In cases of conflict over the attribution of rights and jurisdiction in the zone, the resolution is to be on the basis of equity and in the light of all the relevant circumstances.[131] Article 60(2) provides that in the exclusive economic zone, the coastal state has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures. The International Tribunal for the Law of the Sea took the view in *M/V Saiga (No. 2) (Admissibility and Merits)* that a coastal state was not competent to apply its customs laws in respect of other parts of the economic zone.[132] Accordingly, by applying its customs laws to a customs radius which included parts of the economic zone, Guinea had acted contrary to the Law of the Sea Convention.[133]

A wide variety of states have in the last two decades claimed exclusive economic zones of 200 miles.[134] A number of states that have not made such a claim have proclaimed fishing zones.[135] It would appear that such is the number and distribution of states claiming economic zones, that the existence of the exclusive economic zone as a rule of customary law is firmly established. This is underlined by the comment of the International Court of Justice in the *Libya/Malta Continental Shelf* case[136] that 'the institution of the exclusive economic zone . . . is shown by the practice of states to have become a part of customary law'.[137]

In addition to such zones, some other zones have been announced by states over areas of the seas. Canada has, for example, claimed a 100-mile-wide zone along her Arctic coastline as a special, pollution-free zone.[138]

[131] Article 59. [132] 120 ILR, pp. 143, 190. [133] *Ibid.*, p. 192.

[134] The Hydrographic Department of the Royal Navy noted that as of 1 January 2008, 126 states and territories had proclaimed 200-mile economic zones: see www.ukho.gov.uk/content/amdAttachments/2008/annual_nms/12.pdf. No state has appeared to claim an economic zone of a different width. See also the US Declaration of an exclusive economic zone in March 1983, which did not, however, assert a right of jurisdiction over marine scientific research over the zone, 22 ILM, 1983, pp. 461 ff. On 22 September 1992, eight North Sea littoral states and the European Commission adopted a Ministerial Declaration on the Coordinated Extension of Jurisdiction in the North Sea in which it was agreed that these states would establish exclusive economic zones if they had not already done so, UKMIL, 63 BYIL, 1992, p. 755.

[135] The Hydrographic Department of the Royal Navy noted that as of 1 January 2008, forty-five states and territories had proclaimed fishery zones of varying breadths up to 200 miles: see www.ukho.gov.uk/content/amdAttachments/2008/annual_nms/12.pdf.

[136] ICJ Reports, 1985, p. 13; 81 ILR, p. 238.

[137] ICJ Reports, 1985, p. 33; 81 ILR, p. 265. See also the *Tunisia/Libya* case, ICJ Reports, 1982, pp. 18, 74; 67 ILR, pp. 4, 67.

[138] See O'Connell, *International Law of the Sea*, vol. II, pp. 1022–5. See also the Canadian Arctic Water Pollution Prevention Act 1970. The US has objected to this jurisdiction: see e.g. *Keesing's Contemporary Archives*, pp. 23961 and 24129. The Canadian claim was reiterated in September 1985, *ibid.*, p. 33984.

Certain states have also asserted rights over what have been termed security or neutrality zones,[139] but these have never been particularly well received and are rare.

In an unusual arrangement, pursuant to a US–USSR Maritime Boundary Agreement of 1 June 1990, it was provided that each party would exercise sovereign rights and jurisdiction derived from the exclusive economic zone jurisdiction of the other party in a 'special area' on the other party's side of the maritime boundary in order to ensure that all areas within 200 miles of either party's coast would fall within the resource jurisdiction of one party or the other. It would appear that jurisdiction over three special areas within the USSR's 200-mile economic zone and one special area within the US's 200-mile economic zone were so transferred.[140]

The continental shelf[141]

The continental shelf is a geological expression referring to the ledges that project from the continental landmass into the seas and which are covered with only a relatively shallow layer of water (some 150–200 metres) and which eventually fall away into the ocean depths (some thousands of metres deep). These ledges or shelves take up some 7 to 8 per cent of the total area of ocean and their extent varies considerably from place to place. Off the western coast of the United States, for instance, it is less than 5 miles wide, while, on the other hand, the whole of the underwater area of the North Sea and Persian Gulf consists of shelf.

The vital fact about the continental shelves is that they are rich in oil and gas resources and quite often are host to extensive fishing grounds.

[139] O'Connell, *International Law of the Sea*, vol. I, p. 578, note 95 regarding North Korea's proclamation of a 50-mile security zone in 1977. See also Cumulative DUSPIL 1981–8, vol. II, pp. 1750 ff. detailing US practice objecting to peacetime security or military zones. Note also the establishment of the 'exclusion zone' around the Falkland Islands in 1982: see 22 HC Deb., cols. 296–7, 28 April 1982. See e.g. R. P. Barston and P. W. Birnie, 'The Falkland Islands/Islas Malvinas Conflict. A Question of Zones', 7 *Marine Policy*, 1983, p. 14.

[140] 84 AJIL, 1990, pp. 885–7.

[141] See e.g. Brown, *International Law of the Sea*, vol. I, chapters 10 and 11; O'Connell, *International Law of the Sea*, vol. I, chapter 13; Churchill and Lowe, *Law of the Sea*, chapter 8; Z. J. Slouka, *International Custom and the Continental Shelf*, The Hague, 1968; C. Vallée, *Le Plateau Continental dans le Droit International Positif*, Paris, 1971; V. Marotta Rangel, 'Le Plateau Continental dans la Convention de 1982 sur le Droit de la Mer', 194 HR, 1985 V, p. 269, and H. Lauterpacht, 'Sovereignty over Submarine Areas', 27 BYIL, 1950, p. 376. See also *Oppenheim's International Law*, p. 764, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 1183.

This stimulated a round of appropriations by coastal states in the years following the Second World War, which gradually altered the legal status of the continental shelf from being part of the high seas and available for exploitation by all states until its current recognition as exclusive to the coastal state.

The first move in this direction, and the one that led to a series of similar and more extensive claims, was the Truman Proclamation of 1945.[142] This pointed to the technological capacity to exploit the riches of the shelf and the need to establish a recognised jurisdiction over such resources, and declared that the coastal state was entitled to such jurisdiction for a number of reasons: first, because utilisation or conservation of the resources of the subsoil and seabed of the continental shelf depended upon co-operation from the shore; secondly, because the shelf itself could be regarded as an extension of the land mass of the coastal state, and its resources were often merely an extension into the sea of deposits lying within the territory; and finally, because the coastal state, for reasons of security, was profoundly interested in activities off its shores which would be necessary to utilise the resources of the shelf.

Accordingly, the US government proclaimed that it regarded the 'natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control'. However, this would in no way affect the status of the waters above the continental shelf as high seas.

This proclamation precipitated a whole series of claims by states to their continental shelves, some in similar terms to the US assertions, and others in substantially wider terms. Argentina and El Salvador, for example, claimed not only the shelf but also the waters above and the airspace. Chile and Peru, having no continental shelf to speak of, claimed sovereignty over the seabed, subsoil and waters around their coasts to a limit of 200 miles, although this occasioned vigorous protests by many states.[143] The problems were discussed over many years, leading to the 1958 Geneva Convention on the Continental Shelf.[144]

142 Whiteman, *Digest*, vol. IV, p. 756.

143 *Ibid*., pp. 794–9 and see also *Oppenheim's International Law*, pp. 768–9.

144 Note that in the *Abu Dhabi* case, the arbitrator declared that the doctrine of the continental shelf in 1951 was not yet a rule of international law, 18 ILR, p. 144. See also to the same effect (with regard to 1949), *Reference Re: The Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, 5 DLR (46), p. 385; 86 ILR, p. 593 *per* Supreme Court of Canada (1984).

In the *North Sea Continental Shelf* cases,[145] the Court noted that:

> the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is here an inherent right.

The development of the concept of the exclusive economic zone has to some extent confused the issue, since under article 56 of the 1982 Convention the coastal state has sovereign rights over all the natural resources of its exclusive economic zone, including the seabed resources.[146] Accordingly, states possess two sources of rights with regard to the seabed,[147] although claims with regard to the economic zone, in contrast to the continental shelf, need to be specifically made. It is also possible, as will be seen, that the geographical extent of the shelf may be different from that of the 200-mile economic zone.

Definition

Article 1 of the 1958 Convention on the Continental Shelf defined the shelf in terms of its exploitability rather than relying upon the accepted geological definition, noting that the expression referred to the seabed and subsoil of the submarine areas adjacent to the coast but outside the territorial sea to a depth of 200 metres or 'beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas'.

This provision caused problems, since developing technology rapidly reached a position to extract resources to a much greater depth than 200 metres, and this meant that the outer limits of the shelf, subject to the jurisdiction of the coastal state, were consequently very unclear. Article 1 was, however, regarded as reflecting customary law by the Court in the *North Sea Continental Shelf* case.[148] It is also important to note that the basis of title to continental shelf is now accepted as the geographical

[145] ICJ Reports, 1969, pp. 3, 22; 41 ILR, pp. 29, 51. [146] See above, p. 582.

[147] Note that the International Court in the *Libya/Malta Continental Shelf* case, ICJ Reports, 1985, pp. 13, 33; 81 ILR, pp. 238, 265, stated that the two concepts were 'linked together in modern law'.

[148] ICJ Reports, 1969, pp. 3, 39; 41 ILR, pp. 29, 68.

criterion, and not reliance upon, for example, occupation or effective control. The Court emphasised this and declared that:

> The submarine areas concerned may be deemed to be actually part of the territory over which the coastal state already has dominion in the sense that although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.[149]

This approach has, however, been somewhat modified. Article 76(1) of the 1982 Convention provides as to the outer limit of the continental shelf that:

> [t]he continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of continental margin does not extend up to that distance.[150]

Thus, an arbitrary, legal and non-geographical definition is provided. Where the continental margin actually extends beyond 200 miles, geographical factors are to be taken into account in establishing the limit, which in any event shall not exceed either 350 miles from the baselines or 100 miles from the 2,500-metre isobath.[151] Where the shelf does not extend as far as 200 miles from the coast, natural prolongation is complemented as a guiding principle by that of distance.[152] Not surprisingly, this complex formulation has caused difficulty[153] and, in an attempt to provide a mechanism to resolve problems, the Convention established a Commission on the Limits of the Continental Shelf, consisting of

[149] ICJ Reports, 1969, p. 31; 41 ILR, p. 60.

[150] See article 76(3) for a definition of the continental margin. See also D. N. Hutchinson, 'The Seaward Limit to Continental Shelf', 56 BYIL, 1985, p. 133, and Brown, *International Law of the Sea*, vol. I, p. 140.

[151] Article 76(4), (5), (6), (7), (8) and (9). See also Annex II to the Final Act concerning the special situation for a state where the average distance at which the 200-metre isobath occurs is not more than 20 nautical miles and the greater proportion of the sedimentary rock of the continental margin lies beneath the rise.

[152] See the *Libya/Malta Continental Shelf* case, ICJ Reports, 1985, pp. 13, 33–4; 81 ILR, pp. 238, 265–6. See also the *Tunisia/Libya* case, ICJ Reports, 1982, pp. 18, 61; 67 ILR, pp. 4, 54 and the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 277; 71 ILR, pp. 57, 104.

[153] See e.g. Churchill and Lowe, *Law of the Sea*, p. 149, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 1187. There are particular problems, for instance, with regard to the meaning of the terms 'oceanic ridges', 'submarine ridges' and 'submarine elevations' appearing in article 76(3) and (6).

twenty-one experts elected by the states parties. Article 4 of Annex II to the Convention provides that a coastal state intending to establish the outer limits to its continental shelf beyond 200 nautical miles is obliged to submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within ten years of the entry into force of the Convention for that state. The limits of the shelf established by a coastal state on the basis of these recommendations are final and binding.[154] The first submission to the Commission was made by the Russian Federation on 21 December 2001.[155] In support of this claim, Russian explorers planted the national flag on the seabed below the North Pole on 2 August 2007, arguing that parts of underwater mountains underneath the Pole were extensions of the Eurasian continent.[156] A joint submission in respect of the area of the Celtic Sea and the Bay of Biscay was made by France, Ireland, Spain and the UK on 19 May 2006,[157] while on 21 April 2008, the Commission confirmed Australia's continental shelf claim made in 2004.[158]

Islands generate continental shelves, unless they consist of no more than rocks which cannot sustain human habitation.[159]

The rights and duties of the coastal state[160]

The coastal state may exercise 'sovereign rights' over the continental shelf for the purposes of exploring it and exploiting its natural resources under article 77 of the 1982 Convention. Such rights are exclusive in that no other state may undertake such activities without the express consent of the coastal state. These sovereign rights (and thus not territorial title as such since the Convention does not talk in terms of 'sovereignty') do not depend upon occupation or express proclamation.[161] The Truman concept of resources, which referred only to mineral resources, has been extended

[154] Article 76(8). See also www.un.org/Depts/los/clcs_new/clcs_home.htm.
[155] See UN Press Release, SEA/1729, 21 December 2001.
[156] See ASIL Insight, vol. 11, issue 27, 8 November 2007.
[157] See e.g. UKMIL, 77 BYIL, 2006, pp. 767–8, and H. Llewellyn, 'The Commission on the Limits of the Continental Shelf: Joint Submission by France, Ireland, Spain, and the United Kingdom', 56 ICLQ, 2007, p. 677.
[158] See UN Press Release, SEA/1899, 21 April 2008.
[159] Article 121(3). See also *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 97, and above, p. 565.
[160] See *Oppenheim's International Law*, p. 773 and Churchill and Lowe, *Law of the Sea*, p. 151.
[161] See also article 2 of the Continental Shelf Convention, 1958.

to include organisms belonging to the sedentary species.[162] However, this vague description did lead to disputes between France and Brazil over lobster, and between the USA and Japan over the Alaskan King Crab in the early 1960s.[163] The sovereign rights recognised as part of the continental shelf regime specifically relate to natural resources, so that, for example, wrecks lying on the shelf are not included.[164] The Convention expressly states that the rights of the coastal state do not affect the status of the superjacent waters as high seas, or that of the airspace above the waters.[165] This is stressed in succeeding articles which note that, subject to its right to take reasonable measures for exploration and exploitation of the continental shelf, the coastal state may not impede the laying or maintenance of cables or pipelines on the shelf. In addition, such exploration and exploitation must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.[166]

The coastal state may, under article 80 of the 1982 Convention,[167] construct and maintain installations and other devices necessary for exploration on the continental shelf and is entitled to establish safety zones around such installations to a limit of 500 metres, which must be respected by ships of all nationalities. Within such zones, the state may take such measures as are necessary for their protection. But although under the jurisdiction of the coastal state, these installations are not to be considered as islands. This means that they have no territorial sea of their own and their presence in no way affects the delimitation of the territorial waters of the coastal state. Such provisions are, of course, extremely

[162] See article 77(4) of the 1982 Convention and article 2(4) of the 1958 Continental Shelf Convention.

