

## MARINE CADASTRE

**General rights and charges under the United Nations Convention on the Law of the Sea  
(Unclos)  
Patrimonial rights in the different marine zones  
Registration of patrimonial rights**

**Guido de Latte**

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## A.LEGAL INSTRUMENTS AND LEGAL LITERATURE

### A.1. International public maritime law

- International convention on civil liability for oil pollution damage, 1969 (CLC 1969) and protocols thereto (CLC PROT 1976 & CLC PROT 1992)
- Convention relating to civil liability in the field of maritime carriage of nuclear material, 1971 (NUCLEAR 1971)
- International Regulations for preventing collisions at sea, 1972 - as amended (COLREG 1972)
- Convention on the prevention of marine pollution by dumping of wastes and other matter, 1972 – as amended (LC 1972 & LC PROT 1996)
- International Convention for the prevention of pollution from ships, 1973 - as amended by the 1978 protocol related thereto, as amended (MARPOL 73/78 & MARPOL PROT 1997)
- International Convention for the safety of life at sea, 1974 - as amended (SOLAS 1974) and the 1978 and 1988 protocols thereto (SOLAS PROT 1978 & SOLAS PROT 1988)
- International convention on maritime search and rescue, 1979 (SAR 1979)
- International convention of salvage, 1989 (SALVAGE 1989)
- United Nations Convention on the Law of the Sea, done at Montego Bay (Jamaica) on 10 December 1982, entered into force on 16 November 1994 – hereinafter designated as ‘Unclos’ – all EU member states as well as the European Union itself, are parties to Unclos
- **United Nations Convention on Biological Diversity (CBD), 1992**
- Agreement relating to the Implementation of Part XI of the “United Nations Convention on the Law of the Sea of 10 December 1982”, done at New York on 28 July 1994 – in force since 28 July 1996
- Agreement for the implementation of the provisions of the UN convention on the law of the sea of 10 December 1982 relating to the conservation and management of straddling fish and highly migratory fish stocks, done at New York on 4 December 1995 (UN Fish Stocks Agreement) – in force since 11 December 2001
- International convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, 1996 – and 2010 protocol thereto (HNS 1996 & HNS PROT 2010)
- Unesco convention on the protection of the underwater cultural heritage, done at Paris on 2 November 2001;
- International convention on civil liability for bunker oil pollution damage, 2001 (BUNKERS 2001)
- Unidroit convention on international interests in mobile equipment done at Cape Town on 16 November 2001 (<http://www.unidroit.org/instruments/security-interests/cape-town-convention>)
- International convention on the removal of wrecks, done at Nairobi on May 2007 (NAIROBI WRC)

### A.2. European law

- Regulation (EU) No 1380/2013 of the European parliament and of the council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations

- (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC
- Com(2007) 575: Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions – An integrated maritime policy for the European Union
- Directive 2008/56/EC of the European parliament and of the council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)
- Com(2012)494: Communication from the Commission to the European parliament, the council, the European economic and social committee and the committee of the regions – Blue Growth – Opportunities for marine and maritime sustainable growth
- Com(2013)473: Green Paper – Marine Knowledge 2020 – from seabed mapping to ocean forecasting
- Regulation (EU) No 1380/2013 of the European parliament and of the council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC
- Com(2014)254 – Commission staff working document – Marine Knowledge 2020: roadmap – accompanying the ‘Communication from the commission (...) – Innovation in the blue economy realising the potential of our seas and oceans for jobs and growth’
- Directive 2014/89/EU of the European parliament and of the council of 23 July 2014 establishing a framework for maritime spatial planning

### A.3. Belgian national public maritime law

- act of 19 August 1891 on maritime fishing in the territorial sea (previously called: act regarding sea fishery in the Belgian territorial waters)
- act of 12 April 1957 regarding the protection of the living resources of the sea - (as amended) – act authorizing the King to ensure the conservation of living resources in both the high seas and the exclusive economic zone and the territorial sea
- act of 13 June 1969 regarding Belgium’s continental shelf - (as amended) act regarding the exploration and exploitation of non-living resources of the territorial sea and of the continental shelf
- act of 10 October 1978 establishing a national fishery zone outside the territorial sea (official journal of 28 December 1978)
- act of 6 October 1987 establishing the extent of the territorial sea of Belgium (official journal 22 October 1987)
- act of 18 June 1998 granting assent to UNCLOS (official journal 16 September 1999)
- act of 20 January 1999 regarding the protection of the marine environment and ocean space under Belgian jurisdiction (official journal 12 March 1999)
- act of 22 April 1999 concerning the exclusive economic zone of Belgium in the North Sea (official journal 10 July 1999)
- act of 29 April 1999 regarding the organization of the electricity market (official journal 11 May 1999)
- royal decree of 20 December 2000 that determines the conditions and procedure regarding allocation of concessions for the construction and exploitation of installations for the production of electricity from the water, rivers or winds, in the marine areas over which Belgium has jurisdiction under the international law of the

- sea – as amended by royal decrees of 17 May 2004 and 18 September 2008 (official journals 30 December 2000 & 29 June 2004 & 30 October 2008)
- act of 9 April 2007 regarding the discovery and protection of wrecks (official journal 21 June 2007);
- act of 17 August 2013 regarding the prospection, exploration and exploitation of the resources of the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (official journal 16 September 2013)
- act of 4 April 2014 regarding the protection of underwater cultural heritage (official journal 18 April 2014)
- royal decree of 20 March 2014 regarding the establishment of a marine spatial plan for the Belgian part of the North Sea (official journal 27 March 2014)

#### A.4. Belgian civil law (*Code civil belge / Belgisch burgerlijk wetboek*)

- article 519: “Windmills or watermills built on piles, and the construction that is part of them, are immovables” (*only applicable inside the Belgian territory*)
- article 539: « *Tous les biens vacants et sans maître, et ceux des personnes qui décèdent sans héritiers, ou dont les successions sont abandonnées, appartiennent au domaine public.* »
- article 544 : right of ownership: « *La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.* »
- article 546: right of accession: « *La propriété d'une chose, soit mobilière, soit immobilière, donne droit sur tout ce qu'elle produit, et sur ce qui s'y unit accessoirement, soit naturellement, soit artificiellement. Ce droit s'appelle droit d'accession.* »
- article 552 : « *La propriété du sol emporte la propriété du dessus et du dessous* »
- article 713 : « *Les biens qui n'ont pas de maître appartiennent à l'Etat.* »

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- CMI Yearbook 1996 – Offshore craft and structures – pages 105 – 165 ([www.comitemaritime.org/Yearbooks/0,2714,11432,00.html](http://www.comitemaritime.org/Yearbooks/0,2714,11432,00.html))
- CMI Yearbook 1997 – Offshore craft and structures – pages 159 -178 (<http://www.comitemaritime.org/Yearbooks/0,2714,11432,00.html>)
- CMI Yearbook 1998 – Offshore craft and structures – pages 145 -162 (<http://www.comitemaritime.org/Yearbooks/0,2714,11432,00.html>)
- CMI Yearbook 2004 – Offshore – pages 419-421 (<http://www.comitemaritime.org/Yearbooks/0,2714,11432,00.html>)
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- De Latte, Guido, *Teboekstelling en registratie van schepen*, Maklu, Antwerpen, 2007 – a book about registration of ships in Belgium – pages 103 to 106 deal with the issue of offshore units at sea
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(<http://www.imo.org/OurWork/Legal/Documents/Implications%20of%20UNCLOS%20for%20IMO.pdf>)
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## **B. PRELIMINARY REMARKS**

1. The present paper focuses on some basic aspects of the marine zones established under UNCLOS, and mainly on the general rights and charges existing under Unclos, and on issues of property interests in the different marine zones and of the eligibility for registration of private rights *in rem* regarding parts of the seabed or offshore structures fixed to the seabed. This paper is not meant to be exhaustive.

It only intends to provide the cadastre experts who will have to report on the establishment of an European marine cadastre, with basic but essential information.

2. This paper expresses the opinions of its author. These opinions do not commit the Belgian Finance department (Patrimonial Documentation Administration) nor any other Belgian authority for that matter.

3. In this paper things are analysed from a perspective that is mostly international and Belgian. It would be very interesting if relevant information about the law and practice of other member states could be added.

4. This paper does not address the issue of archipelagic waters, since these waters are, in my opinion, less relevant for the European situation. I don't think they need to be taken into account for the purpose of establishing a European marine cadastre.

5. When a coastal state is referred to in this paper and when this state happens to be a federal state, it should always be borne in mind that the jurisdiction and/or rights and/or duties/responsibilities of this coastal state might not be exercised or assumed by the federal state, but might instead be taken care of by one of the federated entities that state is composed of.

6. One has always to be aware of the multi-layered reality of the sea.

Any part of the marine world normally consists at least of:

- a sea surface
- a water column subjacent to the sea surface and superjacent to the seabed
- a soil / seabed
- a subsoil.

Whereas the continental shelf and the Area only comprise a seabed and a subsoil, the territorial sea also extends to the air space above the sea.

Within each layer a whole array of different rights and restrictions may operate.



## C.TERRITORIAL SEA

7. It follows from Unclos, Part II, section 1 and 2 (article 2 through to 16):

- that a coastal state exercises sovereignty over the territorial sea (surface and water column), its bed and subsoil and the air space over it
- that this territorial sea extends from the normal baseline (the low water line along the coast) up to a limit not exceeding 12 nautical miles.

Ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea, subject to the use of sea lanes and traffic separation schemes (Unclos, Part II, section 3 – articles 17 to 26 inclusive).

