



Marta Lourenço Marques Vicente Gueifão

**THE INFLUENCE OF THE EUROPEAN UNION ON THE FUTURE OF THE  
GOVERNANCE OF MEMBER STATES' SEAS**

Dissertation to obtain a Master's Degree in Law,  
in the specialty of International and European Law

Supervisor:

Dr. Assunção Cristas, Professor at the Nova School of Law

December 2022





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### **Anti plagiarism statement**

I hereby declare that the work I present is my own work and that all my citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offence.

*Marta Lourenço Marques Vicente Gueifão*

Marta Lourenço Marques Vicente Gueifão

## Acknowledgments

I want to start by thanking my parents for making me see that excellence prevails over perfection. To my father, for the example of focus and persistence that has instilled in me for as long as I can remember. To my mother, for her unconditional support and for believing that I am always capable of delivering more and better.

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## Quoting and other Conventions

The writing of this dissertation is done in British English and follows ‘The Chicago Manual of Style’ citation guidelines.

The quotation of other works will be done in footnotes as follows: (i) books – author(s), year, title in italics, place of publication and publisher; (ii) articles – author(s) or institution, year, title in quotation marks, the name of the periodic in italics, volume, issue, pages cited and its DOI (Digital Object Identifier); (iii) academic works – author(s), year, title in quotation marks, publisher. Moreover, the complete reference will be available in the Bibliography chapter.

For websites and other media sources which contain relevant information, their source will be identified, followed by the date of access, as well as the link where the specific information is present.

Official communications will be mentioned as follows: institution, year, form (in quotation marks), publisher, date of access and website. As for Reports, the format will be: institution, year, title (in italics), place of publications and publisher.

All legal instruments will be briefly identified in the text and completed in the footnotes, as well as in the Bibliography chapter.

Similarly, the jurisprudence mentioned in the text will be cited in the footnotes with further identifying information (the case number and the deciding body), and in the Bibliography chapter too.

Recurring citations will be mentioned in the footnotes as a short note as follows: author’s surname and page number(s) (e.g., Gueifão, 23-30). However, when the same source is used two or more times consecutively, the word ‘Ibid’ (short for the Latin *ibidem*) will be used instead, followed by a comma and the page number(s).

When quoting an excerpt from a text, the transcription will be in quotation marks. If a quote is not available in English, I will take the liberty to translate it in view of the imperative of clairvoyance. Whenever this is the case, it will be mentioned on the respective footnote. Extensive quotes (more than 60 words) will be highlighted from the body of the text for emphasis.

In the context of this Thesis, italics will also be used to refer to Latin words.

In addition, all the abbreviations and acronyms used in the text will be identified in alphabetical order in the List of Abbreviations and Acronyms chapter.

It suffices to say that whenever some information is incomplete, this is due to its absence in the source.



## **List of Abbreviations and Acronyms**

**AAP 2.0** – Atlantic Action Plan 2.0

**CFP** – Common Fisheries Policy

**CISE** – Common Information Sharing Environment

**CLCS** – Commission on the Limits of the Continental Shelf

**DG MARE** – Directorate-General for Maritime Affairs and Fisheries

**EC** – European Commission

**ECJ** – European Court of Justice

**EEC** – European Economic Community

**EEZ** – Exclusive Economic Zone

**E.g.** – Example

**EP** – European Parliament

**EU** – European Union

**EUMSS** – European Union Maritime Security Strategy

**Eurocid** – Jacques Delors European Information Centre

**Fig.** – Figure

**ICJ** – International Court of Justice

**I.e.** – That is

**IILSS** – International Institute for Law of the Sea Studies

**IMP** – Integrated Maritime Policy

**IOG** – International Ocean Governance

**ISA** – International Seabed Authority

**MS** – Member States

**MSP** – Maritime Spatial Planning

**NM** – Nautical Miles

**No.** – Number

**NOS** – National Ocean Strategy

**OECD** – Organisation for Economic Cooperation and Development

**PM** – Prime Minister

**REE** – Rare Earths Elements

**SDGs** – Sustainable Development Goals

**TEU** – Treaty on European Union

**TFEU** – Treaty on the Functioning of the European Union

**UK** – United Kingdom

**UN** – United Nations

**UNCLOS** – United Nations Convention on the Law of the Sea

**UNRIC** – United Nations Regional Information Centre

**VAT** – Value Added Tax

### **Statement regarding length of dissertation**

The body of this dissertation, including spaces and footnotes, has 119.067 characters.

## **Abstract**

Clearly, the European Union has been acquiring an eminent presence in relation to the management of the governance of the seas of its Member States, mainly since its accession to the United Nations Convention on the Law of the Sea, which has prompted a growing adoption of European maritime management policies. These European policies may intend to create some positive impacts on the management of Member States' seas; however, they also seem to be the cause of certain negative, albeit sometimes subtle, effects.

This dissertation aims to explain the extent to which the European Union might play a role in the managing of the governance of its Member States' seas which would jeopardise the national interests of the latter. In this regard, the threat of the 'Europeanisation of the Sea' will be particularly discussed. Or, in other words: the risk of the 'European Sea' narrative.

The challenges of the 'Europeanisation of the Sea' and how this process can introduce a change of paradigms will also be addressed, especially regarding the Portuguese case since Portugal has one of the largest maritime areas in the world, and, most notable, one of the largest in the European Union. In addition, this research work will clarify how the extension of the continental shelf, a possibility provided for in the UNCLOS, is crucial for the country.

The study of these matters is highly relevant for several reasons, given that the 'Europeanisation of the Sea' is a complex issue that may have repercussions that will be perpetuated in different ways among the Member States. Thus, it can be said that the study on the relevance of the influence of the European Union in the future of the governance of Member States' seas is associated with the analysis of the impacts that this may cause in relation to their national interests, in this case focusing on Portugal.

Ultimately, this dissertation will seek to answer some questions, namely: (i) what is the importance and the impact of the UNCLOS for the Law of the Sea, especially taking into account that it foresees the possibility for States Parties to extend their continental shelves (when they fulfil the requirements outlined in the Convention); (ii) what is the consequence of the accession of the European Union to the UNCLOS, which is connected to the narrative of the 'European Sea'; and (iii) what are the implications that this entails

for Portugal and how can the country safeguard its interests. In the final conclusions, there will be some reflections on the theme developed, whereas the main contributions of the research consist in approaching this subject in a holistic way to bring some clarity.

**Keywords:** Continental Shelf, European Union, Europeanisation of the Sea, Law of the Sea, Maritime Areas, Maritime Management Policies, Portugal, UNCLOS.

## Resumo

É patente que a União Europeia tem vindo a adquirir uma presença eminente relativamente à gestão da governação dos mares dos seus Estados Membros, principalmente desde a sua adesão à Convenção das Nações Unidas sobre o Direito do Mar (CNUDM), que motivou uma crescente adoção de políticas europeias de gestão marítima. Estas políticas comunitárias podem tencionar gerar alguns impactos positivos na gestão dos mares dos Estados Membros; no entanto, também demonstram ser a causa de certos efeitos negativos, embora por vezes subtis.

A presente dissertação visa explicar em que medida a União Europeia poderá vir a desempenhar um papel na gestão da governação dos mares dos Estados Membros que ponha em causa os interesses nacionais destes últimos. Neste sentido, analisar-se-á particularmente a ameaça da ‘Europeização do Mar’. Ou, por outras palavras: o risco da narrativa do ‘Mar Europeu’.

Os desafios da ‘Europeização do Mar’ e a forma como este processo pode introduzir uma mudança de paradigmas, serão também abordados, especialmente no que diz respeito ao caso português, uma vez que Portugal conta com uma das maiores áreas marítimas do mundo, e, sobretudo, uma das maiores da União Europeia. Pretender-se-á ainda esclarecer como a extensão da plataforma continental, uma possibilidade prevista na CNUDM, é um tema crucial para o país.

O estudo destas questões é altamente relevante por várias razões, uma vez que a ‘Europeização do Mar’ é uma problemática complexa que pode ter repercussões que se perpetuarão de diferentes maneiras entre os Estados Membros. Assim, pode dizer-se que o estudo sobre a relevância da influência da União Europeia no futuro da governação dos mares dos Estados Membros se prende com a análise dos impactos que esta pode causar em relação aos interesses nacionais dos mesmos, neste caso centrando-se em Portugal.

Em última análise, este trabalho de investigação procurará responder a algumas questões, nomeadamente: (i) qual é a importância e o impacto da CNUDM para o Direito do Mar, especialmente tendo em conta que esta prevê a possibilidade dos Estados Partes alargarem as suas plataformas continentais (quando reúnam e cumpram os requisitos delineadas na Convenção); (ii) qual a consequência da adesão da União Europeia à CNUDM, que está

interligada à narrativa do ‘Mar Europeu’; e (iii) quais são as implicações que isso comporta para Portugal e de que forma é que o país poderá salvaguardar os seus interesses. Nas conclusões finais, serão feitas algumas reflexões sobre a temática desenvolvida, tendo esta dissertação como principal contributo uma abordagem holística do tema, de modo a trazer alguma clareza.

**Palavras-chave:** Áreas Marítimas, CNUDM, Direito do Mar, Europeização do Mar, Plataforma Continental, Políticas de Gestão Marítima, Portugal, União Europeia.

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## **1. Introduction**

### **1.1. Background and Scope**

The growing and renewed interest of international actors in maritime affairs seems to be a pertinent feature to be addressed. This is not accidental, but results from the increasingly concrete notion of the growing importance of maritime spaces from the perspective of security and defence, economy, and scientific development. For geographical reasons, some European Union (EU) Member States (MS) are presented with demanding challenges, as the EU may end up having a major influence on the future management of their maritime areas. This is a reality leading to a phenomenon which will be called the ‘Europeanisation of the Sea’.

The United Nations Convention on the Law of the Sea (UNCLOS) is an instrument of international law to which the EU and all its MS are parties, and which prescribes rights and obligations for both. However, what is the relevance of this legal instrument for the Law of the Sea? What does the EU’s accession to this Convention mean for the MS? What are the challenges that Portugal may encounter with the expansion of the EU’s competences in sea-related matters?

To answer all these questions, this Thesis will use as its main argument the influence of the EU on the future of the governance of MS’ seas, focusing, particularly, on the case of Portugal. To this end, it should rather be acknowledged that the development of economic, military and political strategies, supported by a strategic culture of affirmation of the States’ national interests, may converge in an adequate, viable and acceptable integral strategy which may help face the challenges ahead. Moreover, through a proper analysis of these development tactics, it will be possible to understand how the desirable balance of interests can be achieved.

Nevertheless, it will be noted that Portugal can only carry out such strategies if it manages to preserve its sovereignty, jurisdiction and control over its sea. This notion of ‘Portuguese Sea’ is attributed to the country either by International Law, the UNCLOS or EU Law which, in the areas assigned to it by the Treaties governing the EU – Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) – takes precedence over national law. From this perspective, the ‘Europeanisation of the

Sea' could then be seen as a threat to Portugal's sovereignty and economic security, and as an obstacle to its development.

The chosen argument will be structured and developed around an array of factors (to be outlined in the following section). These, in addition to helping to answer the abovementioned questions, will also highlight the importance that the Sea has and may come to have for Portugal's national interests, the threat that the country faces through the 'Europeanisation of the Sea' phenomenon, and some considerations on how it might be possible to overcome this threat and safeguard the country's interests.

It is thus undeniable that, in recent years, the subject of the Law of the Sea has come to the centre of major political debates around the world. This may be due, among other factors, to the development of new policies on sea-related issues and the increasing detail given to the legal instruments regulating them. It may also be seen due to the growth of States' involvement in sea-related activities. For whatever the reasons, the oceans have eventually become one of the most pressing issues of our time. A large majority of coastal States have placed it at the top of their political agendas and have found their own ways to approach the growing value of the oceans. This, in turn, has given rise to a problematic phenomenon, already evidenced as the 'Europeanisation of the Sea', which is a scenario that this Thesis will consider as possible in the medium-long term, and which may pit national and European interests against each other.

## **1.2. Aim and Objectives**

The purpose of this study is to understand if the 'European Sea' narrative appears as a threat to MS – particularly to a State such as Portugal –, despite the rights and duties of States (coastal and landlocked) being contemplated and protected by current instruments of international law, as is the case of the UNCLOS. Furthermore, the aim is to determine whether the existing legal instruments are adequate and sufficient to face the 'Europeanisation of the Sea' or whether future initiatives to strengthen EU legislation on sea-related matters could be a problem for the national interests (this research will essentially consider those focused on the sea) of MS. In the event of an imminent threat, it is then important to assess how States can best safeguard and protect their interests considering the existing international and legal context. Therefore, this Thesis attempts

to answer the following question: ‘How might the growing influence of the European Union pose a threat to the future management of the seas of its Member States, particularly that of Portugal?’. To this end, four objectives have been set out:

- Firstly, the key aspects necessary to understand the topic under study should be theoretically framed. In this sense, this Thesis will start by briefly addressing the historical background of the oceans, mentioning the constant competition between different regimes and doctrines related to the freedom of the seas. Furthermore, it will demonstrate how the United Nations (UN) has played a decisive role in ensuring the best management of the oceans, starting with the evolution of the codification of the Law of the Sea until the emergence of the UNCLOS, briefly exposing the maritime zones defined by this Convention.
- Secondly, the context that led to the association of the ‘Europeanisation of the Sea’ as a threat must be explained (theoretically and empirically). Thus, this study will begin by providing an explanation of the process of the EU’s accession to the UNCLOS, and how this represented a new paradigm for MS. Furthermore, it will be possible to assess the threat of the ‘Europeanisation of the Sea’, starting by considering the maritime management policies as covered by the UNCLOS, and proceeding to a distinction between the Exclusive Economic Zone (EEZ) and the Continental Shelf which will be essential to put into perspective the importance and implications of the continental shelf extension process. Finally, for a complete understanding, the European maritime management policies will be addressed, and it will be demonstrated how these pose a threat to MS’ maritime management.
- Thirdly, the specific case of Portugal should be contemplated, by addressing the Portuguese link with the ocean, the opportunities that the UNCLOS has brought to the country, and the threat that the narrative of the ‘European Sea’, to the detriment of the consolidation of a ‘Portuguese Sea’, represents for Portugal’s national interests.
- Fourthly, consideration should be given to strategies that Portugal could use to overcome the identified threat.

In an effort to achieve these objectives, this Thesis will be undertaking a study which will provide a broad understanding of the legal instruments and practices surrounding the issue

of the 'Europeanisation of the Sea'. Besides highlighting the limitations of this issue, an attempt will be made to understand which is the best way forward.

### **1.3. Structure, Methodology and Literature review**

This Thesis adopts an approach which allows, from different contextual perspectives, to lead to a better understanding of the proposed theme. Thus, the research is structured into six chapters which are particularly dedicated to the analysis of each of these perspectives. Although these aspects complement each other, a specific approach was followed for each of them. Consequently, a chapter by chapter overview of the methodology adopted seems logical, whilst outlining the structure that was followed.