[163] See e.g. O'Connell, *International Law of the Sea*, vol. I, pp. 501–2.

[164] See e.g. Churchill and Lowe, *Law of the Sea*, p. 152; E. Boesten, *Archaeological and/or Historical Valuable Shipwrecks in International Waters*, The Hague, 2002, and C. Forrest, 'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage', 34 *Ocean Development and International Law*, 2003, p. 41. See also articles 149 (protection of cultural objects found in the International Seabed Area) and 303 (wrecks and the rights of coastal states in the contiguous zone).

[165] Article 78 of the 1982 Convention and article 3 of the 1958 Continental Shelf Convention. Note that the reference to 'high seas' in the latter is omitted in the former for reasons related to the new concept of the exclusive economic zone.

[166] Articles 78 and 79 of the 1982 Convention and articles 4 and 5 of the 1958 Continental Shelf Convention.

[167] Applying *mutatis mutandis* article 60, which deals with the construction of artificial islands, installations and structures in the exclusive economic zone. See also article 5 of the 1958 Continental Shelf Convention.

important when considering the status of oil rigs situated, for example, in the North Sea. To treat them as islands for legal purposes would cause difficulties.[168]

Where the continental shelf of a state extends beyond 200 miles, article 82 of the 1982 Convention provides that the coastal state must make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond the 200-mile limit. The payments are to be made annually after the first five years of production at the site in question on a sliding scale up to the twelfth year, after which they are to remain at 7 per cent. These payments and contributions are to be made to the International Seabed Authority, which shall distribute them amongst state parties on the basis of 'equitable sharing criteria, taking into account the interests and needs of developing states particularly the least developed and the landlocked among them'.[169]

Maritime delimitation[170]

While delimitation is in principle an aspect of territorial sovereignty, where other states are involved, agreement is required. However valid in domestic law, unilateral delimitations will not be binding upon third

[168] See also N. Papadakis, *The International Legal Regime of Artificial Islands*, Leiden, 1977.

[169] Note also that by article 82(3) a developing state which is a net importer of the mineral resource in question is exempt from such payments and contributions.

[170] See e.g. *UN Handbook on the Delimitation of Maritime Boundaries*, New York, 2000; N. Antunes, *Towards the Conceptualisation of Maritime Delimitation*, The Hague, 2003; Churchill and Lowe, *Law of the Sea*, chapter 10; E. D. Brown, *Sea-Bed Energy and Mineral Resources and the Law of the Sea*, London, 1984–6, vols. I and III; M. D. Evans, *Relevant Circumstances and Maritime Delimitation*, Oxford, 1989, and P. Weil, *The Law of Maritime Delimitation – Reflections*, Cambridge, 1989. See also *International Maritime Boundaries* (eds. J. I. Charney and L. M. Alexander), Washington, vols. I–III, 1993–8, and *ibid.* (eds. J. I. Charney and R. W. Smith), vol. IV, 2002 and *ibid.* (eds. D. A. Colson and R. W. Smith), vol. V, 2005, The Hague; M. Kamga, *Délimitation Maritime sur la Côte Atlantique Africaine*, Brussels, 2006; *Maritime Delimitation* (eds. R. Lagoni and D. Vignes), Leiden, 2006; Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, Oxford, 2006; D. A. Colson, 'The Delimitation of the Outer Continental Shelf between Neighbouring States', 97 AJIL, 2003, p. 91; V. D. Degan, 'Consolidation of Legal Principles on Maritime Delimitation', 6 Chinese YIL, 2007, p. 601; L. D. M. Nelson, 'The Roles of Equity in the Delimitation of Maritime Boundaries', 84 AJIL, 1990, p. 837; J. I. Charney, 'Progress in International Maritime Boundary Delimitation Law', 88 AJIL, 1994, p. 227, and Charney, 'Central East Asian Maritime Boundaries and the Law of the Sea', 89 AJIL, 1995, p. 724; *Oppenheim's International Law*, p. 776, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 1178 and 1187 ff.

states.[171] The International Court noted in *Nicaragua* v. *Honduras* that the establishment of a permanent maritime boundary was 'a matter of grave importance and agreement is not easily to be presumed'.[172] It was also pointed out that the principle of *uti possidetis* applied in principle to maritime spaces.[173]

In so far as the delimitation of the territorial sea between states with opposite or adjacent coasts is concerned,[174] article 15 of the 1982 Convention, following basically article 12 of the Geneva Convention on the Territorial Sea, 1958, provides that where no agreement has been reached, neither state may extend its territorial sea beyond the median line every point of which is equidistant from the nearest point on the baselines from which the territorial sea is measured.[175] However, particular geographical circumstances may make it difficult to establish clear baselines and this may make it therefore impossible to draw an equidistance line.[176] In such an exceptional case, the Court would consider alternative lines drawn by the states, for example bisector lines.[177]

The provision as to the median line, however, does not apply where it is necessary by reason of historic title or other special circumstances to delimit the territorial sea of the two states in a different way. The Court in *Qatar* v. *Bahrain* noted that article 15 was to be regarded as having a customary law character[178] and may be referred to as the 'equidistance/special circumstances' principle. The Court went on to declare that, 'The most logical and widely practised approach is first to draw provisionally an

[171] See the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, p. 132. The International Court noted in the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 299; 77 ILR, pp. 57, 126, that 'no maritime delimitation between states with opposite or adjacent coasts may be effected unilaterally by one of those states. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.'

[172] ICJ Reports, 2007, para. 253. [173] *Ibid.*, para. 156 and see above, p. 525.

[174] See Churchill and Lowe, *Law of the Sea*, pp. 182 ff.

[175] See also *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 94. The International Court in *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 269, noted that 'the methods governing territorial sea delimitations have needed to be, and are, more clearly articulated in international law than those used for the other, more functional maritime areas'.

[176] See *Nicaragua* v. *Honduras*, ICJ Reports, 2007, paras. 277 ff. The Court in *Qatar* v. *Bahrain* noted that an equidistance line could only be drawn where the baselines were known, ICJ Reports, 2001, pp. 40, 94.

[177] *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 287.

[178] See also e.g. the *Dubai/Sharjah* case, 91 ILR, pp. 543, 663.

equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.'[179]

This was underlined in the arbitration award in *Guyana* v. *Suriname*, which emphasised that article 15 placed 'primacy on the median line as the delimitation line between the territorial seas of opposite or adjacent states'.[180] The tribunal noted that international courts were not constrained by a finite list of special circumstances, but needed to assess on a case-by-case basis with reference to international case-law and state practice.[181] Navigational interests, for example, could constitute such special circumstances.[182] The tribunal also held that a 3-mile territorial sea delimitation line did not automatically extend outwards in situations where the territorial sea was extended to 12 miles, but rather that a principled method had to be found that took into account any special circumstances, including historical arrangements made.[183]

Separate from the question of the delimitation of the territorial sea, but increasingly convergent with it, is the question of the delimitation of the continental shelf and of the exclusive economic zone between opposite or adjacent states. The starting point of any delimitation of these areas is the entitlement of the state to a given maritime area. Such entitlement in the case of the continental shelf was originally founded upon the concept of natural prolongation of the land territory into the sea,[184] but with the emergence of the exclusive economic zone a new approach was introduced based upon distance from the coast.[185] The two concepts in fact became close.

Article 6 of the Continental Shelf Convention, 1958 declared that in the absence of agreement and unless another boundary line was justified by special circumstances, the continental shelf boundary should be determined 'by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured', that is to say by the introduction of the equidistance or median line which would operate in relation to the sinuosities of the particular coastlines.

[179] ICJ Reports, 2001, pp. 40, 94. See also *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 268.

[180] Award of 17 September 2007, para. 296. See also UKMIL, 77 BYIL, 2006, p. 764.

[181] Award of 17 September 2007, paras. 302–3. See also the *Jan Mayen* case, ICJ Reports, 1993, pp. 38, 61–4.

[182] Award of 17 September 2007, para. 306.

[183] *Ibid.*, paras. 311 ff.

[184] The *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 22.

[185] See *Barbados* v. *Trinidad and Tobago*, Award of 11 April 2006, para. 224.

This provision was considered in the *North Sea Continental Shelf* cases[186] between the Federal Republic of Germany on the one side and Holland and Denmark on the other. The problem was that the application of the equidistance principle of article 6 would give Germany only a small share of the North Sea continental shelf, in view of its concave northern shoreline between Holland and Denmark. The question arose as to whether the article was binding upon the Federal Republic of Germany at all, since it had not ratified the 1958 Continental Shelf Convention.

The Court held that the principles enumerated in article 6 did not constitute rules of international customary law and therefore Germany was not bound by them.[187] The Court declared that the relevant rule was that:

> delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the others.[188]

The Court, therefore, took the view that delimitation was based upon a consideration and weighing of relevant factors in order to produce an equitable result. Included amongst the range of factors was the element of a reasonable degree of proportionality between the lengths of the coastline and the extent of the continental shelf.[189] In the *Anglo-French Continental Shelf* case,[190] both states were parties to the 1958 Convention, so that article 6 applied.[191] It was held that article 6 contained one overall rule, 'a combined equidistance–special circumstances rule', which in effect:

> gives particular expression to a general norm that, failing agreement, the boundary between states abutting on the same continental shelf is to be determined on equitable principles.[192]

[186] ICJ Reports, 1969, p. 3; 41 ILR, p. 29. [187] See above, chapter 3, p. 85.
[188] ICJ Reports, 1969, pp. 3, 53; 41 ILR, pp. 29, 83.
[189] ICJ Reports, 1969, pp. 3, 52; 41 ILR, pp. 29, 82.
[190] Cmnd 7438 (1978); 54 ILR, p. 6. See also D. W. Bowett, 'The Arbitration between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel of South-Western Approaches', 49 BYIL, 1978, p. 1.
[191] Although subject to a French reservation regarding the Bay of Granville to which the UK had objected, Cmnd 7438, p. 50; 54 ILR, p. 57.
[192] Cmnd 7438, p. 48; 54 ILR, p. 55.

The choice of method of delimitation, whether equidistance or any other method, depended upon the pertinent circumstances of the case. The fundamental norm under both customary law and the 1958 Convention was that the delimitation had to be in accordance with equitable principles.[193] The Court took into account 'special circumstances' in relation to the situation of the Channel Islands which justified a delimitation other than the median line proposed by the UK.[194] In addition, the situation of the Scilly Isles was considered and they were given only 'half-effect' in the delimitation in the Atlantic area since

> what equity calls for is an appropriate abatement of the disproportionate effects of a considerable projection on the Atlantic continental shelf of a somewhat attenuated projection of the coast of the United Kingdom.[195]

In the *Tunisia/Libya Continental Shelf* case,[196] the Court, deciding on the basis of custom as neither state was a party to the 1958 Convention, emphasised that 'the satisfaction of equitable principles is, in the delimitation process, of cardinal importance'. The concept of natural prolongation was of some importance depending upon the circumstances, but not on the same plane as the satisfaction of equitable principles.[197] The Court also employed the 'half-effect' principle for the Kerkennah Islands,[198] and emphasised that each continental shelf dispute had to be considered on its own merits having regard to its peculiar circumstances, while no attempt should be made to 'overconceptualise the application of the principles and rules relating to the continental shelf'.[199] The view of the Court that 'the principles are subordinate to the goal' and that '[t]he principles to be indicated . . . have to be selected according to their appropriateness for reaching an equitable result'[200] led to criticism that the carefully drawn restriction on equity in the *North Sea Continental Shelf* cases[201] had been

[193] Cmnd 7438, pp. 59–60; 54 ILR, p. 66.

[194] Cmnd 7438, p. 94; 54 ILR, p. 101. This arose because of the presence of the British islands close to the French coast, which if given full effect would substantially reduce the French continental shelf. This was *prima facie* a circumstance creative of inequity, *ibid.*

[195] Cmnd 7438, pp. 116–17; 54 ILR, p. 123.

[196] ICJ Reports, 1982, p. 18; 67 ILR, p. 4. See also L. L. Herman, 'The Court Giveth and the Court Taketh Away', 33 ICLQ, 1984, p. 825.

[197] ICJ Reports, 1982, p. 47; 67 ILR, p. 40. See also ICJ Reports, 1982, p. 60; 67 ILR, p. 53.

[198] ICJ Reports, 1982, p. 89; 67 ILR, p. 82. This was specified in far less constrained terms than in the *Anglo-French Continental Shelf* case, Cmnd 7438, pp. 116–17; 54 ILR, p. 123. See e.g. Judge Gros' Dissenting Opinion, ICJ Reports, 1982, pp. 18, 150; 67 ILR, p. 143.

[199] ICJ Reports, 1982, p. 92; 67 ILR, p. 85.

[200] ICJ Reports, 1982, p. 59; 67 ILR, p. 52.

[201] ICJ Reports, 1969, pp. 3, 49–50; 41 ILR, pp. 29, 79.

overturned and the element of predictability minimised. The dangers of an equitable solution based upon subjective assessments of the facts, regardless of the law of delimitation, were pointed out by Judge Gros in his Dissenting Opinion.[202]

The Court in the *North Sea Continental Shelf* cases[203] in general discussed the relevance of the use of equitable principles in the context of the difficulty of applying the equidistance rule in specific geographical situations where inequity might result. In such a case, recourse may be had to equitable principles, provided a reasonable result was reached.