Pursuant to Unclos, article 245, coastal states, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal state.

According to Unclos, article 303, no objects of an archaeological and historical nature found at sea may be removed from the seabed of the territorial sea of the coastal state without its approval.

8. Sovereignty of the coastal state (*imperium*) implies that the coastal state has plenary jurisdiction over the territorial sea. This means that the law of the coastal state regarding fishery, security and defence, customs and taxes, immigration and sanitary policy, navigation regulation, civil & military & criminal jurisdiction, fully applies to the territorial sea. The coastal state holds the exclusive right to explore and exploit the soil and subsoil of the territory sea. It also has to right to regulate the overflight of the territorial sea.

### *Rights and charges under Unclos*

9. This sovereignty, jurisdiction and rights that come with it, are to be exercised subject to the following rights, responsibilities and restrictions:

- [the right of innocent passage](#);
- fishing rights in favour of other states (as a result of European or international or bilateral law);
- general marine spatial planning restrictions (shipping routes & protected sandbanks & special fishing and aquaculture zones & areas for sand and gravel exploitation & energy atolls & areas for wind farms & corridors for cables and pipelines & disposal sites for dredged material & extension zones for ports & sites for coastal protection & zones for military exercises & protected wrecks and underground cultural heritage - see: the marine spatial plan for the Belgian part of the North Sea, established by royal decree of 20 March 2014 – see also: the European Union instruments relating to: common fisheries policy & marine environmental policy & marine and maritime sustainable growth policy);
- protection and preservation of the marine environment and the prevention, reduction and control of pollution thereof (Unclos, article 192 & part XII)
- conservation of living and non-living resources (though not expressly imposed by Unclos for the territorial sea);
- marine scientific research (Unclos, part XIII, article 245)
- protection of archaeological and historical objects found at sea (Unclos, art.303)
- private rights *in personam* based on licences, concessions or leases granted by the coastal state to companies for exploration and exploitation of the territorial sea (e.g. sand and gravel

extraction, crude oil and natural gas extraction, mining, fishing, aquaculture, energy production, dumping of dredging material etc.) – these rights are temporary in that they only last for the duration of the licences, concessions or leases;  
- public and private rights *in rem* (see no 17 *infra*).

### *Belgium*

10. In Belgium the exploration and exploitation of the territorial sea is mainly governed by following instruments (as amended by the 22 April 1999 EEZ Act<sup>1</sup>):

- the act of 19 August 1891 (as amended) on maritime fishing in the territorial sea;
- the act of 12 april 1957 (as amended) authorizing the King to ensure the conservation of livings resources in both the high seas and the exclusive economic zone and the territorial sea;
- the act of 13 June 1969 (as amended) regarding the exploration and exploitation of non-living resources of the territorial sea and of the continental shelf;  
the provisions of this act have been made applicable by article 38 of the EEZ Act to the artificial islands, installations and structures situated in the territorial sea and used for the purpose of exploring and exploiting living and non-living natural resources as well as for purposes other than the exploration and exploitation of mineral and other non-living resources;  
article 3 of this act provides that a concession needs to be granted for the exploration and exploitation of the minerals and other non-living resources of the seabed and its subsoil in accordance with the conditions and procedure to be determined by the King; this concession has also to be granted for the establishment and exploitation of the artificial islands, installations and structures;  
safety zones may be established too;
- act of 20 January 1999<sup>2</sup> regarding the protection of the marine environment and ocean space under Belgian jurisdiction; by ocean space is meant in this act “the territorial sea, the exclusive economic zone and the continental shelf covered by the act of 13 June 1969”; under article 25 permits or prior authorization from the Belgian authorities is required for following activities: (i) civil engineering projects, (ii) excavations of trenches and raising of the seabed, (iii) use of explosives or high-power acoustical devices, (iv) abandonment or destruction of wreckage or sunken cargo, (v) industrial activities, (vi) activities of advertising or commercial enterprises;
- the royal decree of 1 September 2004<sup>3</sup> determining the conditions and procedure regarding allocation of concessions for the exploration and exploitation of the minerals and other non-living resources of the territorial sea and the continental shelf; article 16 of this decree provides that the concession is granted for a fixed term, which may not exceed ten years.

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<sup>1</sup> See footnote 31 *infra*

<sup>2</sup> Belgian official journal (*Belgisch Staatsblad / Moniteur belge*) of 12 March 1999; an English translation of this act can be found in the the Law of the Sea Bulletin no 45 (pages 47 to 66) of the UN Division for Oceans Affairs and the Law of the Seas - see: [http://www.un.org/depts/los/doalos\\_publications/los\\_bult.htm](http://www.un.org/depts/los/doalos_publications/los_bult.htm) –

<sup>3</sup> Belgian official journal (*Belgisch Staatsblad / Moniteur belge*) of 7 October 2004.

This royal decree of 1 September 2004 was amended by the royal decree of 20 March 2014 regarding the establishment of a marine spatial plan for the Belgian part of the North Sea.



11. Sovereignty (*imperium*) does not mean that the coastal state *ipso facto* owns the territorial sea (*dominium*).

These legal concepts are quite different.

Unclos does not say anything about possible property rights of the coastal state over the territorial sea.

It only follows from Unclos that the coastal state has the exclusive right to appropriate and to alienate the living and non-living resources of the territorial sea, in that it has the right of exploration and exploitation of the territorial sea. So, the coastal state is obviously considered to be the owner of the resources.

It also follows from the sovereignty accorded by Unclos to the coastal state that in case of doubt the coastal state interests are to prevail within the territorial sea.

12. It is widely admitted, though, that the waters of the territorial sea (surface and water column) are a '*res communis*' that belongs to no one but the international community and that is definitely not susceptible for appropriation.

As regards the ownership of the soil and subsoil of the territorial sea, it is clear, in my opinion, that by virtue of its sovereignty over the territorial sea and its exclusive rights of exploration and exploitation, the coastal can always claim the ownership of this soil and subsoil, be it as part of its 'public domain' or as part of its 'private domain'. This claim of ownership should, of course, be made explicit by an adequate legal instrument to be passed by the coastal state legislators.

13. The situation in Belgium regarding the ownership of the soil and subsoil of the territorial sea is rather confusing, as is the content and extent of the Belgian public domain itself. Some authors, like Somers and Lagasse, tend to exclude all of the territorial sea from the Belgian public domain<sup>4</sup>. Other authors like Pâques and Deckers/Dirix regard the territorial sea as a downright part of the Belgian public domain<sup>5</sup>.

The fact remains that the Belgian legislator has never passed any act to clarify the situation, let alone to claim its ownership over all or part of the territorial sea.

Taking into account the residual status of the territorial sea as a marine zone where the coastal state interests prevail<sup>6</sup>, I'd favour the opinion that the soil and subsoil are part of the Belgian public domain.

14. As regards other EU member states, I understand :

- that in France<sup>7</sup> the seabed and subsoil of the territorial sea are part of the maritime public domain;
- that in Scotland<sup>8</sup> the seabed of the territorial sea belongs to the 'Crown Estate', that interests therein can be alienated by lease, and that leases of at least 20 years can be

<sup>4</sup> Somers, Eddy, *Inleiding tot het internationale zee-recht*, Kluwer, Antwerpen, 1997 – pages 70-72; Lagasse, Dominique, *Droit administratif spécial – Les domaines public et privé - La voirie*, Presses Universitaires de Bruxelles, 8<sup>th</sup> edition, 1999-2000/I - page 34

<sup>5</sup> Pâques, Michel, *Le domaine public*, in *Répertoire notarial, tome XIV*, Editions Larcier (matière arrêtée au 30 juin 2007) – no 46 ; Deckers René & Dirix, Eric, *Handboek Burgerlijk Recht, deel II – Zakenrecht - Zekerheden – Verjaring*, Intersentia, Antwerpen-Oxford, 2005 – page 40 (no 96)

<sup>6</sup> Barnes, Richard, *Property rights and natural resources*, Hart Publishing, Oxford and Portland (Oregon-USA), 2009 - *Studies in international law*, volume 22 – page 291, 1<sup>st</sup> paragraph.

<sup>7</sup> Code général de la propriété des personnes publiques, article L2111-4: Le domaine public maritime naturel de L'Etat comprend : 1° Le sol et le sous-sol de la mer entre la limite extérieure de la mer territoriale et, côté terre, le rivage de la mer.(..)

registered in the Scottish land register, and even a mortgage could be granted over such a lease and be registered in the land register;

- that in England<sup>9</sup> the territorial sea, as well as the seabed and the subsoil, are part of the UK Marine Area;
- that in England they cannot register title to the seabed, in that the land registration legislation in England does not include territorial waters<sup>10</sup>;
- that in Croatia<sup>11</sup> the territorial sea, as well as the corresponding seabed and subsoil, are part of the “maritime domain” and public property.

15. Since there has not been until now any devolution to the Flemish region (that is bordering on the Belgian part of the North Sea) with respect to the territorial sea, the Flemish region does not hold any interests in the soil and subsoil of that sea.

The Flemish region has only jurisdiction over the Belgian part of the North Sea in so far as pilotage, fisheries policy, buoyage and beaconing, navigation monitoring (via radio communication and radar), rescue and towage at sea and maintenance of maritime access routes to Belgian ports (dredging) are concerned<sup>12</sup>.

16. The Belgian public domain consists of the goods destined for purposes of public use or especially adjusted for the public service they are intended for<sup>13</sup>.

