PART V
EXCLUSIVE ECONOMIC ZONE

Article 55
Specific legal regime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Bibliography: *Gemma Andreone*, The Exclusive Economic Zone, in: Donald R. Rothwell/Alex G. Oude Elferink/Karen N. Scott/Tim Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015), 159–180; *David Attard*, The Exclusive Economic Zone in International Law (1987); *Edward D. Brown*, The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts between Different Users of the EEZ, Maritime Policy and Management 4 (1977), 325–350; *Edward D. Brown*, The International Law of the Sea, vol. I (1994); *Jorge Castañeda*, Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea, in: Jerzy Makarczyk (ed.), Essays in International Law in Honour of Judge Manfred Lachs (1984), 605–623; *Robin R. Churchill/Alan V. Lowe*, Law of the Sea (3rd edn. 1999); *René-Jean Dupuy*, The Sea under National Competence, in: René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. 1 (1991), 247–314; *Sir Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea, ICLQ 8 (1959), 73–121; *Ann L. Hollick*, The Origins of the 200-mile Offshore Zones, AJIL 71 (1977), 494–500; *Natalie Klein*, Dispute Settlement in the UN Convention on the Law of the Sea (2005); *Shalva Kvinikhidze*, Contemporary Exclusive Fishery Zone or Why Some States Still Claim an EFZ, IJMCL 23 (2008), 271–295; *Barbara Kwiatkowska*, The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989); *L. Dolliver M. Nelson*, Exclusive Economic Zone, MPEPIL, available at: http://www.mpepil.com; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Shigeru Oda*, The Concept of the Contiguous Zone, ICLQ 11 (1962), 131–153; *Francisco Orrego Vicuña*, The Exclusive Economic Zone (1989); *Bernhard H. Oxman*, The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions, AJIL 71 (1977), 247–269; *Alexander Proelss*, Ausschließliche Wirtschaftszone (AWZ), in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 222–264; *Alexander Proelss*, The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited, Ocean Yearbook 26 (2012), 87–112; *Elliot L. Richardson*, Power, Mobility and the Law of the Sea, Foreign Affairs 58 (1979/80), 902–919; *Donald R. Rothwell*, Fishery Zones and Limits, MPEPIL, available at: http://www.mpepil.com; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016); *Peter-Tobias Stoll*, The Continental Shelf, MPEPIL, available at: http://www.mpepil.com; *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015)

Documents: GA Res. 1307 (XIII) of 10 December 1958; UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21)

Cases: Arbitral Tribunal, *Dispute Concerning Filleting within the Gulf of St. Lawrence* (Canada *v.* France), RIAA XIX (2006), 225; ICJ, *Continental Shelf* (Libyan Arab Jamahiriya *v.* Malta), Judgment of 3 June 1985, ICJ Reports (1985), 13; ICJ, *Continental Shelf* (Tunisia *v.* Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports (1982), 18; ICJ, *Fisheries* (United Kingdom *v.* Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116; ICJ, *Fisheries Jurisdiction* (Germany *v.* Iceland), Judgment of 25 July 1974, ICJ Reports (1974), 175; ICJ, *Fisheries Jurisdiction* (United Kingdom *v.* Iceland), Judgment of 25 July 1974, ICJ Reports (1974), 3; ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3; PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, available at: www.pca-cpa.org/MU-UK%2020150318%20Awardd4b1.pdf?-fil_id=2899

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I. Purpose and Function

Art. 55 is the first provision of Part V on the exclusive economic zone (EEZ). It attempts to define the concept of the EEZ and clarifies that the pertinent provisions of Part V of the Convention establish a 'specific legal regime'. While Art. 55, in contrast to Art. 2 concerning internal waters, territorial sea and archipelagic waters, does not expressly determine the legal status of the EEZ, reference being made therein to the 'rights and jurisdiction of the coastal State' on the one hand and to 'rights and freedoms of other States' on the other indicates that the EEZ is not subjected to the sovereignty of the coastal State. Rather, the 'specific legal regime' that came to be accepted in the course of UNCLOS III is characterized by a combination of selected exclusive rights and jurisdiction of the coastal State and rights and freedoms of other States. **1**

Part V contains two further provisions which substantiate the rights, jurisdiction and freedoms of the two groups of States mentioned in Art. 55: While Art. 56 (1) contains a list of matters over which the coastal State is entitled to exercise sovereign rights or jurisdiction, Art. 58 (1) specifies the rights and freedoms of other States. Both provisions prescribe further requirements that ought to be fulfilled by the States concerned when exercising their rights, jurisdiction and freedoms. Situations where the Convention attributes rights or jurisdiction neither to the coastal State nor to other States within the EEZ are covered by Art. 59. Art. 57 defines the breadth of the EEZ. The remainder of the provisions of Part V (1) serve to substantiate the sovereign rights of the coastal State concerning the management of marine living resources and the establishment and use of artificial islands, installations and structures, (2) prescribe special rules concerning the situation of land-locked and geographically disadvantaged States (Arts. 69 to 72), and (3) prescribe rules on the delimitation of overlapping EEZ claims between States with opposite or adjacent coasts as well as the relevance of charts and lists of geographical coordinates for the delineation of the outer limits of the EEZ and the delimitation of overlapping claims respectively (Arts. 74 and 75). **2**

As can be demonstrated by reference to the wording of Art. 56 (1)(a), which allocates to the coastal State 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed *and of the seabed and its subsoil*',[1] the regime of the EEZ is structurally related to that of the continental shelf. The fact that Part V does not contain a provision following the model of Art. 77 (3) indicates, however, that in contrast to the continental shelf,[2] the coastal State must claim its EEZ in order to be able to lawfully exercise its sovereign rights and jurisdiction therein. This conclusion is supported by the negotiating history[3] as well as the practice of States.[4] In the *Libya/Malta Continental Shelf Case*, the International Court of Justice (ICJ) stated that **3**

> '[a]lthough the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although *there can be a*

[1] Italics added.

[2] For further information, see *Maggio* on Art. 77 MN 23 *et seq*.

[3] See UNCLOS III, Contribution of the Group of Land-Locked and Geographically Disadvantaged States to the "United Negoitiating Text" on the Economic Zone (1975), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1983), 234 (Draft Art. 1), speaking of the 'right' of coastal States to establish an EEZ.

[4] See the references collected by *David Attard*, The Exclusive Economic Zone in International Law (1987), 56 *et seq*.

> *continental shelf where there is no exclusive economic zone*, there cannot be an exclusive economic zone without a corresponding continental shelf.'[5]

In contrast to the situation concerning the continental shelf, the EEZ is thus not subject to an 'inherent right'[6] of the coastal State. Notwithstanding the fact that Art. 56 (1)(a) also covers the 'natural resources, whether living or non-living, […] of the seabed and its subsoil', the two regimes must therefore be regarded as having distinct legal bases.[7] That said, if and to the extent to which the coastal State has claimed and established an EEZ above its continental shelf, the two zones form part of an integral regime. As far as the **exercise** of the rights of the coastal State with respect to the seabed and subsoil is concerned, Art. 56 (3) refers to Part VI on the continental shelf. This complicated (and first and foremost historically founded[8]) relationship between the two regimes has been commented upon by the ICJ in the following words:

> 'As the 1982 Convention demonstrates, the two institutions – continental shelf and exclusive economic zone – are linked together in modern law. […] Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf.'[9]

If a coastal State refrains from claiming an EEZ, the waters superjacent to its continental shelf are subject to the regime of the high seas. Taking into account that as of today more than 140 States have claimed an EEZ, there can be no doubt that the concept itself and most parts of the regime codified in Part V have meanwhile entered the body of customary international law. As early as 1985, the ICJ stated that 'the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law.'[10] As far as States are concerned who originally claimed an **exclusive fishing zone** (EFZ) and have not replaced it by an EEZ, the argument has been made that the fisheries provisions of Part V are applicable to the EFZ, taking into account that all affected States have meanwhile become parties to the Convention.[11]

4 The factual importance of the regime of the EEZ cannot be overstated. Since the entry into force of the Convention, most of the world's fish stocks have become subject to the jurisdiction of coastal States. Although EEZs worldwide only account for 8 % of the Earth's surface (and 36 % of the world marine areas), it has been estimated that about 95 % of the capture fisheries take place in waters within 200 NM of the coast.[12] These figures are accompanied by the ever

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[5] ICJ, *Continental Shelf* (Libyan Arab Jamahiriya *v.* Malta), Judgment of 3 June 1985, ICJ Reports (1985), 13, 33 (para. 34, italics added).

[6] ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3, 22 (para. 19).

[7] *Peter-Tobias Stoll*, The Continental Shelf, MPEPIL, para. 6, available at: http://www.mpepil.com.

[8] See *Maggio* on Art. 77 MN 4 *et seq*.

[9] *Libya/Malta Case* (note 5), 33 (paras. 33 *et seq.*); see also ICJ, *Continental Shelf* (Tunisia *v.* Libyan Arab Jamahiriya), Judgment of 24 February 1982, Dissenting Opinion of Judge Evensen, ICJ Reports (1982), 18, 278, 287 (para. 9).

[10] *Libya/Malta Case* (note 5), 33 (para. 34). See also *Tunisia/Libya Case* (note 9), 74 (para. 100); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 519; *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 128; *Robin R. Churchill/Alan V. Lowe*, Law of the Sea (3rd edn. 1999), 161 *et seq.*, arguing that at least the broad rights of coastal and other States enumerated in Arts. 56 and 58 are part of customary international law.

[11] *Tanaka* (note 10), 129, who refers to the Award of 17 July 1986 in the *Dispute Concerning Filleting within the Gulf of St. Lawrence* (Canada *v.* France), RIAA XIX (2006), 225, 255 (para. 49). In that award, the Arbitral Tribunal stated that it considered itself 'autorisé à considérer qu'entre les Parties les concepts de zone économique et de zone de pêche sont tenus pour équivalents sous le rapport des droits qu'y exerce un Etat côtier sur les ressources biologiques de la mer'. See also *Shalva Kvinikhidze*, Contemporary Exclusive Fishery Zone or Why Some States Still Claim an EFZ, IJMCL 23 (2008), 271, 289; *Donald R. Rothwell*, Fishery Zones and Limits, MPEPIL, para. 19, available at: http://www.mpepil.com; *Gemma Andreone*, The Exclusive Economic Zone, in: Donald R. Rothwell *et al.* (eds.), The Oxford Handbook of the Law of the Sea (2015), 159, 163 *et seq.*

[12] UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21), Ch. 17.70.

growing relevance of energy production from the water, currents and winds in the EEZ. Against this background, it is not surprising that the historic origins of the EEZ regime are closely related to the desire of many coastal States to extend their jurisdiction further to the sea in order to be able to control a greater share of living and non-living marine resources. While it was frequently argued in the course of UNCLOS III that the coastal State was also the best suited actor to decide upon and implement the conservation measures necessary for safeguarding that EEZ fish stocks are managed at levels which can produce the maximum sustainable yield, this estimation has, unfortunately, not fully been proven right.[13]

II. Historical Background

The origins of the regime of the EEZ can be traced back to attempts by some coastal and island States to extend their jurisdiction concerning fisheries to areas beyond the outer limits of their territorial seas. These attempts are embodied in the concept of preferential fisheries zone, or contiguous fishing zone respectively, which was in 1974 considered by the ICJ as 'tertium genus between the territorial sea and the high seas'.[14] In the course of the preparations of the Hague Conference for the Codification of International Law held in 1930, under the auspices of the League of Nations, the Committee of Experts for the Progressive Codification of International Law compiled and deliberated a draft convention on territorial waters, whose Art. 2 read: **5**

> 'The zone of the coastal sea shall extend for three marine miles […]. Beyond the zone of sovereignty, States may exercise administrative rights on the ground either of custom or of vital interest. […] *Outside the zone of sovereignty no right of exclusive economic enjoyment may be exercised*.'[15]

An extension of fishery rights beyond what is today the territorial sea had thus been expressly rejected. Similarly, in 1951 the ICJ refused to allocate specific legal weight to a fisheries zone established by Norway by stating that

> '[a]lthough the Decree of July 12th, 1935, refers to the Norwegian fisheries zone and does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea.'[16]

In the course of the 1958 Geneva Convention, several proposals were submitted[17] that militated in favor of accepting a 6 NM zone beyond the outer limits of the territorial sea, within which the coastal State was to be entitled to exercise 'the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in the territorial sea.'[18] However, these proposals did not obtain the necessary 2/3 majority in the plenum of the conference,[19] as it remained controversial whether the zone concerned was identical with the already accepted contiguous zone (with the jurisdictional scope of the coastal State being limited to a mere control necessary to prevent and punish infringements of its laws within the territorial sea),[20] or whether the envisaged contiguous fishing zone was to be considered as an *aliud*, i. e., a separate zone. **6**

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[13] See *Harrison/Morgera* on Art. 61 MN 1.

[14] ICJ, *Fisheries Jurisdiction* (United Kingdom *v.* Iceland), Judgment of 25 July 1974, ICJ Reports (1974), 3, 24 (para. 54).

[15] Draft Convention amended by M. Schücking in consequence of the discussion in the committee of experts, reprinted in: AJIL 20, No. 3, Suppl (1926), 141.

[16] ICJ, *Fisheries* (United Kingdom *v.* Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116, 125.

[17] UNCLOS I, United States of America: Proposal (Article 3), UN Doc. A/CONF.13/C.1/L.159 (1958), OR III, 253; UNCLOS I, Canada, India and Mexico: Proposal (Article 3), UN Doc. A/CONF.13/C.1/L.77/REV.2 (1958), OR III, 232; UNCLOS I, Canada: Revised Proposal (Article 3), UN Doc. A/CONF.13/C.1/L.77/REV.3 (1958), OR III, 232.

[18] Canada: Revised Proposal (note 17).

[19] See UNCLOS I, Summary Records of the 14th Plenary Meeting, UN Doc. (1958), OR II, 39.

[20] See *Khan* on Art. 33 MN 23.

7 Following UNCLOS I, leading authorities initially continued to oppose acceptance of exclusive fishing rights in areas beyond the limits of the territorial sea. For example, Sir Fitzmaurice argued that '[u]nder general international law, and despite certain recent claims and attempts, there is no warrant for the establishment by coastal States of exclusive fishery limits separately from the proper limits of territorial waters, or for the assertion of exclusive fishery rights in areas going beyond these.'[21] In the early 1960s, however, the **doctrine of unity of territorial sea and fisheries zone** came under increasing pressure in light of cumulating efforts of coastal and island States to gain acceptance of extending fishing rights beyond the outer limits of the territorial sea, in particular in areas of the world where coastal populations depended on fisheries, and where coastal fisheries were threatened by high seas fishing fleets operating in close distance to the territorial sea. In this respect, it is interesting to note that UNCLOS II was *inter alia* convened for the purpose of 'considering further the questions of the breadth of the territorial sea and fishery limits.'[22]

8 The debate on the relationship between the coastal State's sovereignty over the territorial sea on the one hand and exclusive fishing rights in areas beyond the outer limits of the territorial sea on the other was then strongly influenced by developments that ultimately resulted in the ICJ's judgment in the *Fisheries Jurisdiction Case*. Notwithstanding the fact that the concept of exclusive fishing zone had not been accepted in the course of UNCLOS I, Iceland adopted a law on 30 June 1958 by which it claimed a 12 NM fishing zone attached to its territorial sea.[23] Germany and the United Kingdom, whose nationals had traditionally fished in the area outside of Iceland's territorial sea, accepted this claim only following the failure of UNCLOS II in 1960, but strongly objected to a further extension of the fishing zone to a breadth of 50 NM that had meanwhile been promised by Iceland at different occasions in the 1960s. On the basis of, and as foreseen by, two bilateral agreements that had been concluded in 1961,[24] Germany and the United Kingdom brought the issue before the ICJ, following Iceland's announcement of 14 July 1971 to extend its fishery zone to 50 NM effective from 1 September 1972. The Court held that

> 'the question of the extent of the fisheries jurisdiction of the coastal State, which had constituted a serious obstacle to the reaching of an agreement at the 1958 Conference, became gradually separated from the notion of the territorial sea. This was a development which reflected the increasing importance of fishery resources for all States. […] Two concepts have crystallized *as customary law* in recent years arising out of the general consensus revealed at that Conference [UNCLOS II]. The first is the *concept of the fishery zone*, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the *concept of preferential rights of fishing* in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries […].'[25]

Based on this reasoning, the Court decided that while Iceland's unilateral extension of exclusive fishing rights to 50 NM was not opposable to Germany and the United Kingdom, and that German and United Kingdom fishing vessels could thus not be excluded from the area between the 12-mile and 50-mile limits, it considered that the parties were under a mutual obligation to undertake negotiations in good faith for an equitable solution of their differences, and that preferential rights of Iceland as well as

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[21] *Sir Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea, ICLQ 8 (1959), 78, 118 *et seq.*; consenting *Shigeru Oda*, The Concept of the Contiguous Zone, ICLQ 11 (1962), 131, 146 *et seq.*

[22] GA Res. 1307 (XIII) of 10 December 1958, Convening of a Second United Nations Conference on the Law of the Sea.

[23] *Fisheries Jurisdiction* (note 14), 12 (para. 23).

[24] Agreement Settling the Fishery Dispute between the Government of Iceland and the Government of the United Kingdom of Great Britain and Northern Ireland of 11 March 1961, 397 UNTS 276; Agreement Concerning the Fishery Zone around Iceland of 19 July 1961, 409 UNTS 47.

[25] *Fisheries Jurisdiction* (note 14), 23 (para. 51 *et seq.*), italics added.

the conservation of fishery resources in the area concerned were among the factors to be taken into account in these negotiations.[26]

9 The Court's findings on the state of customary international law concerning the concepts of fishery zone and preferential fishing rights were overtaken by developments that took place in the course of UNCLOS III. These developments were initiated by a **practice of Latin American States** that culminated as early as 1952 in the Declaration of Santiago adopted by Chile, Ecuador and Peru, by which the States concerned declared their view that 'they each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts.'[27] While this course of action, being closely related to political pressure exercised by the national whaling industries,[28] could not be regarded as being in conformity with the law as it stood at that time, the legal situation was not as clear in 1970, when the Declarations of Montevideo[29] and Lima[30] were adopted. These documents emphasized the existence of the rights of coastal States to 'avail themselves of the natural resources of the sea adjacent to their coasts and of the soil and subsoil thereof in order to promote the maximum development of their economies and to raise the levels of living of their peoples'.[31] Indeed, it is the economic imprint embodied in this language that characterizes the regime of the EEZ until this day. With the Declaration of Santo Domingo,[32] several Caribbean States then claimed the existence of a **patrimonial sea** characterized by, inter alia, (1) the existence of sovereign rights of the coastal State over the renewable and non-renewable natural resources, (2) a maximum breadth of 200 NM, and (3) the persisting right of freedom of navigation and overflight (note: not innocent passage!) of other States.[33] The close affinity of these elements to what is now codified in Part V is striking.

10 The approach taken by the Latin American States was echoed at the beginning of the 1970s in the work of the **Asian-African Legal Consultative Committee**. Following its decision taken in 1970 to also address law of the sea issues, Kenya was the first State to submit a working paper entitled 'The Exclusive Economic Zone Concept'.[34] According to its Art. II,

> '[a]ll states have the right to establish an Economic Zone beyond the territorial sea for the primary benefit of their peoples and their respective economies in which they shall exercise sovereign rights over natural resources for the purpose of exploration and exploitation. Within the zone they shall have exclusive jurisdiction for the purpose of control, regulation and exploitation of both living and non-living resources of the Zone and their preservation, and for the purpose of prevention and control of pollution.'

The 1973 Declaration of the Organization of African Unity on the Issues of the Law of the Sea adopted core elements of the Kenyan proposal and argued in favour of accepting a maximum breadth of 200 NM of that zone.[35] Both documents insisted on the exclusive jurisdiction of the coastal State being without prejudice to the exercise of freedom of navigation, freedom of overflight and freedom to lay submarine cables and pipelines of other States.[36]

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[26] *Ibid.*, 34 et seq. (para. 79); ICJ, *Fisheries Jurisdiction* (Germany *v.* Iceland), Judgment of 25 July 1974, ICJ Reports (1974), 175, 205 *et seq.* (para. 77).

[27] Declaration on the Maritime Zone of 18 August 1952, para. II, 1006 UNTS 325.

[28] See *Ann L. Hollick*, The Origins of the 200-mile Offshore Zones, AJIL 71 (1977), 494, 495 *et seq*.

[29] Montevideo Declaration on the Law of the Sea of 8 May 1970, AJIL 64 (1970), 1021.

[30] Declaration of Latin American States on the Law of the Sea of 8 August 1970, ILM 10 (1971) 207.

[31] Montevideo Declaration, para. 1. The Declaration referred to the 200 NM zone only in its preamble.

[32] Declaration of Santo Domingo of 9 June 1972, AJIL 66 (1972), 918.

[33] *Ibid.*, paras. 1, 3 and 5.

[34] Sea-Bed Committee, Kenya: Draft Articles on Exclusive Economic Zone Concept, UN Doc. A/AC.138/SC.II/L.10 (1972), GAOR 27th Sess. Suppl. 21 (A/8721), 180.

[35] ILM 12 (1973), 1246 (para. 6); a slightly amended version of that declaration was submitted in the course of UNCLOS III, see UNCLOS III, Declaration of the Organization of African Unity on the Issues of the Law of the Sea, UN Doc. A/CONF.62/33 (1974), OR III, 63.

[36] Kenya: Draft Articles (note 34), Art. III; Declaration of the Organization of African Unity (note 35), para. 7.

11 Kenya (in 1972) on the one hand, and Colombia, Mexico and Venezuela (in 1973) on the other, submitted their proposals to the Seabed Committee.[37] Other States followed,[38] but the language used in order to describe the legal position varied between 'exclusive jurisdiction',[39] 'sovereign rights',[40] 'sovereignty'[41] and 'exclusive jurisdiction and control'.[42] Notwithstanding a considerable degree of debate on the exact nature and scope of the coastal State's rights, however, the fact remained that most States agreed that the zone concerned was to be differentiated from the territorial sea, and that the resource-oriented rights of the coastal States were to be regarded as being exclusive.[43]

12 In the course of the 1974 Caracas Session of UNCLOS III, all proposals concerning the EEZ were collected in one single working paper.[44] These conceptions reflected essentially three different notions concerning the **legal status** of the EEZ: (1) the EEZ as an extended territorial sea with some limitations on the coastal State's sovereignty in areas beyond the territorial sea *sensu stricto*; (2) the EEZ as part of the high seas with exclusive usage rights in favour of the coastal State; and (3) the EEZ as *sui generis* regime, following the model of the patrimonial sea concept. As demonstrated by NORDQUIST *ET AL.*, it was not before the Third Session (1975) that the conceptual confusion was resolved in favour of accepting a 12 NM territorial sea and an EEZ located beyond the outer limits of the territorial sea following the lines of what is today Art. 55.[45] Although a first proposal on a comprehensive set of provisions establishing the regime of the EEZ submitted by the Informal Group of Juridical Experts (Evensen group),[46] whose impact on the development of the regime of the EEZ cannot be overestimated, had initially met with criticism from both the Group of 77 and the land-locked and geographically disadvantaged States,[47] it was ultimately agreed to include the articles on the EEZ in the Informal Single Negotiating Text (ISNT),[48] apparently following informal consultations that were initiated by the Second Committee on 4 April 1975.[49] Art. 45 ISNT spoke of 'an area beyond and adjacent to its territorial sea, described as the exclusive economic zone', but then directly moved on to the list of sovereign rights and jurisdiction that is today codified in Art. 56. This reflects the fact that the compromise that had been agreed upon by the members of the informal consultation group did not extend to the issue of the legal status of the EEZ.

13 The question of the legal status of the EEZ more and more came to the fore since the beginning of the Fourth Session in 1976. The chairman of the Second Committee stated in his introductory remarks to Part II of the Revised Single Negotiating Text (RSNT)

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[37] Kenya: Draft Articles (note 34); Sea-Bed Committee, Colombia, Mexico and Venezuela: Draft Articles on Treaty, UN Doc. A/AC.138/SC.II/L.21 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 19, Arts. 4 *et seq.*

[38] See, e. g., Sea-Bed Committee, Iceland: Jurisdiction of Coastal States over Natural Resources of the Area Adjacent to their Territorial Sea, UN Doc. A/AC.138/SC.II/L.23 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 23; Sea-Bed Committee, China: Sea Area within the Limits of National Jurisdiction, UN Doc. A/AC.138/SC.II/L.34 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 71, para. 2; Sea-Bed Committee, Australia and Norway: Certain Basic Principles on an Economic Zone and on Delimitation, UN Doc. A/AC.138/SC.II/L.36 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 77.

[39] China: Sea Area within the Limits of National Jurisdiction (note 38), para. 2.2.

[40] Kenya: Draft Articles (note 34), Art. II; Colombia, Mexico and Venezuela: Draft Articles (note 37), Art. 4.

[41] Colombia, Mexico and Venezuela: Draft Articles (note 37), Art. 5.

