Timor Gap Zone of Cooperation. Source: Australian Government (GeoSciences Australia).
3. Nothing contained in this Treaty and no acts or activities taking place while this Treaty is in force shall be interpreted as prejudicing the position of either Contracting State on a permanent shelf delimitation in the Zone of Cooperation nor shall anything contained in it be considered as affecting the respective sovereign rights claimed by each Contracting State in the Zone of Cooperation.

4. Notwithstanding the conclusion of this Treaty, the Contracting States shall continue their efforts to reach agreement on a permanent continental shelf delimitation in the Zone of Cooperation.

The Zone of Cooperation is divided into three sub-areas (see Figure 3.21). Area A is subject to ‘joint control by the Contracting States of the exploration for and exploitation of petroleum resources, aimed at achieving optimum commercial utilization thereof and equal sharing between the two Contracting States of the benefits of the exploitation of petroleum resources’. Areas B and C are subject to the national jurisdiction of Australia and Indonesia respectively. Each State is required to pay the other State a specified percentage (10 percent) of taxation revenues collected from corporations producing petroleum in the relevant Area (Area B for Australia and Area C for Indonesia).

The 1989 Treaty is primarily focused on the cooperative exercise of coastal State competencies relating to the exploitation of seabed hydrocarbon resources. However, there are detailed provisions concerning the exercise of coastal State jurisdiction in other functional contexts. The Joint Authority established in Part IV of the 1989 Treaty is attributed management functions that include environmental assessment, pollution control and vessel traffic management. The Joint Authority is responsible to a Ministerial Council composed of an equal number of representatives from each State. The Ministerial Council is entrusted with ‘overall responsibility for all matters relating to the exploration for and exploitation of the petroleum resources...”

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340 This is implicit in 1989 Treaty, Article 2(2)(b) and (c).
342 1989 Treaty, Article 7(3).
in Area A of the Zone of Cooperation’ and other relevant functions that may be entrusted to it.\textsuperscript{343}

Part V of the 1989 Treaty requires the Parties, inter alia, to engage in cooperative management of Area A relating to surveillance, security measures, search and rescue, air traffic services, hydrographic and seismic surveys, marine scientific research and protection of the marine environment. Article 27 of the 1989 Treaty contains detailed provisions defining the criminal jurisdiction that applies within Area A to nationals of the Parties and nationals of third States.

Per Article 30 of the 1989 Treaty, disputes concerning its interpretation or application are to be ‘resolved by consultation or negotiation between the Contracting States.’

The provisions discussed above allocate coastal State competence and/or jurisdiction within the relevant OCA in a complete set of functional contexts. They specify the terms on which Australia and Indonesia were to implement within the relevant OCA all of the functional components of their coastal State jurisdiction.

3.6.2 Australia – East Timor

Background:

Australia and East Timor assert overlapping EEZ and continental shelf claims in the vicinity of the Timor Gap.\textsuperscript{344} The resulting OCA has been managed in accordance with the 2002 \textit{Timor Sea Treaty}\textsuperscript{345} and the 2006 \textit{Treaty on Certain Maritime

\textsuperscript{343}See 1989 Treaty, Part III, in particular Article 6.


**Arrangements in the Timor Sea**[^346] (or CMATS). The Timor Sea Treaty was negotiated during the mandate of the United Nations Transitional Authority for East Timor[^347] and was signed on the same day that East Timor became independent[^348].

*Design features and analysis of functional coverage:*

The Timor Sea Treaty establishes a Joint Petroleum Development Area (**JPDA**) that is coextensive with Area A of the Zone of Cooperation defined in the Australia–Indonesia 1989 Agreement (see Figure 3.22).[^349] Article 4 of the Timor Sea Treaty contains obligations relating to the sharing of petroleum production in the JPDA, providing inter alia that:

> Australia and East Timor shall have title to all petroleum produced in the JPDA. Of the petroleum produced in the JPDA, ninety (90) percent shall belong to East Timor and ten (10) percent shall belong to Australia.

In a similar fashion to the Australia–Indonesia 1989 Treaty, the Timor Sea Treaty is primarily focused on the cooperative exercise of coastal State competencies relating to the exploitation of seabed hydrocarbon resources.[^350] However, the Treaty also contains detailed provisions concerning the exercise of coastal State jurisdiction within the JPDA in other functional contexts, including: marine environmental protection,[^351] occupational health and safety,[^352] criminal jurisdiction,[^353] hydrographic and seismic surveys,[^354] surveillance,[^355] security measures,[^356] and air traffic services.[^357]


[^347]: For further discussion concerning the UN mandate, see <http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm>.

[^348]: For further discussion see Schofield, above n on page 164.

[^349]: Timor Sea Treaty, Article 3.

[^350]: The two Treaties also contain similar provisions regarding: the protection of both State’s existing claims to maritime jurisdiction in the Timor Sea (see Timor Sea Treaty, Article 2) and the settlement of disputes (see Timor Sea Treaty Article 23).

[^351]: Timor Sea Treaty, Article 10.

[^352]: Timor Sea Treaty, Article 11.

[^353]: Timor Sea Treaty, Article 12.

[^354]: Timor Sea Treaty, Article 16.

[^355]: Timor Sea Treaty, Article 18.

[^356]: Timor Sea Treaty, Article 19.

[^357]: Timor Sea Treaty, Article 21.
Figure 3.22: Australia – East Timor: Joint Petroleum Development Area and Unit Area. Source: Schofield, note 333 on page 164.
Implementation of the Timor Sea Treaty was complicated by disagreements concerning development of the Greater Sunrise oil and gas fields, which straddle the boundary between the JPDA and seabed then claimed solely by Australia (see Figure 3.22). \(^{358}\) In 2003 both State concluded an agreement concerning unitisation of these fields, \(^{359}\) \textit{(2003 Unitisation Agreement)} which apportioned 20.1% of the fields’ deposits to the JPDA and the remaining 79.9% to Australia. \(^{360}\) Deeming its share of the Greater Sunrise fields to be unacceptable, East Timor elected to delay ratification of the 2003 Unitisation Agreement and asserted its right to claim areas adjacent to the JPDA. \(^{361}\)

After ‘complex and contentious’ \(^{362}\) negotiations, Australia and East Timor concluded the CMATS in 2006. The Treaty is expressly characterised as an implementation of the LOSC and the provisions of the Convention concerning provisional management of overlapping continental shelf and EEZ claims. \(^{363}\) It applies without prejudice to the legal positions of both States concerning delimitation of the Timor Sea and imposes a stringent moratorium on activity relating to those claims while the Treaty is in force. \(^{364}\)

CMATS Article 5 responds to East Timor’s concerns regarding its share of the Greater Sunrise fields. It provides that revenue derived from the upstream pro-


\(^{360}\) 2003 Unitisation Agreement, Article 7. Accordingly, given the share of resources set out in Article 4 of the Timor Sea Treaty, East Timor would receive only an 18.1% (90% of 20.1%) share of the Greater Sunrise deposits. For further discussion see Schofield, above n on page 164.

\(^{361}\) East Timor argued, inter alia, that it was not bound by the dimensions of the Timor Gap, which, as noted above, was defined by previous Australia–Indonesia boundary agreements. For further discussion, see Schofield, above n on page 164, who notes that ‘In effect East Timor opted to use non-ratification of the Sunrise IUA [Unitisation Agreement] as a means to pressure Australia to be more flexible in its negotiating stance and deliver what it regarded as a more equitable share in the seabed resources of the Timor Sea.’

\(^{362}\) Schofield, above n on page 16.

\(^{363}\) CMATS, Preamble. Relevant LOSC provisions are discussed in Chapter 2.3.5 and 2.3.6 above.

\(^{364}\) CMATS, Articles 2 and 4. These provisions will be discussed in further detail in Chapter 5.4 below.
duction of petroleum in the Unit Area defined in the 2003 Agreement is to be shared equally by both States.\textsuperscript{365} CMATS Article 7 addresses the relationship of the Treaty with previous agreements, providing inter alia that the Timor Sea Treaty and 2003 Unitisation Agreement continue to apply (except as otherwise provided in the CMATS). Subject to termination provisions, the CMATS will remain in force for a period of 50 years, or ‘until the date five years after the exploitation of the Unit Area ceases, whichever occurs earlier.’\textsuperscript{366}

Supplementing the detailed allocation of functional competence contained in the Timor Sea Treaty, the CMATS divides the ‘water column jurisdiction’ of both Parties on a provisional basis by reference to a line defined in Annex II of the agreement. This line is coincident with the southern limit of the JPDA established in the Timor Sea Treaty. Article 8 of the CMATS contains the following provisions concerning cooperative management of living marine resources:

\begin{enumerate}
\item Where the same stock or stocks of associated species straddle the line described in Annex II, Timor-Leste and Australia shall seek, either directly or through appropriate subregional or regional fisheries management organisations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks.
\item Timor-Leste and Australia shall make every effort to pursue cooperation in relation to highly migratory fish stocks, as defined in Annex 1 to the 1982 Convention, either directly or through appropriate subregional or regional fisheries management organisations, to ensure effective conservation and management of such stocks.
\end{enumerate}

East Timor is required to exercise its jurisdiction over the water column above the JPDA ‘in a manner that does not unduly inhibit petroleum activities within the JPDA.’\textsuperscript{367} Article 9 of the CMATS establishes a bilateral joint ‘Maritime Commis-

\textsuperscript{365}As a consequence, East Timor receives a 50% share in the Greater Sunrise fields, as opposed to the 18.1% share it received pursuant to the 2003 Unitisation Agreement and the TST.
\textsuperscript{366}CMATS, Article 12. Concerning termination, Article 12(2) provides as follows: ‘If: (a) a development plan for the Unit Area has not been approved in accordance with paragraph 1 of Article 12 of the Sunrise IUA [Unitisation Agreement] within six years after the date of entry into force of this Treaty; or (b) production of petroleum from the Unit Area has not commenced within ten years after the date of entry into force of this Treaty; either Party may notify the other Party in writing that it wishes to terminate this Treaty, in which case the Treaty shall cease to be in force three calendar months after such notice is given.’
\textsuperscript{367}CMATS, Article 8.
sion’ to ‘constitute a focal point for bilateral consultations with regard to maritime matters of interest to the Parties’. Per CMATS Article 9(3), the Maritime Commission is required to consult on matters relating, inter alia, to maritime security, marine environmental protection, and the sustainable management of renewable and non-renewable resources.

Disputes concerning the interpretation or application of the CMATS are to be settled by consultation or negotiation. Disputes concerning the interpretation or application of the Timor Sea Treaty or 2003 Unitisation Agreement may be referred to a specially constituted arbitral tribunal empowered to make final and binding awards.

The provisions of the 2002 Timor Sea Treaty and 2006 CMATS discussed above allocate coastal State competence and/or jurisdiction within the relevant OCA in a complete set of functional contexts. They specifies the terms on which Australia and East Timor are to implement within the relevant OCA all of the functional components of their coastal State jurisdiction.

3.6.3 Cambodia – Thailand

Cambodia and Thailand assert overlapping claims to zones of national jurisdiction in the Gulf of Thailand (see Figure 3.23). On 18 June 2001 the two States signed a memorandum of understanding concerning their large continental shelf OCA. In late 2009 the Thai Government announced its revocation of the

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368 CMATS, Article 11.
369 2003 Unitisation Agreement, Article 26 and Annex IV; Timor Sea Treaty, Article 23 and Annex B. Per Article 23, certain disputes in the 2003 Unitisation Agreement are also subject to final and binding settlement by a nominated expert.
370 For further discussion and illustrative maps see Nguyen Hong Thao, Joint Development in the Gulf of Thailand (Autumn 1999) IBRU Boundary and Security Bulletin 79.
372 Schofield, above n 58 on page 16, notes that ‘[i]t can be inferred that the area of overlap between the parties has been reduced following the resolution of Cambodia and Vietnam’s sovereignty dispute over islands. Uncertainty does, however, persist in relation to the southern limit of the area covered by the MoU.’ See also Ted McDorman, ‘Maritime Boundary Delimitation in the
agreement.\textsuperscript{373} The announcement followed the appointment of former Thai Prime Minister Thaksin Shinawatra as an economic adviser to the Cambodian Government.

\textit{Design features and analysis of functional coverage:}

The 2001 MoU was expressed to apply ‘without prejudice to the maritime claims of either party.’\textsuperscript{374} It did not establish a management framework and is in effect an agreement-to-agree on two matters: (1) joint development of hydrocarbon resources located within a defined ‘Overlapping Claims Area’,\textsuperscript{375} and (2) delimitation of the territorial sea, continental shelf and exclusive economic zone in a defined ‘Area to be delimited’.\textsuperscript{376} The 2001 MoU notes that the intent of the two States was to conduct ‘accelerated negotiation’ of these matters.\textsuperscript{377} With this goal in mind it provides for the establishment of a ‘Joint Technical Committee’ that is responsible, inter alia, for drawing up terms of the contemplated joint development and delimitation agreements.\textsuperscript{378}

As noted above, the 2001 MoU is essentially an agreement to agree concerning provisional joint OCA management. It contains only general commitments to engage in, and discuss the establishment of, cooperative management of the relevant OCA. It did not specifically allocate functional components of coastal State jurisdiction within the area concerned, and does not add clarity to the general and ambiguous provisions of international law concerning the exercise of coastal State jurisdiction within OCAs.

\begin{flushright}
\textsuperscript{373} Gulf of Thailand’ Hogaku Shimpo [The Chuo Law Review], CIX, no. 5-6 (March 2003) 253; See also Clive Schofield, ‘Unlocking the Seabed Resources of the Gulf of Thailand’ (August 2007) 29(2) \textit{Contemporary Southeast Asia} 286; Clive Schofield and M Tan-Mullins, ‘Claims, Conflicts and Cooperation in the Gulf of Thailand’ (2008) Ocean Yearbook 22.

\textsuperscript{374} A press-release issued by the Cambodian government following Thailand’s decision is available at <http://www.un.int/cambodia/Bulletin_Files/Nov09/Thailand_cannot_cancel.pdf>.

\textsuperscript{375} 2001 MoU, Article 5. Per the first sentence of Article 5, the without prejudice clause is (naturally) ‘[s]ubject to entry into force of the delimitation of the Parties’ respective maritime claims ...’

\textsuperscript{376} 2001 MoU, Article 2(a).

\textsuperscript{377} 2001 MoU, Article 2(b). Notwithstanding its designation, the latter area remained an OCA in substance. For further discussion and an illustrative map of the two Areas, see Colson and Smith, Volume V, above n on page 16, 3735–3744.

\textsuperscript{378} 2001 MoU, Articles 3 and 4.
\end{flushright}
Figure 3.23: Overlapping claims in the Gulf of Thailand. Source: Schofield et al, note 7 on page 5.
3.6.4 Cambodia – Vietnam

Background:

Cambodia and Vietnam assert overlapping claims to zones of national jurisdiction projected from their adjacent coasts in the Gulf of Thailand. In 1982 both States concluded an agreement (1982 Agreement) that is primarily focused on the integration of the two States’ straight baseline systems and resolution of territorial sovereignty disputes concerning several islands.

Design features and analysis of functional coverage:

The 1982 Agreement also establishes an area of ‘historical waters of the two countries placed under the juridical regime of their internal waters’ (Joint Historic Waters Area or JHWA). As shown in Figure 3.23, the JHWA extends seaward from points located on the mainland coastlines of the two States out to the vicinity of the Poulo Wei group of islands (to the north-west) and the Tho Chu islands (to the south-east). Several States have issued diplomatic protests in response to the establishment of the JHWA and the associated baseline designations by Cambodia and Vietnam.

The 1982 Agreement specifies that negotiations concerning the establishment of a maritime boundary in the JHWA are to take place ‘at a suitable time’. Article 3 of the Agreement sets out general obligations concerning the management within the JHWA of patrolling and surveillance, fishing practices and resource exploitation more broadly. It provides as follows:

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379 For further discussion and illustrative maps see Nguyen Hong Thao, above n on page 172.
381 For further discussion see Charney and Alexander, Volume III, above n on page 16, 2357–2365.
382 1982 Agreement, Article 1. See also ibid for an illustrative map.
383 Charney and Alexander, Volume III, above n on page 16, 2359.
384 One controversial feature of the 1982 Agreement is its provision for the designation of a mid-ocean point connecting the baselines of both States: see Article 3. For further information concerning diplomatic protests, in particular those issued by Thailand and the United States, see: Roach and Smith, above n 52 on page 93, 39–40 and Schofield and Tan-Mullins (2008), above n 372 on page 173, 91–92.
385 1982 Agreement, Article 2.
Patrolling and surveillance in these territorial waters will be jointly conducted by the two sides. The local populations will continue to conduct their fishing operations and the catch of other sea products in this zone according to the habits that have existed so far. The exploitation of natural resources in this zone will be decided by common agreement.

The extent to which the above provisions have been implemented is unclear. McDorman noted in 1998 that ‘government upheaval within Cambodia has led to non-implementation of many of the cooperative aspects of the agreement and uncertainty over the status of the agreement.’

The 1982 Agreement contains only general commitments to engage in and discuss the establishment of cooperative OCA management. It does not specifically allocate functional components of coastal State jurisdiction within the JHWA. However, it is perhaps arguable that the JHWA falls for the purposes of the 1982 Agreement under the concurrent (and functionally comprehensive) internal waters jurisdiction of the Parties. The existence of concurrent internal waters jurisdiction within the JHWA arguably represents an commitment by each State to assert jurisdiction there, subject to contrary provisions of the 1982 Agreement, on a unilateral and functionally comprehensive basis.

\[386\] Ted McDorman in Charney and Alexander, Volume III, above n on page 16, 2361.
3.6.5 Cooperative frameworks in the South China Sea

Background:

The term ‘South China Sea’ (Nan-Hai / ‘South Sea’ in Chinese) is generally used to refer to the large marginal sea partially enclosed by the coasts of Brunei, Indonesia, Malaysia, the People’s Republic of China, the Philippines, Taiwan and Vietnam. The precise geographic limits of the South China Sea are ill-defined and contested. This thesis employs the 1953 definition adopted by the International Hydrographic Organisation (IHO) which includes the Gulf of Tonkin and excludes the Gulf of Thailand.

The South China Sea is subject to a complex patchwork of overlapping claims to maritime zones of national jurisdiction asserted by Brunei, Indonesia, Malaysia, the Philippines, PRC, the Republic of China/Taiwan (Taiwan) and Vietnam.

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388 Rahman and Tsamenyi, above n 78 on page 21.


390 Several maritime jurisdictional claims justified by reference to historic title, and several continental shelf claims that include insular features, have attracted diplomatic protest given their apparent lack of basis in the LOSC. Concerning maritime jurisdictional claims: there has been considerable debate concerning the claims of PRC and the Republic of China and the so-called ‘U-shaped line’ associated with those claims. Further, a number of straight baseline designations by the claimants have attracted diplomatic protest. Concerning continental shelf claims: Brunei’s continental shelf claim incorporates Louisa Reef – a feature which remains above water at high tide. Similarly, Malaysian claims to sovereignty over the southern part of the Spratly archipelago appear to rely on the fact that the features in question are located within the claimed area of continental shelf. For further discussion see Davenport et al, above n 387. See also Robert Smith, ‘Maritime Delimitation in the South China Sea: Potentiality and Challenges’ (2010) 41 Ocean Development and International Law 214; Nguyen Hong Thao and Ramses Amer, ‘Managing Vietnam’s Boundary Disputes’ (2007) 38 Ocean Development and International Law 305; Clive Schofield, ‘A Code of Conduct for the South China Sea?’ (October 2000) Janes Intelligence Review, available at < http://www.southchinasea.org/>. Note also
Further, all of these claimants bar Indonesia assert competing claims to territorial sovereignty over some or all of the insular features located in the South China Sea. Figure 3.24 depicts the spatial locations of various insular features, maritime claims, and maritime limits (actual and notional) in the South Sea. The ‘dashed lines’ are promulgated by PRC / Taiwan and the Kalayaan Island Group (KIG) box is promulgated by the Philippines.

Design features and analysis of functional coverage:

Establishing provisional management frameworks in the South China Sea has proved difficult given the highly complex physical geography of the region, heightened diplomatic tensions, the presence of multiple territorial and jurisdictional claims, and the inter-linkage between these claims and the fundamental strategic interests of the multiple claimant States.

There have been many negotiations and political discussions concerning joint and provisional management of the South China Sea that, following the 2008 judgment of the ICJ confirming Singaporean sovereignty over Pedra Branca (a small insular feature located to the far south west of the South China Sea), Singapore is also entitled to assert jurisdictional claims in the South China Sea. For further discussion see Robert Beckman and Clive Schofield, ‘Moving Beyond Disputes Over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait’, 40 Ocean Development and International Law 1 (2009) 11–17.

The South China Sea contains more than 200 insular features, including small islands, sand cays and drying reefs: John McManus, Kwang-Tsao Shao, and Szu-Yin Lin, ‘Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan’ (2010) 41 Ocean Development and International Law 270. Most features are situated within four major archipelagos: the Pratas Islands (Dongsha in Chinese), Paracel Islands (Xisha), Macclesfield Bank (Zhongsha), and the Spratly Islands (Nansha). Many of these features do not remain above water at high tide – for example only around 36 of the 170-plus features in the Spratly Islands archipelago are known to rise above high tide elevation: Daniel Dzurek, ‘The Spratly Islands Dispute: Who’s on First?’ (1996) 2(1) Maritime Briefing 1. Many features have not been accurately surveyed.

The dashed lines and KIG box are, at the time of writing, generally understood to indicate not the limits of maritime claims, but rather features over which the respective claimants assert territorial sovereignty.

For further discussion see Chris Rahman and Martin Tsamenyi, ‘A Strategic Perspective on Security and Naval Issues in the South China Sea’ (2010) 41 Ocean Development and International Law 315.