In Belgium – as is the case in France<sup>14</sup> but unlike the Netherlands where private law always in principle governs all goods owned by the authorities – private law only applies to public domain property and private rights *in rem* can only be created, ‘if these private rights *in rem*

<sup>8</sup> De Latte, Guido, Can offshore wind farms be mortgaged under Belgian law, in *ELRA Annual Publication No3 2010*, page 40 – information obtained from Ms Susan MacInnes of Registers of Scotland in July 2009; judging by the information posted on <http://www.thecrownestate.co.uk/energy-and-infrastructure/offshore-wind-energy/working-with-us/leasing-rounds/scottish-territorial-waters-n-ireland/> (viewed on 19 June 2015) agreements for lease have been awarded by the Crown Estate for 4 Scottish territorial waters offshore wind projects since then.

<sup>9</sup> Marine and Coastal Access Act 2009 Chapter 23, part 2, article 42: (1) *For the purposes of this Act, the “UK marine area” consists of the following— (a) the area of sea within the seaward limits of the territorial sea adjacent to the United Kingdom, (b) any area of sea within the limits of the exclusive economic zone, (c) the area of sea within the limits of the UK sector of the continental shelf (so far as not falling within the area mentioned in paragraph (b), and see also subsection (2)), and includes the bed and subsoil of the sea within those areas.* Part 1 of this act establishes the Marine Management Organisation. Part 3 of the act deals with marine planning. ([http://www.legislation.gov.uk/ukpga/2009/23/pdfs/ukpga\\_20090023\\_en.pdf](http://www.legislation.gov.uk/ukpga/2009/23/pdfs/ukpga_20090023_en.pdf))

<sup>10</sup> De Latte, Guido, Can offshore wind farms be mortgaged under Belgian law, in *ELRA Annual Publication No3 2010*, page 40 – information obtained from Ms Susan MacInnes of Registers of Scotland in July 2009

<sup>11</sup> <http://www.pomorskodobro.com/en/legal-nature-of-maritime-domain.html>

<sup>12</sup> E-mail of 4 June 2015 by the policy advisor for the North Sea with the Directorate General Maritime Transport in Brussels.

<sup>13</sup> Lagasse, Dominique, *Droit administratif spécial – Les domaines public et privé - La voirie*, Presses Universitaires de Bruxelles, 8<sup>th</sup> edition, 1999-2000/I – pages 18 & 19 ; Van Damme, Nicolas, Erfdienstbaarheden op het openbaar domein in het licht van de zesde staats hervorming: dan toch naar een administratief zakelijk recht?, in *Jura Falconis*, jaargang 50, 2013-2014, no.2 – page 503

<sup>14</sup> Van Damme, Nicolas, Erfdienstbaarheden op het openbaar domein in het licht van de zesde staats hervorming: dan toch naar een administratief zakelijk recht?, in *Jura Falconis*, jaargang 50, 2013-2014, nr.2 – page 507; Code général de la propriété des personnes publiques – article 2122-4: Des servitudes établies par conventions passées entre les propriétaires, conformément à l'article 639 du code civil, peuvent grever des biens des personnes publiques mentionnées à l'article L. 1, qui relèvent du domaine public, dans la mesure où leur existence est compatible avec l'affectation de ceux de ces biens sur lesquels ces servitudes s'exercent.; Sentence of Belgian court of ‘Cassation’, 18 May 2007

(for instance easements) are compatible with the public destination and the public use of these goods’.

Provided this condition is met, it is now generally admitted<sup>15</sup> that Belgian authorities can grant licences and concessions<sup>16</sup> combined with waiver of the benefit of accession (*renonciation au droit d’accession*) or with creation of rights of easement (*servitudes*), superficies and long leases (*droits d’emphytéose*) - entitling companies to build and to own, for the duration of their licences or concessions, offshore islands, installations, structures (hereinafter referred to as ‘offshore units’<sup>17</sup>) on the sea bed of the territorial sea.

If necessary, the part of the public domain (i.e. part of the territorial sea bed) concerned could be decommissioned at the request of the company the licence or concession is allocated to and with the consent of the authorities involved in order to allow for the creation of mortgages over the fixed offshore structures<sup>18</sup>.

### *Patrimonial rights*

17. Summarizing, following property rights and other rights *in rem* regarding the territorial sea can be distinguished:

- a. the overall public property of the soil and subsoil and its resources, owned by the coastal state and being part of its ‘public domain’ (in the case of Belgium and other EU member states)
- b. the private property rights and other rights *in rem* owned by the holders of licences and concessions with regard to:
  - b.1. immovable goods (offshore units fixed to the seabed & pipelines and cables if fixed to the seabed or embedded in the subsoil) – the property rights to these goods are temporary in that they only last for the duration of the licences, concessions or leases;
  - b.2. movable goods (mobile offshore units & pipelines and cables lying on the seabed without being fixed to it & living and non-living resources appropriated pursuant to the licences, concessions or leases but only for the duration of these licences, concessions or leases).

### *Registration*

18. The deeds establishing the private property rights and other rights *in rem* regarding the immovable goods are eligible for registration at the land registries, provided the ‘good’ concerned is sufficiently identified and described as a proper ‘marine cadastre unit’ and the European and national legislators enact all regulations required.

19. The deeds evidencing the private property rights and other rights *in rem* regarding the mobile offshore units (i.e. building contracts, sales and purchases, and underlying concessions

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<sup>15</sup> Roelen, Emile, L’évolution de l’utilisation du domaine public et ses conséquences sur les formalités hypothécaires in Hyp-Info (bulletin de la Fédération Royale des Conservateurs des hypothèques de Belgique) number 84 of 25 February 2008, annex 1

<sup>16</sup> See: Belgian royal decrees of 20 December 2000 and 17 August 2013 regarding some of these concessions and licences.

<sup>17</sup> Examples of ‘offshore units’: wind farm turbines, platforms for drilling, elevating and other activities, aquaculture installations, energy production and stockage facilities, scientific research installations referred to in article 258 to 262, and so on.

<sup>18</sup> Article 45 of the Belgian act relating to hypothecs (*loi hypothécaire – hypotheekwet*) provides that only real estate that is subject of commerce, is mortgageable. Since public domain goods are no subjects of commerce, can not be alienated, cannot be attached (*insaisissables*), and are no subject to statutory limitations (*imprescriptibles*), it follows that no mortgage can be effected against a public domain good. It is clear that the Belgian legislator should amend this provision for the sake of facilitating financing of offshore units.

or licences) as well as the deeds creating mortgages against these mobile offshore units are eligible for registration at the ship registry<sup>19</sup>.

The Belgian ship registration act<sup>20</sup> also applies to mobile offshore units.

The definition of ship under Dutch law<sup>21</sup> also includes mobile offshore units.

French<sup>22</sup>, Luxembourg<sup>23</sup>, German<sup>24</sup> and British<sup>25</sup> law seem to exclude mobile offshore units from registration at their ship registries.

20. Finally, it should be noted that the ‘Unidroit 2001 International Convention on international interests in mobile equipment’<sup>26</sup> provides for the constitution and effects of international security interests in mobile equipment and associated rights.

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<sup>19</sup> For additional information about the legislation and regulations regarding ship mortgages in Belgium, see: De Latte, Guido, *Zakelijke rechten en hypotheeken op schepen*, Mechelen, Kluwer, 2006; see also: <http://www.shipregistration.be>; Guido De Latte, *Hypothèques maritimes et fluviales*, published in the review of the Belgian Federation of Notaries “Notamus” 3/2008.

<sup>20</sup> Belgian ship registration act of 21 December 1990: Article 1. §1. For the purposes of this Act and its implementation decrees the following definitions apply: 1° Ship: any floating craft, self-propelled or not, with or without any water displacement, used or fit to be used as a means of locomotion, in, above or under water, including the installations not permanently attached to the shore or to the soil (...).

For additional information about the legislation and regulations regarding ship registration in Belgium, see: De Latte, Guido, *Teboekstelling en registratie van schepen*, Maklu, Antwerpen, 2007

<sup>21</sup> Dutch civil code, Book 8, article 1: *1. In dit wetboek worden onder schepen verstaan alle zaken, geen luchtvaartuig zijnde, die blijken hun constructie bestemd zijn om te drijven en drijven of hebben gedreven. 2. Bij algemene maatregel van bestuur kunnen zaken, die geen schepen zijn, voor de toepassing van bepalingen van dit wetboek als schip worden aangewezen, dan wel bepalingen van dit wetboek niet van toepassing worden verklaard op zaken, die schepen zijn.*

<sup>22</sup> Code des douanes, article 219 (as amended in 2001): *I. - Pour être francisé, un navire armé au commerce ou à la plaisance, qui a fait l'objet d'un contrôle de sécurité conformément à la réglementation en vigueur, doit répondre aux conditions suivantes (...)*

<sup>23</sup> Luxembourg Act of 9 November 1990 creating a ‘registre public maritime luxembourgeois’ (amended in 1992 and 1994), article 4: *Définitions - (...) Navire: Sont considérés comme navires, pour l'application de la présente loi, tous bâtiments d'au moins vingt-cinq tonneaux de jauge qui font ou sont destinés à faire habituellement en mer le transport des personnes ou des choses, la pêche, le remorquage ou toute autre opération lucrative de navigation.*

<sup>24</sup> Act relating to German ship flag law - Gesetz über das Flaggenrecht der Seeschiffe (..) (consolidated text of 26 October 1994), section 1, §1: *Die Bundesflagge haben alle Kauffahrteischiffe und sonstigen zur Seefahrt bestimmten Schiffe (Seeschiffe) zu führen, deren Eigentümer...*

Ships' registration regulation - Schiffsregisterordnung (SchRegO) - of 19 December 1940 (as consolidated in 1994): §3. (1) *Seeschiffsregister und Binnenschiffsregister werden getrennt geführt. (2) In das Seeschiffsregister werden die Kauffahrteischiffe und andere zur Seefahrt bestimmten Schiffe (Seeschiffe) eingetragen, die nach §§ 1, 2 des Flaggenrechtsgesetzes vom 8. Februar 1951 (Bundesgesetzbl. I S. 79) die Bundesflagge zu führen haben oder führen dürfen.*

<sup>25</sup> The ships referred to in the Merchant Shipping Act 1995 and in the United Kingdom Merchant Shipping (Registration of Ships) Regulations 1993 (as amended in 1994) are obviously ‘merchant ships’ which do not include offshore units – see appendices I and II to: Ready, *Ship registration*, LLP, London, 1998

<sup>26</sup> This convention has only been signed by France, Germany, Switzerland and the United Kingdom; only Latvia, Luxembourg, Spain, The Netherlands and the EU as such have acceded to the convention. The most important countries to have ratified the convention are: Canada, China, South Africa, Turkey and the USA. The convention has entered into force in 2006.