[42] Iceland: Jurisdiction of Coastal States (note 38).

[43] Nordquist/Nandan/Rosenne (note 10), 515.

[44] UNCLOS III, Working Paper of the Second Committee: Main Trends, Part V, UN Doc. A/CONF.62/L.8/REV.1 (1974), OR III, 107, 120 *et seq.* (Annex II, Appendix I).

[45] Nordquist/Nandan/Rosenne (note 10), 516.

[46] UNCLOS III, Tentative Draft Articles for a Convention on the Law of the Sea (1974, mimeo.) reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XI (1987), 393, 398 *et seq.* (Arts. 11 *et seq.*).

[47] Nordquist/Nandan/Rosenne (note 10), 500.

[48] UNCLOS III, Informal Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 159 (Arts. 45 *et seq.*).

[49] *Cf.* UNCLOS III, Statement of the Work of the Second Committee, UN Doc. A/CONF.62/C.2/L.89/REV.1 (1975), OR IV, 195, 196 (para. 5).

that '[t]he matter on which the Committee was perhaps the most divided was whether or not the exclusive economic zone should be included in the definition of the high seas.'[50] At the Fifth Session, Poland, commenting on the pertinent provisions of the RSNT, submitted a first proposal for a separate article addressing the legal status of the EEZ,[51] but for the time being this approach remained unsuccessful. Even the President of UNCLOS III considered the status question as one of the key issues of the entire conference. He demanded that

> '[a] compromise must be reached on the contentious issue whether or not the exclusive economic zone should be included in the definition of high seas or be treated as a zone *sui generis*, being neither high seas nor territorial sea. The unique nature of the exclusive economic zone concept makes it imperative that the provisions governing the exercise of rights and the fulfilment of duties within it be as explicit as possible.'[52]

Against this background, the Second Committee decided to address the status issue as one out of three priority matters of its work in the Sixth Session.[53] The breakthrough was finally achieved by the informal Castañeda Group[54] which submitted a set of articles on the outstanding aspects of the EEZ regime.[55] For the first time, it adopted a provision drafted in similar terms to what later became Art. 55, which read:

> 'The exclusive economic zone is an area beyond the and adjacent to the territorial sea, subject to the specific legal regime established in this Chapter, under which the rights and jurisdictions of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the present Convention.'[56]

This text was later included as Art. 55 of the Informal Composite Negotiating Text[57] and, with the exception of a recommendation submitted by the drafting committee to adjust the term 'jurisdictions' to the singular,[58] remained unchanged until the end of UNCLOS III.

III. Elements

1. 'beyond and adjacent to the territorial sea'

The phrase that the EEZ 'is an area beyond and adjacent to the territorial sea' clarifies **14** that the EEZ, as regards its location as well as its legal status (see *infra*, MN 15–18), ought to be distinguished from the territorial sea, over which the coastal State exercises sovereignty (Art. 2 (1)). It has correctly been stated that the words 'beyond and adjacent' carry the same meaning as in the context of Art. 2,[59] which is why Art. 55 covers the waters that are located directly seaward of the outer limits of the territorial sea as established in

[50] UNCLOS III, Revised Single Negotiating Text, Part II, Introductory Note, UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 153 (para. 14).

[51] UNCLOS III, Poland, Articles 44–46 (RSNT II), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1983), 407. The relevant part of the proposal read: 'The economic zone is that part of the high seas in which the coastal state exercises the sovereign rights and jurisdiction as provided for in this Convention.'

[52] UNCLOS III, Note by the President of the Conference, UN Doc. A/CONF.62/L.12/REV.1 (1976), OR VI, 122, 123 (para. 12).

[53] UNCLOS III, Summary Records of Meetings of the General Committee: 31st Meeting, UN Doc. A/CONF.62/BUR/SR.31 (1977), OR VII, 21, 22 (para. 5).

[54] The Castañeda Group was a private group jointly chaired by the ambassadors of Mexico and Norway, Jorge Castañeda and Helge Vindenes.

[55] The texts are reproduced in: Platzöder (note 51), 419 et seq., 424 et seq. and 426 et seq.

[56] See UNCLOS III, New Article Preceding Article 44 (RSNT II) (1977, mimeo.), reproduced in: Platzöder (note 51), 419; UNCLOS III, Article 43*bis* (RSNT II) (10 July 1977, mimeo.), reproduced in: *ibid.*, 424; UNCLOS III, New Article 43*bis* (RSNT II) (12 July 1977, mimeo.), reproduced in: *ibid.*, 426.

[57] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 13 (Art. 55).

[58] Nordquist/Nandan/Rosenne (note 10), 519.

[59] *Ibid.*, 520; see also *Barnes* on Art. 2 MN 14 *et seq.*

accordance with Art. 4. In contrast, the term 'adjacent' as used by Art. 74 refers to the possible lateral boundaries of the EEZ.[60]

2. 'subject to the specific legal regime established in this Part'

15 By submitting the rights of coastal and other States to 'the specific legal regime established in this Part', the second element of Art. 55 is related to the question of the **legal status** of the EEZ. As demonstrated above, the issue belonged to the most controversial aspects of the work of the Second Committee of UNCLOS III. Usually, the EEZ is described as constituting a *sui generis* zone,[61] a term which is intended to reveal the compromise that was achieved in the course of UNCLOS III, and which is embodied today in Part V. Following a statement made by the Chairman of the Second Committee in 1976,[62] most commentators thus take the position that the EEZ is neither territorial sea nor part of the high seas.[63] Others argue, however, that the freedoms of other States codified in Art. 58 are allegedly the same as those applicable outside the EEZ[64] and advance the view that the EEZ remains 'an overlay on the high seas'.[65] It has also been stated that the terms of the Convention allow arguments to be made in favour of both positions.[66]

16 If one examines the relevant provisions of the Convention in detail, one must conclude that Art. 55 does not clearly militate in favour of either of the views taken on the legal status of the EEZ. It is sufficiently illustrated by the wording of that provision, however, that the EEZ cannot be considered as part of the State territory, but that it constitutes a zone within which the coastal State is entitled to exercise functionally limited sovereign rights and jurisdiction. While the negotiating history of the regime of the EEZ in general and Art. 55 in particular seems to weigh in favour of the *sui generis* theory, it should not be ignored that the *travaux préparatoires* are only a supplementary means of interpretation in terms of Art. 32 of the 1969 Vienna Convention on the Law of Treaties.[67] This author has presented the argument elsewhere that the main reason for the persisting ambiguity concerning the legal status of the EEZ is related to the fact that no sufficient differentiation is generally made between the categories of territory and function, and that virtually no source is taking into consideration that the EEZ is at the same time both high seas and a *sui generis* zone.[68] Arguably, the dichotomy of the EEZ either remaining part of the high seas or constituting a *sui generis* regime[69] does not sufficiently take

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[60] Nordquist/Nandan/Rosenne (note 10), 520.

[61] As far as can be seen, the term was used for the first time by the Chairman of the Second Committee, see RSNT Part II, Introductory Note (note 50), 153 (para. 17): 'Nor is there any doubt that the exclusive economic zone is neither the high seas nor the territorial sea. It is a zone *sui generis*.' The terminology has been accepted by the leading textbooks on the field: see *Edward D. Brown*, The International Law of the Sea, vol. I (1994), 218; *Churchill/Lowe* (note 10), 166; Nordquist/Nandan/Rosenne (note 10), 520; *Tanaka* (note 10), 130; *Andreone* (note 11), 162.

[62] RSNT Part II, Introductory Note (note 50), para. 17.

[63] *Francisco Orrego Vicuña*, The Exclusive Economic Zone (1989), 41, who states that the regime of the EEZ 'is sufficiently complete and integrated as to justify its own juridical individuality.' See also *L. Dolliver M. Nelson*, Exclusive Economic Zone, MPEPIL, para. 14, available at: http://www.mpepil.com; *Jorge Castañeda*, Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea, in: Jerzy Makarczyk (ed.), Essays in International Law in Honour of Judge Manfred Lachs (1984), 605, 614; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016), 87 *et seq.*; *Tanaka* (note 10), 130; *Churchill/Lowe* (note 10), 165 *et seq.*; *Tunisia/Libya Case* (note 9), Dissenting Opinion of Judge Oda, 157, 227 (para. 118).

[64] *Elliot L. Richardson*, Power, Mobility and the Law of the Sea, Foreign Affairs 58 (1979/80), 902, 907.

[65] *Bernhard H. Oxman*, The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions, AJIL 71 (1977), 247, 263.

[66] *Natalie Klein*, Dispute Settlement in the UN Convention on the Law of the Sea (2005), 132; see also *Barbara Kwiatkowska*, The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989), 230, stating that the reconciliation achieved during UNCLOS III 'resulted in ambiguity in the legal status of the EEZ.'

[67] Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

[68] *Alexander Proelss*, The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited, Ocean Yearbook 26 (2012), 87, 88 *et seq.*; *Alexander Proelss*, Ausschließliche Wirtschaftszone (AWZ), in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 222, 228 *et seq.*

[69] A virtually exhaustive list of arguments has been collected by *Kwiatkowska* (note 66), 231 *et seq.*

into account the complexity of the issue. In particular, it ignores that the sovereign rights and jurisdiction of the coastal State are not associated with the zone in a territorial sense, but mainly derive from its economic potential (*cf.* Art. 56 (1)(a): 'for the purpose of'). Viewed from this perspective, the EEZ can be understood as high seas (solely) in terms of territory, whereas in terms of function, i. e., usage and protection rights, it is a *sui generis* zone subject to the 'specific legal regime' codified in Part V of the Convention. This differentiation best accommodates the risk that the economic dimension of the EEZ, taking into account the quality and quantity of the pertinent rights allocated to the coastal State, may otherwise ultimately turn into a 'territorialisation' of the EEZ.[70] Viewed from this perspective, Oxman's position that the EEZ regime ought to be considered as 'an overlay on the high seas' perhaps constitutes the most adequate reflection of legal realities.

17 Several arguments have been brought forward against the position advocated here, but arguably none of them are fully convincing in the end.[71] The most obvious objection results from Art. 86. This provision distinguishes between the EEZ and the high seas. A closer examination of Art. 86 reveals, however, that it does not contain a definition of the spatial expansion of the high seas, but solely prescribes, as indicated by its title, the scope of application of Part VII.[72] The provision does therefore not exclude the possibility that the EEZ is, as far as its territorial status is concerned, part of the high seas. Furthermore, in light of the fact that the wording of Art. 78 (1) does not refer to 'the legal status of the superjacent waters or of the air space above those waters' as being 'high seas', the argument has been made that that omission carries the implication 'that the waters above that part of the continental shelf which coincides with the EEZ (that is, out to 200 miles) are not High Seas but have the *sui generis* status of the EEZ'.[73] In this respect, it should be taken into account, however, that the coastal State does not have an EEZ *ipso facto* and *ab initio*.[74] The legal status of the superjacent waters thus depends on whether the coastal State has claimed an EEZ or not, which is why the provision is drafted in perfectly appropriate terms. Finally, it has been stated that if the EEZ were to be regarded as part of the high seas, Art. 59 would have had to refer to the freedom of high seas as a means to solve conflicts of interests in situations where the regime of the EEZ does not accord rights or jurisdiction over the matter concerned to any State.[75] Again, this does not seem to be a mandatory interpretation, as acceptance of the *sui generis* status of the EEZ in terms of function required that the freedoms of the high seas were not made applicable to the EEZ in an undifferentiated manner.[76] Art. 59 covers economic uses not included in Art. 56 (1) as well as other uses of the EEZ and can therefore be regarded as perfectly in line with the **conception of dual legal status of the EEZ** advocated here.

18 It should be noted that determining the legal status of the EEZ is not simply an academic exercise. Quite to the contrary, the status question 'impacts on the interpretation and application of States' powers in this large body of water.'[77] In this respect, the legal status of the EEZ is particularly relevant for determining whether the legal position of the coastal State or that of other States enjoys priority in case of conflict.[78] Arguably, it also has a bearing in

[70] See also *René-Jean Dupuy*, The Sea under National Competence, in: René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. 1 (1991), 247, 296.

[71] See *Proelss* 2012 (note 68), 89 *et seq*.

[72] *Dupuy* (note 70), 290; see also *Guilfoyle* on Art. 86 MN 1, 5.

[73] *Edward D. Brown*, The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts between Different Users of the EEZ, Maritime Policy and Management 4 (1977), 325, 339.

[74] See *supra*, MN 3.

[75] *Brown* (note 73), 330.

[76] See *Proelss* on Art. 58 MN 11–15.

[77] *Klein* (note 66), 132.

[78] The consequences of this submission are dealt with in the context of Art. 56, see *Proelss* on Art. 56 MN 26–31. But see PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, para. 303, available at: www.pca-cpa.org/MU-UK%2020150318%20Awardd4b1.pdf?fil_id=2899, holding that Art. 55 'is principally concerned with the definition of the exclusive economic zone and, in the Tribunal's view, adds nothing to the scope of the rights […] under Article 56'.

situations where Part V expressly assigns specific rights or freedoms neither to the coastal State nor to other States.[79] In light of the territorial status of the EEZ as high seas advocated here, the formula codified in Art. 59 would, 'where conflicts arise on issues not involving the exploration for and exploitation of resources, […] tend to favor the interests of other states or of the international community as a whole.'[80]

3. 'rights and jurisdiction of the coastal State'

19 The notion of 'rights and jurisdiction of the coastal State' is first and foremost substantiated by Art. 56.[81]

4. 'rights and freedoms of other States'

20 The basis, scope and consequences of the rights and freedoms of other States in the EEZ are the object of regulation of Art. 58.[82]

5. 'governed by the relevant provisions of this Convention'

21 The last element contained in Art. 55 makes it clear that the rights of coastal and other States are neither exclusively nor comprehensively prescribed by Part V of the Convention, but that other parts may also be relevant. This is particularly true in light of the fact that the term 'jurisdiction' as used in Art. 56 (1)(b) ought to be considered as a proxy for the further substantiation of the respective matter by other provisions of the Convention.[83] In this respect, additional rules expressly affecting the rights of States in the EEZ are contained in Arts. 7 (6), 35–38, 45, 48, 53 (3), 86, 111 (4), 121 (2) and (3), 122, 210 (5), 211 (5), 216 (1)(a), 218, 220, 246, 247, 248, 257, 297 (3) and 298.

Article 56
Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

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

(b) **jurisdiction as provided for in the relevant provisions of this Convention with regard to:**
   (i) **the establishment and use of artificial islands, installations and structures;**
   (ii) **marine scientific research;**
   (iii) **the protection and preservation of the marine environment;**

(c) **other rights and duties provided for in this Convention.**

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[79] *Klein* (note 66), 132.
[80] Nordquist/Nandan/Rosenne (note 10), 569; consenting *Rothwell/Stephens* (note 63), 91.
[81] See therefore *Proelss* on Art. 56 MN 8–22.
[82] See *Proelss* on Art. 58 MN 11–19.
[83] See *Proelss* on Art. 56 MN 20 *et seq*.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

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Order/C22_Ord_22_11_2013_orig_Eng.pdf; ITLOS, *The M/V 'Saiga'* (St. Vincent and the Grenadines *v.* Guinea), Merits, Judgment of 1 July 1999, ITLOS Reports (1999), 10; ITLOS, *The M/V 'Virginia G'* Case (Panama *v.* Guinea-Bissau), Judgment of 14 April 2014, available at: http://www.itlos.org/index.php?id=171; PCA, *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between them* (Barbados *v.* Trinidad and Tobago), Decision of 11 April 2006, RIAA XXVII, 147; PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, available at: www.pca-cpa.org/MU-UK%2020150318%20Awardd4b1.pdf?fil_id=2899; PCA, *South China Sea Arbitration* (Philippines *v.* China), Award of 12 July 2016, available at: http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf

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I. Purpose and Function

1 The purpose of Art. 56 is 'to indicate the general nature of the rights, jurisdiction and duties of the coastal State' in the EEZ.[1] Its practical relevance cannot be overestimated: By prescribing the subject matters with regard to which the coastal State is entitled to exercise exclusive sovereign rights and jurisdiction, and taking into account that no State is authorized to subject any part of the high seas to its sovereignty (→ Art. 88), Art. 56 (1) ought to be considered as the main normative reflection of the *sui generis* status of the exclusive economic zone (EEZ).[2] The sovereign rights of the coastal State are limited to the economic exploration and exploitation of that zone, in particular concerning the conservation and management of fish stocks, and are then further substantiated by Arts. 61–73. The existing emphasis on marine living resources echoes the historical development of the EEZ as a preferential fisheries zone.[3] In contrast, the scope of the coastal State's jurisdiction with regard to (1) the establishment and use of artificial islands, installations and structures, (2) marine scientific research, and (3) the protection and preservation of the marine environment is not governed by Art. 56 (1) itself, but rather depends on the scope of other provisions codified in the Convention where the respective subject matter is further developed. Finally, Art. 56 (1)(c) clarifies that the rights and duties of the coastal State are not exclusively prescribed in Part V of the Convention.

2 Art. 56 (2) serves to safeguard the position of other States in the EEZ by requiring the coastal State to 'have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention'. Therefore, it is not dedicated

[1] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. II (1993), 525.

[2] *Ibid.*

[3] See *Proelss* on Art. 55 MN 5–9.

to the rights but to the duties of the coastal State. Art. 56 (3) takes into account the fact that the regime of the EEZ is, as evidenced by the wording of Art. 56 (1)(a), in principle also applicable to the seabed and subsoil of that zone. Notwithstanding their continuing individual relevance, the regimes of the EEZ and of the continental shelf thus overlap; as stated by the International Court of Justice (ICJ), 'the two institutions – continental shelf and exclusive economic zone – are linked together in modern law.'[4] At the same time, both zones have developed independently of each other, and they differ in their maximum outer limits as well as their legal foundations. In particular, in contrast to the continental shelf, the coastal State must claim its EEZ in order to be able to lawfully exercise its sovereign rights and jurisdiction therein. This is why Art. 56 (3) clarifies that the sovereign rights of the coastal State concerning the exploration and exploitation of the natural resources of the seabed and subsoil ought to be exercised in accordance with Part VI on the continental shelf.

Whether or not the content of Art. 56 reflects **customary international law** cannot be answered in general terms, taking into account that Art. 56 (1) (b) and (c) clarify that the scope of the coastal State's rights and jurisdiction cannot be determined simply on the basis of this provision, but must also be assessed on the basis of other rules and principles codified in the Convention. However, general consensus seems to exists on the broad areas with regard to which the coastal State is authorized to exercise sovereign rights and jurisdiction, and on the general existence of the due regard rule prescribed by Art. 56 (2). 3

II. Historical Background

The origins of Art. 56 are inseparably linked to the development of the regime of the EEZ as such.[5] A proposal containing 'Draft articles on exclusive economic zone concept' submitted to the Seabed Committee in 1972 by Kenya already referred in its Art. II to the exercise of 'sovereign rights over natural resources for the purpose of exploration and exploitation.'[6] It furthermore stated that within that zone coastal States 4

> 'shall have exclusive jurisdiction for the purpose of control, regulation and exploitation of both living and non-living resources of the Zone and their preservation, and for the purpose of prevention and control of pollution. The coastal State shall exercise jurisdiction over its Economic Zone and third States or their nationals shall bear responsibility for damage resulting from their activities within the Zone.'

Other proposals referred to 'exclusive jurisdiction […] over the living resources of the sea in an adequately wide zone of the high seas adjacent to its territorial sea',[7] to 'preferential rights of coastal States in fishing on the high seas',[8] and to 'sovereign rights over the renewable and non-renewable natural resources which are found in the waters, in

[4] ICJ, *Continental Shelf* (Libyan Arab Jamahiriya *v.* Malta), Judgment of 3 June 1985, ICJ Reports (1985), 13, 33 (para. 33).

[5] See *Proelss* on Art. 55 MN 5–13.

[6] Sea-Bed Committee, Kenya: Draft Articles on Exclusive Economic Zone Concept, UN Doc. A/AC.138/SC.II/L.10 (1972), GAOR 27th Sess. Suppl. 21 (A/8721), 180 (Art. II).

[7] Sea-Bed Committee, Australia and New Zealand: Principles for a Fisheries Regime, UN Doc. A/AC.138/SC.II/L.11 (1972), GAOR 27th Sess. Suppl. 21 (A/8721), 183, 184 (para. I); see also Sea-Bed Committee, Iceland: Jurisdiction of Coastal States over Natural Resources of the Area Adjacent to their Territorial Sea, UN Doc. A/AC.138/SC.II/L.23 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 23; Sea-Bed Committee, China: Sea Area within the Limits of National Jurisdiction, UN Doc. A/AC.138/SC.II/L.34 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 71, 73 (para. 2 (3)); Sea-Bed Committee, Algeria *et al.*: Draft Articles on Exclusive Economic Zone, UN Doc. A/AC.138/SC.II/L.40 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 87 (Art. II); but see *ibid.*, 88 (Art. VI, distinguishing between 'exercise of sovereignty over the resources' on one hand and 'jurisdiction over the zone' on the other).

[8] Sea-Bed Committee, Japan: Proposals for a Régime of Fisheries on the High Seas, UN Doc. A/AC.138/SC.II/L.12 (1972), GAOR 27th Sess., Suppl. 21 (A/8721), 188.

the sea-bed and in the subsoil of an area adjacent to the territorial sea called the patrimonial sea'.[9] Therefore, notwithstanding the diversity of terms used for the zone itself, ranging from area of the high seas adjacent to the territorial sea, exclusive fishery zone, patrimonial sea, epicontinental sea to exclusive economic zone, States seemed to have agreed on the existence of exclusive powers of the coastal State in respect of the management and conservation of the living marine resources from the outset.[10]

5 The debate on the scope and nature of the coastal State's powers concerning fisheries in what later became the EEZ continued in the course of UNCLOS III. Two sets of draft articles submitted by the US[11] and a group of 18 African States[12] referred for the first time to rights, or exclusive jurisdiction respectively, of the coastal State in respect of the protection and preservation of the marine environment and the conduct of scientific research. Interestingly, the African proposal repeated an earlier formula discussed in the Sea-Bed Committee by speaking of the coastal State's 'sovereignty over the living and non-living resources'.[13] In 1975, the Evensen Group took stock of the proposals that had been submitted until that point of time and proposed a group of articles on the EEZ that was intended to serve as the basis for the future deliberations. The wording of Art. 1 of this text came very close to that of today's Art. 56.[14] In particular, it distinguished between sovereign rights of the coastal State concerning the exploration and exploitation, or conservation and management respectively, of the natural resources on the one hand and jurisdiction in respect of other activities for the economic exploration and exploitation of the EEZ, the preservation of the marine environment, scientific research and the establishment and use of artificial island, installations and similar structures on the other. Furthermore, Art. 1 (2) was drafted in virtually identical terms with the due regard rule codified in Art. 56 (2). Art. 1 (3) prescribed that the 'rights set out in this article shall be without prejudice to the provisions of articles […] of this Convention', thereby addressing the future relationship between the regimes of the EEZ and the continental shelf.

6 This document strongly influenced the subsequent discussions, but opinions remained divided on the specific nature of the coastal State's rights and jurisdiction. A proposal made by the Group of 77 was modelled on the text of the Evensen Group but referred to 'sovereign rights' (instead of jurisdiction) with regard to other activities for the economic exploration and exploitation of the EEZ, and to 'exclusive jurisdiction' (instead of jurisdiction) as to scientific research and the establishment and use of 'artificial islands, installations, structures

[9] Sea-Bed Committee, Colombia, Mexico and Venezuela: Draft Articles on Treaty, UN Doc. A/AC.138/SC.II/L.21 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 19, 20 (Art. 4); see also Sea-Bed Committee, Australia and Norway: Certain Basic Principles on an Economic Zone and on Delimitation, UN Doc. A/AC.138/SC.II/L.36 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 77 (para. 1 (a)); Sea-Bed Committee, Argentina: Draft Articles, UN Doc. A/AC.138/SC.II/L.37 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 78, 79 (para. 7); Sea-Bed Committee, Canada *et al.*: Draft Articles on Fisheries, UN Doc. A/AC.138/SC.II/L.38 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 82 (Art. 1).

[10] Only the proposal submitted by Malta foresaw the establishment of international ocean space institutions and prescribed obligations of coastal States concerning the exploitation of living resources in their national ocean spaces rather than allocating sovereign rights and jurisdiction to them. See Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under Their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 35, 61–65 (Arts. 81–91).

[11] UNCLOS III, United States of America: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47 (1974), OR III, 222 (Art. 1). The proposal subjected the exercise of the rights concerned to the provisions of this Convention.

[12] UNCLOS III, Gambia *et al.*: Draft Articles on the Exclusive Economic Zone, UN Doc. A/CONF.62/C.2/L.82 (1974), OR III, 240, 241 (Art. 3). The proposal furthermore referred to '[c]ontrol and regulation of customs and fiscal matters related to economic activities in the zone'.

[13] *Ibid.*, 240 (art. 2). See also the statement made by the Chairman of the 2nd Committee in his introduction to the RSNT/Part II: '[T]he rights as to resources belong to the coastal State […]'; UNCLOS III, Revised Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 153 (para. 18)).