A notable example is the series of informal workshops – conducted between 1989 and 2001/2 entitled ‘Managing Potential Conflicts in the South China Sea’. Several officials from the relevant claimant States and policy experts participated in their personal capacity. The workshops were supported financially by the Canadian and Indonesian Governments. The central aim of the workshops was to foster constructive dialogue and identify and develop opportunities for maritime co-operation between the claimants. Areas of discussion included: marine scientific research, marine environmental protection, safety of navigation and communication, resource assessment and means of development, and legal matters. For the further details see:
Figure 3.24: Overlapping claims in the South China Sea. Source: Andi Arsana and Clive Schofield, Australian National Centre for Ocean Resources and Security
and various models for cooperative management of the region have been proposed by academics and policy experts.\footnote{395}

The South China Sea claimants have signed several non-binding documents that represent initial steps toward the provisional joint management of South China Sea OCAs. In 1995, PRC and the Philippines issued a ‘Joint Statement on the South China Sea and Other Areas of Cooperation.’\footnote{396} Also in 1995, the Philippines

\begin{itemize}
  \item BA Hamzah (a Malaysian scholar) has advocated the development of a joint development model analogous to the Antarctic Treaty System, involving a ‘freezing’ of claims and the development of models focused primarily on resource management: BA Hamzah, ‘The Spratlys: What Can be Done to Enhance Confidence in Fishing in Troubled Waters’, eds RD Hill, Norman G Owen, and EV Roberts (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1991) 320–347. Detractors have highlighted the reluctance of claimant countries to abandon their claims, even temporarily: See, eg, Kien-Hong Yu, cited above in this footnote.
  \item Ambassador Hasjim Djalal (Indonesia) has informally proposed a so-called ‘doughnut hole’ method – in which each claimant country projects and an EEZ from coastal baselines and delimits overlaps by negotiation of median lines. The result would be a ‘doughnut hole’ in the centre of the South China Sea that would be reserved for common use. Naturally, the proposal has been criticized as being disadvantageous for the PRC and Taiwan and for encouraging the competitive maximization of coastal claims: See David Denoon and Steven Brams, ‘Fair Division: A new Approach to the Spratly Islands Controversy’ (1997) 2 International Negotiation 320.
  \item David Denoon and Steven Brams have proposed a novel procedure in which claimants are provided with a number of ‘points’ which are used to ‘buy’ groups of insular features and/or maritime spaces in the South China Sea. The authors acknowledge that their proposed mechanism may be undermined if claimants manipulate the system by making ‘purchasing’ decisions in a strategic manner after discovering the point allocations of other claimants: Denoon and Brams, cited above in this footnote, 326.
  \item Mark Valencia has proposed the establishment of a ‘Spratlys Development Authority’ and the allocation to the PRC/Taiwan of a 51 percent share of resource development proceeds. PRC/Taiwan would waive their historic claims in exchange: Mark Valencia, ‘China and the South China Sea Disputes’ (1995) Adelphi Paper no. 298. See also Valencia \textit{et al}, above n 88 on page 28.
  \item Other scholars have advocated the designation of a marine park encompassing the Spratly archipelago: See, eg, John McManus, Kwang-Tsao and Shao Szu-Yin Lin, ‘Toward establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan’ (2010) 41 \textit{Ocean Development and International Law} 270.
\end{itemize}

\footnote{395}{For an overview see Peter Kien-Hong Yu, ‘Setting Up International (Adversary) Regimes in the South China Sea: Analyzing the Obstacles from a Chinese Perspective’ (2007) 38 \textit{Ocean Development and International Law} 147. Some noteworthy proposals and associated criticisms include the following:

- BA Hamzah (a Malaysian scholar) has advocated the development of a joint development model analogous to the Antarctic Treaty System, involving a ‘freezing’ of claims and the development of models focused primarily on resource management: BA Hamzah, ‘The Spratlys: What Can be Done to Enhance Confidence in Fishing in Troubled Waters’, eds RD Hill, Norman G Owen, and EV Roberts (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1991) 320–347. Detractors have highlighted the reluctance of claimant countries to abandon their claims, even temporarily: See, eg, Kien-Hong Yu, cited above in this footnote.
- Ambassador Hasjim Djalal (Indonesia) has informally proposed a so-called ‘doughnut hole’ method – in which each claimant country projects and an EEZ from coastal baselines and delimits overlaps by negotiation of median lines. The result would be a ‘doughnut hole’ in the centre of the South China Sea that would be reserved for common use. Naturally, the proposal has been criticized as being disadvantageous for the PRC and Taiwan and for encouraging the competitive maximization of coastal claims: See David Denoon and Steven Brams, ‘Fair Division: A new Approach to the Spratly Islands Controversy’ (1997) 2 International Negotiation 320.
- David Denoon and Steven Brams have proposed a novel procedure in which claimants are provided with a number of ‘points’ which are used to ‘buy’ groups of insular features and/or maritime spaces in the South China Sea. The authors acknowledge that their proposed mechanism may be undermined if claimants manipulate the system by making ‘purchasing’ decisions in a strategic manner after discovering the point allocations of other claimants: Denoon and Brams, cited above in this footnote, 326.
- Mark Valencia has proposed the establishment of a ‘Spratlys Development Authority’ and the allocation to the PRC/Taiwan of a 51 percent share of resource development proceeds. PRC/Taiwan would waive their historic claims in exchange: Mark Valencia, ‘China and the South China Sea Disputes’ (1995) Adelphi Paper no. 298. See also Valencia \textit{et al}, above n 88 on page 28.
- Other scholars have advocated the designation of a marine park encompassing the Spratly archipelago: See, eg, John McManus, Kwang-Tsao and Shao Szu-Yin Lin, ‘Toward establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan’ (2010) 41 \textit{Ocean Development and International Law} 270.
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\footnote{396}{For further discussion and a reproduction of the text, see Nguyen Hong Thao, ‘Vietnam and the Code of Conduct for the South China Sea’ (2001) 32 \textit{Ocean Development and International Law} 125.}
and Vietnam concluded a joint agreement containing ‘basic principles for a code of conduct in the contested areas’ in which both States committed to ‘search for a fundamental and long-term solution to the disputes relating to sovereignty over the Spratly ... [Islands].’

Between 1999 and 2002, a series of diplomatic incidents and small-scale military confrontations in the South China Sea motivated efforts to improve diplomatic relations between the claimant States and develop a regional framework for dispute management. China was initially resistant to efforts initiated within the Association of Southeast Asian Nations (ASEAN) to develop a regional consensus concerning inter-State relations in the South China Sea.

However, on 4 November 2002 China and the ASEAN member States reached an agreement, signing a ‘Declaration on the Conduct of Parties in the South China Sea’ (2002 Declaration) at the eighth ASEAN Summit in Phnom Penh. The 2002 Declaration contains four preambular statements and ten articles reflecting a non-binding agreement to reduce diplomatic tensions and improve cooperation between the claimants. It reiterates support for the principles set out in the LOSC and other norms of international law concerning peaceful relations and dispute settlement.

Article 5 of the 2002 Declaration provides in part:

The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

397 For further discussion see ibid and Peter Kien-Hong Yu, above n 395 on the preceding page.
398 Schofield notes the following: ‘A key problem from the Chinese perspective was that the Code was intended to effectively freeze the status quo. As far as Beijing was concerned this would, to some extent, legitimise what it regards as the other claimants’ illegal occupation of Chinese territory. China’s position remains that it alone has “indisputable sovereignty” over the Spratly Islands and that the South China Sea has been “China’s territory since ancient times” . . . Moreover, China has steadfastly refused to discuss the dispute in a multilateral forum, instead offering negotiations on a strictly bilateral basis, on the basis that “internationalising” the dispute would only complicate it.: Schofield, above n 390 on page 177.
399 The declaration is available online at <http://www.aseansec.org/13163.htm>. For further discussion, see Nguyen Hong Thao, ‘The Declaration on the Conduct of Parties in the South China Sea: A Note’ (2003) 34 Ocean Development and International Law 282.
Article 6 of the 2002 Declaration reflects in-principle support for cooperative management of the South China Sea and contemplates the establishment of provisional cooperative frameworks that correspond in general terms with the functional components of jurisdiction attributed to coastal States in the LOSC. It provides as follows:

Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities. These may include the following:

a. marine environment protection
b. marine scientific research
c. safety of navigation and communication at sea
d. search and rescue operation; and
e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal trafficking in arms.

The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation.

The 2002 Declaration has been supplemented by several functionally specific cooperative arrangements, which are discussed in the following paragraphs.

- *Exploration for hydrocarbon resources:* On 11 November 2003, State oil companies from PRC and the Phillipines established through letters of intent an agreement to conduct joint exploration for oil and gas in the South China Sea and joint assessment of the area’s oil and gas potential.\(^{400}\) There is also a subsequent agreement concerning joint seismic work.\(^{401}\) A 2004 Joint Communiqué issued by the two States ‘emphasises the importance of maintaining peace and stability in the South China Sea and continuing the discussion of ‘joint development.’\(^{402}\) On 14 March 2005, the Philippines, PRC and Vietnam

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\(^{400}\) See Zou Keyuan, above n 394 on page 180.

\(^{401}\) Ibid.

Figure 3.25: Philippines – PRC – Vietnam: Joint Marine Seismic Undertaking Agreement Area. Source: Andi Arsana and Clive Schofield, Australian National Centre for Ocean Resources and Security
signed a ‘Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea’. This agreement was never meaningfully implemented and lapsed in 2008. Key barriers to implementation of the Agreement were the large (around 140,000 square kilometers) area of cooperation it established (see Figure 3.25) and the overlap of this area with jurisdictional claims advanced by other claimant States. In April 1998, the Chinese Petroleum Corporation (from Taiwan) and China Offshore Oil Corporation (from PRC) approved an agreement concerning the exploration of areas claimed by PRC/Taiwan (i.e. the Tainan Basin and Zhaoshan sunken area). A subsequent joint venture agreement was concluded in 2003.

- **Marine living resources management and environmental protection**: There is no overarching cooperative framework with clear competence concerning living marine resources in the South China Sea.

- **Joint marine scientific expeditions**: These have been undertaken by the Philippines and Vietnam. PRC has responded by expressing concern and reiterating the commitments set out in the 2002 Code of Conduct.

- **Joint patrolling and military exercises**: PRC and the Philippines have conducted joint search and rescue exercises in the South China Sea. The PRC and Vietnamese navies have conducted joint patrol exercises in the Gulf of Tonkin/Beibu Gulf.

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404 See Schofield et al, above n 7 on page 5.
405 See Smith, above n 390 on page 177 and Nguyen Hong Thao and Ramses Amer, above n 403.
407 Ibid.
408 However, the Asia-Pacific Fishery Commission, which was established in 1948 and operates under the auspices of the FAO, provides a framework for consultation and performs advisory functions: See relevant section of the FAO Website at <www.fao.org/fishery/rfb/apfic/en>. Note also the cooperative frameworks established by PRC and Vietnam concerning fisheries management in the Gulf of Tonkin/Beibu Gulf, discussed above n 387 on page 177.
409 See Nguyen Hong Thao and Amer, above n 390 on page 177.
410 Ibid.
411 Peter Kien-Hong Yu, above n 395 on page 180.
Tonkin/Beibu Gulf, implementing provisions of a 2000 delimitation agreement concerning the Gulf of Tonkin.\[^{412}\]

Provisional joint management frameworks concerning the South China Sea display various functional gaps. The 2002 Code of Conduct contains only general commitments to engage in, and discuss the establishment of, cooperative management of the relevant OCA. It does not specifically allocate functional components of coastal State jurisdiction within the area concerned and does not add clarity to the general and ambiguous provisions of international law concerning the exercise of coastal State jurisdiction within OCAs. The surveyed bilateral and trilateral cooperative arrangements concerning the South China Sea are focused on specific functional contexts. Cooperation in other functional contexts is not explicitly enabled or contemplated. Further, the surveyed bilateral and trilateral cooperative arrangements have included all South China Sea claimants. Consequently they do not provide for the exercise of coastal State jurisdiction by all parties asserting claims to all or part of their area of application. In such circumstances, ambiguities of the international legal framework concerning the exercise of coastal State jurisdiction within OCAs continue to impact upon relations between all relevant claimant coastal States and management of the relevant OCA.

### 3.6.6 Indonesia – Malaysia

**Background:**

Indonesia and Malaysia assert overlapping claims to maritime jurisdiction in the Celebes Sea (see Figure 3.26).\[^{413}\] The two States also formerly asserted competing sovereignty claims to two small islands (Ligitan and Sipadan) located in the Celebes

\[^{412}\]Ibid. For discussion of the delimitation agreement see above n 387 on page 177.

The competing sovereignty claims were resolved by a 2002 Judgment of the ICJ, which awarded sovereignty over both islands to Malaysia.

*Design features and analysis of functional coverage:*

Following the Court’s decision both States have agreed, as a provisional management measure, to conduct coordinated patrols in the waters surrounding the islands. This agreement is functionally limited to the context of maritime security and enforcement. Implementation within the relevant OCA of other functional components of coastal State jurisdiction is not explicitly enabled or contemplated.

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3.6.7 Malaysia – Thailand

Background:

Malaysia and Thailand assert overlapping EEZ and continental shelf claims projected from their adjacent coasts in the Gulf of Thailand.\textsuperscript{417} In 1979 both States concluded a Memorandum of Understanding\textsuperscript{418} (1979 MoU) concerning the exploitation of sea-bed resources in a defined ‘Joint Development Area’ characterised as coextensive with the continental shelf OCA claimed by both States (see Figure 3.23 on page 174).\textsuperscript{419}

The most seaward part of the Joint Development Area is also subject to a continental shelf claim asserted by Vietnam.\textsuperscript{420} The resulting trilateral OCA is addressed briefly in a 1997 delimitation agreement concluded by Thailand and Vietnam, which provides that its Parties ‘shall enter into negotiation with the Government of Malaysia ... in order to settle the tripartite overlapping continental shelf claim area.’\textsuperscript{421} As

\textsuperscript{417}Both States reached agreement concerning their territorial sea boundaries in the Gulf of Thailand and Straits of Malacca in 1979: Treaty between the Kingdom of Thailand and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries, signed 24 October 1979, entered into force 15 July 1982, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-MYS1979TS.PDF>. Note also that the continental shelf boundary between the two States in the Gulf of Thailand has been partially defined: Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand, signed 24 October 1979, entered into force 15 July 1982, text published in Charney and Alexander, Volume I, above n 57 on page 16, 1105–1107. For further discussion and illustrative maps see Charney and Alexander, Volume I, above n 57 on page 16 1091–1098, 1099–1123.


\textsuperscript{419}1979 MoU, Preamble and Article 1. Curiously, the area in question is defined twice – first in the preamble and Article 1 as the ‘overlapping area’, and subsequently in Article III as the ‘joint development area’.

\textsuperscript{420}For an illustrative map see Nguyen Hong Thao, above n 370 on page 172.

far as the author is aware, no trilateral agreement concerning overlapping claims in the Joint Development Area has been concluded to date.\footnote{422}{See also Schofield and Tan-Mullins, above n 372 on page 173, 112–113.}

**Design features and analysis of functional coverage:**

The 1979 MoU provides for the establishment of a ‘Joint Authority’ that is empowered to ‘assume all rights and responsibilities on behalf of both Parties for the exploration and exploitation of the non-living natural resources of the sea-bed and subsoil’ in the Joint Development Area.\footnote{423}{1979 MoU, Article III. The Joint Authority is comprised of an equal number of representatives from each State and is conferred ‘all the powers necessary for, incidental to or connected with the discharge of its functions ...’} It also provides for the equal sharing of ‘all costs incurred and benefits derived from activities carried out’ in the Joint Development Area.\footnote{424}{1979 MoU, Article III(5).} The Joint Authority is permitted to exercise its rights and responsibilities for a period of fifty years, or indefinitely in the event that no delimitation agreement is reached within that period.\footnote{425}{1979 MoU, Articles III(1), VI.} Both States are obliged to continue their efforts to effect delimitation of the Joint Development Area.\footnote{426}{1979 MoU, Article II.} Disputes concerning the interpretation or implementation of the 1979 MoU are to be settled ‘peacefully by consultation or negotiation’ between the two States.\footnote{427}{1979 MoU, Article VII.}

Although the 1979 MoU is primarily focused on the cooperative exercise of coastal State competencies relating to the exploitation of seabed hydrocarbon resources, there are several articles concerning the exercise of coastal State jurisdiction in other functional contexts. Article IV(1) of the 1979 MoU recognises several concurrent functional competencies of both States within the Joint Development Area, providing as follows:

> The rights conferred or exercised by the national authority of either Party in matters of fishing, navigation, hydrographic and oceanographic surveys, the prevention and control of marine pollution and other similar matters (including all powers of enforcement in relation thereto) shall extend to the joint development area and such rights shall be recognised and respected by the Joint Authority.
Article IV(2) of the 1979 addresses maritime security issues in general terms, requiring both parties to ‘have a combined and coordinated security arrangement’ in the Joint Development Area. Article V of the 1979 MoU defines two separate sub-areas of criminal jurisdiction (one for Malaysia and one for Thailand) that apply without prejudice to the sovereign rights or negotiating positions of both States.

In order to implement the 1979 agreement, a supplemental agreement was required to address complex operational, administrative and regulatory issues associated with hydrocarbon development and the establishment of the Joint Authority. Following several years of negotiations, taking place in the context of various domestic political obstacles, the supplemental agreement\(^\text{428}\) was concluded in May 1990. The supplemental agreement is now operational, with offshore hydrocarbon resources being discovered and exploited.\(^\text{429}\)

The 1979 MoU and 1990 supplemental agreement contain provisions allocating coastal State competence and/or jurisdiction within the relevant OCA in a complete set of functional contexts. They specify the terms on which Malaysia and Thailand are to implement within the relevant OCA all of the functional components of their coastal State jurisdiction. However, they do not contain provisions concerning the assertion of coastal State jurisdiction by Vietnam in the parts of the Joint Development Area claimed by that State. Accordingly, ambiguities of the international legal framework concerning the exercise of coastal State jurisdiction within OCAs continue to impact upon the part of the Joint Development Area claimed by Vietnam, in which no petroleum development has been undertaken. In

\(^\text{428}\) Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority, signed 30 May 1990, reproduced in Charney and Alexander, Volume I, above n 57 on page 16, 1111–1123 and available at <http://cil.nus.edu.sg/rp/ii/pdf/1990%20Agreement%20between%20Malaysia%20and%20Thailand%20on%20the%20MTJA-pdf.pdf>. Milligan and Schofield, above n 1 on page 35, note that ‘[t]he long pause between the two agreements has been ascribed to a number of factors, including changes in the governments of both countries that undermined the political will for joint development. Additionally, bilateral disputes arose in relation to fisheries, the parties’ differing approaches to managing offshore rights, and commercial issues concerning previously-granted Thai concessions. Ultimately these difficulties were overcome and commercially viable oil and gas field have been discovered within the JDA’ See also Schofield, above n 372 on page 173 and Schofield and Tan-Mullins, above n 372 on page 173.

\(^\text{429}\) See Schofield, 372 on page 173.
1999 Vietnam, Thailand and Malaysia reached an in-principle agreement concerning management of the relevant sub-area of the OCA. However this agreement does not appear to have evolved into a more concrete OCA management framework.\textsuperscript{430}

### 3.6.8 Malaysia – Vietnam

**Background:**

Malaysia and Vietnam assert overlapping claims to zones of national jurisdiction in the Gulf of Thailand.\textsuperscript{431} In 1992 both States concluded a memorandum of understanding\textsuperscript{432} (1992 MoU) concerning development of hydrocarbon resources in a long, narrow ‘Defined Area’ subject to their overlapping continental shelf claims (see Figure 3.23 on page 174). A key factor motivating negotiations was the discovery of potentially viable hydrocarbon deposits by Malaysian contractors.\textsuperscript{433}

**Design features and analysis of functional coverage:**

The Defined Area is located in the south-eastern part of the Gulf of Thailand and, per Article 1 of the 1992 MoU, is acknowledged to be coextensive with the continental shelf OCA claimed by both States.

The 1992 MoU applies, without prejudice to maritime claims of the Parties,\textsuperscript{434} for a period of 40 years (subject to review and extensions).\textsuperscript{435} It establishes a minimalist framework for the joint development of seabed petroleum deposits: Two nominated State-owned corporations (Petronas from Malaysia and PetroVietnam from Vietnam) are to enter into a commercial arrangement to explore and exploit petroleum

\textsuperscript{430}See Davenport, above n 313 on page 158, who notes that further progress may have been limited by Vietnam’s insistence on a three-way split of revenue from the entire Joint Development Area, as opposed to the small tripartite OCA.

\textsuperscript{431}For further discussion and illustrative maps see Nguyen Hong Thao, above n 370 on page 172.

\textsuperscript{432}Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries, signed on 5 June 1992, entered into force 4 June 1993. For further discussion and the text of the Memorandum see Charney and Alexander, Volume III, above n 57 on page 16, 2335–2344.

\textsuperscript{433}Schofield, above n 372 on page 173.

\textsuperscript{434}1992 MoU, Article 4.

\textsuperscript{435}Schofield, above n 58 on page 16. See also 1992 MoU, Article 5.
resources in the Defined Area. The 1992 MoU also requires the Parties to arrive at mutually acceptable terms for development of petroleum fields that are identified to be partly located in the Defined area. The MoU is at present being actively implemented, with discovered deposits in the Defined Area being developed on a cooperative basis.

The 1992 MoU is functionally limited to the context of non-living marine resource development. Implementation within the relevant OCA of other functional components of coastal State jurisdiction is not explicitly enabled or contemplated.

3.7 Polar Regions

3.7.1 Norway – Russia

Background:

In September 2010, after four decades of negotiations, Norway and Russia concluded a Treaty (2010 Delimitation Treaty) finalising the delimitation of their respective claims to maritime jurisdiction in the Barents Sea and Arctic Ocean. Prior to the conclusion of the 2010 Delimitation Treaty, both States engaged in cooperative management of marine living resources within a defined ‘Grey Zone’ that incorporated parts of the Norwegian EEZ, Russian EEZ and an OCA subject to competing

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436 1992 MoU, Article 3. Per Article 3(b), commercial arrangements between the two nominated organisations are subject to the approval of both States. Schofield notes that ‘[i]n practical terms, as Petronas had already issued production-sharing contracts for the overlapping area, PetroVietnam agreed to a commercial arrangement whereby these existing contracts would remain valid and petroleum operations would be directly managed by Petronas’: Schofield, above n 58 on page 16, 17.


440 For further discussion see Tore Henriksen and Geir Ulfstein, ‘Maritime Delimitation in the Arctic: The Barents Sea Treaty’ (2011) 42 Ocean Development and International Law 1. For background see also Elferink, above n 315 on page 159.
EEZ claims and continental shelf entitlements asserted by both States (see Figures 3.27, 3.28, and 3.29).\footnote{For further discussion see Robin Churchill and Geir Ulfstein, Maritime Management in Disputed Areas: The Case of the Barents Sea (1992); and Kristoffer Stabrun, The Grey Zone Agreement of 1978: Fishery Concerns, Security Challenges and Territorial Interests, Fridtjof Nansen Institute Report 13/2009.}

Design features and analysis of functional coverage:

Marine living resources management in the Grey Zone was conducted in accordance with a short-term Agreement\footnote{Agreement Between Norway and the Soviet Union on a Temporary and Practical Arrangement for the Fishery in an Adjacent Area of the Barents Sea, signed 11 January 1978, entered in force 27 April 1978, Oeverenskomster med fremmede stater (1978), 436. For further discussion see Churchill and Ulfstein, above n 441.} (1978 Fisheries Agreement) first concluded in
1978 and renewed on an annual basis thereafter. The 1978 Fisheries Agreement permitted each Party to exercise jurisdiction within the Grey Zone over (1) fishing vessels flying its flag and (2) vessels flying the flag of third States granted access to fish in the Zone under license. The 1978 Fisheries Agreement was designed to complement Agreements concluded by Norway and the Soviet Union in 1975 and 1976, which establish a detailed bilateral framework of fisheries cooperation that also applies to contiguous areas of non-overlapping jurisdiction.

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443 Henriksen and Ulfstein, above n 440 on page 191.
444 Ibid.
445 Agreement on Co-operation in the Fishing Industry Between Union of Soviet Socialist Republics and Norway, signed 11 April 1975, 983 UNTS 8; Agreement Concerning Mutual Relations in the Field of Fisheries Between Union of Soviet Socialist Republics and Norway, signed 15 October 1976, 1157 UNTS 147.
446 See Churchill and Ulfstein, above n 441 on the previous page. For a brief overview of cooperation undertaken pursuant to the Agreements, see Geir Honneland, ‘Norway and Russia in the Barents Sea – Cooperation and Conflict in Fisheries Management’ (2007) 20 Russian Analytical Digest 9, available online at <http://www.res.ethz.ch/analysis/rad/details.cfm?lng=en&id=30693>.
Figure 3.29: Norway – Russia: Grey Zone before September 2010. Source: Stabrun, note 441 on page 192.
In 1998 the Soviet Union proposed the establishment of a joint zone in order to facilitate hydrocarbon development in continental shelf areas claimed by both States (see Figure 3.27 on page 192).\textsuperscript{447} This proposal was rejected by Norway.\textsuperscript{448}

Provisional joint management undertaken by Norway – Russia was functionally focused on marine living resources management. Implementation within the relevant OCA of other functional components of coastal State jurisdiction was not explicitly enabled or contemplated.