In the *Anglo-French Continental Shelf* case,[204] it was emphasised that:

> the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case.

The methodological aspect here is particularly important, based as it is upon the requisite geographical framework.

Article 83 of the 1982 Convention provides simply that delimitation 'shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution'. This was emphasised by the Court in *Tunisia/Libya*, where it was stated that the 'principles and rules applicable to the delimitation of the continental shelf areas are those which are appropriate to bring about an equitable result'.[205] In the *Gulf of Maine* case,[206] which dealt with the delimitation of both the continental shelf and fisheries zones of Canada and the United States,[207] the Chamber of the ICJ produced two principles reflecting what general international law prescribes in every maritime delimitation. First, there could be no unilateral delimitations. Delimitations had to be sought and effected by agreement between the parties or, if necessary, with the aid of third parties. Secondly, it held that 'delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant

[202] ICJ Reports, 1982, pp. 18, 153; 67 ILR, pp. 4, 146.
[203] ICJ Reports, 1969, pp. 3, 35–6; 41 ILR, pp. 29, 64.
[204] Cmnd 7438, p. 59; 54 ILR, p. 66.
[205] ICJ Reports, 1982, pp. 18, 49.
[206] ICJ Reports, 1984, p. 246; 71 ILR, p. 74. See also J. Schneider, 'The Gulf of Maine Case: The Nature of an Equitable Result', 79 AJIL, 1985, p. 539.
[207] A 'single maritime boundary' was requested by the parties, ICJ Reports, 1984, pp. 246, 253; 71 ILR, p. 80.

circumstances, an equitable result'.[208] The Court took as its starting point the criterion of the equal division of the areas of convergence and overlapping of the maritime projections of the coastlines of the states concerned, a criterion regarded as intrinsically equitable. This, however, had to be combined with the appropriate auxiliary criteria in the light of the relevant circumstances of the area itself. As regards the practical methods necessary to give effect to the above criteria, like the criteria themselves these had to be based upon geography and the suitability for the delimitation of both the seabed and the superjacent waters. Thus, it was concluded, geometrical methods would serve.[209] It will be noted that the basic rule for delimitation of the continental shelf is the same as that for the exclusive economic zone,[210] but the same boundary need not necessarily result.[211] The Chamber in the *Gulf of Maine* case indeed strongly emphasised 'the unprecedented aspect of the case which lends it its special character', in that a single line delimiting both the shelf and fisheries zone was called for by the parties.

Criteria found equitable with regard to a continental shelf delimitation need not necessarily possess the same properties with regard to a dual delimitation.[212] The above principles were reflected in the arbitral award in the *Guinea/Guinea-Bissau Maritime Delimitation* case in 1985.[213] The Tribunal emphasised that the aim of any delimitation process was to achieve an equitable solution having regard to the relevant circumstances.[214] In the instant case, the concepts of natural prolongation and economic factors were in the circumstances of little assistance.[215] In the *Libya/Malta Continental Shelf* case,[216] the International Court, in deciding the case according to customary law since Libya was not a party to the 1958

[208] ICJ Reports, 1984, pp. 299–300; 71 ILR, pp. 126–7. This was regarded as the fundamental norm of customary international law governing maritime delimitation, ICJ Reports, 1984, p. 300.

[209] ICJ Reports, 1984, pp. 328–9; 71 ILR, p. 155. Note that the Chamber gave 'half-effect' to Seal Island for reasons of equity, ICJ Reports, 1984, p. 337; 71 ILR, p. 164.

[210] Article 74 of the 1982 Convention.

[211] See e.g. the Australia–Papua New Guinea Maritime Boundaries Treaty of 1978, cited in Churchill and Lowe, *Law of the Sea*, p. 160.

[212] ICJ Reports, 1984, pp. 246, 326; 71 ILR, p. 153.

[213] See 25 ILM, 1986, p. 251; 77 ILR, p. 636. The tribunal consisted of Judge Lachs, President, and Judges Mbaye and Bedjaoui.

[214] 25 ILM, 1986, p. 289; 77 ILR, pp. 675–6.

[215] 25 ILM, 1986, pp. 300–2; 77 ILR, p. 686. It should be noted that the delimitation concerned a single line delimiting the territorial waters, continental shelves and economic zones of the respective countries.

[216] ICJ Reports, 1985, p. 13; 81 ILR, p. 239.

Convention on the Continental Shelf, emphasised the distance criterion. This arose because of the relevance of the economic zone concept, which was now held to be part of customary law, and the fact that an economic zone could not exist without rights over the seabed and subsoil similar to those enjoyed over a continental shelf. Thus the 200-mile limit of the zone had to be taken into account with regard to the delimitation of the continental shelf.[217] The fact that the law now permitted a state to claim a shelf of up to 200 miles from its coast, irrespective of geological characteristics, also meant that there was no reason to ascribe any role to geological or geographical factors within that distance.[218]

Since the basis of title to the shelf up to the 200-mile limit is recognised as the distance criterion, the Court felt that the drawing of a median line between opposite states was the most judicious manner of proceeding with a view to the eventual achievement of an equitable result. This provisional step had to be tested in the light of equitable principles in the context of the relevant circumstances.[219] The Court also followed the example of the *Tunisia/Libya* case[220] in examining the role of proportionality and in treating it as a test of the equitableness of any line.

However, the Court did consider the comparability of coastal lengths in the case as part of the process of reaching an equitable boundary, and used the disparity of coastal lengths of the parties as a reason for adjusting the median line so as to attribute a larger shelf area to Libya.[221] The general geographical context in which the islands of Malta exist as a relatively small feature in a semi-enclosed sea was also taken into account in this context.[222]

The Court in its analysis also referred to a variety of well-known examples of equitable principles, including abstention from refashioning nature, non-encroachment by one party on areas appertaining to the other, respect due to all relevant circumstances and the notions that equity did not necessarily mean equality and that there could be no question of distributive justice.[223] The Court, however, rejected Libya's argument that a state with a greater landmass would have a greater claim to the shelf

[217] The Court emphasised that this did not mean that the concept of the continental shelf had been absorbed by that of the economic zone, but that greater importance had to be attributed to elements, such as distance from the coast, which are common to both, ICJ Reports, 1985, p. 33; 81 ILR, p. 265.

[218] *Ibid.*

[219] ICJ Reports, 1985, p. 47; 81 ILR, p. 279.

[220] See above, p. 595.

[221] ICJ Reports, 1985, pp. 48–50; 81 ILR, p. 280.

[222] ICJ Reports, 1985, p. 52; 81 ILR, p. 284.

[223] ICJ Reports, 1985, pp. 39–40; 81 ILR, p. 271.

and dismissed Malta's view that the relative economic position of the two states was of relevance.[224]

In conclusion, the Court reiterated in the operative provisions of its judgment, the following circumstances and factors that needed to be taken into account in the case:

(1) the general configuration of the coasts to the parties, their oppositeness, and their relationship to each other within the general context;
(2) the disparity in the lengths of the relevant coasts of the parties and the distance between them;
(3) the need to avoid in the delimitation any excessive disproportion between the extent of the continental shelf areas appertaining to the coastal state and the length of the relevant part of its coast, measured in the general direction of the coastlines.[225]

In the *St Pierre and Miquelon* case,[226] the Court of Arbitration emphasised that the delimitation process commenced with the identification of the geographical context of the dispute in question and indeed pointed out that geographical features were at the heart of delimitation.[227] The identification of the relevant coastlines in each particular case, however, generates specific problems. Accordingly, the way in which the geographical situation is described may suggest particular solutions, so that the seemingly objective process of geographical identification may indeed constitute a crucial element in the adoption of any particular juridical answer. In the *St Pierre and Miquelon* case, the Court divided the area into two zones, the southern and western zones. In the latter case, any seaward extension of the islands beyond their territorial sea would cause some degree of encroachment and cut-off to the seaward projection towards the south from points located on the southern shore of Newfoundland. The Court felt here that any enclaving of the islands within their territorial sea would be inequitable and the solution proposed was to grant the islands an additional 12 miles from the limits of the territorial sea as an exclusive economic zone.[228] In the case of the southern zone, where the islands had a coastal opening seawards unobstructed by any opposite or

[224] ICJ Reports, 1985, pp. 40–1; 81 ILR, p. 272. The Court also noted that an equitable boundary between the parties had in the light of the general geographical situation to be south of a notional median line between Libya and Sicily, ICJ Reports, 1985, p. 51; 81 ILR, p. 283.

[225] ICJ Reports, 1985, pp. 56–8; 81 ILR, p. 288.

[226] 31 ILM, 1992, p. 1145; 95 ILR, p. 645.

[227] 31 ILM, 1992, pp. 1160–1; 95 ILR, pp. 660–3.

[228] 31 ILM, 1992, pp. 1169–70; 95 ILR, p. 671.

laterally aligned Canadian coast, the Court held that France was entitled to an outer limit of 200 nautical miles, provided that such a projection was not allowed to encroach upon or cut off a parallel frontal projection of the adjacent segments of the Newfoundland southern coast. In order to achieve this, the Court emphasised the importance of the breadth of the coastal opening of the islands towards the south, thus resulting in a 200-mile, but narrow, corridor southwards from the islands as their economic zone.[229] Having decided upon the basis of geographical considerations, the Court felt it necessary to assure itself that the delimitation proposed was not 'radically inequitable'.[230] This it was able to do on the basis of facts submitted by the parties. The Court also considered the criterion of proportionality and satisfied itself that there was no disproportion in the areas appertaining to each of the parties.[231]

In the *Jan Mayen (Denmark* v. *Norway)* case,[232] the question of the delimitation of the continental shelf between the islands of Greenland and Jan Mayen was governed in the circumstances by article 6 of the 1958 Convention, accepted as substantially identical to customary law in requiring an equitable delimitation.[233] The International Court noted that since a delimitation between opposite coasts was in question, one needed to begin by taking provisionally the median line and then enquiring whether 'special circumstances'[234] required another boundary line.[235] In particular, one needed to take into account the disparity between the respective coastal lengths of the relevant area and, since in this case that of Greenland was more than nine times that of Jan Mayen, an unqualified use of equidistance would produce a manifestly disproportionate result.[236] In addition,

[229] 31 ILM, 1992, pp. 1170–1; 95 ILR, pp. 671–3.

[230] 31 ILM, 1992, p. 1173; 95 ILR, p. 675. The phrase comes from the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 342; 71 ILR, pp. 74, 169, where it was defined as 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the parties concerned'.

[231] 31 ILM, 1992, p. 1176; 95 ILR, p. 678.

[232] ICJ Reports, 1993, p. 37; 99 ILR, p. 395.

[233] ICJ Reports, 1993, p. 58; 99 ILR, p. 426. But see the Separate Opinion of Judge Oda, ICJ Reports, 1993, pp. 102–14; 99 ILR, pp. 470–82.

[234] The Court noted that the category of 'special circumstances' incorporated in article 6 was essentially the same as the category of 'relevant circumstances' developed in customary international law since both were designed to achieve an equitable solution, ICJ Reports, 1993, p. 62; 99 ILR, p. 430. Special circumstances were deemed to be those that 'might modify the result produced by an unqualified application of the equidistance principle', while relevant circumstances could be described as 'a fact necessary to be taken into account in the delimitation process', *ibid.*

[235] ICJ Reports, 1993, pp. 59–61; 99 ILR, pp. 427–9.

[236] ICJ Reports, 1993, pp. 65–9; 99 ILR, pp. 433–7.

the question of equitable access to fish stocks for vulnerable fishing communities needed to be considered. Since the principal resource in the area was capelin, which was centred on the southern part of the area of overlapping claims, the adoption of a median line would mean that Denmark could not be assured of equitable access to the capelin. This was a further reason for adjusting the median line towards the Norwegian island of Jan Mayen.[237] However, there was no need to consider the presence of ice as this did not materially affect access to fishery resources,[238] nor the limited population of Jan Mayen, socio-economic factors or security matters in the circumstances.[239]

In discussing the variety of applicable principles, a distinction has traditionally been drawn between opposite and adjacent states for the purposes of delimitation. In the former case, the Court has noted that there is less difficulty in applying the equidistance method than in the latter, since the distorting effect of an individual geographical feature in the case of adjacent states is more likely to result in an inequitable delimitation. Accordingly, greater weight is to be placed upon equidistance in a delimitation of the shelf between opposite states in the context of equitable considerations,[240] than in the case of adjacent states where the range of applicable equitable principles may be more extensive and the relative importance of each particular principle less clear. Article 83 of the 1982 Convention, however, makes no distinction between delimitations on the basis of whether the states are in an opposite or adjacent relationship. The same need to achieve an equitable solution on the basis of international law is all that is apparent and recent moves to a presumption in favour of equidistance in the case of opposite coasts may well apply also to adjacent states.

[237] ICJ Reports, 1993, pp. 70–2; 99 ILR, pp. 438–40. But see the Separate Opinion of Judge Schwebel, ICJ Reports, 1993, pp. 118–20; 99 ILR, pp. 486–8.

[238] ICJ Reports, 1993, pp. 72–3; 99 ILR, pp. 440–1.

[239] ICJ Reports, 1993, pp. 73–5; 99 ILR, pp. 441–3. But see the Separate Opinion of Judge Oda, ICJ Reports, 1993, pp. 114–17; 99 ILR, pp. 482–5. Note also the discussion of equity in such situations in the Separate Opinion of Judge Weeramantry, ICJ Reports, 1993, pp. 211 ff.; 99 ILR, pp. 579 ff.

[240] See *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 36–7; 41 ILR, pp. 29, 65; the *Anglo-French Continental Shelf* case, Cmnd 7438, pp. 58–9; 54 ILR, p. 65; the *Tunisia–Libya Continental Shelf* case, ICJ Reports, 1982, pp. 18, 88; 67 ILR, pp. 4, 81; the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 325; 71 ILR, p. 74, and the *Jan Mayen* case, ICJ Reports, 1993, p. 37; 99 ILR, p. 395. See also article 6 of the Continental Shelf Convention, 1958.