The first Chapter is entitled 'Introduction' and is subdivided into three sections. The first section – 'Background and Scope' – presents the main argument of this Thesis and the rationale on which it is based. The second section – 'Aim and Objectives' – briefly determines what the question of this research is, hence setting out the general objectives that will lead to its answer. The third section – 'Structure, Methodology and Literature review' – summarises the organisation of this Thesis on a chapter by chapter basis and justifies the methodological options chosen, preceded by a literature review.

The second Chapter – 'Oceans and the Law of the Sea: historical context' – focuses on a brief historical evolution of the doctrine of the Law of the Sea, showing how it has oscillated between a doctrine of freedom and another of appropriation of the sea. It awakens to a current and future context of gradual appropriation of maritime spaces, which today are mostly considered spaces for public use. This chapter further identifies the role of the UN in the creation of what has become a breakthrough agreement which has paved the way for better management of maritime spaces. The various contributions to this chapter help to clarify very briefly the historical context of ocean doctrines and regimes, thus allowing for the introduction of the following chapters. It is worth stressing that this chapter is far from exhausting all these issues, thus drawing attention only to the most relevant aspects to then pursue the objectives of this Thesis.

The third Chapter – 'The United Nations Convention on the Law of the Sea' – is divided into three parts. The first part – 'The beginnings of the codification of the Law of the Sea'

– covers the evolution of the Law of the Sea and shows how this is a very comprehensive branch which regulates various aspects of international law, some that already existed as a customary norm, and others that did not exist before. Moreover, the general principles governing this branch of law are analysed. The second part – ‘The UNCLOS’ – presents the theoretical foundations of the UNCLOS, carrying out a legal examination of the international negotiation which resulted in this Convention. This is followed by a subsection – ‘Maritime areas defined by the Convention’. The latter analyses the relevant provisions enshrined in the UNCLOS and proceeds with their interpretation. The third part – ‘The European Union accession to the UNCLOS’ – is an overview of how the EU’s accession to the UNCLOS was made possible, so as to understand one of the processes which led to the intensification of the threat outlined in the chapter that follows. The information outlined in this chapter results mainly on the analysis of EU and UNCLOS legislation.

The fourth Chapter – ‘The threat of the Europeanisation of the Sea’ – builds on the growing involvement of the EU in the maritime areas of the MS. It focuses on presenting the main feature of the reconciliation between international and European law. An in-depth assessment is made of the EU’s possible intention to limit the action of MS. Thus, three examples of European Court of Justice (ECJ) cases are provided (Case C-6/04, Case C-111/05, and Case C-347/10), which illustrate actions that confirm evidence of the ‘Europeanisation of the Sea’ process. This chapter is further subdivided into two sections. The first section of this chapter – ‘Maritime Management Policies (general framework)’ – notes that the maritime management policies relating to the areas defined in the UNCLOS are dealt with under the same Convention. Special attention is paid to the distinction between the EEZ and the continental shelf, which allows for the contextualization of the discussion in the following chapter. A summary table is used to concentrate and highlight the most relevant information in this regard. This first section is further divided into one more subsection – ‘Brief overview on the extension of the Continental Shelf’ – which seeks to reflect on the benefits and disadvantages that have arisen from the possibility triggered by the UNCLOS for States Parties to request the extension of their continental shelf and takes the opportunity to summarise the instruments that establish the legal framework of this process. The second section of this chapter – ‘European Maritime Management Policies’ – contains an analysis of the EU’s main maritime management policy, the Integrated Maritime Policy (IMP). This Thesis

considers it relevant to outline three pillars of the IMP (blue economy, international ocean governance, and security and safety at sea) to address the issues within EU maritime policies that mostly affect the MS' interests at sea. The point of discussion here is to approach the steps taken by the EU which have led to its emergence as a key global actor on issues related to the sea. Various contributions were considered when tackling the issues raised before.

The fifth Chapter – 'The specific case of Portugal' – is divided into three sections. This chapter introduces the complex legal environment in which Portugal is embedded (international, European, and national) which, as the following sections address, may limit, or condition the country's interests at sea. The first section – 'Portugal's link with the Ocean' – explains how the sea has shaped Portugal's identity and made the country stand out in the world as a markedly maritime country with a remarkable past linked to the ocean. It attempts to point out what the country's current relationship with the ocean is, and some developments made in recent decades towards fostering this link. The second section – 'The role played by the UNCLOS' – underlines the importance of the UNCLOS for a country like Portugal, which has considerable interests at sea. Portugal's maritime dimension makes the country's application to extend its continental shelf a proposal that could enable it to exercise exclusive sovereignty in the exploitation of existing resources and to reposition itself favourably in the context of globalisation, taking advantage of the vast opportunities it offers. The third section – 'The threat posed by the EU' – approaches the main question of this study. It describes the interests of Portugal and the EU in the sea. Moreover, it attempts to explain how the phenomenon of the 'Europeanisation of the Sea' unfold and how it may threaten national interests. For this purpose, this Thesis analyses in detail the external and internal reality of Portugal and the major trends of the evolution of the 'Europeanisation of the Sea', focusing in greater depth on the case of Portugal. This chapter seeks to expose the threats and opportunities that Portugal faces and its vulnerabilities and potentialities, whilst reinforcing the need for Portugal to adopt new lines of action to mitigate or neutralise this threat.

The sixth and last Chapter – 'Conclusion' – draws conclusions on the research developed. This chapter assesses the degree of achievement of the objectives proposed at the beginning. It focuses on answering the research question and formulates recommendations directly related to tackling the threat outlined in the main argument. Still, it reflects on the limitations of the work undertaken and stresses that further research



on a comprehensive model of formulation and operationalisation to help mitigate or settle this issue is required. This Thesis is primarily developed through desk research on EU laws, policies and practices which reflect on the threat faced by MS, particularly Portugal. In addition, it draws on instruments of international law, Portuguese law, and relevant case law to lead to a better understanding and interpretation. To reach its conclusions, this Thesis relies on several contributions from academics, whose publications (books, articles, academic works, among other documents) prove relevant to this research. Throughout this Thesis, the disciplines of Political Science and International Relations also contributed instrumentally to present a confrontation of paradigms through theoretical and practical tools which, supported by the opinions formulated through the analysis of the various contributions, provided the necessary information for the understanding of the different spectrums of the theme under examination. Finally, the desire to pursue studies in this line of research related to the relevance of the 'Europeanisation of the Sea' is the main reason which led to the development of this Thesis.

## 2. Oceans and the Law of the Sea: historical context

In the past, the oceans were seen as communication routes which, over time, allowed and served as an engine for the development of trade, transport, mineral extraction and energy generation. Nowadays, most of the world's people live near the sea and are closely related to it<sup>1</sup>.

Throughout history, there have been various regimes and theories regarding the freedom of the seas. Oceans have been subject to the doctrine of freedom of the seas – *Mare Liberum*, as it was later shaped by Hugo Grotius –, a principle established in the 17<sup>th</sup> century that limited national rights and jurisdictions over the oceans to a narrow area of sea around a country's coast. As for the remaining area, this was accessible to everyone and belonged to no one<sup>2</sup>. Furthermore, providing a context for the Portuguese case, Grotius' position was challenged by the priest Serafim de Freitas, who in 1625 published the work *De iusto imperio Lusitanorum asiatico*, refuting Grotius' arguments. Thus, Serafim de Freitas, in his work, tried to defend the Portuguese right to discovery and its expansion derived from its conquests, as well as argued that the supreme power should remain in the hands of the Catholic Church<sup>3</sup>. Despite his arguments, the international situation of the time called for the end of the *Mare Clausum* doctrine and the advent of the freedom of the sea's regime.

Although the doctrine of ocean freedom prevailed into the 20<sup>th</sup> century, by mid-century there was a push to extend national claims over offshore resources<sup>4</sup>. As authors Antunes and Becker-Weinberg note, it was the dynamics of international affairs that dictated the oscillation between the *mare clausum* and *mare liberum* doctrines, and eventually led '(...) to a type of refashioned *mare clausum*.'<sup>5</sup> Therefore, the history of the Law of the

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<sup>1</sup> Centro Regional de Informação das Nações Unidas (UNRIC). n.d. *Oceanos e o Direito do Mar*. Accessed April 25, 2022. <https://unric.org/pt/oceanos-e-direito-do-mar/>.

<sup>2</sup> Division for Ocean Affairs and the Law of the Sea. n.d. *United Nations Convention on the Law of the Sea (a historical perspective)*. Accessed April 25, 2022. [https://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm).

<sup>3</sup> Freitas, Serafim de. 1983. *Do justo império asiático dos portugueses*. Vol. I. Lisboa: Instituto Nacional de Investigação Científica, 102-179.

<sup>4</sup> Division for Ocean Affairs and the Law of the Sea. *United Nations Convention on the Law of the Sea (a historical perspective)*.

<sup>5</sup> Antunes, Nuno Marques, and Vasco Becker-Weinberg. 2018. 'Entitlement to Maritime Zones and their Delimitation.' In *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, edited by Alex G. Oude Elferink, Tore Henriksen, and Signe Veierud Busch, 62-91. Cambridge: Cambridge University Press. doi:10.1017/9781108344302.004, 63-64.

Sea has been dominated by a central theme consisting of the competition between doctrines advocating the sea as property, and those defending its total freedom<sup>6</sup>.

In recent years there has been a trend towards increased unilateralism regarding claims at sea. The most accepted doctrine today is that of *res communis*, meaning that the sea is something destined for public use, with guarantees of freedom of navigation and exclusive exploitation, except on the high seas where the theory of the common good prevails<sup>7</sup>. In this sense, the UN has long been at the forefront of efforts to ensure the sustainable, legal, peaceful, and cooperative use of the oceans for the benefit of humanity<sup>8</sup>. Namely, the adoption of the Resolution 2749 of 1970 by the General Assembly, which states that '[t]he sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction [...] as well as the resources of the area, are the common heritage of mankind.'<sup>9</sup>, represents an effort made by the UN to protect and conserve the oceans.

Moreover, the Law of the Sea is the branch of International Law concerned with public order at sea that has seen the greatest evolution, particularly since the mid-twentieth century<sup>10</sup>. The UNCLOS<sup>11</sup> provided for a new legal balance between the interests of coastal States and those of other States. This Convention established the zoning regime – the legal regime of maritime zones according to the geographical location of each zone, and the activities which can be conducted there – which contributed to resolving the issues of States' appropriation of maritime areas<sup>12</sup>. Hence, most of the Law of the Sea is codified in it.

The ground-breaking work of the UN in adopting a comprehensive international agreement represents an important milestone in the Law of the Sea<sup>13</sup>. This agreement enshrines the notion that all problems of ocean space are closely interrelated and need to

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<sup>6</sup> Martins, Cláudio Luiz de Lima. 2008. 'A Convenção das Nações Unidas para o Direito do Mar: as perspectivas para as Operações Navais.' Rio de Janeiro: Escola de Guerra Naval, 3

<sup>7</sup> Martins. 'A Convenção das Nações Unidas para o Direito do Mar', 9.

<sup>8</sup> Centro Regional de Informação das Nações Unidas (UNRIC). *Oceanos e o Direito do Mar*.

<sup>9</sup> *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction*. 1970. A/RES/2749(XXV) (General Assembly resolution 2749, December 17).

<sup>10</sup> Coelho, Paulo Neves. 2020. 'A Convenção das Nações Unidas sobre o Direito do Mar de 1982.' *Relações Internacionais*, no. 66: 11-35. doi:10.23906/ri2020.66a02, 11.

<sup>11</sup> United Nations. 1982. 'United Nations Convention on the Law of the Sea.' *UNCLOS*. Montego Bay.

<sup>12</sup> Antunes. 'Entitlement to Maritime Zones and their Delimitation.', 64.

<sup>13</sup> Coelho. 'A Convenção das Nações Unidas', 11.

be addressed as a whole, and resolves several critical issues related to the use and sovereignty of the ocean<sup>14</sup>. In addition to establishing a clear legal regime to be complied with, it also establishes rules to facilitate international cooperation and promote peaceful use of the seas, the equitable and efficient use of their resources, and the study and preservation of the marine environment. One of the most relevant aspects of this Convention is the creation of rules which enable coastal States to extend the limits of their continental shelves beyond 200 nautical miles (NM)<sup>15</sup>. To date, 93 States have submitted requests to the UN Commission on the Limits of the Continental Shelf (CLCS) to extend their continental shelves<sup>16</sup>. This process can be considered the ultimate political division of the planet's territorial spaces, as art. 77 of the Convention grants the coastal State sovereign rights to exploit its continental shelf<sup>17</sup>. Furthermore, the legal regime currently in force is the result of a lengthy process which was the subject of a broad consensus in the international community<sup>18</sup>.

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<sup>14</sup> Division for Ocean Affairs and the Law of the Sea. 2022. *United Nations Convention on the Law of the Sea of 10 December 1982: overview and full text*. Accessed July 15, 2022. [https://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm).

<sup>15</sup> Pinto, Sérgio Carrilho da Silva. 2020. 'A Segurança Marítima nas Relações Internacionais.' *Seminário de Segurança Marítima*. Academia de Marinha. 01-30, 4.

<sup>16</sup> Division for Ocean Affairs and the Law of the Sea. 2022. *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*. Accessed June 22, 2022. [https://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](https://www.un.org/depts/los/clcs_new/commission_submissions.htm).

<sup>17</sup> Pinto. 'A Segurança Marítima', 4.

<sup>18</sup> Coelho. 'A Convenção das Nações Unidas', 11-12.

### **3. The United Nations Convention on the Law of the Sea**

#### **3.1. The beginnings of the codification of the Law of the Sea**

The first steps towards a multilateral approach to maritime space were only taken in the 20<sup>th</sup> century. The Hague Conference of 1930, also known as the First Conference for the Codification of International Law, was an effort at codification and a groundbreakingly development in international law. Matters relating to the sea included the principle of freedom of navigation, the legal nature of the territorial sea, the rights of coastal States, the definition of the baselines, the regulation of the right of innocent passage, the regime of straits, and the recognition of the contiguous zone<sup>19</sup>.

Thereafter, the codification of the Law of the Sea gained momentum in 1956, when the United Nations held its first conference, in Geneva<sup>20</sup>. The 1958 Geneva Conventions on the Law of the Sea<sup>21</sup> (a set of four legal instruments) introduced concepts such as territorial sea, contiguous zone, high seas and continental shelf. Although this conference was considered a success, significant gaps in the legal framework remained to be addressed, such as the EEZ, and a more consistent solution for defining the outer limit of the continental shelf<sup>22</sup>. Despite these limitations, it provided the basis for the contemporary international Law of the Sea and represented an important stage in the development of the codification of '[c]ustomary law emerging from centuries of state practice (...)'<sup>23</sup>, thus paving the way for the 1982 Montego Bay Convention.