See: <http://www.unidroit.org/instruments/security-interests/cape-town-convention>

However, this convention only applies to uniquely identifiable objects belonging to following categories:

- (a) airframes, aircraft engines and helicopters;
- (b) railway rolling stock;
- (c) space assets.

So this convention offers no alternative solution for creating and registering ‘security interests’ - and for substituting for the ship registration solution - on mobile offshore units in the territorial sea or in any other Unclos marine zone for that matter.

#### **D. CONTIGUOUS ZONE**

21. It follows from Unclos, article 33 :

- that the contiguous zone is a zone contiguous to the territorial sea ;
- that it may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured ;
- that in this zone the coastal state may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

It follows from Unclos, article 303, that no objects of an archaeological and historical nature found at sea may be removed from the seabed of the contiguous zone of the coastal state without its approval.

22. Article 47 of the act of 22 April 1999<sup>27</sup> relating to the exclusive economic zone allows Belgium to exercise in this contiguous zone the necessary control with a view to:

- a. preventing violations of the customs, fiscal, immigration or health legislation or regulations in its territory or in its territorial sea;

- b. suppressing any violation of such legislation or regulations in its territory or in its territorial sea.

23. The coastal state exercises certain rights analogous to those it enjoys in the territorial sea, but those rights are limited to well defined fields as set out in Unclos, article 33, and those rights do not extend to the air space above the contiguous zone<sup>28</sup>.

Moreover, these limited rights of the coastal state are subject to the same rights, responsibilities and restrictions that apply in the territorial sea (see no 9 *supra*).

24. Beyond the outer limit of the territorial sea, the freedom of the seas applies in favour of the international community and only certain exceptional *imperium*-linked rights were accorded to the coastal state, as explained before<sup>29</sup>.

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<sup>27</sup> Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) of 10 July 1999; an English translation of this act can be found in the Law of the Sea Bulletin no 44 (pages 36 to 50) of the UN Division for Oceans Affairs and the Law of the Seas - see: [http://www.un.org/depts/los/doalos\\_publications/los\\_bult.htm](http://www.un.org/depts/los/doalos_publications/los_bult.htm)

see also: Guido De Latte, *Teboekstelling en registratie van schepen*, Antwerpen, Maklu, 2007 – no 277

<sup>28</sup> Somers, Eddy, *Inleiding tot het international zeerecht*, Kluwer, Antwerpen, 1997 – pages 101-106

<sup>29</sup> Barnes, Richard, *Property rights and natural resources*, Hart Publishing, Oxford and Portland (Oregon-USA), 2009 - *Studies in international law*, volume 22 – page 291, 1<sup>st</sup> paragraph.



It follows that the *dominium* over the sea, the soil and subsoil and its resources belongs to the international community (*res communis*).

There are no property rights over the contiguous sea.

The goods belonging to holders of licences, concessions or leases are movables or are deemed to be “movables” (see no 36 *infra*).

25. This zone is also part of the exclusive economic zone and the continental shelf, with which zones it overlaps.

This implies that the Belgian legislation regarding the exclusive economic zone (EEZ) and the continental shelf do equally apply to this contiguous zone.

### **E. EXCLUSIVE ECONOMIC ZONE (EEZ)**

26. It follows from Unclos, Part V, articles 56 and 57:

- that in the EEZ the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds (art.56, 1, a);
- that in the EEZ the coastal state has jurisdiction as provided for in the relevant provisions of Unclos with regard to:
  - (i) the establishment and use of artificial islands, installations and structures;
  - (ii) marine scientific research;
  - (iii) the protection and preservation of the marine environment (art.56,1,b);
- that in the EEZ the coastal state has other rights and duties provided for in Unclos (art.56,1,c);
- that the EEZ extends from the normal base line (low water line along the coast) up to a limit not exceeding 200 nautical miles (art.57).

27. It follows from Unclos, art.58:

- that in the EEZ all states, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention;
- that articles 88 to 115<sup>30</sup> and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with Unclos, part. 3 relating to ‘straits used for international

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<sup>30</sup> Articles 88 to 115 refer to: reservation of the high seas for peaceful purposes (art.88), invalidity of claims of sovereignty over the high seas (art.89), right of navigation (art.90), nationality of ships (art.91), status of ships (art.92), ships flying the flag of the United Nations, its specialized agencies and the International Atomic Energy Agency (art.93), duties of the flag state (art.94), immunity of warships on the high seas (art.95), immunity of ships used only on government non-commercial service (art.96), penal jurisdiction in matters of collision or any other incident of navigation (art.97), duty to render assistance (art.98), prohibition of the transport of slaves (art.99), duty to cooperate in the repression of piracy (art.100), definition of piracy (art.101), piracy by a warship, government ship or government aircraft whose crew has mutinied (art.102), definition of a pirate ship



navigation'; in exercising their rights and performing their duties under Unclos in the EEZ, states shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal state in accordance with the provisions of Unclos and other rules of international law in so far as they are not incompatible with this Part V of Unclos.

28. According to Unclos, article 60, the jurisdiction of the coastal state regarding the artificial islands, installations and structures encompasses:

- the exclusive right to construct and to authorize and regulate the construction, operation and use of: (a) artificial islands;
  - (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
  - (c) installations and structures which may interfere with the exercise of the rights of the coastal state in the zone;
- exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations;
- the right to establish reasonable safety zones around those artificial islands, installations and structures.

29. According to Unclos, articles 61 and 62, the sovereign right of the coastal state with respect to the conservation and management of living resources, has to do with:

- determining the allowable catch;
- taking proper conservation and management measures to prevent over-exploitation as well as to maintain or restore populations of harvested species;
- promoting the objective of optimum utilization of the living resources.

30. According to article 73 of Unclos, the coastal state may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take all measures necessary, including boarding, inspection, arrest and judicial proceedings.

31. Pursuant to Unclos, article 246, 1 & 2, coastal states, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone in accordance with the relevant provisions of Unclos, and marine scientific research in the exclusive economic zone shall be conducted with the consent of the coastal state.

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or aircraft (art.103), retention or loss of the nationality of a pirate ship or aircraft (art.104), seizure of a pirate ship or aircraft (art.105), liability for seizure without adequate grounds (art.106), ships and aircraft which are entitled to seize on account of piracy (art.107), illicit traffic in narcotic drugs or psychotropic substances (art.108), unauthorized broadcasting from the high seas (art.109), right of visit (art.110), right of hot pursuit (art.111), right to lay submarine cables and pipelines (art.112), breaking or injury of a submarine cable or pipeline (art.113), breaking or injury by owners of a submarine cable or pipeline of another submarine cable or pipeline (art.114), indemnity for loss incurred in avoiding injury to a submarine cable or pipeline (art.115).

32. Beyond the outer limit of the territorial sea, the freedom of the seas applies in favour of the international community and only certain exceptional rights were accorded to the coastal state<sup>31</sup>.

The sovereign rights “for the purpose of exploring and exploiting” as referred to in Unclos, art.56,1 (a), basically are economic rights, which are quite different from rights of sovereignty over the territorial sea, in that they are well determined specific rights and do not imply any general jurisdiction including all non enumerated competences, as this general jurisdiction applies in the case of the sovereignty over the territorial sea<sup>32</sup>.

### *Belgium*

33. In Belgium the EEZ is mainly governed by the following instruments:

33.1. The provisions of the act of 13 June 1969 regarding the exploration and exploitation of non-living resources of the territorial sea and of the continental shelf have been made applicable by article 38 of the EEZ Act to the artificial islands, installations and structures situated in the EEZ and used for the purpose of exploring and exploiting living and non-living natural resources as well as for other purposes.

Article 3 of this 1969 act provides that a concession needs to be granted for the exploration and exploitation of the minerals and other non-living resources of the seabed and its subsoil in accordance with the conditions and procedure to be determined by the King. This concession has also to be granted for the establishment and exploitation of the artificial islands, installations and structures; safety zones may be established too.

A royal decree of 1 September 2004<sup>33</sup> implements this 1969 act and determines the conditions and procedure regarding allocation of concessions for the exploration and exploitation of the minerals and other non-living resources of the territorial sea and the continental shelf; article 16 of this decree provides that the concession is granted for a fixed term which may not exceed ten years.