The weight to be given to the criterion of proportionality between the length of the coastline and the area of continental shelf has also been the subject of some consideration and opinions have varied. It is a factor that must be cautiously applied.[241]

Article 74 of the 1982 Convention provides that delimitation of the exclusive economic zone between states with opposite or adjacent coasts is to be effected by agreement on the basis of international law,[242] 'in order to achieve an equitable solution'. Since this phrase is identical to the provision on delimitation of the continental shelf,[243] it is not surprising that cases have arisen in which states have sought a single maritime boundary, applying both to the continental shelf and the economic zone.

In the *Gulf of Maine* case,[244] the Chamber of the International Court took the view that the criteria for a single maritime boundary[245] were those that would apply to both the continental shelf and economic zones (in this case a fisheries zone) and not criteria that relate to only one of these areas.[246] Nevertheless, the overall requirement for the establishment of

[241] The Court in the *North Sea Continental Shelf* cases, in discussing this issue, called for a reasonable degree of proportionality, ICJ Reports, 1969, pp. 3, 52; 41 ILR, pp. 29, 82, while in the *Anglo-French Continental Shelf* case the Tribunal emphasised that it was disproportion rather than proportionality that was relevant in the context of the equities, Cmnd 7438, pp. 60–1; 54 ILR, pp. 6, 67. But cf. the *Tunisia/Libya Continental Shelf* case, ICJ Reports, 1982, pp. 18, 75; 67 ILR, pp. 4, 75. See also the *Libya/Malta Continental Shelf* case, ICJ Reports, 1985, pp. 48–50; 81 ILR, p. 280.

[242] As referred to in article 38 of the Statute of the ICJ.

[243] Article 83. Note that the International Court declared that 'the identity of the language which is employed, even though limited of course to the determination of the relevant principles and rules of international law, is particularly significant', the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 295; 71 ILR, pp. 74, 122. The Court declared in the *Jan Mayen Maritime Delimitation (Denmark* v. *Norway)* case, ICJ Reports, 1993, pp. 37, 59; 99 ILR, pp. 395, 427, that the statement in article 74(1) and the corresponding provision in article 83(1) with regard to the aim of any delimitation process being an equitable solution, 'reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones'. The Tribunal in *Eritrea/Yemen (Phase Two: Maritime Delimitation)* stated in relation to articles 74 and 83 that these provisions resulted from a last-minute endeavour at the conference to get agreement on a very controversial matter and so 'were consciously designed to decide as little as possible', 119 ILR, pp. 417, 454.

[244] ICJ Reports, 1984, p. 246; 71 ILR, p. 74.

[245] The Court has emphasised that the notion of a single maritime line stems from state practice and not from treaty law, thus underlining its position in customary law: see *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 93; *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 440–1; *Barbados* v. *Trinidad and Tobago*, Award of 11 April 2006, para. 235 and *Guyana* v. *Suriname*, Award of 17 September 2007, para. 334.

[246] *Gulf of Maine* case, ICJ Reports, 1984, p. 326; 71 ILR, p. 153.

such a boundary is the need to achieve an equitable solution and this brings into consideration a range of factors that may or may not be deemed relevant or decisive by the Court. It is in the elucidation of such factors that difficulties have been encountered and it would be over-optimistic to assert that the situation is clear, although very recent cases have moved towards a degree of predictability. In the *Gulf of Maine* case, the Court emphasised that the relevant criteria had to be essentially determined 'in relation to what may be properly called the geographical features of the area', but what these are is subject to some controversy and did not appear to cover scientific and other facts relating to fish stocks, oil exploration, scientific research or common defence arrangements.[247] In the *Guinea/Guinea-Bissau Maritime Delimitation* case,[248] the Tribunal was called upon to draw a single line dividing the territorial sea, economic zone and continental shelf of the two states concerned. In the case of the latter two zones, the Tribunal noted that the use of the equidistance method was unsatisfactory since it exaggerated the importance of insignificant coastal features. Rather one had to consider the whole coastline of West Africa.[249] The Tribunal also considered that the evidence with regard to the geological and geomorphological features of the continental shelf was unsatisfactory,[250] while general economic factors were rejected as being unjust and inequitable, since they were based upon an evaluation of data that was constantly changing.[251] The question of a single maritime boundary arose again in the *St Pierre and Miquelon (Canada/France)* case,[252] where the Tribunal was asked to establish a single delimitation as between the parties governing all rights and jurisdiction that the parties may exercise under international law in these maritime areas. In such cases, the Tribunal, following the *Gulf of Maine* decision, took the view that in a single or all-purpose delimitation, article 6 of the Geneva Convention on the Continental Shelf, 1958, which governed the delimitation of the continental shelf, did not have mandatory force as regards the establishment of that single maritime line.[253]

[247] ICJ Reports, 1984, p. 278; 71 ILR, p. 105. [248] 77 ILR, p. 635.
[249] *Ibid.*, pp. 679–81. [250] *Ibid.*, pp. 685–7. [251] *Ibid.*, pp. 688–9.
[252] 31 ILM, 1992, p. 1145; 95 ILR, p. 645. See also M. D. Evans, 'Less Than an Ocean Apart: The St Pierre and Miquelon and Jan Mayen Islands and the Delimitation of Maritime Zones', 43 ICLQ, 1994, p. 678; K. Highet, 'Delimitation of the Maritime Areas Between Canada and France', 87 AJIL, 1993, p. 452, and H. Ruiz Fabri, 'Sur la Délimitation des Espaces Maritimes entre le Canada et la France', 97 RGDIP, 1993, p. 67.
[253] 31 ILM, 1992, p. 1163; 95 ILR, p. 663.

However, where there did not exist a special agreement between the parties asking the Court to determine a single maritime boundary applicable both to the continental shelf and the economic zone, the Court declared in the *Jan Mayen Maritime Delimitation (Denmark* v. *Norway)* case[254] that the two strands of the applicable law had to be examined separately. These strands related to the effect of article 6 of the Geneva Convention on the Continental Shelf, 1958 upon the continental shelf and the rules of customary international law with regard to the fishery zone.[255]

Recent cases have seen further moves towards clarity and simplicity. In *Eritrea/Yemen (Phase Two: Maritime Delimitation)*, the Tribunal noted that it was a generally accepted view that between coasts that are opposite to each other, the median or equidistance line normally provided an equitable boundary in accordance with the requirements of the 1982 Convention.[256] It also reaffirmed earlier case-law to the effect that proportionality was not an independent mode or principle of delimitation, but a test of the equitableness of a delimitation arrived at by other means.[257] The Tribunal also considered the role of mid-sea islands in a delimitation between opposite states and noted that to give them full effect would produce a disproportionate effect.[258] Indeed, no effect was given to some of the islands in question.[259]

In *Qatar* v. *Bahrain*, the Court emphasised the close relationship between continental shelf and economic zone delimitations[260] and held that the appropriate methodology was first to provisionally draw an equidistance line and then to consider whether circumstances existed which must lead to an adjustment of that line.[261] Further, it was noted that 'the equidistance/special circumstances' rule, applicable to territorial sea

[254] ICJ Reports, 1993, p. 37; 99 ILR, p. 395. See also M. D. Evans, 'Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (*Denmark* v. *Norway*)', 43 ICLQ, 1994, p. 697.

[255] But see the Separate Opinion of Judge Oda, who took the view that the regime of the continental shelf was independent of the concept of the exclusive economic zone and that the request to draw a single maritime boundary was misconceived, ICJ Reports, 1993, pp. 96–7; 99 ILR, pp. 464–5.

[256] 119 ILR, pp. 417, 457.

[257] *Ibid*., p. 465. See also the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 52; 41 ILR, p. 29 and the *Anglo-French Continental Shelf* case, Cmnd 7438; 54 ILR, p. 6.

[258] 119 ILR, p. 454.

[259] *Ibid*., p. 461. Note that the Tribunal rejected the enclaving of some islands as had occurred in the *Anglo-French Continental Shelf* case, *ibid*., p. 463.

[260] ICJ Reports, 2001, pp. 40, 110.

[261] *Ibid*., p. 111.

delimitation, and the 'equidistance/relevant circumstances' rule as developed since 1958 in case-law and practice regarding the delimitation of the continental shelf and the exclusive economic zone were 'closely related'.[262] The Court did not consider the existence of pearling banks to be a circumstance justifying a shift in the equidistance line[263] nor was the disparity in length of the coastal fronts of the states.[264] It was also considered that for reasons of equity in order to avoid disproportion, no effect could be given to Fasht al Jarim, a remote projection of Bahrain's coastline in the Gulf area, which constituted a maritime feature located well out to sea and most of which was below water at high tide.[265]

This approach was reaffirmed by the Court in *Cameroon* v. *Nigeria*, where it was noted that 'the applicable criteria, principles and rules of delimitation' concerning a line 'covering several zones of coincident jurisdiction' could be expressed in 'the so-called equitable principles/relevant circumstances method'. This method, 'which is very similar to the equidistance/special circumstances method' concerning territorial sea delimitation, 'involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an "equitable result"'.[266] Such a line had to be constructed on the basis of the relevant coastlines of the states in question and excluded taking into account the coastlines of third states and the coastlines of the parties not facing each other.[267] Further, the Court emphasised that 'equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation',[268] thus putting an end to a certain trend in previous decades to put the whole emphasis in delimitation upon an equitable solution, leaving substantially open the question of what factors to take into account and how to rank them. The geographical configuration of the maritime area in question was an important element in this case and the Court stressed that while certain geographical peculiarities of maritime areas could be taken into account, this would be solely as relevant circumstances for the purpose, if necessary, of shifting the provisional delimitation line. In the present case, the Court did not consider the configuration of the coastline a relevant circumstance justifying altering the equidistance line.[269] Similarly the Court did not feel it necessary to take

[262] *Ibid.*, p. 111. [263] *Ibid.*, p. 112.
[264] *Ibid.*, p. 114. This was in view of the recognition that Bahrain had sovereignty over the Hawar Islands, a factor which mitigated any serious disparity.
[265] *Ibid.*, p. 115. [266] ICJ Reports, 2002, pp. 303, 441. [267] *Ibid.*, p. 442.
[268] *Ibid.*, p. 443. [269] *Ibid.*, pp. 443–5.

into account the existence of Bioko, an island off the coast of Cameroon but belonging to a third state, Equatorial Guinea, nor was it concluded that there existed 'a substantial difference in the lengths of the parties' respective coastlines' so as to make it a factor to be considered in order to adjust the provisional delimitation line.[270]

In the *Barbados* v. *Trinidad and Tobago* arbitration award of 11 April 2006, it was noted that equitable considerations *per se* constituted an imprecise concept in the light of the need for stability and certainty in the outcome of the legal process and it was emphasised that the search for predictable, objectively determined criteria for delimitation underlined that the role of equity lies within and not beyond the law.[271] The process of achieving an equitable result was constrained by legal principle, as both equity and stability were integral parts of the delimitation process.[272] The tribunal concluded that the determination of the line of delimitation followed a two-step approach. First, a provisional line of equidistance is constructed and this constitutes the practical starting point. Secondly, this line is examined in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result. This approach was termed the 'equidistance/relevant circumstances' principle so that certainty would thus be combined with the need for an equitable result.[273]

Conclusion

Accordingly, there is now a substantial convergence of applicable principles concerning maritime delimitation, whether derived from customary law or treaty. In all cases, whether the delimitation is of the territorial sea, continental shelf or economic zone (or of the latter two together), the appropriate methodology to be applied is to draw a provisional equidistance line as the starting position and then see whether any relevant or special circumstances exist which may warrant a change in that line in order to

[270] *Ibid.*, p. 446. See also, as to the relevance of oil practice by the parties, *ibid.*, pp. 447–8, and *Eritrea/Yemen (Phase Two: Maritime Delimitation)*, 119 ILR, pp. 417, 443 ff.

[271] Award of 11 April 2006, para. 230. See also B. Kwiatkowska, 'The 2006 Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction and Merits) Award', in Ndiaye and Wolfrum, *Law of the Sea, Environmental Law and Settlement of Disputes*, p. 917.

[272] Award of 11 April 2006, paras. 243 and 244.

[273] *Ibid.*, para. 242. See also para. 317. This approach was approved in *Guyana* v. *Suriname* , Award of 17 September 2007, paras. 340–1.

achieve an equitable result. The presumption in favour of that line is to be welcomed as a principle of value and clarity.

As to the meaning of special or relevant circumstances, or the criteria that need to be taken into account, case-law provides a range of clear indications. Equity is not a method of delimitation and nature cannot be totally refashioned, but some modification of the provisional equidistance line may be justified for the purpose of, for example, 'abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result'.[274] The following principles may be noted. First, the delimitation should avoid the encroachment by one party on the natural prolongation of the other or its equivalent in respect of the economic zone and should avoid to the extent possible the interruption of the maritime projection of the relevant coastlines.[275] Secondly, the configuration of the coast may be relevant where the drawing of an equidistance line may unduly prejudice a state whose coast is particularly concave or convex within the relevant area of the delimitation when compared with that of its neighbours. But the threshold for this is relatively high.[276] Thirdly, a 'substantial difference in the lengths of the parties' respective coastlines may be a factor to be taken into consideration' in mitigation of an equidistance line so as to avoid a disproportionate and inequitable result.[277] Fourthly, the presence of islands or other similar maritime features may be relevant to the equities of the situation and may justify a modification of the provisional equidistance line.[278] Fifthly, security considerations may be taken into account, but the precise effects of this are unclear. Sixthly, resource-related criteria, such as the distribution of fish stocks, have been treated cautiously and have not generally been accepted as a relevant circumstance.[279] Finally, the prior conduct of the parties may be relevant, for example, where there is sufficient practice to show that a provisional boundary has been agreed. In the *Tunisia/Libya* case, the Court held that a line close to the coast which neither party had crossed when granting offshore oil and gas concessions and which thus constituted a *modus*

274 The *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 50.

275 *Barbados* v. *Trinidad and Tobago*, Award of 11 April 2006, para. 232.