[14] UNCLOS III, The Economic Zone (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1983), 209, 210 (Art. 1).

and other devices'.[15] The structure of Art. 45 included in the Part II of the Informal Single Negotiating Text (ISNT) was similar to that of Art. 1 proposed by the Evensen Group, but spoke of 'exclusive rights and jurisdiction' (instead of jurisdiction) in respect of the establishment and use of artificial islands, installations and structures, and of 'exclusive jurisdiction' (instead of jurisdiction) concerning other economic uses as well as scientific research.[16] It remains unclear why it was felt necessary to make a distinction, as far as the scope of jurisdiction is concerned, between scientific research and the preservation of the marine environment. Furthermore, Art. 45 (2) referred to the due regard rule, but not to the necessity that the coastal State acts 'in a manner compatible with the provisions of this Convention.' Despite numerous informal proposals addressing the specific scope of the coastal State's jurisdiction with varying connotation,[17] Art. 44 of Part II of the Revised Single Negotiating Text (RSNT) remained virtually identical with Art. 45 ISNT.[18] It did not include a suggestion made by the US, according to which the coastal State's jurisdiction with regard to scientific research and the preservation of the marine environment was to be exercised 'as provided for in this Convention'.[19] Art. 44 (3) RSNT now required that the rights with respect to the sea-bed (termed 'bed') and subsoil shall be exercised 'in accordance with' chapter 4 on the continental shelf (instead of 'shall be without prejudice to').

The following set of informal proposals, predominantly again centring on the question of the 7
scope of the coastal State's jurisdiction, need not be illustrated here in detail. It suffices to refer to a proposal submitted by Poland, under which the first part of the first paragraph of the provisions contained in the ISNT and RSNT ('[i]n an area beyond and adjacent to its territorial sea') was going to establish the basis of a new provision on the legal status of the EEZ.[20] A text proposed in 1977 by the Castañeda Group came extremely close to the wording of today's Art. 56.[21] It clarified that the jurisdiction in respect of '(i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the preservation of the marine environment, including pollution control and abatement' was to be 'provided for in the relevant provisions of the present Convention' and could thus arguably not be considered as generally being exclusive anymore. It should be noted that this text referred to 'marine scientific research' instead of, as was the case in the ISNT and RSNT, 'scientific research' – a change in terminology that is convincingly held to reflect a narrower understanding of the pertinent coastal State's jurisdiction.[22] With the exception of the phrase 'including pollution control and abatement' (which was dropped in light of the fact that the respective rights and duties were going to be substantiated in Part XII of the Convention), the proposal of the Castañeda Group was included *verbatim* as Art. 56 of the Informal Composite Negotiating Text.[23] Subsequent proposals addressing, *inter alia*, the need of other States to comply with the laws and regulations of the coastal State in its EEZ insofar as they are not incompatible with this Part,[24] and the establishment of a Common Heritage Fund concerning the exploitation of non-living resources of the EEZ[25] remained unsuccessful, probably due to the regulation of the matter in the context of other provisions of Parts V and VI (Art. 82).

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[15] UNCLOS III, Working Paper on the Exclusive Economic Zone (1975, mimeo.), reproduced in: Platzöder (note 14), 227 *et seq.* (Art. 2). For a comparative assessment see Nordquist/Nandan/Rosenne (note 1), 533–534.

[16] UNCLOS III, Informal Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/Part II (1975), OR IV, 152, 159 (Art. 45).

[17] For references see Nordquist/Nandan/Rosenne (note 1), 535–536.

[18] RSNT/Part II (note 13), 160 (Art. 44).

[19] UNCLOS III, United States, Article 45 (ISNT II) (1976, mimeo), reproduced in: Platzöder (note 14), 289.

[20] UNCLOS III, Poland, Articles 44–46 (RSNT II) (1976, mimeo.), reproduced in: Platzöder (note 14), 407 (Arts. 44 and 45). See also *Proelss* on Art. 55 MN 13.

[21] UNCLOS III, Castañeda Group (1977, mimeo.), reproduced in: Platzöder (note 14), 426 (Art. 44).

[22] Nordquist/Nandan/Rosenne (note 1), 539.

[23] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 13 (Art. 56).

[24] UNCLOS III, Anonymous: Articles 55–110 (ICNT/Rev.1) (1979, mimeo.), reproduced in: Platzöder (note 14), 518 (Art. 56).

[25] UNCLOS III, Lesotho: Amendments, UN Doc. A/CONF.62/L.115 (1982), OR XVI, 224 (Art. 56).

III. Elements

1. 'sovereign rights'

8 Art. 56 (1)(a) allocates to the coastal State 'sovereign rights' relating to the economic exploration and exploitation of the resources of the EEZ. The term is not defined anywhere in the Convention but equally used by Art. 77 (1) concerning the exploration of the continental shelf and the exploitation of its natural resources. In this context, Art. 77 (2), echoing Art. 2 (2) of the 1958 Geneva Convention on the Continental Shelf,[26] clarifies that the 'rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.' Taking into account that Art. 56 does not specify whether the sovereign rights of the coastal State are exclusive or not, the question arises whether the legal situation ought to be assessed differently, depending on whether Part VI is applicable or not due to the reference contained in Art. 56 (3). Arguably, the correct answer is that the sovereign rights of the coastal State in terms of Art. 56 are **generally exclusive**, and that the sole reason for the omission of a provision that corresponds to Art. 77 (2) is that third States may, depending on the circumstances, have the right of access to the natural resource of the EEZ according to Arts. 62 (2), 69 and 70.[27]

9 The historical background evidences that the concept of 'sovereign rights' is not tantamount to 'sovereignty', and that the EEZ is thus a zone that does not belong to the coastal State's territory. That said, it has been stated that the notion of sovereign rights, if reasonably interpreted, must be seen as constituting an **extract of the broader concept of sovereignty**, and that one may thus consider this concept of having been extended to the EEZ, even though only for the limited purposes specified in Art. 56 (1)(a).[28] In the words of Judge Oda:

> '[T]he mode of exercise of jurisdiction is no different from that exercised by the coastal State within its territorial sea and, so far as the development of the natural resources of the sea is concerned, its competence in the Exclusive Economic Zone is equivalent to that it enjoys in the territorial sea.'[29]

From a systematic viewpoint, it should be noted that Art. 137 (1), which addresses the legal status of the Area and its resources, emphasizes the existence of a logical link between sovereignty on the one hand and sovereign rights on the other by stating that

> '[n]o State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.'

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[26] Convention on the Continental Shelf of 29 April 1958, 499 UNTS 311.

[27] *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 130 *et seq.* In its decision on the merits in the *South China Sea Arbitration* (Philippines *v.* China), Award of 12 July 2016, para. 243, available at: http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf, the Arbitral Tribunal emphasized the exclusive nature of the coastal State's sovereign rights by observing that 'the notion of sovereign rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources'.

[28] *Edward D. Brown*, The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts between Different Users of the EEZ, Maritime Policy and Management 4 (1977), 325, 333; consenting *Alexander Proelss*, The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited, Ocean Yearbook 26 (2012), 87, 93 *et seq.*; see also *Maria Gavouneli*, Functional Jurisdiction in the Law of the Sea (2007), 65; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016), 92, arguing that coastal States 'have very close to plenary rights and jurisdiction in EEZ fisheries'. In the *Intertanko* Case before the Court of Justice of the European Union, Advocate General *Kokott* stated that '[t]he sovereignty of the coastal State over this zone is functional and under Article 55 of the Convention on the Law of the Sea is limited to the competence conferred on it by that convention' (CJEU, Case C-308/06, *Intertanko* [2008] ECR I-4057, Opinion of Advocate General *Kokott* of 20 November 2007, ECLI:EU:C:2007:689, para. 62).

[29] ICJ, *Continental Shelf* (Tunisia *v.* Libyan Arab Jamahiriya), Judgment of 24 February 1982, Dissenting Opinion of Judge Oda, ICJ Reports (1982), 18, 157, 230 (para. 124).

Arguably, this conclusion is also backed by the African proposal referred to above (MN 5), which referred to 'sovereignty' in specific relation (and limited to) the resources themselves.

Leaving aside for a moment the question whether a difference in terms of quality exists between 'sovereign rights' on the one hand and 'jurisdiction' on the other (see *infra*, MN 20), it should be noted that the competence allocated to the coastal State by Art. 56 (1)(a) comprises both **prescriptive and enforcement jurisdiction**. As far as the living resources of the EEZ are concerned, this conclusion is expressly backed by Art. 73 (1), according to which the **10**

> 'coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.'

2. 'for the purpose of'

The element 'for the purpose of' demonstrates that the sovereign rights of the coastal State are not associated with the zone in a spatial sense, but are mainly related to its economic potential. Taking into account that the special legal status of the EEZ is essentially limited to the functional perspective,[30] i. e., to the economic use of the EEZ, this element requires that a **direct connection** exists between the activity concerned and the fields mentioned in Art. 56 (1)(a) in order for the coastal State being legally entitled to rely on its sovereign rights. In this respect, the question arose whether **offshore bunkering** of fishing vessels can be considered as an activity assimilated to the sovereign rights of the coastal State concerning the management of marine living resources in the EEZ, or whether it constitutes an international lawful use of the sea 'associated with the operation of ships' in terms of Art. 58 (1). In its judgment in the *M/V 'Saiga'* Case, the International Tribunal for the Law of the Sea (ITLOS) did not find it necessary to come to a clear decision,[31] but several judges commented upon the issue.[32] At that time, State practice did not seem to be sufficiently uniform to provide a clear answer. In its 2014 judgment in the *M/V 'Virginia G'* Case, however, the ITLOS concluded that **11**

> 'the regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the Convention read together with article 62, paragraph 4, of the convention. This view is also confirmed by State practice which has developed after the adoption of the Convention.'[33]

The Tribunal reasoned that 'it is apparent from the list in article 62, paragraph 4, of the Convention that for all activities that may be regulated by a coastal State there must be a direct connection to fishing', and that 'such connection to fishing exists for the bunkering of foreign vessels fishing in the exclusive economic zone since this enables them to continue their activities without interruption at sea.'[34]

When assessing the scope of Art. 56 (1)(a) based on this jurisprudence, one must not ignore the danger of creeping coastal State jurisdiction by way of broad reference to the **12**

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[30] See *Proelss* on Art. 55 MN 16; *Gavouneli* (note 28), 68 *et seq.* With regard to the functionally limited scope of enforcement jurisdiction see ITLOS, *The 'Arctic Sunrise'* (Netherlands *v.* Russia), Order of 22 November 2013, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf, Joint Separate Opinion of Judges Wolfrum/Kelly, para. 12 *et seq.* A different position is taken by *Tanaka* (note 27), 132, who considers the EEZ as a zone within which the coastal State is entitled to exercise 'limited spatial jurisdiction'.

[31] ITLOS, *The M/V 'Saiga'* (St. Vincent and the Grenadines *v.* Guinea), Merits, Judgment of 1 July 1999, ITLOS Reports (1999), 10, para. 137 *et seq.*

[32] In favour of Art. 58 (1): *ibid.*, Separate Opinion of Judge Vukas, para. 17; but see *ibid.*, Separate Opinion of Judge Zhao, para. 3 *et seq.*

[33] ITLOS, *The M/V 'Virginia G'* (Panama *v.* Guinea-Bissau), Judgment of 14 April 2014, para. 217, available at: http://www.itlos.org/index.php?id=171.

[34] *Ibid.*, para. 215.

sovereign rights codified in this provision.[35] In order to safeguard the functionally limited nature of the powers of the coastal State over its EEZ enshrined in the element 'for the purpose of', it is indeed necessary to insist on a direct connection between the fields mentioned in Art. 56 (1)(a) on the one hand and the regulated activity on the other. In this respect, the ITLOS deserves credit for having substantiated this requirement by pointing at other relevant provisions of the Convention such as Art. 62 (4), but there may still be room for debate as to what activities are covered by these provisions. In this respect, while an Arbitral Tribunal held in the *Case Concerning Filleting within the Gulf of St. Lawrence* that the coastal State's sovereign right to manage the living resources of the EEZ does not extend to the processing of fish caught in the EEZ,[36] the ITLOS seems to have taken a broader approach. In the *M/V 'Virginia G'* Case, it informed itself by definitions of 'fisheries related activities' contained in international documents such as the 2009 FAO Agreement on Port State Measures,[37] a course of action suggesting that it considers all activities mentioned in Art. 1 (d) of that Agreement[38] as being covered by Art. 56 (1)(a) in conjunction with Art. 62 (4).[39] The case is even more difficult to decide if the Convention does not provide any specification of the field concerned – a situation that may particularly arise in connection with 'other activities for the economic exploitation and exploration of the zone' in terms of Art. 56 (1)(a). Whether or not the activity concerned is then covered by the sovereign rights of the coastal State ought to be decided on a case-by-case basis, taking into account the circumstances under which the activity is conducted and depending on the type of legislation applied by the coastal State.[40]

3. 'exploring and exploiting, conserving and managing the natural resources, whether living or non-living'

13 The coastal State's sovereign rights extend to the exploration and exploitation as well as the conservation and management of both living and non-living natural resources. Arguably, taking into account that the terms 'conserving and managing' are frequently used in Arts. 61–67, but not in the context of Part VI, they should be regarded as primarily referring to the living resources of the EEZ, whereas 'exploring and exploiting' mainly affects the non-living resources as defined by Art. 77 (4).[41] Arts. 61 (2) and 65 evidence, however, that the terminology used in Part V is not coherent in this respect.

14 The sovereign rights of the coastal State under Art. 56 (1)(a) only relate to **natural resources**, be they living or non-living. As far as the resources of the seabed and its subsoil are concerned, Art. 56 (3) clarifies that the pertinent rights ought to be exercised in accordance with Part VI. Consequently, the definition contained in Art. 77 (4) can be consulted in order to substantiate the scope of the coastal State's rights. According to this provision, the term 'natural resources' comprises 'the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species'. It is thus not possible to allocate in a clear-cut

[35] *David Anderson*, Coastal State Jurisdiction and High Seas Freedoms in the EEZ, in: Clive R. Symmons (ed.), Selected Contemporary Issues in the Law of the Sea (2011), 105, 113; see also *Proelss* on Art. 58 MN 12–13. The danger identified in the text also exists in respect of enforcement jurisdiction; see ITLOS, *The M/V 'Virginia G'* (Panama *v.* Guinea-Bissau), Judgment of 14 April 2014, para. 217, available at: http://www.itlos.org/index.php?id=171.

[36] Arbitral Tribunal, *Case concerning filleting within the Gulf of St. Lawrence* (Canada *v.* France), Award of 17 July 1986, RIAA XIX, 225, 255 *et seq.* (para. 50).

[37] Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 22 November 2009. The Agreement has not yet entered into force. Its text is available at: http://www.fao.org/fileadmin/user_upload/legal/docs/2_037t-e.pdf.

[38] Art. 1 (d) reads: '"fishing related activities" means any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea'.

[39] *The M/V 'Virginia G'* (note 33), para. 216.

[40] *Cf. Anderson* (note 35), 113 *et seq.*

[41] *Robin R. Churchill/Alan V. Lowe*, Law of the Sea (3rd edn. 1999), 166.

manner the living resources to the regime of the EEZ and the non-living resources to that of the continental shelf. However, in light of Art. 77 (2) and taking into account that if and to the extent to which the coastal State has claimed and established an EEZ above its continental shelf, the two zones form part of an integral regime (see *infra*, MN 34), it can be said that the term 'non-living natural resources' encompasses all resources of the seabed and subsoil that are not of plant, animal, microbial or other origin containing functional units of heredity.[42] In contrast, the term 'living natural resources' not only (even though primarily) relates to fish, but also includes the marine flora and genetic organisms living near and on the seabed, and in the subsoil respectively. As stated, whether the sovereign rights ought to be exercised in accordance with Part V or Part VI then depends on the scope of Art. 77 (4).[43] It is thus not the spatial provenance (water column *v.* seabed or subsoil) of the resources but their normative attribution under the Convention that decides upon which regime is applicable. 'Permanent symbiosis' arguments ought to be rejected.[44]

15 With the exception of sedentary species (whose management is governed by Part VI), the sovereign rights for the purpose of conservation and management of the living resources of the EEZ are further substantiated by Arts. 61–67. While it has been argued that the provisions contained in the Convention that are applicable to 'living resources' must generally be considered as being also applicable to species and organisms other than fish,[45] it is true that most elements codified in Arts. 61–67 (e. g. allowable catch, maximum sustainable yield etc.) are clearly intended to govern EEZ fisheries only. In contrast, the sovereign rights relevant here do not seem to cover the exploration and exploitation, or conservation and management respectively, of **non-natural ('artificial')**, i. e., man-made, resources. It is therefore submitted that offshore aquaculture in the EEZ, an activity that has so far not been realized on commercially relevant level, cannot be regarded as satisfying the element of conservation and management of natural living resources, but rather that it ought to be seen as one of several 'other activities for the economic exploitation and exploration of the zone'.[46] Consequently, Arts. 61–67 are arguably not applicable to offshore aquaculture activities.

4. 'waters superjacent to the seabed and of the seabed and its subsoil'

16 The term 'waters superjacent' is not defined in the Convention but used in a similar way in Arts. 78 and 135. According to a publication of the UN Division for Ocean Affairs and the Law of the Sea (DOALOS), it ought to be understood as covering '[t]he waters lying immediately above the sea-bed or deep ocean floor up to the surface'.[47] The same document defines the terms 'seabed' and 'subsoil' as '[t]he top of the surface layer of sand, rock, mud or other material lying at the bottom of the sea and immediately above the subsoil', and '[a]ll naturally occurring matter lying beneath the sea-bed or deep ocean floor' respectively.[48] It should be

[42] *Argumentum e contrario* in relation to the Convention on Biological Diversity of 5 June 1992, 1760 UNTS 79, Art. 2 ('genetic material').

[43] See *Maggio* on Art. 77 MN 24–26.

[44] But see, e. g., *Frida Maria Armas Pfirter*, The Management of Seabed Living Resources in "the Area" under UNCLOS, Revista Electrónica de Estudios Internacionales 11 (2006), 19, available at: https://dialnet.unirioja.es/servlet/articulo?codigo=1446321.

[45] Relating to Arts. 116–119, see *Gaetan Verhoosel*, Prospecting for Marine and Coastal Biodiversity: International Law in Deep Water, IJMCL 13 (1998), 91, 97; *Montserrat Gorina-Ysern/Joseph H. Jones*, International Law of the Sea, Access and Benefit Sharing Agreements, and the Use of Biotechnology in the Development, Patenting and Commercialization of Marine Natural Products as Therapeutic Agents, Ocean Yearbook 20 (2006), 221, 258 *et seq.*; *Alexander Proelss*, Marine Genetic Resources under UNCLOS and the CBD, GYIL 51 (2008), 417, 431; but see *Harrison/Morgera* on Art. 61 MN 2.

[46] See also *Thomas Dux*, Specially Protected Marine Areas in the Exclusive Economic Zone (2011), 54.

[47] UN DOALOS, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Appendix I: Consolidated Glossary of Technical Terms Used in the United Nations Convention on the Law of the Sea (1989), 47, 64, available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/The%20Law%20of%20the%20Sea_Baselines.pdf.

[48] *Ibid.*, 61 and 64.

noted that these terms are related to concepts that have been imported into the Convention from the realm of geosciences – a fact which demonstrates the complicated relationship between legal, scientific and technical conceptions that is typical for the modern international law of the sea in light of the 'spatial turn' embodied in its provisions.

5. 'with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds'

17 Art. 56 (1)(a) is drafted broadly so as to make it possible to extend the sovereign rights of the coastal State to other economically relevant uses of the EEZ. Inclusion of the words 'such as' demonstrates that the pertinent rights include, but are not limited to, the production of energy from the water, currents and winds. The coastal State is thus given the possibility to take advantage of new technological developments,[49] the only requirement for the legality of the exercise of sovereign rights arguably being that the activity concerned ought to be of economic relevance.[50] This would include, e. g., the extraction of freshwater from seawater.[51]

18 Concerning the risks involved in the decision by the negotiating parties to include such a broad extension clause in the text of the Convention, it suffices here to refer to potential creeping jurisdiction of the coastal State, which might ultimately result in a transformation of the EEZ from a zone of functionally limited jurisdiction into a zone of spatial jurisdiction, which might not be too easy to distinguish from territorial sovereignty. As will be demonstrated below (see *infra*, MN 23–31), doubts exist as to whether the clause contained in Art. 56 (2) is a sufficient safeguard in respect of such a development.

19 So far, the element discussed here has become particularly relevant in the context of **renewable energy production**. As offshore wind or wave energy production necessarily involves the operation of platforms and installations, Art. 56 (1)(a) cannot be read isolated from Art. 56 (1)(b)(i) in conjunction with Art. 60. The fact that these provisions use different terms in order to describe the coastal State's powers – while Art. 56 (1)(a) speaks of 'sovereign rights', Art. 56 (1)(b)(i) and Art. 60 respectively refer to 'jurisdiction' and 'exclusive rights', or 'exclusive jurisdiction' – suggests that no general difference in terms of quality of the rights involved can be deduced from their wording (see *infra*, MN 20). Whether or not a coastal State is entitled to exercise sovereign rights related to offshore wind energy production by constructing and operating wind farms in case it has not claimed an EEZ, or on its extended continental shelf respectively, is subject to debate. Art. 80 prescribes that 'Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf', but it should be taken into account that this provision is part of Part VI which is dedicated (and limited) to the purpose of exploring the continental shelf and exploiting its natural resources (*arg. e* Art. 77 (1)). Thus, as far as the production of energy irrespective of the natural resources of the continental shelf is concerned, the better argument seems to be that Art. 80 (which is, as stated, only applicable *mutatis mutandis*) cannot be relied upon as separate legal basis for the relevant activities.[52]

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[49] *Churchill/Lowe* (note 41), 167; *Rothwell/Stephens* (note 28), 93.

[50] But see *The M/V 'Saiga'* (note 31), Separate Opinion of Judge Laing, 10, para. 38: 'The text clearly limits these activities to natural resources.'

[51] *Lothar Gündling*, Die 200 Seemeilen-Wirtschaftszone (1983), 213.

[52] *Alexander Proelss*, Ausschließliche Wirtschaftszone, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 222, 249 *et seq.* (para. 255); the opposite opinion is taken by *Karen N. Scott*, Tilting at Offshore Windmills: Regulating Wind Farm Development in the Exclusive Economic Zone, Journal of Environmental Law 18 (2006), 89, 96.

6. 'jurisdiction as provided for in the relevant provisions of this Convention'

Art. 56 (1)(b) allocates 'jurisdiction as provided for in the relevant provisions of this Convention' to the coastal State. There has been some debate on whether a **difference in terms of quality** exists between the sovereign rights under Art. 56 (1)(a) and jurisdiction under Art. 56 (1)(b). While some authorities take the view that 'the change of terminology undoubtedly reflects a change in the balance of principles',[53] the negotiating history suggests that the wording 'jurisdiction as provided for in the relevant provisions of this Convention' was agreed upon in the course of UNCLOS III in order to serve as a compromise formula with the aim to end the controversies on the content and scope of the coastal state's powers vis-à-vis the fields mentioned in Art. 56 (1)(b). Furthermore, the terminology used in Part V is not at all consistent, ranging from 'sovereign rights' (Art. 56 (1)(a)) to 'jurisdiction' (Art. 56 (1)(b), 'exclusive rights' (Art. 60 (1)), and 'exclusive jurisdiction' (Art. 60 (2)). Art. 60 (1)(b) demonstrates that installations and structures are regularly constructed and authorized for the purposes mentioned in Art. 56 (1)(a), with regard to which the Convention assigns to the coastal State 'sovereign rights' and not merely jurisdiction. Finally, the due regard rule codified in Art. 56 (2) does not distinguish between sovereign rights and jurisdiction at all, but merges these two categories by speaking of 'exercising its rights'. In light of the aforementioned, it is submitted that no *prima facie* difference in terms of scope exists between the categories of sovereign rights and jurisdiction, but that the reason for distinguishing between them can be derived from the phrase 'as provided for in the relevant provisions of this Convention'. This part of Art. 56 (1)(b) evidences that the term 'jurisdiction' ought to be considered as a **proxy** for the further development and substantiation of the respective subject matter by other provisions of the Convention.[54] Their scope automatically defines the scope of the coastal State's jurisdiction in terms of Art. 56 (1)(b). Viewed from this perspective, jurisdiction could theoretically reach as far as (or even further than) the sovereign rights of the coastal State under Art. 56 (1)(a). **20**

7. 'with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment'

The jurisdiction of the coastal State under Art. 56 (1)(b) covers (1) the establishment and use of artificial islands, installations and structures, (2) marine scientific research and (3) the protection and preservation of the marine environment. As stated above (see *supra*, MN 20), the scope of the coastal State's jurisdiction depends on the development of the respective subject matter by other provisions of the Convention. In this respect, the jurisdiction with regard to the establishment and use of artificial islands, installations and structures is first and foremost substantiated by Art. 60, while that concerning marine scientific research is substantiated by the provisions of Part XIII, in particular Arts. 246–249, 253 and 259–262. As far as the protection and preservation of the marine environment are concerned, the coastal State's jurisdiction is addressed in detail in Part XII, in particular Arts. 210 (5), 211 (5) and (6), 216, 218, 220 and 234.[55] **21**

8. 'other rights and duties provided for in this Convention'

Art. 56 (1) does not prescribe the areas with regard to which the coastal State is entitled to exercise sovereign rights and jurisdiction in an exclusive manner. Rather, Art. 56 (1)(c) contains **22**

[53] *Brown* (note 28), 334; see also *Churchill/Lowe* (note 41), 167; *Gavouneli* (note 28), 65.