33.2. The act of 10 October 1978<sup>34</sup> establishing a national fishery zone beyond the territorial sea of Belgium and coterminous with the exclusive economic zone.

33.3. The act of 20 January 1999<sup>35</sup> regarding the protection of the marine environment and ocean space under Belgian jurisdiction; by ocean space is meant in this act “the territorial sea,

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<sup>31</sup> Barnes, Richard, *Property rights and natural resources*, Hart Publishing, Oxford and Portland (Oregon-USA), 2009 - *Studies in international law*, volume 22 – page 291, 1<sup>st</sup> paragraph.

<sup>32</sup> Bill (*Wetsontwerp / Projet de loi*) regarding the exclusive economic zone of Belgium in the North Sea, Motivation (*Memorie van toelichting/Exposé des motifs*), Parl.Doc. 1998-1999, No 1902/1.

<sup>33</sup> Belgian official journal (*Belgisch Staatsblad / Moniteur belge*) of 7 October 2004.

This royal decree of 1 September 2004 was amended by the royal decree of 20 March 2014 regarding the establishment of a marine spatial plan for the Belgian part of the North Sea.

<sup>34</sup> Official Belgian journal (*Belgisch Staatsblad / Moniteur belge*) of 28 December 1978; the act was amended several times, also by the EEZ Act referred to under footnote 32.

<sup>35</sup> Belgian official journal (*Belgisch Staatsblad / Moniteur belge*) of 12 March 1999; an English translation of this act can be found in the Law of the Sea Bulletin no 45 (pages 47 to 66) of the UN Division for Oceans Affairs and the Law of the Seas - see: [http://www.un.org/depts/los/doalos\\_publications/los\\_bult.htm](http://www.un.org/depts/los/doalos_publications/los_bult.htm)

the exclusive economic zone and the continental shelf covered by the act of 13 June 1969<sup>36</sup>; under article 25 permits or prior authorization from the Belgian authorities is required for following activities: (i) civil engineering projects, (ii) excavations of trenches and raising of the seabed, (iii) use of explosives or high-power acoustical devices, (iv) abandonment or destruction of wreckage or sunken cargo, (v) industrial activities, (vi) activities of advertising or commercial enterprises.

33.4. The act of 22 April 1999<sup>36</sup> relating to the exclusive economic zone (hereinafter referred to as “EEZ Act”) has created the Belgian EEZ.

Articles 2 and 3 of the EEZ Act provide that the Belgian EEZ :

- contains the waters superjacent to the seabed, the seabed and its subsoil;
- covers a part of the North Sea extending between the outer limit of the Belgian territorial sea and a specific EEZ outer limit which is a line formed by the segments connecting the under article 3 of the act indicated coordination points.

Article 4 of the EEZ Act provides that the Kingdom of Belgium exercises:

a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

b) jurisdiction with regard to: a. the establishment and use of artificial islands, installations and structures, b. marine scientific research, c. the protection and preservation of the marine environment;

c) other rights under international law.

Under article 37 of the EEZ Act Belgium has exclusive jurisdiction over artificial islands, installations and structures situated in the Belgian EEZ, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

33.5. The act of 29 April 1999 regarding the organization of the electricity market<sup>37</sup>; the article 6 provides that concessions can be granted for the construction and exploitation of installations for the production of electricity from the water, rivers or winds, in the marine areas over which Belgium has jurisdiction under the international law of the sea; the article 6/1 provides that concessions can be granted for the construction and exploitation of storage facilities of hydro-electric energy in the marine areas over which Belgium has

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<sup>36</sup> The EEZ Act was published on the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) of 10 July 1999; an English translation of this EEZ act can be found in the Law of the Sea Bulletin no 44 (pages 36 to 50) of the UN Division for Oceans Affairs and the Law of the Seas - see: [http://www.un.org/depts/los/doalos\\_publications/los\\_bult.htm](http://www.un.org/depts/los/doalos_publications/los_bult.htm)  
see also: Guido De Latte, Teboekstelling en registratie van schepen, Antwerpen, Maklu, 2007 – no 277

<sup>37</sup> Belgian official journal (*Belgisch Staatsblad / Moniteur belge*) of 11 May 1999.

jurisdiction under the international law of the sea, meaning the territorial sea, the exclusive economic zone and the continental shelf governed by the 13 June 1969 act.

33.6. A royal decree of 20 December 2000 (amended by royal decrees of 17 May 2004 and 18 September 2008)<sup>38</sup> determines the conditions and procedure regarding allocation of concessions for the construction and exploitation of installations for the production of electricity from the water, rivers or winds, in the marine areas over which Belgium has jurisdiction under the international law of the sea.

33.7. A royal decree of 8 May 2014<sup>39</sup> determines the conditions and procedure regarding allocation of concessions for the construction and exploitation of storage facilities of hydro-electric energy in the marine areas over which Belgium has jurisdiction under the

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<sup>38</sup> Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) of 30 December 2000.

The text that follows is an unofficial translation of the official Dutch text:

*Art. 13. The domain concession is granted for a fixed term, which may not exceed twenty years. It may be extended indefinitely without the total term exceeding thirty years.*

*Art. 20. The request to sell, partially or totally transfer, partition and lease the concession shall be notified to the official authorised by the Minister. The concession holder must not execute this plan, unless a term of 50 working days has expired, during which term the minister –after having been advised by the commission and on the proposal of the authorised official– may notify the concession holder that this operation is not compatible with the concession being maintained. The would-be transferee is subject to the selection criteria summed up in article 2. The obligations and conditions relating to the concession are opposable to the new interested party.*

*Art. 21. The rights attached to the concession come to an end as a result of the concession having expired or of the title being rescinded because of the cancellation or the renunciation by the concession holder.*

*Art. 24. Whereas the concession has expired or has been rescinded because of cancellation or renunciation, the concession holder shall execute on his own responsibility the measures prescribed for the final decommissioning and removal of the installation, for the safety of the zone concerned and for the preservation and protection of the marine environment. If the Minister –after having been advised by the administrations and commission concerned– agrees thereto, and depending upon the technical developments, other measures than those prescribed at the time of allocation of the concession may also be applied so far as those measures guarantee equal quality result.*

<sup>39</sup> Belgian official journal (*Belgisch Staatsblad / Moniteur belge*) of 6 June 2014

The text that follows is an unofficial translation of the official Dutch text:

*Art. 14. The domain concession is granted for a fixed term, which may not exceed fifty years. It may be extended indefinitely without the total term ever exceeding seventy-five years.*

*Art. 21. The request to sell, to partially or totally transfer, partition and lease the concession shall be notified to the official authorised by the Minister. The concession holder must not execute this plan, unless a term of 50 working days has expired, during which term the minister – after having been advised by the commission and on the proposal of the authorised official– may notify the concession holder that this operation is not compatible with the concession being maintained. The would-be transferee is subject to the selection criteria summed up in article 2. The obligations and conditions relating to the concession are opposable to the new interested party.*

*Art. 22. The rights attached to the concession come to an end as a result of the concession having expired or of the title being rescinded because of the cancellation or the renunciation by the concession holder.*

*Art. 25. Whereas the concession has expired or has been rescinded because of cancellation or renunciation, the concession holder shall execute on his own responsibility the measures prescribed for the final decommissioning and removal of the installation, for the safety of the zone concerned and for the preservation and protection of the marine environment. If the Minister –after having been advised by the administrations and commission concerned– agrees thereto, and depending upon the technical developments, other measures than those prescribed at the time of allocation of the concession may also be applied so far as those measures guarantee equal quality result.*

international law of the sea.

*Rights and charges under Unclos*

34. The sovereign economic rights granted under Unclos to the coastal state in the EEZ are to be exercised subject to the following rights, responsibilities and restrictions:

- the paramount right of free navigation (innocent passage /freedom of the sea) and overflight (Unclos, articles 58 and 87);
- the right of other states to lay and maintain cables and pipelines (Unclos, art.58);
- fishing rights in favour of other states (pursuant to European or international law or bilateral agreements);
- general marine spatial planning restrictions (shipping routes & protected sandbanks & special fishing and aquaculture zones & areas for sand and gravel exploitation & energy atolls & areas for wind farms & corridors for cables and pipelines & disposal sites for dredged material & extension zones for ports & sites for coastal protection & zones for military exercises & protected wrecks and underground cultural heritage - see: the marine spatial plan for the Belgian part of the North Sea, established by royal decree of 20 March 2014 – see also: the European Union instruments relating to: common fisheries policy & marine environmental policy & marine and maritime sustainable growth policy);
- protection and preservation of the marine environment and the prevention, reduction and control of pollution thereof (Unclos, articles 56 & 192 & part XII);
- conservation of living and non-living resources;
- marine scientific research (Unclos, articles 56 & 245 & part XIII)
- protection of archaeological and historical objects found at sea (Unclos, art.303)
- private rights *in personam* based on licences, concessions or leases granted by the coastal state to companies for exploration and exploitation of the EEZ (e.g. sand and gravel extraction, crude oil and natural gas extraction mining, fishing, aquaculture, energy production, dumping of dredging material etc.) - these rights are temporary in that they only last for the duration of the licences, concessions or leases;
- private rights *in rem* (see no 38 *infra*).

35. Beyond the outer limit of the territorial sea, the freedom of the seas applies in favour of the international community and only certain exceptional *imperium*-linked rights were accorded to the coastal state<sup>40</sup>.

It follows that the *dominium* over the sea, the soil and subsoil and its resources in the EEZ belongs to the international community (*res communis*).