276 *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 445–6.

277 See e.g. *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 446–7 and *Barbados* v. *Trinidad and Tobago*, Award of 11 April 2006, para. 240.

278 See e.g. the *Anglo-French Continental Shelf* case, 54 ILR, p. 6 and *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 114 ff.

279 *Gulf of Maine*, ICJ Reports, 1984, pp. 246, 342 and *Barbados* v. *Trinidad and Tobago*, Award of 11 April 2006, paras. 228 and 241.

vivendi was highly relevant,[280] although in *Cameroon* v. *Nigeria*, the Court emphasised that only if such concessions were based on express or tacit agreement between the parties could they be taken into account for the purposes of a delimitation.[281]

Landlocked states[282]

Article 3 of the Geneva Convention on the High Seas, 1958 provided that 'in order to enjoy freedom of the seas on equal terms with coastal states, states having no sea coast should have free access to the sea'.[283] Article 125 of the 1982 Convention on the Law of the Sea is formulated as follows:

> 1. Land-locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked states shall enjoy freedom of transit through the territory of transit states by all means of transport.
>
> 2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked states and the transit state concerned through bilateral, subregional or regional agreements.
>
> 3. Transit states, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked states shall in no way infringe their legitimate interests.

It will thus be seen that there is no absolute right of transit, but rather that transit depends upon arrangements to be made between the land-locked and transit states. Nevertheless, the affirmation of a right of access to the sea coast is an important step in assisting landlocked states. Articles 127 to 130 of the 1982 Convention set out a variety of terms for the

[280] ICJ Reports, 1982, pp. 18, 71, 84 and 80–6.

[281] ICJ Reports, 2002, pp. 303, 447–8. See also *Guyana* v. *Suriname*, Award of 17 September 2007, paras. 378 ff.

[282] See e.g. S. C. Vasciannie, *Land-Locked and Geographically Disadvantaged States in the International Law of the Sea*, Oxford, 1990; J. Symonides, 'Geographically Disadvantaged States in the 1982 Convention on the Law of the Sea', 208 HR, 1988, p. 283; M. I. Glassner, *Bibliography on Land-Locked States*, 4th edn, The Hague, 1995; L. Caflisch, 'Land-locked States and their Access to and from the Sea', 49 BYIL, 1978, p. 71, and I. Delupis, 'Land-locked States and the Law of the Sea', 19 *Scandinavian Studies in Law*, 1975, p. 101. See also Churchill and Lowe, *Law of the Sea*, chapter 18.

[283] See also the Convention on Transit Trade of Land-Locked States, 1965.

operation of transit arrangements, while article 131 provides that ships flying the flag of landlocked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports. Ships of all states, whether coastal states or landlocked states, have the right of innocent passage in the territorial sea and freedom of navigation in the waters beyond the territorial sea.[284]

It is also to be noted that landlocked states have the right to participate upon an equitable basis in the exploitation of an appropriate part of the surplus of the living resources of the economic zones of coastal states of the same subregion or region, taking into account relevant economic and geographical factors.[285] Geographically disadvantaged states have the same right.[286] The terms and modalities of such participation are to be established by the states concerned through bilateral, subregional or regional agreements, taking into account a range of factors, including the need to avoid effects detrimental to fishing communities or fishing industries of the coastal state and the nutritional needs of the respective states.[287]

With regard to provisions concerning the international seabed regime, article 148 of the 1982 Convention provides that the effective participation of developing states in the International Seabed Area shall be promoted, having due regard to their special interests and needs, and in particular to the special need of the landlocked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.[288]

[284] See e.g. article 14(1) of the Geneva Convention on the Territorial Sea, 1958; articles 2(1) and 4 of the Geneva Convention on the High Seas, 1958 and articles 17, 38(1), 52(1), 53(2), 58(1), 87 and 90 of the 1982 Convention.

[285] Article 69(1) of the 1982 Convention.

[286] Article 70(1). Geographically disadvantaged states are defined in article 70(2) as 'coastal states, including states bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other states in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal states which can claim no exclusive economic zone of their own'.

[287] See articles 69(2) and 70(2). Note also articles 69(4) and 70(5) restricting such rights of participation of developed landlocked states to developed coastal states of the same subregion or region. By article 71, the provisions of articles 69 and 70 do not apply in the case of a coastal state whose economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone.

[288] See also articles 152, 160 and 161.

The high seas[289]

The closed seas concept proclaimed by Spain and Portugal in the fifteenth and sixteenth centuries, and supported by the Papal Bulls of 1493 and 1506 dividing the seas of the world between the two powers, was replaced by the notion of the open seas and the concomitant freedom of the high seas during the eighteenth century.

The essence of the freedom of the high seas is that no state may acquire sovereignty over parts of them.[290] This is the general rule, but it is subject to the operation of the doctrines of recognition, acquiescence and prescription, where, by long usage accepted by other nations, certain areas of the high seas bounding on the territorial waters of coastal states may be rendered subject to that state's sovereignty. This was emphasised in the *Anglo-Norwegian Fisheries* case.[291]

The high seas were defined in Article 1 of the Geneva Convention on the High Seas, 1958 as all parts of the sea that were not included in the territorial sea or in the internal waters of a state. This reflected customary international law, although as a result of developments the definition in article 86 of the 1982 Convention includes: all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state.

Article 87 of the 1982 Convention (developing article 2 of the 1958 Geneva Convention on the High Seas) provides that the high seas are open to all states and that the freedom of the high seas is exercised under the conditions laid down in the Convention and by other rules of international law. It includes *inter alia* the freedoms of navigation, overflight, the laying of submarine cables and pipelines,[292] the construction of artificial islands and other installations permitted under international law,[293] fishing, and the conduct of scientific research.[294] Such freedoms are to be exercised with due regard for the interests of other states in their exercise of the

[289] See e.g. Brown, *International Law of the Sea*, vol. I, chapter 14; O'Connell, *International Law of the Sea*, vol. II, chapter 21, and Churchill and Lowe, *Law of the Sea*, chapter 11. See also *Oppenheim's International Law*, pp. 710 ff. and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 1194.

[290] See article 2 of the 1958 High Seas Convention and article 89 of the 1982 Convention.

[291] ICJ Reports, 1951, p. 116; 18 ILR, p. 86. See above, p. 559.

[292] Subject to Part VI of the Convention, dealing with the continental shelf.

[293] Subject to Part VI of the Convention, dealing with the continental shelf.

[294] Subject to Part VI of the Convention, dealing with the continental shelf, and Part XIII, dealing with marine scientific research.

freedom of the high seas, and also with due regard for the rights under the Convention regarding activities in the International Seabed Area.[295]

Australia and New Zealand alleged before the ICJ, in the *Nuclear Tests* case,[296] that French nuclear testing in the Pacific infringed the principle of the freedom of the seas, but this point was not decided by the Court. The 1963 Nuclear Test Ban Treaty prohibited the testing of nuclear weapons on the high seas as well as on land, but France was not a party to the treaty, and it appears not to constitute a customary rule binding all states, irrespective of the treaty.[297] Nevertheless, article 88 of the 1982 Convention provides that the high seas shall be reserved for peaceful purposes.

Principles that are generally acknowledged to come within article 2 include the freedom to conduct naval exercises on the high seas and the freedom to carry out research studies.

The freedom of navigation[298] is a traditional and well-recognised facet of the doctrine of the high seas, as is the freedom of fishing.[299] This was reinforced by the declaration by the Court in the *Fisheries Jurisdiction* cases[300] that Iceland's unilateral extension of its fishing zones from 12 to 50 miles constituted a violation of article 2 of the High Seas Convention, which is, as the preamble states, 'generally declaratory of established principles of international law'. The freedom of the high seas applies not only to coastal states but also to states that are landlocked.[301]

The question of freedom of navigation on the high seas in times of armed conflict was raised during the Iran–Iraq war, which during its

[295] See below, p. 628.

[296] ICJ Reports, 1974, pp. 253 and 457; 57 ILR, pp. 350, 605. See also the Order of the International Court of Justice of 22 September 1995 in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France)* case, ICJ Reports, 1995, p. 288, where the Court refused to accede to a request by New Zealand to re-examine the 1974 judgment in view of the resumption by France of underground nuclear testing in the South Pacific.

[297] Note, however, the development of regional agreements prohibiting nuclear weapons: see the Treaty of Tlatelolco for the Prohibition of Nuclear Weapons in Latin America, 1967, which extends the nuclear weapons ban to the territorial sea, airspace and any other space over which a state party exercises sovereignty in accordance with its own legislation; the Treaty of Rarotonga establishing a South Pacific Nuclear-Free Zone, 1985; the African Nuclear Weapon-Free Treaty, 1996 and the Treaty on the Southeast Asia Nuclear Weapon-Free Zone, 1995.

[298] See the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 22; 16 AD, p. 155, and *Nicaragua* v. *United States*, ICJ Reports, 1986, pp. 14, 111–12; 76 ILR, pp. 349, 445.

[299] See the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 183; 18 ILR, pp. 86, 131. See also below, p. 623.

[300] ICJ Reports, 1974, p. 3.

[301] See above, p. 607.

latter stages involved attacks upon civilian shipping by both belligerents. Rather than rely on the classical and somewhat out-of-date rules of the laws of war at sea,[302] the UK in particular analysed the issue in terms of the UN Charter. The following statement was made:[303]

> The UK upholds the principle of freedom of navigation on the high seas and condemns all violations of the law of armed conflicts including attacks on merchant shipping. Under article 51 of the UN Charter, a state actively engaged in armed conflict (as in the case of Iran and Iraq) is entitled in exercise of its inherent right of self-defence to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicion proves to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay. This right would not, however, extend to the imposition of a maritime blockade or other forms of economic warfare.

Jurisdiction on the high seas[304]

The foundation of the maintenance of order on the high seas has rested upon the concept of the nationality of the ship, and the consequent jurisdiction of the flag state over the ship. It is, basically, the flag state that will enforce the rules and regulations not only of its own municipal law but of international law as well. A ship without a flag will be deprived of many of the benefits and rights available under the legal regime of the high seas.

Each state is required to elaborate the conditions necessary for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag.[305] The nationality of the ship will depend upon the flag it flies, but article 91 of the 1982 Convention also stipulates that there must be a 'genuine link' between the state and the ship.[306] This

302 See e.g. Churchill and Lowe, *Law of the Sea*, chapter 17, and C. J. Colombos, *International Law of the Sea*, 6th edn, London, 1967, part II.

303 *Parliamentary Papers*, 1987–8, HC, Paper 179–II, p. 120 and UKMIL, 59 BYIL, 1988, p. 581.

304 See e.g. *Oppenheim's International Law*, p. 731.

305 Article 5 of the 1958 High Seas Convention and article 91 of the 1982 Convention.

306 Article 5 of the High Seas Convention, 1958 had added to this the requirement that 'in particular the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'. This requirement appears in article 94 of the 1982 Convention.

provision, which reflects 'a well-established rule of general international law',[307] was intended to check the use of flags of convenience operated by states such as Liberia and Panama which would grant their nationality to ships requesting such because of low taxation and the lack of application of most wage and social security agreements. This enabled the ships to operate at very low costs indeed. However, what precisely the 'genuine link' consists of and how one may regulate any abuse of the provisions of article 5 are unresolved questions. Some countries, for example the United States, maintain that the requirement of a 'genuine link' really only amounts to a duty to exercise jurisdiction over the ship in an efficacious manner, and is not a pre-condition for the grant, or the acceptance by other states of the grant, of nationality.[308]

An opportunity did arise in 1960 to discuss the meaning of the provision in the *IMCO* case.[309] The International Court was called upon to define the 'largest ship-owning nations' for the purposes of the constitution of a committee of the Inter-Governmental Maritime Consultative Organisation. It was held that the term referred only to registered tonnage so as to enable Liberia and Panama to be elected to the committee. Unfortunately, the opportunity was not taken of considering the problems of flags of convenience or the meaning of the 'genuine link' in the light of the true ownership of the ships involved, and so the doubts and ambiguities remain.

The UN Conference on Conditions of Registration of Ships, held under the auspices of the UN Conference on Trade and Development, convened in July 1984 and an agreement was signed in 1986. It attempts to deal with the flags of convenience issue, bearing in mind that nearly one-third of the world's merchant fleet by early 1985 flew such flags. It specifies that flag states should provide in their laws and regulations for the ownership of ships flying their flags and that those should include appropriate provision for participation by nationals as owners of such ships, and that such provisions should be sufficient to permit the flag state to exercise effectively its jurisdiction and control over ships flying its flag.[310]

The issue of the genuine link arose in the context of the Iran–Iraq war and in particular Iranian attacks upon Kuwaiti shipping. This prompted

[307] See the 1999 decision of the International Tribunal for the Law of the Sea in *M/V Saiga (No. 2)*, 120 ILR, pp. 143, 175.

[308] See Churchill and Lowe, *Law of the Sea*, pp. 213 ff.

[309] ICJ Reports, 1960, p. 150; 30 ILR, p. 426.

[310] *Keesing's Contemporary Archives*, p. 33952.

Kuwait to ask the UK and the USA to reflag Kuwaiti tankers. The USA agreed in early 1987 to reflag eleven such tankers under the US flag and to protect them as it did other US-flagged ships in the Gulf.[311] The UK also agreed to reflag some Kuwaiti tankers, arguing that only satisfaction of Department of Trade and Industry requirements was necessary.[312] Both states argued that the genuine link requirement was satisfied and, in view of the ambiguity of state practice as to the definition of genuine link in such instances, it is hard to argue that the US and UK acted unlawfully. The International Tribunal for the Law of the Sea in *M/V Saiga (No. 2)* has underlined that determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag state, although disputes concerning such matters may be subject to the dispute settlement procedures of the 1982 Convention. The question of the nationality of a ship was a question of fact to be determined on the basis of evidence adduced by the parties.[313] The conduct of the flag state, 'at all times material to the dispute', was an important consideration in determining the nationality or registration of a ship.[314] The Tribunal has also confirmed that the requirement of a genuine link was in order to secure effective implementation of the duties of the flag state and not to establish criteria by reference to which the validity of the registration of ships in a flag state may be challenged by other states.[315]

Ships are required to sail under the flag of one state only and are subject to its exclusive jurisdiction (save in exceptional cases). Where a ship does sail under the flags of more than one state, according to convenience, it may be treated as a ship without nationality and will not be able to claim any of the nationalities concerned.[316] A ship that is stateless, and does not fly a flag, may be boarded and seized on the high seas. This point was accepted by the Privy Council in the case of *Naim Molvan* v.