### 3.7.2 Canada – United States

**Background:**

In addition to the competing claims discussed in Chapters 3.2.1 on page 82 and 3.3.4 on page 116, Canada and the United States assert overlapping claims to a territorial sea, continental shelf and EEZ in the Beaufort Sea (north of Alaska and the Yukon Territory).\textsuperscript{449} The dimensions of the resulting OCA are depicted in Figure 3.30.

**Design features of provisional joint management frameworks:**

During the 1970s both States engaged in negotiations concerning the potential joint development of hydrocarbon resources in this OCA.\textsuperscript{450} Both States have also undertaken joint hydrographic surveys in the area.\textsuperscript{451} McDorman notes that, at present, ‘Both Canada and the United States have adopted a policy of preventing drilling or other hydrocarbon-related activity from taking place in the disputed area within the Beaufort Sea.’\textsuperscript{452} As noted in Section 3.2.1, several government agencies from each State cooperate closely within their field of operational responsibility and have developed detailed cooperative management arrangements in this context.

\textsuperscript{447}Henriksen and Ulfstein, above n 440 on page 191; Churchill and Ulfstein, above n 441 on page 192, 68; Elferink, above n 315 on page 159, 185.

\textsuperscript{448}Ibid.

\textsuperscript{449}For further information and illustrative maps see Gray, above n 3 on page 82. See also McDorman, Salt Water Neighbours, above n 2, 181–187.

\textsuperscript{450}McDorman, Salt Water Neighbours, above n 2, 187–190.

\textsuperscript{451}Ibid, 182.

\textsuperscript{452}McDorman, Salt Water Neighbours, above n 2, 187.
Figure 3.30: Canada – United States: overlapping claims in the Beaufort Sea.
Source: Gray, note 3 on page 82.
Provisional joint management frameworks relating specifically to the Beaufort Sea OCA are functionally focused on hydrocarbon development and associated scientific research. They operate in tandem with various inter-agency cooperation frameworks (see Chapters 3.2.1 and 3.3.4) to provide a functionally broad allocation of coastal State jurisdiction within the Area.

### 3.7.3 Cooperative frameworks in Antarctic waters

**Background:**

Maritime spaces surrounding the Antarctic continent are not commonly discussed in the context of OCA management. They are, however, relevant to discuss given the presence in Antarctic waters of both OCAs and frameworks that facilitate, inter alia, the long-term provisional joint management of such areas.

At present seven States – Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom – have asserted territorial claims to parts of the Antarctic continent or islands located south of 60 degrees south latitude. Claims asserted by Argentina, Chile and the United Kingdom overlap with one another. Further, Antarctic territorial claims have not been recognised widely by non-claimant States and have been actively protested by several States with an active presence in the region (some of whom reserve the right to assert claims in the future).

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453 Material in this sub-Chapter has been adapted from the author’s contribution to a previous work: Gregory Rose and Ben Milligan, ‘Law for the management of Antarctic marine living resources: from normative conflicts towards integrated governance?’ (2009) 20 Yearbook of International Environmental Law 41.


455 Ibid. For an illustrative map see Rose and Milligan, above n 453.

456 For example, the United States has refused to recognise any claims at all to the Antarctic continent: *Digest of United States Practice in International Law* (1975) 107–111. Some states advocate that the Antarctic continent and surrounding waters should be regarded as common heritage of mankind: Moritaka Hayashi, ‘The Antarctic Question in the United Nations’ (1986) 19 Cornell International Law Journal 275.
claims to the Antarctic continent and surrounding islands are depicted in Figure 3.31.

The seven States named above have also declared maritime zones of national jurisdiction that are projected from their Antarctic territorial claims. These claims, which overlap in several locations a manner corresponding to the relevant underlying territorial claims, remain unrecognised or have been actively protested by other States. Argentina, Australia, Chile and France have claimed both a territorial sea and an EEZ/fisheries zone adjacent to Antarctica. New Zealand, "Note that despite having made such maritime claims, Antarctic baselines from which to measure them have not yet been declared by most claimant States: Stuart Kaye and Donald Rothwell, 'Southern Ocean Maritime Claims: Another Antarctic Challenge for the Law of the Sea?' (2002) 33 Ocean Development and International Law 359."

"Note to the International Bureau of the Universal Postal Union Asserting Argentine Jurisdiction over Antarctica and Other Territories (14 September 1927), reprinted in Bush, Volume I, above n 454 on the preceding page, 584–585; Law no. 17,694 (29 November 1966) and several other enactments discussed in Bush, Volume II, above n 454 on the previous page, 72."


Norway\textsuperscript{463} and the United Kingdom\textsuperscript{464} have declared a territorial sea but not an EEZ/fisheries zone adjacent to Antarctica.\textsuperscript{465} All of the territorial claimant States have claimed, or cited their entitlement to, coastal State rights over continental shelf areas adjacent to the Antarctic continent.\textsuperscript{466} EEZ claims (actual and notional) to Antarctic waters are depicted in Figure 3.32.

\textit{Design features and analysis of functional coverage:}

Antarctica and its surrounding waters are currently managed on a cooperative basis in accordance with the Antarctic Treaty System (ATS), which consists of the 1959 Antarctic Treaty\textsuperscript{467}; 1972 Convention for the Conservation of Antarctic Seals (CAS Convention);\textsuperscript{468} Convention for the Conservation of Antarctic Marine Living Resources (CAMLR Convention)\textsuperscript{469}, Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol)\textsuperscript{470}. The Convention on the Regulation of Antarctic Mineral Resource Activities was adopted in 1988 but never entered into force.\textsuperscript{471}

The following paragraphs discuss some relevant provisions of the Antarctic Treaty, CAMLR Convention and Madrid Protocol. The CAS Convention is not discussed, given the absence since 1964 of commercial sealing in Antarctica.\textsuperscript{472} Design fea-

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., British Note to Chile Providing Information South Concerning British Claims to Certain Territory (23 May 1914), reprinted in Bush, Volume II, above n 454 on page 197, 304–305.
\item For further details see Rothwell, above n 454 on page 197, 276–282.
\item Note that the territorial claimant States have also presented submissions to the Commission on the Limits of the Continental Shelf that either (1) incorporate claims to an extended continental shelf projected from the Antarctic continent or (2) include clear reservations relating to their Antarctic claims. See United Nations, Division for Ocean Affairs and the Law of the Sea, Submissions to the Commission on the Limits of the Continental Shelf (30 October 2009), available at <http://www.un.org/Depts/los/clcs_new/commission_submissions.htm>; and Karen Scott, ‘Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The Next Fifty Years’ (2009) 20 \textit{Yearbook of International Environmental Law} 1.
\item Antarctic Treaty, signed 1 December 1959, entered into force 23 June 1961, 402 UNTS 71.
\item Signed 11 February 1972, entered into force 11 March 1978, 1080 UNTS 175.
\item For further discussion see Rothwell, above n 454 on page 197.
\end{enumerate}
\end{footnotesize}
Figure 3.31: Territorial claims to the Antarctic continent and surrounding islands. Source: Rose and Milligan, note 453 on page 197.
Figure 3.32: The CAMLR Convention and EEZ claims (actual and notional) to Antarctic waters. Source: Rose and Milligan, note 453 on page 197.
tures of the ATS may be distinguished from other OCA management frameworks on a three grounds that are explained in further detail below. First, the ATS is a truly multilateral management framework with corresponding institutional frameworks that differ significantly from other surveyed frameworks that involve a much smaller number of States Parties. Second, spatial coverage of the CAMLR Convention includes both OCAs, non-disputed zones of national jurisdiction, and maritime spaces that are unambiguously high seas. Third, the ATS is one of four surveyed frameworks that reflect a policy objective to undertake cooperative management of a defined area on an indefinite basis without limitation (see Chapter (4.3.5) for further discussion).

The Antarctic Treaty:

Sovereignty disputes and concerns regarding the strategic, economic and scientific significance of the Antarctic region prompted a series of negotiations during the 1940s and 1950s culminating with the adoption of the Antarctic Treaty in 1959. The Antarctic Treaty entered into force in 1961 after ratification by the twelve states participants in the negotiations, including all states claiming sovereignty over territories on the Antarctic continent.

Article VI of the Antarctic Treaty defines its area of application as follows:

The provisions of the present Treaty shall apply to the area south of 60 degrees South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

Within this area, the Antarctic Treaty establishes a cooperative management framework based on several objectives – the use of Antarctica for peaceful purposes, freedom of scientific investigation, international scientific cooperation, pro-

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474 As of 27 February 2010, forty-eight countries are party to the Antarctic Treaty. See the Secretariat website at <http://www.ats.aq/devAS/ats_parties.aspx?lang=e>.
475 Antarctic Treaty, Article I.
476 Antarctic Treaty, Article II.
477 Antarctic Treaty, Article III.
hibition of nuclear activity,\textsuperscript{478} and the setting aside of disputes over territorial sovereignty. The focal point of cooperative activities is the Antarctic Treaty Consultative Meeting, which is empowered to develop binding and non-binding measures concerning implementation of the Antarctic Treaty and the furtherance of its objectives.\textsuperscript{479} A large number of such measures have been adopted since the Treaty’s entry into force.\textsuperscript{480} The Antarctic Treaty also contains robust rights of inspection, enabling certain Parties to designate observers having freedom of access to ‘[a]ll areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel’.\textsuperscript{481} Contracting Parties are also required to provide each other with advance notice of a broad range of specified activities undertaken in Antarctica.\textsuperscript{482}

The issue of territorial sovereignty is addressed in Article IV of the Antarctic Treaty, which contains language that simultaneously prohibits the expansion of territorial claims but stipulates that its provisions are to be interpreted without prejudice to existing territorial claims. It provides as follows:

2. Nothing contained in the present Treaty shall be interpreted as:

   a) renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

   b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

\textsuperscript{478} Antarctic Treaty, Article V.
\textsuperscript{479} See Antarctic Treaty, Article IX. For further discussion see Handbook of the Antarctic Treaty System, above n 472 on page 199 and Rothwell, above n 454 on page 197.
\textsuperscript{480} These recommendations are published online at <http://www.ats.aq/devAS/info_measures_list.aspx>.
\textsuperscript{481} Antarctic Treaty, Article VII.
\textsuperscript{482} Antarctic Treaty, Article VII(5). The specified activities are: ‘all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory; all stations in Antarctica occupied by its nationals; and any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty [concerning the use of Antarctica for peaceful purposes].’
c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State’s rights of or claim or basis of claim to territorial sovereignty in Antarctica.

3. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

The Antarctic Treaty does not contain specific provisions concerning the assertion of national jurisdiction in Antarctic waters on the basis of territorial claims to the Antarctic continent.483 There has been considerable academic debate concerning whether, in light of the prohibitions set out in Article IV of the Antarctic Treaty, a state claiming Antarctic territory is entitled to regard itself as a coastal State under the LOSC and to assert maritime jurisdiction consistent with the Antarctic Treaty.484 The LOSC does not contain specific provisions concerning the Antarctic Treaty. However, LOSC Article 311(2) preserves the rights and obligations in other agreements provided they are compatible with the convention and ‘do not affect the enjoyment by other States Parties of their rights or the performance of their obligations’ under the LOSC.485 To date, States claiming maritime zones within the area of application of the Antarctic Treaty have sought to reconcile their implementation of parallel rights and obligations under the ATS and the LOSC by refraining from taking steps to enforce or consolidate their claims to maritime zones against third parties.486

483 Note however, Article VIII, establishing nationality-based jurisdiction over persons located in Antarctica.
486 For example, each of these states has requested that the UN Commission on the Limits of the Continental Shelf not consider their claims to an extended continental shelf projected from the Antarctic continent. National legislation of the territorial claimant States is generally drafted to defer in express terms to international instruments or specifically exclude jurisdiction over
Article XI of the Antarctic Treaty establishes a consent-based dispute settlement mechanism, providing as follows:

1. If any dispute arises between two or more of the Contracting Parties concerning the interpretation or application of the present Treaty, those Contracting Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent, in each case, of all parties to the dispute, be referred to the International Court of Justice for settlement; but failure to reach agreement on reference to the International Court shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 of this Article.

The CAMLR Convention:

The CAMLR Convention establishes a framework for the exploitation of marine living resources that places a strong emphasis on conservation objectives. In contrast to the Antarctic Treaty and the Madrid Protocol, the Convention’s area of application extends beyond 60 degrees South latitude to a line approximating the Antarctic convergence (see Figure 3.32).
CAMLR Convention Article II(1) provides that ‘the objective of this Convention is the conservation of Antarctic marine living resources’. To this end, the Convention establishes a Commission of the Parties that is empowered, inter alia, to establish binding measures regarding the conservation and management of marine living resources including measures permitting the harvesting of particular species.\textsuperscript{489} In exercising this function, the Commission is required to take full account of recommendations and advice of a Scientific Committee of Commission Members.\textsuperscript{490} The subject matter jurisdiction of the Convention in relation to marine mammals is specifically limited by Article VI, which provides that nothing in the Convention derogates from the rights and obligations of Parties to the International Convention for the Regulation of Whaling\textsuperscript{491} and the 1972 CAS Convention.

CAMLR Convention Article XXV contains a dispute settlement mechanism that is for the most part identical to the equivalent mechanism in the Antarctic Treaty. However, it also permit parties to agree to resolve a dispute by recourse to an arbitral tribunal constituted in accordance with an Annex to the Convention. Awards of the arbitral tribunal are final and binding on all parties to a dispute.\textsuperscript{492}

The Madrid Protocol:

The Madrid Protocol establishes a stringent system of environmental protection within the area of application of the Antarctic Treaty.\textsuperscript{493} Article 2 of the Protocol designates Antarctica as a natural reserve devoted to peace and science and refers to the commitment of the Parties to the ‘comprehensive protection of the Antarc-

\textsuperscript{489}See CAMLR Convention, Article VII. Decisions of the Commission on matters of substance are taken by consensus (Article XII) and are subject to ‘opt-out’ procedures (Article IV(6)).

\textsuperscript{490}See CAMLR Convention, Article IX(4). The composition and functions of the Scientific Committee are set out in Articles XIV - XVI.

\textsuperscript{491}International Convention for the Regulation of Whaling, signed 2 December 1946, 161 UNTS 72.

\textsuperscript{492}CCAMLR Convention, Annex for an Arbitral Tribunal, Article 5.

tic environment. The Protocol and its six associated Annexes set out detailed obligations to plan and carry out activities so as to limit environmental impacts, to conduct prior assessment of possible environmental impacts, and to undertake regular and effective monitoring of the Antarctic environment.

Several of the Protocol’s provisions relate specifically to the marine environment and the management of marine living resources:

Annex II of the Protocol (Conservation of Antarctic Fauna and Flora) prohibits the taking of or harmful interference with flora and fauna except in accordance with a permit granted only in relation to scientific or educational activities. Potential conflicts between the Madrid Protocol and resource exploitation frameworks established by other instruments are addressed by specific limitations of the Protocol’s subject matter jurisdiction. Article 4 provides that the Protocol does not modify or amend the Antarctic Treaty, and does not derogate from ‘rights and obligations of the Parties to this Protocol under the other international instruments in force within the Antarctic Treaty system.’ Accordingly, the restrictions set out in the Protocol do not apply to the harvesting of fish undertaken in accordance with the CCAMLR Convention or in accordance with high seas freedoms referred to in Article VI of the Antarctic Treaty. The subject matter jurisdiction of Annex II regarding interactions with marine mammals is limited by an express requirement that ‘nothing in the Annex shall derogate from the rights and obligations of Parties under the International Convention for the Regulation of Whaling.’

Annex IV of the Protocol (Prevention of Marine Pollution) establishes, inter alia, detailed restrictions on the discharge of oil, noxious liquids, garbage, sewage, and

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494 Annex II (Conservation of Fauna and Flora) prohibits the taking of or harmful interference with flora and fauna except in accordance with a permit granted only in relation to scientific or educational activities.

495 Broad environmental management principles are set out in Madrid Protocol, Article 3.

496 Madrid Protocol, Annex II, Articles 3(1) and 3(2). See also Madrid Protocol, Annex V (Area protection and management).


other substances from ships operating in the area of application of the Antarctic Treaty. 499

Annex V of the Madrid Protocol (Area Protection and Management) provides, inter alia, for the designation of ‘any area, including any marine area’ as an Antarctic Specially Protected Area (ASPA) or an Antarctic Specially Managed Area (ASMA). The specified objective of ASPA designations is ‘to protect outstanding environmental, scientific, historic, aesthetic or wilderness values, any combination of those values, or ongoing or planned scientific research.’ 500 The specified objective of ASMA designations is to ‘assist in the planning and co-ordination of activities, avoid possible conflicts, improve co-operation between Parties or minimise environmental impacts.’ 501

Madrid Protocol Article 18 establishes consent-based dispute settlement procedures supplemented by a limited procedure for compulsory and binding dispute settlement. The provision calls for parties to settle disputes concerning the interpretation or application of the Protocol by peaceful means, including but not limited to negotiation, inquiry, mediation, conciliation, arbitration and judicial settlement. 502 Where non-compulsory means fail to resolve the dispute, the Madrid Protocol Articles 19 and 20 provides for compulsory and binding dispute settlement by an Arbitral Tribunal or, if the Parties have indicated such a preference in advance, by the International Court of Justice. Madrid Protocol Article 20(1) limits the availability of compulsory procedures to specific subject matter, providing that compulsory procedures are only available in relation to

\[\ldots\text{ disputes concerning the interpretation or application of Articles 7 [Prohibition of Mineral Resource Activities], 8 [Environmental Impact Assessment] or 15 [Emergency Response Action] or, except to the extent that an Annex provides otherwise, the provisions of any Annex or, insofar as it relates to these Articles and provisions, Article 13 [Compliance with this Protocol]} \ldots\]

502Madrid Protocol, Article 18.
Madrid Protocol Article 20(2) limits the subject matter jurisdiction of the relevant dispute settlement forum by providing as follows:

The Arbitral Tribunal shall not be competent to decide or rule upon any matter within the scope of Article IV of the Antarctic Treaty. In addition, nothing in this Protocol shall be interpreted as conferring competence or jurisdiction on the International Court of Justice or any other tribunal established for the purpose of settling disputes between Parties to decide or otherwise rule upon any matter within the scope of Article IV of the Antarctic Treaty.

Comment concerning functional coverage:

OCAs located within the Antarctic Treaty Area are subject to management measures prescribed by the Antarctic Treaty Consultative Meeting, CAMLR Commission of the Parties, and the other cooperative management mechanisms mentioned above. These cooperative management mechanisms are not specifically tailored to the objective of OCA management. Rather, OCA management is integrated into a broader cooperative framework defined by reference to the 60 degree parallel and, in the case of CAMLR, by reference to the approximate location of the Antarctic convergence (and Antarctic large marine ecosystem). Claimant coastal States in practice assert all functional components of their coastal State jurisdiction throughout Antarctic waters in relation to their own nationals. Management of non-nationals is undertaken on a cooperative basis on the terms set out in ATS instruments. Operating together, the constituent instruments of the Antarctic Treaty System thus contain provisions impacting upon all functional components of coastal State jurisdiction claimed in Antarctic waters.
3.8 Conclusion: functional coverage of provisional joint management frameworks

By supplementing the provisions of international law discussed in Chapter 2, the varied State practice discussed in this Chapter represents an important step towards establishing a sound legal basis for the management of the world’s OCAs. Many of the surveyed provisional joint management frameworks facilitate, or contemplate, further cooperation concerning the implementation within the relevant OCA of functional components of coastal State jurisdiction set out in the LOSC. In keeping with the established position of customary international law and common paragraph 3 of LOSC Articles 74/83 (concerning delimitation of the EEZ and continental shelf respectively), most frameworks are designed to avoid prejudice to the legal positions of the claimant coastal States.\(^{503}\)

However, the functional coverage of provisional joint management frameworks varies greatly. Several frameworks may be characterised as functionally comprehensive, including the: Argentina – Uruguay 1973 Agreement concerning the Río de la Plata (Chapter 3.3.2); Guinea-Bissau – Senegal 1993 Management and Cooperation Agreement and the 1995 Protocol (Chapter 3.3.8); Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9); Malaysia – Thailand 1979 MoU and supplemental agreement of 1990, in the parts of the joint development area not claimed by Vietnam (Chapter 3.6.7); Australia – Indonesia 1989 Treaty (Chapter 3.6.1); Australia – East Timor 2002 Timor Sea Treaty and 2006 CMATS (Chapter 3.6.2); the Antarctic Treaty System (Chapter 3.7.3).

As discussed in illustrated in detail the preceding sections of this Chapter, these frameworks contain provisions allocating coastal State competence and/or jurisdiction within the relevant OCA in a complete set of functional contexts. The claimant coastal States are afforded a clear basis for implementing, within the relevant OCA,

\(^{503}\)This is achieved either expressly, through inclusion of a ‘without prejudice’ clause, or through the conclusion of an agreement that is not legally binding.
the components of their jurisdiction concerning: artificial structures, environmental protection, marine scientific research, maritime security, navigational safety and resource exploitation. As discussed in further detail in Chapter 4.1, the allocation of functional competence is achieved through the use of provisions that either (1) establish cooperative mechanisms in a variety of specific functional contexts without directly addressing the issue of coastal State jurisdiction; or (2) allocate coastal State jurisdiction to one or more of the claimant coastal States within the relevant OCA or within defined sub-areas.

Other provisional joint management frameworks exhibit clear functional gaps that may undermine the ability of claimant coastal States to engage in management of the relevant OCA. The gaps and associated State practice may be loosely categorised as follows:

*Functionally limited allocation of competence:*

State practice falling under this category includes the following: several of the surveyed bilateral cooperative arrangements established between Canada – United States (Chapters 3.2.1, 3.3.4 and 3.7.2); the surveyed cooperative arrangements established between El-Salvador – Honduras – Nicaragua concerning environmental management in the Gulf of Fonseca (Chapter 3.2.2); Denmark (Faroe Islands) – United Kingdom 1999 Agreement (Chapter 3.3.6);* several of the surveyed bilateral cooperative arrangements established between Argentina – United Kingdom concerning the Southern Atlantic Ocean (Chapter 3.3.1);* Trinidad and Tobago – Venezuela 1977 and 1985 Fisheries Agreements (Chapter 3.3.10); Iran – United Arab Emirates (Sharjah) 1971 MoU (Chapter 3.4.1); Saudi Arabia – Sudan 1974 Agreement concerning development of non-living continental shelf resources (Chapter 3.4.2); Japan – Republic of Korea 1974 Agreement concerning hydrocarbon development (Chapter 3.5.2); Japan – Russia cooperative arrangements concerning fisheries (Chapter 3.5.3); Japan – PRC 1997 Agreement; Japan – Republic of Korea 1998 Agreement; and PRC – Republic of Korea 2000 Agreement concerning fisheries management in the East China Sea (Chapter 3.5.5); several of the surveyed bilateral
and trilateral cooperative arrangements concerning the South China Sea (Chapter 3.6.5); Indonesia – Malaysia cooperation concerning maritime enforcement (Chapter 3.6.6); Malaysia – Vietnam 1992 MoU concerning hydrocarbon development (Chapter 3.6.8); Norway – Russia 1978 Fisheries Agreement (Chapter 3.7.1).

These frameworks focus on the cooperative management of specific resources or the cooperative exercise of coastal State jurisdiction in functionally specific contexts. Cooperation in other functional contexts is either contemplated in very general terms, not referred to, or deferred to subsequent agreement. Functional contexts not addressed in these frameworks remain subject to relevant provisions of international law, which, as argued in Chapter 2, do not establish a detailed framework for implementation within an OCA of coastal State jurisdiction.