The waters, soil and subsoil of the EEZ belong to the international community, though they are subject to the sovereign economic rights of the coastal state.

The coastal state has no entitlement to any property right in the EEZ.

36. Since the bed and subsoil of the EEZ are not owned by the coastal state and do not belong to the public or private domain of that state<sup>41</sup>, and since the property law of the coastal state

<sup>40</sup> Barnes, Richard, *Property rights and natural resources*, Hart Publishing, Oxford and Portland (Oregon-USA), 2009 - *Studies in international law*, volume 22 – page 291, 1<sup>st</sup> paragraph.

<sup>41</sup> Dekkers René & Dirix, Eric, *Handboek Burgerlijk Recht, deel II – Zakenrecht -Zekerheden – Verjaring*, Intersentia, Antwerpen-Oxford, 2005 – p.151 - no 377 : *Bij natrekking, of accessio, wordt de eigenaar van een zaak tot eigenaar van al wat er zich aan toevoegt (quod accedit).* = *In case of accession, the owner of a good becomes owner of everything that accedes to that good.* Since there exists in the EEZ no owner of the soil, how could there be any accession than ?



(including the legal concepts of incorporation and accession of movables to the land<sup>42</sup>) does not apply to the EEZ, the *in se* movable offshore ‘artificial islands, and installations and structures’ that are referred to in Unclos, article 60 (see no 25) and that happen to be fixed to the EEZ soil, cannot become immovable as a result of incorporation or attachment to the EEZ soil.

So, these ‘artificial islands, installations and structures’ are still deemed to be ‘movables’.

### *CMI position*

37. Since 1897 the Comité Maritime International (hereinafter “CMI”) has played an important role in the unification of the international law of the sea. Its assistance in drafting and preparing new maritime conventions has been very valuable to the International Maritime Organisation (IMO) and to the maritime world at large. Over the years, the CMI has also devoted its attention to the feasibility of an offshore units convention.

From the different texts<sup>43</sup> produced by a special CMI working group dealing with the issue of offshore structures, it seems that the following points which are quoted from the relevant CMI Yearbooks, are to be borne in mind:

- article 60 (8) of UNCLOS means that fixed structures and artificial islands cannot be regarded as part of state territory unless located in the territorial sea; therefore one cannot apply domestic law respecting property rights in immovables to artificial islands simply by the legal principle of accession to the soil; unilateral attempts by national governments to extend property laws of general application to structures outside the territorial sea could be subject to challenge under international law or risk of non-recognition by courts of other states; therefore a specific legal regime is needed for property in fixed structures and artificial islands;
- the question whether or not an offshore unit is a ship has bedevilled discussion of this subject for many years; it is the view of the CMI subcommittee that the term offshore unit is to be preferred to cover both fixed and mobile modes;
- adoption of a general principle that all offshore units be registered would permit the stable and predictable application of rules for the granting of mortgages or hypothecs in offshore units;
- all offshore units should have a nationality; this would permit the clear application of the law of property of the flag under which units are registered; it is undesirable that unregistered or stateless offshore units be permitted to operate outside internal waters without some juridical connection to a state and its legal system (...);
- the international regime should provide for the registration by flag states of ownership and mortgage or hypothec interest in offshore units; it is immaterial whether such units are registered as ships, or in specialised registries established for that purpose.

I fully subscribe to this CMI position.

### *Patrimonial rights*

38. With respect to property rights and other rights *in rem* regarding the EEZ, only the private property rights and other rights *in rem* owned by the holders of licences, concessions or leases are to be examined.

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<sup>42</sup> Van Erp, Sjeff & Akkermans, Bram, *Cases, materials and text on property law*, Hart Publishing, Oxford, 2012 - pages 617 to 620 regarding the meaning of ‘accession’ (tenant’s fixtures) and its effects under Dutch, English, French, and German land law.

<sup>43</sup> CMI Yearbook 1996 (p.105 to 165) & CMI Yearbook 1997 (p.159 to 178) & CMI Yearbook 1998 (p.145 to 162) & CMI Yearbook 2004 (p.419 to 421)



Those property rights and rights *in rem* exist with regard to following movable goods:

- fixed and mobile offshore units (artificial islands, installations and structures) – the rights to fixed offshore units are temporary in that they only last for the duration of the licences, concessions or leases having allowed for their construction;
- pipelines and cables lying on the seabed or embedded into the seabed;
- living and non-living resources appropriated pursuant to the licences, concessions or leases but only for the duration of the licences, concessions or leases involved.

### *Registration*

39. The deeds evidencing the private property rights and other rights *in rem* regarding the mobile offshore units<sup>44</sup> in the EEZ (i.e. building contracts, sales and purchases, and underlying concessions or licences) as well as the deeds creating mortgages against these mobile offshore units are eligible for registration at the ship registry (cf. point 19 *supra*).

40. The deeds regarding the rights in fixed offshore units in the EEZ (i.e. building contracts, sales and purchases, to be supported by technical descriptions and by detailed spatial information and adequate marine cadastre data regarding the exact geographic location of the unit and accompanied by the underlying concessions or licences) as well as the deeds creating mortgages against these fixed offshore units would be eligible '*de lege ferenda*' for registration at the ship registry in Belgium, provided that the Belgian ship registration act of 21 December 1990<sup>45</sup>, title I of the maritime act and the provisions of the judicial code relating to the arrest of seagoing ships were made applicable to all artificial islands, installations and structures (both fixed and mobile) referred to in article 60,1, of the 1982 United Nations Convention on the Law of the Sea and located in the Belgian exclusive economic zone of the North Sea.

41. A legislative initiative would have to be taken by the government and parliament in Belgium (and in other EU member states) in order to extend the eligibility of ship registration<sup>46</sup> to these fixed offshore units.

An initiative by IMO that could prepare an international convention and/or by the European Commission that could prepare a common European directive would, of course, be also very welcome, if only to streamline things at an international or European level.

42. This assimilation of fixed offshore units to seagoing ships would be in line with the CMI position.

Furthermore, it would offer following advantages:

- a. it would enhance legal certainty by better defining and determining the status of these units, if only for the sake and purpose of registration and mortgage;
- b. it would grant a nationality to these units by having them fly a national flag; thus it would connect these units to a national jurisdiction that would be entitled to exercise all sorts of control over them;

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<sup>44</sup> The Belgian register of seagoing ships contains several so-called 'self elevating platforms' owned by dredging and shipping companies. From 1985 until 1995 the drilling platform Yatzy was also registered on the Belgian register (under registration No 03.16606.1985).

<sup>45</sup> Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) of 29 December 1990

<sup>46</sup> "A deed is not eligible for registration unless the ship is registered on the register of seagoing ships" (unofficial translation of Belgian maritime act, art.11); for additional information about the legislation and regulations regarding registration of ships under Belgian flag, see: Guido De Latte, *Teboekstelling en registratie van schepen*, Antwerpen, Maklu 2007.

- c. no other special ‘offshore units’ register would need to be created and the existing legislation and decrees relating to ship registration and to ship mortgages could be made applicable;
- d. this would also allow for these units to be prefinanced, as registration of the offshore structure and of the ship mortgage created against it would be feasible as soon as the building contract would have been signed (at least in Belgium)<sup>47</sup>.

## **F. CONTINENTAL SHELF**

43. It follows from Unclos, Part VI (articles 76 to 85):

- that the continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance (article 76.1);
- that the continental margin referred to in the preceding paragraph comprises the submerged prolongation of the land mass of the coastal state, and consists of the seabed and subsoil of the shelf, the slope and the rise, but it does not include the deep ocean floor with its oceanic ridges or the subsoil thereof (article 76.2);
- that the outer limit of the continental shelf shall – as a general rule - not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured (76.5);
- that the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources; these rights are exclusive and do not depend on occupation, effective or notional, or on any express proclamation; these natural resources consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, meaning organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil (article 77);
- that the coastal state has the exclusive right to authorize and regulate drilling on the continental shelf for all purposes (article 81);
- that the coastal state has the right to exploit the subsoil by means of tunnelling, irrespective of the depth of the water above the subsoil (article 85).

44. It is further understood:

- that the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters (article 78);
- all states are entitled to lay submarine cables and pipelines on the continental shelf (article 79).

45. Pursuant to Unclos, article 246, 1 & 2, coastal states, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research on their continental shelf in accordance with the relevant provisions of Unclos; this marine scientific research on the continental shelf shall be conducted with the consent of the coastal state.

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<sup>47</sup> “A ship under construction is considered to be a ship as soon as the building contract has been signed” (unofficial translation of Belgian ship registration act, art.1, §1, 1°); this means that a seagoing ship is eligible for registration under Belgian flag, once the ship building contract has been signed.

46. The Belgian continental shelf is governed by the act of 13 June 1969 regarding the exploration and exploitation of non-living resources of the territorial sea and of the continental shelf.

Pursuant to article 3 of this act, concessions need to be granted by the Belgian authorities for the exploration and exploitation of non-living resources of the soil and subsoil of the Belgian continental shelf.

A royal decree of 1 September 2004<sup>48</sup> has determined the conditions and procedure regarding allocation of concessions for the exploration and exploitation of the minerals and other non-living resources of the territorial sea and the continental shelf; article 16 of this decree provides that the concession is granted for a fixed term, which may not exceed ten years.