[54] *L. Dolliver M. Nelson*, Exclusive Economic Zone, MPEPIL, para. 12, available at http://www.mpepil.com; *Proelss* (note 28), 101 *et seq.*; *Gündling* (note 51), 216.

[55] For a discussion of expansionist trends concerning the exercise of jurisdiction in the EEZ see *infra*, MN 32.

a **catchall element** by clarifying that in addition to the powers allocated to the coastal State by Art. 56 (1)(a) and (b), the coastal State has 'other rights and duties provided for in this Convention'. Taking into account that the contiguous zone (if declared) overlaps with the inner 12 NM of the EEZ, this element is usually held to be relevant in respect of the rights of the coastal State in terms of Art. 33, as well as the right of hot pursuit under Art. 111,[56] which applies

> '*mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.'

9. 'the coastal State shall have due regard to the rights and duties of other States'

23 Art. 56 (2) requires the coastal State, when exercising its rights and performing its duties in the EEZ, to 'have due regard to the rights and duties of other States'. Clearly, the first conclusion that can be drawn from this element is that the sovereign rights and jurisdiction of the coastal State **cannot be held to be absolute**.[57] The fact that the coastal State is only entitled to exercise exclusive but at the same time functionally limited powers in the EEZ (see *supra*, MN 8) is reflected by Art. 58 (1), according to which 'all States […] enjoy […] the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms […]' in the EEZ. The co-existence of the rights and jurisdiction of the coastal State on the one hand and the continuing freedoms of other States on the other results in a **considerable potential for conflict** between the two groups of rights. As correctly stated by one authority,

> '[a]part from high seas fisheries and the protection of the marine environment, the major "unfinished business" of the LOS Convention is likely to prove to be the sovereign rights and jurisdiction of coastal states in their EEZs and the rights and duties of other states in those zones.'[58]

For example, one may ask to what extent the coastal State is entitled to demand, by relying on its jurisdiction to preserve the marine environment, that other States shift a pipeline project to another part of the EEZ, or to exclude international shipping from parts of its EEZ because it intends to authorize the construction and operation of a large offshore wind energy farm in the area concerned. The territorial imprint of such activities becomes even more apparent when considering that the coastal State is entitled to establish reasonable safety zones around artificial islands, installations and structures in which it may take appropriate measures to ensure the safety of both navigation and of the structures concerned, and that these zones may, depending on the circumstances of the individual case, extend to a distance of up to 500 m around them (*cf.* Art. 60 (4) and (5)). Only in some instances does the Convention contain special rules dedicated to the avoidance of such conflicts.[59] If and to the extent to which no such special rule exists, conflicts between the rights and jurisdiction of the coastal State and the freedoms of other States ought to be avoided and resolved on the

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[56] *Churchill/Lowe* (note 41), 169; *Rothwell/Stephens* (note 28), 94.

[57] *Gemma Andreone*, The Exclusive Economic Zone, in: Donald R. Rothwell *et al.* (eds.), The Oxford Handbook of the Law of the Sea (2015), 159, 165.

[58] *Ivan A. Shearer*, Ocean Management Challenges for the Law of the Sea in the First Decade of the 21st Century, in: Alex G. Oude Elferink/Donald R. Rothwell (eds.), Ocean Management in the 21st Century: Institutional Frameworks and Responses (2004), 1, 10.

[59] Examples include Arts. 60 (6) and 79 (3). For a discussion of conflicts between the coastal State's jurisdiction concerning the protection and preservation of the marine environment on the one hand and the freedom of other States to lay submarine pipelines on the other see: *Alexander Proelss*, Pipelines and Protected Sea Areas, in: Richard Caddell/Rhidian Thomas (eds.), Shipping, Law and the Marine Environment in the 21st Century (2013), 276, 287 *et seq.*

basis of the *lex generalis* Art. 56 (2).[60] Its main objective is thus to create a general but at the same time 'permanent legal arrangement for balancing the diverse interests in the EEZ'.[61]

When evaluating the conflict avoidance potential of Art. 56 (2), it is crucial to take into account that Art. 58 (3) contains a similar provision addressed to States other than the coastal State, requiring them to take 'due regard to the rights and duties of the coastal State' when exercising their rights and performing their duties in the EEZ. The two provisions thus prescribe **mutual due regard obligations**, an approach that is closely related to the findings of the ICJ in the *Fisheries Jurisdiction* case. In its judgment, the Court held: **24**

> '*Due recognition* must be given to the rights of both Parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of Iceland. *Neither right is an absolute one:* the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation.'[62]

The ICJ furthermore stated that the 'most appropriate method for the solution of the dispute is clearly that of negotiation', whose 'objective should be the delimitation of the rights and interests of the Parties, the preferential rights of the coastal State on the one hand and the rights of the Applicant on the other, to balance and regulate equitably questions […].'[63] While the mutual obligation to have due regard must thus be considered as being of **procedural nature**,[64] it has correctly been pointed to the fact that international case-law prior to 2015 did not offer much guidance on how to implement this duty.[65]

In March 2015, however, the Arbitral Tribunal in the *Chagos Marine Protected Area Arbitration* had the opportunity to substantiate the due regard rule codified in Art. 56 (2). Mauritius argued that the United Kingdom had violated its obligation arising from Art. 56 (2), as it had created certain expectations vis-à-vis Mauritius that were subsequently not met. The Tribunal stated that the extent of regard required by the Convention would **25**

> 'depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches.'[66]

It embraced the position taken by the ICJ in the *Fisheries Jurisdiction* case by holding that '[i]n the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.'[67] These consultations would have to be undertaken in good faith,[68] i. e., (1) in a timely manner, (2) in a spirit of understanding of the other State's concerns in connection of the proposed activities, and, if possible, (3) by submitting suggestions of compromise.[69] The Tribunal furthermore decided that Art. 56 (2)

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[60] See also *Churchill/Lowe* (note 41), 175.

[61] *Andreone* (note 57), 165; Nordquist/Nandan/Rosenne (note 1), 543.

[62] ICJ, *Fisheries Jurisdiction* (United Kingdom *v.* Iceland), Judgment of 25 July 1974, ICJ Reports (1974), 3, 31 (para. 71), italics added.

[63] *Ibid.*, 31 (para. 73).

[64] *James Kraska*, Maritime Power and the Law of the Sea: Expeditionary Operations and World Politics (2011), 267.

[65] *Robert Beckman/Tara Davenport*, The EEZ Regime: Reflections after 30 Years, in: Harry N. Scheiber/Moon Sang Kwong (eds.), Securing the Ocean for the Next Generation (2012), 14, available at: https://www.law.berkeley.edu/files/Beckman-Davenport-final.pdf.

[66] PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, para. 519, available at: www.pca-cpa.org/MU-UK%2020150318%20Awardd4b1.pdf?fil_id=2899; consenting *South China Sea Arbitration* (note 27), para. 742.

[67] *Ibid.*

[68] In light of this, it was criticized in a separate opinion to the Tribunal's award that the issue of due regard was not sufficiently linked to Art. 300 and the abuse of rights doctrine; see *Chagos Marine Protected Area Arbitration* (note 66), Joint Dissenting and Concurring Opinion of Judges Kateka/Wolfrum, para. 89, available at: https://www.pcacases.com/web/sendAttach/1570.

[69] *Chagos Marine Protected Area Arbitration* (note 66), paras. 528 *et seq.*

would usually require that a **balancing exercise** of the colliding rights and interests with the coastal State's own rights and interests be consciously undertaken.[70]

26 Assuming that the coastal State complies with its procedural duties resulting from Art. 56 (2), the question remains whether Part V in general and Arts. 56 (2) and 58 (3) in particular provide States with a **general guideline for the lawful implementation of the balancing exercise** that was convincingly held to be necessary by the Arbitral Tribunal in the *Chagos Marine Protected Area Arbitration*. It has been submitted elsewhere by this author that a mere case-by-case analysis does not seem to sufficiently take into account the special legal status of the EEZ as well as the need for legal certainty.[71] It is true that the Convention, if read literally, does not expressly and comprehensively answer the question of whether any of the States concerned enjoys priority in case of conflict. The position taken by the Tribunal in the *Chagos Marine Protected Area Arbitration* can perfectly be justified by reference to Art. 297 (1)(a) and (b), according to which the exceptions from the regime of compulsory dispute settlement recognized by the Convention are not applicable vis-à-vis allegations that a coastal State has acted contrary to the freedoms of other states contained in Art 58 (1), or that other States have acted in contravention of the laws and regulations adopted by the coastal State in conformity with Art. 56 (1). This provision thus seems to allocate the central role for the resolution of user conflicts in the EEZ to international courts and tribunals. It should not be forgotten, however, that international courts and tribunals will only have the opportunity to address a matter after it has turned out to be impossible to avoid the conflict of rights and interests, and that their decisions will be limited to the specific circumstances of the cases brought to their attention. Taking this into account, a closer analysis of the history and ratio of the regime of the EEZ arguably militates in favour of accepting a '**shift of emphasis in favour of the coastal State**'.[72]

27 The reasons of this line of argument cannot be presented here in detail.[73] It suffices to refer to the following considerations: First, it should be recalled that the notion of sovereign rights constitutes an extract of the broader concept of sovereignty (see *supra*, MN 9). Taking into account the functional *sui generis* status of the EEZ,[74] it seems difficult to adhere to the argument that the coastal State cannot be seen as being privileged in some way in respect of the rights and jurisdiction referred to in Art. 56 (1).[75] The opposite view would essentially render **marine spatial planning** in the EEZ unlawful, a conclusion that would ignore recent developments in State practice.[76] Marine spatial planning constitutes a tool whose objective it is to avoid conflicts between different rights and interests of States from the outset. This concept could not be relied upon, would the coastal State not be entitled to activate *a priori* its sovereign rights and jurisdiction by conducting planning processes in its EEZ. While the

[70] *Ibid.*, para. 534.

[71] *Proelss* (note 28), 92 *et seq.*; see also *Gavouneli* (note 28), 69; the opposite position is taken by *Barbara Kwiatkowska*, The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989), 215, arguing that 'the principle of equivalence and reasonableness of the uses of the sea implies the necessity of balancing relevant priorities in each case where the competing rights and freedoms of states are exercised in accordance with the Convention'.

[72] *David J. Attard*, The Exclusive Economic Zone in International Law (1987), 75.

[73] For an in-depth analysis of the following points, see *Proelss* (note 28), 93–97; the opposite position has, *inter alia*, been taken by *Mathias Schubert*, Maritimes Infrastrukturrecht (2015), 50–52.

[74] See *Proelss* on Art. 55 MN 15–18.

[75] A review of relevant State practice undertaken by one authority indicates that the majority of coastal States subjects the exercise of the freedom of communications by other States to the condition of their compatibility with their sovereign rights; see *Attard* (note 68), 76–84. Other assessments do not arrive at unambiguous conclusions with regard to the resolution of user conflicts in the EEZ. See Erik Franckx/Philippe Gautier (eds.), The Exclusive Economic Zone and the United Nations Convention on the Law of the Sea, 1992–2000: A Preliminary Assessment of State Practice (2003); Ocean Yearbook 25 (2011), 221–480.

[76] This legal implication seems to have been ignored by *Schubert* (note 73), 52, 60–61. Note that the UNESCO has published a best practice guide on marine spatial planning. See Charles Ehler/Fanny Douvere (eds.), Marine Spatial Planning: A Step-by-step Approach Toward Ecosystem-based Management, IOC Manual and Guides No. 53 (2009); see also European Commission, Legal Aspects of Maritime Spatial Planning (2009), 2 *et seq.*, available at: http://ec.europa.eu/maritimeaffairs/documentation/studies/documents/legal_aspects_msp_summary_en.pdf.

coastal State is certainly not automatically entitled to apply its domestic spatial planning rules developed with regard to its territory (including the internal waters and territorial sea) in a comprehensive manner to the EEZ, general consensus seems to exist that marine spatial planning in the EEZ, provided that it is directly connected to the sovereign rights and jurisdiction in terms of Art. 56 (1), ought to be considered as being in line with the Convention. The fact that 'UNCLOS remains silent about MSP as a management process'[77] does thus not imply that the process concerned is not covered by the Convention's provisions.[78]

28 As far as the rights of other States are concerned, Art. 58 (1) does not likewise speak of sovereign rights, but merely of freedoms. These freedoms refer to the regime of the high seas, but it is important to note that Art. 87 has not been made applicable to the EEZ in an unmodified manner. Rather, Art. 58 (1) subjects the exercise of 'the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms' to 'the relevant provisions of this Convention'. For example, Art. 60 (6) *a priori* limits the freedom of navigation by requiring all ships to respect the safety zones established by the coastal State around its artificial islands, installations and structures.[79] Furthermore, Art. 58 (2) declares Arts. 88–115 only applicable in the EEZ 'in so far as they are not incompatible with this *Part*'.[80] Compared to the high seas, the exercise of the freedoms mentioned in Art. 58 (1) is, therefore, subjected to stricter limits in the EEZ.[81]

29 Two different approaches can be imagined how the shift of emphasis in favour of the coastal State advocated here could be implemented in practice: Whereas the first one would indeed accept a substantive hierarchy between the sovereign rights of the coastal State and the rights of other States, the second approach would confine itself to becoming manifest in a **rebuttable presumption in favour of the coastal State**. Under the first alternative, the position of the coastal State would necessarily and automatically have to be considered as principal and that of the other States as subsidiary in case of conflict. However, such a schematic solution would not be compatible with the reciprocal due regard rule contained in Arts. 56 (2) and 58 (3). In contrast, recognition of a rebuttable presumption in favour of the coastal State that is only applicable in the event of a conflict, and unless the behaviour of the coastal State is not equal to an abuse of rights, offers a degree of flexibility that arguably sufficiently takes into account the requirements of the mutual due regard obligation. As ATTARD has argued,

> '[w]ith respect to activities related to the development of the zone's resources, the assumption is that the coastal State has the competence 'equivalent to that it enjoys in the territorial sea', thereby shifting the onus of proof to the opponent. Thus, if another State's activity clashes with this competence, and no priority is specified by the CLOS, the onus of proof lies with the State. […] Consequently, the coastal State will no longer be obliged to prove, for example, that at least in form and general content, its conservation measures are in accordance with international law; it will be up to the opponent to prove them contrary to the Convention.'[82]

Invoking a rebuttable presumption established by rules of substantive law before a court thus results in shifting the burden of proof from one party to the dispute to the opposing party. While the resolution of conflicts will ultimately be a task to be coped with by courts and tribunals (provided that negotiations undertaken in good faith have failed), the compe-

[77] *Frank Maes*, The International Legal Framework for Marine Spatial Planning, Marine Policy 32 (2008), 797, 799.

[78] *Schubert* (note 73), 59–62.

[79] See also Art. 60 (1)(c), which arguably limits, to the advantage of the coastal State, the scope of Art. 59; *Proelss* on Art. 60 MN 14.

[80] Italics added.

[81] See also *Brown* (note 28), 337; *Gavouneli* (note 28), 65 *et seq.*; for the opposite view *Kwiatkowska* (note 71), 214.

[82] *Attard* (note 72), 75 (footnotes omitted); see also *ibid.*, 64; *James Crawford*, Brownlie's Principles of Public International Law (8th edn. 2012), 278 (note 144).

tent dispute settlement body is thus supplied with a general guideline for its decision, which furthermore provides for the necessary predictability that is important for the parties of a dispute.

30 Taking into account that the due regard rule codified in Art. 56 (2) does not distinguish between sovereign rights and jurisdiction, it is submitted that the shift of emphasis in favour of the coastal State advocated here should generally be held to apply also in respect of the coastal State's **jurisdiction** in terms of Art. 56 (1)(b).[83] No reason exists why the jurisdiction of the coastal State in regard to, say, the protection and preservation of the marine environment should be given less weight in the event of a conflict with the rights of other States in terms of Art. 58 (1) than the sovereign rights for the purpose of exploring and exploiting the living natural resources of the EEZ. Distinguishing between the two categories of powers in the present context would essentially ignore that the *sui generis* status of the EEZ is characterized by the existence of both sovereign rights and jurisdiction of the coastal State. In light of the fact that the term 'jurisdiction', codified in Art. 56 (1)(b), ought to be regarded as a proxy for the further development and substantiation of the respective subject matter by other provisions of the Convention (see *supra*, MN 20), this conclusion must only be rejected if and to the extent to which the Convention contains special rules to the contrary.[84]

31 It should be noted that the primacy of the coastal State's legal position embodied in the concept of rebuttable presumption can only become effective if and to the extent to which the sovereign rights of the coastal State are actually affected.[85] Both the duty to have due regard to the rights of other States and the obligation to not exercise the rights, jurisdiction and freedoms recognized under the Convention in a manner that would constitute an abuse of rights require that the coastal State has already **'activated' its sovereign rights**, e. g. by the granting of a permission for the use of a certain area of the EEZ for one of the purposes mentioned in Art. 56 (1)(a), or by initiating marine spatial planning, **prior to the occurrence of the conflict**.[86] In this respect, it would constitute an abuse of rights if the coastal State repeatedly reacts to the expression of intent of another State to lay a transit pipeline or cable through the EEZ of the coastal State by asserting that it plans to use exactly the respective sea area for the purpose of, say, managing the living resources occurring there.

10. 'shall act in a manner compatible with the provisions of this Convention'

32 In addition to the due regard clause, Art. 56 (2) furthermore requires the coastal State to 'act in a manner compatible with the provisions of this Convention'. Arguably, this element is merely of declaratory nature, taking into account that the provisions developing and substantiating the sovereign rights and jurisdiction of the coastal State in terms of Art. 56 (1) are legally binding by themselves, a fact that renders a coastal State ignoring, say, the provisions codified in Part XII in violation of the Convention. Viewed from this perspective, Art. 56 (2) primarily seems to be intended to remind coastal States of the referential character of Art. 56 (1)(b). In this respect, more **recent developments in State practice** seem to indicate a growing tendency amongst coastal States to challenge, at the expense of freedom of navigation, the limited nature of their jurisdiction concerning the protection of the marine environment.[87] For example, following the oil tanker accident of the '*Prestige*' in 2002, France and Spain adopted the Malaga Agreement, through which they 'agreed to a measure of immediate effect for

[83] *Proelss* (note 28), 102 *et seq.*; for a different view see *Brown* (note 28), 334 et seq.

[84] For a discussion of examples see *Proelss* (note 28), 104 *et seq.*

[85] *Ibid.*, 100.

[86] In a court proceedings, the coastal State is thus under a duty to conclusively demonstrate that it decided to exercise its sovereign rights prior to the expression of intent to make use of the freedom of communications by the other State.

[87] A general assessment concerning expansionist trends in the EEZ, embodied in enhanced references to the sovereign rights and jurisdiction in terms of Art. 56 (1), is provided by *Sophia Kopela*, The 'Territorialisation' of the Exclusive Economic Zone: Implications for Maritime Jurisdiction, 3–14, available at: https://www.dur.ac.uk/resources/ibru/conferences/sos/s_kopela_paper.pdf. See also *Proelss* on Art. 58 MN 11–18.

inspecting dangerous ships of the same type as the PRESTIGE, ie single-hull oil tankers over fifteen years of age, carrying heavy fuel oil or tar and lacking gauges to measure the level and pressure of hydrocarbons in their holds.'[88] Taking into account that the coordinated unilateral measures that were subsequently implemented by France, Spain and Portugal included the banning of ships from the EEZ of these States in several cases,[89] it is difficult to justify such course of action on the basis of the Convention.[90] In particular, it should be noted that Art. 56 (1)(b)(iii), in conjunction with Art. 220 (3)-(6), does not envisage the complete banning of foreign ships from the EEZ, and State practice is clearly not sufficiently constant and uniform in order to convincingly argue in favour of the evolution of a new rule of customary international law modifying the restrictive approach on which the Convention is based.[91] A different conclusion ought to be drawn, though, if and to the extent to which unilateral measures implemented by one or more coastal State(s) are later on generally endorsed by the International Maritime Organization (and thereby turned into 'applicable international rules and standards for the prevention, reduction and control of pollution from vessels' in terms of Art. 220 (3)), e. g., by amending one of the Annexes to MARPOL.[92]

Expansionist trends concerning coastal State jurisdiction in the EEZ have furthermore been 33
identified, based on the collection of relevant declarations, acts and laws compiled by UN DOALOS,[93] in relation to security issues, hydrographic surveys, installations and structures, and custom-related activities.[94] As far as the latter category is concerned, the ITLOS held in *the M/V 'Saiga' Case (No. 2)* that the coastal State is not entitled to apply its customs laws in respect of other parts of its EEZ than artificial islands, installations and structures,[95] a conclusion that is backed by the practice of the overwhelming majority of States.[96] In respect of hydrographic surveying, a number of States seems to act on the assumption that this activity generally falls within the scope of marine scientific research under Art. 56 (1)(b)(ii) and thus requires prior consent,[97] but it is submitted that Art. 21 (1)(g) demonstrates that the two concepts ought to be distinguished from each other under the Convention. An even larger number of States has proclaimed jurisdiction in terms of Art. 56 (1)(b)(i) related to all types of installations, structures and devices for any purpose, i. e., not only for the purposes set out in Art. 56 (1).[98] Again, the functionally limited nature of the sovereign rights and jurisdiction of the coastal State that is embodied, as far as the specific context relevant here is concerned, in Art. 60 (1)(b) ('installations and structures for the purposes provided for in article 56 and other economic purposes') clearly militates against accepting this view as being compatible with the law of the sea as it stands today. As far as security measures are concerned, e. g., requiring prior consent for the conduct of military exercises, or implementing maritime identifications systems that aim at enhancing the protection of national security,[99] it does not seem to be possible under the Convention to argue that such activities can be regulated by the coastal State on the basis of its sovereign rights and jurisdiction in terms of Art. 56 (1). It should be noted in this respect that the matter is one of existence of competence and not one of proportionality, which

[88] CoE, Sea Pollution, Report, Committee on the Environment, Agriculture and Local and Regional Affairs, Council of Europe Doc. 10485 (2005), para. 127. The text of the agreement does not seem to be officially available.

[89] Between November 2002 and March 2003, 28 ships were turned back by France; see Council of Europe Doc. 10485 (note 88), para. 129.

[90] GA, Oceans and the Law of the Sea: Report of the Secretary-General, UN Doc. A/58/65 (2003), para. 57. For further references see *Hamamoto* on Art. 220 MN 25.

[91] But see *John M. Van Dyke*, The Disappearing Right to Navigational Freedom in the EEZ, Marine Policy 29 (2005), 107, 121.

[92] International Convention for the Prevention of Pollution from Ships of 2 November 1973, 1340 UNTS 184.

[93] Available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionslist.htm.

[94] *Kopela* (note 87), 4–7.

[95] *The M/V 'Saiga'* (note 31), paras. 127, 136.

[96] *Kopela* (note 87), 7, has identified seven States claiming jurisdiction concerning custom-related issues.

[97] *Ibid.*, 5.

[98] *Ibid.*, 6, listing 24 States.

[99] See *Rothwell/Stephens* (note 28), 100, pointing to the system enacted by Australia.

is why it is difficult to justify security measures of the coastal State depending on the intensity of interference with the freedom of navigation of other States. Even though the aforementioned trends are not sufficiently uniform and widespread in order to accept their relevance as to the interpretation, or further development respectively, of the jurisdiction of the coastal State in accordance with a new rule of customary international law, the examples show that there is still considerable uncertainty concerning the exact scope of jurisdiction in terms of Art. 56 (1)(b) – uncertainty that could ultimately threaten the functionally limited nature of the coastal State's powers in the EEZ.[100]

11. 'rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI'

34 Art. 56 (3) refers to the sovereign rights allocated to the coastal State by Art. 56 (1). It has been demonstrated elsewhere that the regimes of the EEZ and continental shelf have developed independently of each other, and that the two zones do not share the same legal status.[101] That said, the wording of Art. 56 (1), by referring also to the 'seabed and its subsoil', clarifies that if and to the extent to which the coastal State has claimed and established an EEZ above its continental shelf, the two zones form part of an integral regime. The ICJ thus correctly stated in the *Libya/Malta* case that 'the two institutions – continental shelf and exclusive economic zone – are linked together in modern law.'[102] The logical contradiction inherent in this statement is resolved by Art. 56 (3), according to which the sovereign rights set out in Art. 56 (1) are, as far as the seabed and subsoil is concerned, to be exercised in accordance with Part VI on the continental shelf. It has been submitted by one of the parties to the dispute in the *Barbados/Trinidad and Tobago Arbitration* that the fact that Art. 56 (3) uses the phrase 'in accordance with', rather that the phrase 'subject to', indirectly emphasizes the integral nature of the overarching regime applicable to the 200-NM-zone.[103] While the EEZ and the continental shelf are, therefore, conceptually linked,[104] the sovereign rights of the coastal State concerning the exploration and exploitation of the living resources of the seabed and subsoil are to be exercised in accordance with Art. 77.