[311] See 26 ILM, 1987, pp. 1429–30, 1435–40 and 1450–2. See also 37 ICLQ, 1988, pp. 424–45, and M. H. Nordquist and M. G. Wachenfeld, 'Legal Aspects of Reflagging Kuwaiti Tankers and Laying of Mines in the Persian Gulf', 31 German YIL, 1988, p. 138.

[312] See e.g. 119 HC Deb., col. 645, 17 July 1987.

[313] 120 ILR, pp. 143, 175–6. See also the decision by the International Tribunal for the Law of the Sea in the *Grand Prince* case, 2001, paras. 81 ff., 125 ILR, pp. 272, 297 ff. See www.itlos.org/start2_en.html.

[314] *M/V Saiga*, 120 ILR, pp. 143, 176 and the *Grand Prince* case, 2001, para. 89, 125 ILR, pp. 272, 299.

[315] *M/V Saiga*, 120 ILR, pp. 143, 179.

[316] Article 6 of the 1958 Convention and article 92 of the 1982 Convention.

Attorney-General for Palestine,[317] which concerned the seizure by the British navy of a stateless ship attempting to convey immigrants into Palestine.

The basic principle relating to jurisdiction on the high seas is that the flag state alone may exercise such rights over the ship.[318] This was elaborated in the *Lotus* case,[319] where it was held that 'vessels on the high seas are subject to no authority except that of the state whose flag they fly'.[320] This exclusivity is without exception regarding warships and ships owned or operated by a state where they are used only on governmental non-commercial service. Such ships have, according to articles 95 and 96 of the 1982 Convention, 'complete immunity from the jurisdiction of any state other than the flag state'.[321]

Exceptions to the exclusivity of flag-state jurisdiction

However, this basic principle is subject to exceptions regarding other vessels, and the concept of the freedom of the high seas is similarly limited by the existence of a series of exceptions.

Right of visit

Since the law of the sea depends to such an extent upon the nationality of the ship, it is well recognised in customary international law that warships have a right of approach to ascertain the nationality of ships. However, this right of approach to identify vessels does not incorporate the right to board or visit ships. This may only be undertaken, in the absence of hostilities between the flag states of the warship and a merchant vessel and in the absence of special treaty provisions to the contrary, where the ship is engaged in piracy or the slave trade, or, though flying a foreign flag or no flag at all, is in reality of the same nationality as the warship or of no nationality. But the warship has to operate carefully in such circumstances,

[317] [1948] AC 351; 13 AD, p. 51. See also e.g. *US* v. *Dominguez* 604 F.2d 304 (1979); *US* v. *Cortes* 588 F.2d 106 (1979); *US* v. *Monroy* 614 F.2d 61 (1980) and *US* v. *Marino-Garcia* 679 F.2d 1373 (1982). In the latter case, the Court referred to stateless vessels as 'international pariahs', *ibid.*, p. 1383.

[318] See article 6 of the 1958 Convention and article 92 of the 1982 Convention.

[319] PCIJ, Series A, No. 10, 1927, p. 25; 4 AD, p. 153. See also *Sellers* v. *Maritime Safety Inspector* [1999] 2 NZLR 44, 46–8; 120 ILR, p. 585.

[320] Note that duties of the flag state are laid down in articles 94, 97, 98, 99, 113 and 115 of the 1982 Convention.

[321] See articles 8 and 9 of the High Seas Convention, 1958.

since it may be liable to pay compensation for any loss or damage sustained if its suspicions are unfounded and the ship boarded has not committed any act justifying them. Thus, international law has settled for a narrow exposition of the right of approach, in spite of earlier tendencies to expand this right, and the above provisions were incorporated into article 22 of the High Seas Convention. Article 110 of the 1982 Convention added to this list a right of visit where the ship is engaged in unauthorised broadcasting and the flag state of the warship has under article 109 of the Convention jurisdiction to prosecute the offender.

Piracy[322]

The most formidable of the exceptions to the exclusive jurisdiction of the flag state and to the principle of the freedom of the high seas is the concept of piracy. Piracy is strictly defined in international law and was declared in article 101 of the 1982 Convention to consist of any of the following acts:

> (a) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state; (b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[323]

The essence of piracy under international law is that it must be committed for private ends. In other words, any hijacking or takeover for political reasons is automatically excluded from the definition of piracy. Similarly, any acts committed on the ship by the crew and aimed at the ship itself or property or persons on the ship do not fall within this category.

Any and every state may seize a pirate ship or aircraft whether on the high seas or on *terra nullius* and arrest the persons and seize the property on board. In addition, the courts of the state carrying out the seizure

[322] See e.g. Brown, *International Law of the Sea*, vol. I, p. 299; *Oppenheim's International Law*, p. 746, and B. H. Dubner, *The Law of International Sea Piracy*, The Hague, 1979.

[323] See also article 15 of the High Seas Convention, 1958. Note that article 105 of the 1982 Convention deals with the seizure of pirate boats or aircraft, while article 106 provides for compensation in the case of seizure without adequate grounds. See also *Athens Maritime Enterprises Corporation* v. *Hellenic Mutual War Risks Association* [1983] 1 All ER 590; 78 ILR, p. 563.

have jurisdiction to impose penalties, and may decide what action to take regarding the ship or aircraft and property, subject to the rights of third parties that have acted in good faith.[324] The fact that every state may arrest and try persons accused of piracy makes that crime quite exceptional in international law, where so much emphasis is placed upon the sovereignty and jurisdiction of each particular state within its own territory. The first multilateral treaty concerning the regional implementation of the Convention's provisions on piracy was the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia in 2005, which calls for the establishment of an information-sharing centre in Singapore and extends the regulation of piracy beyond the high seas to events taking place in internal waters, territorial seas and archipelagic waters.[325]

The slave trade[326]

Although piracy may be suppressed by all states, most offences on the high seas can only be punished in accordance with regulations prescribed by the municipal legislation of states, even where international law requires such rules to be established. Article 99 of the 1982 Convention provides that every state shall take effective measures to prevent and punish the transport of slaves in ships authorised to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.[327] Under article 110, warships may board foreign merchant ships where they are reasonably suspected of engaging in the slave trade; offenders must be handed over to the flag state for trial.[328]

[324] See article 19 of the 1958 Convention and article 105 of the 1982 Convention. See also the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and Protocol, 1989. Note that on 18 April 2008, a French court charged six Somalis with piracy following the release of hostages taken from a French yacht that they had allegedly seized in the Gulf of Aden. The Somalis were apprehended by French forces and removed to France with the permission of the President of Somalia: see www.news.bbc.co.uk/1/hi/world/Europe/7355598.stm.

[325] See 44 ILM, 2005, p. 829.

[326] See e.g. Brown, *International Law of the Sea*, vol. I, p. 309.

[327] See also article 13 of the High Seas Convention, 1958.

[328] See also article 22 of the High Seas Convention, 1958. Several international treaties exist with the aim of suppressing the slave trade and some provide for reciprocal rights of visits and search on the high seas: see e.g. Churchill and Lowe, *Law of the Sea*, pp. 171–2. Note also that under article 108 of the 1982 Convention all states are to co-operate in the suppression of the illicit drug trade.

Unauthorised broadcasting[329]

Under article 109 of the 1982 Convention, all states are to co-operate in the suppression of unauthorised broadcasting from the high seas. This is defined to mean transmission of sound or TV from a ship or installation on the high seas intended for reception by the general public, contrary to international regulations but excluding the transmission of distress calls. Any person engaged in such broadcasting may be prosecuted by the flag state of the ship, the state of registry of the installation, the state of which the person is a national, any state where the transmission can be received or any state where authorised radio communication is suffering interference.

Any of the above states having jurisdiction may arrest any person or ship engaging in unauthorised broadcasting on the high seas and seize the broadcasting apparatus.[330]

Hot pursuit[331]

The right of hot pursuit of a foreign ship is a principle designed to ensure that a vessel which has infringed the rules of a coastal state cannot escape punishment by fleeing to the high seas. In reality it means that in certain defined circumstances a coastal state may extend its jurisdiction onto the high seas in order to pursue and seize a ship which is suspected of infringing its laws. The right, which has been developing in one form or another since the nineteenth century,[332] was comprehensively elaborated in article 111 of the 1982 Convention, building upon article 23 of the High Seas Convention, 1958.

It notes that such pursuit may commence when the authorities of the coastal state have good reason to believe that the foreign ship has violated its laws. The pursuit must start while the ship, or one of its boats, is within the internal waters, territorial sea or contiguous zone of the coastal state and may only continue outside the territorial sea or contiguous zone if it is uninterrupted. However, if the pursuit commences while the foreign

329 See e.g. J. C. Woodliffe, 'The Demise of Unauthorised Broadcasting from Ships in International Waters', 1 *Journal of Estuarine and Coastal Law*, 1986, p. 402, and Brown, *International Law of the Sea*, vol. I, p. 312.

330 See also article 110 of the 1982 Convention. In addition, see the European Agreement for the Prevention of Broadcasting transmitted from Stations outside National Territories.

331 See e.g. N. Poulantzas, *The Right of Hot Pursuit in International Law*, 2nd edn, The Hague, 2002, and *Oppenheim's International Law*, p. 739. See also W. C. Gilmore, 'Hot Pursuit: The Case of *R* v. *Mills and Others*', 44 ICLQ, 1995, p. 949.

332 See e.g. the *I'm Alone* case, 3 RIAA, p. 1609 (1935); 7 AD, p. 203.

ship is in the contiguous zone, then it may only be undertaken if there has been a violation of the rights for the protection of which the zone was established. The right may similarly commence from the archipelagic waters. In addition, the right will apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf (including safety zones around continental shelf installations) of the relevant rules and regulations applicable to such areas.

Hot pursuit only begins when the pursuing ship has satisfied itself that the ship pursued or one of its boats is within the limits of the territorial sea or, as the case may be, in the contiguous zone or economic zone or on the continental shelf. It is essential that prior to the chase a visual or auditory signal to stop has been given at a distance enabling it to be seen or heard by the foreign ship and pursuit may only be exercised by warships or military aircraft or by specially authorised government ships or planes. The right of hot pursuit ceases as soon as the ship pursued has entered the territorial waters of its own or a third state. The International Tribunal for the Law of the Sea has emphasised that the conditions laid down in article 111 are cumulative, each one of them having to be satisfied in order for the pursuit to be lawful.[333] In stopping and arresting a ship in such circumstances, the use of force must be avoided if at all possible and, where it is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.[334]

Collisions

Where ships are involved in collisions on the high seas, article 11 of the High Seas Convention declares, overruling the decision in the *Lotus* case,[335] that penal or disciplinary proceedings may only be taken against the master or other persons in the service of the ship by the authorities of either the flag state or the state of which the particular person is a national. It also provides that no arrest or detention of the ship, even for investigation purposes, can be ordered by other than the authorities of the flag state. This was reaffirmed in article 97 of the 1982 Convention.

[333] *M/V Saiga*, 120 ILR, pp. 143, 194.

[334] *Ibid*., p. 196. See also the *I'm Alone* case, 3 RIAA, p. 1609 (1935); 7 AD, p. 203, and the *Red Crusader* case, 35 ILR, p. 485. Note that article 22(1)f of the Straddling Stocks Convention, 1995 provides that an inspecting state shall avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. In addition, the force used must not exceed that reasonably required in the circumstances.

[335] PCIJ, Series A, No. 10, 1927, p. 25; 4 AD, p. 153.

Treaty rights and agreements[336]

In many cases, states may by treaty permit each other's warships to exercise certain powers of visit and search as regards vessels flying the flags of the signatories to the treaty.[337] For example, most of the agreements in the nineteenth century relating to the suppression of the slave trade provided that warships of the parties to the agreements could search and sometimes detain vessels suspected of being involved in the trade, where such vessels were flying the flags of the treaty states. The Convention for the Protection of Submarine Cables of 1884 gave the warships of contracting states the right to stop and ascertain the nationality of merchant ships that were suspected of infringing the terms of the Convention, and other agreements dealing with matters as diverse as arms trading and liquor smuggling contained like powers. Until recently, the primary focus of such activities in fact concerned drug trafficking.[338] However, the question of the proliferation of weapons of mass destruction (WMD) is today of great importance.[339] This issue has been tackled by a mix of international treaties, bilateral treaties, international co-operation and Security Council action. Building on the Security Council statement in 1992 identifying the proliferation of WMD as a threat to international peace and security,[340] the US announced the Proliferation Security Initiative in May 2003. A statement of Interdiction Principles agreed by participants in the initiative in September 2003 provided for the undertaking of effective measures to interdict the transfer or transport of WMD, their delivery systems and related materials to and from states and non-state actors of proliferation concern. Such measures were to include the boarding and

[336] See e.g. Churchill and Lowe, *Law of the Sea*, pp. 218 ff.

[337] This falls within article 110, which notes that 'Except where acts of interference derive from powers conferred by treaty . . . '.

[338] See the UK–US Agreement on Vessels Trafficking in Drugs, 1981 and *US* v. *Biermann*, 83 AJIL, 1989, p. 99; 84 ILR, p. 206. See also e.g. the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 and the Council of Europe Agreement on Illicit Traffic by Sea, 1995. But see as to enforcement of the Straddling Stocks Convention, below, p. 623.