Two years after, in 1960, the UN held another Conference on the Law of the Sea, then again in Geneva. This focused on two issues: the breadth of the territorial sea and the fishing limits. The Second Conference failed to agree on any reforms or modifications to the 1958 Geneva Conventions, therefore it did not contribute to the development of the Law of the Sea. Nonetheless, it highlighted the importance of seeking agreement on key

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<sup>19</sup> Coelho. 'A Convenção das Nações Unidas', 13.

<sup>20</sup> Ibid, 18.

<sup>21</sup> Treves, Tullio. n.d. '1958 Geneva Conventions on the Law of the Sea.' *Audiovisual Library of International Law*. Accessed September 23, 2022. <https://legal.un.org/avl/ha/gclos/gclos.html>.

<sup>22</sup> Coelho. 'A Convenção das Nações Unidas', 19-20.

<sup>23</sup> Antunes. 'Entitlement to Maritime Zones and their Delimitation.', 64.

aspects, such as the limits of maritime zones, that were defined at the conference that followed, which will be addressed hereafter<sup>24</sup>.

### 3.2. The UNCLOS

It was in 1967 in New York that a Maltese diplomat pointed out that the 1958 Geneva Conventions were no longer the most appropriate instruments for regulating the Law of the Sea, arguing that those were too limited to meet the new emerging challenges<sup>25</sup>. This ultimately led to the Third United Nations Conference on the Law of the Sea, which took place between 1973 and 1982 in Montego Bay, Jamaica<sup>26</sup>. This international conference came to unify and supplement the four Geneva Conventions of 1958<sup>27</sup>, constituting the legal framework of reference for the contemporary international Law of the Sea<sup>28</sup>. Therefore, the Convention established a legal regime for the seas and oceans, setting out rules applicable to all uses of the oceans and its resources<sup>29</sup>. This legal text is still regarded today as the foundational and unavoidable text on the Law of the Sea and has been dubbed as 'A Constitution for the Oceans'<sup>30</sup>.

This conference was much more representative than the previous ones, having more than 160 nations participating, many more observers attending, and being joined by various national liberation movements and specialised agencies. In addition to this wider participation, there was also a quite different political dynamic from previous conferences. In an unprecedented manner in history, a convention was agreed upon in a consensual manner<sup>31</sup>.

The resulting convention entered into force on 16 November 1994, one year after the 60<sup>th</sup> ratification, as provided for in its provisions (art. 308). After 28 years in force, many States have already ratified it – Portugal ratified it on 3 November 1997. The EU was one

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<sup>24</sup> Coelho, 'A Convenção das Nações Unidas', 20.

<sup>25</sup> Alves, Duarte Bué. 2017. *Diplomacia Azul: o mar na política externa de Portugal*. Lisbon: Caleidoscópio, 57-58.

<sup>26</sup> Coelho, 'A Convenção das Nações Unidas', 22.

<sup>27</sup> Pinto, 'A Segurança Marítima', 4.

<sup>28</sup> Coelho, 'A Convenção das Nações Unidas', 11.

<sup>29</sup> Publications Office of the European Union. 2018. 'Summaries of EU legislation.' *EUR-Lex*. Accessed April 25, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM%3A4337127>.

<sup>30</sup> As it has been remarked by Tommy T.B. Koh, the President of the Third United Nations Conference on the Law of the Sea.

<sup>31</sup> Coelho, 'A Convenção das Nações Unidas', 22.

of the parties that also ratified the Convention, a matter that will deserve particular attention in this Thesis, due to the implications that this accession may have for its Member States' interests<sup>32</sup>. Although there are still some States that have not ratified it, many of its norms have been recognised as part of customary international law, thus gaining an even wider scope of application<sup>33</sup>.

The Convention is divided into seventeen parts and nine annexes. The UNCLOS introduced several provisions (320 articles) governing all aspects of ocean space, such as: delimitation, navigation, protection, and preservation of the marine environment (Part XII); archipelagic status and transit regimes; marine scientific research (Part XIII); economic and commercial activities; continental shelf jurisdiction; development and transfer of marine technology (Part XIV); and the settlement of disputes (Part XV) relating to ocean matters<sup>34</sup>. It also established six maritime zones and their limits (as illustrated in Fig. 1) – i.e., Territorial Sea (Part II), Archipelagic States (Part IV), Exclusive Economic Zone (Part V), Continental Shelf (Part VI), High Seas (Part VII) and the Area (Part XI)<sup>35</sup>. These maritime areas have distinct levels of national jurisdictional rights, which decrease with distance from the coast<sup>36</sup>. In addition to those zones, the UNCLOS further provided for specific regimes applicable to maritime areas within them, such as the Contiguous Zone (Part II) and the Straits used for International Navigation (Part III)<sup>37</sup>.

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<sup>32</sup> Division for Ocean Affairs and the Law of the Sea. *United Nations Convention on the Law of the Sea of 10 December 1982*.

<sup>33</sup> Coelho. 'A Convenção das Nações Unidas', 11.

<sup>34</sup> Division for Ocean Affairs and the Law of the Sea. *United Nations Convention on the Law of the Sea of 10 December 1982*.

<sup>35</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

<sup>36</sup> Pinto. 'A Segurança Marítima', 21.

<sup>37</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

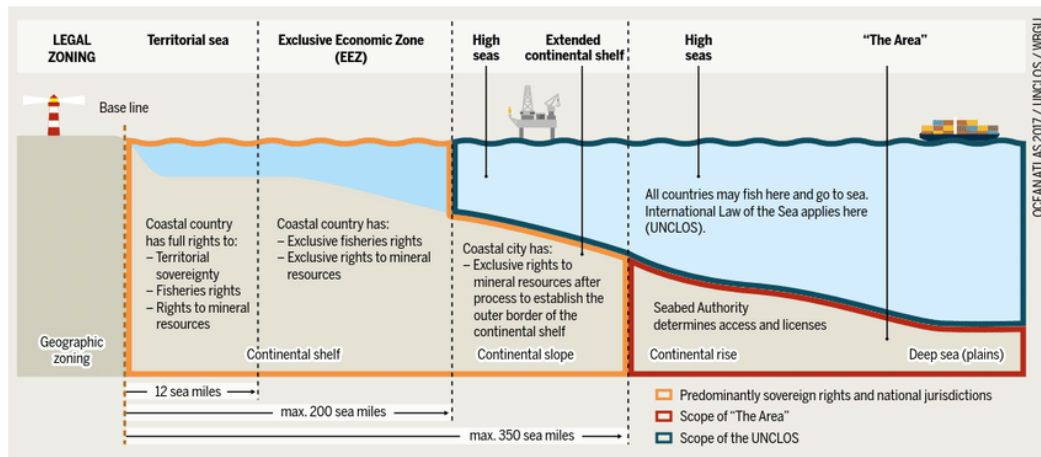


Figure 1. Maritime zones according to UNCLOS.

To sum up, quoting Antunes and Becker-Weinberg, the UNCLOS ‘(...) incorporates essentially two types of norms: one, norms geographically defining the “zones” into which the ocean is divided; and two, norms establishing the rights granted to, and obligations imposed on, states (but also international entities). The first set of norms constitutes the legal basis for the maritime entitlement of states. The second sets forth the scope and limits of the legal authority exercised by states in such zones.’<sup>38</sup> Moreover, the Convention also gave rise to three new institutions: (i) the International Tribunal for Disputes relating to the Law of the Sea; (ii) the International Seabed Authority (which governs activities in the sea); and (iii) the Commission on the Limits of the Continental Shelf (whose role is to make recommendations concerning the outer limit of the continental shelves beyond 200 NM)<sup>39</sup>.

### 3.2.1. Maritime areas defined by the Convention

The first area of interest defined in the Convention is the Territorial Sea (articles 2-32), which ‘(...) comprises the seabed and its subsoil, the adjacent waters, and its airspace.’<sup>40</sup> This is a zone of sea adjacent to the coasts where the State exercises sovereign powers as it does on land, but these are limited, since there is a right of innocent passage, as provided

<sup>38</sup> Antunes. ‘Entitlement to Maritime Zones and their Delimitation.’, 73-74.

<sup>39</sup> Pinto, Sérgio Carrilho da Silva. 2017. ‘Formulação e Operacionalização de Estratégias Nacionais de Segurança Marítima. O caso de Portugal.’ *PhD diss.* NOVA University of Lisbon: School of Social Sciences and Humanities, 12.

<sup>40</sup> Tanaka, Yoshifumi. 2012. *The international Law of the Sea*. Cambridge: Cambridge University Press, 83.



for in art. 17 of the Convention<sup>41</sup>. In its art. 19, the Convention clarifies that the '[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.'<sup>42</sup>, meaning continuous and rapid passage without entering the internal waters and abstaining from a range of activities described therein<sup>43</sup>. Furthermore, art. 25 provides that '[t]he coastal State may take the necessary steps [...] to prevent passage which is not innocent.'<sup>44</sup> In this maritime area the coastal State has several rights, such as the exclusive right to fish, the right to establish sanitary regulations, customs and tax laws, security measures, defence zones, and civil and criminal authority. The territorial sea extends to a limit of 12 NM from the baselines, which are the lines that separate the territorial sea from internal waters, and it is from them that all the UNCLOS maritime spaces are measured<sup>45</sup>.

Another area is the Contiguous Zone (art. 33), which is a zone contiguous to a State's territorial sea, and whose distance may not exceed 24 NM. The contiguous zone was an idea that developed over the centuries for economic reasons, to avoid non-compliance with Customs Laws. The coastal State may exercise limited sovereignty over it, with respect to the control of customs, taxation, immigration, and sanitary infringements. However, according to art. 33(1), and as Churchill and Lowe state 'action may be taken only in respect of offences committed within the territory or territorial sea of a State, not in respect of anything done within the contiguous zone itself'<sup>46</sup>.

The Convention also established the Exclusive Economic Zone (articles 55-75), a zone beyond and adjacent to the territorial sea, whose outer limit may extend up to 200 NM from the baseline of the territorial sea. Within this area, the coastal State has sovereign rights to explore, exploit, conserve and manage all its natural resources (art. 56). Coastal States also have jurisdiction regarding the construction, operation, and use of installations and structures for economic purposes<sup>47</sup>. In this maritime zone there is no idea of sovereignty over the space itself but over the resources that exist there. Regardless, the EEZ only guarantees the economic rights of the coastal State over natural resources, and even then, as provided in art. 62, those rights are not exclusive, in the sense that if the

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<sup>41</sup> Alves. *Diplomacia Azul*, 59-60.

<sup>42</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

<sup>43</sup> Coelho. 'A Convenção das Nações Unidas', 25.

<sup>44</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

<sup>45</sup> Coelho. 'A Convenção das Nações Unidas', 25.

<sup>46</sup> Churchill, R. R., and A. V. Lowe. 1999. *The Law of the Sea*. Manchester: Manchester University Press, 132-139

<sup>47</sup> Tanaka, Yoshifumi. *The international Law of the Sea*, 124-132.

'(...) coastal State does not have the capacity to harvest the entire allowable catch, it shall, [...] give other States access to the surplus (...)'<sup>48</sup>. Here, it is relevant to also mention the Common Fisheries Policy (CFP), which will be addressed more thoroughly below. First formulated by the Treaty of Rome in 1957 (thus before the creation of the UNCLOS), this common policy governing fisheries has been implemented at EU level and is applied in all its MS. It is important to highlight the development of the CFP following the adoption in 1970 of the EEZs by the Member States, which entrusted the management of their fisheries resources to the European Community<sup>49</sup>. Accordingly, the UNCLOS provided that it was up to the coastal States to determine its capacity to capture the living resources in their EEZs, although as noted above, it is the EU that does so in the EEZs of the Member States<sup>50</sup>.

Another area delimited by the Convention is the Continental Shelf (articles 76-85). It comprises the seabed and the subsoil of submarine areas to a maximum extent of the natural extension of a coastal State's territory. Therefore, this maritime area may reach up to 200 NM from the shore, or more under specific circumstances mentioned in the Convention. This area is of great economic importance as it has significant wealth in terms of natural resources such as oil, gas, coal, among other mineral resources, and even sedentary fishing resources<sup>51</sup>. Thus, according to art. 77 of the UNCLOS, '[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.'<sup>52</sup> Moreover, the rights on the continental shelf are exclusive in the sense that if the coastal State does not exploit them, no one else can do so without its express consent, which is not the case in the EEZ. As several States have a continental shelf which is more extensive than the length determined in the Convention, the UNCLOS allows a coastal State to extend this area up to 350 NM from the coast or

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<sup>48</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

<sup>49</sup> Breuer, Marcus Ernst Gerhard. 2022. *The common fisheries policy: origins and development*. Edited by European Parliament. Accessed September 28, 2022. [https://www.europarl.europa.eu/factsheets/en/sheet/114/the-common-fisheries-policy-origins-and-development#:~:text=A%20common%20fisheries%20policy%20\(CFP,and%20stable%20jobs%20for%20fishers](https://www.europarl.europa.eu/factsheets/en/sheet/114/the-common-fisheries-policy-origins-and-development#:~:text=A%20common%20fisheries%20policy%20(CFP,and%20stable%20jobs%20for%20fishers).

<sup>50</sup> Pinto. 'A Segurança Marítima', 22.

<sup>51</sup> Churchill. *The Law of the Sea*, 141-142.

<sup>52</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

100 NM beyond the 2,500 meters isobath (a line connecting equal points of water depth)<sup>53</sup>.

The UNCLOS also regulated the High Seas (articles 86-120), an area which lies beyond the zones described above, so beyond national jurisdiction. Tanaka explains that the principle of the freedom of the high seas (established in the early 19<sup>th</sup> century), ‘(...) means that the high seas are free from national jurisdiction [...] Consequently, each and every State has an equal right to enjoy the freedom to use the high seas in conformity with international law.’<sup>54</sup> Moreover, the high seas are defined as the maritime area open to all States (coastal or landlocked), where the traditional freedoms prevail (e.g., navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands and other installations, fishing, and scientific research)<sup>55</sup>. However, these freedoms are naturally limited to peaceful purposes<sup>56</sup>. Furthermore, articles 99, 100, 108 and 109 of the UNCLOS stipulate that all States must cooperate to prevent and punish the transport of slaves, to repress piracy, to suppress the illicit traffic of drugs, and the unauthorised broadcasting from the high seas<sup>57</sup>.

Finally, the so-called ‘Area’ (articles 133-191), one of the most innovative concepts enshrined in Part XI of the Convention. This maritime area is beyond the limits of national jurisdiction and must be used solely for peaceful purposes and for the benefit of humankind. The area and its resources are considered ‘common heritage of humanity’ (art. 136). Consequently, no State, individual or legal entity may appropriate any part of it or its resources<sup>58</sup>. The ISA was created in order to manage the activities of this maritime zone on behalf of all humankind<sup>59</sup>.