35 An isolated reading of Art. 56 (3) suggests that the reference to Part VI contained therein extends to all rights mentioned in Art. 56 (1)(a), as long as these are related to the seabed and subsoil. *Prima facie*, this seems to include the conservation and management of all marine benthic organisms. It should be noted, however, that Art. 77 (4) defines the term 'natural resources' as used in Part VI as encompassing

> 'mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.'

As this definition is, again, included in Part VI of the Convention referred to by Art. 56 (3), the conservation and management of benthic organisms that do not qualify as 'sedentary species' in terms of Art. 77 (4) is governed by Art. 56 (1).

36 Whether or not this conclusion ought to be applied to genetic resources living on the seabed arguably depends on whether the organisms concerned are immobile or unable to move except

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[100] See also *Andreone* (note 57), 179 *et seq.*; *Gavouneli* (note 28), 82–90.

[101] *Proelss* on Art. 55 MN 3.

[102] *Libya/Malta* (note 4), 33 (para. 33).

[103] PCA, *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between them* (Barbados *v.* Trinidad and Tobago), Decision of 11 April 2006, RIAA XXVII, 147, 201 (para. 182); see also *Tunisia/Libya* (note 29), Dissenting Opinion of Judge Evensen 18, 278, 287 (para. 9): 'This 200-mile economic zone concept refers not only to the resources of the seas (living or non-living), but also to the natural resources on or in the sea-bed. To this extent it is also in practice a continental shelf concept.'

[104] See also *Attard* (note 72), 139 *et seq.*; *Francisco Orrego Vicuña*, The Exclusive Economic Zone (1989), 68 *et seq.*

in constant physical contact with the seabed. It has been stated that some of the species covered by the term 'genetic resources' are indeed to be 'managed' in accordance with Part V, whereas others are not.[105] It is less clear how to legally assess activities relating to the storage of CO_2 on the continental shelf. Are these governed by Art. 56 (1) or by Art. 56 (3) in conjunction with Art. 77 (1)? A literal reading of Art. 77 (1) seems to imply that the sovereign rights of the coastal State under Part VI do not extend to every economic use of the continental shelf, but only to uses directly related to the resources in terms of Art. 77 (4). However, taking into account that the coastal State has the exclusive right under Art. 81 to authorize and regulate drilling on the continental shelf 'for all purposes', and keeping in mind that Art. 85 emphasizes the coastal State's right to exploit the subsoil of the continental shelf by means of tunneling, the better view (supported by, e. g., Norwegian State practice)[106] is that the provisions of Part VI are applicable to all CO_2 storage activities on the continental shelf.[107]

Article 57
Breadth of the exclusive economic zone

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

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[105] *Maggio* on Art. 77 MN 26; see also *Robin Warner*, Protecting the Diversity of the Depths: Environmental Regulation of Bioprospecting and Marine Scientific Research Beyond National Jurisdiction, Ocean Yearbook 22 (2008), 411, 419; *David K. Leary*, International Law and the Genetic Resources of the Deep Sea (2007), 94; *Proelss* (note 45), 427 *et seq*.

[106] By its own account (http://www.statoil.com/en/TechnologyInnovation/NewEnergy/Co2CaptureStorage/Pages/SleipnerVest.aspx), the Norwegian oil and gas company Statoil has captured and stored up to one million tons of CO_2 annually since 1996 in the Sleipner area of the North Sea, which is located on the Norwegian continental shelf.

[107] *Alexander Proelss/Kerstin Güssow*, Carbon Capture and Storage from the Perspective of International Law, European Yearbook of International Economic Law 2 (2011), 151, 155 *et seq*.; *Ray Purdy*, Geological Carbon Dioxide Storage and the Law, in: Simon Shackley/Claire Gough (eds.), Carbon Capture and its Storage (2006), 87, 100.

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I. Purpose and Function

1 Art. 57 serves the purpose to prescribe the maximum breadth of the exclusive economic zone (EEZ) by reference to the **200 NM distance criterion**. It clarifies that the EEZ on the one hand and the continental shelf on the other are, as regards their spatial extent, not necessarily identical, taking into account that the maximum outward limit of the EEZ is determined in absolute terms, i. e., independent of geographical or biological criteria or those mentioned in Art. 76 (4).[1] It can be derived from this that the justification for the EEZ regime differs from that of the continental shelf. As stated by EVENSEN, the EEZ

> 'is not based on the concept of natural prolongation, but on the concept that a coastal State should have functional sovereign rights over the natural resources in a belt of water and sea-bed 200 miles seawards whether the coastal State concerned possesses a continental shelf in the traditional sense or not.'[2]

In normative terms, the outer limit of the EEZ establishes the boundary between the regime of the EEZ and that of the high seas.[3] Taking into account that the great majority of coastal States have, where spatially possible, claimed an EEZ of 200 NM,[4] and in light of the fact that there is no indication whatsoever of claims exceeding 200 NM, it is fair to conclude that the distance criterion codified in Art. 57 is, similar to the regime of the EEZ as such,[5] valid under customary international law.[6]

II. Historical Background

2 Historically, the issue of the breadth of the EEZ was inseparably linked to the first attempts of coastal and island States to extend their jurisdiction concerning fisheries to areas beyond the outer limits of their territorial seas.[7] In the course of the 1958 Geneva Conference, several proposals were submitted[8] that militated in favor of accepting a 6 NM zone beyond the outer limits of the territorial sea, within which the coastal State was to be entitled to exercise 'the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in the territorial sea',[9] but these proposals did not obtain the

[1] See ICJ, *Continental Shelf* (Tunisia *v.* Libyan Arab Jamahiriya), Judgment of 24 February 1982, Dissenting Opinion of Judge Evensen, ICJ Reports (1982), 18, 278, 284 (para. 7); *cf.* also (in respect of the continental shelf) *ibid.*, Separate Opinion of Judge Jiménez de Aréchaga, 100, 114 (para. 51).

[2] *Ibid.*, Dissenting Opinion of Judge Evensen, 287 (para. 9).

[3] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 552.

[4] For an overview on relevant State practice, see the table provided at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf.

[5] See *Proelss* on Art. 55 MN 3.

[6] Concerning the breadth of the continental shelf: *Tunisia/Libya Case* (note 1), Separate Opinion of Judge Jiménez de Aréchaga, 114 (para. 52).

[7] For details see *Proelss* on Art. 55 MN 5 *et seq.*

[8] UNCLOS I, United States of America: Proposal (Article 3), UN Doc. A/CONF.13/C.1/L.159 (1958), OR III, 253; UNCLOS I, Canada, India and Mexico: Proposal (Article 3), UN Doc. A/CONF.13/C.1/L.77/REV.2 (1958), OR III, 232; UNCLOS I, Canada: Revised Proposal (Article 3), UN Doc. A/CONF.13/C.1/L.77/REV.3 (1958), OR III, 232.

[9] Canada: Revised Proposal (note 8).

necessary majority in the plenary of the Conference.[10] In the early 1960s, however, the dominant doctrine of unity of territorial sea and fisheries zone came under increasing pressure, following Iceland's decision to claim a 12 NM fishing zone attached to its territorial sea.[11] The announcement of Iceland to further extend this zone to a breadth of 50 NM resulted in proceedings before the International Court of Justice (ICJ) initiated by Germany and the United Kingdom. However, the Court's decision, according to which Iceland's unilateral extension of exclusive fishing rights to 50 NM was not opposable to Germany and the United Kingdom,[12] was overtaken by developments in State practice that took place prior to and in the course of UNCLOS III. Already in 1952, Chile, Ecuador and Peru had claimed that 'they each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts.'[13] With the 1972 Declaration of Santo Domingo,[14] several Caribbean States then argued in favor of the existence of a patrimonial sea of a maximum breadth of 200 NM, within which the coastal State would exercise sovereign rights of over the renewable and non-renewable natural resources.

This position was reflected in the deliberations of the UN Sea-Bed Committee. In its 3
proposal on 'The Exclusive Economic Zone Concept' submitted in 1972, Kenya suggested the following provision concerning the breadth of the EEZ:

> 'The limits of the Economic Zone shall be fixed in nautical miles in accordance with criteria in each region which take into consideration the resources of the region and the rights and interests of developing land-locked, near land-locked, shelf-locked States and States with narrow shelves and without prejudice to limits adopted by any State within the region. The Economic Zone shall not in any case exceed 200 nautical miles, measured from the baselines for determining territorial sea.'[15]

Other States agreed with that proposal inasmuch as while the maximum breadth would have to be set at 200 NM, other requirements such as geographical, geological, biological, ecological, economic and national security factors should be taken into account when delineating the zone concerned (referred to either as 'patrimonial sea', 'exclusive economic zone', 'economic zone' or 'intermediate zone').[16] A second group of States argued in favour of accepting only the distance criterion of a maximum breadth of 200 NM measured from the baselines,[17] while a third group decided to leave the issue open for future determination.[18] Some States emphasized that the maximum limit of 200 NM would not exclude the

[10] See UNCLOS I, Summary Records of the 14th Plenary Meeting, UN Doc. (1958), OR II, 39.

[11] ICJ, *Fisheries Jurisdiction* (United Kingdom *v.* Iceland), Judgment of 25 July 1974, ICJ Reports (1974), 3, 12 (para. 23).

[12] For further information and references, see *Proelss* on Art. 55 MN 8.

[13] Declaration on the Maritime Zone of 18 August 1952, para. II, 1006 UNTS 325. The reason why the figure of 200 NM was chosen remains unclear; see *Ann L. Hollick*, The Origins of the 200-mile Offshore Zones, AJIL 71 (1977), 494, 495 *et seq.*; *Robin R. Churchill/Alan V. Lowe*, Law of the Sea (3rd edn. 1999), 163.

[14] Declaration of Santo Domingo of 9 June 1972, AJIL 66 (1972), 918.

[15] Sea-Bed Committee, Kenya: Draft Articles on Exclusive Economic Zone Concept, UN Doc. A/AC.138/SC.II/L.10 (1972), GAOR 27th Sess. Suppl. 21 (A/8721), 180, 181 (Art. VII).

[16] Sea-Bed Committee, Iceland: Jurisdiction of Coastal States over Natural Resources of the Area Adjacent to their Territorial Sea, UN Doc. A/AC.138/SC.II/L.23 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 23; Sea-Bed Committee, China: Sea Area within the Limits of National Jurisdiction, UN Doc. A/AC.138/SC.II/L.34 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 71, 72 (para. 2 (1)); Sea-Bed Committee, Algeria *et al.*: Draft Articles on Exclusive Economic Zone, UN Doc. A/AC.138/SC.II/L.34 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 87 (Art. I).

[17] Sea-Bed Committee, Colombia, Mexico and Venezuela: Draft Articles on Treaty, UN Doc. A/AC.138/SC.II/L.21 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 19, 20 (Art. 8); Sea-Bed Committee, Pakistan: Breadth of the Territorial Sea and Boundaries of the Exclusive Economic Zone, UN Doc. A/AC.138/SC.II/L.23 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 106. See also UNCLOS III, Declaration of the Organization of African Unity on the Issues of the Law of the Sea, UN Doc. A/CONF.62/33 (1974), OR III, 63, 64 (para. 6).

[18] Sea-Bed Committee, USA: Draft Articles for a Chapter on the Rights and Duties of States in the Coastal Sea-Bed Economic Area, UN Doc. A/AC.138/SC.II/L.34 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 75 (Art. 1 (2)); Sea-Bed Committee, Canada *et al.*: Draft Articles on Fisheries, UN Doc. A/AC.138/SC.II/L.37 (1973), GAOR 28th

possibility of an outer continental shelf (extending beyond the EEZ).[19] As far as can be seen, only one State (Argentina) favoured accepting that the EEZ could extend beyond 200 NM measured from the baselines by pointing to the concept of 'epicontinental sea'.[20]

4 In the course of UNCLOS III, most proposals concerning the EEZ exclusively referred to a maximum breadth of that zone of 200 NM from the baselines from which the territorial sea is measured.[21] An attempt made by some European States to expressly allocate to the coastal State discretion as to the extent of the EEZ, but also to require it in this context to take into account 'all relevant factors, in particular the geographical characteristics of the area and the fishery resources and their distribution off its coast',[22] remained unsuccessful. In light of the fact that also this proposal referred to the maximum distance criterion of 200 NM, it was considered neither necessary nor appropriate to specify in any way the requirements to be observed by the coastal State when exercising its discretion in respect of the delineation of the EEZ. The Chairman of the Second Committee summarized the position advocated by the clear majority of States in the following terms:

> 'The idea of a territorial sea of 12 miles and an exclusive economic zone beyond the territorial sea up to a total maximum distance of 200 miles is, at least at this time, the keystone of the compromise solution favoured by the majority of the States participating in the Conference, as is apparent from the general debate in the plenary meetings and the discussions held in our Committee.'[23]

He also made it clear that acceptance of the envisaged EEZ regime would depend on the satisfactory solution of other issues, such as the straits question, the concept of the outer continental shelf and the rights land-locked geographically disadvantaged States, thereby anticipating the 'package deal approach' on which the Convention was ultimately based.[24] Since that time, the 200 NM maximum distance criterion remained, as far as can be seen, undisputed.[25] An informal proposal on the EEZ submitted by the Informal Group of Juridical Experts (Evensen group) in the course of the Third Session already contained a provision whose wording was virtually identical to that of Art. 57;[26] it was later included without

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Sess., Suppl. 21 (A/9021-III), 82 (Art. 2); Sea-Bed Committee, Afghanistan *et al.*: Draft Articles on Resource Jurisdiction of Coastal States beyond the Territorial Sea, UN Doc. A/AC.138/SC.II/L.39 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 85 (Art. I (2)); Algeria *et al.*: Draft Articles (note 16), 87 (Art. I); Sea-Bed Committee, Uganda and Zambia: Draft Articles on the Proposed Economic Zone, UN Doc. A/AC.138/SC.II/L.36 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 89, 90 (Art. 4 (1)); Sea-Bed Committee, Netherlands: Proposal Concerning an Intermediate Zone, UN Doc. A/AC.138/SC.II/L.59 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 111, 112 (Art. 1 (a)).

[19] Sea-Bed Committee, Australia and Norway: Certain Basic Principles on an Economic Zone and on Delimitation, UN Doc. A/AC.138/SC.II/L.36 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 77, 78 (para. 1 (c)).

[20] Sea-Bed Committee, Argentina: Draft Articles, UN Doc. A/AC.138/SC.II/L.37 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 78, 79 (para. 4). According to this proposal, the concept of 'epicontinental sea' refers to 'the column of water covering the sea-bed and subsoil which are situated at an average depth of 200 metres' (*ibid.*).

[21] UNCLOS III, Canada *et al.*: Working Paper, UN Doc. A/CONF.62/L.4 (1974), OR III, 81, 82 (Art. 13); UNCLOS III, Nigeria: Revised Draft Articles on the Exclusive Economic Zone, UN Doc. A/CONF.62/C.2/L.21/REV.1 (1974), OR III, 199 (Art. 1 (1)); UNCLOS III, Bulgaria *et al.*: Draft Articles on the Economic Zone, UN Doc. A/CONF.62/C.2/L.38 (1974), OR III, 214, 215 (Art. 3); UNCLOS III, United States of America: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47 (1974), OR III, 222 (Art. 2); UNCLOS III, Bolivia and Paraguay: Draft Articles on the "Regional Economic Zone", UN Doc. A/CONF.62/C.2/L.65 (1974), OR 234 (Art. 1); UNCLOS III, Gambia *et al.*: Draft Articles on the Exclusive Economic Zone, UN Doc. A/CONF.62/C.2/L.82 (1974), OR III, 240 (Art. 1).

[22] UNCLOS III, Belgium *et al.*: Draft Articles on Fisheries, UN Doc. A/CONF.62/C.2/L.40 and ADD.1 (1974), OR III, 217 (Art. 5).

[23] UNCLOS III, Statement by the Chairman of the Second Committee at its 46th Meeting, UN Doc.A/CONF.62/C.2/L.86 (1974), OR III, 242, 243.

[24] *Ibid.*

[25] *Tunisia/Libya Case* (note 1), Dissenting Opinion of Judge Oda, 227 (para. 117). – An informal comment submitted by Singapore remains unclear. See UNCLOS III, Singapore: Articles 45–60 (ISNT II) (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1983), 290, 291 (Art. 46): 'General reservation on 200 miles […] provided rights of land-locked and geographically disadvantaged States are fairly accommodated.'

[26] UNCLOS III, The Economic Zone (1975, mimeo.), reproduced in: Platzöder (note 25), 209, 211 (Art. 2).

further amendment in the Informal Single Negotiating Text[27] and, with the sole exception of 'baseline' being changed to 'baselines', in the Revised Single Negotiating Text.[28] In the Informal Composite Negotiating Text, the provision became Art. 57, and no further amendments were adopted.[29]

III. Elements

1. 'shall not extend beyond 200 nautical miles'

Art. 57 determines the maximum breadth of the EEZ by referring to the criterion of the distance of maximum 200 NM from the baselines from which the breadth of the territorial sea is measured. The negative phrasing ('shall not extend') of this provision implies that the coastal State is **free to decide to claim an EEZ of a lesser extent**.[30] The unilateral process of determining the outward limits of the EEZ is referred to as 'delineation'. Where the sea area concerned is, due to the presence of adjacent or opposite coastal States, not large enough (i. e., the distance between the baselines of the States is less than 400 NM) to claim an EEZ of 200 NM, delineation of a 200 NM EEZ is not allowed;[31] rather, the States involved are under the duty to conclude a delimitation agreement with the aim to achieve an equitable solution (see Art. 74 (1)). 5

Notwithstanding the fact that the EEZ, in contrast to the continental shelf, is not subject to an 'inherent right'[32] of the coastal State, and that the EEZ and the continental shelf thus have distinct legal bases, Art. 56 (1)(a) and (3) demonstrates that the two zones form part of an integral regime, if and to the extent to which the coastal State has claimed and established an EEZ above its continental shelf.[33] In light of this, it has been asked by Evensen whether 6

> 'different lines of delimitation are conceivable for the Exclusive Economic Zone and the continental shelf in such a case, bearing in mind that the exclusive economic zone concept laid down in Part V of the draft convention also comprises the natural mineral resources of the sea-bed and its subsoil, that is the natural resources of the continental shelf.'[34]

State practice shows that in the majority of cases a **single maritime boundary** as outer limits of the EEZ and the continental shelf, or a single line of delimitation between States with adjacent or opposite coasts respectively, has been established. While drawing such single lines can therefore not be considered as being in any way prohibited under international law,[35] it should be noted, however, that coastal States are not legally bound to decide, or agree, on such course of action, in particular in situations where an agreement concerning delimitation of the continental shelf of States with adjacent or opposite coasts has already been concluded prior to the delimitation of the EEZs.[36] At the same time, the ICJ considered the distance criterion

[27] UNCLOS III, Informal Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 159 (Art. 46).

[28] UNCLOS III, Revised Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 160 (Art. 45).

[29] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 13 (Art. 57).

[30] *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016), 88.

[31] See ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada *v.* United States of America), Judgment of 12 October 1984, ICJ Reports (1984), 246, 299 (para. 112): 'No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States.'

[32] ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3, 22 (para. 19).

[33] See *Proelss* on Art. 55 MN 3.

[34] *Tunisia/Libya Case* (note 1), Dissenting Opinion of Judge Evensen, 287 (para. 9).

[35] Arbitral Tribunal, *Delimitation of the Maritime Areas between Canada and France* (France *v.* Canada), Decision of 10 June 1992, RIAA XXI, 265, 282 (para. 37); *Gulf of Maine Case* (note 31), 246, 267 (para. 27); *Tunisia/Libya Case* (note 1), Dissenting Opinion of Judge Evensen, 296 (para. 15).

[36] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 552, relying on ICJ, *Case Concerning the Arbitral Award of 31 July*

codified in Art. 57 as a 'relevant circumstance' to be taken into account in the context of the continental shelf delimitation.[37] One must thus conclude that the issue of single maritime boundary is characterized by a considerable degree of flexibility.

7 On closer examination, the fact that Art. 57 refers to the 'baselines from which the breadth of the territorial sea is measured' as point of origin for delineating the EEZ reveals that the EEZ overlaps with the territorial sea (as far as the maximum breadth of that zone of 12 NM is concerned) and, if claimed, with the contiguous zone (in respect of the first 12 NM beyond the outer limits of the territorial sea). Taking into account that the sovereignty of the coastal State extends to the territorial sea, and that the degree of the coastal State's jurisdiction thus goes far beyond that allocated to it in the EEZ, the regime of this zone only applies in the area between the outer limits of the territorial sea and the 200 NM maximum extent. It would therefore be more accurate to refer to the EEZ as a **188 miles zone** (in case the coastal State has delineated a 12 NM territorial sea).[38] The situation is different in respect of the contiguous zone, with regard to which the coastal State has not been allocated jurisdiction to prescribe, but is only authorized to exercise the control necessary to prevent and punish infringements of its laws within the territorial sea (see Art. 33).

2. 'from the baselines from which the breadth of the territorial sea is measured'

8 The second element of Art. 57 refers to the 'baselines from which the breadth of the territorial sea is measured' as point of origin for delineating the EEZ. It has correctly been stated that this 'encompasses claims from normal and straight baselines, and bay closing lines, drawn along coastlines consistent with Part II of the LOSC.'[39] Even though the wording of Art. 57 does not use the formula codified in Art. 3 ('measured from baselines *determined in accordance with this Convention*') but seems to refer to the mere existence of baselines, baselines not drawn in accordance with the requirements codified in Part II cannot be relied upon as the basis for lawful delineation of the outward limits of the EEZ. Rather, the formula contained in Art. 57 ('baselines from which the breadth of the territorial sea is measured') must be interpreted in light of Art. 3, which is why the legality of the outward limit of the EEZ is directly linked to that of the drawing of baselines.[40] In case of archipelagic States, Art. 48 prescribes that the breadth of the EEZ shall be measured from archipelagic baselines drawn in accordance with Art. 47.[41]

9 In contrast to the rules applicable to the territorial sea (Art. 4), it is not specified by Art. 57 how the outer limit of the EEZ ought to be established.[42] This gap suggests that the coastal State enjoys a considerable scope of discretion in deciding which of the generally accepted methods (loxodromes *v.* geodetic lines) it intends to use for connecting the relevant

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1989 (Guinea-Bissau *v.* Senegal), ICJ Reports (1991), 53, 72 (para. 55 *et seq.*). Note, however, the argument presented by Evensen according to which the fact that the regime of the EEZ is, as far as the maximum breadth of the zone is concerned, based on a distance criterion 'seems to strengthen the equidistance/median line principle as an equitable approach for delimiting overlapping areas' (*Tunisia/Libya Case* (note 1), Dissenting Opinion of Judge Evensen, 296 (para. 15)).

[37] ICJ, *Continental Shelf* (Libyan Arab Jamahiriya *v.* Malta), Judgment of 3 June 1985, ICJ Reports (1985), 13, 33 (para. 33); see also *Tunisia/Libya Case* (note 1), Dissenting Opinion of Judge Evensen, 296 (para. 15), arguing that the fact that the regime of the EEZ is, as far as the maximum breadth of the zone is concerned, based on a distance criterion 'seems to strengthen the equidistance/median line principle as an equitable approach for delimiting overlapping areas'.

[38] *Churchill/Lowe* (note 13), 162 (footnote 6); see also *Rothwell/Stephens* (note 30), 88.

[39] *Rothwell/Stephens* (note 30), 89.

[40] In contrast, there is no direct link between the issue of determining the baseline for the purpose of measuring the breadth of the EEZ and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the EEZ between adjacent or opposite States; see ICJ, *Maritime Delimitation in the Black Sea* (Romania *v.* Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61, 108 (para. 137).

[41] See *Symmons* on Art. 48 MN 3 *et seq.*

[42] Nordquist/Nandan/Rosenne (note 36), 551.

geographical coordinates.[43] According to Art. 75, the outer limit lines of the EEZ 'shall be shown on charts of a scale or scales adequate for ascertaining their position' (Art. 75 (1)), and the coastal State is obliged to 'give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations' (Art. 75 (2)).