[339] See e.g. M. Byers, 'Policing the High Seas: The Proliferation Security Initiative', 98 AJIL, 2004, p. 526; D. Joyner, 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation and International Law', 30 Yale JIL, 2005, p. 507; D. Guilfoyle, 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force', 56 ICLQ, 2007, p. 69, and Guilfoyle, 'Maritime Interdiction of Weapons of Mass Destruction', 12 *Journal of Conflict and Security Law*, 2007, p. 1. See also the statement of the UK Foreign Office Minister of 25 April 2006, UKMIL, 77 BYIL, 2006, pp. 773–4.

[340] S/23500, 31 January 1992.

search of any vessel flying the flag of one of the participants, with their consent, in internal waters, territorial seas or beyond the territorial seas, where such vessel is reasonably suspected of carrying WMD materials to or from states or non-state actors of proliferation concern.[341] In addition, the US has signed a number of bilateral WMD interdiction agreements, providing for consensual boarding of vessels.[342]

In a further development, Security Council resolution 1540 (2004) required all states *inter alia* to prohibit and criminalise the transfer of WMD and delivery systems to non-state actors, although there is no direct reference to interdiction.[343] In addition, a Protocol adopted in 2005 to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation provides essentially for the criminalisation of knowingly transporting WMD and related materials by sea and provides for enforcement by interdiction on the high seas.[344]

Pollution[345]

Article 24 of the 1958 Convention on the High Seas called on states to draw up regulations to prevent the pollution of the seas by the discharge of oil or the dumping of radioactive waste, while article 1 of the Convention on the Fishing and Conservation of the Living Resources of the High Seas, of the same year, declared that all states had the duty to adopt, or co-operate with other states in adopting, such measures as may be necessary for the conservation of the living resources of the high seas. Although these provisions have not proved an unqualified success, they have been reinforced by an interlocking series of additional agreements covering the environmental protection of the seas.

The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, signed in 1969 and in force as of June 1975, provides that the parties to the Convention may take such measures on the high seas:

[341] Participants include the US, UK, Australia, Canada, France, Germany, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Portugal, Singapore, Spain and Turkey: see Guilfoyle, 'Maritime Interdiction', p. 12.

[342] Including with Liberia, Panama, Croatia, Cyprus and Belize: see Guilfoyle, 'Maritime Interdiction', p. 22.

[343] See below, chapter 22, pp. 1208 and 1240.

[344] Guilfoyle, 'Maritime Interdiction', pp. 28 ff.

[345] See Brown, *International Law of the Sea*, vol. I, chapter 15; Churchill and Lowe, *Law of the Sea*, chapter 15, and O'Connell, *International Law of the Sea*, vol. II, chapter 25. See also below, chapter 15.

> as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

This provision came as a result of the *Torrey Canyon* incident in 1967[346] in which a Liberian tanker foundered off the Cornish coast, spilling massive quantities of oil and polluting large stretches of the UK and French coastlines. As a last resort to prevent further pollution, British aircraft bombed the tanker and set it ablaze. The Convention on Intervention on the High Seas provided for action to be taken to end threats to the coasts of states, while the Convention on Civil Liability for Oil Pollution Damage, also signed in 1969 and which came into effect in June 1975, stipulated that the owners of ships causing oil pollution damage were to be liable to pay compensation.

The latter agreement was supplemented in 1971 by the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage which sought to provide for compensation in circumstances not covered by the 1969 Convention and aid shipowners in their additional financial obligations.

These agreements are only a small part of the web of treaties covering the preservation of the sea environment. Other examples include the 1954 Convention for the Prevention of Pollution of the Seas by Oil, with its series of amendments designed to ban offensive discharges; the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft and the subsequent London Convention on the Dumping of Wastes at Sea later the same year; the 1973 Convention for the Prevention of Pollution from Ships; and the 1974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources.[347]

Under the 1982 Convention nearly fifty articles are devoted to the protection of the marine environment. Flag states still retain the competence to legislate for their ships, but certain minimum standards are imposed

[346] 6 ILM, 1967, p. 480. See also the *Amoco Cadiz* incident in 1978, e.g. Churchill and Lowe, *Law of the Sea*, p. 241, and the *Aegean Sea* and *Braer* incidents in 1992–3, e.g. G. Plant, '"Safer Ships, Cleaner Seas": Lord Donaldson's Inquiry, UK Government's Response and International Law', 44 ICLQ, 1995, p. 939.

[347] Also a variety of regional and bilateral agreements have been signed, Churchill and Lowe, *Law of the Sea*, pp. 263–4.

upon them.[348] It is also provided that states are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment and are liable in accordance with international law. States must also ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief regarding damage caused by pollution of the marine environment by persons under their jurisdiction.[349]

States are under a basic obligation to protect and preserve the marine environment.[350] Article 194 of the 1982 Convention also provides that:

> 1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonise their policies in this connection.
>
> 2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.
>
> 3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimise to the fullest possible extent:
>
> (a) the release of toxic, harmful, or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;
>
> (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;
>
> (c) pollution from installations and devices used in exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

[348] See article 211. See also generally articles 192–237, covering *inter alia* global and regional co-operation, technical assistance, monitory and environmental assessment, and the development of the enforcement of international and domestic law preventing pollution.
[349] Article 235. [350] Article 192.

(d) pollution from other installations and devices operating in the marine environment, in particular for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

4. In taking measures to prevent, reduce or control pollution of the marine environment, states shall refrain from unjustifiable interference with activities carried out by other states in the exercise of their rights and in pursuance of their duties in conformity with this Convention.[351]

Straddling stocks[352]

The freedom to fish on the high seas is one of the fundamental freedoms of the high seas, but it is not total or absolute.[353] The development of

[351] See also the Mox case, the International Tribunal for the Law of the Sea, Provisional Measures Order of 3 December 2001, www.itlos.org/start2_en.html; the OSPAR award of 2 July 2003, see www.pca-cpa.org/upload/files/OSPAR%20Award.pdf; the arbitral tribunal's suspension of proceedings, Order No. 3 of 24 June 2003 and Order No. 4 of 14 November 2003, see www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf and www.pca-cpa.org/upload/files/MOX%20Order%20No4.pdf and 126 ILR, pp. 257 ff. and 310 ff. See also the decision of the European Court of Justice of 30 May 2006, Case C-459/03, *Commission* v. *Ireland*, 45 ILM, 2006, p. 1074, where the Court found that by instituting proceedings against the UK under the Law of the Sea Convention dispute settlement mechanisms, Ireland had breached its obligations under articles 10 and 292 of the European Community Treaty and articles 192 and 193 of the European Atomic Energy Treaty.

[352] See e.g. Brown, *International Law of the Sea*, vol. I, p. 226; Churchill and Lowe, *Law of the Sea*, p. 305; F. Orrego Vicuña, *The Changing International Law of High Seas Fisheries*, Cambridge, 1999; W. T. Burke, *The New International Law of Fisheries*, Oxford, 1994; H. Gherari, 'L'Accord de 4 août 1995 sur les Stocks Chevauchants et les Stocks de Poisson Grands Migrateurs', 100 RGDIP, 1996, p. 367; B. Kwiatowska, 'Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice', 22 *Ocean Development and International Law*, 1991, p. 167; E. Miles and W. T. Burke, 'Pressures on the UN Convention on the Law of the Sea 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks', 20 *Ocean Development and International Law*, 1989, p. 352; E. Meltzer, 'Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries', 25 *Ocean Development and International Law*, 1994, p. 256; P. G. G. Davies and C. Redgwell, 'The International Legal Regulation of Straddling Fish Stocks', 67 BYIL, 1996, p. 199; D. H. Anderson, 'The Straddling Stocks Agreement of 1995 – An Initial Assessment', 45 ICLQ, 1996, p. 463, and D. Freestone and Z. Makuch, 'The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement', 7 *Yearbook of International Environmental Law*, 1996, p. 3.

[353] See article 2 of the High Seas Convention, 1958 and articles 1 and 6 of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958, and article 116 of the 1982 Convention. In particular, the freedom to fish is subject to a state's treaty obligations, to the interests and rights of coastal states and to the requirements of

exclusive economic zones has meant that the area of high seas has shrunk appreciably, so that the bulk of fish stocks are now to be found within the economic zones of coastal states. In addition, the interests of such coastal states have extended to impinge more clearly upon the regulation of the high seas.

Article 56(1) of the 1982 Convention provides that coastal states have sovereign rights over their economic zones for the purpose of exploring and exploiting, conserving and managing the fish stocks of the zones concerned. Such rights are accompanied by duties as to conservation and management measures in order to ensure that the fish stocks in exclusive economic zones are not endangered by over-exploitation and that such stocks are maintained at, or restored to, levels which can produce the maximum sustainable yield.[354] Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal states, these states shall seek either directly or through appropriate subregional or regional organisations to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks.[355] Article 116(b) of the 1982 Convention states that the freedom to fish on the high seas is subject to the rights and duties as well as the interests of coastal states as detailed above, while the 1982 Convention lays down a general obligation upon states to co-operate in taking such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas and a variety of criteria are laid down for the purpose of determining the allowable catch and establishing other conservation measures.[356]

A particular problem is raised with regard to straddling stocks, that is stocks of fish that straddle both exclusive economic zones and high seas, for if the latter were not in some way regulated, fishery stocks regularly present in the exclusive economic zone could be depleted by virtue of unrestricted

conservation. See generally on international fisheries law, www.oceanlaw.net/ and above, p. 581, with regard to the *Fisheries Jurisdiction* case.

354 Article 61. See also article 62.

355 Article 63(1). This is without prejudice to the other provisions of this Part of the 1982 Convention.

356 See articles 117–20. A series of provisions in the 1982 Convention apply with regard to particular species, e.g. article 64 concerning highly migratory species (such as tuna); article 65 concerning marine mammals (such as whales, for which see also the work of the International Whaling Commission); article 66 concerning anadromous species (such as salmon); article 67 concerning catadromous species (such as eels) and article 68 concerning sedentary species (which are regarded as part of the natural resources of a coastal state's continental shelf: see article 77(4)).

fishing of those stocks while they were present on the high seas. Article 63(2) of the 1982 Convention stipulates that where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone (i.e. the high seas), the coastal state and the states fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organisations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

The provisions in the 1982 Convention, however, were not deemed to be fully comprehensive[357] and, as problems of straddling stocks grew more apparent,[358] a Straddling Stocks Conference was set up in 1993 and produced an agreement two years later. The Agreement emphasises the need to conserve and manage straddling fish stocks and highly migratory species and calls in particular for the application of the precautionary approach.[359] Coastal states and states fishing on the high seas shall pursue co-operation in relation to straddling and highly migratory fish stocks either directly or through appropriate subregional or regional organisations and shall enter into consultations in good faith and without delay at the request of any interested state with a view to establishing appropriate arrangements to ensure conservation and management of the stocks.[360] Much emphasis is placed upon subregional and regional organisations and article 10 provides that in fulfilling their obligation to co-operate through such organisations or arrangements, states shall *inter alia* agree on measures to ensure the long-term sustainability of straddling and highly migratory fish stocks and agree as appropriate upon participatory rights such as allocations of allowable catch or levels of fishing effort. In particular, the establishment of co-operative mechanisms for effective

[357] See e.g. Burke, *New International Law of Fisheries*, pp. 348 ff., and B. Kwiatowska, 'The High Seas Fisheries Regime: At a Point of No Return?', 8 *International Journal of Marine and Coastal Law*, 1993, p. 327.

[358] E.g. with regard to the Grand Banks of Newfoundland, the Bering Sea, the Barents Sea, the Sea of Okhotsk and off Patagonia and the Falklands, see Anderson, 'Straddling Stocks Agreement', p. 463.

[359] See articles 5 and 6 of the Straddling Stocks Agreement. See also, with regard to this approach, below, chapter 15, p. 868. See generally on the agreement which came into force on 11 December 2001, www.un.org/Depts/los/convention_agreements/ convention_overview_fish_stocks.htm.

[360] Article 8. Note that by article 1(3) the agreement 'applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas'. This was intended to refer to Taiwan: see e.g. Orrego Vicuña, *High Seas Fisheries*, p. 139, and Anderson, 'Straddling Stocks Agreement', p. 468.

monitoring, control, surveillance and enforcement, decision-making procedures facilitating the adoption of such measures of conservation and management, and the promotion of the peaceful settlement of disputes are called for. The focus in terms of implementation is upon the flag state. Article 18 provides that flag states shall take such measures as may be necessary to ensure that their vessels comply with subregional and regional conservation and management measures, while article 19 provides that flag states must enforce such measures irrespective of where violations occur and investigate immediately any alleged violation. Article 21 deals specifically with subregional and regional co-operation in enforcement and provides that in any area of the high seas covered by such an organisation or arrangement, a state party which is also a member or participant in such an organisation or arrangement may board and inspect fishing vessels flying the flag of another state party to the Agreement. This applies whether that state party is or is not a member of or a participant in such a subregional or regional organisation or arrangement. The boarding and visiting powers are for the purpose of ensuring compliance with the conservation and management measures established by the organisation or arrangement. Where, following a boarding and inspection, there are clear grounds for believing that a vessel has engaged in activities contrary to the relevant conservation and management measures, the inspecting state shall secure evidence and promptly notify the flag state. The flag state must respond within three working days and either fulfil its investigation and enforcement obligations under article 19 or authorise the inspecting state to investigate. In the latter case, the flag state must then take enforcement action or authorise the inspecting state to take such action. Where there are clear grounds for believing that the vessel has committed a serious violation and the flag state has failed to respond or take action as required, the inspectors may remain on board and secure evidence and may require the master to bring the vessel into the nearest appropriate port.[361] Article 23 provides that a port state has the right and duty to take measures in accordance with international law to promote the effectiveness of subregional, regional and global conservation and management measures.[362]

One of the major regional organisations existing in this area is the North Atlantic Fisheries Organisation (NAFO), which came into being

[361] See also article 22.