However, it is important to note that the frameworks marked with an asterisk (*) operate (or have in the past operated) in tandem with other functionally specific frameworks, for the intended purpose of establishing a functionally broad management framework within the relevant OCA. For example: the United States and Canada engage in cooperative management of their OCAs in accordance with a complementary collection of international legal instruments, cooperative management arrangements developed by equivalent government agencies in each State, and coordinated national policy-making. These frameworks exhibit functional gaps only when viewed in isolation. Together they provide a functionally broad allocation of coastal State competencies within the relevant OCA. The Denmark (Faroe Islands) – United Kingdom 1999 Agreement is functionally focused on fisheries cooperation in the Special Area and contains only general provisions concerning protection of the marine environment. However, environmental management in the Special Area is also subject to detailed provisions set out in the Convention for the Protection of the Marine Environment of the North-East Atlantic, to which both Denmark and the United Kingdom are party.\textsuperscript{504}

\textsuperscript{504}Note also 1999 Agreement, Article 6(a), which, as noted in Chapter 4.2.6, specifically defers to the Convention for the Protection of the Marine Environment of the North-East Atlantic.
No allocation (or clear allocation) of functional competence:

State practice falling under this category includes the following: the condominium / co-ownership arrangement applicable to parts of the Gulf of Fonseca (Chapter 3.2.2);† 2004 Memorandum of Understanding concluded by Equatorial Guinea – Gabon (Chapter 3.3.7); Cambodia – Thailand 2001 MoU (Chapter 3.6.3); Cambodia – Vietnam 1982 Agreement (Chapter 3.6.4);† 2002 Declaration concerning the South China Sea (Chapter 3.6.5); Japan – PRC 2008 Cooperation Consensus concerning the East China Sea (Chapter 3.5.1).

These frameworks contain general commitments to engage in, or discuss the establishment of, cooperative management of an OCA but do not specifically allocate functional components of coastal state jurisdiction within the area concerned. They do not add clarity to the general and ambiguous provisions of international law concerning the exercise of coastal State jurisdiction within OCAs.

The frameworks marked with a dagger (†) are special cases that could be categorised differently. It is perhaps arguable that the Joint Historic Waters Area defined in the Cambodia – Vietnam 1982 Agreement, which is described as being ‘placed under the juridical regime of their internal waters’, falls for the purposes of that agreement under the concurrent (and functionally comprehensive) jurisdiction of the Parties. The existence of concurrent jurisdiction within the JHWA arguably represents a commitment by each State to assert jurisdiction there, subject to contrary provisions of the 1982 Agreement, on a unilateral and functionally comprehensive basis. Similarly, it is perhaps arguable that the condominium / co-ownership arrangement that applies to certain waters of the Gulf of Fonseca entitles El-Salvador, Honduras and Nicaragua to exercise jurisdiction within those waters on a concurrent, unilateral and functionally comprehensive basis.506

No allocation of functional competence to certain claimants:

505 Cambodia – Vietnam 1982 Agreement, Article 3.
506 Alternatively, it could be argued that the presence of an agreement between the Parties may be a precondition for the exercise of jurisdiction within the relevant waters: for further discussion see Chapter 4.1.2.
State practice falling under this category includes the following: Barbados – Guyana 2003 Treaty (Chapter 3.3.3);†† Colombia – Jamaica 1993 Treaty (Chapter 3.3.5);†† Malaysia – Thailand 1979 MoU and supplemental agreement of 1990, in the parts of the joint development area claimed by Vietnam (Chapter 3.6.7);†† several of the surveyed bilateral and trilateral cooperative arrangements concerning the South China Sea (Chapter 3.6.5); Japan – PRC 1997 Agreement; Japan – Republic of Korea 1998 Agreement; and PRC – Republic of Korea 2000 Agreement concerning fisheries management in the East China Sea (Chapter 3.5.5).

These frameworks allocate certain functional competencies to the relevant parties, but do not provide for the exercise of jurisdiction by other coastal States asserting claims to all of part of the relevant OCA. In such circumstances, ambiguities of the international legal framework concerning the exercise of coastal State jurisdiction within OCAs continue to impact upon relations between all claimant coastal States and management of the relevant OCA. The frameworks marked with a double dagger (††) could be characterised as functionally comprehensive if they involved of all of the relevant claimant States: each framework contains detailed provisions allocating coastal State competence and/or jurisdiction to its States parties in a complete set of functional contexts.

No allocation of functional competence concerning non-claimant States:

This is a peculiar feature of the Japan – PRC 1997 Agreement; Japan – Republic of Korea 1998 Agreement; and PRC – Republic of Korea 2000 Agreement concerning fisheries management in the East China Sea. As noted in Chapter 4.4.5, these instruments allocate jurisdiction on an inter-se basis only and do not provide a clear basis for the exercise of coastal State jurisdiction against vessels flagged to third States (or the ROC).

Drawing on State practice identified and critiqued in this Chapter, the next Chapter will formulate legal and policy options for provisional joint OCA management.

507 And in the case of the aforementioned East China Sea fisheries agreements, to ROC.
4 Legal and policy options for managing overlapping claim areas

4.1 Introduction

Chapters 2 and 3 have examined provisions of international law concerning the assertion of coastal State jurisdiction within OCAs, the impact of these provisions on OCA management, and the development by several coastal States of supplemental legal and policy frameworks concerning the provisional joint management of such spaces.

Drawing on the responses developed in those Chapters, this Chapter proposes detailed legal and policy options for the provisional joint management of OCAs. The proposed options are intended to fulfill two aims: First, they are intended to inform the future negotiation of provisional joint management frameworks. Accordingly, each proposed option is accompanied by explanatory commentary, suggested legal drafting, and detailed cross-references to representative examples of State practice discussed in Chapter 3. Secondly, the proposed options are intended to facilitate the functionally comprehensive management of OCAs by the relevant claimant coastal States. They offer potential avenues towards ‘filling’ the functional gaps identified in Chapter 3 by enabling the collective implementation within OCAs of all functional components of coastal State jurisdiction.
The author’s intention is to be helpfully suggestive rather than prescriptive – in deference to the fact that functional gaps in provisional joint management frameworks often arise from compelling political and strategic factors that impede further cooperation concerning the management of OCAs. Indeed the survey in Chapter 3 suggests that the presence of sufficient political will, and a stable bilateral relationship, are critical factors influencing the establishment of OCA management frameworks, and endurance of those frameworks in the medium and long term.\(^1\) While discussing State practice concerning the joint development of petroleum resources (including in OCAs), Townsend-Gault and Stormont make the relevant observation that:

A joint development arrangement is not a mechanical process, but rather a highly complex and complicated result of a series of dealings between the countries concerned over a range of issues, some of which may have little or nothing to do with the ostensible subject of the exercise. It should not be suggested lightly, and cannot take the place of any true mutuality of understanding between two States. In other words, the conclusion of any form of joint development arrangement, in the absence of the appropriate level of consent between the parties, is merely redrafting the problem and possible complicating it further.\(^2\)

The remainder of the Chapter is structured as follows: Section 4.2 discusses methods for achieving the objective of functionally comprehensive OCA management. Sections 4.3 – 4.10 recommend different design features of a prospective provisional joint management framework that are consistent with that objective, and analyse key strengths and weaknesses of specific design features common to several of OCA management frameworks identified in Chapter 3. Taking into account the significance of political factors, particular attention will be devoted to assessing the merits of different design features in different general political contexts.

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1 This observation is commonly made. See, eg: Davenport, above n 313 on page 158; and Schofield and Tan-Mullins, above n 372 on page 173.

4.2 Achieving functionally comprehensive OCA management

Within an OCA, how can the claimant coastal States collectively implement all functional components of coastal State jurisdiction attributed to them by the LOSC? Given the ambiguities in the international legal framework discussed above in Chapter 2 on page 35, functionally comprehensive management of an OCA can only be achieved through development of a provisional joint management framework having the following two characteristics:

- *Comprehensive participation*: The framework must involve all of the relevant claimant coastal States;

- *Comprehensive allocation of functional competence*: The framework must enable each of the claimant coastal States to clearly identify the circumstances (and locations) in which they are entitled (or not entitled) to implement all LOSC rights and obligations concerning: artificial structures, environmental protection, marine scientific research, maritime security, navigational safety and resource exploitation.

4.2.1 Variety of options and selection methodology

There is enormous scope for calibrating a provisional joint management framework to suit the specific circumstances of claimant coastal States in a manner that remains consistent with the above characteristics. Drawing on examples of State practice discussed in Chapter 3 (and the author’s critical assessment of best practice) the remaining Sections of this Chapter will canvas several legal and policy options that are consistent with the objective of functionally comprehensive management. The following design features of a prospective provisional joint management framework will be addressed: duration of the framework; spatial coverage of the framework; interaction of the framework with existing jurisdictional claims; choice of constituent
instrument(s); mechanism for allocating jurisdiction; mechanism for allocating re-
resources and revenues; institutional aspects of cooperation; and dispute settlement
procedures. Each of these features have been selected on the basis that they are a
recurrent element of multiple provisional joint management frameworks surveyed in
Chapter 3. They also represent domains in which negotiators have developed vary-
ing solutions to a common issue or similar cluster of issues associated with OCA
management.

4.3 Duration of the framework

Claimant coastal States should determine the operative time-period of a provisional
joint management framework or its component parts. There are a wide variety of
factors that may influence the choice to engage in provisional joint management of
an OCA for a particular length of time, including: the nature of planned resource
exploitation, progress (if any) of delimitation negotiations, and national politics in
the claimant coastal States. The provisional joint management frameworks surveyed
in Chapter 3 employ a variety of methods to define their duration. The following
paragraphs discuss a selection of these methods and provide representative drafting
where relevant.

4.3.1 Termination upon boundary delimitation

Several frameworks link their operative time-period with the progress of maritime
delimitation negotiations; i.e. the framework or certain subcomponents continue
to apply until a maritime boundary has been established by the claimant coastal
States. A basis for provisional joint management is therefore maintained for the
remaining duration of the OCA. Representative drafting can be found in Article
12(2) of the Barbados – Guyana 2003 Treaty (Chapter 3.3.3), which provides as
follows:
This Treaty shall remain in force until an international maritime boundary delimitation agreement is concluded between the Parties.

See also the Colombia – Jamaica 1993 Treaty (Chapter 3.3.5) and Cambodia – Vietnam 1982 Agreement (Chapter 3.6.4), which both contain specific obligations that apply pending delimitation of a maritime boundary in the relevant OCA. The various cooperative measures referred to in Article 3 of the Cambodia – Vietnam 1982 Agreement are expressed to apply ‘pending the settlement of the maritime border between the two States in the historical waters mentioned in Article 1 ...’ Article 3(1) of the Colombia – Jamaica 1993 Treaty provides as follows:

Pending the determination of the jurisdictional limits of each Party in the area designated below, the Parties agree to establish therein a zone of joint management, control, exploration and exploitation of the living and non-living resources, hereafter called ‘The Joint Regime Area’.

4.3.2 Termination connected with resource exploitation

Article 12 of the Australia – East Timor 2006 CMATS (Chapter 3.6.2), which is quoted below, permits either State to terminate the Treaty if certain activities concerning hydrocarbon development have not taken place within a specified timeframe. See also Article XXXI(4) of the Japan – Republic of Korea 1974 Agreement concerning hydrocarbon development (Chapter 3.5.2), which requires the Parties to consult on whether to revise or terminate the Agreement if either Party ‘recognises that natural resources are no longer economically exploitable in the Joint Development Zone’.

Provisions of this nature enable claimant coastal States to terminate a framework that has demonstrably failed to encourage certain forms of resource development within an OCA. Such provisions are attractive because they offer a degree of flexibility to claimant coastal States, enabling them to explore alternative approaches to resource management. The specific provisions quoted in the previous paragraph are, however, problematic because the legal basis for all functional aspects of OCA management (i.e. the entire Treaty or Agreement) may be terminated if resource
exploitation activities cease or do not proceed. A preferable approach (to achieve functionally comprehensive OCA management) is to narrow the scope of termination provisions connected with resource exploitation, allowing unrelated aspects of the cooperative management framework to continue.

4.3.3 Longer numeric term

Several frameworks, in particular those designed to facilitate hydrocarbon development, apply for specified time period of 20 years or more. A longer numeric term provides protection and encouragement for the high levels of new financial investment associated with such development. Most of the frameworks having a longer numeric term also contain provisions that enable (1) the continued operation of the framework after the numeric term has expired, or (2) termination of the framework before the numeric term has expired. Representative drafting can be found in Article XXXI of the Japan – Republic of Korea 1974 Agreement concerning hydrocarbon development (Chapter 3.5.2), which provides in part as follows:

2. This Agreement shall remain in force for a period of fifty years and shall continue in force thereafter until terminated in accordance with paragraph 3 of this article.

3. Either Party may, by giving three years’ written notice to the other Party, terminate this Agreement at the end of the initial fifty-year period or at any time thereafter.

See also the: Guinea-Bissau – Senegal 1993 Management Cooperation Agreement (Chapter 3.3.8), which applies for an ‘automatically renewable’ term of 20 years;\(^3\) and the Malaysia – Vietnam 1992 MoU concerning hydrocarbon development (Chapter 3.6.8) which applies for a term of 40 years subject to review and extensions.\(^4\) Review and extension provisions are desirable because they enable claimant coastal States to flexibly adapt the modalities of cooperation in response to current circumstances, or periodically continue a framework that is operating successfully.

\(^{3}\text{Guinea-Bissau – Senegal 1993 Management Cooperation Agreement, Article 8.}\)
\(^{4}\text{Schofield, above n 58 on page 16. See also 1992 MoU, Article 5.}\)
4.3.4 Shorter numeric term

Several of the surveyed frameworks, in particular those focused on marine living resources management, apply for specified time period of five years or less. Exploitation of marine living resources is generally less investment-intensive than hydrocarbon development and is less likely to be discouraged or undermined by a shorter numeric term. Frameworks falling under this category are generally intended to be renewed by the claimant coastal States on a regular basis. Representative drafting can be found in Article 14 of the Japan – PRC 1997 Agreement concerning fisheries management in the East China Sea (Chapter 3.5.5), which provides in part as follows:

1. ... This Agreement shall remain in force for a period of five years, and shall continue in force thereafter subject to termination in accordance with paragraph 2 of this Article.

2. Either Contracting Party may terminate this Agreement at any time on or after the date of expiration of an initial period of five years by giving six months’ written notice to the other Contracting Party.

See also the: Trinidad and Tobago – Venezuela 1977 and 1985 Fisheries Agreements (Chapter 3.3.10); Japan – Russia cooperative arrangements concerning fisheries (Chapter 3.5.3); Japan – Republic of Korea 1998 Agreement concerning fisheries management in the East China Sea (Chapter 3.5.5), which applies for an initial period of three years and thereafter until six months from provision of notice by either Party;\(^5\) PRC – Republic of Korea 2000 Agreement concerning fisheries management in the East China Sea (Chapter 3.5.5), which applies for an initial term of five years and thereafter until one year from provision of notice by either Party;\(^6\) several of the surveyed bilateral and trilateral cooperative arrangements concerning the South China Sea (Chapter 3.6.5); and the Norway – Russia 1978 Fisheries Agreement (Chapter 3.7.1).

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\(^6\)PRC – Republic of Korea 2000 Agreement, Article 16.
A potential disadvantage of shorter numeric terms is that they leave management frameworks vulnerable to political discretion and short-term political imperatives. Such factors are often not conducive to effective long-term sustainable management of maritime space (including the deployment of marine spatial planning).

### 4.3.5 Indefinite duration

Several frameworks do not define their operative time-period, reflecting an intention to engage in cooperative management of an OCA on an indefinite basis. An indefinite operative time-period can be used to further two contrasting policy objectives. The first objective is management of an OCA on a long-term basis without limitation. The second is to provide the claimant coastal States with complete discretion to terminate the framework at any time.

Frameworks where the first objective is prevalent include the: Argentina – Uruguay 1973 Agreement concerning the Río de la Plata (Chapter 3.3.2); Denmark (Faroe Islands) – United Kingdom 1999 Agreement (Chapter 3.3.6); Saudi Arabia – Sudan 1974 Agreement concerning development of non-living continental shelf resources (Chapter 3.4.2); and Antarctic Treaty System instruments (Chapter 3.7.3), which entitle certain Parties to withdraw if the instrument in question has been amended without their consent.⁷

Frameworks where the second objective is prevalent include the: Japan – PRC 2008 Cooperation Consensus concerning the East China Sea (Chapter 3.5.1); several of the surveyed bilateral cooperative arrangements established between Canada – United States (Chapters 3.2.1, 3.3.4 and 3.7.2); several of the surveyed bilateral cooperative arrangements established between Argentina – United Kingdom concerning the Southern Atlantic Ocean (Chapter 3.3.1); Iran – United Arab Emirates (Sharjah) 1971 MoU (Chapter 3.4.1); 2002 Declaration concerning the South China

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⁷See Antarctic Treaty, Article XII; CAMLR Convention, Articles XXX and XXXI; Madrid Protocol, Article 24.
Sea (Chapter 3.6.5); and Indonesia – Malaysia cooperation concerning maritime enforcement (see 3.6.6).

4.3.6 Hybrid methods

Several frameworks use a combination of the methods discussed above. See for example the Australia – Indonesia 1989 Treaty (Chapter 3.6.1), which is expressed to apply for an initial period of 40 years, subsequent periods of 20 years unless the Parties otherwise agree, or until a permanent continental shelf boundary is established in the area covered by the Zone of Cooperation.\footnote{Australia – Indonesia 1989 Treaty, Article 12.} Similar language can be found in Article VI of the Malaysia – Thailand 1979 MoU (Chapter 3.6.7).

Several frameworks also use different methods to define the operative time-period of different sub-components of the framework. A representative example is the Australia – East Timor 2006 CMATS (Chapter 3.6.2). Article 12 of the 2006 CMATS establishes a long numeric term, an indefinite operative time-period for certain provisions, and permits either State to terminate the Treaty if certain activities concerning hydrocarbon development have not taken place within a specified timeframe.

It provides in part as follows:

**Period of this Treaty**

1. Subject to paragraphs 2, 3 and 4 of this Article, this Treaty shall remain in force until the date 50 years after its entry into force, or until the date five years after the exploitation of the Unit Area ceases, whichever occurs earlier.

2. If:

   a) a development plan for the Unit Area has not been approved in accordance with paragraph 1 of Article 12 of the Sunrise IUA within six years after the date of entry into force of this Treaty; or

   b) production of petroleum from the Unit Area has not commenced within ten years after the date of entry into force of this Treaty;

   either Party may notify the other Party in writing that it wishes to terminate this Treaty, in which case the Treaty shall
cease to be in force three calendar months after such notice is given.

3. Should petroleum production take place in the Unit Area subsequent to the termination of this Treaty pursuant to paragraph 2 of this Article, all the terms of this Treaty shall come back into force and operate from the date of commencement of production.

4. The following provisions of this Treaty shall survive termination of this Treaty, and the Parties shall continue to be bound by them after termination: ......

5. The period of this Treaty referred to in paragraph 1 of this Article may be extended by agreement in writing between the Parties.

Note also the Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9), which applies for a term of 45 years and can be terminated if certain categories of dispute arise between its Parties.9 Article 51(3) of the 2001 Treaty provides for the continued operation of certain provisions in order to protect the commercial interests associated with hydrocarbon development in the Joint Development Zone. It provides as follows:

Unless otherwise agreed, the expiry or other termination of this Treaty shall not affect development contracts with an expiry date after such expiry or other termination and the provisions of this Treaty shall remain in force for the sole purpose of administering such contracts and maintaining the joint development regime to the extent necessary. On the expiry or earlier termination of the last remaining such contract the outstanding provisions of this Treaty shall terminate forthwith.

This approach is particularly useful for claimant coastal States who lack sufficient resources to engage in resource exploration activities and wish to provide additional certainty to external private investors without committing themselves to a longer term of cooperation in other functional contexts. Ultimately, the method for defining the duration of a framework should seek to strike a balance between the demands of the various political and resource development factors discussed above. Hybrid approaches may prove useful when these different demands become too difficult to reconcile. A risk associated with complex or vaguely drafted hybrid approaches is that they may generate uncertainty and expectation gaps regarding the extent of the Parties’ time commitment to cooperative OCA management.

4.4 Spatial coverage of the framework

Claimant coastal States should identify the maritime spaces in which a provisional joint management framework applies. Ideally, the spatial coverage of a provisional joint management framework should extend throughout the relevant OCA – a lack of spatial coverage in certain locations would have adverse management implications for those locations (see Chapter 2.6).  

It is important to note that the spatial limits of an OCA may be disputed by the relevant claimant coastal States. This situation arises when coastal State A asserts that coastal State B has no legal entitlement to assert a claim in a particular location claimed by coastal State A (or vice versa). For example, coastal State A might assert that baselines defined by coastal State B are inconsistent with the LOSC. Another example is where coastal State A asserts that an insular feature claimed by coastal State B is not capable of generating the maritime zones projected from that feature by coastal State B. Alternatively, coastal State A might assert that coastal State B does not have sovereignty over a relevant insular feature (and vice versa). Where the spatial limits of an OCA are disputed, claimant coastal States are advised to reach agreement concerning (1) the location of those limits, or (2) the limits of a subset of the OCA in which all claimant coastal States are prepared to acknowledge the legal legitimacy of each others’ claims. In practice, negotiations concerning the spatial limits of an OCA are often closely connected with negotiations concerning provisional joint management of the OCA.

Note also that claimant coastal States frequently do not claim the full extent of their respective maritime zones. Instead they only claim waters located landward of what they assert to be the correct course of the maritime boundary. In such circumstances, and assuming that all claimant coastal States agree that their respective claims are consistent with the LOSC, the limits of the OCA are defined by the competing asserted locations of the maritime boundary.

For further discussion concerning relevant provisions of the LOSC, see Churchill and Lowe, above n 10 on page 7, 31–59.

For further discussion of relevant LOSC provisions, in particular LOSC Article 121, see ibid, 48–52.

Of course, acceptance of OCA limits by the claimant coastal States does remove the possibility that third States will accept the basis on which those limits of the claimants’ national jurisdiction are defined. See for example, the Cambodia – Vietnam 1982 Agreement (Chapter 3.6.4), for which several States have issued diplomatic protests in response to the establishment of the JHWA and the associated baseline designations by Cambodia and Vietnam.
Commentators have observed that there is a degree of correlation in current State practice between clearly defined OCA limits and the subsequent implementation of a stable provisional joint management framework.\textsuperscript{14} For example: The Malaysia – Thailand 1979 MoU and supplemental agreement of 1990 (Chapter 3.6.7) were preceded by Thailand’s unilateral declaration of its continental shelf limit in the 1970s, and by map issued by Malaysia in 1979 defining the limit of its continental shelf and territorial sea.\textsuperscript{15} Similar observations could be made for the majority of provisional joint management frameworks surveyed in Chapter 3. There is also a degree of correlation between the presence of territorial sovereignty disputes (complicating spatial characterisation the OCA), and limited progress towards establishment and sustained implementation of provisional joint OCA management. See for example the progress of cooperation between: Argentina – United Kingdom concerning the Southern Atlantic Ocean (Chapter 3.3.1); the various claimants to parts of the South China Sea (Chapter 3.6.5); Iran – United Arab Emirates (Sharjah) concerning the Persian Gulf (Chapter 3.4.1); Equatorial Guinea – Gabon regarding the Corisco Bay (Chapter 3.3.7); and Japan – PRC regarding continental shelf resources in the East China Sea (Chapter 3.5.1). The significant counter example is the sustained cooperative management of Antarctica and surrounding waters under the Antarctic Treaty System (Chapter 3.7.3). A clearly characterised OCA may provide claimant coastal States with a tangible basis for making the trade-offs and compromises that are necessary ingredients of a successful OCA management framework.