*Rights and charges under Unclos*

47. The sovereign rights of the continental state over the continental shelf – as defined in Unclos, article 77 – are to be exercised subject to the following rights, responsibilities and restrictions:

- the right of other states to lay and maintain cables and pipelines (Unclos, art.79);
- general marine spatial planning restrictions (protected sandbanks & special aquaculture zones & areas for sand and gravel exploitation & corridors for cables and pipelines & disposal sites for dredged material & extension zones for ports & sites for coastal protection & protected wrecks and underground cultural heritage - see: the marine spatial plan for the Belgian part of the North Sea, established by royal decree of 20 March 2014 – see also: the European Union instruments relating to: marine environmental policy & marine and maritime sustainable growth policy);
- protection and preservation of the marine environment and the prevention, reduction and control of pollution thereof (Unclos, article 192 & part XII);
- conservation of living and non-living resources;
- marine scientific research (Unclos, article 246 & part XIII);
- protection of archaeological and historical objects (Unclos, art.303);
- private rights *in personam* based on licences, concessions or leases granted by the coastal state to companies for exploration and exploitation of the continental shelf (e.g. sand and gravel extraction, crude oil and natural gas extraction, mining, aquaculture, dumping of dredging material, etc.) – these rights are temporary as they only exist and last for the duration of the licences, concessions or leases involved
- private rights *in rem* (see no 50 *infra*).

48. I refer to my comments made under nos 35, 36 and 37 *supra* regarding ownership (*dominium*), property rights and offshore units.

I believe these comments are also relevant to the continental shelf, with the exception of course of any remarks about the sea and water column superjacent to the continental shelf.

49. Unclos does not grant property rights to coastal states, and coastal states do not own the continental shelf.

Still, the fact can not be denied that some states are implementing strong private property-based systems, primarily for the regulation of oil and gas deposits, and that a ‘*de facto*’

<sup>48</sup> Belgian official journal (*Belgisch Staatsblad / Moniteur belge*) of 7 October 2004.

This royal decree of 1 September 2004 was amended by the royal decree of 20 March 2014 regarding the establishment of a marine spatial plan for the Belgian part of the North Sea.

appropriation or ‘proprietaryization’ of the continental shelf – in violation of Unclos – is under way<sup>49</sup>.

Anyway, it is impossible to anticipate future developments, let alone the impact they may have on the situation of this marine zone.

Since the Belgian continental shelf does not contain any oil or gas deposit, Belgium is no point in case of this evolution.

However, this process of ‘proprietaryization’ of the continental shelf – if it were to continue – would be very regrettable, as it runs counter to the interests of the international community as a whole and to the interests of other states that are deprived of such highly profitable resources.

#### *Patrimonial rights*

50. With respect to property rights and other rights *in rem* regarding the continental shelf, only the private property rights and other rights *in rem* owned by the holders of licences, concessions or leases are to be dealt with.

Those property rights and rights *in rem* exist with regard to following movable goods:

- fixed offshore units (offshore installations and structures attached to the seabed) – these rights are temporary because they only exist and last for the duration of the underlying licences, concessions or leases;
- pipelines and cables lying on the seabed or embedded into the seabed;
- living and non-living resources appropriated pursuant to the licences, concessions or leases but only for the duration of these licences, concessions or leases.

#### *Registration*

51. The deeds regarding the rights in offshore units fixed to the continental shelf (i.e. building contracts, sales and purchases, to be supported by technical descriptions and by detailed spatial information and adequate marine cadastre data regarding the exact geographic situation of the unit and accompanied by the underlying concessions or licences) as well as the deeds creating mortgages against these fixed offshore units would be eligible ‘*de lege ferenda*’ for registration at the ship registry in Belgium.

For the conditions of this registration, as well as the legislative steps to be taken and the advantages involved, I refer ‘*mutatis mutandis*’ to my comment under nos 40, 41 and 42 *supra*.

### **G. THE HIGH SEAS**

52. It follows from Unclos, articles 86, 87, 88, 89 and 90:

- that the high seas mean all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state;
- that the high seas are open to all states, whether coastal or land-locked, and that this ‘freedom of the high seas’ comprises, *inter alia*, both for coastal and land-locked states:
  - (a) freedom of navigation;
  - (b) freedom of overflight;
  - (c) freedom to lay submarine cables and pipelines;

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<sup>49</sup> Barnes, Richard, *Property rights and natural resources*, Hart Publishing, Oxford and Portland (Oregon-USA), 2009 - *Studies in international law*, volume 22 – pages 270 to 282

(d) freedom to construct artificial islands and other installations permitted under international law;

(e) freedom of fishing;

(f) freedom of scientific research;

- that the high seas shall be reserved for peaceful purposes;

- that no state may validly purport to subject any part of the high seas to its sovereignty;

- that all states, whether coastal or land-locked, have the right to sail ships flying their flag on the high seas (right of navigation).

53. According to Unclos, articles 112 & 115 & 116 & 117, all states:

- are entitled to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf;

- have the right for their nationals to engage in fishing on the high seas subject to: (a) their treaty obligations; (b) the rights and duties as well as the interests of coastal states and (c) the provisions of this section 2 of Part VI of Unclos (regarding the conservation and management of the living resources of the high seas);

- have the duty to take, or to cooperate with other states in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

54. Pursuant to Unclos, article 257, all states, irrespective of their geographical location, and competent international organizations have the right, in conformity with Unclos, to conduct marine scientific research in the water column beyond the limits of the exclusive economic zone.

55. It is clear that the high seas are a '*res communis*' belonging to the international community.

**The High Seas are beyond the limits of any national jurisdiction.**

So, these 'High Seas' may be all what is left of the '*mare liberum*' of the famous Dutch legal scholar Hugo Grotius.

*Rights and charges under Unclos*

56. This '*res communis*' that are the waters of the 'High seas', is subject to following freedoms benefiting to all states, to following duties and restrictions to be lived up to by all states, and to following rights:

- freedom of navigation;

- freedom of overflight;

- freedom to lay submarine cables and pipelines;

- freedom to construct artificial islands and other installations<sup>50</sup> permitted under international law;

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<sup>50</sup> In his book 'Inleiding tot het internationale zeerecht' (=Introduction to international maritime law) - published by Kluwer, Antwerp, 1997 - Professor Somers of the University of Ghent wonders who is to exercise control over these artificial islands and offshore installations in the High Seas. He suggests that the jurisdiction and control be entrusted to the International Seabed Authority with regard to the artificial islands and installations built for purposes of mining and extraction in the Area, and that the other artificial islands and installations be controlled by the state that has built them or by the state that has granted the licence or permit for building them, or by the nearest coastal state. In reality, things can be taken care of in a much simpler and more efficient way: it suffices to assimilate these islands and installations to seagoing ships, provide them with a flag and a nationality, and

- freedom of fishing;
- freedom of scientific research;
- duty of protection and preservation of the marine environment and the prevention, reduction and control of pollution thereof (Unclos, article 192 & part XII);
- duty of conservation and management of living resources (Unclos, art.117)<sup>51</sup>;
- right to conduct marine scientific research (Unclos, article 257);
- private rights *in personam* based on licences, concessions or leases granted for exploration and exploitation (e.g. fisheries, aquaculture, production and storage of energy etc.) – these rights are temporary as they only exist and last for the duration of the licences, concessions or leases involved;
- private rights *in rem* (see no 57 *infra*).

#### *Patrimonial rights*

57. With respect to property rights and other rights *in rem* regarding the high seas, only the private property rights and other rights *in rem* owned by the holders of licences and concessions are to be dealt with.

Those property rights and rights *in rem* only exist with regard to following movable goods:

- mobile offshore units
- living resources appropriated pursuant to the licences, concessions or leases but only for the duration of these licences, concessions or leases.

#### *Registration*

58. The deeds evidencing the private property rights and other rights *in rem* regarding the mobile offshore units in the High Seas (i.e. building contracts, sales and purchases, .. and underlying concessions or licences) as well as the deeds creating mortgages against these mobile offshore units are eligible for registration at the ship registry (cf. point 19 *supra*).

### **H. THE AREA**

59. The "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (article 1) i.e. beyond the outer limit of the continental shelf.

It follows from Unclos, articles 136 and 137:

-that the Area and its resources, meaning “all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules”, are the common heritage of mankind;

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have them controlled by their flag state. This is what the Comité Maritime International (CMI) advocates and what I subscribe to (see my paper, no 37).

<sup>51</sup> A United Nations Convention on Biological Diversity (CBD) was signed in 1992

The objectives of this CBD are: “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.”

For several years, the countries that are party to his convention have been seeking an agreement on the establishment of marine protected areas in marine areas beyond the limits of national jurisdiction.

Cf. Kinball, Lee A., *The international legal regime of the high seas and the seabed beyond national jurisdiction and options for cooperation for the establishment of marine protected areas (MPAS) in marine areas beyond the limits of national jurisdiction*, CBD Technical Series No.19, published by the Secretariat of the Convention on Biological Diversity (CBD); Montreal (Canda), November 2005



- that no sovereignty or sovereign rights shall be claimed or exercised by any state over any part of the Area or its resources, and that no part thereof shall be appropriated by any state or natural or juridical person; and that no such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized;
- that all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the International Seabed Authority (in short ISA – [with headquarters in Kingston/Jamaica](#) - hereinafter called the ‘Authority’) shall act; and these resources are not subject to alienation;
- that the minerals, meaning “resources recovered from the Area”, may only be alienated in accordance with this Part XI of Unclos and the rules, regulations and procedures of the Authority;
- that no state or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part XI of Unclos; and that otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

60. According to articles 140 and 141 of Unclos, the activities in the Area shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing states and of peoples who have not attained full independence or other self-governing status, and the Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, and the Area shall be open to use exclusively for peaceful purposes by all states, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part XI of Unclos.