10 The fact that Art. 57 establishes a direct nexus between the outer limit of the EEZ on the one hand and the 'baselines from which the breadth of the territorial sea is measured' on the other implies that if the baseline of the coastal State moves inland due to, say, natural changes of the coastline,[44] the outer limit of the EEZ will likewise move landward. Although it has been stated that the outer limits of the EEZ are often less susceptible to change as they rely on a limited number of critical basepoints which are not necessarily subject to change even in case of significant changes in the location of the coastline,[45] the dependence of the outer limit of the EEZ on the course of the coastal State's baselines may lead to problems with regard to island States that are particularly vulnerable, but have regularly only contributed marginally to, **sea-level rise**. Under the law as it stands today, the unavoidable consequence of accepting ambulatory baselines arguably is that sea-level rise will ultimately result in loss of maritime space, or, in case of sinking of island States that are particular vulnerable to climate change due to their low elevation and small size, total loss of territory and potentially also Statehood. Virtually all sources that have addressed this issue so far have come to the conclusion that this is an inacceptable result. Thus, different options have been proposed *de lege ferenda* how existing maritime entitlements could be preserved, the most common ones being to 'freeze' either the existing baselines in their current position[46] or the outer limits of the EEZ.[47] The second option would imply that the nexus between the outer limit of the EEZ and the baselines from which the breadth of the territorial sea is measured on which Art. 57 is based must be abandoned by way of a new rule of customary international law or a multilateral agreement.[48] The matter is currently assessed by the ILA Committee on International Law and Sea Level Rise.

11 As of today, the sole **exception** to the rule according to which a sovereign territory that is eligible to generate a territorial sea in accordance with the principle 'the land dominates the sea'[49] qualifies as the point of origin for delineating an EEZ is codified in Art. 121 (3): Whereas rocks that cannot sustain human habitation or economic life of their own generate a territorial sea, they shall have no EEZ or continental shelf.[50] According to Art. 60 (8), artificial islands, installations and structures do not possess the status of islands and do thus not even generate a territorial sea of their own.[51]

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[43] *Ibid.*

[44] A report submitted by a Committee of the International Law Association (ILA) in 2012 concluded that baselines are generally ambulatory. See Report of the Seventy-Fifth Conference held in Sofia, Baselines under the International Law of the Sea: Committee Report, 2012, 385–428. For further information see *Trümpler* on Art. 5 MN 15–22 and MN 38–42.

[45] *Clive Schofield*, Defining the 'Boundary' between Land and Sea: Territorial Sea Baselines in the South China Sea, in: S. Jayakumar/Tommy Koh/Robert Beckman (eds.), The South China Sea Disputes and the Law of the Sea (2014), 21–54.

[46] *David D. Caron*, Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict, in: Seoung-Yong Hong/John M. Van Dyke (eds), Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea (2009), 1, 14; *José L. Jesus*, Rocks, New-born Islands, Sea Level Rise and Maritime Space, in: Jochen A. Frowein et al. (eds.), Negotiating For Peace – Liber Amicorum Tono Eitel (2003), 579, 602.

[47] See, e. g., *Alfred H. A. Soons*, The Effects of a Rising Sea Level on Maritime Limits and Boundaries, Netherlands International Law Review 37 (1990), 207, 231; *Rosemary Rayfuse*, Sea Level Rise and Maritime Zones: Preserving the Entitlements of "Disappearing" States, in: Michael B. Gerrard/Gregory E. Wannier (eds.), Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate (2013), 167–191.

[48] See also *Moritaka Hayashi*, Sea Level Rise and the Law of the Sea – Future Options, in: Davor Vidas/Peter J. Schei (eds.), The World Ocean in Globalisation: Challenges and Responses (2011), 187, 196.

[49] ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3, 51 (para. 96).

[50] For a detailed discussion see *Talmon* on Art. 121 MN 27–52; *Rothwell/Stephens* (note 30), 89 *et seq.*

[51] See *Proelss* on Art. 60 MN 33.

Article 58
Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Bibliography: Jill Barrett/Richard Barnes (eds.), Law of the Sea: UNCLOS as a Living Treaty (2016); *Robin R. Churchill/Alan V. Lowe*, Law of the Sea (3rd edn. 1999); *Jianjun Gao*, The ITLOS Advisory Opinion for the SRFC, Chinese JIL 14 (2015), 735–755; *Douglas Guilfoyle*, The High Seas, in: Donald R. Rothwell/Alex G. Oude Elferink/Karen N. Scott/Tim Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015), 203–225; *Sophia Kopela*, The 'Territorialisation' of the Exclusive Economic Zone: Implications for Maritime Jurisdiction, available at: https://www.dur.ac.uk/resources/ibru/conferences/sos/s_kopela_paper.pdf; *Barbara Kwiatkowska*, The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Alexander Proelss*, Peaceful Purposes, MPEPIL, available at http://www.mpepil.com; *Alexander Proelss*, Piracy and the Use of Force, in: Panos Koutrakos/Achilles Skordas (eds.), The Law and Practice at Sea (2014), 53–66; *Alexander Proelss/Tobias Hofmann*, Law of the Sea and Transnational Organized Crime, in: Pierre Hauck/Sven Peterke (eds.), International Law and Transnational Organised Crime (2016), 422–447; *J. Ashley Roach*, Marine Data Collection: Methods and the Law, in: Myron H. Nordquist/Tommy T. B. Koh/John N. Moore (eds.), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (2009), 171–208; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016); *Valentin Schatz*, Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State, Goettingen Journal of International Law 7 (2016), available at: http://www.gojil.eu/issues/prepublished/schatz.pdf; *Valentin Schatz*, Fishing for Interpretation – The ITLOS Advisory Opinion of April 2015 on Flag State Responsibility for Illegal Fishing in the EEZ, ODIL 47 (2016), 327–345; *Ivan Shearer*, Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance, Ocean Yearbook 17 (2003), 548–562; *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015)

Documents: GA, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 28 January 2002; ICAO, Study on United Nations Convention on the Law of the Sea – Implications, if any, for the Application of the Chicago Convention, its Annexes, and other International Air Law Instruments, ICAO Doc. C.WP/7777 (1984); IHO, Manual on Hydrography, Publication C-13 (2005); SC Res.1838 of 7 October 2008; UN DOALOS, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Appendix I: Consolidated Glossary of Technical Terms Used in the United Nations Convention on the Law of the Sea (1989)

Cases: CJEU, Case C-308/06, Judgment of 3 June 2008, *Intertanko* [2008] ECR I-4057; ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* USA) (Merits), Judgment of 27 June 1986, ICJ Reports (1986), 14; ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/; ITLOS, *The 'Monte Confurco'* (Seychelles *v.* France), Judgment of 18 December 2000, ITLOS Reports (2000), 86; ITLOS, *The M/V 'Saiga'* (St. Vincent and the Grenadines *v.* Guinea), Merits, Judgment of 1 July 1999, ITLOS Reports (1999), 10; ITLOS, *The M/V 'Virginia G' Case* (Panama *v.* Guinea-Bissau), Judgment of 14 April 2014, available at: http://www.itlos.org/index.php?id=171; PCA, *South China Sea Arbitration* (Philippines *v.* China), Award of 12 July 2016, available at: http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf

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I. Purpose and Function

Art. 58 is one of the few provisions included in Part V that does not address the powers of the coastal State, but rather deals with the rights and obligations of other States in the exclusive economic zone (EEZ), thus serving as the counterpart of Art. 56. By legally reflecting the functional *sui generis* status of the EEZ,[1] Art. 58, read together with Art. 56, must be considered as establishing the core of the concept of that zone.[2] Art. 58 (1) complements Art. 56 (2) and is dedicated to the rights of other States. As stated by one authority, these rights are 'are all essentially concerned with international communications and are those high-seas freedoms that have survived the demands of coastal States.'[3] In this respect, of the four high seas freedoms codified in the 1958 Geneva Convention on the High Seas,[4] only fishing in the EEZ has been subjected to the sovereign rights of the coastal State and is thus governed by Art. 56 (1). In light of this, it is fair to conclude that the main purpose of Art. 58 is to **safeguard the interests of the major maritime States**.[5] Taking into account that the wording of Art. 58 (1) also refers to 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention', it is not surprising that the exact scope of the 'freedom of communications' (*jus communicationis*)[6] has been a controversial issue ever since. Where the Convention attributes rights, jurisdiction or freedoms respectively neither to the coastal State nor to other States, the resolution of conflicts of interests in the EEZ ought to be governed in line with Art. 59. **1**

Art. 58 (2) renders applicable the general provisions of the regime of the high seas codified in Arts. 88–115 whose main focus is on shipping and flag State jurisdiction, but only if and to the extent to which they are not incompatible with Part V of the Convention. Similar to Art. 58 (1), which subjects the freedom of communications to 'the relevant provisions of this Convention', Art. 58 (2) clarifies that the regime of the high seas has not been made **2**

[1] See *Proelss* on Art. 55 MN 5–9.

[2] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 526.

[3] *Robin R. Churchill/Alan V. Lowe*, Law of the Sea (3rd edn. 1999), 170.

[4] Art. 2 Convention on the High Seas of 29 April 1958, 450 UNTS 11.

[5] *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016), 97.

[6] The term 'freedom of communications' was used by the ICJ in the Nicaragua case; see ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* USA) (Merits), Judgment of 27 June 1986, ICJ Reports (1986), 14, 112.

applicable to the EEZ in an unmodified manner. Finally, together with Art. 56 (2), Art. 58 (3) prescribes a **mutual due regard rule** to be observed by the coastal State and other States when exercising their rights and duties in the EEZ. While Art. 58 (1) addresses the rights of other States, Art. 58 (3) is concerned with their duties. The latter provision implies that neither the coastal State's sovereign rights and jurisdiction nor the freedoms of other States are valid in the EEZ in an absolute manner. Art. 58 (3) furthermore obliges other States to comply with the laws and regulations adopted by the coastal State on the basis of Art. 56 (1), provided that these measures are in conformity with Part V and other provisions of the Convention as well as with the rules and principles of public international law in general.

II. Historical Background

3 In 1972, Kenya submitted a proposal to the Seabed Committee concerning 'Draft articles on exclusive economic zone concept', Art. III of which clarified that the new zone 'shall be without prejudice to the exercise of freedom of navigation, freedom of overflight and freedom to lay submarine cables and pipelines as recognized in international law.'[7] The rule codified today in Art. 58 (1) was thus linked to the establishment of the EEZ and the coastal State's powers from the very outset. Other proposals submitted in the course of the Sea-Bed Committee equally referred to the freedoms of navigation and overflight as well as of the laying of cables and pipelines.[8] These freedoms were considered to be valid 'with no restrictions other than those resulting from the exercise by the coastal State of its rights within the area' and to the freedom to lay submarine cables and pipelines.[9] Malta proposed to include a provision into the future Convention demanding that the 'exploration and exploitation of the natural resources of national ocean space shall be conducted with reasonable regard to other uses of national ocean space, in particular navigation, scientific research and the laying and repair of submarine cables and pipelines'[10]

4 It is interesting to see that several States, or groups of States, that submitted proposals on what is today codified in Art. 56[11] refrained from also commenting on the rights and freedoms of other States, a fact that demonstrates that the development of the regime of the EEZ was clearly triggered by coastal States with the aim to be authorized to exercise sovereign rights and jurisdiction in a broader area beyond the outer limits of their territorial sea. Furthermore, as far as the scope of the freedoms of other States is concerned, it should be noted that controversies that have become manifest in recent years were already reflected in the positions taken by China and the US in the Sea-Bed Committee. While China submitted a more restrictive proposal that referred to 'normal navigation and overflight on the water surface of and in the air space above the economic zone by ships and aircraft of all states' (a phrasing that may arguably be understood as excluding navigation of military vessels as well as submarines) and that made the delineation of the course for laying cables and pipelines 'subject to the consent of

[7] Sea-Bed Committee, Kenya: Draft Articles on Exclusive Economic Zone Concept, UN Doc. A/AC.138/SC.II/L.10 (1972), GAOR 27th Sess., Suppl. 21 (A/8721), 180 (Art. III).

[8] Sea-Bed Committee, Colombia, Mexico and Venezuela: Draft Articles on Treaty, UN Doc. A/AC.138/SC.II/L.21 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 19, 20 (Arts. 9 and 10); see also Sea-Bed Committee, Argentina: Draft Articles, UN Doc. A/AC.138/SC.II/L.37 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 78, 80 (para. 13); Sea-Bed Committee, Australia and Norway: Certain Basic Principles on an Economic Zone and on Delimitation, UN Doc. A/AC.138/SC.II/L.36 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 77, 78 (para. 1 (d)); Sea-Bed Committee, Algeria *et al.*: Draft Articles on Exclusive Economic Zone, UN Doc. A/AC.138/SC.II/L.40 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 87, 88 (Art. IV).

[9] Colombia, Mexico and Venezuela: Draft Articles (note 8), 20 (Art. 9).

[10] Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under Their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 35, 61 (Art. 80).

[11] For references see *Proelss* on Art. 56 MN 4.

the coastal State',[12] the US proposal insisted on the coastal State, when exercising its rights in the EEZ, being obliged to act 'in strict conformity with the provisions of this chapter and other applicable provisions of this Convention'.[13]

5 In the course of UNCLOS III, several proposals adopted the idea expressed in some of the documents referred to above that the two groups of States (coastal States and other States) were mutually obliged to not interfere with the lawful exercise of the rights, or freedoms respectively, of the other group of States.[14] Based on these proposals, Provision 97 of the Main Trends Working Paper contained four alternative formulations regarding the rights and duties of other States in the EEZ.[15] In the course of the Third Session, the Evensen Group prepared a draft provision to be included in the future articles on the EEZ, paragraph 1 of which came quite close to the wording of what is today Art. 58 (1):

> 'All States, whether coastal or land-locked, shall, subject to the relevant provisions of this Convention, enjoy [in] the exclusive economic zone the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication and shall have other rights and duties provided for in this Convention.'[16]

This proposal is particularly noteworthy due to the fact that it was the first text that included a reference to 'other internationally lawful uses of the sea related to navigation and communication'. Moreover, paragraph 3 of the proposed provision required States, when exercising their freedoms in the EEZ, 'to have due regard to the rights and duties of the coastal State and shall act in a manner compatible with the provisions of this Convention.'

6 A proposal submitted by the Group of 77 and the Part II of the Informal Single Negotiating Text (ISNT) closely followed the text submitted by the Evensen Group. That said, the first document referred to 'other legitimate uses of the sea' and dropped the reference to 'other rights and duties provided for in this Convention'.[17] Its second paragraph, relying on paragraph 3 of the text submitted by the Evensen Group, expressly referred to the duty to have due regard in particular to the 'security interests' of the coastal State. With the exception of the phrase 'other rights and duties provided for in this Convention', Art. 47 (1) of the ISNT/Part II was identical with the first paragraph of the Evensen text.[18] In its second paragraph, it referred to specific provisions relevant to the high seas and made them applicable to the EEZ 'in so far as they are not incompatible with the provisions of this part'. Art. 47 (4) of the ISNT/Part II amended the third paragraph of the Evensen text by requiring States to 'comply with the laws and regulations enacted by the coastal State in conformity with the provisions of this part and other rules of international law'. This provision, which abstained from expressly referring to coastal States' security interests, essentially anticipated Art. 58 (3).

7 Irrespective of minor drafting changes, and with the exception of the rule applicable to situations where the Convention does attribute rights or jurisdiction neither to the coastal

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[12] Sea-Bed Committee, China: Sea Area within the Limits of National Jurisdiction, UN Doc. A/AC.138/SC.II/L.34 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 71, 73 (para. 2 (4)).

[13] Sea-Bed Committee, US: Draft Articles for a Chapter on the Rights and Duties of States in the Coastal Sea-bed Economic Area, UN Doc. A/AC.138/SC.II/L.35 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 75, 76 (Art. 2).

[14] See, e. g., UNCLOS III, Nigeria: Revised Draft Articles on the Exclusive Economic Zone, UN Doc. A/CONF.62/C.2/L.21 (1974), OR III, 199 (Arts. 3 (3) and 4 (1)); UNCLOS III, Bulgaria *et al.*: Draft Articles on the Economic Zone, UN Doc. A/CONF.62/C.2/L.38 (1974), OR III, 214 (Arts. 4 and 6).

[15] UNCLOS III, Working Paper of the Second Committee: Main Trends, UN Doc. A/CONF.62/L.8/REV.1 (1974), OR III, 107, 122 (Annex II, Appendix I, Provision 97 on freedom of navigation and overflight).

[16] UNCLOS III, The Economic Zone (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1983), 209, 211 (Art. 3). Paragraph 2 of the provision addressed situations where the Convention does attribute rights or jurisdiction neither to the coastal State nor to other States, which are today governed by Art. 59.

[17] UNCLOS III, Working Paper on the Exclusive Economic Zone (1975, mimeo.), reproduced in: Platzöder (note 16), 227, 230 (Art. 7).

[18] UNCLOS III, Informal Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 159 (Art. 47).

State nor to other States which was moved to a separate provision, Art. 46 of Part II of the Revised Single Negotiating Text (RSNT) did not change the substance of Art. 47 of the ISNT/Part II.[19] In particular, it was not considered necessary to include a proposal made by Peru to clarify that flag States must ensure that their vessels 'refrain from any threat or use of force against the sovereignty, territorial integrity or political independence' of the coastal State,[20] taking into account that this duty was already valid under general international law. Several informal amendments that were subsequently introduced in respect of Art. 46 of the RSNT/Part II referred to the structure of the provision and to specific issues such as the reference contained in paragraph 2 to the regime of the high seas.[21] Particularly far-reaching proposals were submitted by the LL/GDS Group. These focused on the inclusion of a paragraph that was intended to clarify that land-locked and geographically disadvantaged States would also enjoy rights relating to the natural resources in the EEZ, and on the deletion of the words 'related to navigation and communication' with regard to 'other internationally lawful uses of the sea'.[22] However, both suggestions remained unacceptable for the majority of States as they implied a limitation of the coastal States' sovereign rights, and a lack of qualification of the scope of freedoms enjoyed by other States.

8 The final wording of Art. 58 was strongly influenced by the work of the Castañeda Group that in the course of the Sixth Session prepared a series of proposals concerning the content of Art. 46 of the RSNT/Part II. The last text submitted by the Group was virtually identical with Art. 58 of the Convention. In particular, express reference was made in its paragraph 1 for the first time to the provision prescribing the freedoms of the high seas (Art. 76 of the RSNT/Part II), thereby clarifying that 'the freedoms to be enjoyed in the exclusive economic zone were, for the most part, the same as those enjoyed on the high seas',[23] and to 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.'[24] Furthermore, while paragraph 3 of the provision repeated Art. 46 (2) of the RSNT/Part II *verbatim*, Art. 46 (3) was amended by reference to the condition that the laws and regulations established by the coastal State should only be complied with 'insofar as they are not incompatible with this Chapter.' The pertinent provision of the Informal Composite Negotiating Text was renumbered Art. 58, but essentially adopted the text proposed by the Castañeda Group.[25] Proposals submitted in the course of the Seventh and Eighth Sessions by the Federal Republic of Germany and the US that respectively aimed at restricting the rights of coastal States, or at widening the scope of the freedoms of other States,[26] ultimately remained unsuccessful. They could not be arranged with the primary motive for accepting the regime of the EEZ, namely to extend the rights and jurisdiction of the coastal State towards the sea.

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[19] UNCLOS III, Revised Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 160 (Art. 46).

[20] UNCLOS III, Peru, Article 47 (ISNT II) (1976, mimeo.), reproduced in: Platzöder (note 16), 294.

[21] For references see Nordquist/Nandan/Rosenne (note 2), 560–561.

[22] UNCLOS III, LL/GDS Group, Articles 44–47 (RSNT II) (1976, mimeo), reproduced in: Platzöder (note 16), 411, 412 (Art. 46); 412, 413 (Art. 46); and 414, 415 (Art. 46).

[23] Nordquist/Nandan/Rosenne (note 2), 563.

[24] UNCLOS III, Castañeda Group (1977), reproduced in: Platzöder (note 16), 426 *et seq.* (Art. 46).

[25] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 13 (Art. 58).

[26] UNCLOS III, Federal Republic of Germany: Articles 58, 86 and 123 *bis* (ICNT) (1977), reproduced in: Platzöder (note 16), 494 (Art. 58), referring at the end of Art. 58 (1) in broad language to 'the other internationally lawful uses of the sea'; UNCLOS III, United States: Exclusive Economic Zone (1978), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, Vol. XI (1987), 574: Art. 58 'preserves, for the international community, in addition to certain specified high seas freedoms, all other high seas freedoms traditionally enjoyed by ships and aircraft which are recognized by the general principles of international law'.

III. Elements

1. 'All States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention'

The first element of Art. 58 (1) clarifies that the freedoms prescribed in this provision can be relied upon by all States, no matter whether they are coastal or land-locked. It accommodates the fact that it is common that States not bordering the sea have a shipping register and are entitled to grant the right to fly their flags. The way in which Art. 58 (1) is drafted also expresses that the freedoms which are declared to be applicable in the EEZ constitute rights of States, not of ships or its masters, of companies intending to lay submarine pipelines or cables, or pilots of aircraft in overflight respectively.[27] 9

The wording of Art. 58 (1) furthermore illustrates that the *jus communicationis* mentioned in the provision is only applicable in the EEZ 'subject to the relevant provisions of this Convention'. Compared to the high seas, the exercise of the rights of other States is, therefore, subjected to stricter limits in the EEZ.[28] This conclusion has been referred to in the context of Art. 56 as one of the relevant factors implying that a rebuttable presumption in favour of the coastal State should be recognized that is applicable in the event of a conflict between the sovereign rights and jurisdiction of the coastal State and the freedoms of other States.[29] 10

2. 'freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines'

Art. 58 (1) makes express reference to the freedoms referred to in Art. 87 of navigation and overflight and of the laying of submarine cables and pipelines. That Art. 58 (1) does not mention the other freedoms codified in Art. 87, namely the freedoms of fishing, of scientific research and to construct artificial islands and other installations permitted under international law, results from the fact that the fields concerned have been subjected to the sovereign rights (fishing) and jurisdiction (installations, marine scientific research) of the coastal State by Art. 56 (1). Theoretically, the freedoms of navigation, overflight and laying of submarine cables and pipelines are the same as those incorporated on the high seas,[30] but it has already been stated above (see *supra*, MN 10) that they can only be relied upon in the EEZ if and to the extent to which they are exercised in accordance with the relevant provisions of this Convention. This requirement is directly linked to the issue of the scope of the freedoms codified in Art. 58 (1). 11

As far as the **freedom to lay submarine cables and pipelines** is concerned, Art. 79 constitutes the 'relevant provision' in terms of Art. 58 (1). Art. 79 (3) strengthens the position of the coastal State (and consequently limits the freedom of other States) by prescribing that 12

[27] See also CJEU, Case C-308/06, Judgment of 3 June 2008, *Intertanko* [2008] ECR I-4057, paras. 59, 61: '[I]ndividuals are in principle not granted independent rights and freedoms by virtue of UNCLOS. In particular, they can enjoy the freedom of navigation only if they establish a close connection between their ship and a State which grants its nationality to the ship and becomes the ship's flag State. […] It is true that the wording of certain provisions of UNCLOS, such as Articles 17, 110 (3) and 111 (8), appears to attach rights to ships. It does not, however, follow that those rights are thereby conferred on the individuals linked to those ships, such as their owners, because a ship's international legal status is dependent on the flag State and not on the fact that it belongs to certain natural or legal persons.'

[28] See also *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 135; but see the argument presented by Panama in ITLOS, *The M/V 'Virginia G'* (Panama *v.* Guinea-Bissau), Judgment of 14 April 2014, para. 168, available at: http://www.itlos.org/index.php?id=171. In its decision on the merits in the *South China Sea Arbitration* (Philippines *v.* China), Award of 12 July 2016, para. 700, available at: http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf, the Arbitral Tribunal stressed the limited scope of the rights of other States by stating that they '*are limited* to "navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms"' (italics added).

[29] See *Proelss* on Art. 56 MN 28.

[30] Nordquist/Nandan/Rosenne (note 2), 564; *Rothwell/Stephens* (note 5), 98.

'[t]he delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.'[31] Further limitations arise in the context of **navigation**, in particular of fishing vessels, taking into account that the management of the living resources of the EEZ is subject to the sovereign rights of the coastal State.[32] While foreign fishing vessels must be regarded as being generally entitled to freely navigate through the EEZ, it is clear that the coastal State is at the same time authorized to observe that these vessels do not undermine its fisheries management measures. This conclusion is backed by Art. 73 (1), stating that

> '[t]he coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.'

Having regard to navigation of ships other than fishing vessels, limitations to the pertinent freedom result from the jurisdiction of the coastal State concerning the construction and use of artificial islands, installations and structures in terms of Art. 56 (1)(b)(i). The pertinent jurisdiction of the coastal State is further developed by Art. 60 (6), according to which '[a]ll ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.'