The provisional joint management frameworks surveyed in Chapter 3 employ a variety of methods to define their spatial coverage and/or the spatial limits of the relevant OCA. The following paragraphs discuss a selection of these methods and provide representative drafting where relevant.

\textsuperscript{14} See, eg, Davenport, above n 313 on page 158.
4.4.1 Geographic coordinates (zonal management)

Most frameworks define geographic coordinates of a zone in which the claimant States engage in provisional joint management. Article 4 of the Denmark (Faroe Islands) – United Kingdom 1999 Agreement (Chapter 3.3.6), contains a simple representative example of this method. It provides as follows:

1. In the area between points L and R listed in Schedule B, the Special Area, each Party is entitled to exercise its jurisdiction and rights in accordance with the provisions of articles 5, 6 and 7 [concerning cooperative management of the Special Area].

2. The Special Area is described by the coordinates in Schedule C to this Agreement and, by way of illustration, drawn on chart C annexed to this Agreement.

Article 3 of the Colombia – Jamaica 1993 Treaty contains more complex representative drafting that defines the limits of a zone by reference to both straight lines and arcs. It provides in part as follows:

a. The Joint Regime Area is established by the closed figure described by the lines joining the following points in the order in which they occur. The lines so joining the listed points are geodesic lines unless specifically stated otherwise.

<table>
<thead>
<tr>
<th>POINT</th>
<th>LATITUDE (North)</th>
<th>LONGITUDE (West)</th>
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</thead>
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<tr>
<td>........</td>
<td>..................</td>
<td>..................</td>
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</table>

The limit of the Joint Regime Area then continues along the arc of 12 nautical miles radius centred on a point at $15^\circ\ 47'\ 50''\ N, 79^\circ\ 51'\ 20''\ W$, such that it passes to the West of Serranilla Cays to a point at $15^\circ\ 58'\ 40''\ N, 79^\circ\ 56'\ 40''\ W$. The figure is then closed by the geodesic line to point 1.

b. The Joint Regime Area excludes the maritime area around the cays of Serranilla Bank comprised with-in the outermost arc of the Circle of 12 nautical miles radius centred at a point $15^\circ\ 47'\ 50''\ N, 79^\circ\ 51'\ 20''\ W$, such that it passes through points $15^\circ\ 46'\ 00''\ N, 80^\circ\ 03'\ 55''\ W$ and $15^\circ\ 58'\ 40''\ N, 79^\circ\ 56'\ 40''\ W$.

c. The Joint Regime Area will also exclude the maritime area around the cays of Bajo Nuevo comprised within the outermost arc of the circle of 12 nautical miles radius centred at the point $15^\circ\ 51'\ 00''\ N, 78^\circ\ 38'\ 00''\ W$. 

227
See also: Article 1 of the Guinea-Bissau – Senegal 1993 Management and Cooperation Agreement (Chapter 3.3.8), which defines a wedge-shaped area bounded by two azimuths;\(^{16}\) Article 2 of the Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9); Article II of the Japan – Republic of Korea 1974 Agreement concerning hydrocarbon development (Chapter 3.5.2); relevant provisions of the Japan – PRC 1997 Agreement, Japan – Republic of Korea 1998 Agreement, and PRC – Republic of Korea 2000 Agreement concerning fisheries management in the East China Sea (Chapter 3.5.5); Article 1 of the Cambodia – Vietnam 1982 Agreement (Chapter 3.6.4); Article 2 of the Australia – Indonesia 1989 Treaty (Chapter 3.6.1); Article 3 of the Australia – East Timor 2002 Timor Sea Treaty, Article 1 of the 2006 CMATS (Chapter 3.6.2); and Article VI of the Antarctic Treaty (Chapter 3.7.3), which defines its spatial jurisdiction by reference to a parallel of latitude. When formulating provisions that define the spatial coverage of a provisional joint management framework, coastal States are advised to rely on geotechnical advice in order to avoid mistakes such as a failure to specify the datum associated with specified points of latitude and longitude.\(^{17}\)

Note also that several frameworks expressly mention that the spatial coverage of the provisional joint management framework is coextensive with agreed limits of the relevant OCA. Article 2 of the Barbados – Guyana 2003 Treaty (Chapter 3.3.3) is a representative example of this approach. It provides as follows:

\(^{16}\)Article 1 of the 1993 Management and Cooperation Agreement provides as follows: “The parties hereto shall jointly exploit a maritime zone situated between the 268° and 220° azimuths drawn from Cape Roxo; The respective territorial seas of Guinea-Bissau and Senegal shall be excluded from this joint exploitation zone ...”. This drafting does not clearly define the seaward limit of the maritime zone, which as noted above, assumedly would be the outer limit of the States’ respective maritime claims. The following language is preferable: In accordance with international law, the parties hereto shall jointly exploit a maritime zone, which is situated between the 268° and 220° azimuths drawn from Cape Roxo and extends seaward to the limit of maritime zones claimed by either party.

The Geographical Extent of the Co-operation Zone

1. The Parties agree that the Co-operation Zone is the area of bilateral overlap between the exclusive economic zones encompassed within each of their outer limits measured to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and beyond the outer limits of the exclusive economic zones of other States at a distance of 200 nautical miles measured from the baselines from which their territorial sea is measured. For the purposes of this Treaty, the term “exclusive economic zone” and its legal regime shall have the meaning ascribed to them in Part V of the [LOS] Convention.

2. The precise geographical extent of the Co-operation Zone is defined in Annex 1 to this Treaty.

3. The Parties contemplate that they may, by agreement at a later date, delimit an international boundary between them.

Other provisions linking the spatial coverage of a provisional joint management framework with agreed limits of an OCA include: Articles 1(1) and 2(1) of the Malaysia – Vietnam 1992 MoU concerning hydrocarbon development (Chapter 3.6.8); Article 1 of the Malaysia – Thailand 1979 MoU (Chapter 3.6.7); and The Iran – United Arab Emirates (Sharjah) 1971 MoU (Chapter 3.4.1), which contains provisions concerning cooperation within a 12 mile territorial sea projected from island of Abu Massa (claimed by both States). As noted above, a significant advantage of provisions of this nature is that they enable spatially comprehensive removal of the jurisdictional uncertainties (and adverse management implications) associated with overlapping claims. A trend evident in the State practice surveyed in Chapter 3 is that where the claimant coastal States have established some form of provisional framework in a subset of the OCA, remaining uncertainties and tensions associated with the area as a whole (or political tensions not specifically related to the OCA) have significantly undermined implementation of the framework. See for example the: Cambodia – Thailand 2001 MoU (Chapter 3.6.3); surveyed bilateral and trilateral cooperative arrangements concerning the South China Sea (Chapter 3.6.5); and Japan – PRC 2008 Cooperation Consensus concerning the East China Sea (Chapter 3.5.1).
4.4.2 Specific coordinates (provisional maritime boundary)

Claimant coastal States can simply specify coordinates of a line that delimits the relevant OCA on a provisional basis. This approach is not widely used. As noted above (Chapter 3.5.3), Japan and Russia have reportedly established a provisional maritime boundary for the purposes of fisheries management in waters surrounding the Northern Territories/Kuril Islands.

Provisional maritime boundaries provide a high degree of jurisdictional certainty, which is conducive to effective OCA management. However, in practical terms they may be difficult to negotiate – competing diplomatic and political positions concerning the final location of a maritime boundary can be readily deployed during negotiations of a provisional boundary. Furthermore, a provisional boundary may in practical terms be difficult to depart from or modify at a later date, as management practices, domestic laws, and the behaviour of nationals from both claimant coastal States become progressively entrenched.

As a matter of international law, establishment of a provisional maritime boundary need not, and is unlikely to, prejudice the legal positions of claimants States concerning the proper course of a final maritime boundary. Please refer to Chapter 4.5 for further discussion of this issue.

4.4.3 Geophysical characteristics

Several frameworks define their spatial coverage and/or the spatial limits of the relevant OCA by reference to local geophysical or biogeographic characteristics. This approach can be considered a subset of the approach discussed in Chapter 4.4.4 below. For a representative example of State practice see the Saudi Arabia – Sudan 1974 Agreement, discussed in further detail in Chapter 3.4.2, establishes a framework for cooperative management of an area of sea-bed lying between the two States’ respective coasts and seaward of the 1,000 metre isobath. Article I of the CAMLR
Convention refers to the Antarctic Convergence, which represents a biogeographic boundary between Antarctic and sub-Antarctic ecosystems. It provides as follows:

1. This Convention applies to the Antarctic marine living resources of the area south of 60° South latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem.

...

4. The Antarctic Convergence shall be deemed to be a line joining the following points along parallels of latitude and meridians longitude:

Note that in order to maintain precision and clarity, the location of the Antarctic Convergence is approximated by specific coordinates. See also the Argentina – Uruguay 1971 Agreement (Chapter 3.3.2), which establishes, inter alia, cooperative provisions concerning the maritime area located landward of a closing line drawn across the mouth of the Río de la Plata. An advantage of using geophysical or biogeographic characteristics to define spatial coverage is that a meaningful relationship can be established between the OCA management framework and the principle object of management – namely, the inter-related components of the regional marine environment.

4.4.4 No relation between spatial coverage and OCA

Claimant coastal States may wish to integrate management of an OCA into cooperative frameworks concerning that apply within a broader area. See for example several of the surveyed bilateral cooperative arrangements established between Canada – United States (Chapters 3.2.1, 3.3.4 and 3.7.2). As noted above, several government agencies from each of these States cooperate closely within their field of operational responsibility and have developed detailed cooperative management arrangements that apply to both OCAs and contiguous areas of non-overlapping jurisdiction.

See also the: fisheries Grey Zone established by Norway – Russia (Chapter 3.7.1), which incorporated parts of the Norwegian EEZ, Russian EEZ and the OCA subject
to claims asserted by both States; Argentina UK 1990 Joint Statement on Fisheries (Chapter 3.3.1) establishing a fisheries management framework in waters between meridians 45°S latitude and 60°S latitude; 2002 Declaration concerning the South China Sea (Chapter 3.6.5); and the Norway – Russia 1978 Fisheries Agreement (Chapter 3.7.1) establishing a detailed framework of fisheries cooperation that applied, prior to the conclusion of the 2010 boundary delimitation, both to the OCA and to contiguous areas of non-overlapping jurisdiction.

This option is desirable when there is not a close match between the spatial limits of an OCA and preferred/effective spatial units of oceans management. For example: in order to achieve effective outcomes coastal States may wish to engage in holistic cooperative management of a certain ecosystem, or throughout the migratory range of certain species, either of which may extend beyond the relevant OCA.

In the case of marine living resources, spatially limited unilateral management measures are unlikely to produce sustainable outcomes. Churchill makes the following observations concerning the unilateral Interim Fisheries Conservation Zone (FICZ) established by the United Kingdom in waters claimed by the United Kingdom and Argentina (see Chapter 3.3.1):

[The FICZ] not a wholly successful answer to the broader needs of fisheries management in the region. This was so for two reasons. First, many fish stocks in the FICZ migrated into the Argentine 200-mile zone; thus management measures taken in the FICZ for such stocks could be ineffective unless co-ordinated with Argentine measures. Second, a good deal of foreign fishing still took place beyond the FICZ, much of it within 200 miles of the Falkland Islands.¹⁸

¹⁸Churchill, above n 56 on page 95.
4.5 Interaction of the framework with existing jurisdictional claims

Claimant coastal States may elect to define the relationship between their overlapping jurisdictional claims and joint management of the relevant OCA. In particular, they may elect to (1) clearly emphasise the provisional nature of a joint management framework; (2) protect their legal positions concerning their competing claims; and/or (3) set out mutually accepted forms of behaviour concerning those competing claims. The provisional joint management frameworks surveyed in Chapter 3 employ a variety of methods to address these issues. The following paragraphs discuss a selection of these methods and provide representative drafting where relevant.

4.5.1 No definition of interaction between joint management and overlapping claims

Frameworks falling under this category include the Argentina – Uruguay 1973 Agreement concerning the Río de la Plata (Chapter 3.3.2) and the Denmark (Faroe Islands) – United Kingdom 1999 Agreement (Chapter 3.3.6). As noted above, these frameworks also contain no definition of their operative time-period, reflecting an intention to engage in cooperative management of an OCA on an long-term indefinite basis. Accordingly, protection or clarification of underlying jurisdictional claims is not an important policy concern for the claimant coastal States.

If claimant coastal States intend to protect or clarify their respective claims to an OCA, it is not strictly necessary to insert protective language into a provisional joint management framework. Overlapping claims are protected by three aspects of international law concerning maritime delimitation and jurisdictional disputes. First, in accordance with LOSC Part XV Section 3, claimant coastal States are entitled to exclude disputes concerning maritime delimitation and provisional management of an OCA from compulsory and binding dispute settlement procedures set out in
Part XV Section 2 of the Convention. Essentially, this allows the Claimant States to maintain complete control over delimitation and provisional arrangements without being concerned about how their conduct will be interpreted by an independent dispute settlement body.

Second, even if a case was brought to compulsory dispute settlement, international judicial and arbitral bodies are demonstrably reluctant to interpret cooperation between the claimant coastal States in a manner that undermines their respective jurisdictional claims. For example, in the 1974 Fisheries Jurisdiction Case between Iceland and the United Kingdom, the International Court of Justice emphatically declined to construe a cooperative management agreement as a modification of the rights held by the parties. The Court also noted the following:

Moreover, if the Court were to come to a conclusion that the interim agreement prevented it from rendering judgment ... the inevitable result would be to discourage the making of interim arrangements in future disputes with the object of reducing friction and avoiding risk to peace and security. This would run contrary to the purpose enshrined in the provisions of the United Nations Charter relating to the pacific settlement of disputes.

Third, in the case of overlapping claims to EEZ and continental shelf, LOSC Articles 74(3) and 83(3) require claimant States to ‘make every effort’ to establish provisional arrangements to manage the OCA. LOSC Articles 74(3) and 83(3) also insulates those arrangements from the delimitation dispute by specifically providing that provisional management arrangements ‘shall be without prejudice to the final delimitation.’

If claimant coastal States are dissatisfied by the protections offered under international law, they may elect to protect existing jurisdictional claims by mutual agreement, using one or more of the following methods.

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19 See Chapter 2.5.
20 For further discussion see Anderson, above n 129 on page 113, 495–497.
23 Ibid.
24 See Chapters 2.3.5 and 2.3.6.
4.5.2 Express reference to provisional nature of framework

Several frameworks contain a simple express statement that joint management activities are to be undertaken on a provisional basis, pending delimitation of a maritime boundary. Representative drafting can be found in Article 16 of the Canada – United States 1979 Protocol concerning the northern Pacific and Bering Sea halibut fishery (Chapter 3.2.1), which contains the following language:

Pending delimitation of maritime boundaries between Canada and the United States in the Convention area, the following principles shall be applied as interim measures in the boundary region ....

See also: Article 3 of the Colombia – Jamaica 1993 Treaty (Chapter 3.3.5) establishing a Joint Regime Area in which certain cooperative measures apply ‘pending the determination of the jurisdictional limits of each Party ...’; Article 3 of the Cambodia – Vietnam 1982 Agreement (Chapter 3.6.4), setting out cooperative measures that apply ‘pending the settlement of the maritime border between the two States’ in the Joint Historic Waters Area; and the 2002 Declaration concerning the South China Sea (Chapter 3.6.5), which contemplates the establishment of cooperative activities ‘[p]ending a comprehensive and durable settlement of the disputes’.

Note also that several agreements, including the Australia – Indonesia 1989 Treaty (Chapter 3.6.1) and Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9), contain preambular text that specifically acknowledge the relevance and applicability of the LOSC Articles 74(3) and 83(3). As discussed in Chapter 3, these Articles provide that ‘provisional arrangements of a practical nature’ concerning delimitation of the EEZ and continental shelf ‘shall be without prejudice to the final delimitation’.

Legal considerations notwithstanding, express agreement concerning the provisional nature of a management framework may serve the important function of building trust amidst diplomatic and political tension. For example, Anderson observes that during negotiations between Argentina and the UK (concerning maritime claims in the South Atlantic), development of the Madrid Formula on Sovereignty was
instrumental in ensuring the continued progress of diplomatic discussions concerning OCA management.\(^{25}\)

### 4.5.3 Express protection of existing jurisdictional claims

Several frameworks contain clauses that are designed to prevent interpretation or implementation of the framework from impacting upon existing jurisdictional claims. Representative drafting can be found in Article 2 of the Australia – East Timor 2006 CMATS (Chapter 3.6.2), which provides as follows:

**Without prejudice**

1. Nothing contained in this Treaty shall be interpreted as:
   
   a) prejudicing or affecting Timor-Leste’s or Australia’s legal position on, or legal rights relating to, the delimitation of their respective maritime boundaries;
   
   b) a renunciation of any right or claim relating to the whole or any part of the Timor Sea; or
   
   c) recognition or affirmation of any right or claim of the other Party to the whole or any part of the Timor Sea.

2. No act or activities taking place as a result of, and no law entering into force by virtue of, this Treaty or the operation thereof, may be relied upon as a basis for asserting, supporting, denying or furthering the legal position of either Party with respect to maritime boundary claims, jurisdiction or rights concerning the whole or any part of the Timor Sea.

Article 14 of the PRC – Republic of Korea 2000 Agreement concerning fisheries management in the East China Sea (Chapter 3.5.5) provides succinctly as follows:\(^{26}\)

No provision in this Agreement shall be interpreted in such a way as to prejudice the position of either Contracting Party on issues in the Law of the Sea.

See also the: Argentina – United Kingdom Madrid Formula on Sovereignty, quoted above in Chapter 3.3.1); Article 1 of the Barbados – Guyana 2003 Treaty (Chapter 3.3.3); Article 6 of Guinea-Bissau – Senegal 1993 Management and Cooperation


\(^{26}\)This language is similar to that found in the other bilateral fisheries agreements concerning the East China Sea - see Chapter 3.5.5.
Agreement (Chapter 3.3.8); Article 4 of the Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9); Article XIV of the Trinidad and Tobago – Venezuela 1977 Fisheries Agreement (Chapter 3.3.10); Article XI of the Trinidad and Tobago – Venezuela 1985 Fisheries Agreement (Chapter 3.3.10); Japan – PRC 2008 Cooperation Consensus concerning the East China Sea (Chapter 3.5.1); Article XVIII of the Japan – Republic of Korea 1974 Agreement concerning hydrocarbon development (Chapter 3.5.2); Article 5 of the Cambodia – Thailand 2001 MoU (Chapter 3.6.3); Article V of the Malaysia – Thailand 1979 MoU (Chapter 3.6.7); Article 4 of the Malaysia – Vietnam 1992 MoU (Chapter 3.6.8); Article 2 of the Australia – Indonesia 1989 Treaty (Chapter 3.6.1); Antarctic Treaty Article IV(1), quoted above in Chapter 3.7.3, which focuses on territorial sovereignty but contains robust drafting; and the preamble of the Iran – United Arab Emirates (Sharjah) 1971 MoU (Chapter 3.4.1) which notes that ‘[n]either Iran nor Sharjah will give up its claim to Abu Masa nor recognise the other’s claim.’

From a political and diplomatic perspective, express protection of existing jurisdictional claims may go a long way towards building trust between claimant States, and providing mutual reassurance of good faith intention(s) to discuss cooperative OCA management. Such protections are unsuited to highly contentious jurisdictional disputes where express mutual acknowledgment of claims may be readily perceived, regardless of legal considerations, as undermining those claims.

### 4.5.4 Moratorium concerning assertion or expansion of current claims

Several frameworks also contain clauses designed to prevent the parties from taking steps to actively assert, pursue or expand their existing jurisdictional claims. The key purpose of such clauses is to mandate continued commitment to cooperative management – participating States must refrain from undermining cooperative management frameworks through actions extrinsic to that framework. Detailed rep-
Moratorium

1. Neither Australia nor Timor-Leste shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty.

2. Paragraph 1 of this Article does not prevent a Party from continuing activities (including the regulation and authorisation of existing and new activities) in areas in which its domestic legislation on 19 May 2002 authorised the granting of permission for conducting activities in relation to petroleum or other resources of the seabed and subsoil.

3. ...

4. Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement, neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.

5. Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.

6. Neither Party shall raise or pursue in any international organisation matters that are, directly or indirectly, relevant to maritime boundaries or delimitation in the Timor Sea.

7. The Parties shall not be under an obligation to negotiate permanent maritime boundaries for the period of this Treaty.

The robust drafting of this provision was influenced by strident media criticism of the Australian Government on the alleged basis its approach to negotiations was exploitative of East Timor’s bargaining position, and that the 2002 Timor Sea Treaty had established an unfair allocation of the Timor Sea’s natural resources. More succinct language can be found in Antarctic Treaty Article IV(2), which provides

27 For further discussion see: Schofield, above n 333 on page 164.
that ‘No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.’

4.5.5 Acknowledgment of concurrent jurisdiction or overlapping claims

Another method is simply to acknowledge that zones claimed by the relevant coastal States overlap with one another and/or apply on a concurrent basis. See for example Article V of the Saudi Arabia – Sudan 1974 Agreement concerning hydrocarbon development (Chapter 3.4.2), which provides as follows:

The two Governments recognize that the ... [defined area] ... is common to both Governments and shall hereafter be known as the Common Zone. The two Governments have equal sovereign rights in all the natural resources of the Common Zone which rights are exclusive to them ...

See also the Malaysia – Thailand 1979 MoU (Chapter 3.6.7) which explicitly acknowledges the existence of ‘overlapping claims’ and notes the commitment of both States to delimiting the OCA. These approaches emphasise mutual commitment to OCA management and do not characterise overlapping claims in adversarial terms. Once established, express acknowledgment of concurrent jurisdiction or overlapping claims may serve the important function of reducing ongoing tensions between the relevant claimant States. However, such approaches may be difficult to implement where domestic political sentiment is strongly attached to the validity of one particular claim (to the exclusion of the other).

4.5.6 Approaches for highly sensitive jurisdictional disputes:

All of the methods discussed above either explicitly or implicitly acknowledge the existence of multiple jurisdictional claims in, or competing legal positions concerning, an OCA. Where overlapping claims are associated with a high degree of political

\[28\text{1979 MoU, Preamble and Article I.}\]
\[29\text{1979 MoU, Article II.}\]
tension, there may be a strong political aversion to any compromise of a State’s own claim, or a strong political aversion to any acknowledgment of the claims of other States. In such circumstances even an implicit acknowledgment of another States’ claims may be vulnerable to mischaracterisation during domestic political debates as an impermissible ‘sell-out’ of national interests. The two clauses set out below (drafted by the author) attempt to avoid generating the perception of any compromise concerning existing claims, while at the same time expressly protecting those claims.

In accordance with international law, this agreement shall in no way prejudice the sovereignty and sovereign rights that exist within the zone of cooperation.

In accordance with international law, the State entitled to sovereignty and sovereign rights within the zone of cooperation agrees, in the interest of peace, cooperation and friendship, to cooperate with the other States Parties in the manner specified in this agreement.

The first clause provides a general protection for sovereignty and jurisdiction within an OCA. It does not specify which State is entitled to that sovereignty and jurisdiction and it does not acknowledge that multiple States may have valid claims to that sovereignty and jurisdiction. The second clause goes a step further towards accommodating possible domestic political sensitivities. It acknowledges that a single State is the rightful holder of sovereignty and jurisdiction within an OCA but it does not identify that State. Cooperation is characterised as an unspecified holder of sovereignty and jurisdiction generously engaging in cooperation with other States.