[362] Note that by article 17(3) the fishing entities referred to in article 1(3) may be requested to co-operate with the organisations or arrangements in question.

following the Northwest Atlantic Fisheries Convention, 1978. The organisation has established a Fisheries Commission with responsibility for conservation measures in the area covered by this Convention. The European Community is a party to the Convention, although it has objected on occasions to NAFO's total catch quotas and the share-out of such quotas among state parties. In particular, a dispute developed with regard to the share-out of Greenland halibut, following upon a decision by NAFO to reduce the EC share of this fishery in 1995.[363] The EC formally objected to this decision using NAFO procedures and established its own halibut quota, which was in excess of the NAFO quota. In May 1994, Canada had amended its Coastal Fisheries Protection Act 1985 in order to enable it to take action to prevent further destruction of straddling stocks and by virtue of which any vessel from any nation fishing at variance with good conservation rules could be rendered subject to Canadian action. In early 1995, regulations were issued in order to protect Greenland halibut outside Canada's 200-mile limit from overfishing. On 9 March 1995, Canadian officers boarded a Spanish vessel fishing on the high seas on the Grand Banks some 245 miles off the Canadian coast. The captain was arrested and the vessel seized and towed to a Canadian harbour. Spain commenced an application before the International Court, but this failed on jurisdictional grounds.[364] In April 1995, an agreement between the EC and Canada was reached, under which the EC obtained an increased quota for Greenland halibut and Canada stayed charges against the vessel and agreed to repeal the provisions of the regulation banning Spanish and Portuguese vessels from fishing in the NAFO regulatory area. Improved control and enforcement procedures were also agreed.[365] Problems have also arisen in other areas: for example, the 'Donut Hole', a part of the high seas in the Bering Sea surrounded by the exclusive economic zones of Russia and the US,[366] and the 'Peanut Hole', a part of the high seas in the Sea of Okhotsk surrounded by Russia's economic zone. In 2001, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean was signed. This agreement establishes a Commission to determine *inter alia* the

[363] See e.g. P. G. G. Davies, 'The EC/Canadian Fisheries Dispute in the Northwest Atlantic', 44 ICLQ, 1995, p. 927.
[364] ICJ Reports, 1998, p. 432.
[365] See European Commission Press Release, WE/15/95, 20 April 1995.
[366] See the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, 1994.

total allowable catch within the area and to adopt standards for fishing operations.[367]

The international seabed[368]

Introduction

In recent years the degree of wealth contained beneath the high seas has become more and more apparent. It is estimated that some 175 billion dry tonnes of mineable manganese nodules are in existence, scattered over some 15 per cent of the seabed. This far exceeds the land-based reserves of the metals involved (primarily manganese, nickel, copper and cobalt).[369] While this source of mineral wealth is of great potential importance to the developed nations possessing or soon to possess the technical capacity to mine such nodules, it poses severe problems for developing states, particularly those who are dependent upon the export earnings of a few categories of minerals. Zaire, for example, accounts for over one third of total cobalt production, while Gabon and India each account for around 8 per cent of total manganese production.[370] By the early 1990s, there appeared to be six major deep sea mining consortia with the participation of numerous American, Japanese, Canadian, British, Belgian, German, Dutch and French companies.[371] The technology to mine is at an advanced stage and some basic investment has been made, although it is unlikely that there will be considerable mining activity for several years to come.

[367] Note also the existence of other agreements with regard to specific species of fish, e.g. the International Convention for the Conservation of Atlantic Tuna, 1966; the Convention for the Conservation of Southern Bluefin Tuna, 1993 and the Indian Ocean Tuna Commission Agreement, 1993.

[368] See e.g. Brown, *International Law of the Sea*, vol. I, chapter 17; O'Connell, *International Law of the Sea*, vol. I, chapter 12; Churchill and Lowe, *Law of the Sea*, chapter 12; E. Luard, *The Control of the Seabed*, Oxford, 1974; B. Buzan, *Seabed Politics*, New York, 1976; T. G. Kronmiller, *The Lawfulness of Deep Seabed Mining*, New York, 2 vols., 1980; E. D. Brown, *Sea-Bed Energy and Mineral Resources and the Law of the Sea*, London, 3 vols., 1986; A. M. Post, *Deepsea Mining and the Law of the Sea*, The Hague, 1983; A. D. Henchoz, *Règlementations Nationales et Internationales de l'Exploration et de l'Exploitation des Grans Fonds Marins*, Zurich, 1992; *Oppenheim's International Law*, p. 812, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 1210.

[369] See e.g. *Seabed Mineral Resource Development*, UN Dept. of International Economic and Social Affairs, 1980, ST/ESA/107, pp. 1–2.

[370] *Ibid.*, p. 3. Zaire is now called the Democratic Republic of the Congo.

[371] *Ibid.*, pp. 10–12.

In 1969, the UN General Assembly adopted resolution 2574 (XXIV) calling for a moratorium on deep seabed activities and a year later a Declaration of Principles Governing the Seabed and Ocean Floor and the Subsoil Thereof, beyond the Limits of National Jurisdiction ('the Area') was adopted. This provided that the Area and its resources were the 'common heritage of mankind' and could not be appropriated, and that no rights at all could be acquired over it except in conformity with an international regime to be established to govern its exploration and exploitation.

The 1982 Law of the Sea Convention (Part XI)

Under the Convention, the Area[372] and its resources are deemed to be the common heritage of mankind and no sovereign or other rights may be recognised. Minerals recovered from the Area in accordance with the Convention are alienable, however.[373] Activities in the Area are to be carried out for the benefit of mankind as a whole by or on behalf of the International Seabed Authority (the Authority) established under the Convention.[374] The Authority is to provide for the equitable sharing of such benefits.[375] Activities in the Area are to be carried out under article 153 by the Enterprise (i.e. the organ of the Authority established as its operating arm) and by states parties or state enterprises, or persons possessing the nationality of state parties or effectively controlled by them, acting in association with the Authority. The latter 'qualified applicants' will be required to submit formal written plans of work to be approved by the Council after review by the Legal and Technical Commission.[376]

This plan of work is to specify two sites of equal estimated commercial value. The Authority may then approve a plan of work relating to one of these sites and designate the other as a 'reserved site' which may only

[372] Defined in article 1 as the 'seabed and ocean floor and subsoil thereof beyond national jurisdiction'. This would start at the outer edge of the continental margin or at least at a distance of 200 nautical miles from the baselines.

[373] Articles 136 and 137.

[374] See below, p. 633. Note that certain activities in the Area do not need the consent of the Authority, e.g. pipeline and cable laying and scientific research not concerning seabed resources: see articles 112, 143 and 256.

[375] Article 140. See also article 150.

[376] See also Annex III, articles 3 and 4. Highly controversial requirements for transfer of technology are also included, *ibid.*, article 5.

be exploited by the Authority, via the Enterprise or in association with developing states.[377]

Resolution I of the Conference established a Preparatory Commission to make arrangements for the operation of the Authority and the International Tribunal for the Law of the Sea. [378]

Resolution II of the Conference made special provision for eight 'pioneer investors', four from France, Japan, India and the USSR and four from Belgium, Canada, the Federal Republic of Germany, Italy, Japan, the Netherlands, the UK and the USA, and possibly others from developing states, to be given pioneer status. Each investor must have invested at least $30 million in preparation for seabed mining, at least 10 per cent of which must be invested in a specific site. Sponsoring states must provide certification that this has happened.[379] Such pioneer investors are to be able to carry out exploration activities pending entry into force of the Convention with priority over the other applicants (apart from the Enterprise) in the allocation of exploitation contracts.[380] India, France, Japan and the USSR were registered as pioneer investors in 1987 on behalf of various consortia.[381] China was registered as a pioneer investor in March 1991,[382] while the multinational Interoceanmetal Joint Organisation was registered as a pioneer investor in August that year.[383] Several sites have

[377] *Ibid.*, articles 8 and 9. The production policies of the Authority are detailed in article 151 of the Convention.

[378] 21(4) *UN Chronicle*, 1984, pp. 44 ff. See also 25 ILM, 1986, p. 1329 and 26 ILM, 1987, p. 1725.

[379] See Churchill and Lowe, *Law of the Sea*, p. 230.

[380] See 21(4) *UN Chronicle*, 1984, pp. 45–7.

[381] See LOS/PCN/97–99 (1987). See also the Understanding of 5 September 1986 making various changes to the rules regarding pioneer operations, including extending the deadline by which the $30 million investment had to be made and establishing a Group of Technical Experts, LOS/PCN/L.41/Rev.1. See also Brown, *International Law of the Sea*, vol. I, pp. 448–54. An Understanding of 30 August 1990 dealt with training costs, transfer of technology, expenditure on exploration and the development of a mine site for the Authority, *ibid.*, pp. 454–5, while an Understanding of 22 February 1991 dealt with the avoidance of overlapping claims signed by China on the one hand and seven potential pioneer investor states on the other (Belgium, Canada, Italy, the Netherlands, Germany, the UK and the US), *ibid.*, p. 455.

[382] Brown, *International Law of the Sea*, vol. I, p. 455.

[383] *Ibid.*, p. 456. This organisation consisted of Bulgaria, Czechoslovakia, Poland, the Russian Federation and Cuba. See, for the full list of registered pioneer investors, www.isa.org.jm/en/default.htm. The first fifteen-year contracts for exploration for polymetallic nodules in the deep seabed were signed at the headquarters of the International Seabed Authority in Jamaica in March 2001, *ibid.*

been earmarked for the Authority, all on the Clarion–Clipperton Ridge in the North-Eastern Equatorial Pacific.

The regime for the deep seabed, however, was opposed by the United States in particular and, as a consequence, it voted against the adoption of the 1982 Convention. The UK also declared that it would not sign the Convention until a satisfactory regime for deep seabed mining was established.[384] Concern was particularly expressed regarding the failure to provide assured access to seabed minerals, lack of a proportionate voice in decision-making for countries most affected, and the problems that would be caused by not permitting the free play of market forces in the development of seabed resources.[385]

The Reciprocating States Regime

As a result of developments in the Conference on the Law of the Sea, many states began to enact domestic legislation with the aim of establishing an interim framework for exploration and exploitation of the seabed pending an acceptable international solution. The UK Deep Sea Mining (Temporary Provisions) Act 1981, for example, provided for the granting of exploration licences (but not in respect of a period before 1 July 1981) and exploitation licences (but not for a period before 1 January 1988).[386]

A 1982 Agreement[387] called for consultations to avoid overlapping claims under national legislation and for arbitration to resolve any dispute.[388] The Preparatory Commission, however, adopted a declaration in 1985 stating that any claim, agreement or action regarding the Area and its resources undertaken outside the Commission itself, which was

[384] See e.g. *The Times*, 16 February 1984, p. 4, and 33 HC Deb., col. 404, 2 December 1982.

[385] See e.g. the US delegate, *UN Chronicle*, June 1982, p. 16.

[386] The Act also provided for a Deep Sea Mining Levy to be paid by the holder of an exploitation licence into a Deep Sea Mining Fund and for mutual recognition of licences. A number of countries adopted similar, unilateral legislation, e.g. the US in 1980, 19 ILM, 1980, p. 1003; 20 ILM, 1981, p. 1228 and 21 ILM, 1982, p. 867; West Germany, 20 ILM, 1981, p. 393 and 21 ILM, 1982, p. 832; the USSR, 21 ILM, 1982, p. 551; France, 21 ILM, 1982, p. 808, and Japan, 22 ILM, 1983, p. 102: see Brown, *International Law of the Sea*, vol. I, pp. 456 ff.

[387] The 1982 Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Seabed (France, Federal Republic of Germany, UK, US), 21 ILM, 1982, p. 950.

[388] See also the Provisional Understanding Regarding Deep Seabed Mining (Belgium, France, Federal Republic of Germany, Italy, Japan, Netherlands, UK, US), 23 ILM, 1984, p. 1354.

incompatible with the 1982 Convention and its related resolutions, 'shall not be recognised'.[389]

The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea[390]

Attempts to ensure the universality of the 1982 Convention system and thus prevent the development of conflicting deep seabed regimes began in earnest in 1990 in consultations sponsored by the UN Secretary-General, with more flexibility being shown by states.[391] Eventually, the 1994 Agreement emerged. The states parties undertake in article 1 to implement Part XI of the 1982 Convention in accordance with the Agreement. By article 2, the Agreement and Part XI are to be interpreted and applied together as a single instrument and, in the event of any inconsistency, the provisions in the former document are to prevail. States can only express their consent to become bound by the Agreement if they at the same time or previously express their consent to be bound by the Convention. Thus, conflicting systems operating with regard to the seabed became impossible. The Agreement also provides in article 7 for provisional application if it had not come into force on 16 November 1994 (the date on which the Convention came into force).[392] The Agreement was thus able to be provisionally applied by states that had consented to its adoption in the General Assembly, unless they had otherwise notified the depositary (the UN Secretary-General) in writing; by states and entities signing the agreement, unless they had otherwise notified the depositary in writing; by states and entities which had consented to its provisional application

[389] See *Law of the Sea Bulletin*, no. 6, October 1985, p. 85. But see the 1987 Agreement on the Resolution of Practical Problems, 26 ILM, 1987, p. 1502. This was an attempt by the states involved to prevent overlapping claims.

[390] 33 ILM, 1994, p. 1309. See also B. H. Oxman, 'The 1994 Agreement and the Convention', 88 AJIL, 1994, p. 687; L. B. Sohn, 'International Law Implications of the 1994 Agreement', *ibid.*, p. 696; J. I. Charney, 'US Provisional Application of the 1994 Deep Seabed Agreement', *ibid.*, p. 705; D. H. Anderson, 'Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea', 43 ICLQ, 1994, p. 886, and Report of the UN Secretary-General, A/50/713, 1 November 1995.

[391] See e.g. D. H. Anderson, 'Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea', 42 ICLQ, 1993, p. 654, and Brown, *International Law of the Sea*, vol. I, p. 462.

[392] The Agreement came into force on 28 July 1996, being thirty days after the date on which forty states had established their consent to be bound under procedures detailed in articles 4 and 5.