13 The International Tribunal for the Law of the Sea (ITLOS) has accepted in its case-law that **fisheries related activities** such as offshore bunkering of fishing vessels as well as processing, transshipping and transporting of fish that has not been previously landed at a port are covered by the sovereign rights of the coastal State in terms of Art. 56 (1)(a).[33] In contrast, while transport and on-board processing of catch that has previously been landed at port (i. e., prior to the entry into the EEZ) is indeed covered by Art. 58 (1), the jurisprudence of the ITLOS indicates that the coastal State even then has the right to require notification of the entry of the fishing vessel concerned into the EEZ, or to inspect catches and secure stowing of fishing gear during transit, in order to safeguard adherence to its fisheries management measures.[34] Indeed, in such situations there is a sufficiently direct connection to the sovereign rights of the coastal State, since its management measures may otherwise be too easy to circumvent. Moreover, in its advisory opinion submitted on the request of the Sub-Regional Fisheries Commission, the ITLOS took the view that Art. 62 (4)

> 'imposes an obligation on States to ensure that their nationals engaged in fishing activities within the exclusive economic zone of a coastal State comply with the conservation measures and with the other terms and conditions established in its laws and regulations.'[35]

It further limited freedom of navigation specifically in relation to fishing vessels by concluding that it would follow 'from article 58, paragraph 3, and article 62, paragraph 4, as well as from article 192, of the Convention that flag States are obliged to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities.'[36] This issue will be commented upon in the context of Art. 58 (3) (see *infra*, MN 24–27). It has been suggested that the coastal State would be entitled to enact

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[31] See also *Churchill/Lowe* (note 3), 174; for a detailed assessment see *Englender* on Art. 79 MN 23.

[32] Nordquist/Nandan/Rosenne (note 2), 565.

[33] See *Proelss* on Art. 56 MN 11–12.

[34] ITLOS, *The 'Monte Confurco'* (Seychelles *v.* France), Judgment of 18 December 2000, ITLOS Reports (2000), 86, para. 82. For further discussion see *Valentin Schatz*, Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State, Goettingen Journal of International Law 7 (2015), pre-published version, 8–10, available at: http://www.gojil.eu/issues/prepublished/schatz.pdf.

[35] ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 123, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/.

[36] *Ibid.*, para. 124.

legislation limiting freedom of navigation by merchant vessels in order to protect certain vulnerable marine areas such as coral reefs, seamounts etc. whose preservation is a necessary requirement for the healthy development of fish stocks,[37] but arguably this conclusion does not sufficiently take into account the mandate allocated to the International Maritime Organization by Art. 211 (5) and (6)(a), which in light of Art. 194 (5) as well as the wording of Art. 211 (6)(a)[38] also seems to cover the protection and preservation of vulnerable sea areas for the purpose of safeguarding stock development.

As far as **freedom of overflight** is concerned, the Convention does not prescribe any specific requirements to be observed by the flag States, taking into account that the rules of the air are part of a different sub-system of international law, namely the regime established on the basis of the 1944 Chicago Convention.[39] This Convention distinguishes between the territories of the contracting parties, defined in Art. 2 as 'the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State', and the high seas. Whereas aircraft over the high seas must, according to Art. 12, comply with the rules in force established under the Convention by the International Civil Aviation Organization (ICAO), States are entitled to depart from the international standards and recommended practices adopted by that organization if and to the extent to which aircraft are flying over their territories (*cf.* Art. 38). Against this background, one may ask whether the EEZ, which had not yet been accepted at the time of adoption of the Chicago Convention, ought to be considered as sovereign territory or high seas in the context of international air law. If one agrees with the reasoning of this author, according to which the legal status of the EEZ is characterized by the duality of the categories of territory and function, resulting in the conclusion that the EEZ is at the same time both high seas and a *sui generis* zone,[40] the answer is not difficult to give: As the *sui generis* nature of the EEZ is inseparably linked to existence of exclusive sovereign rights and jurisdiction of the coastal State under Art. 56, this zone ought to be treated as high seas if and to the extent to which these rights and jurisdiction are not affected. Thus, all States are generally bound to observe the international standards and recommended practices adopted by the ICAO over the EEZ.[41] This conclusion is further supported by Arts. 39 (3) and 54 of the Convention, requiring respectively aircraft exercising the right of transit passage, or archipelagic sea-lanes passage, to observe the ICAO rules.[42] **14**

If and to the extent to which the sovereign rights and jurisdiction of the coastal State are not directly affected, measures that aim at restricting the freedoms of navigation, overflight and laying of submarine pipelines and cables cannot generally be considered as being compatible with Art. 58 (1). This is particularly true with regard to the small number of coastal States that claim jurisdiction or rights over foreign pipelines and cables, or that make exercise of freedom of navigation generally dependent on prior authorization, or on observing domestic legal requirements that have been adopted unilaterally respectively.[43] For **15**

[37] *Rothwell/Stephens* (note 5), 98.

[38] This provision expressly refers to the 'ecological conditions' and the 'protection of its resources' of clearly defined areas in the EEZ.

[39] Convention on International Civil Aviation of 7 December 1944, 15 UNTS 296.

[40] See *Proelss* on Art. 55 MN 16–18.

[41] See also ICAO, Study on United Nations Convention on the Law of the Sea – Implications, if any, for the Application of the Chicago Convention, its Annexes, and other International Air Law Instruments, ICAO Doc. C.WP/7777 (1984), reproduced in: Netherlands Institute for the Law of the Sea (ed.), International Organizations and the Law of the Sea Documentary Yearbook 3 (1987), 243, 257 (para. 11.12).

[42] *Churchill/Lowe* (note 3), 173, who question whether the same result should apply in situations where the coastal State has built an airport on an artificial island in its EEZ (see *ibid.*, 173 *et seq.*). It should be noted, though, that Art. 60 (8) is clearly based on the assumption that the status of artificial islands is not the same as that of sovereign territory. With the exception of safety zones that do not have a specific territorial status (see *Proelss* on Art. 60 MN 33), only sovereign territory is capable of 'producing' maritime zones under the international law of the sea.

[43] See the compilation of relevant State practice collected by *Sophia Kopela*, The 'Territorialisation' of the Exclusive Economic Zone: Implications for Maritime Jurisdiction available at: https://www.dur.ac.uk/resources/ibrn/conferences/sos/s_kopela_paper.pdf

example, the practice of Maldives that requires prior authorization for the entry of all foreign vessels in its EEZ[44] clearly violates Art. 58 (1). Even if the jurisdiction of the coastal State concerning, say, the protection of the marine environment is affected, this jurisdiction must be implemented vis-à-vis the freedoms mentioned in Art. 58 (1) in accordance with the relevant provisions of the Convention, taking into account that the term 'jurisdiction' ought to be considered as a proxy for the further development and substantiation of the respective subject matter by other provisions of the Convention.[45] Thus, measures taken by the coastal State in its EEZ to prevent, reduce and control pollution from vessels (e. g. compulsory ship reporting systems etc.) are only in line with the Convention if they conform and give effect to the 'generally accepted international rules and standards established through the competent international organization or general diplomatic conference' (Art. 211 (5)).[46] State practice suggests that this conclusion is also valid with regard to vessels **transporting ultra-hazardous materials** such as elements of decommissioned nuclear reactors or nuclear waste.[47] In this respect, it does not seem to be without relevance with regard to the legal situation in the EEZ that Art. 23 accepts that foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances are entitled to exercise the right of innocent passage through the territorial sea.[48]

3. 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines'

16 Art. 58 (1) prescribes that all States enjoy other internationally lawful uses of the sea related to the freedoms of navigation, overflight and laying of submarine pipelines and cables, provided that they are compatible with the other provisions of the Convention. Since these uses of the sea must be related to the aforementioned freedoms, it is clear that States other than the coastal State are not entitled to use the EEZ of the coastal State for **any** other internationally lawful purpose. This is also demonstrated by the non-exhaustive ('such as') list of activities substantiating the other internationally lawful uses, which only takes into consideration uses that are 'associated with the operation of ships, aircraft and submarine cables and pipelines'. That said, the fact remains that the wording of Art. 58 (1) does not clarify how closely related to the high seas freedoms the activity concerned has to be. In light of this, it is somewhat surprising that the element 'other internationally lawful uses related to these freedoms' has, with the exception of issues directly affecting the sovereign rights and jurisdiction of the coastal State in terms of Art. 56 (1), such as offshore bunkering of fishing vessels, so far not been the subject of decisions of international courts or tribunals.

17 Examples of internationally lawful uses of the sea related to the freedoms referred to by Art. 58 (1) most certainly include **supporting and maintenance activities**, but it is not possible here to present a comprehensive list of activities falling within the scope of this element. For example, following the decision of the ITLOS in the *M/V 'Virginia G' Case*,[49] it is still not completely clear today whether offshore bunkering of merchant or other ships other than fishing vessels ought to be considered as an activity that is sufficiently closely related to freedom of navigation, or whether it falls within the scope of Art. 59. It is submitted that much will depend on whether the conduct concerned is considered by the actors involved, including the maritime and offshore industries, as an activity that is a regular, common or even necessary

[44] See para. 14 of Maritime Zones of Maldives Act No. 6/96, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MDV_1996_Act.pdf.

[45] See *Proelss* on Art. 56 MN 20.

[46] See the table of contrary legislation provided by *Kopela* (note 43), 12.

[47] Arguably, a different view can be taken in respect of ice-covered areas within the limits of the EEZ; see *Franckx/Boone* on Art. 234 MN 26–30.

[48] *Rothwell/Stephens* (note 5), 99.

[49] *The M/V 'Virginia G'* (note 28), para. 217.

requirement for the exercise of the freedoms in terms of Art. 58 (1). A sufficiently close relationship between the activity concerned and the freedom of navigation, overflight and laying of submarine pipelines and cables thus presupposes that it **depends on, or is inseparably linked** to, one of these freedoms, e. g., because its autonomous execution would have to be qualified as pointless. This will not be the case if the conduct in question can just as well be undertaken independently of navigation, overflight and laying of pipelines and cables. In such a situation, the main focus would not be on the applicable freedoms of the high seas anymore. Rather, accepting that the activity is covered by Art. 58 (1) would ignore the separate existence of Art. 59, which presumes that situations exist where the Convention does not attribute rights or jurisdiction to the coastal State or to other States within the EEZ.

Art. 58 (1) furthermore requires that the other uses of the sea are 'internationally lawful', i. e., they must be in accordance with international law in general and the Convention in particular. In this respect, the most controversial issues under Art. 58 (1) are **military activities and hydrographic surveying**. While it seems difficult to exclude simple and continuous passage of military vessels through (or flight of military aircraft over) the EEZ from the scope of Art. 58 (1),[50] the question remains whether naval exercises, manoeuvres and weapons testing can be considered as other internationally lawful uses of the sea related to freedoms of navigation and overflight. Opinions are split on the issue, taking into account that 'there has been a growing body of practice indicating the willingness of coastal states to interfere with navigational rights and freedoms on grounds of maritime security, particularly since the September 2001 terrorist attacks in the United States.'[51] Indeed, the peaceful purposes clauses codified in Arts. 88 and 301, whose wording echoes that of the general prohibition of the use of force codified in Art. 2 (4) UN Charter, would render any military activity in the EEZ illegal (and thus internationally unlawful) which would have to be regarded as a threat or use of force against the territorial integrity or political independence of the coastal State. However, the scope of these provisions arguably does not go beyond that of the prohibition of the use of force.[52] It seems doubtful, however, that the limited approach taken by the Convention on the issue of military activities can be regarded as the final word, taking into account the growing body of State practice requiring prior consent for the performance of naval military exercises.[53] In light of this, it may simply be impossible today to come to a conclusive answer on whether military activities reaching beyond mere passage or overflight are covered by Art. 58 (1). If this reasoning is agreed with, naval military manoeuvres and the like ought to be considered as falling within the scope of Art. 59, taking into account that the sovereign rights and jurisdiction of the coastal State in no case provide a sufficient legal basis for the regulation of the respective activities.[54] **18**

While the operation of ocean data acquisition systems has been held by this author to be a comparatively strong case for applying Art. 59,[55] the situation is not so easy to assess with regard to **hydrographic surveying**. This term is not defined in the Convention, but used in Arts. 19 (2)(j) and 40. According to a publication of the UN Division of Ocean Affairs and the Law of the Sea, it ought to be understood as covering '[t]he science of measuring and depicting those parameters necessary to describe the precise nature and configuration of the sea-bed and coastal strip, its geographical relationship to the land-mass, and the characteristics and dynamics of the sea'.[56] Other approaches emphasize the fact that the **19**

[50] See also *Barbara Kwiatkowska*, The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989), 203; *Ivan Shearer*, Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance, Ocean Yearbook 17 (2003), 548, 557 *et seq*.

[51] *Rothwell/Stephens* (note 5), 99 *et seq*.

[52] *Alexander Proelss*, Peaceful Purposes, MPEPIL, paras. 12–17, available at http://www.mpepil.com; *Rothwell/Stephens* (note 5), 100; *Douglas Guilfoyle*, The High Seas, in: Donald R. Rothwell *et al.* (eds.), The Oxford Handbook of the Law of the Sea (2015), 203, 211; see also *Guilfoyle* on Art. 88 MN 4–9; *O'Brien* on Art. 301 MN 6–8.

[53] See the compilation of relevant State practice collected by *Kopela* (note 43), 4.

[54] *Proelss* on Art. 56 MN 33.

[55] *Proelss* on Art. 59 MN 4.

[56] UN DOALOS, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Appendix I: Consolidated Glossary of Technical Terms Used in the United Nations

end product of a hydrographic survey is a nautical chart,[57] and that hydrographic surveying is thus undertaken to 'obtain information for the making of navigational charts and for the safety of navigation'.[58] If these attempts to give a definition are combined, it is difficult to deny that a direct connection exists between hydrographic surveying and navigation. Provided that the main objective of the surveying is really to enhance maritime safety and not to, say, prospect potential deposits of natural resources located on or underneath the seabed of the EEZ, the better view seems to be that hydrographic surveying should be considered as an internationally lawful use of the sea related to the freedom of navigation in terms of Art. 58 (1). That said, more than 15 States require prior consent for the performance of this kind of activity,[59] a fact that casts a shadow of doubt over the strength of the conclusion drawn here.

4. 'compatible with the other provisions of this Convention'

20 According to Art. 58 (1), the other internationally lawful uses of the sea related to the freedoms of navigation, overflight and laying of submarine pipelines and cables must be exercised in a manner 'compatible with the other provisions of this Convention'. That this element can systematically only be understood to refer to the other uses, and not to the aforementioned freedoms is demonstrated by the fact that the wording of Art. 58 (1) clarifies that the freedoms for their part can only be enjoyed 'subject to the relevant provisions of this Convention'. However, as the other uses of the sea related to the freedoms must, again, be 'internationally lawful', the final element of Art. 58 (1) is arguably superfluous, taking into account that a conduct not compatible with the other provisions of the Convention cannot be held to be internationally lawful.

5. 'Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part'

21 Art. 58 (2) renders applicable Arts. 88 to 115, whose main focus is on shipping and flag State jurisdiction, and other pertinent rules of international law in the EEZ, but only if and to the extent to which they are not incompatible with Part V of the Convention. It further develops the freedom of navigation referred to in Art. 58 (1) and results in the spatial scope of, e. g., the duties of the flag State codified in Art. 94,[60] as well as the rules and principles concerning the repression of piracy and other maritime crimes, including certain interdiction rights and the right to hot pursuit, being extended to the EEZ. Thus, irrespective of the exact content and nature of the resolutions of the UN Security Council concerning the situation off the coast of Somalia,[61] no reason existed in light of Art. 58 (2) to separately make applicable the scope of these resolutions to the EEZ.[62]

Convention on the Law of the Sea (1989), 47, 56, available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/The%20Law%20of%20the%20Sea_Baselines.pdf.

[57] IHO, Manual on Hydrography, Publication C-13 (2005), 7, available at: http://www.iho.int/iho_pubs/CB/C-13/english/C-13_Chapter_1_and_contents.pdf.

[58] *J. Ashley Roach*, Marine Data Collection: Methods and the Law, in: Myron H. Nordquist/Tommy T.B. Koh/John N. Moore (eds.), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (2009), 171, 175.

[59] A table of relevant coastal State legislation is provided by *Kopela* (note 43), 5.

[60] See also *SRFC Advisory Opinion* (note 35), para. 115. The consequences resulting from Art. 58 (2) in conjunction with Art. 94 as to the duties of the flag State to combat illegal, unregulated and unreported fisheries will be briefly addressed below, see *infra*, MN 24–27.

[61] For an analysis and further references see *Alexander Proelss*, Piracy and the Use of Force, in: Panos Koutrakos/Achilles Skordas (eds.), The Law and Practice at Sea (2014), 57–63.

[62] See, e. g., SC Res.1838 of 7 October 2008, para. 7, deciding that States cooperating with the Transitional Federal Government of Somalia in the fight against piracy and armed robbery at sea off the coast of Somalia may, for an initial period of six months, '[e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law […]'.

The reference made by Art. 58 (2) to other pertinent rules of international law must in particular be understood as encompassing treaties concerning the **repression of transnational organized crimes** that further develop the rules and principles codified in Arts. 99–110.[63] In this respect, the SUA Convention[64] and its 2005 Protocol,[65] the United Nations Convention against Transnational Organized Crime and its Protocols,[66] the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[67] and the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances[68] deserve to be mentioned. Application of these treaties in the EEZ requires that their scope is not limited to the territory of their States parties, and that they are compatible with Arts. 88 to 115 as well as Part V of the Convention. In contrast to, e. g., Art. 210 (6), Art. 58 (2) does not prescribe that the content of the aforementioned agreements[69] serves as minimum standard; the rights and duties therein are thus not made indirectly, i. e., via accession to the Convention, applicable to States that have not become parties to the agreements concerned. 22

6. 'In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State'

Art. 58 (3) obligates all States to have due regard to the rights and duties of the coastal State when exercising their freedoms in terms of Art. 58 (1). Together with Art. 56 (2), this provision prescribes a **mutual due regard rule** to be observed by the coastal State and other States when exercising their rights and duties in the EEZ.[70] In doing so, Art. 58 (3) demonstrates that the freedoms of navigation, overflight and laying of submarine pipelines and cables as well as the internationally lawful uses related to these freedoms cannot be relied upon in the EEZ in an absolute manner. As stated in the context of Art. 56 (2), the co-existence of the rights and jurisdiction of the coastal State on the one hand and the continuing freedoms of other States on the other results in a considerable potential for conflict between the two groups of rights. Indeed, the mutual obligation to have due regard must be considered as being primarily of procedural nature, which generally requires the State relying on one of the aforementioned freedoms to undertake a balancing exercise with the colliding rights and jurisdiction of the coastal State.[71] With regard to the question whether a general guideline for the lawful implementation of the balancing exercise can be identified, this author takes the view that the specific legal regime codified in Part V of the Convention is based on a shift of emphasis in favour of the coastal State which in case of conflict becomes manifest in the shape of a rebuttable presumption in favour of the coastal State.[72] 23

[63] For an overview, see *Alexander Proelss/Tobias Hofmann*, Law of the Sea and Transnational Organized Crime, in: Pierre Hauck/Sven Peterke (eds.), International Law and Transnational Organised Crime (2016), 422–447.

[64] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988, 1678 UNTS 221.

[65] Protocol of 14 October 2005 to the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Convention), IMO Doc. LEG/CONF.15/21.

[66] United Nations Convention against Transnational Organized Crime of 15 November 2000, 2225 UNTS 209; Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime of 15 November 2000, 2241 UNTS 507.

[67] United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 21 March 1950, 96 UNTS 271.

[68] United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances of 20 December 1988, 1582 UNTS 95.

[69] It is important to note that none of the agreements mentioned in the text authorize States to unilaterally take enforcement action without at least asking the flag State for prior authorisation.

[70] See *Proelss* on Art. 56 MN 24.

[71] See *Proelss* on Art. 56 MN 25.

[72] See *Proelss* on Art. 56 MN 26–31.

7. 'and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.'

24 Art. 58 (3) contains a further obligation of States exercising the freedoms in terms of Art. 58 (1) to comply with the laws and regulations adopted by the coastal State on the basis of its sovereign rights and jurisdiction under Art. 56 (1) and other rules of international law. The rights and duties to be observed by all States in the EEZ thus not only arise from the Convention, but also from **national laws and regulations**.[73] That said, taking into account the element 'in so far as they are not incompatible with this Part', if and to the extent to which the coastal States enact measures not covered by the scope of its sovereign rights and jurisdiction, other States are not bound by them. In this respect, the ITLOS held in the *M/V 'Saiga' Case* that Guinea violated Arts. 56 and 58 by prohibiting all activities in its EEZ which it decided to characterize as activities affecting its economic 'public interest' or entail 'fiscal losses' for it.[74]

25 The recent advisory opinion submitted by the ITLOS on the request of the Sub-Regional Fisheries Commission provides further guidance on the implementation of Art. 58 (3). The Tribunal held that '[i]t follows from article 58, paragraph 3, and article 62, paragraph 4, as well as from article 192, of the Convention that flag States are obliged to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities.'[75] Pursuant to Arts. 58 (3) and 62 (4), the flag State was considered as carrying a 'responsibility to ensure' compliance by vessels flying its flag with the laws and regulations concerning conservation measures adopted by the coastal State. This responsibility was regarded as becoming manifest in a duty of conduct, i. e., a due diligence obligation to take all necessary measures to ensure compliance and to prevent illegal, unreported and unregulated (IUU) fishing by fishing vessels flying its flag.[76] The issue was further elaborated on in the separate opinion submitted by Judge Paik, stating that:

> 'Although "States" are direct addresses of the obligation to comply with the laws and regulations of the coastal State, private actors, be they natural or juridical persons, are the ultimate regulatory targets under this provision, as they are the main actors engaging in various activities in the foreign EEZ. Thus in order to perform its duties under article 58, paragraph 3, of the Convention, the State must ensure that those subject to its jurisdiction comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention. Through article 94, paragraph 1, of the Convention, those subject to jurisdiction of the State should include a ship flying its flag.'[77]

Consequently, '[t]aking article 94 and article 58, paragraph 3, of the Convention together, it can be stated that the flag State has an obligation to ensure that fishing vessels flying its flag comply with the laws and regulations adopted by the coastal State when fishing in its EEZ.'[78]

26 The advisory opinion rendered by the ITLOS gives rise to some questions.[79] First, it should be noted that the wording of Art. 58 (3) requires that the State is **actually exercising its rights and performing its duties** under the Convention in the EEZ. In situations where a flag State is actively involved in violating fisheries management measures enacted by the

[73] ITLOS, *The M/V 'Saiga'* (St. Vincent and the Grenadines *v.* Guinea), Merits, Judgment of 1 July 1999, ITLOS Reports (1999), 10, para. 121.

[74] *Ibid.*, para. 131.

[75] *SRFC Advisory Opinion* (note 35), paras. 124, 134; consenting *South China Sea Arbitration* (note 28), para. 744.

[76] *Ibid.*, paras. 125–129.

[77] *Ibid.*, Separate Opinion of Judge Paik, para. 14.

[78] *Ibid.*, para. 16.

[79] For a critical assessment see *Valentin Schatz*, Fishing for Interpretation – The ITLOS Advisory Opinion of April 2015 on Flag State Responsibility for Illegal Fishing in the EEZ, ODIL 47 (2016), 327, 329–333.

coastal State, e. g. by allocating licenses to vessels flying its flag to fish in the EEZ of another State, it does certainly not comply with the 'laws and regulations adopted by the coastal State in accordance with the provisions of this Convention'. At the same time, however, it seems difficult to argue that the flag State is exercising one of its rights, namely freedom of navigation, at all, as it claims for itself a right that has expressly been assigned to the coastal State. Such course of action goes beyond a mere violation of the coastal State's laws and regulations, which is why it seems more convincing to argue that the flag State has directly violated Art. 56 (1).[80] In other words, it is unnecessary to invoke Art. 58 (3) where the freedoms in terms of Art. 58 (1) are relied upon by a State other than the coastal State just in order to exercise powers that are in reality covered by the sovereign rights and jurisdiction of the coastal State under Art. 56 (1).

The second issue refers to the fact that Art. 58 (3) does not expressly require the flag 27
State to adopt laws and regulations ensuring that vessels flying its flag that are allowed to fish in the EEZ of other States comply with their fisheries management measures. The wording of Art. 58 (3) may thus seem to suggest a lower level of flag State supervision than that provided for in more detailed provisions such as Arts. 94 (2), 139 (1) and 211 (2).[81] However, as Judge Paik has explained, the 'responsibility to ensure' of flag States has been construed by the ITLOS by merging, or harmonizing respectively, several pertinent provisions of the Convention, namely Arts. 58 (3), 62 (4), 94 (1) and 192. Even though none of these provisions prescribes an express duty of the flag State to combat IUU fishing by ships flying its flag, it should be noted that Art. 62 (4) indeed requires nationals of other States fishing in the EEZ to 'comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.' From a critical perspective, reference could also be made to the fact that the addressees of Art. 58 (3) are States and not private ships or their crews.[82] But if a vessel violates or ignores fisheries management measures enacted by a coastal State vis-à-vis its EEZ, is it then reasonable to argue that this non-compliance should be irrelevant for the flag State of that vessel due to the fact that this State has not breached any provision of the Convention itself? Would such a line of argument not ignore that the Convention has to be applied and interpreted as a 'living instrument'[83] in light of modern challenges? And is it not mandatory to take into account Art. 62 (4) when determining the content and scope of Art. 58 (3)?[84] It should be noted in this respect that the approach chosen by the ITLOS does not at all imply that the accepted rules of attribution of private conduct to States accepted under the rules of State responsibility[85] are circumvented. The Tribunal has not decided that the flag State is directly responsible for the IUU fishing, but rather that it has to accept a duty of conduct to take all necessary measures to ensure compliance and to prevent IUU fishing by vessels flying its flag – a situation with regard to which the rules of attribution are not even relevant. Viewed from this perspective, it is submitted that the position taken by Judge Paik, according to whom private actors are the ultimate regulatory targets of Art. 58 (3), deserves approval, and no reason exists why the 'responsibility to ensure' embodied in this provision should not extend to all areas covered by Art. 56 (1). It thus does not seem to be justified to argue that the ITLOS has essentially ignored, although for a just cause, the limited approach on which the Convention is based.