61. This part XI contains articles providing for marine scientific research to be carried out for peaceful purposes and for the benefit of mankind as a whole (article 143), for the protection of marine environment (article 145 ), for the protection of human life (article 146) and for the preservation of all objects of archaeological an historical nature (article 149).

62. According to Unclos, article 147.2, installations<sup>52</sup> used for carrying out activities in the Area shall be subject to the following conditions:

- (a) such installations shall be erected, emplaced and removed solely in accordance with this part XI and subject to the rules, regulations and procedures of the Authority; due notice must be given of the erection, emplacement and removal of such installations, and permanent means for giving warning of their presence must be maintained;
- (b) such installations may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity;
- (c) safety zones shall be established around such installations with appropriate markings to ensure the safety of both navigation and the installations; the configuration and location of such safety zones shall not be such as to form a belt impeding the lawful access of shipping to particular maritime zones or navigation along international sea lanes;
- (d) such installations shall be used exclusively for peaceful purposes;
- (e) such installations do not possess the status of islands; they have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive

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<sup>52</sup> See also: footnote 50 regarding the jurisdiction and control to be exercised over these installations, [and footnote 51 regarding the UN Convention on Biological Diversity.](#)

economic zone or the continental shelf.

63. According to Unclos, articles 153 and 170, activities in the Area shall be carried out (a) by the Enterprise, and (b) in association with the Authority by states parties, or state enterprises or natural or juridical persons which possess the nationality of states Parties or are effectively controlled by them or their nationals, when sponsored by such states, or any group of the foregoing which meets the requirements provided in part XI<sup>53</sup> of Unclos and in annex II to Unclos.

64. Pursuant to Unclos, article 256, all states, irrespective of their geographical location, and competent international organizations have the right, in conformity with the provisions of Part XI, to conduct marine scientific research in the Area.

#### *Belgium*

65. The Belgian act of 17 August 2013<sup>54</sup> relating to the prospection, the exploration and the exploitation of the resources of the seabed and its subsoil beyond the limits of national jurisdiction elaborates on these Unclos provisions regarding the Area.

Article 4 of this act authorises the King to implement the rules, regulations, and procedures of the Authority.

Article 8 of the act deals with the procedure of sponsorship by the Belgian state of the applicants for a contract with the Authority.

#### *Rights and charges under Unclos*

66. The Area and its resources are the common heritage of mankind, represented by the International Seabed Authority.

The exclusive economic rights to be exercised by the International Seabed Authority “for the benefit of mankind”, are subject to:

- the right of all states to lay and maintain cables and pipelines (Unclos, art.112);
- protection and preservation of the marine environment and the prevention, reduction and control of pollution thereof (Unclos, articles 142 & 145 & 192 & part XII)
- marine scientific research (Unclos, articles 246 & 256 & part XIII)
- protection of archaeological and historical objects (Unclos, art.149 & 303)
- private rights *in personam* based on licences, concessions or leases granted by or with the consent of the Authority to companies for exploration and exploitation of the Area (e.g. sand and gravel extraction, crude oil and natural gas extraction, mining, aquaculture, dumping of dredging material.. etc.) – these rights are temporary as they only exist and last for the duration of the licences, concessions or leases involved
- private rights *in rem* (see no 67 *infra*).

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<sup>53</sup> This part XI of Unclos was implemented by an “Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982”, done at New York on 28 July 1994; this agreement has substantially simplified the regulations on deep sea mining activities; it also severely restricted the role, functions and importance of the Enterprise that risks never to come into operational existence. – see: Somers, Eddy, *Inleiding tot het internationaal zeerecht*, Kluwer, Antwerpen, 1997 – pages 210 to 214

<sup>54</sup> Belgian official journal (Belgisch Staatsblad / Moniteur belge) of 16 September 2013

*Patrimonial rights*

67. With respect to property rights and other rights *in rem* regarding the Area, only the private property rights and other rights *in rem* owned by the holders of licences, concessions or leases are to be dealt with.

Those property rights and rights *in rem* exist with regard to following goods:

- fixed offshore units (offshore installations and structures attached to the seabed) – these rights are temporary because they only exist and last for the duration of the underlying licences, concessions or leases;
- pipelines and cables lying on the seabed or embedded into the seabed;
- resources appropriated pursuant to the licences, concessions or leases but only for the duration of these licences, concessions or leases.

*Registration*

68. The deeds regarding the rights in offshore units fixed to the soil of the Area (i.e. building contracts, sales and purchases – to be supported by technical descriptions and by detailed spatial information and adequate marine cadastre data regarding the exact geographic location of the unit and accompanied by the underlying concessions or licences) as well as the deeds creating mortgages against these fixed offshore units would be eligible ‘*de lege ferenda*’ for registration at the ship registry in Belgium.

For the conditions of this registration, as well as the legislative steps to be taken and the advantages involved, I refer ‘*mutatis mutandis*’ to my comment under nos 40, 41 and 42 *supra*.

**I. ISLANDS**

69. It follows from Unclos, article 121:

- that an island is a naturally formed area of land, surrounded by water, which is above water at high tide;
- that the territorial sea, the contiguous zone, the exclusive economic zone (EEZ) and the continental shelf of an island are determined in accordance with the provisions of Unclos applicable to other land territory ;
- that rocks which cannot sustain human habitation or economic life of their own have no exclusive economic zone or continental shelf.

70. It should be noted:

- that the comments contained in this paper about the territorial sea, the contiguous sea, the EEZ and the continental shelf also apply to the corresponding marine zones of the islands;
- that artificial islands, installations and structures – referred to above as ‘offshore units’ - do not possess the status of islands (Unclos, articles 60.8 and 80).

**J. PROVISIONAL CONCLUSIONS**

71. The findings in this paper emphasise the need for substantial new legislation to urgently address and regulate some very important issues:

1. the description and delimitation of the marine public domain including the soil and subsoil of the territorial sea– in Belgium and probably in many other member states;
2. the possibility to create private rights *in rem* and ‘hypothecs’/mortgages on ‘conceded’ parts of this public domain;

3. the assimilation of fixed offshore units in the waters beyond the territorial sea to seagoing vessels for the purpose of registration, attachment/arrest/seizure and mortgage;
4. the establishment of basic principles, semantics, rules and procedures relating to the creation of a marine cadastre (in Belgium and all other member states);

72. These national legislative initiatives **should** be preceded by, and based on, EU orientations, communications and/or directives.

Moreover, there is an urgent need for the EU to harmonise the many and confusing European legal instruments regarding all things marine and maritime – a kind of ‘codex’ that would also contain basic common EU guidelines and principles relating to # # 1 to 4 referred to in the previous paragraph 71.

73. The status of the fixed offshore units would ideally be established by an international convention prepared by the International Maritime Organisation (IMO) and the Comité Maritime International (CMI). An intervention and assistance by IMO and CMI would also be very welcome with respect to the creation of a marine cadastre.

74. Any marine cadastre unit or parcel will have to take into account:

1. the tridimensional and volumetric reality of every distinct marine zone (sea surface & water column & seabed or soil & subsoil) with:
  - a) the rights and charges under Unclos  
(see: nos 9 & 34 & 47 & 56 & 66 *supra* of this paper),
  - b) the patrimonial rights  
(see: nos 17 & 38 & 50 & 57 & 67 *supra* of this paper);
2. a fourth dimension, meaning the temporary nature of many particular rights because of the time aspect of most sea-linked activities (fixed terms licences, concessions and leases for mining, production of energy, aquaculture, fishing, etc... ).

75. Finally, this paper which is understandably focused on Belgium, should ideally be supplemented by an addendum with information about the situation in the other EU coastal states.

So, it would be useful if ELRA members or members of the other European associations concerned (PCC-Permanent Committee on Cadastre, Eulis, Eurogeographics and CLGE) could answer following specific questions:

*1. What is the property statute of the seabed of the territorial sea in your country?*

*Does the territorial sea belong to the national state?*

*Is it part of the national public domain?*

*Under what legal provision (constitution, act, decree..)?*

*2. Can rights in rem (property rights, usufruct, servitudes/usufruct, emphyteusis, superficies..) and/or security rights (mortgages, privileges/liens, attachments/seizures) be created against fixed offshore ‘artificial islands, installations or structures’ on conceded or leased parts of the seabed of the territorial sea?*

*Under what legal provision (act, decree..)?*

*3. If so: can the rights in rem and the security rights referred to under 2 be registered at the land registry?*

*If so: what cadastral (marine cadastre?) or spatial data of the ‘plot/parcel’ are required for this registration?*

*4. Can rights in rem (property rights, usufruct, servitudes/usufruct, emphyteusis, superficies..) and/or security rights (mortgages, privileges/liens, attachments/seizures) be created against fixed offshore 'artificial islands, installations or structures' on conceded or leased parts of the seabed of the exclusive economic zone (EEZ)?*

*Under what legal provision (act, decree..)?*

*5. If so: can the rights in rem and the security rights referred to under 4 be registered at the land registry?*

*If so: what cadastral (marine cadastre?) or spatial data of the 'plot/parcel' are required for this registration?*

Antwerp, 26 June 2015

G. De Latte

Ship mortgage registrar (ship mortgage registry at B-2000 Antwerpen, Italiëlei 4 box 3)  
Secretary of the Belgian Royal Federation of Mortgage Registrars (*Koninklijke Federatie der Hypotheekbewaarders van België / Fédération Royale des Conservateurs des Hypothèques de Belgique*)

Special ELRA representative for marine cadastre