This set of concepts is essential to this Thesis, as it helps to understand the notion of the extension of the continental shelf beyond 200 NM, and the complex and detailed architecture of the Convention. In general terms, the UNCLOS regulates marine spaces, establishes the rights and duties in each delimited area, sets rules for navigation,

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<sup>53</sup> Pinto. ‘A Segurança Marítima’, 22 (translated by Marta Gueifão).

<sup>54</sup> Tanaka, Yoshifumi. *The international Law of the Sea*, 150-151.

<sup>55</sup> Coelho. ‘A Convenção das Nações Unidas’, 27.

<sup>56</sup> Alves. *Diplomacia Azul*, 59-60.

<sup>57</sup> Martins. ‘A Convenção das Nações Unidas para o Direito do Mar’, 6.

<sup>58</sup> Churchill. *The Law of the Sea*, 238-239.

<sup>59</sup> International Seabed Authority. n.d. *About ISA*. Accessed September 28, 2022. <https://www.isa.org.jm/about-isa>.

emphasises the right of innocent passage, creates measures for protection and preservation of the marine environment, and even addresses the settlement of disputes.

### 3.3. The European Union accession to the UNCLOS

The negotiations of the UNCLOS took place at a time when major developments in the Law of the Sea were occurring. It is now widely accepted, including by the EU and its MS, that most of the provisions of the Convention reflect customary international law<sup>60</sup>.

During the UNCLOS negotiations the EU, formerly known as the European Economic Community (EEC), was not a contracting party to the Convention but had an observer status. Although it was not directly represented, its views were echoed through its MS, which often made statements jointly to maintain the sense of unity of the EU<sup>61</sup>. As this Convention provided for the establishment of EEZs of 200 NM, it triggered the need for the EU to become a contracting party to the Convention<sup>62</sup> due to its exclusive competence in the conservation of marine biological resources under the CFP (Article 3(1)(d) of the TFEU)<sup>63</sup>.

The Community, together with its MS, achieved one of its major objectives with the introduction of the so-called 'EEC clause' which allowed its accession as a contracting party to the UNCLOS. This clause was eventually codified by art. 305(1)(f) and Annex IX of the Convention<sup>64</sup>. Regarding art. 305(1)(f), this states that the Convention is 'open for signature [...] by international organizations, in accordance with Annex IX'<sup>65</sup>. Concerning Annex IX, this regulates the participation of international organisations in the Convention. As stated by Paasivirta, Annex IX '(...) contents are quite detailed and tailor-made for the EU.' and '(...) sets out a number of conditions that apply for the participation of such an organisation as a contracting party.'<sup>66</sup>

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<sup>60</sup> Paasivirta, Esa. 2015. 'The European Union and the United Nations Convention on the Law of the Sea.' *Fordham International Law Journal* 38, no. 5, 4 ed.: 1045-1071, 1045-1046.

<sup>61</sup> Paasivirta. 'The European Union', 1046-1051.

<sup>62</sup> *Ibid*, 1046.

<sup>63</sup> The Member States. 2012. 'Treaty.' *EUR-Lex*. Accessed July 15, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:12012E/TXT>.

<sup>64</sup> Paasivirta. 'The European Union', 1047-1048.

<sup>65</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

<sup>66</sup> Paasivirta. 'The European Union', 1048.

The Council Decision 98/392/EC<sup>67</sup> of 23 March 1998 was intended to formally approve the binding of the EU to the UNCLOS and to the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention<sup>68</sup> - this Decision became applicable on 13 July 1998<sup>69</sup>. The EU signed the Convention in 2003, and before that all MS had signed it as well<sup>70</sup>.

Furthermore, art. 5(1) of Annex IX and art. 4(4) of the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention provide that when joining the UNCLOS, an international organisation (in this case the EU) must present a declaration of competence<sup>71</sup>, which '(...) specifies the matters governed by the convention and the agreement, in respect of which competence has been [conferred by the MS]'<sup>72</sup>. Hence, it refers to the different competences involved, namely the Union exclusive competence in the conservation of marine biological resources under the CFP, and other areas under the shared competence of the EU with its Member States (e.g., agriculture and fisheries [except conservation of marine biological resources], environment, transport, ...)<sup>73</sup>. In addition, the EU declaration of competence foresees that '[t]he scope and exercise of such Community competence are, by their nature, subject to continuous development, and the Community will complete or amend this declaration, if necessary'<sup>74</sup>. However, to date, no amendments have been made to this effect.

In this way, the UNCLOS introduced a procedure for the EU to participate in international agreements as a contracting party. Thus, even though the '(...) EU is not a State, [...] it participates in international agreements alongside States.', particularly because of the public powers transferred by its MS<sup>75</sup>. This is reflected in art. 1(2)(2) of the UNCLOS, which states that '[t]his Convention applies *mutatis mutandis* (...) ' to entities such as the EU and consequently '(...) to that extent "States Parties" refers to those entities.'<sup>76</sup>

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<sup>67</sup> Council of the European Union. 1998. 'Decision.' *EUR-Lex*. Accessed July 15, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:31998D0392>.

<sup>68</sup> States Parties. 1994. 'International agreement.' *EUR-Lex*. Accessed August 18, 2022. [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:21994A0820\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:21994A0820(01)).

<sup>69</sup> Publications Office of the European Union. 'Summaries of EU legislation.'

<sup>70</sup> *Ibid.*

<sup>71</sup> Paasivirta. 'The European Union', 1049.

<sup>72</sup> Publications Office of the European Union. 'Summaries of EU legislation.'

<sup>73</sup> Paasivirta. 'The European Union', 1050.

<sup>74</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

<sup>75</sup> Paasivirta. 'The European Union', 1046-1047.

<sup>76</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

As outlined by Paasivirta, this has two interpretations. On the one hand, it means that the EU has rights and obligations under the Convention. On the other hand, and as it was previously mentioned, the conditions for its participation require the EU to declare its competences to the other parties. This becomes central since the EU Member States are also parties to the Convention and it is of paramount importance to explain its unique position to all parties concerned. So not only is the UNCLOS '(...) part of a common phenomenon known as "mixed agreements" in terms of EU language.', but it was also '(...) the first major multilateral convention of this kind.'<sup>77</sup>

The phenomenon referred to above requires regular coordination meetings between the EU, the UN, and the contracting parties involved, thus there is a trilateral relationship. Furthermore, '[t]his close coordination is ultimately guided by the EU law principle of sincere cooperation (...)' (as set out in the EU's founding treaties), which has the vital role of maintaining cohesion and unity within the EU<sup>78</sup>.

As emphasised by the author, the EU participation in the UNCLOS appears as '(...) an inevitable outcome of the internal developments of European integration.', as it would be impossible for EU Member States to participate in the UNCLOS without the EU participation, which is something that became clearer throughout the negotiations of the Third Conference on the Law of the Sea<sup>79</sup>.

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<sup>77</sup> Paasivirta. 'The European Union', 1047-1071.

<sup>78</sup> Ibid, 1050-1051.

<sup>79</sup> Ibid, 1071.

#### 4. The threat of the Europeanisation of the Sea

As previously explained, there is no full sovereignty of coastal States over their maritime areas, and so there has been an increasing involvement of other international and regional organisations, with the aim of better dealing with the risks and threats emanating from the sea by overseeing the maritime security domain of these States. Indeed, as they only have some sovereign rights over their maritime areas, coastal States must resort to this cooperation with other States and international organisations<sup>80</sup>.

Nowadays, it is not contested that international law prevails over domestic law. However, in terms of the Law of the Sea, it is critical to understand how to reconcile the different legal systems in place, namely international law and European law (which is also international but at the same time sectoral or regional)<sup>81</sup>.

The ratification of the UNCLOS by the EU is undoubtedly the greatest proof of the internationalisation of European law, promoting the fruition of the EU's external relations and its cooperation with Third States<sup>82</sup>. Of the 27 MS of the EU, 22 are coastal States, hence representing a large part of the Union's external borders. Thus, bearing in mind that more than 70% of the Union's external borders are maritime borders<sup>83</sup>, the UNCLOS has not only contributed to its affirmation as an essential institution for the development of the Law of the Sea but also led to its assertion as a political and economic union, by allowing it to conclude conventional agreements with third countries<sup>84</sup>.

It should be noted that the Convention has the characteristic of balancing interests between States (coastal and landlocked) and to coordinate aspects of the Law of the Sea where cooperation between countries is crucial. Hence, it is clear how important the main international maritime law instrument is for the EU<sup>85</sup>.

Furthermore, it is understood that the Law of the Sea has the particularity of conferring rights and obligations in relation to specific maritime areas, and so being the 'UNCLOS

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<sup>80</sup> Pinto. 'Formulação e Operacionalização de Estratégias', 5.

<sup>81</sup> Pinto, Ana Rita Babo. 2015. 'Direito do mar: internacionalização do direito europeu ou europeização do direito internacional?' *Mateus DOC*. 1-8, 3 (translated by Marta Gueifão).

<sup>82</sup> Babo Pinto. 'Direito do mar', 1-2.

<sup>83</sup> Jacques Delors European Information Centre. n.d. *A Política Marítima da União Europeia*. Accessed September 28, 2022. <https://eurocid.mne.gov.pt/mares-e-oceanos/politica-maritima-da-uniao-europeia>.

<sup>84</sup> Babo Pinto. 'Direito do mar', 1-2.

<sup>85</sup> *Ibid*, 2 (translated by Marta Gueifão).

itself takes a zonal approach to the sea and lays down the rules and principles, not only in relation to different activities as such, but to the rights and obligations that depend on where the activities take place.’<sup>86</sup> As a contracting party to the Convention, within this framework, the EU has its own specificities.

In the EU’s case, the scope of the Convention’s legislation depends, in addition, on the territorial scope of the EU Treaties. Pursuant to art. 52 of the TEU<sup>87</sup>, the EU Treaties apply to the MS without the need for a reference to the scope of the EU. Now, this is generally interpreted to include all areas that are within the sovereignty or jurisdiction of the MS, and that includes their maritime areas. As a result, ‘(...) the territorial scope of application of EU legislation may extend to all areas and activities where the member States exercise full sovereignty or enjoy “sovereign rights”. EU law therefore normally applies to the member States’ inland, coastal, and territorial waters, as well as to the EEZ (within the limits of the enjoyed sovereign rights) (...)’<sup>88</sup>. In the case under consideration (the UNCLOS), when the EU takes on international obligations in these matters, they are consequently binding on MS as EU law, therefore as EU obligations<sup>89</sup>.

Nonetheless, it must be taken into consideration that sometimes the intention of the legislature may be to limit the territorial application in some respects<sup>90</sup>. That being said, some of the concrete and pertinent examples given by Paasivirta will now be outlined.

The author’s first example refers to the Case C-6/04 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*<sup>91</sup>, regarding the failure of a former EU Member State to fulfil its obligations related to the application of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora<sup>92</sup> (hereinafter referred to as ‘Habitats Directive’). In this judgement, the ECJ confirmed that the Habitats Directive would apply beyond the territorial waters of MS, since ‘(...) within their exclusive economic zones the Member States have an obligation to comply with

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<sup>86</sup> Paasivirta. ‘The European Union’, 1068.

<sup>87</sup> The Member States. 2012. ‘Treaty.’ *EUR-Lex*. Accessed September 5, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:12012M/TXT>.

<sup>88</sup> Paasivirta. ‘The European Union’, 1069.

<sup>89</sup> Babo Pinto. ‘Direito do mar’, 3-4.

<sup>90</sup> Paasivirta. ‘The European Union’, 1069.

<sup>91</sup> *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*. 2005. Case C-6/04 (European Court of Justice).

<sup>92</sup> Council of the European Union. 1992. ‘Directive.’ *EUR-Lex*. Accessed September 28, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31992L0043>.



Community law in the fields where they exercise sovereign powers (...)’<sup>93</sup>. Accordingly, given that the United Kingdom (UK) exercised sovereign rights over its EEZ and on its continental shelf, the Habitats Directive would then be applicable beyond the country’s territorial waters<sup>94</sup>.

The second instance is Case C-111/05 *Aktiebolaget NN v. Skatterverket*<sup>95</sup>, involving the application of the Sixth Directive 77/388/EEC on the common system of value added tax (VAT)<sup>96</sup> to the installation and supply of undersea cables. Here, the ECJ emphasised that ‘(...) the sovereignty of the coastal State over the exclusive economic zone and the continental shelf is merely functional and, as such, is limited to the right to exercise the activities of exploration and exploitation laid down in Articles 56 and 77 of the Convention on the Law of the Sea.’<sup>97</sup> The Court further provided that since the installation and supply of undersea cables was not covered in the activities listed in those articles of the Convention, operations carried out in the EEZ, and on the continental shelf, were not within the sovereignty of the coastal State. It was concluded that those activities would thereafter not be subject to VAT for the operations to be carried out in those two maritime zones<sup>98</sup>.

The last example to be highlighted here is Case C-347/10 *A. Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*<sup>99</sup>, which concerns the refusal of the Employee Insurance Agency to grant Mr. Salemink, who was employed on a gas-drilling platform on the continental shelf adjacent to the Netherlands, invalidity benefit. The Netherlands Court showed uncertainty as to whether EU law would be applicable to the continental shelf in question. The ECJ, therefore, noted that the rules and principles of international law relating to the legal regime applicable to the continental shelf had to be addressed. To that end, the Court called on the nature of the continental shelf as a natural prolongation of a country’s land territory under the sea, as ruled by the International Court of Justice (ICJ) in the North Sea Continental Shelf

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<sup>93</sup> *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*. 2005. Case C-6/04 (European Court of Justice).

<sup>94</sup> Paasivirta. ‘The European Union’, 1069-1070.

<sup>95</sup> *Aktiebolaget NN v Skatteverket*. 2007. Case C-111/05 (European Court of Justice).

<sup>96</sup> Council of the European Union. 1977. ‘Directive.’ *EUR-Lex*. Accessed September 28, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:31977L0388>.

<sup>97</sup> *Aktiebolaget NN v Skatteverket*. 2007. Case C-111/05 (European Court of Justice).

<sup>98</sup> Paasivirta. ‘The European Union’, 1070.

<sup>99</sup> *A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*. 2012. Case C-347/10 (European Court of Justice).

Cases<sup>100</sup>, as well as by the UNCLOS's art. 77 on the rights of the coastal State over its continental shelf, alongside art. 80 regarding installations on the continental shelf<sup>101</sup>. Thus, the ECJ confirmed that '(...) work carried out on fixed or floating installations positioned on the continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying EU law (...)'<sup>102</sup>. Henceforth, the conclusion to this situation was that '[a] member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions designed to ensure the freedom of movement of persons working on such installations.'<sup>103</sup>

The examples given above serve as an illustration of what one might call a European dominance in maritime affairs as far as the EU Member States are concerned. Nevertheless, there are several obstacles to the effective consolidation of the superiority of the EU vis-à-vis international bodies.