Several scholars have noted that acknowledgment of sovereignty and jurisdiction operates as a precondition for discussions concerning joint management of OCAs. See, eg, comments by Peter Kien-Hong Yu, above n 99, in relation to the PRC diplomatic position concerning maritime claims in the South China Sea.
4.6 Mechanism for allocating jurisdiction or competence

In order to facilitate functionally comprehensive management of an OCA, a provisional joint management framework must enable each of the claimant coastal States to clearly identify the circumstances (and locations) in which they are entitled (or not entitled) to implement LOSC rights and obligations concerning: artificial structures, environmental protection, marine scientific research, maritime security, navigational safety and resource exploitation.

How might this be achieved? The provisional joint management frameworks surveyed in Chapter 3 use a variety of mechanisms to allocate jurisdiction or competence within the relevant OCA. The following paragraphs discuss a selection of these methods and provide representative drafting where relevant.

4.6.1 Flag-based allocation of coastal State jurisdiction

Several frameworks employ a ‘flag-based’ mechanism whereby the claimant States exercise coastal State jurisdiction (i.e. enforce their respective national laws and regulations) over vessels flying their respective flags. Such mechanisms are most suitable for the management of the water column within an OCA and their utility may be limited if development of seabed resources is contemplated. A key issue with flag-based mechanisms is how to allocate jurisdiction over vessels flagged to third parties. As noted above, the Japan – PRC 1997 Agreement, Japan – Republic of Korea 1998 Agreement; and PRC – Republic of Korea 2000 Agreement concerning fisheries management in the East China Sea (Chapter 3.5.5) are silent on this issue.

A preferable approach is to recognise the existence of concurrent jurisdiction against nationals of non-claimant States, allowing any of the claimant States to enforce national laws and regulations against third State vessels. See for example Article

31 Development of seabed resources would require, for example, the allocation of jurisdiction in relation to artificial structures in addition to vessels.
16 of the Canada – United States 1979 Protocol concerning the northern Pacific and Bering Sea halibut fishery (Chapter 3.2.1) which provides that either party may enforce provisions of the Convention against fishing vessels flagged to third Parties.\textsuperscript{32} In order to ensure the similar regulatory standards are applied to all vessels, it is desirable when implementing flag-based approaches to reach agreement regarding the harmonisation of relevant domestic laws and regulations in each of the claimant coastal States.

4.6.2 Spatial allocation of coastal State jurisdiction (discrete subzones)

Several frameworks employ a zonal approach that provisionally delimits jurisdictional competence of the Parties (i.e. what laws apply and which State may enforce them) within the OCA. Representative drafting can be found in Article V of the Malaysia – Thailand 1979 MoU, which provides as follows:

The criminal jurisdiction of Malaysia in the joint development area shall extend over that area bounded by straight lines joining the following coordinated points: - ..... 

The criminal jurisdiction of the Kingdom of Thailand in the joint development area shall extend over that area bounded by straight lines joining the following coordinated points: - ..... 

The areas of criminal jurisdiction of both Parties defined under this Article shall not in any way be construed as indicating the boundary line of the continental shelf between the two countries in the joint development area, which boundary is to be determined as provided for by Article II, nor shall such definition in any way prejudice the sovereign rights of either Party in the joint development area.

See also the Australia – Indonesia 1989 Treaty (Chapter 3.6.1) and the Australia – East Timor 2002 Treaty and 2006 CMATS (Chapter 3.6.2). As noted above (Chapter 3.5.3), Japan and Russia have also reportedly established a provisional maritime boundary for the purposes of fisheries management in waters surround-

\textsuperscript{32}1979 Protocol, Article 16. Note that the agreement applies to management of specific fisheries resources as opposed to EEZ rights in general. However, the provision for concurrent jurisdiction could be readily adapted more broadly.
ing the Northern Territories/Kuril Islands. The Japan – Republic of Korea 1974 Agreement concerning hydrocarbon development combines discrete subzones with a nationality-based allocation of prescriptive and enforcement jurisdiction. As noted in (Chapter 3.5.2), this Agreement requires each Party to authorise ‘concessionaires’ for each Subzone of the Joint Development Zone, who are required to enter into an operating agreement to carry out joint exploration and/or exploitation of natural resources.\(^{33}\) Within each Subzone a single ‘operator’ is designated from among the concessionaires to conduct operations.\(^{34}\) The designation of an operator is determinative of the laws and regulations that apply within the relevant Subzone – Japanese law applies to Japanese operators and Korean law applies to a Korean operators.\(^{35}\)

Discrete subzones provide a high degree of jurisdictional certainty, which may incentivise investment in major infrastructure development (e.g. hydrocarbon exploration and exploitation), and is conducive to effective OCA management. In comparison to the concurrent or informal allocation methods discussed below, discrete subzones limit the risk of uncertainty regarding what claimant State is entitled to exercise jurisdiction (and what law applies) in specific locations and circumstances. However, in practical terms the designation of subzones may be more difficult to negotiate than other approaches, because competing diplomatic and political positions concerning the final location of a maritime boundary can be readily deployed during negotiations. As explained in Chapter 4.5, establishment of defined sub-zones need not and is unlikely to prejudice the legal positions of claimants States concerning the course of a final maritime boundary.

It is open to the claimant coastal States to decide whether or not the allocation of coastal State jurisdiction in discrete OCA subzones is inter-linked with the allocation of marine resources from each subzone. For example: Under the Japan – Republic of Korea 1974 Agreement (Chapter 3.5.2), costs and revenues associated with

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\(^{33}\)Japan – Republic of Korea 1974 Agreement, Articles III–V.

\(^{34}\)Japan – Republic of Korea 1974 Agreement, Article VI.

\(^{35}\)Japan – Republic of Korea 1974 Agreement, Article XXIX provides that ‘the laws and regulations of one Party shall apply with respect to matters relating to exploration and exploitation of natural resources in the sub-zones with respect to which the Party has authorised concessionaires designated and acting as operators.’
hydrocarbon development in each Subzone are shared equally by the concessionaires authorised by each State, regardless of which State exercises jurisdiction in the Subzone pursuant to the Agreement.\textsuperscript{36} In contrast, each of the subzones defined in the Australia – Indonesia 1989 Treaty (Chapter 3.6.1) features a different resource allocation between the Parties.\textsuperscript{37} Where is there is strong political opposition to spatially-oriented compromises (e.g. ‘we shouldn’t give up our waters’), de-coupling of resource allocation from allocation of jurisdiction may enable the claimant coastal States to reach an agreement that includes constructive trade-offs (e.g. ‘you exercise jurisdiction, we get more resources’ or vice versa).

4.6.3 Spatial allocation of coastal State jurisdiction (on a concurrent basis)

Instead of allocating coastal State jurisdiction on a spatially discrete basis, several frameworks provide for the concurrent exercise of coastal State jurisdiction throughout the relevant OCA. A robust example of this approach is the Barbados – Guyana 2003 Treaty, which is discussed in further detail in Chapter 3.3.3. Another example can be found in Article 3 of the Colombia – Jamaica 1993 Treaty (Chapter 3.3.5) which provides in part as follows:

2. In the Joint Regime Area, the Parties may carry out the following activities:
   a) Exploration and exploitation of the natural resources, whether living or non-living, of the waters superjacent to the seabed and the seabed and its subsoil, and other activities for the economic exploitation and exploration of the Joint Regime Area;
   b) The establishment and use of artificial islands, installations and structures;
   c) Marine scientific research;

\textsuperscript{36} Schofield notes that ‘To date, exploration activities have failed to result in the discovery of commercially viable oil and gas reserves.’: Schofield, above n 58 on page 16.

\textsuperscript{37} For further discussion see also Stuart Kaye, ‘The Timor Gap Treaty: Creative Solutions and International Conflict’ (1994) 16 Sydney Law Review 74.
d) The protection and preservation of the marine environment;

e) The conservation of living resources;

f) Such measures as are authorized by this Treaty, or as the Parties may otherwise agree for ensuring compliance with and enforcement of the regime established by this Treaty.

3. Activities relating to exploration and exploitation of non-living resources, as well as those referred to in paragraph 2 (c) and (d), will be carried out on a joint basis agreed by both Parties.

4. The Parties shall not authorize third States and international organizations or vessels of such States and organizations to carry out any of the activities referred to in paragraph 2. This does not preclude a Party from entering into, or authorizing arrangements for leases, licences, joint ventures and technical assistance programmes in order to facilitate the exercise of the rights pursuant to paragraph 2, in accordance with the procedures established in article 4 [concerning the Joint Commission].

This language specifically refers to the concurrent entitlement of both States to exercise the six key functional components of coastal State jurisdiction recognised in the LOSC. Note also that, in addition to recognising the entitlement of both States to engage in certain activities within the OCA, the 1993 Treaty determines the existence of national jurisdiction in specific instances by reference to nationality and the flag State of a vessel. As noted in Chapter 3.3.5, Article 3(5) of the 1993 Treaty stipulates that ‘each Party has jurisdiction over its nationals and vessels flying its flag or over which it exercises management and control in accordance with international law’. Each Party is also required to take certain steps when its nationals or vessels have been alleged by the other Party to have breached either the

38 The meaning of this provision is uncertain in several respects: Is the intention to draw a distinction between nationals and vessels? If so, how is jurisdiction allocated when persons holding the nationality of one Party are aboard a vessel flagged to the other Party? Perhaps the reference to ‘nationals’ attempts to ensure that both Parties can exercise jurisdiction within the Joint Regime Area over their own nationals when they are not aboard a flagged vessel? Further, what is the effect of allocating jurisdiction to a Party in respect of national and vessels ‘over which it exercises management and control in accordance with international law’? Perhaps this is intended to enable either Party to exercise coastal State jurisdiction over vessels flagged to third States? That interpretation would complement the specific provision in Article 3(6) concerning the adoption of regulations and measures relating to nationals and vessels of third States.
provisions of the 1993 Treaty or any measures adopted for their implementation. Note also the Article 3(6) of the Treaty sets out an agreement to ‘adopt measures for ensuring that nationals and vessels of third States comply with any regulations and measures adopted by the Parties’ that concern activities within the Joint Regime Area.

Allocation of concurrent jurisdiction is potentially well-suited to OCAs in which all the claimant States have historically engaged in overlapping patterns of enforcement activity or resource exploitation (e.g. fishing in the same location), and it is politically difficult to depart from those established patterns. There are however significant risks associated with the allocation of jurisdiction on a concurrent basis. For example, if the political relationship between claimant coastal States deteriorates, concurrent jurisdiction does not provide an clear agreed basis for preventing the exercise of enforcement jurisdiction within the OCA in a confrontational or competitive manner. Discrete subzones, in contrast, mitigate this risk by spatially separating the exercise of coastal State jurisdiction by each of the claimant States. Another risk associated with concurrent jurisdiction is that, without active harmonisation of domestic laws and regulations, divergent regulatory standards may be applied throughout the OCA. These risks are addressed in the Barbados – Guyana 2003 Treaty through a combination of incentives and commitments to develop appropriate supplementary agreements. For example: As noted in Chapter 3.3.3, the Treaty provides for the establishment of a ‘Joint Fisheries Licensing Agreement’ and coordinated national measures under which concurrent jurisdiction concerning marine living resources will be exercised by both States. A strong incentive to engage in cooperation is provided by a requirement that, in the event of a failure to reach agreement concerning ‘the exercise of their joint jurisdiction over living resources’ in

\[\text{Barbados – Guyana 2003 Treaty, Article 6(2)-(3).}\]
the Co-operation Zone, neither State is entitled exercise jurisdiction on a unilateral basis.\textsuperscript{41}

### 4.6.4 Allocation of coastal State jurisdiction or competence to a joint authority

Several frameworks delegate jurisdictional or administrative competence to a joint authority composed of representatives of the claimant coastal States. One example of this approach is Article 5 of the Guinea-Bissau – Senegal 1993 Management and Cooperation Agreement (Chapter 3.3.8), which provides as follows:

> Upon its establishment, the Agency shall succeed Guinea-Bissau and Senegal in the rights and obligations deriving from the Agreements concluded by each State and relating to the exploitation of the resources in the Area.

As noted in Chapter 3.3.8, the use of the term ‘succeed’ in the above provision suggests that both States intended to delegate the entire scope of their respective national jurisdiction in the Joint Area to the Agency.

Frameworks that delegate jurisdictional or administrative competence to a joint authority also generally contain provisions recognising the underlying concurrent or joint jurisdiction of the claimant coastal States within the OCA. See for example Article 6 of the Guinea-Bissau – Senegal 1993 Management and Cooperation Agreement (Chapter 3.3.8), which provides as follows:

> Under this Agreement, the Parties shall pool the exercise of their respective rights, without prejudice to the rights in law previously acquired by each Party and confirmed by judicial decisions, or to any claims previously formulated by them in respect of areas that have not been delimited.

See also: Article 36–46 of the Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9); and Article 17 of the Guinea-Bissau – Senegal 1995 Protocol (Chapter 3.3.8) concerning the exercise of police powers. The role of joint authorities is discussed\textsuperscript{41} Barbados – Guyana 2003 Treaty, Article 5(5).
in further detail in Chapter 4.8. For the present purposes it is relevant to note the following: A potential advantage of allocating jurisdiction or competence to a joint authority is that it establishes a focal point for decision-making and rule-making to inform the concurrent exercise of jurisdiction by the claimant States. However, establishing a new entity with competence and powers concerning OCA management may be more effort-intensive than establishing networks between existing institutions in the respective claimant States. If agreement is reached to allocate jurisdiction or competence to a joint authority, claimant coastal States are also advised to clearly define the relationship between the powers and duties of the authority and the residual powers and duties of the claimant coastal States. Any uncertainty in this context has the potential undermine effective OCA management, deter potential investors in major infrastructure development, and lead to misunderstandings between the relevant national governments.

### 4.6.5 Operational coordination within an OCA

Several frameworks do not contain specific allocations of jurisdiction of competence within the relevant OCA. Rather, they establish networks of coordination between national agencies and governments that enable each of the claimant coastal States to identify circumstances (and locations) in which they are entitled (or not entitled) to implement LOSC rights and obligations. See for example the surveyed bilateral cooperative arrangements established between Canada – United States (Chapters 3.2.1, 3.3.4 and 3.7.2). Reviewing these arrangements, McDorman comments as follows:

> ... following the *Gulf of Maine Case*, the existence of areas of overlapping claims has not caused significant difficulty between the two States. The two States have been adept at overlooking the disputes and, in most cases, finding ways to circumvent the “issue” and cooperate on a functional and operational level. Because of this, it appears that there have been few or no discussions between the two governments in the last three decades seeking resolution of any of the maritime boundary disputes.

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42McDorman, Saltwater Neighbours, above n 2 on page 82, 118.
A potential disadvantage of operational coordination within an OCA is a lack of transparency or public clarity concerning the allocation of national jurisdiction within an OCA. However, as a matter of international law, the absence of a transparent and public allocation of jurisdiction within an OCA does not in and of itself deprive the claimant coastal States of their national jurisdiction in the area. Rather, as discussed in Chapter 2, the existence of overlapping claims entails certain unclear limitations on the ability to exercise national jurisdiction within the OCA. These limitations may be removed by consent or otherwise addressed on an operational level by the claimant coastal States. A key limitation of operational coordination is that it may provide insufficient certainty to attract investors in major infrastructure development in the OCA.

In comparison to the other allocation models discussed in Chapter 4.6, three significant potential advantages of operational coordination are: (1) it minimises the effort and resources required to establish a provisional joint management framework, provided capable institutions are already present; (2) it can be adapted more flexibly than other approaches in response to changing circumstances; and (3) it does not necessarily require strong vertical integration within national governments, and may be achieved informally via horizontal links between relevant agencies at local and regional levels.43

4.6.6 Other approaches

Articles 3–6 of the Argentina – Uruguay 1973 Agreement concerning the Río de la Plata, which are discussed in Chapter 3.3.2, employ a complex combination of several criteria (including geographic proximity and impact of national security of the claimant States) to determine the existence of national jurisdiction in the relevant

43 Cf Townsend-Gault in Schofield (ed), above n 313 on page 158, who notes that ‘...links between local governments of different countries may be an absolute necessity in the discharge of the international obligations of their respective states. This, in turn, requires a high degree of vertical integration within each state.’
OCA. See also the condominium / co-ownership arrangement applicable to parts of the Gulf of Fonseca (Chapter 3.2.2).

These models should be approached with caution – they provide broadly worded legal bases for claimant States to retrospectively justify their exercise of jurisdiction within an OCA, but do not enable government agencies to clearly determine in a prospective manner whether or not they are entitled to exercise jurisdiction in specific locations and circumstances. See for example Article 3 of the Argentina – Uruguay 1973 Agreement, which provides, inter alia, that the ‘jurisdiction of one Party shall apply in all cases in which its security is affected or in which unlawful acts are committed which have effect in its territory, regardless of the flag flown by the vessel involved.’

4.7 Mechanism for allocating resources and revenues

Claimant coastal States should determine their respective share of resources and revenues associated with management of the OCA. The provisional joint management frameworks surveyed in Chapter 3 use a variety of methods to address this issue. The following paragraphs discuss a selection of these methods and provide representative drafting where relevant.

4.7.1 Moratorium on resource exploitation

Several frameworks simply prohibit exploitation of certain resources located within the OCA. See for example the moratorium on hydrocarbon development established by Canada – United States which is discussed above in Chapters 3.2.1, 3.3.4 and 3.7.2. Note also the Barbados – Guyana 2003 Treaty (Chapter 3.3.3), which prohibits the exploitation of certain resources until both States have reached agreement concerning the cooperative management of those resources in the OCA. Concerning marine living resources, Article 5(5) of the 2003 Treaty provides as follows:
For further clarity, the failure of the Parties to reach agreement in writing in relation to the exercise of their joint jurisdiction over living resources in the Co-operation Zone in any particular instance means that neither Party can exercise its jurisdiction in that instance.

Article 6(4) of the 2003 Treaty establishes an equivalent prohibition that applies to non-living resources. These provisions create a powerful incentive for cooperation – each has an effective veto over resource exploitation in the OCA. This approach is obviously not appropriate when one claimant State is significantly more reliant than the other(s) on resources located within the OCA. A key advantage of moratoria is that they effectively remove a source of the OCA dispute, and may have the significant ancillary benefit of preventing damage to marine ecosystems.\(^{44}\) Moratoria concerning marine living resources will of course not be effective unless they are accompanied by an effective allocation of enforcement jurisdiction covering both nationals of the claimant coastal States and third States.

**4.7.2 Percentage shares**

Most frameworks allocate resources and revenues associated with the OCA in percentage shares to each of the claimant coastal States. For simple representative drafting see Article 3.1 of the 1989 Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9), which provides as follows:

> Within the Zone, there shall be joint control by the States Parties of the exploration for and exploitation of resources, aimed at achieving optimum commercial utilization. The State Parties shall share, in the proportions Nigeria 60 per cent., São Tomé e Príncipe 40 per cent., all benefits and obligations arising from development activities carried out in the Zone in accordance with this Treaty.

For complex representative drafting focused on hydrocarbon resources see the Australia – Indonesia 1989 Treaty (Chapter 3.6.1); Australia – East Timor 2002 Timor

\(^{44}\)For further discussion concerning the potential benefits of establishing resource exploitation moratoria in the South China Sea, see: John McManus, Kwang-Tsao and Shao Szu-Yin Lin, ‘Toward establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan (2010) 41 Ocean Development and International Law 270.
Sea Treaty and 2006 CMATS (Chapter 3.6.2); and other provisions of the Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9) that elaborate upon the general provision quoted above.\textsuperscript{45} Most of the provisional joint management frameworks surveyed in Chapter 3 provide for an equal division of resources between the parties. Note that in the Australia – Indonesia 1989 Treaty, a different percentage allocation is established within different sub-areas of the OCA. This approach enables resource allocation in particular locations to reflect the proximity of that location to each claimant coastal State.

When negotiating resource allocation percentages, it is advisable to account for economic benefits and impacts that are related to development of the OCA but may be not be realised in that immediate area. A failure to account for economic benefits and impacts flowing from downstream development of OCA hydrocarbons has caused considerable friction between several coastal States and compromised implementation of OCA management frameworks. For example: Implementation of the Malaysia – Thailand 1979 MoU and supplemental agreement of 1990 (Chapter 3.6.7) have been complicated by significant protests regarding potential environmental, social and cultural impacts of a downstream gas separation plant and associated offshore pipelines in southern Thailand.\textsuperscript{46} Implementation of the Australia – East Timor 2002 Timor Sea Treaty and 2006 CMATS (Chapter 3.6.2) has been complicated by East Timor’s insistence that downstream processing associated with the Greater Sunrise development should take place at a gas liquefaction plant near Dili.\textsuperscript{47} In response to the petroleum developer’s reluctance to do so,\textsuperscript{48} East Timor has threatened to end its participation in the cooperative management framework.\textsuperscript{49}

\textsuperscript{45}For detailed discussion of resource allocation issues concerning joint hydrocarbon development see Fox et al, above n 90 on page 29.
\textsuperscript{46}For further discussion see: Schofield and Tan-Mullins, above n 372 on page 173. As of 2007 the gas separation plant was operational and a re-routed pipeline was completed in 2006-7: Davenport, above n 313 on page 158.
\textsuperscript{47}See Davenport, above n 313 on page 158.
\textsuperscript{48}Woodside Petroleum has cited in this context the technical and economic difficulties associated with constructing a pipeline across the Timor trough, as opposed to the easier route across the physical continental shelf of Australia.
\textsuperscript{49}See Davenport, above n 313 on page 158.
4.7.3 Allocation determined by institutional body

Another approach is to delegate the task of resource allocation to an institutional body comprised of representatives from each claimant coastal State. Specific resource allocation is then implemented through coordinated enactment of domestic legislation – for example legislation setting the total allowable catch allocated to vessels licensed by each claimant coastal State. For further discussion see Chapter 4.8.

In order to minimise the potential for future disputes, claimant coastal States are advised to ensure that the mechanisms for allocating resources and revenues are clearly drafted and take into account potential future activities in the OCA. A construction to avoid can be found in Article 2 of the Guinea-Bissau - Senegal 1993 Management and Cooperation Agreement (Chapter 3.3.8), which as noted above does not clearly categorise sedentary species. For a discussion of issues arising from an unclear allocation of hydrocarbon resources in the Kuwait–Saudi Arabia ‘Offshore Neutral Zone’, see Fox et al, above n 90 on page 29, 48–49.

4.8 Institutional aspects of cooperation

Claimant coastal States should consider the institutional and administrative requirements associated with managing an OCA on a provisional joint basis. The provisional joint management frameworks surveyed in Chapter 3 address institutional aspects of OCA joint management in a variety of ways. The following paragraphs discuss different approaches evident in current State practice and provide representative drafting where relevant.

4.8.1 New consultative institutions

Several frameworks establish new institutions that are entrusted with consultative or deliberative functions concerning management of the OCA. A common function
is the making of recommendations concerning specific aspects of OCA manage-
ment. See for example the: Argentina – Uruguay 1973 Agreement concerning the
Río de la Plata (Chapter 3.3.2); Barbados – Guyana 2003 Treaty (Chapter 3.3.3);
Trinidad and Tobago – Venezuela 1977 and 1985 Fisheries Agreements (Chapter
3.3.10); Colombia – Jamaica 1993 Treaty (Chapter 3.3.5); several of the surveyed
bilateral cooperative arrangements established between Argentina – United King-
dom concerning the Southern Atlantic Ocean (Chapter 3.3.1); Japan – PRC 1997
Agreement; Japan – Republic of Korea 1998 Agreement; and PRC – Republic of
Korea 2000 Agreement concerning fisheries management in the East China Sea
(Chapter 3.5.5); and the Japan – Republic of Korea 1974 Agreement concerning
hydrocarbon development (Chapter 3.5.2). A key advantage of these institutions is
that they provide a focal point for ongoing (and potentially complex) discussions
concerning the implementation of provisional joint management frameworks. An-
other advantage of consultative institutions is that they may provide a forum for
dispute settlement and maintenance of political relationships that, as noted pre-
viously, are critical components of effective OCA management. Where claimant
coastal States have well-established and ongoing communication links concerning
overlapping maritime claims, establishment of a new consultative institution may
be unnecessary/redundant.