Furthermore, European law can hardly replace the role played by international law, for it is international conventions that represent the best way of finding the common ground on matters of global importance. Nonetheless, the main barrier seems to arise from the fact that we are facing a trilateral relationship (EU, UN, and the Member States themselves), rather than a two-sided (EU and UN) discussion<sup>104</sup>.

In fact, as Babo Pinto goes on to explain '(...) most MS do not apply a uniform and consistent European maritime law.'<sup>105</sup> An illustration of this is the ECJ judgment, Case C-45/07 *Commission of the European Communities v. Hellenic Republic*<sup>106</sup>, in which the Court censured Greece for engaging in commitments liable to affect Community rules within the framework of its participation in an international organisation.

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<sup>100</sup> *North Sea Continental Shelf Cases*. 1969. (International Court of Justice).

<sup>101</sup> Paasivirta. 'The European Union', 1070.

<sup>102</sup> *A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*. 2012. Case C-347/10 (European Court of Justice).

<sup>103</sup> *Ibid.*

<sup>104</sup> Babo Pinto. 'Direito do mar', 5 (translated by Marta Gueifão).

<sup>105</sup> *Ibid.*

<sup>106</sup> *Commission of the European Communities v Hellenic Republic*. 2009. C-45/07 (European Court of Justice).

It can therefore be concluded that there are still many obstacles to the assertion of European maritime law as a preponderant legal order in these matters. Some of these obstacles stem from the difficulty of concerting global maritime interests, others from the lack of internal standardisation and coordination which do not allow the EU to assume a position of international supremacy. Notwithstanding, taking into consideration all the above, it seems clearly indisputable to speak about a ‘Europeanisation of the Sea’, as will be referred to from now on<sup>107</sup>.

#### **4.1. Maritime Management Policies (general framework)**

As provided for in the UNCLOS, the maritime spaces under national sovereignty or jurisdiction are the internal waters, the archipelagic waters, the territorial sea, the contiguous zone, the EEZ and the continental shelf. In addition, the maritime management policies for these areas are also legally covered by the Convention<sup>108</sup>.

Hence, for the purpose of what is intended to be discussed in this chapter, it is relevant to emphasise the three major differences between the EEZ and the continental shelf (as listed in Table 1), in addition to the physical location and the nature of the respective powers and resources as set out earlier. Firstly, one must understand that the determination of the outer limit of the continental shelf is much more complex than that of the EEZ. The latter is calculated only by a distance from the baselines of the coastal State, whilst in the former the outer limit is determined based on the extent of the continental margin, as defined respectively in articles 57 and 76 of the UNCLOS<sup>109</sup>.

In line with Coelho, the first major difference to be addressed has to do with the fact that the EEZ’s limit can never exceed 200 NM, whereas the limit of the continental shelf may exceed well beyond that distance (under favourable geomorphological and geological circumstances). The second difference is that on the continental shelf, the rights of the coastal State exist without the need for an express or tacit proclamation (they are *ipso facto* and *ab initio*), yet by contrast, in the EEZ, there is a need for a unilateral declaration

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<sup>107</sup> Babo Pinto. ‘Direito do mar’, 3-5 (translated by Marta Gueifão).

<sup>108</sup> Ramos, Luís Eduardo Matos Dias. 2022. ‘Portugal e a Ameaça da Europeização do Mar: Contributos da Teoria Geral da Estratégia para a sua Superação.’ *PhD diss.* Lisbon: Institute of Social and Political Sciences, 50.

<sup>109</sup> Coelho. ‘A Convenção das Nações Unidas’, 26-27.

from the coastal State. Finally, on the continental shelf, the coastal State exercises sovereign rights for the purpose of prospecting and exploiting its resources (both living and non-living), which are therefore exclusive, meaning that even if the coastal State does not exploit them, no other State may do so without its authorisation. On the other hand, in the EEZ, besides the coastal State, other States (coastal or landlocked) also enjoy the freedoms referred to in art. 87 of the Convention related to the high seas' regime. Therefore, taking the example of the freedom to fish, in this maritime area when a coastal State does not have the capacity to make all its allowed catch in relation to the exploitation of its living resources, there is a duty to transfer the surplus to other States<sup>110</sup>.

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<sup>110</sup> Coelho. 'A Convenção das Nações Unidas', 27 (translated by Marta Gueifão).

<b>Rights</b>	<b>Exclusive Economic Zone</b>	<b>Continental Shelf</b>
Navigation	Freedom of navigation (art. 58)	Freedom of navigation (art. 78)
Overflight	Freedom of overflight (art. 58)	Freedom of overflight (art. 78)
Fishing	The coastal State has sovereign rights over its living resources (art. 56). However, it shall give other States access to the surplus of its allowable catch (art. 62)	The coastal State has sovereign rights over its living resources (art. 77)
Marine Scientific Research	The coastal State has jurisdiction, so all research requires its consent (art. 246). Consent is normally given to research carried out for peaceful purposes. However, this consent does not apply under a limited range of exceptions (i.e., exploration or exploitation of resources)	The coastal State has jurisdiction, so all research requires its consent (art. 246). Consent is normally given to research carried out for peaceful purposes. However, this consent does not apply under a limited range of exceptions (i.e., exploration or exploitation of resources)
Submarine cables and pipelines	Subject to the consent of the coastal State (art. 58)	Subject to the consent of the coastal State (art. 79)
Exploration and Exploitation	The coastal State has sovereign rights (art. 56)	The coastal State has sovereign rights (art. 77)
Delimitation	The EEZ shall not extend beyond 200 NM (art. 57)	The continental shelf may extend beyond 200 NM (art. 76)

Table 1. Comparison between the EEZ and the Continental Shelf (table by Marta Gueifão)

Having this as a reference, one can consider the extension of the continental shelf of a coastal State, when its limit goes beyond 200 NM, and when this has been previously approved by the CLCS. Thus, for example, valuable mineral resources that lie within 300 NM of a State's baseline, and which are located within the extent of its continental shelf, belong to that State. Nevertheless, if that State's continental shelf does not include this geographical area (up to 300 NM), those mineral resources will belong to humanity and will consequently be managed by the ISA (which grants exploration concessions to the States that request them). Therefore, the fundamental idea to convey with the previous

points is that the smaller the extent of the continental shelf of a coastal State, the larger the area managed by the UNCLOS, more specifically by the ISA<sup>111</sup>.

Certainly, as Ramos puts it, States with greater financial, scientific, technological, diplomatic, and political capacity to exploit marine resources – especially if the focus is on those with less extensive maritime areas, or even landlocked –, will have a strong interest in ensuring that the extent of the continental shelves of coastal States is as limited as possible. Following this rationale, the former would not have to obtain authorisation from the latter to carry out exploration activities over the resources that exist there. Hence, it is equally evident that, within the EU, the coastal MS that can also be considered from this point of view as being ‘geographically advantaged’ States, have a clear interest in extending their continental shelves. However, in this scenario, landlocked MS (or those with a smaller maritime area), may feel their interests harmed since, under the existing legal framework, they would have no access to these resources, which may lead them to find a way at the level of the EU to get around this<sup>112</sup>. Moreover, it is necessary to create awareness because a landlocked State, which has no coastline or sea, is perhaps understandably less sensitive to ocean issues, whereas these should be a cross-cutting concern for all States<sup>113</sup>.

Furthermore, as it was mentioned before, according to art. 3(1)(d) of the TFEU, the EU has exclusive competence to represent all its MS in the conservation of marine biological resources under the CFP<sup>114</sup>. Therefore, it is understood that resources not covered by the CFP, meaning non-biological resources, are outside the EU’s exclusive competences. This would give MS considerable freedom of action over their maritime management policies<sup>115</sup>.

Nonetheless, the IMP of the EU<sup>116</sup> addresses comprehensive maritime sectors and has the legislative capacity to issue legal acts that are binding on the MS. In this way, the EU may not only legislate and bind MS to certain rules regarding maritime management

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<sup>111</sup> Ramos. ‘Portugal e a Ameaça da Europeização do Mar’, 51 (translated by Marta Gueifão).

<sup>112</sup> Ibid, 51-52.

<sup>113</sup> Alves, Duarte Bué, interview by Mala Diplomática (podcast). 2022. *Os Oceanos na Política Externa portuguesa*. Accessed November 1, 2022. [https://www.youtube.com/watch?v=y\\_aCvNT6rqs&ab\\_channel=DiplomaciaPT](https://www.youtube.com/watch?v=y_aCvNT6rqs&ab_channel=DiplomaciaPT).

<sup>114</sup> The Member States. ‘Treaty.’.

<sup>115</sup> Ramos. ‘Portugal e a Ameaça da Europeização do Mar’, 52.

<sup>116</sup> The Integrated Maritime Policy of the European Union will be discussed in greater detail in Section 4.2.

policies, but these may also prove to be possibly detrimental to the MS' national interests, resulting in the gradual loss of their sovereignty over their maritime space<sup>117</sup>. This legal grey area paves the way for what is considered to be the 'Europeanisation of the Sea'.

#### 4.1.1. Brief overview on the extension of the Continental Shelf

Turning now to the question of the extension of the continental shelf. In art. 76 of the UNCLOS, it is established that each coastal State has a continental shelf that extends 200 NM from its baselines, and which constitutes '(...) the natural prolongation of its land territory (...)'<sup>118</sup>. Notwithstanding, the Convention also admits the possibility of extending the continental shelf beyond 200 NM if a series of conditions outlined therein are met, and a submission to that effect is made to the CLCS. Therefore, when referring to the extension of the continental shelf of a coastal State, only the seabed and subsoil beyond 200 NM from the limit of the territorial sea is considered<sup>119</sup>.

Apart from the above-mentioned article, the Annex II to the Convention and a document approved in the CLCS in May 1999 entitled 'Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf', are the most relevant documents concerning the extension of the continental shelf, the deadlines for requesting it, and the rules which must be followed<sup>120</sup>.

The extension of the continental shelf is of great relevance and desire by many coastal States. As outlined by Alves, this is primarily for political reasons and to uphold sovereignty, as the Convention enables States to ultimately grow in area. With the increase of their effective space, the sovereignty of States may also extend significantly beyond their land territory and their EEZs. Alves further suggests that this factor is crucial from the point of view of the geostrategic importance and influence of coastal States, as it allows them to develop a narrative that somehow overcomes the land paradigm inherited from history<sup>121</sup>.

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<sup>117</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 52-53 (translated by Marta Gueifão).

<sup>118</sup> United Nations. 'United Nations Convention on the Law of the Sea.'

<sup>119</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 51.

<sup>120</sup> Division for Ocean Affairs and the Law of the Sea. 2019. *Scientific and Technical Guidelines*. Accessed July 15, 2022. [https://www.un.org/depts/los/clcs\\_new/commission\\_guidelines.htm](https://www.un.org/depts/los/clcs_new/commission_guidelines.htm).

<sup>121</sup> Alves. *Diplomacia Azul*, 61-64 (translated by Marta Gueifão).

In addition, this action is also highly important from an economic point of view since the sea contains vast resources, although it is difficult to say exactly how much economic and commercial value can be extracted from them. As far as living resources are concerned, it is known that over 95% of the biosphere is present in the oceans, and the examples and potential of non-living resources are no less impressive<sup>122</sup>. Paraphrasing Alves, in terms of non-living resources, it should be to emphasize some metallic and non-metallic resources where one can find materials such as cobalt (estimated global reserves of 8.4 million tonnes in 2021<sup>123</sup>, with use in the pharmaceutical industry and construction), copper (estimated global reserves of 970 million tonnes as of 2021<sup>124</sup>, with potential use in electronics or construction), manganese (estimated global reserves of 1.7 billion tonnes in 2021<sup>125</sup>, used in steel for the glass industry, fibre optics, chemicals and electronic components), or nickel (estimated global reserves of 105 million tonnes by 2021<sup>126</sup>, the most valuable metal found in polymetallic nodules, with applications in the naval, chemical and aeronautical industries)<sup>127</sup>.

Moreover, the extension of the continental shelf is also meaningful from a security perspective, since it is something which brings new responsibilities and challenges to the coastal States concerned<sup>128</sup>.

Finally, and drawing again on Alves's reasoning, a process of this dimension and technical complexity is very empowering for coastal States, as they must develop many efforts and manners to respond to the challenges encountered. Consequently, the various developments required to meet their needs – from the training of scientists, the studies conducted, the data collected, and the partnerships established at both domestic and foreign levels – already constitute a body of oceanographic knowledge that enriches the

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<sup>122</sup> Santos, Catarina Frazão, Tundi Agardy, Edward Allison, Nathan Bennett, Jessica Blythe, Helena Calado, Larry Crowder, et al. 2022. 'A sustainable ocean for all.' *npj Ocean Sustain*, 1, no. 2: 1-2. doi:10.1038/s44183-022-00004-4, 1-2.

<sup>123</sup> Garside, Melissa. 2022. *Reserves of cobalt worldwide from 2010 to 2021*. Edited by Statista. Accessed October 15, 2022. <https://www.statista.com/statistics/1058647/global-cobalt-reserves/>.

<sup>124</sup> Garside, Melissa. 2022. *Reserves of copper worldwide from 2010 to 2021*. Edited by Statista. Accessed October 15, 2022. <https://www.statista.com/statistics/1070228/global-copper-reserves/>.

<sup>125</sup> Garside, Melissa. 2022. *Reserves of manganese worldwide from 2010 to 2021*. Edited by Statista. Accessed October 15, 2022. <https://www.statista.com/statistics/247609/world-manganese-reserves/>.

<sup>126</sup> Garside, Melissa. 2022. *Reserves of nickel worldwide from 2000 to 2021*. Edited by Statista. Accessed October 15, 2022. <https://www.statista.com/statistics/1003284/nickel-reserves-worldwide/>.

<sup>127</sup> Alves. *Diplomacia Azul*, 64 (translated by Marta Gueifão).

<sup>128</sup> *Ibid.*



States themselves. Besides, there is the benefit that these advances will last beyond the UN's decision to extend States' continental shelves<sup>129</sup>.

#### 4.2. European Maritime Management Policies

The European maritime management policies are handled by the Commissioner for Environment, Oceans and Fisheries<sup>130</sup> whose powers are delegated to him by the EC. These policies are designed to 'ensure that the ocean resources are used sustainably and that coastal communities and the fishing sector have a prosperous future [,] promote maritime policies and stimulate a sustainable blue economy [, and] promote ocean governance at international level'. Therefore, it is the responsibility of the Directorate-General for Maritime Affairs and Fisheries (DG MARE) to develop and implement the Commission's policies on such matters<sup>131</sup>.

The IMP emerged in 2007 with the publication of the EC's so-called 'Blue Book'. This policy framework was established as a new approach in order to promote the interconnection of the maritime policies and decision-making processes which were too fragmented along sectoral lines, thus '(...) aiming to foster the sustainable development of all sea-based activities and coastal regions by improving the coordination of policies affecting the oceans, seas, islands, coastal and outermost regions and maritime sectors, and by developing cross-cutting tools.'<sup>132</sup> It is about bringing together policies on seas and oceans, leading to better economic results and less environmental impact in Europe. Therefore, it focuses both on the economic and environmental dimensions of the sea<sup>133</sup>.

Among some of the issues that the IMP deals with are maritime transport and seaports, shipbuilding, employment, environment, fisheries, marine scientific research, tourism, offshore energy, .... Beyond this, the IMP also aims at coordinating the EU's external

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<sup>129</sup> Alves. *Diplomacia Azul*, 65.

<sup>130</sup> Currently Virginijus Sinkevicius.

<sup>131</sup> European Commission. n.d. *Maritime Affairs and Fisheries*. Accessed July 15, 2022. [https://ec.europa.eu/info/departments/maritime-affairs-and-fisheries\\_en](https://ec.europa.eu/info/departments/maritime-affairs-and-fisheries_en).

<sup>132</sup> Breuer, Marcus Ernst Gerhard. 2022. *Integrated Maritime Policy of the European Union*. Edited by European Parliament. Accessed July 15, 2022. <https://www.europarl.europa.eu/factsheets/en/sheet/121/integrated-maritime-policy-of-the-european-union>.

<sup>133</sup> Salvador, Regina. 2018. 'A política marítima integrada da UE: visão global e desafios para Portugal.' *Lusitana. Economia & Empresa*, no. 25: 87-97. doi:10.34628/24bq-eq52, 93.

relations in maritime affairs, with the intention of promoting a EU leadership in these matters '(...) through enhanced cooperation at the level of international ocean governance and, on a European scale (...)'<sup>134</sup>, thereby projecting the European maritime management policies not only at a regional stage, but at an international stage too.

For this Thesis blue economy, international ocean governance, and security and safety at sea will be considered as the three most important pillars of the IMP, since these particularly address issues that may clearly affect some of the MS' national interests<sup>135</sup>.

Before carrying on, it is worth stressing that the European Green Deal, presented by the EC in 2019, has become inextricably linked to the IMP. Therefore, as noted by the EC, this net growth strategy:

(...) aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use. It also aims to protect, conserve and enhance the EU's natural capital, and protect the health and well-being of citizens from environment-related risks and impacts. At the same time, this transition must be just and inclusive.<sup>136</sup>

This is an extremely ambitious package of actions that should enable European businesses and citizens to benefit from a sustainable green transition, aiming to achieve climate neutrality by 2050, making Europe the first climate neutral continent, slowing global warming, and mitigating its effects<sup>137</sup>. The European Green Deal is an integral part of the EC's strategy to implement the UN 2030 Agenda for Sustainable Development and deliver on its 17 Sustainable Development Goals (SDGs), displayed in Fig. 2<sup>138</sup>.

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<sup>134</sup> Breuer. *Integrated Maritime Policy*.

<sup>135</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 60.

<sup>136</sup> European Commission, Secretariat-General. 2019. 'Communication.' *EUR-Lex*. Accessed October 15, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2019:640:FIN>.

<sup>137</sup> European Commission. n.d. *Delivering the European Green Deal*. Accessed October 15, 2022. [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en).

<sup>138</sup> *Transforming our world: the 2030 Agenda for Sustainable Development*. 2015. A/RES/70/1 (General Assembly resolution 70/1, October 21).



Figure 2. Sustainable Development Goals and its targets.

The blue economy pillar is concerned essentially with sustainable economic goals. The IMP encompasses the ‘Blue Economy Strategy’, which is one of the actions proposed by the European Green Deal to protect the environment and oceans. Under this strategy, regional cooperation is regarded as a necessary factor in creating the conditions for sustainable governance. As it reads in the EC’s Communication on a new approach to a sustainable blue economy in the EU, the EU intends to ‘(...) continue to support cooperation, develop tailored strategies for each European sea basin and extend the same cooperative approach to neighbouring countries that share with the EU a basin, marine living resources and geo-economic features.’<sup>139</sup> Hence, among the cooperation frameworks that the EU supports, the revised Atlantic Action Plan 2.0 (AAP 2.0) stands out. This aims to ‘(...) unlock the potential of blue economy in the Atlantic area (...)’, whilst demonstrating the contributions of the four EU Atlantic Member States (i.e., France, Ireland, Portugal and Spain), their regions, and the EC, in ‘(...) preserving marine ecosystems and contributing to climate change adaptation and mitigation.’<sup>140</sup> The AAP 2.0 covers the ‘(...) coasts, territorial and jurisdictional waters of the [...] EU Member States with an Atlantic coastline (...)’<sup>141</sup> Through this strategy’s geographical plan of

<sup>139</sup> European Commission, Directorate-General for Maritime Affairs and Fisheries. 2021. ‘Communication.’ *EUR-Lex*. Accessed July 15, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:240:FIN>.

<sup>140</sup> Atlantic Strategy. n.d. *The Atlantic Strategy*. Accessed July 15, 2022. <http://www.atlanticstrategy.eu/en/atlantic-strategy-glance/atlantic-strategy>.

<sup>141</sup> European Commission. 2011. ‘Communication.’ *EUR-Lex*. Accessed July 15, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011DC0782>.

action, one can observe how the EU may gradually broaden its scope of action beyond the territorial seas and EEZs of the MS.

Moreover, regarding the exploitation of the sea's mineral resources, in particular the marine minerals and metals in/on the seabed (e.g., manganese, titanium, copper, zinc and cobalt), the EC in 'The EU Blue Economy Report 2021' considered that, despite their great potential, a moratorium on the deep-sea mining exploitation was required until its impact was fully understood since '(...) scientists argue that biodiversity loss from deep-sea mining is likely to be inevitable and irrevocable, and thus most likely permanent.'<sup>142</sup> As a result of this, in the 'The EU Blue Economy Report 2022'<sup>143</sup>, there is no longer any mention to the deep-sea mining of these specific mineral resources. It therefore seems that the exploitation of marine minerals and metals by MS in their EEZs and continental shelves may be subject to strong legal restrictions by the EU. Thus, these legal constraints of a more fundamentalist and restrictive environmental nature, compromise the possibility of MS to exploit their marine mineral resources. This could also undermine the interest and potential benefits resulting from the effort made by some MS, in conjunction with the CLCS, for the approval of their proposals to extend the continental shelves (as is the case of Portugal)<sup>144</sup>.

The second pillar focuses mainly on the sustainable management of the oceans and their resources. The EU strives for an interconnected ocean approach and is committed to '(...) a safe, secure, clean, healthy and sustainably managed ocean.' In 2016, the EU launched its first joint communication on an International Ocean Governance (IOG) Agenda, and the efforts to strengthen this commitment have been ongoing. Furthermore, the IOG Agenda focuses on four policy pillars, which are the following: 'strengthening the international ocean governance framework'; 'making ocean sustainability a reality by 2030'; 'ensuring security and safety at sea'; and 'building up ocean knowledge'<sup>145</sup>.

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<sup>142</sup> European Commission. 2021. *The EU Blue Economy Report 2021*. Luxembourg: Publications Office of the European Union.

<sup>143</sup> European Commission. 2022. *The EU Blue Economy Report 2022*. Luxembourg: Publications Office of the European Union.

<sup>144</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 63 (translated by Marta Gueifão).

<sup>145</sup> European Commission, Directorate-General for Maritime Affairs and Fisheries. 2022. 'Joint Communication.' *EUR-Lex*. Accessed October 15, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52022JC0028>.

The publication of the 2022 IOG Agenda responds somewhat to the absence of mention of the mining of marine minerals and metals in/on the seabed in ‘The EU Blue Economy Report 2022’, given that the former document, in its key priorities, announced the intention to ‘[p]rohibit deep-sea mining until scientific gaps are properly filled, no harmful effects arise from mining and the marine environment is effectively protected’. Considering that the IOG Agenda aims to strengthen the role of the EU as a reliable partner in building an international governance framework, articulated around the UNCLOS, deep-sea mining would prove not to be reconcilable with the SDG 14 (Life Below Water) – which is designed for the conservation and sustainable use of the oceans, seas, and marine resources –, nor indeed with any other SDG<sup>146</sup>.

In this regard it is also important to mention one of the key EU-funded programmes for the period 2021-2023. That is the ‘Mission Starfish 2030: Restore our Ocean and Waters’<sup>147</sup> which focuses on five main objectives that aim to ‘(...) demonstrate practical solutions for cleaning waters, restoring degraded ecosystems and to transition the blue economy to climate neutrality.’<sup>148</sup> Thus, this Mission is set to support many SDGs, and is in line with the IOG Agenda goals.

In this context, what may demonstrate the EU intentions in the long term is its belief in leading by example to inspire and create a vision to be shared internationally, hence establishing itself as a ‘strong world leader’ on this. The EU therefore proposes to contribute to the security, quality and sustainable management of the oceans on the basis of an international approach, proposing to shape international ocean governance by relying on its experience<sup>149</sup>, particularly in the ‘(...) EU fisheries policy [...]; the EU’s approach for a sustainable economy; the Maritime Spatial Planning (MSP) Directive; the sea-basin and macro-regional frameworks; its environment policy [...]; its climate policy [...]; its maritime transport security legislation; and action on data, observation and research (...)’<sup>150</sup>.

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<sup>146</sup> European Commission, Directorate-General for Maritime Affairs and Fisheries. ‘Joint Communication.’

<sup>147</sup> European Commission. 2020. *Mission Starfish 2030: Restore our Ocean and Waters*. Luxembourg: Publications Office of the European Union.

<sup>148</sup> European Commission, Directorate-General for Maritime Affairs and Fisheries. ‘Joint Communication.’

<sup>149</sup> Ramos. ‘Portugal e a Ameaça da Europeização do Mar’, 64 (translated by Marta Gueifão).

<sup>150</sup> European Commission, Directorate-General for Maritime Affairs and Fisheries. ‘Joint Communication.’

Lastly, the third pillar is all about sovereignty and security. Through the European Union Maritime Security Strategy (EUMSS), the EU intends to continue to foster the exchange and sharing of data and information with its maritime security regional partners, and to keep addressing '(...) challenges affecting the security of the ocean as cross-border and organised crime, threats to freedom of navigation, threats to biodiversity, climate security challenges or environmental degradation due to illegal or accidental discharge.'<sup>151</sup> The EUMSS action plan targets five key areas, namely 'international cooperation [,] maritime surveillance [,] capability development, research and innovation [,] risk management [, and] education and training'<sup>152</sup>. By sharing data and information regarding border control, customs, security, terrorism and piracy through the Common Information Sharing Environment (CISE), much of the existing sectoral legislation will be eliminated, introducing a binding EU legal framework that will address these concerns<sup>153</sup>.

In view of the above, the conclusion which can be drawn is in line with the concerns previously expressed: the EU has a clear interest in the 'communitarisation of marine resources' or, in a broader sense, the 'Europeanisation of the Sea'. Indeed, through some of the situations previously outlined, divergences may arise between Member States' national interests and the EU's maritime interests.

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<sup>151</sup> European Commission, Directorate-General for Maritime Affairs and Fisheries. 'Joint Communication.'

<sup>152</sup> European Commission. n.d. *Maritime security strategy*. Accessed October 15, 2022. [https://oceans-and-fisheries.ec.europa.eu/ocean/blue-economy/other-sectors/maritime-security-strategy\\_en#documents](https://oceans-and-fisheries.ec.europa.eu/ocean/blue-economy/other-sectors/maritime-security-strategy_en#documents).

<sup>153</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 65 (translated by Marta Gueifão).

## 5. The specific case of Portugal

### 5.1. Portugal's link with the Ocean

Portugal is an eminently maritime nation, and this is due to its vast maritime areas that give it centrality and geographical relevance, placing the country in a strategic position.

The sea has been a fundamental part of Portugal's history since the beginning of the Age of Discoveries in 1415, having been the starting point for the discovery of new peoples, new cultures and, above all, a new global economy<sup>154</sup>. Nonetheless, from the Age of Discoveries (1415) to decolonisation (1975) and European integration (1986), Portugal naturally moved away from the sea and became more European-centred<sup>155</sup>. Now, approximately 600 years after the beginning of a maritime strategy, this maritime dimension re-emerges as a strategic factor that may provide again the projection of Portugal in the world<sup>156</sup>.

With Portugal's accession to the EEC, new commitments followed. These had an impact on the national maritime sector, which was left off the priorities of the national political agenda<sup>157</sup>. Hence, Portugal resumed its prominent role in the debate on the international ocean regime in the mid-1990s. Thus, the beginning of the Portuguese reunion with the ocean began in 1995 with the launch of the 'Comissão Mundial Independente para os Oceanos' (Independent World Commission for the Oceans) – coordinated by Mário Ruivo and chaired by the former President of the Republic Mário Soares –<sup>158</sup>, and later continued with Expo'98 (1998 Lisbon World Exposition), which had as its theme 'The Oceans, a Heritage for the Future'<sup>159</sup>.

One of the most recent steps in reconnecting the country to the ocean, twenty-four years later, is the approval of the National Ocean Strategy (NOS) 2021-2030 which, in line with

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<sup>154</sup> Cosme, Francisco José de Carvalho, and João Pedro Silva Vieira Gomes. 2017. 'Aumento da dimensão da Plataforma Continental Atlântica.' *Revista Militar*, no. 2591: 1015-1060.

<sup>155</sup> Salvador. 'A política marítima integrada da UE', 95.

<sup>156</sup> Cosme. 'Aumento da dimensão da Plataforma Continental Atlântica.' (translated by Marta Gueifão).

<sup>157</sup> Vaz, Nélia Moniz. 2019. 'A extensão da plataforma continental de Portugal e a Região Autónoma dos Açores.' *Master's thesis*. Ponta Delgada: Universidade dos Açores, 41 (translated by Marta Gueifão).

<sup>158</sup> Jacques Delors European Information Centre. n.d. *A Política Marítima da União Europeia*. Accessed September 28, 2022. <https://eurocid.mne.gov.pt/mares-e-oceanos/politica-maritima-da-uniao-europeia>.

Jacques Delors European Information Centre. n.d. *Portugal é Mar*. Accessed December 11, 2022. <https://eurocid.mne.gov.pt/mares-e-oceanos/estrategia-nacional-para-o-mar>.