4.8.2 New administrative institutions

Several frameworks establish new institutions that are entrusted with some organi-
sational, administrative or regulatory functions concerning management of an OCA.
In several cases a new institution is entrusted with international legal personality,
or legal personality arising under the domestic law of the claimant coastal States.
See for example the: Guinea-Bissau – Senegal 1993 Management and Cooperation
Agreement and the 1995 Protocol (Chapter 3.3.8); Nigeria – Sao Tome and Principe
2001 Treaty (Chapter 3.3.9); the Antarctic Treaty System (Chapter 3.7.3); Saudi
Arabia – Sudan 1974 Agreement concerning development of non-living continental
shelf resources (Chapter 3.4.2); Malaysia – Thailand 1979 MoU and supplemental agreement of 1990 (Chapter 3.6.7); Australia – Indonesia 1989 Treaty (Chapter 3.6.1).

While new administrative institutions may foster close and continued cooperation concerning OCA management, a potential drawback is the large amount of effort involved to establish such institutions and integrate them into the domestic legal systems of the claimant States. Fox et al make the following observations about difficulties encountered during implementation of the Malaysia – Thailand 1979 MoU and efforts to establish the supplemental agreement which was not concluded until 1990 (Chapter 3.6.7):50

The second major difficulty in the Thai/Malaysia zone is the legal system under which the Authority will operate. While the constitution of the Authority stipulated its powers and functions the Authority needed to be given legal personality in both jurisdictions. Legal authority was to be conferred by the implementation of identical legislation in both States which would contain provisions on petroleum production and defining powers vested in the Authority. However, it was recognised that this would require a common legal system, alteration of domestic legislation and a degree of harmonisation. The natural consequence of the allocation of rights and responsibilities of such a sweeping nature to the Joint Authority and the nature of the joint claim to the Area would appear to envisage a unique jurisdictional approach: a new and special set of laws applying in the Area.

Efforts to establish the Joint Authority were further complicated by significant differences between the national petroleum licensing frameworks used in Malaysia and Thailand.51

50 Fox et al, above n 90 on page 29, 136.
51 In Malaysia, a national company (PETRONAS) with monopoly rights concerning petroleum development adopted a production-sharing system to manage the participation of other developers. In contrast, petroleum development in Thailand was managed through licenses and associated royalties/tax concessions. For further discussion see Davenport, above n 313 on page 158.
4.8.3 Cooperation between existing institutions

Several frameworks do not establish new institutions but instead focus on encouraging the development of cooperative networks between existing governments or government agencies. See for example: several of the surveyed bilateral and trilateral cooperative arrangements concerning the South China Sea (Chapter 3.6.5); Malaysia – Vietnam 1992 MoU concerning hydrocarbon development (Chapter 3.6.8); Indonesia – Malaysia cooperation concerning maritime enforcement (Chapter 3.6.6); and several of the surveyed bilateral cooperative arrangements established between Canada – United States (Chapters 3.2.1, 3.3.4 and 3.7.2). Such approaches may be desirable when claimant coastal States wish to avoid the effort (and potential difficulties discussed in Chapter 4.8.2) associated with the establishment of new cooperative institutions. Indeed OCA management frameworks featuring cooperation between existing institutions have generally required less time to negotiate in comparison to frameworks featuring new institutions. Compare for example the negotiation period associated with the Malaysia – Vietnam 1992 MoU (2 years) with the equivalent period for the Japan – Republic of Korea 1974 Agreement concerning hydrocarbon development (Chapter 3.5.2, 4 years), Guinea-Bissau – Senegal 1995 Protocol (Chapter 3.3.8, 4+ years), Australia – Indonesia 1989 Treaty (Chapter 3.6.1, 5 years), and Malaysia – Thailand supplemental agreement of 1990 (Chapter 3.6.7, 11+ years).\

Cooperation between existing institutions can be encouraged (or mandated) through a variety of methods. For example: Article 9 of the Barbados – Guyana 2003 Treaty (Chapter 3.3.3) contains the following language concerning consultation and communications:

52Timeframes for Japan – Korea 1974 Agreement, Malaysia – Vietnam 1992 MoU, and Australia – Indonesia 1989 Treaty are taken from Davenport, above n 313 on page 158. A significant exception is the Nigeria – Sao Tome and Principe 2001 Treaty, which as noted in Chapter 3.3.9 was negotiated rapidly, motivated by desire to exploit petroleum resources in the OCA. A noteworthy unusual characteristic of this framework, which may have contributed to the speed of the negotiations, is the marked disparity of economic power and capacity of the claimant coastal States.
1. Either Party may request consultations with the other Party in relation to any matter arising out of this Treaty or otherwise concerning the Co-operation Zone.

2. The Parties shall designate their respective Ministers of Foreign Affairs to be responsible for all communications required under this Treaty, including under this Article 9, and Articles 3, 5, 6 and 10. Either Party can change its designation upon written notice to the other Party.

General obligations to cooperate (such as the provision quoted above), may be supplemented with specific obligations to exchange specified information, or engage in cooperation in particular functional contexts. See for example Article 8 of the Barbados – Guyana 2003 Treaty (Chapter 3.3.3), which provides as follows:

1. The Parties shall, consistent with their international obligations, endeavour to co-ordinate their activities so as to adopt all measures necessary for the preservation and protection of the marine environment in the Co-operation Zone.

2. The Parties shall provide each other as soon as possible with information about actual or potential threats to the marine environment in the Co-operation Zone.

See also: Article 6(9) of the same Treaty, which requires each Party ‘to provide the other with the results of any scientific research or exploration as soon as possible after the conclusion of any survey’; and Articles 12–18 of the Australia – Indonesia 1989 Treaty (Chapter 3.6.1), which require cooperation (and information exchange in certain contexts) concerning surveillance, security measures, search and rescue, air traffic services, hydrographic and seismic surveys, marine scientific research, and marine environmental protection.

Alternatively, claimant coastal States may wish to establish an agreement emphasising: (1) the procedures through which inter-institutional cooperation is to be realised, or (2) the results of such cooperation. In the case of the former category, claimant coastal States, or particular institutions in those States, may commit to meeting on regular, and perhaps specified, occasions. See for example the Canada–United States 1990 Agreement on Fisheries Enforcement (Chapter 3.2.1),
in accordance with which law enforcement agencies of each State undertake regular (annual) meetings and consultations. For representative drafting falling under the second category (emphasising results of cooperation), see Article 3 of the Malaysia – Vietnam 1992 MoU concerning hydrocarbon development (Chapter 3.6.8), which provides as follows:

1. Malaysia and the Socialist Republic of Vietnam agree to nominate PETRONAS and PETROVIETNAM, respectively, to undertake, on their respective behalves, the exploration and exploitation of petroleum in the Defined Area;

2. Malaysia and the Socialist Republic of Vietnam shall cause PETRONAS and PETROVIETNAM, respectively, to enter into a commercial arrangement as between them for the exploration and exploitation of petroleum in the Defined Area provided that the terms and conditions of that arrangement shall be subject to the approval of the Government of Malaysia and the Government of the Socialist Republic of Vietnam;

3. both parties agree, taking into account the significant expenditures already incurred in the Defined Area, that every effort shall be made to ensure continued early exploration of petroleum in the Defined Area.

Inter-institutional cooperation may also be furthered through negative requirements that prohibit conduct falling short of a specified standard. See for example Paragraph 6 of the Argentina–United Kingdom 1995 Joint Declaration concerning hydrocarbon resources (Chapter 3.3.1). This declaration requires both States to abstain, during the course of their cooperative activities, from ‘taking action or imposing conditions designed or tending to inhibit or frustrate the possibility of carrying out hydrocarbon development’.

4.8.4 Delegation of functions to a particular State

Several of the surveyed provisional joint management frameworks simply delegate particular administrative and regulatory functions to a particular State. The delegation may be spatial (within particular areas), functional (related to certain activities) and/or jurisdictional (concerning specified components of coastal State juris-
diction). For a representative example of State practice see Article 8 of the Australia – East Timor 2006 CMATS which, as discussed in Chapter 3.6.2, allocates to East Timor jurisdiction and responsibility concerning fisheries management in the Joint Petroleum Development Area. Claimant coastal States are advised to clearly define any limits and conditions associated with a delegation of functions. Under the Australia – East Timor 2006 CMATS, East Timor is required to exercise its jurisdiction over the water column above the JPDA ‘in a manner that does not unduly inhibit petroleum activities within the JPDA’.\(^{53}\) East Timor is also required to undertake certain activities relating to the management of highly migratory and straddling fish stocks.\(^{54}\)

A delegation of functions can be used to facilitate OCA management when there is a significant disparity of administrative and technical capability between the claimant coastal States.\(^ {55}\) See for example the Malaysia – Vietnam 1992 MoU concerning hydrocarbon development. As noted in Chapter 3.6.8, this agreement stipulates that two nominated State-owned corporations (Petronas from Malaysia and PetroVietnam from Vietnam) are to enter into a commercial arrangement to explore and exploit petroleum resources in the Defined Area. In practice, exploration and exploitation activities in the Defined Area have been undertaken primarily by PETRONAS on behalf of PETROVIETNAM.\(^ {56}\) This course of action was taken because PETROVIETNAM lacked the necessary technical expertise and enabling (Vietnamese) petroleum legislation.\(^ {57}\)

Note also that where there is strong political opposition to delegating functions to a particular claimant State, a possible approach is to de-couple formal allocation of functions from de-facto contributions to OCA management, for example by one claimant State providing technical or economic assistance to the other. Anal-

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\(^ {53}\)CMATS, Article 8.

\(^ {54}\)Ibid. The relevant drafting is quoted in Chapter 3.6.2.

\(^ {55}\)See also Thomas Mensah, ‘Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation’ in Ranier Lagoni and Daniel Vignes (eds) *Maritime Delimitation* (2006), who characterizes a delegation of functions (by one claimant coastal State in favour of another) as as a form of technical assistance.

\(^ {56}\)Davenport, above n 313 on page 158. See also 370 on page 172.

\(^ {57}\)Ibid.
ogous approaches are commonly used to improve the effectiveness of coastal State maritime law enforcement outside of OCAs. Useful examples of State practice include: the provision to several South Pacific States of patrol boats and associated training as part of the Australian Navy’s Pacific Patrol Boat Project;\textsuperscript{58} a variety of arrangements between South-East Asian States to share aerial and maritime surveillance information;\textsuperscript{59} and bilateral ‘Shiprider Agreements’ between several Caribbean coastal States and the United States, which permit officials of the relevant States Parties to exercise their functions whilst embarked on vessels of the United States Coast Guard or United States Navy.\textsuperscript{60}

### 4.9 Dispute settlement procedures\textsuperscript{61}

Claimant coastal States may elect to establish procedures for the settlement of disputes concerning provisional joint management of the OCA. Dispute settlement is a critical component of effective OCA management – the State practice surveyed in Chapter 3 clearly illustrates that negotiation of a provisional joint management framework may not in and of itself significantly reduce the likelihood of further


\textsuperscript{59}Examples of such arrangements include: The ‘Eye in the Sky’ Program, which was established in September 2005 between Indonesia, Malaysia, Singapore and Thailand and provides for the sharing and collection of aerial surveillance information regarding the Straits of Malacca: see Anders C Sjaastad, ‘Southeast Asia SLOCs and security options’ in Kwa Chong Guan and John K Skogan (eds), *Maritime Security in Southeast Asia* (2007); Project SURPIC, a joint maritime surveillance program established by Singapore and Indonesia regarding the Singapore Straits: see See Joshua Ho, ‘The important and security of regional sea lanes’ in Kwa Chong Guan and John K Skogan (eds), *Maritime Security in Southeast Asia* (2007); and the establishment, pursuant to the Regional Cooperation Agreement on Combating Piracy and armed Robbery against Ships in Asia (ReCAAP) of an Information Sharing Centre in Singapore which maintains a database of information related to piracy and facilitates communication between a variety of law enforcement agencies prosecuting piracy cases: see ibid. The ReCAAP agreement was opened for signature 28 February 2005 and entered into force 4 September 2006. The text of the agreement may be found at <http://www.recaap.org/about/pdf/ReCAAP%20Agreement.pdf>.


\textsuperscript{61}Material in this sub-Chapter has been adapted from the author’s contribution to a previous work: Rose and Milligan, above n 453 on page 197.
disputes between the claimant coastal States. The provisional joint management frameworks surveyed in Chapter 3 contains a variety of dispute settlement procedures. They can be classified according to (1) their compulsory or non-compulsory nature, and (2) their provision for binding or non-binding decisions by courts of tribunals. The following paragraphs discuss a selection of procedures and provide representative drafting where relevant.

4.9.1 Non-compulsory procedures

Several frameworks refer to dispute settlement procedures but do not mandate their use in the absence of agreement between the claimant coastal States. Representative drafting can be found in Article 7 of the Colombia – Jamaica 1993 Treaty (3.3.5), which provides as follows:

Any dispute between the Parties on the interpretation or application of this Treaty shall be settled by agreement between the two countries in accordance with the means for the peaceful settlement of disputes provided for by international law.

This approach may be appropriate when claimant coastal States have previously established frameworks for formal and informal dispute settlement concerning their overlapping claims, and/or intend to incorporate dispute resolution and consultative functions into the institutional component of a provisional joint management (see discussion in Chapter 4.8).

4.9.2 Compulsory procedures (entailing non-binding decisions)

Several frameworks require claimant coastal States to engage in certain behaviour in the event of a dispute but do not provide for binding decisions by courts or tribunals. This approach is more prescriptive than non-compulsory procedures, but

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62For example, claimant coastal States may have accepted the compulsory jurisdiction of the International Court of Justice or appropriate regional body (e.g. Caribbean Court of Justice, European Court of Justice), and/or elected not to take advantage of the optional exclusion for delimitation disputes set out in LOSC Part XV Section 3 (see Chapter 2.5 for further discussion).
affords the claimant States more behavioural flexibility, in comparison to compulsory procedures that entail binding decisions regarding compliance with the OCA management framework. See for example Article 30 of the Australia – Indonesia 1989 Treaty (Chapter 3.6.1), which provides as follows:

**Settlement of disputes**

1. Any dispute arising between the Contracting States concerning the interpretation or application of this Treaty shall be resolved by consultation or negotiation between the Contracting States.

2. Each production sharing contract entered into by the Joint Authority shall contain provisions to the effect that any dispute concerning the interpretation or application of such contract shall be submitted to a specified form of binding commercial arbitration. The Contracting States shall facilitate the enforcement in their respective courts of arbitral awards made pursuant to such arbitration.

Note the that paragraph 2, while not enabling decisions that are binding on Australia and Indonesia, does provide for binding commercial arbitration of certain contractual aspects of hydrocarbon development. Provisions of this nature are useful if claimant States wish to retain flexibility to interpret and implement the OCA management framework as they see fit, whilst providing a degree of commercial and financial certainty to developers of major infrastructure in the OCA.

### 4.9.3 Compulsory procedures (entailing binding decisions)

Several frameworks require claimant coastal States to submit their disputes to binding determination by courts or tribunals. This approach significantly limits the flexibility of the claimant States to interpret and implement the OCA management framework as they see fit. It may also serve the useful function of making national governments less vulnerable domestic political pressure to retreat from compromises embedded in the OCA management framework. Representative drafting can be found in Article 10 of the Barbados – Guyana 2003 Treaty (Chapter 3.3.3) which provides as follows:

**Dispute resolution**
1. Any dispute concerning the interpretation or application of the provisions of this Treaty shall be resolved by direct diplomatic negotiations between the two Parties.

2. If no agreement can be reached within a reasonable period of time, either Party may have recourse to the dispute resolution provisions contemplated under the [1982 Law of the Sea] Convention.

3. Any decision or interim order of any court or tribunal constituted pursuant to Article 10(2) shall be final and binding on the Parties. The Parties shall carry out in good faith all such orders and decisions.

As noted in Chapter 3.3.3, this language provides for recourse to the dispute settlement framework (including compulsory and binding procedures) set out in the LOSC in the event that direct diplomatic negotiations have failed to resolve a dispute concerning the interpretation or application of the 2003 Treaty. See also: Article 9 of the Guinea-Bissau – Senegal 1993 Management and Cooperation Agreement and Article 25 of the 1995 Protocol (Chapter 3.3.8); and Article 23 of the Australia – East Timor 2002 Timor Sea Treaty (Chapter 3.6.2), which also containing specific procedures for taxation-related disputes.

Note especially Articles 47–49 of the Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9), which provide as follows:

**Article 47: Settlement of Disputes between the Authority and Private Interests**

1. Disputes between the Authority and a contractor or between joint contractors and/or operators concerning the interpretation or application of a development contract or operating agreement, shall unless otherwise agreed between the parties thereto be subject to binding commercial arbitration pursuant to the terms of the relevant development contract or operating agreement.

2. Unless otherwise agreed, the arbitration shall be held in Lagos pursuant to the UNCITRAL Arbitration Rules and administered by the AACCL Centre for International Commercial Dispute Settlement, Lagos.

**Article 48: Resolution of Disputes arising in the work of the Authority of the Council**

1. Any dispute that arises with respect to the functioning of this Treaty shall be sought to be resolved by the Board having regard to the objects and purposes of this Treaty, the principles set out in
Article 3 and the spirit of amicable fraternal relations between the two States Parties.

2. If a dispute cannot be resolved by the Board and its continuance affects or threatens to affect the actual or future implementation of this Treaty, it shall be referred to the Council.

3. The Council shall make every effort to resolve the dispute in a spirit of compromise, and without prejudice to any underlying position of either State Party.

4. If the dispute has not been resolved by the Council within 12 months of being referred to the Council under paragraph 2, or such other period as the Heads of State may decide, the Council or either State Party may refer it to the Heads of State for their decision.

Article 49: Settlement of unresolved disputes between the States Parties

1. The provisions of Article 52 shall apply
   a) if the Heads of State agree in writing that a dispute referred to them under paragraph 48 concerns a matter of policy or administration and the dispute has not been resolved by the Heads of State within 12 months of its referral to them, or such additional time as they agree; or
   b) if arbitral proceedings under paragraph 2 below leave a substantial dispute between the parties unresolved by reason, either expressly or implicitly, of the fact that such dispute concerns a matter of policy or administration.

2. In any case not covered by sub-paragraph 1(a), if the dispute has not been resolved by the Heads of State within six months of the reference under paragraph 4 of Article 48, and unless the States Parties have otherwise agreed, either State Party may give notice to the other State Party (the "referral") to refer the dispute to an arbitral tribunal ("the Tribunal") for resolution.

3. The Tribunal shall be constituted in the following manner:
   a) Each State Party shall, within 60 days of the referral, appoint one arbitrator and the two arbitrators so appointed shall within 60 days of the appointment of the second arbitrator appoint a national of a third State as third arbitrator who shall act as President of the Tribunal;
   b) If a State Party fails to appoint an arbitrator within 60 days of the referral, or the two arbitrators fail to appoint a third arbitrator within 60 days of the appointment of the second, either State Party may request the President of the International Court of Justice to fill the vacancy by appointing a national of a third State;
   c) If the President of the International Court of Justice is a national of or habitually resident in the territory of a State Party
or is otherwise unable to act, the appointment shall be made by the next most senior judge of the Court who is not a national of either State Party and who is available to act;

d) The Tribunal shall apply the UNCITRAL Rules, and on any point not covered by those Rules shall determine its own procedure, unless the States Parties have otherwise agreed;
e) The Tribunal pending its final award may on the request of a State Party issue an order or orders indicating the interim measures which must be taken to preserve the respective rights of either State Party or prevent the aggravation or extension of the dispute;
f) Unless the States Parties otherwise agree, the Tribunal shall sit at The Hague and the administering authority for the arbitration shall be the Secretariat of the Permanent Court of Arbitration.

4. Decisions of the Tribunal shall be final and binding on the States Parties.

5. The States Parties shall carry out in good faith all decisions of the Tribunal including any orders for interim measures. Any question as to the implementation of a decision may be referred to the Tribunal, or if the same tribunal is no longer in existence and cannot be reconstituted, to a new Tribunal constituted in accordance with paragraph 3.

The provisions quoted above apply different settlement procedures to disputes arising between (1) between the Joint Authority and private interests; (2) arising in the work of the Joint Authority or the Joint Ministerial Council; and (3) between the States Parties. This categorisation of disputes – and the progressive application of varied dispute settlement procedures – serves the useful function of preventing disputes from automatically being escalated to an inter-State level.

When drafting dispute settlement procedures, an important issue to consider is the relationship between (1) dispute settlement procedures in a provisional joint management framework; and (2) the dispute settlement mechanism set out in LOSC Part XV. More specifically, it is important to consider the effect of LOSC Part XV Section 1 and LOSC Article 281 in particular, which provides as follows:

Procedure where no settlement has been reached by the parties

63 LOSC Part XV is discussed in detail in Chapter 2.5.
a. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

b. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

As noted in Chapter 2.5.1, the effect of this provision is that States Parties may have recourse to LOSC compulsory and binding dispute settlement procedures where no settlement has been reached under an alternative procedure, ‘unless agreement between the parties excludes any further procedure.’ The scope of LOSC Article 281 of LOSC was a central issue in the Southern Bluefin Tuna cases, which related to a unilateral decision by Japan to exceed national catch limits for southern bluefin tuna determined under the framework of the Convention for the Conservation for Southern Bluefin Tuna (CCSBT). Australian and New Zealand alleged that Japan’s actions were in breach of several obligations arising under LOSC and applied to ITLOS for provisional measures prior to the establishment of an arbitral tribunal constituted in accordance with Article 287 and Annex VII of the Convention.

ITLOS considered that an Annex VII arbitral tribunal would have prima facie jurisdiction over the disputes and prescribed a series of provisional measures. A central question considered by the Annex VII Arbitral Tribunal was the interaction between compulsory dispute settlement procedures in LOSC and the consent-based dispute settlement mechanisms set out in CCSBT Article 16. The Tribunal re-

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65 See Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures) (Order of 27 August 1999), [28], [29], 38 International Legal Materials 1624 (1999).
66 Signed 10 May 1993, entered into force 20 May 1994, 1819 UNTS 359. Article 16 of the Convention establishes a consent-based dispute settlement procedure, providing as follows: 1. ‘If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice. 2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means
jected Japan’s argument that the CCSBT functioned as a lex specialis excluding the application LOSC and noted that:

it is commonplace for international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.\(^\text{67}\)

However, the Tribunal concluded that the drafting of CCSBT Article 16 reflected an intent to ‘exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute.’ Accordingly, the Tribunal applied Article 281 of LOSC in finding that compulsory procedures set out in Part XV Section 2 of the Convention were not available in the context of the dispute.\(^\text{68}\)

The Southern Bluefin Tuna award employs a low threshold for excluding the application of compulsory procedures set out in Part XV Section 2 of LOSC. The Tribunal acknowledged that Article 16 of the CCSBT does not ‘expressly and in so many words exclude the applicability of any procedure’ but was willing to imply an exclusion of such procedures despite the lack of express language to that effect.\(^\text{69}\)

Accordingly, claimant coastal States that wish to ensure recourse to the compulsory and binding procedures set out in LOSC Part XV are advised to include specific language to that effect in a provisional joint management framework. However, such language would not ensure the availability of LOSC Part XV procedures if a

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\(^{68}\) Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Jurisdiction and Admissibility) (Award of 4 August 2000) [59]. For a debate concerning the merits of the Tribunal’s argument, see Colson and Hoyle cf Kwiatkowska, above n 95 on page 66.