<sup>159</sup> Salvador. 'A política marítima integrada da UE', 95 (translated by Marta Gueifão).

the UN 2030 Agenda, the European Climate Pact, the IMP, the CFP, and the recent strategies presented by the EC, defines the national priorities for the public ocean policy for the next decade. This instrument '(...) aims to enhance the contribution of the sea to the country's economy, the prosperity and well-being of Portuguese people, and respond to the great challenges of the decade, strengthening Portugal's position as an eminently maritime nation.'<sup>160</sup> Nevertheless, it is important to recall that this is not the only NOS adopted by Portugal. On the contrary, Portugal had already adopted two NOSs, which demonstrates its continuous commitment to the promotion of public ocean policies. It was in 2006 that the first NOS was presented (NOS 2006-2016). However, after the elaboration of this strategy, several events took place – i.e., the changes that occurred in the EU context, particularly regarding the development of common political reforms and the respective financing mechanisms – which, taken together, justified the need to proceed with its revision and update. Thus, it was taking into account this framework that it was deemed necessary to align the period of duration of Portugal's ocean strategy with the mentioned timeframe of the EU action. Moreover, the review of the NOS 2006-2016 was presented in the form of a new strategy in 2013, the NOS 2013-2020. Finally, it was this historical context that led to the renewed commitment to approve the NOS 2021-2030<sup>161</sup>.

According to Becker-Weinberg, '[t]he past years have witnessed important changes in Portugal's approach to its immense national maritime space. Amongst such changes, one of the most significant was the approval of this country's legal regime on marine spatial planning and management of the national maritime space.'<sup>162</sup> Hence, the Portuguese maritime management policies are legally framed in three main documents: (i) Law no. 17/2014<sup>163</sup> – which establishes the basis for spatial planning and management policy for the entire Portuguese maritime space; (ii) Directive 2014/89/EU<sup>164</sup> – which regulates the MSP; and (iii) Decree-Law no. 38/2015<sup>165</sup> (updated by Decree-Law no. 139/2015<sup>166</sup>) –

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<sup>160</sup> Direção-Geral de Política do Mar. n.d. 'Estratégia Nacional para o Mar 2021-2030.' *Direção-Geral de Política do Mar*. Accessed November 1, 2022. <https://www.dgpm.mm.gov.pt/enm-21-30>.

<sup>161</sup> Direção-Geral de Política do Mar. n.d. 'National Ocean Strategy 2013-2020.' *Direção-Geral de Política do Mar*. Accessed December 12, 2022. <https://www.dgpm.mm.gov.pt/enm-en>, 21-23.

<sup>162</sup> Becker-Weinberg, Vasco. 2015. 'Portugal's legal regime on marine spatial planning and management of the national maritime space.' *Marine Policy*, 61: 46-53. doi:10.1016/j.marpol.2015.06.014.

<sup>163</sup> *Law no. 17/2014*. 2014. (Assembleia da República, April 10).

<sup>164</sup> Council of the European Union, and European Parliament. 2014. 'Directive.' *EUR-Lex*. Accessed November 1, 2022. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32014L0089>.

<sup>165</sup> *Decree-Law no. 38/2015*. 2015. (Ministério da Agricultura e do Mar, March 12).

<sup>166</sup> *Decree-Law no. 139/2015*. 2015. (Ministério da Agricultura e do Mar, July 30).



which establishes the format and applicability of the MSP and transposes the former Directive into Portuguese law. With the entry into force of these documents Portugal has assumed an innovative position at the forefront of ocean governance, both at EU and global level<sup>167</sup>.

On the one hand, in a geopolitical dimension, Portugal can be considered a medium-sized peripheral country, in the context of the EU (e.g., 12<sup>th</sup> in surface area, 12<sup>th</sup> in population, and 21<sup>st</sup> in GDP per capita)<sup>168</sup>. However, despite its weak geopolitical valuation, the country's distinguishing factor on the international scene leads undoubtedly to its maritime territory<sup>169</sup>. Currently, as the matter of oceans has progressively assumed an increasingly important role in foreign policy, Portugal has been taking a leading role in debates about the oceans in the UN, the Organisation for Economic Cooperation and Development (OECD) and the EU. For example, when the UN 2030 Agenda for Sustainable Development was negotiated in 2015, Portugal was one of the countries that was in the front line to ensure that this thematic was defined in one of its 17 Goals. This resulted in what is now SDG 14 (Life Below Water)<sup>170</sup>.

Furthermore, some of the statements made by the current Prime Minister (PM) António Costa (XXI, XXII and XXIII Constitutional Governments) on matters of the sea reiterate that maritime management issues and the extensions of continental shelves should be managed within the UN. The PM has already underlined on several occasions that Portugal is a country that is committed to support and strengthen the competences of the UN in the management of maritime resources. The PM has also highlighted the irreplaceable role of the UNCLOS in the definition of maritime rules and global governance of the sea's resources<sup>171</sup>. Hence, from this Portuguese commitment to strengthen the powers and competences of the UN one can draw the conclusion that the Portuguese Government is aware of the potential negative consequences of the alignment of the UN with the EU in this respect, which may remove freedom of action from MS in

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<sup>167</sup> Becker-Weinberg. 'Portugal's legal regime'.

<sup>168</sup> European Union. n.d. *Facts and figures on life in the European Union*. Accessed November 1, 2022. [https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/life-eu\\_en](https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/life-eu_en).

<sup>169</sup> Pinto. 'A Segurança Marítima', 4.

<sup>170</sup> Alves. *Os Oceanos na Política Externa portuguesa*.

<sup>171</sup> Expresso. 2016. *António Costa quer reforço do poder na ONU na gestão do Mar*. Accessed November 2022. <https://expresso.pt/economia/2016-06-03-Antonio-Costa-quer-reforco-do-poder-na-ONU-na-gestao-do-Mar>.

areas where the EU does not yet have full authority, and which may deny Portugal the opportunity to adopt autonomously the policies that best serve its interests<sup>172</sup>.

There is no question that the country is associated with a specific 'niche', the 'niche of the sea'. Thus, it is in matters of the sea that Portugal is recognised as having a particular place on the global stage and where a certain *auctoritas* still persists. As has been made a point of demonstrating in this Thesis, the sea is a valuable asset for Portugal, not only for diplomatic reasons, but also for reasons of sovereignty and global assertion. Whilst all countries require special attention for interests of different natures, for Portugal this attention is directed to maritime affairs<sup>173</sup>. Therefore, as suggested by Pinto, the country's challenges include simultaneously ensuring control over the areas where it has rights and obligations under international agreements and upholding respect for international law, which is why it should secure its continued presence at the negotiation table on this subject. In short, basically, any State that has some interest in the exploration and use of the oceans must also have an interest in maintaining the capacity to prevent that use from being challenged<sup>174</sup>.

## 5.2. The role played by the UNCLOS

The Convention's knowledge is very useful, especially for a country like Portugal, which has major interests at sea. The UNCLOS has given rise to the possibility of States Parties proposing an extension of the area in which they have exclusive sovereign rights (continental shelf) for the exploitation of natural resources on the seabed and subsoil, provided that they can prove, through morphological and geological data collected at sea, that they meet the criteria laid down in the Convention. This process of extension of coastal States' continental shelves can be seen as the last peaceful delimitation of the planet's borders<sup>175</sup>.

Accordingly, Portugal submitted the application to the extension of its continental shelf in 2009 and has been waiting for the conclusion of the process ever since. The evaluation of the Portuguese proposal started in 2017 and, at the time, it was expected that it would

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<sup>172</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 56 (translated by Marta Gueifão).

<sup>173</sup> Alves. *Diplomacia Azul*, 17-18.

<sup>174</sup> Pinto. 'A Segurança Marítima', 5.

<sup>175</sup> Pinto, Sérgio da Silva. 2021. 'O risco da narrativa do "Mar Europeu".' *Negócios*, 30.

be assessed in the following two to three years<sup>176</sup>. It turns out that, essentially due to the forced halt by the pandemic, the work of evaluating the proposals submitted by coastal States to the UN for the extension of their continental shelves was delayed<sup>177</sup>. Although work within the CLCS has already resumed, this is a highly complex dossier, from a legal, political and technical point of view, so it is not possible to predict with certainty when this evaluation process will be completed.

In fact, the UNCLOS has been a victim of its own success, as so many proposals (to date 93 proposals have been submitted<sup>178</sup>) have ended up slowing down the process more than had initially been thought, hence demonstrating the race for the sea and its valuable resources in face of growing scarcity on land<sup>179</sup>. Portugal was the 44<sup>th</sup> country to submit its proposal and the approval process works on a ‘first come first served’ basis<sup>180</sup>. As the CLCS establishes subcommittees to analyse the specific cases of each country, Portugal’s subcommittee was defined in 2017. This is not a negotiation process, but rather it is an ongoing interaction with the UN<sup>181</sup>.

For Portugal, extending its continental shelf is to assert itself internationally as a maritime power, and at the same time to emerge as a country of around 4 million km<sup>2</sup> (see Fig. 3). In brief, admitting that this submission is fairly accepted in the proposed terms, the country would be left with one of the most extensive continental shelves in the world – the 4<sup>th</sup> largest –, increasing the territory under its jurisdiction. Hence, Portugal would become about 45 times larger at sea than on land. Alves further adds, in a more expressive way, that Portugal would be 3% land territory and 97% sea territory<sup>182</sup>.

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<sup>176</sup> Portuguese Task Group for the Extension of the Continental Shelf (EMEPC). n.d. *FAQ - Frequently Asked Questions*. Accessed December 11, 2022. <https://en.emepc.pt/faq>.

<sup>177</sup> Pinto. ‘O risco da narrativa do “Mar Europeu”.’, 30.

<sup>178</sup> Division for Ocean Affairs and the Law of the Sea. *Submissions, through the Secretary-General*.

<sup>179</sup> Pinto. ‘O risco da narrativa do “Mar Europeu”.’, 30.

<sup>180</sup> Division for Ocean Affairs and the Law of the Sea. *Submissions, through the Secretary-General*.

<sup>181</sup> Alves, 67 (translated by Marta Gueifão).

<sup>182</sup> *Ibid*, 20-64 (translated by Marta Gueifão).

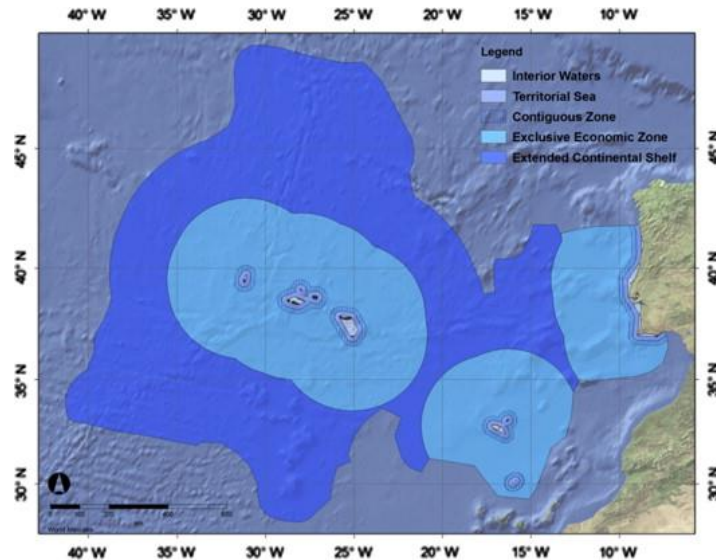


Figure 3. Maritime Zones under Portuguese Sovereignty and/or Jurisdiction

Besides this project being particularly relevant for sovereignty reasons, it is also relevant for geostrategic and economic purposes, due to the potential of the resources to be exploited there. Amongst the various opportunities that the continental shelf extension project may bring to Portugal, one can mention those that are clearly the most interesting for the country which are the marine resources directly related to the continental shelf<sup>183</sup>. Although marine scientific exploitation on the national seabed is still limited, the fact is that the data and knowledge that have been obtained throughout the Portuguese continental shelf extension process allowed to anticipate a vast economic potential for the different resources existing therein. Thus, on the Portuguese seabed there can be found metallic mineral resources – namely polymetallic sulphides (Cu, Zn, Ag and Au) –, Fe-Mn crusts and nodules, non-renewable energy resources – namely oil (in sub-economic quantities) and gas (in significant quantities) –, and genetic resources of various types<sup>184</sup>.

It should be emphasised that the project to extend Portugal's continental shelf beyond 200 NM would grant the country sovereign rights to explore and exploit its natural resources. In short, notwithstanding the economic motivation behind this project, its success would give a new dimension to the country. Currently, Portugal occupies a total area of 92,212 km<sup>2</sup> and has an EEZ of 1,727,408 km<sup>2</sup>. With the approval of the continental shelf

<sup>183</sup> Vaz. 'A extensão da plataforma continental', 54-56 (translated by Marta Gueifão).

<sup>184</sup> Estrutura de Missão para a Extensão da Plataforma Continental (EMEPC). 2014. *Atlas do Projeto de Extensão da Plataforma Continental*. Paço de Arcos, 74-75.

extension project, the country's continental shelf will have a total area of 4,127,408 km<sup>2</sup>, about 45 times its territorial area<sup>185</sup>.

Furthermore, if the country's proposal is approved, the first challenge for Portugal in the management of its maritime space will be in the fields of maritime knowledge and science, to which will be later added the challenges of surveillance and security.

### 5.3. The threat posed by the EU

Portugal currently has the 20<sup>th</sup> largest continental shelf in the world and the 3<sup>rd</sup> largest in the EU<sup>186</sup>. For this reason, the country must be mindful of the fact that the EU often makes use of the expression 'European sea', which may be understood to carry risks for MS with large maritime areas, as it is its case.

With the accession to the then EEC in 1986, Portugal subjected its marine biological resources to be governed by the EU's exclusive competences, under the CFP. Later, with the establishment of the IMP (the EU's main maritime management policy) in 2007, a holistic approach towards all European policies related to the sea was introduced<sup>187</sup>. In this context, Portugal has shown itself to be a supporter of the IMP. For example, in the year following the approval of the NOS 2006-2016, the year in which the IMP was agreed upon, Portugal was part of the group of countries that presented the first strategic reflection document within the process of creating this maritime policy framework, as the latter's vision was in line with the country's national strategic thinking at the time<sup>188</sup>. This is also a reality that can be seen today through the NOS 2021-2030, which remains a national strategy regarded to be in line with the IMP<sup>189</sup>.

Moreover, the Treaty of Lisbon, which came into force in December 2009, reinforced the supranational nature of the EU, particularly by introducing the use of the ordinary legislative procedure (set out in art. 294 of the TFEU) as the main decision-making procedure used for adopting EU legislation. Hence, the Treaty of Lisbon also extended

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<sup>185</sup> Vaz. 'A extensão da plataforma continental', 58 (translated by Marta Gueifão).

<sup>186</sup> International Institute for Law of the Sea Studies (IILSS). 2021. *Exclusive Economic Zone (EEZ) map of the world*. Accessed April 25, 2022. <https://iilss.net/exclusive-economic-zoneeez-map-of-the-world/>.

<sup>187</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 81 (translated by Marta Gueifão).

<sup>188</sup> Direção-Geral de Política do Mar. 'National Ocean Strategy 2013-2020.', 22.

<sup>189</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 81 (translated by Marta Gueifão).

the areas of qualified majority voting (replacing the unanimity previously required) making this voting method the general rule in the Council<sup>190</sup>.