\(^{69}\) Ibid, [56].
claimant coastal State made a subsequent declaration pursuant to LOSC Part XV Section 3.\textsuperscript{70}

4.10 Choice of constituent instrument

A provisional joint management framework can be constituted in a variety of ways. Key choices to be made by the claimant coastal States in this context are: (1) what degree of formality and corresponding political expectation should be associated with the provisional joint management framework?; (2) should the framework be established using a single instrument or multiple instruments?; (3) if multiple instruments are used, what features of the framework should be established under each instrument? The following paragraphs discuss a variety of options for addressing these choices:

4.10.1 Formal inter-State treaty or agreement

This approach involves the creation of international legal obligations between the claimant coastal States in a formal manner.\textsuperscript{71} In comparison to the alternative options discussed below, it represents the highest degree of commitment between claimant coastal States, and requires the most amount of effort to establish, amend, replace or modify. For representative examples see the: Argentina – Uruguay 1973 Agreement concerning the Río de la Plata (Chapter 3.3.2); Guinea-Bissau – Senegal 1993 Management and Cooperation Agreement and the 1995 Protocol (Chapter 3.3.8); Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9); Australia – Indonesia 1989 Treaty (Chapter 3.6.1); Australia – East Timor 2002 Timor Sea Treaty and 2006 CMATS (Chapter 3.6.2); and Antarctic Treaty (Chapter 3.7.3).

\textsuperscript{70}As noted in Chapter 2.5.3, the optional exclusion set out in LOSC Article 298 allows coastal States involved in disputes concerning OCAs to insulate themselves from the compulsory and binding dispute settlement procedures set out in LOSC Part XV Section 2.

\textsuperscript{71}For examples of what commonly represents ‘formality’ in this context, see Anthony Aust, \textit{Modern Law and Treaty Practice} (2000).
When negotiating a formal treaty or agreement concerning OCA management, it is important to ensure that its language is carefully calibrated to provide a degree of flexibility to the claimant coastal States, so that OCA management practices can be adapted in response to unforeseen developments. A commonly used approach for retaining flexibility in a formal instrument is to delegate specific modalities of OCA management to an institution (see Chapter 4.8) or subsequent agreement (which may then feature a less formal constituent instrument). For a detailed example of this approach see Articles 36 – 46 of the Nigeria – Sao Tome and Principe 2001 Treaty (Chapter 3.3.9). Article 38.2 of the 2001 Treaty provides for example that:

the States Parties on the recommendation of the Authority shall agree necessary measures and procedures to prevent and remedy pollution of the marine environment resulting from development activities in the Zone.

Several States have elected to establish a framework agreement concerning provisional joint OCA management, which is then supplemented by a specific agreement after further rounds of negotiations. See for example the Guinea-Bissau – Senegal 1993 Management and Cooperation Agreement and the 1995 Protocol (Chapter 3.3.8). An advantage of this approach is that it enables the claimant States to establish a phased approach to OCA management, where broad principles are agreed as a foundation of trust and cooperation, paving the way for challenging specific issues to be addressed at a later date.

In this context it is important to note that commercial entities are demonstrably reluctant to invest in major infrastructure development in OCAs unless a provisional joint management framework provides a relatively high degree of stability and certainty. In comparison to less formal approaches discussed below, a formal inter-State treaty or agreement is more difficult to change and less vulnerable to domestic political pressures, and is consequently better suited to provide such

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72 For detailed guidance concerning treaty drafting see Aust, above n 71 on the previous page.
73 See also the Malaysia – Thailand 1979 MoU and supplemental agreement of 1990 (Chapter 3.6.7), which for the present purposes are categorised as an inter-State legal agreement avoiding formal language (see below).
74 For further discussion see Schofield (ed), above n 313 on page 158.
assurances. It is illustrative that none of the frameworks surveyed in Chapter 3 concerning petroleum development were constituted without a formal inter-State treaty or agreement, or an inter-State legal agreement couched in more informal terms (see below).

4.10.2 Inter-State legal agreement avoiding formal language

As a matter of international law, the formal characterisation of an agreement may be indicative, but is not determinative, of its legal character.\textsuperscript{75} Article 2 of the Vienna Convention on the Law of Treaties\textsuperscript{76} defines the word ‘treaty’ to mean:

\begin{quote}

an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation ...
\end{quote}

Discussing the meaning of this provision, Aust observes that:

\begin{quote}

the name does not, in itself, determine the status of the instrument; what is decisive is whether the negotiating states intended the instrument to be (or not to be) legally binding. Thus, just as one should never judge a book by its cover, one should not assume that the name given to an international instrument automatically indicates its status ...\textsuperscript{77}
\end{quote}

Accordingly, it is open to claimant coastal States to create an legally binding instrument that is couched in terms that, from a political perspective, de-emphasise the nature of obligations contained in the instrument. Commonly used instrument titles in this context include: ‘exchange of letters’, ‘joint declaration’, and ‘memorandum of understanding’.\textsuperscript{78} Given the political tensions that are often associated with overlapping maritime claims, this approach is frequently used to establish OCA management frameworks. For a representative examples of State practice see the: Malaysia – Thailand 1979 MoU and supplemental agreement of 1990; Iran – United

\textsuperscript{75}See Aust, above n 71 on page 268.
\textsuperscript{76}Signed 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.
\textsuperscript{77}Aust, above n 71 on page 268, 20.
\textsuperscript{78}For further discussion see Aust, above n 71 on page 268.
Arab Emirates (Sharjah) 1971 MoU (Chapter 3.4.1); and Malaysia – Vietnam 1992 MoU concerning hydrocarbon development (Chapter 3.6.8).

The advantages and disadvantages of agreements avoiding formal language are similar to those discussed above concerning formal instruments. However, it is important to note that informal terminology may give rise to misunderstandings concerning the legal status of an international instrument. Regardless of the terms in which an instrument is couched, claimant coastal States are advised to reach a clear mutual understanding of the instrument’s legal implications.

4.10.3 Non-binding inter-State agreements

This approach involves the creation of an instrument at an inter-state level that is deliberately drafted to avoid the creation of legal obligations between the claimant coastal States. For representative examples of State practice see: 2002 Declaration concerning the South China Sea (Chapter 3.6.5); the surveyed bilateral cooperative arrangements established between Argentina – United Kingdom concerning the Southern Atlantic Ocean (Chapter 3.3.1); and the Japan – PRC 2008 Cooperation Consensus concerning the East China Sea (Chapter 3.5.1).

In comparison to the previously discussed options, a non-binding inter-State agreement enables claimant coastal States to retain more flexibility concerning their future conduct. Because of the flexibility they offer claimant coastal States, such agreements provide limited certainty for external stakeholders (e.g. international oil and gas companies) who may wish to invest in resource-development in the relevant OCA.

79 Recalling his experience in the United Kingdom Foreign and Commonwealth Office, Aust, above n 71 on page 268, draws attention to instruments that: (1) were about to be signed when it was discovered that the States parties disagreed about whether or not they were legally binding; and (2) had already been signed when the States parties discovered that they disagreed about whether or not the instruments were legally binding. See also: Mark Scully, ‘Choose your instrument’ (November 17, 2004), available at <http://www.dfat.gov.au/treaties/workshops/treaties_global/scully2.html>.
As mentioned previously, claimant coastal States are advised to reach a clear mutual understanding regarding the legal implications of the relevant international instrument. When the legally binding character of an instrument is disputed, each claimant coastal State risks an adverse finding if the dispute is referred to an international court or tribunal. For example, in *Qatar v. Bahrain*, the International Court of Justice held, contrary Bahrain’s submission, that minutes of a meeting (recording that both States had ‘agreed’ on the matters documented) represented a legally binding agreement between both States.\(^{80}\)

### 4.10.4 Executive understandings and operational agreements

This approach involves the development of an agreed position or patterns of behaviour between the respective executive governments of the claimant coastal States, without creation of a specific instrument that reflects the consensus reached. See for example several of the surveyed bilateral cooperative arrangements established between Canada – United States ( Chapters 3.2.1, 3.3.4 and 3.7.2). A key advantage of this approach is the flexibility that it provides to the relevant claimant coastal States, in addition to the discrete nature of executive understanding and operational agreements. In particular, it allows cooperative frameworks to be established on a dynamic basis between specific government agencies. Executive understandings and operational arrangements may also build trust and good relations between claimant States, laying a foundation for more formal cooperative frameworks. A key potential disadvantage is the associated lack of certainty and transparency, which may, depending on the relevant circumstances, be inimical to effective OCA management.

\(^{80}\) *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment of 1 July 1994, 1994 ICJ Rep 112. At paragraph [23] of the Judgment, the Court emphasised that ‘international agreements may take a number of forms and be given a variety of names ...’. The agreement in question related to methods of dispute settlement – the meeting minutes were found to enliven the Court’s jurisdiction over the case.
4.10.5 Coordinated enactment of national legislation

This approach involves the harmonisation of domestic legislation in each of the claimant coastal States, in accordance with an executive understanding or operational agreement. For example, both governments may agree informally to designate a marine park in an OCA under domestic legislation, thereby establishing coordinated management in absence of a written international instrument. See also the hydrocarbon moratorium established by Canada – United States (Chapters 3.3.4 and 3.7.2). Coordinated enactment of national legislation maintains flexibility at an international level, combined with a degree of certainty and transparency at a domestic level. In the author’s view, this combination of characteristics make it an attractive (and under-utilised) basis for provisional joint OCA management.
5 Conclusion

The primary objective of this thesis has been to develop a template set of legal and policy options for coastal States to engage in provisional joint management of OCAs in a manner that fully utilises their rights, and is consistent with their obligations, under international law. Before focusing on this primary objective, several sub-objectives were pursued. Through examination of relevant international law, Chapter 2 sought to identify the scope of coastal State entitlements to manage activity within OCAs. Chapter 3 surveyed current State concerning the provisional joint management of OCAs in order to identify: (1) specific design features of provisional joint management frameworks; and (2) the extent to which these frameworks provide for the full utilisation of coastal State rights by enabling the functionally comprehensive management of OCAs. Drawing on the responses developed in previous Chapters, Chapter 4 addressed the primary research objective, discussing methods for achieving functionally comprehensive OCA management, and recommending different potential design features of prospective provisional joint management frameworks.

The remaining paragraphs of this Chapter outline the key conclusions of the thesis concerning: (1) management of OCAs under international law; (2) design features of current State practice concerning OCA management; and (3) the legal and policy options available to coastal States to engage in provisional joint management of OCAs. The final Section recommends several issues that would benefit from future research. It also contains recommendations for coastal States that are ac-
tively engaged in the provisional joint management of OCAs, or the negotiation of prospective provisional joint management frameworks.

5.1 Management of overlapping claim areas under international law

Within each zone of national jurisdiction recognised by the LOSC, a coastal State is entrusted with a package of exclusive rights to manage human activity in one or more of the following six functional contexts, namely: artificial structures, environmental protection, marine scientific research, maritime security, navigational safety and resources exploitation. This thesis has demonstrated that provisions of international law concerning the assertion of these rights within OCAs are general in nature, emphasising restraint, peaceful cooperation and commitment to negotiations. They do not establish a detailed or functionally comprehensive template for the provisional and cooperative implementation within an OCA of the functional components of coastal State jurisdiction. Rather, international law defers to claimant coastal States to reach agreement enabling them to manage activity within OCAs on a functionally comprehensive basis (thereby fully utilising their coastal State rights under international law).

In the absence of such a management agreement, international law does not establish clear entitlements to undertake provisional management of an OCA on a unilateral basis. Within an OCA arising from territorial sea claims, LOSC Article 15 proscribes such action in the broadly defined context of ‘historic title or other special circumstances’. In relation to the contiguous zone, the LOSC Article 33 does not contain specific obligations concerning the provisional management of OCAs or the delimitation of overlapping claims. Concerning archipelagic waters, LOSC Articles 47(5) and (6) limit the impact of archipelagic baseline claims on the rights and interests of neighbouring States but do not contain specific obligations concerning overlapping claim areas or maritime delimitation. Within an OCA arising from claims to
an EEZ and/or continental shelf, LOSC Articles 74(3) and 83(3) each contain two obligations that simultaneously attempt to promote and limit activity undertaken or authorised by the claimant coastal States. Unilateral management of an OCA is constrained, but not prohibited, by the requirement to make ‘every effort to enter into provisional arrangements of a practical nature’ and by the requirement to make ‘every effort ... not to jeopardize or hamper the reaching of the final agreement.’ The Guyana–Suriname Award provides some analytical guidance to coastal States concerning the interpretation and application of LOSC Articles 74(3) and 83(3) to specific factual circumstances.

The dispute settlement framework set out in LOSC Part XV – and in particular the popular optional exclusion set out in LOSC Article 298 – allows coastal States involved in disputes concerning OCAs to insulate themselves from the Convention’s compulsory and binding dispute settlement procedures. Consequently, in the absence of consent between the relevant claimant coastal States, there is limited scope for international court and tribunals to prescribe modalities for OCA management in particular cases. Furthermore, any territorial sovereignty disputes associated with an OCA fall beyond the subject matter jurisdiction of the Convention’s compulsory and binding dispute settlement procedures.

5.2 Management of overlapping claim areas in current State practice

The thesis has identified a wide variety of frameworks for the provisional joint management of OCAs. Through development of these frameworks, claimant coastal States have taken important steps towards (1) supplementing applicable provisions of international law and (2) establishing a sound legal basis for the management of such spaces. Indeed, many of the surveyed provisional joint management frameworks facilitate, or contemplate, further cooperation concerning the implementation
within the relevant OCA of functional components of jurisdiction attributed by the
LOS to the relevant claimant coastal States.

The thesis has also identified great variation in the functional coverage of surveyed
provisional joint management frameworks. Several frameworks may be characterised
as functionally comprehensive, containing provisions allocating coastal State com-
petence and/or jurisdiction within the relevant OCA for a complete set of functional
contexts. These frameworks establish a clear basis for the claimant coastal States
to implement, within the relevant OCA, LOSC rights and obligations concerning:
artificial structures, environmental protection, marine scientific research, maritime
security, navigational safety and resource exploitation. Other provisional joint man-
agement frameworks exhibit clear functional gaps that may undermine the ability
of claimant coastal States to engage in management of the relevant OCA in one or
more functional contexts. Key functional gaps evident in the surveyed provisional
joint management frameworks include the following:

*No allocation of competence in certain functional contexts (i.e. a functionally limited
allocation of competence)*:

Several of the surveyed frameworks focus on the cooperative management of specific
resources or the cooperative exercise of coastal State jurisdiction in functionally
specific contexts. Cooperation in other functional contexts is either contemplated in
very general terms, not referred to, or deferred to subsequent agreement. Functional
contexts not addressed in these frameworks remain subject to relevant provisions of
international law which, as this thesis has demonstrated, do not establish a detailed
framework for implementation within an OCA of coastal State jurisdiction.

*No allocation (or clear allocation) of functional competence*:

Several of the surveyed frameworks contain general commitments to engage in, or
discuss the establishment of, cooperative management of an OCA but do not specif-
ically allocate functional components of coastal state jurisdiction within the area
concerned. They do not add clarity to the general and ambiguous provisions of international law concerning the exercise of coastal State jurisdiction within OCAs.

No allocation of functional competence to certain claimants:

Several of the surveyed frameworks allocate certain functional competencies to the relevant parties, but do not provide for the exercise of jurisdiction by other coastal States asserting claims to all of part of the relevant OCA. In such circumstances, ambiguities of the international legal framework concerning the exercise of coastal State jurisdiction within OCAs continue to impact upon relations between all claimant coastal States and management of the relevant OCA.

No allocation of functional competence concerning non-claimant States:

Finally, several of the surveyed frameworks allocate jurisdiction between claimant States on an *inter-se* basis only and hence do not provide a clear basis for the exercise of coastal State jurisdiction within the relevant OCA in relation to vessels flagged to third States.

### 5.3 Legal and policy options for managing overlapping claim areas

Drawing on an examination of relevant international law and current State practice, the thesis has proposed that functionally comprehensive OCA management can only be achieved through development of a provisional joint management framework having the following two characteristics:

- *Comprehensive participation*: The framework must involve all of the relevant claimant coastal States;

- *Comprehensive allocation of functional competence*: The framework must enable each of the claimant coastal States to clearly identify the circumstances (and locations) in which they are entitled (or not entitled) to implement LOSC
rights and obligations concerning: artificial structures, environmental protection, marine scientific research, maritime security, navigational safety and resource exploitation.

The thesis has demonstrated that there is enormous scope for calibrating a provisional joint management framework to suit the specific circumstances of claimant coastal States in a manner that remains consistent with the above characteristics. It outlines varied legal and policy options for designing the following features of a prospective provisional joint management framework: duration of the framework; spatial coverage of the framework; interaction of the framework with existing jurisdictional claims; choice of constituent instrument(s); mechanism for allocating jurisdiction; mechanism for allocating resources and revenues; institutional aspects of cooperation; and dispute settlement procedures. Each of the proposed options are consistent with the objective of functionally comprehensive OCA management.

5.4 Recommendations

The world’s oceans and seas cannot be managed effectively unless coastal State authority is asserted to the maximum permissible extent on a functionally comprehensive basis throughout OCAs. The research presented here suggests that current OCA management efforts fall considerably short of that objective. The extent to which they fall short remains an open question. The author has presented an initial global sketch of current high-level legal and policy frameworks, supplemented by snippets of secondary information concerning their implementation. An important task for the future will be to comprehensively assess the de facto implementation and functional coverage of OCA management frameworks in specific regional contexts.

Another important task for the future is to develop regionally specific proposals for filling functional gaps in OCA management frameworks. As an initial step toward that end, the author encourages coastal States that assert overlapping maritime claims to review the variety of legal and policy options that are identified and dis-
cussed in this thesis. None of the proposed options represent an easy solution to compelling political and strategic issues that in many cases impede further cooperation concerning the management of particular OCAs. Rather, they are non-prescriptive template sketches that provide a basis for further discussion and concrete policy development. Critically, the proposed options illustrate that it is possible for claimant coastal States to work together, to develop flexible and creative solutions for managing the valuable maritime spaces that they share.
Reference list

Treaties, international instruments and other relevant
State practice

(in chronological order)


• 1953 – Convention between Canada and the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, signed 2 March 1953, CTS No. 14 (1953).


• 1975 – Agreement on Co-operation in the Fishing Industry Between Union of Soviet Socialist Republics and Norway, signed 11 April 1975, 983 UNTS 8.

• 1976 – Agreement Concerning Mutual Relations in the Field of Fisheries Between Union of Soviet Socialist Republics and Norway, signed 15 October 1976, 1157 UNTS 147.


• 1979 – Protocol Amending the Convention between Canada and the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, signed 29 March 1979, CTS No. 44 (1980).


• 1986 – Note dated 31 October 1986, sent ... through the Embassy of Brazil in Buenos Aires, regarding the Declaration by the Secretary of State for Foreign Affairs of Great Britain in the House of Commons on 29 October, reproduced in (1987) 9 Law of the Sea Bulletin 44.


• 1997 – Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on the Delimitation of the Maritime Boundaries between the Two Countries in the Gulf of Thailand, 9 August 1997 (entered into


**Jurisprudence of international courts and tribunals and associated documents**

• 1951 – Fisheries Case (United Kingdom v Norway), [1951] ICJ Reports 116.


• 1993 – Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway), [1993] ICJ Reports 38.


• 2001 – Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), [2001] ICJ Reports 40.


Books, articles and reports

(in alphabetical order)

• Alberto Szekely, ‘The International Law of Submarine Transboundary Hydrocarbon Resources: Legal Limits to Behavior and Experiences for the Gulf of Mexico’ 26 Natural Resources Journal 766 (1986).


• Arthur Evans, Relevant Circumstances and Maritime Delimitation (1989).

• Ashley Roach and Robert Smith, United States responses to excessive maritime claims (2nd ed, 1996).
• Barbara Kwiatkowska, ‘The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle’ (2003) 34 Ocean Development and International Law 369.


• Clive Schofield and Ian Townsend-Gault, ‘Choppy waters ahead in a sea of peace cooperation and friendship’: Slow progress towards the application of maritime joint development to the East China Sea’ (2011) 35 Marine Policy 25.

• Clive Schofield et al, From Disputed Waters to Seas of Opportunity: Overcoming Barriers
to Maritime Cooperation in East and Southeast Asia (National Bureau of Asian Research


• Clive Schofield, ‘Blurring the Lines? Maritime Joint Development and the Cooperative
Management of Ocean Resources’ (2009) Issues in Legal Scholarship Article 3 available at

• Clive Schofield, ‘Cooperative Mechanisms and Maritime Security in Areas of Overlapping
Claims to Maritime Jurisdiction’ in Peter Cozens and Joanna Mossop (eds), Capacity Build-
ing for Maritime security Cooperation in the Asia-Pacific (2005).

• Clive Schofield, ‘Dividing the Resources of the Timor Sea: A Matter of Life and Death for
East Timor’ (2005) 27 Contemporary Southeast Asia 255.

Arrangements in the Timor Sea (CMATS)’ (2007) 22 The International Journal of Marine
and Coastal Law 189.

Arrangements in the Timor Sea (CMATS)’ (2007) 22 The International Journal of Marine
and Coastal Law 189.

• Clive Schofield, ‘Unlocking the Seabed Resources of the Gulf of Thailand’ (August 2007)
29(2) Contemporary Southeast Asia 286.

• Clive Symmons, ‘The Maritime Zones around the Falkland Islands’ (1988) 37 The Interna-
tional and Comparative Law Quarterly 283.

• D Colson, ‘The Delimitation of the Outer Continental Shelf between Neighboring States’

• D McRae, ‘Delimitation Problems of Canada (First Part)’ in D Pharand and U Leanza (eds)
The Continental Shelf and the Exclusive Economic Zone: Delimitation and Legal Regime
(1993).

• Daniel Dzurek, ‘Gulf of Guinea Boundary Disputes’ [Spring 1999] IBRU Boundary and Se-
curity Bulletin 98, available online at <http://www.dur.ac.uk/resources/ibru/publications/
full/bsb7-1_dzurek.pdf>.

• Daniel Dzurek, ‘Parting the Red Sea: Boundaries, Offshore Resources and Transit’ (2001)
3(2) IBRU Maritime Briefing.


• International Boundaries Research Unit, ‘Claims and potential claims to maritime jurisdiction in the South Atlantic and Southern Oceans by Argentina and the UK’ available at <http://www.dur.ac.uk/resources/ibru/south_atlantic_maritime_claims.pdf>.


• Kaldone Nweihed, ‘EZ(uneasy) delimitation in the semi-enclosed caribbean sea: Recent agreements between Venezuela and her neighbors’ (1980) 8 Ocean Development and International Law 1.


• LexisNexis, Laws of New Zealand (2004), Antarctica.


• Malcolm Evans, ‘Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras)–The Nicaraguan Intervention’ (1992) 41 International and Comparative Law Quarterly 896.


• Nuno Antunes, Towards the conceptualisation of maritime delimitation: Legal and technical aspects of a political process (2003).


• Rainer Lagoni and Daniel Vignes, Maritime Delimitation (2006).

• Rainer Lagoni, ‘Oil and Gas Deposits Across National Frontiers’ (1979) 73 The American Journal of International Law 233.


• Robert Kolb, Case law on equitable maritime delimitation: digest and commentaries (2003).


• Ted McDorman, ‘Maritime Boundary Delimitation in the Gulf of Thailand’ *Hogaku Shimpo* [The Chuo Law Review], CIX, no. 5-6 (March 2003) 253.


• Yoshifumi Tanaka, Predictability and flexibility in the law of maritime delimitation (2006).


News media and press releases

(in chronological order)


302