Therefore, as Ramos argues, since numerous decisions started to be approved by qualified majorities, it became impossible for any MS to single-handedly veto them, thus requiring the establishment of coalitions to do so. As a result, the EU has been given great freedom of action to legislate in terms of maritime management policies and to approve these by qualified majorities (as demonstrated in Table 2), except in areas subject to the unanimity voting method. This means that if the EU intends to strengthen the IMP by giving it more economic powers, Portugal alone will have great difficulty in opposing it<sup>191</sup>.

<b>EU Competences</b>				
<b>Areas</b>	<b>Regulatory Treaty</b>	<b>Type of Competence</b>	<b>Decision-making Mechanism</b>	<b>Articles of the Treaty</b>
Marine Biological Resources	TFEU	EU Exclusive	Ordinary Legislative Procedure	art. 3(1)(d)
Agriculture and Fisheries	TFEU	Shared	Ordinary Legislative Procedure	art. 4(2)(d)

Table 2. Some of the EU competences (table by Marta Gueifão)

The evaluation of the Portuguese proposal to extend its continental shelf started in 2017 and if approved, its surface will be about 4 million km<sup>2</sup> – roughly equal to the land area of the entire EU, which covers over 4 million km<sup>2</sup><sup>192</sup>. Meanwhile, it appears that Portugal has sought to manage this process within the UN, without making any reference to the EU's maritime management policies. It can therefore be seen that the country has some awareness of the importance of achieving the objectives it has set itself with this proposal, choosing to act outside the scope of the EU<sup>193</sup>.

<sup>190</sup> Coelho, Carlos, Luís Faria, and Duarte Marques. n.d. 'Tratado de Lisboa.' *GEPSD*. Accessed November 1, 2022. <https://carloscoelho.eu/dossiers/view/32>.

<sup>191</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 81-82 (translated by Marta Gueifão).

<sup>192</sup> European Union. *Facts and figures on life in the European Union*.

<sup>193</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 82 (translated by Marta Gueifão).

Furthermore, the approval of this proposal triggers a wide range of ambitions and opportunities. Hence, Portugal would exercise sovereign rights to the exploitation of resources in an area equivalent to 47.3% of the total maritime spaces of the EU countries, and would clearly benefit compared to MS that are unable to extend their continental shelves, such as Germany or the Netherlands (see Fig. 4, where the dark blue colour represents the ‘Portuguese Sea’ area, the light blue colour depicts the maritime spaces of the remaining EU Member States, and these colours together represent the ‘European Sea’ – including the proposals for extension of continental shelves)<sup>194</sup>.

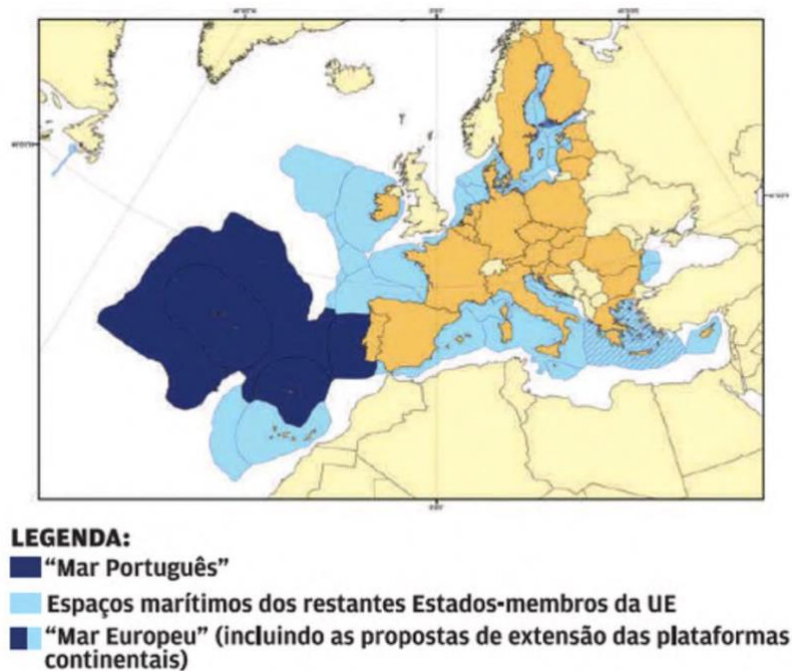


Figure 4. ‘Portuguese Sea’ versus ‘European Sea’

Whilst one cannot ignore the value that the extension of the continental shelf could provide to the country, it is also worth highlighting the geopolitical risk associated with the ‘European Sea’ narrative. This narrative may, in the long term, compromise Portugal’s legitimate aspirations to exercise exclusive sovereign rights over the natural resources of the seabed and subsoil of its continental shelf.

Indeed, in the future, the EU may wish to manage the natural resources of the continental shelves belonging to the MS. Furthermore, as demonstrated above, some MS (i.e., Germany and the Netherlands) possibly have an interest in gradually introducing this

<sup>194</sup> Pinto. ‘O risco da narrativa do “Mar Europeu”’, 30 (translated by Marta Gueifão).

concept of a 'European Sea', in the sense of a common area whose rules of exploitation of the continental shelves could be dictated by the EU, thus countering the advantages of some MS over others. Therefore, as Pinto suggests, perhaps the question that must be asked is whether Portugal can be sure that the UNCLOS will grant the country exclusive rights to exploit this maritime space, or whether it makes sense to fear the 'European Sea' narrative<sup>195</sup>.

Hence, it becomes necessary to analyse whether there are any economic motives and political precedents that merit strategic reflection on the possibility of the EU in the future undermining Portugal's legitimate claim to manage (on an exclusive basis) the exploitation of the resources that belong to the country<sup>196</sup>.

According to Pinto, in economic terms, even with the EU's climate policies and strategies to become the world's first climate-neutral continent by 2050, in line with the Paris Agreement, offshore oil and gas production in Europe is expected to continue at least until then (especially when considering the current energy crisis). Moreover, if technological advances reduce the environmental risks of deep-sea mining, this is expected to increase, thereby responding to the growing demand for valuable metals and rare earths elements (REE) for high-tech development essential for the EU's competitiveness, including in the renewable energy industry. Considering this, one can expect a greater propensity of the EU to interfere in the management of the 'European Sea', so it is up to Portugal to respond strategically, by strengthening the expertise, the protection and the exploitation of the 'Portuguese Sea' (illustrated above in Fig. 4). It is of little use for the country to stop exploiting the resources of its continental shelf if it will continue to consume and buy them from abroad<sup>197</sup>.

Added to this is the context of the CFP, which gave the EU powers to manage fisheries in Member States' seas, and subsequently contributed to the EU determining the catch limits in the EEZs of the MS, despite this being a sovereign right that the UNCLOS conferred to the coastal States themselves. Furthermore, it is also worth noting that the EU is the only international organisation to have ratified the UNCLOS, as if it were a State. It is therefore essential to reinforce the idea that Portugal should continue to

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<sup>195</sup> Pinto. 'O risco da narrativa do "Mar Europeu".', 30 (translated by Marta Gueifão).

<sup>196</sup> Ibid (translated by Marta Gueifão).

<sup>197</sup> Ibid (translated by Marta Gueifão).



participate actively in all forums where the global governance of the oceans is debated, thus safeguarding the rights and interests of its maritime nation<sup>198</sup>.

It can be inferred that, regarding Portugal's internal situation in matters of the sea, there is a national awareness of its importance. Ramos states that, if on the one hand, there is a scientific and strategic trend that is more concerned about the negative consequences inherent in a progressive loss of sovereignty in this area, which could consecutively lead to the identification of a threat, on the other hand, there is a more legalistic current that considers that there is a legal framework (the UNCLOS) which safeguards the country from such consequences. Meanwhile, externally, it can be seen that the EU has a growing number of policies in the area of the sea, which it has sought to address in a holistic way, aiming to position itself as a 'strong world leader', whilst seeking a more prominent role in the international governance of the oceans, at the levels of their sustainability, of their economic exploitation, framed by an environmental preservation criteria which is deeply associated and conditioned by the European Green Deal, and also, of their security, to which it intends to contribute actively<sup>199</sup>.

Moreover, in view of the above, it is understood that there is a trend towards the progressive dissolution of the unanimity method and the accentuation of the process of 'Europeanisation of the Sea'. This process constitutes a threat, as it calls into question the possibility of some MS being able to prevent the EU from harming their national interests. In the case of Portugal, the 'Europeanisation of the Sea' raises particular concerns, as national powers become increasingly diminished and it also becomes increasingly inopportune to question the fairness and correctness of this process, sustained by a narrative of adequacy, sharing and preservation of global commons, which appears to be extremely challenging to contradict<sup>200</sup>.

Furthermore, the 'European Sea' narrative should be given due attention by Portuguese diplomacy, just as it seems prudent to adopt an approach that ensures compliance with international law, as established in the UNCLOS, with a view to safeguard the national interests.

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<sup>198</sup> Pinto. 'O risco da narrativa do "Mar Europeu".', 30 (translated by Marta Gueifão).

<sup>199</sup> Ramos. 'Portugal e a Ameaça da Europeização do Mar', 82-83 (translated by Marta Gueifão).

<sup>200</sup> Ibid.

Finally, given the circumstances, there seems to be no doubt that the 'Europeanisation of the Sea' could be a threat to Portugal, as well as to the other MS. However, at the same time one would want to believe, arguably quite naively, that the EU and its MS will respect international law and will not interfere with Portugal's exclusive sovereign rights of exploitation of the continental shelf.

## 6. Conclusion

The final considerations of this Thesis are now presented, returning to the initial motivations of this research. Even though the UNCLOS is the result of years of discussions, conflicts still exist. The trend towards the 'territorialisation' of the oceans which can be observed today is fertile ground for the increase of the possibility of conflicts, even more so if one considers the importance of the sea, both in strategic and economic terms. During this research, it was learned how Portugal's creation of wealth and well-being is inextricably linked to the sea. However, in recent decades, Portugal has been losing ground in the sea over which it has jurisdiction, and this is likely to continue through processes of Europeanisation, materialised in European maritime management policies. These policies make sense to mitigate the inefficiencies, incoherence and conflicts created by the separate management of these by MS. Nevertheless, they promote European leadership in maritime affairs and consequently lead to the removal of decision-making powers from coastal MS to their centralisation at the EU level. The main debate is whether these European developments pose a threat, especially to Portugal. This Thesis has essentially used the example of the CFP and the possibility of future amendments to the EU founding treaties as arguments seeking to explain how the EU can continue to take steps towards the sea becoming an EU resource through a process of extended Europeanisation. Therefore, it was concluded that there is indeed a threat and that it is convenient for any 'geographically advantaged' coastal MS to mitigate or neutralise it, otherwise the sea over which it has jurisdiction will be considered a 'global common', which as it is not being exploited and protected by a MS, must then be exploited, and protected by third parties, therefore integrating the 'European Sea'.

In this context, firstly, this Thesis has tried to show that the 'Europeanisation of the Sea' has current and potentially harmful effects for Portugal, since this is a country that claims a huge maritime area which can lead to scientific, economic, geopolitical, and cultural gains. Moreover, despite its limited means and the need for improvements, it is Portugal's responsibility to defend its interests in the area corresponding to the extension of its continental shelf in order to take advantage of these potentials. With this attitude, the country would gain freedom of action to defend its national interests, recover its international prestige, increase its technological capacity, and, in general, create better conditions to alleviate its weaknesses. Therefore, Portugal should make sure that it will

have all the capabilities to, in the future, exploit the opportunities that the sea offers, seeking freedom of action and ways to respond to national vulnerabilities. In addition, it should find ways to develop, essentially, a cluster of the sea. The country must maintain the domain of the sea as a national domain, to escape a fate of total irrelevance and exiguity in the EU. Furthermore, it is argued that the resources and potential gains from its sea should primarily serve Portuguese national interests and not those of others.

Moreover, the desire for international affirmation is essentially transversal to any coastal State that submits a proposal to extend its continental shelf. Thus, this Thesis has focused on showing how the new continental shelves limits that may be fixed would generate a new reality and a profound change in the map of sovereignties at a geopolitical, geostrategic and geoeconomic level. Therefore, it has identified the possibility of the EU, through its subsequent gain of influence in maritime affairs legislation, to start interfering in the study, exploration and exploitation of non-biological resources such as marine minerals and energy sources located in the EEZs and continental shelves (with the respective extensions) of its MS. If there is a possibility of such scenarios materialising, the impact economically and in terms of sovereignty appears to be very serious. Therefore, this Thesis attempts to make a detail analysis the EU's course of action in maritime affairs, whilst trying to understand how the most vulnerable MS can reverse this scenario, if necessary.

On the other hand, just like Portugal, Europe has a historical relationship with the sea, since of the 27 EU MS, 22 have coastal zones. Thus, this Thesis also reflects on the fact that it is not a surprise that the EU has been moving successively forward to communitarise maritime issues (e.g., through the IMP). As can be seen throughout this Thesis, there are arguments which use issues such as sovereignty, national interests, independence, geopolitics, geoeconomics, and national strategy, to criticise the 'European Sea' narrative, claiming that it will only benefit the most powerful MS. Faced with this situation, Portugal and other vulnerable coastal MS may find themselves confronted with the EU's desire to legislate to this end. At the same time, it is possible to perceive that Portugal may not have the capabilities to take advantage of its immense maritime areas, due to several factors, such as financial limitations and lack of resources (naval, technological, and scientific). In this way, this Thesis tries to underline the need for Portugal to present strategies that allow it to tackle these weaknesses, because only then will it be able to assert itself fully on the international scene. Alone, or through

## Conclusion

alliances, it needs to clearly demonstrate how it can make the most of its capabilities. Otherwise, there will always be confrontations that show how the realisation of the 'European Sea' narrative would be a win-win situation for all MS. To this end, given that this is an immense maritime area, which will naturally require a great deal of investment, it is worth adding the role that Portugal must play in properly regulating access to its resources. Portugal must therefore make a point of defining the rules, setting the priorities, and making the right choices for its advantage.

It is understandable that for some this could be seen as a debate between Euroscepticism and pro-Europeanism. However, this Thesis does not intend to take either of these sides, but rather to show how the growing influence of the EU in the governance of MS' seas could then pose a threat to them, particularly to Portugal, the country on which this study focuses. Nonetheless, this research argues for the preservation of Portugal's maritime tradition. Moreover, since this Thesis does not intend to fuel controversy, it states that it is indeed necessary to adopt strategies that lead to decisions that do not limit the country and that allow, if necessary, for the existence of a turning point. Although Portugal is a country of small economic size, the importance of its maritime dimension should guarantee it a decisive role in EU maritime affairs.

The issue of the sea in Portugal therefore deserves to be studied further in greater detail with empirical reflections on strategies to be adopted, considering its historical importance and the potential of the sea for the country. Thus, a more in-depth study of the Portuguese strategic culture deserves to be undertaken to present the necessary solutions to the possible predominance of the EU over the Portuguese maritime tradition.

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