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[80] Consenting *South China Sea Arbitration* (note 28), para. 712, holding that an 'assertion of jurisdiction [over fisheries] amounts to a breach of Article 56 of the Convention'. But see *ibid*., paras. 753, 757, referring to a violation of Art. 58 (3).

[81] *Schatz* (note 79), 329 *et seq.*

[82] *Jianjun Gao*, The ITLOS Advisory Opinion for the SRFC, Chinese JIL 14 (2015), 735, 750–753.

[83] See the contributions in Jill Barrett/Richard Barnes (eds.), Law of the Sea: UNCLOS as a Living Treaty (2016).

[84] See also *South China Sea Arbitration* (note 28), paras. 739–744.

[85] GA, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 28 January 2002, Annex (Arts. 8 and 11).

Article 59
Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Bibliography: *Gemma Andreone*, The Exclusive Economic Zone, in: Donald R. Rothwell/Alex G. Oude Elferink/Karen N. Scott/Tim Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015), 159–179; *Katharina Bork*, Der Rechtsstatus von unbemannten ozeanographischen Messplattformen im internationalen Seerecht (2011); *Edward D. Brown*, The International Law of the Sea, vol. I (1994); *Robin R. Churchill/Alan V. Lowe*, Law of the Sea (3rd edn. 1999); *Francesco Francioni*, Equity in International Law, MPEPIL, available at: http://www.mpepil.com; *Douglas Guilfoyle*, The High Seas, in: Donald R. Rothwell/Alex G. Oude Elferink/Karen N. Scott/Tim Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015), 203–225; *Sienho He*, Sketching the Debate on Military Activities in the EEZ: An Editorial Comment, Chinese JIL 9 (2010), 1–7; *Tobias Hofmann/Alexander Proelss*, The Operation of Gliders under the International Law of the Sea, ODIL 46 (2015), 167–187; *Natalie Klein*, Dispute Settlement in the UN Convention on the Law of the Sea (2005); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Alexander Proelss*, The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited, Ocean Yearbook 26 (2012), 87–112; *J. Ashley Roach*, Marine Data Collection: MSR, Surveys, Operational Oceanography, Exploration and Exploitation, Revue Egyptienne de Droit International 64 (2008), 79–107; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016); *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015); *Florian H.T. Wegelein*, Marine Scientific Research: The Operation and Status of Research Vessels and other Platforms in International Law (2005); *Guifang Xue*, Marine Scientific Research and Hydrographic Survey in the EEZs: Closing up the Legal Loopholes?, in: Myron H. Nordquist/Tommy T. B. Koh/John Norton Moore (eds.), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (2009), 205–225; *Haiwen Zhang*, Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ, Chinese JIL 9 (2010), 31–47

Documents: GA, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 25/2625 of 24 October 1970; IOC, Technical Report on Scoping of Operational Oceanography, UN Doc. IOC/INF-1291 (2012); IOC, Draft Guidelines for the Implementation of Resolution XX-6 of the IOC Assembly regarding the Deployment of Floats in the High Seas within the Framework of the Argo Program, UN Doc. IOC/ABE-LOS VIII/3 (2008); IOC, Revised Draft Convention on the Legal Status of Ocean Data, Acquisition Systems, Aids and Devices (ODAS) of 1993, UN Doc. IOC-XVII/Inf.1 (1993)

Cases: ITLOS, *The M/V 'Saiga'* (St. Vincent and the Grenadines *v.* Guinea), Merits, Judgment of 1 July 1999, ITLOS Reports (1999), 10; ICJ, *Case concerning the Frontier Dispute* (Burkina Faso *v.* Mali), Judgment of 22 December 1986, ICJ Reports (1986), 554

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I. Purpose and Function

Art. 59 is dedicated to the ultimate objective of the Convention to settle inter-State disputes peacefully. It addresses how conflicts of interests in the exclusive economic zone (EEZ) between the coastal State and other States should be resolved in situations where the Convention attributes rights or jurisdiction neither to the coastal State nor to other States, and is thus concerned with the issue of 'residual rights'.[1] As accurately stated by VUKAS, 'Article 59 of the Convention itself is a confirmation of the awareness of States participating in UNCLOS III that the specific legal régime they have established has not attributed all possible rights and jurisdiction to the coastal States or to other States.'[2] Indeed, it must be borne in mind that the EEZ is not part of the State territory but constitutes, as far as its functional status is concerned, a zone *sui generis* within which the coastal State is entitled to exercise exclusive and functionally limited sovereign rights and jurisdiction.[3] At the same time, Art. 58 (1) renders only some of the freedoms of the high seas referred to in Art. 87 (1) applicable to the EEZ in favour of other States. This legal situation made it necessary to include a provision in Part V which prescribes how to address situations where none of the groups of rights and freedoms codified in Arts. 56 (1) and 58 (1) are affected. However, Art. 59 does not provide precise answers,[4] but rather requires that conflicts ought to be resolved on a case-by-case basis, depending on the individual circumstances and based on a balancing of the interests involved, with the aim to achieve an equitable solution. This implies that once an attempt to resolve a conflict by consensual means has failed, the dispute settlement provisions codified in Part XV ought to be activated.[5] Viewed from this perspective, Art. 59 could theoretically stimulate the jurisdictional power of international courts and tribunals, but this potential has so far not materialised in legal practice. **1**

II. Historical Background

The rule codified today in Art. 59 was not addressed in the deliberations of the UN Sea-Bed Committee. It appeared for the first time in the course of the Third Session of UNCLOS III in an informal proposal submitted by the Chairman of the Contact Group of the Group of 77,[6] and it is interesting to note that the wording of the draft provision concerned already corresponded to that of Art. 59 to a significant degree. A proposal submitted by the Evensen group in the same year was identical (with the sole exception of one minor drafting issue) to Art. 59.[7] This proposal was included later on in the Informal Single Negotiating Text.[8] Sporadic proposals to delete the provision,[9] or to replace it with a **2**

[1] 'Residual rights' is not a legal term. Its origins, when used in the context of the regime of the EEZ, remain in the dark.

[2] ITLOS, *The M/V 'Saiga'* (Saint Vincent and the Grenadines *v.* Guinea), Merits, Judgment of 1 July 1999, Separate Opinion of Judge Vukas, ITLOS Reports (1999), 10, para. 21.

[3] See *Proelss* on Art. 55 MN 15.

[4] *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 176.

[5] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 569.

[6] UNCLOS III, Exclusive Economic Zone: Revised Draft Prepared by the Chairman of the Contact Group of the Group of 77 on Matters before the Second Committee – Rev. 1 (1975), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1983), 205, 207 (para. 8).

[7] UNCLOS III, The Economic Zone (1975), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XI (1987), 481, 482 (Art. 3 (2)).

[8] UNCLOS III, Informal Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 159 (Art. 47 (3)).

[9] UNCLOS III, Singapore: Articles 45–60 (ISNT II) (1976), reproduced in Platzöder (note 6), 290, 291 (Art. 47); UNCLOS III, Informal Suggestion by Uruguay, UN Doc. C.2/Informal Meeting/16 (1978), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. V (1984), 22 (Art. 59).

provision referring to the duty to resolve disputes in accordance with the compulsory dispute settlement procedures provided in the future Convention,[10] remained unsuccessful. It was apparently felt by the clear majority of States that a provision addressing the resolution of conflicts between the coastal State and other States in situations where today's Arts. 56 and 58 are not applicable was necessary. The provision drafted by the Evensen Group was correspondingly included in the Revised Single Negotiating Text[11] and the Informal Composite Negotiating Text.[12]

III. Elements

1. 'In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone'

3 Art. 59 is only applicable in situations where the Convention does not attribute rights or jurisdiction to the coastal state or to other States within the EEZ. This element is closely related (but not limited) to Arts. 56 (1) and 58 (1), whose purpose it is to prescribe the rights and jurisdiction of the coastal State and to other States. Even though Art. 58 (1) does not speak of 'rights or jurisdiction' but of 'freedoms', Art. 58 (3) (referring to 'rights' and 'duties') clarifies that the difference is arguably one of editing rather than of substance. Art. 59 is thus best be understood in terms of a **backup clause**.

4 Taking into account the breadth of the concepts codified in Arts. 56 (1) and 58 (1), generally speaking there does not seem to be much room left for applying Art. 59. That said, it should be noted that existing controversies surrounding the scope of activities mentioned in these provisions automatically affect the application of Art. 59. This is particularly true in respect of military manoeuvres conducted in the EEZ, which are considered as navigation and overflight, or uses of the sea related to these freedoms by some States, in particular the US,[13] but held to fall within the scope of Art. 59 by others.[14] One example that seems to have found general recognition as being covered by Art. 59 is the protection and conservation of archaeological and historical objects found within the EEZ beyond the contiguous zone;[15] a second one is the operation of ocean data acquisition systems (ODAS). It has correctly been held that the deployment of these devices is not 'marine scientific research' (MSR) in terms of Art. 56 (1)(b)(ii) and thus not subject to the jurisdiction of the coastal State.[16] The reason is that the activity concerned neither aims at verifying or falsifying yet unresolved phenomena, nor is it conducted in order to explain such phenomena, or even in order to explain the

[10] UNCLOS III, Group of Land-Locked and Geographically Disadvantaged States: Articles 44–47 (RSNT II) (1976), reproduced in: Platzöder (note 6), 410, 411 (Art. 47). The Group resubmitted its proposal several times.

[11] UNCLOS III, Revised Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 161 (Art. 47).

[12] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 13 (Art. 59).

[13] *Proelss* on Art. 58 MN 18.

[14] See *Sienho He*, Sketching the Debate on Military Activities in the EEZ: An Editorial Comment, Chinese JIL 9 (2010), 1, 3 *et seq.*; but see *Douglas Guilfoyle*, The High Seas, in: Donald R. Rothwell *et al.* (eds.), The Oxford Handbook of the Law of the Sea (2015), 203, 214.

[15] *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 136.

[16] *Edward D. Brown*, The International Law of the Sea, vol. I (1994), 239 *et seq.*; *Florian H.T. Wegelein*, Marine Scientific Research: The Operation and Status of Research Vessels and other Platforms in International Law (2005), 181; *Katharina Bork*, Der Rechtsstatus von unbemannten ozeanographischen Messplattformen im internationalen Seerecht (2011), 105; see also *Tobias Hofmann/Alexander Proelss*, The Operation of Gliders under the International Law of the Sea, ODIL 46 (2015), 167, 172–173; *contra* (with regard to military marine data collection) *Haiwen Zhang*, Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ, Chinese JIL 9 (2010), 31, 36; *Guifang Xue*, Marine Scientific Research and Hydrographic Survey in the EEZs: Closing up the Legal Loopholes?, in: Myron H. Nordquist/Tommy T. B. Koh/John Norton Moore (eds.), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (2009), 205–225.

relationship between these and other phenomena.[17] Against this background, the operation of ODAS constitutes 'operational oceanography', a term not used in the Convention, which has been defined by one authority as 'the routine collection of ocean observations, such as temperature, pressure, current, salinity and the wind, in all maritime zones'.[18] It is submitted that this activity is a prime example for the situation described by the first element of Art. 59.[19]

2. 'conflict arises between the interests of the coastal State and any other State or States'

The second element of Art. 59 clarifies that this provision is only applicable to conflicts 5
arising between the interests of the coastal State and those of another State or group of States ('inter-State conflicts'). In contrast, it is not concerned with conflicting uses of the EEZ that are exclusively covered by the sovereign rights and jurisdiction of the coastal State. Such 'intra-State conflicts' (fisheries *v.* environmental protection; MSR *v.* environmental protection) are not directly regulated by the Convention,[20] but must, in accordance with its objectives, be resolved by means of domestic law. Usage of the term 'conflict' in Art. 59 suggests that the provision covers situations which have not yet reached the stage of a dispute in terms of Part XV,[21] but this should not lead oneself to ignore that the difference is arguably one of duration and involvement of a third actor rather than of quality.

3. 'the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole'

The criteria mentioned in Art. 59 that should govern the resolution of conflicts, or the 6
settlement of disputes respectively, have adequately been described by recognized authorities as being 'elusive'[22] and lacking 'normative content'.[23] Indeed, it seems difficult to derive clearly foreseeable parameters from the broad wording of the provision. It should be noted, though, that the concept of equity expressly referred to by Art. 59 as the 'basis' for the resolution of conflicts ('equity *infra legem*')[24] is often used for the very sake of making it possible to infuse elements of reasonableness and 'individualized justice', and to adapt the applicable law to the specific circumstances of the case.[25] The elements of 'equity' and 'all relevant circumstances' are thus inseparably linked,[26] and the exercise required by Art. 59 is inevitably a matter for case-by-case assessment, which is why there can be no *numerus clausus* of relevant circumstances and interests involved.

Art. 59 prescribes that the conflict 'should' be resolved by reference to the criteria 7
mentioned in the provision. Taking into account that this term, in contrast to 'shall', is

[17] IOC, Technical Report on Scoping of Operational Oceanography, UN Doc. IOC/INF-1291 (2012), 3.

[18] *J. Ashley Roach*, Marine Data Collection: MSR, Surveys, Operational Oceanography, Exploration and Exploitation, Revue Egyptienne de Droit International 64 (2008), 79, 82.

[19] The situation might have to be assessed differently with regard to hydrographic surveying, see *Proelss* on Art. 58 MN 19.

[20] But see, e. g., Art. 240 (d) requiring that 'marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.'

[21] Nordquist/Nandan/Rosenne (note 5), 569.

[22] *Churchill/Lowe* (note 4), 461.

[23] *Natalie Klein*, Dispute Settlement in the UN Convention on the Law of the Sea (2005), 140.

[24] ICJ, *Case Concerning the Frontier Dispute* (Burkina Faso *v.* Mali), Judgment of 22 December 1986, ICJ Reports (1986), 554, 567 et seq. (para. 28).

[25] *Francesco Francioni*, Equity in International Law, MPEPIL, para. 7, available at: http://www.mpepil.com.

[26] See also Nordquist/Nandan/Rosenne (note 5), 569.

often used in order to clarify that no binding legal obligations are established by a treaty provision, the question arises whether Art. 59 prescribes a hard law duty. Are the coastal State and other States thus bound at all to resolve their conflicts on the basis of equity and in the light of all the relevant circumstances? This question does not seem to have been addressed in the course of UNCLOS III, and it cannot be answered in the affirmative by simply pointing to the fact that the provision concerned is part of a legally binding agreement, as an international treaty may well establish both binding and soft law obligations. While it would go too far to deny Art. 59 any mandatory character, its normative claim is comparatively weak in light of the fact that the obligation to settle disputes peacefully is already recognized under general international law.[27] Moreover, it can be speculated that the drafting of Art. 59 in soft terms was chosen in light of the fact that the process of conflict resolution described in the provision is, as stated, characterized by its particularly flexible character, and that no alternative – and potentially less flexible – means of resolving conflicts that likewise put into effect the object and purpose of Art. 59 were intended to be precluded. For example, States are free to enter into multilateral agreements, or to adopt soft law guidelines, with the aim to govern the resolution of user conflicts in a more general way. In this respect, it has been held that the UNESCO Convention on the Protection of Underwater Cultural Heritage[28] ought to be regarded as an agreement substantiating the rule codified in Art. 59,[29] and the same could arguably be said in relation to the Draft Guidelines regarding the Deployment of Floats in the High Seas within the Framework of the Argo Program.[30] Finally, assuming that in a given situation all attempts to resolve an existing conflict by consensual means have failed, and the States concerned then agree to settle their differences by way of recourse of the compulsory dispute settlement system codified in Part XV (i. e., conflict resolution is converted into dispute settlement), a strict understanding of the obligation prescribed here could theoretically imply that the States concerned ought to be regarded as having violated Art. 59 – an absurd result which is avoided by the more flexible wording of this provision.

8 The case-by-case approach on which Art. 59 is based also extends to the actors whose interests should be taken into account. Depending on the specific situation, these may range from individual (coastal or other) States to the international community as a whole. The latter may be affected, e. g., in the context of ODAS, whose use has been described by the International Oceanographic Commission (IOC) of the UNESCO as being of 'great significance for studying and exploration of the oceans for the benefit of all mankind'.[31] As far as the interests of the coastal State are concerned, if one agrees with the position that naval military manoeuvres ought to be considered as falling within the scope of Art. 59,[32] it seems fair to conclude that the security situation in the area concerned as well as the intentions of the State conducting the operations cannot be left unconsidered. At the same time, in light of the balancing process required by Art. 59 it would be difficult to defend the argument that foreign naval activities in the EEZ should always and automatically be held to be of lower weight compared to the security interests of the coastal State.

9 In light of the case-by-case assessment that is generally required by Art. 59, it is somewhat surprising that the elements codified in this provision, in particular with regard to the

[27] See Arts. 1 (1), 2 No. 3 UN Charter; GA, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 25/2625 of 24 October 1970, Annex.

[28] UNESCO Convention on the Protection of Underwater Cultural Heritage of 2 November 2001, 2562 UNTS 1.

[29] *Tanaka* (note 15), 136.

[30] IOC, Draft Guidelines for the Implementation of Resolution XX-6 of the IOC Assembly regarding the Deployment of Floats in the High Seas within the Framework of the Argo Program, UN Doc. IOC/ABE-LOS VIII/3 (2008), Eighth Meeting of the Advisory Body of Experts on the Law of the Sea (IOC/ABE-LOS VIII), at 16 *et seq*.

[31] See IOC, Revised Draft Convention on the Legal Status of Ocean Data, Acquisition Systems, Aids and Devices (ODAS) of 1993, UN Doc. IOC-XVII/Inf.1 (1993), para. 1 of the preamble.

[32] See the reference provided in *supra*, note 14.

principle of equity, have so far not been dealt with, and much less substantiated, to any significant degree by international courts and tribunals. It has been argued that the uncertain scope of some of the provisions of Part V, including Art. 59, has contributed to the reluctance of States to activate the compulsory dispute settlement procedures contained in the Convention.[33] In this respect, the argument can be made that the way the rules on maritime delimitation codified in Arts. 74 and 83 have been applied and substantiated in international case-law (which has allocated great relevance to considerations of equity)[34] has resulted in a shift of power from coastal States to international courts and tribunals, taking into account that the outcome of a maritime delimitation dispute is often quite difficult to predict. This observation may have kept coastal States from submitting disputes that have arisen in situations where Art. 59 applies to an international court or tribunal.

Notwithstanding the flexible approach on which Art. 59 is based, it is frequently discussed whether the provision ought to be interpreted, depending on the circumstances of the individual case, as containing a presumption in favour of either the coastal State or the other States. While most authorities seem to suggest that the answer to this question should be no,[35] it is submitted that the issue cannot be convincingly addressed without taking into account the legal status of the EEZ. In light of this, NORDQUIST *ET AL.* have argued that 'where conflicts arise on issues not involving the exploration for and exploitation of resources, the formula [codified in Art. 59] would tend to favor the interests of other states or of the international community as a whole.'[36] Based on the opinion that the EEZ is characterized by a dual legal status,[37] this author has subscribed to this view by referring to the fact that the functional ('*sui generis*') status of the EEZ should generally only become relevant and effective in situations where the rights and jurisdiction of the coastal State prescribed in Art. 56 are involved in the matter. In contrast, taking into account that in terms of territory the EEZ is arguably to be considered as high seas, a consistent interpretation would suggest accepting a presumption in favour of the interest of other States or the international community.[38] This understanding also helps to minimize the risk of attempts by the coastal State to extend its jurisdiction to the EEZ on a broader scale than permitted by Art. 56. In any case, it should be noted that the presumption advocated here must clearly be understood as being rebuttable, or as constituting no more than a rule of thumb. It can thus not be applied if the circumstances of the individual case require a different outcome of the balancing of the interests involved (e. g. where clear indications exist that ODAS are deployed by another State in order to pursue unilateral strategic aims). **10**

[33] *Gemma Andreone*, The Exclusive Economic Zone, in: Rothwell *et al.* (note 14), 159, 179.

[34] See *Tanaka* on Art. 74 MN 16 *et seq.*

[35] *Churchill/Lowe* (note 4), 176, 461; *Tanaka* (note 15), 136. See also *The M/V 'Saiga'* (note 2), Separate Opinion of Judge Laing, 10, para. 55: 'It has been said that rights concerning economic interests, communication, scientific research and seabed drilling have been attributed to the coastal State by Part V. However, notwithstanding the over-complete and ambitious nature of the institutional title "exclusive economic zone," economic rights, on the whole, have not been attributed solely to that State. In view of what this Opinion reveals, the same holds true about the attribution of such other rights as those concerning communication and navigation.'

[36] Nordquist/Nandan/Rosenne (note 5), 569; consenting *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016), 91. Reference to this statement has also been made by ITLOS: *The M/V 'Saiga'* (note 2),, Separate Opinion of Judge Vukas, 10, para. 16.

[37] See *Proelss* on Art. 55 MN 16.

[38] *Alexander Proelss*, The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited, Ocean Yearbook 26 (2012), 87, 89 *et seq.*, 95. Note that the scope of Art. 59 is arguably limited, to the advantage of the coastal State, by Art. 60 (1)(c); see *Proelss* on Art. 60 MN 14.

Article 60
Artificial islands, installations and structures in the exclusive economic zone

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
(a) **artificial islands;**
(b) **installations and structures for the purposes provided for in article 56 and other economic purposes;**
(c) **installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.**

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

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Documents: IMO, Guidelines and Standards for the Removal of Offshore Installations and Standards on the Continental Shelf and in the Exclusive Economic Zone, IMO Res. A.672(16) of 19 October 1989, Annex; IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.8 (2014); IMO, Safety Zones and Safety of Navigation around Offshore Installations and Structures, IMO Res. A671(16) of 19 October 1989; OSPAR, Decision on the Disposal of Disused Offshore Installations, Decision 98/3 (1998); UN, Impact of the Entry Into Force of the 1982 United Nations Convention on the Law of the Sea on Related Existing and Proposed Instruments and Programmes, UN Doc. A/52/491 (1997); UN DOALOS, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Appendix I: Consolidated Glossary of Technical Terms Used in the United Nations Convention on the Law of the Sea (1989)

Cases: CJEU, Case C-308/06, Judgment of 3 June 2008, *Intertanko* [2008] ECR I-4057; ITLOS, *The 'Arctic Sunrise'* (Netherlands *v.* Russia), Order of 22 November 2013, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf; ITLOS, *The M/V 'Saiga'* (St. Vincent and the Grenadines *v.* Guinea), Merits, Judgment of 1 July 1999, ITLOS Reports (1999), 10; PCA, *South China Sea Arbitration* (Philippines *v.* China), Award of 12 July 2016, available at: http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf

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I. Purpose and Function

1 Art. 60 deals with artificial islands, installations and structures in the EEZ. Its first two paragraphs constitute 'relevant provisions' in terms of Art. 56 (1)(b). They further **develop the pertinent jurisdiction of the coastal State** by establishing the exclusive right to construct and to authorize and regulate the construction, operation and use of the structures concerned, and by clarifying that the coastal State is also entitled to exercise exclusive jurisdiction **over** such artificial islands. Art. 60 (3) prescribes the duty of the coastal State to give due notice of the construction of artificial islands, installations and structures, and to maintain permanent means for giving warning of their presence. The further phrases of the third paragraph then address the general requirement to fully or partly remove abandoned or disused structures. Art. 60 (4)-(6) deals with the right of the coastal State to establish reasonable safety zones around the artificial islands, installations and structures as well as the consequences resulting from such conduct. Finally, Art. 60 (7) limits the right to establish the structures concerned by reference to recognized sea lanes essential to international navigation, and Art. 60 (8) is concerned with their legal status.

2 Art. 60 is not the only provision contained in the Convention that addresses the issue of jurisdiction over artificial islands, installations and structures in the EEZ. It is logically and, in light of Art. 56 (3), structurally linked to Art. 80, according to which 'Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.' Other relevant provisions include Arts. 194 (3)(c) and (d), 208 (1) and 258–262. In this respect, the jurisdiction of the coastal State in terms of Art. 56 (1)(b)(i) overlaps with that under Art. 56 (1)(b)(ii) and (iii), referring to marine scientific research and the protection and preservation of the marine environment. The subject matter regulated by Art. 60 demonstrates that while the *sui generis* nature of the EEZ results first and foremost from the allocation of functional sovereign rights and jurisdiction to the coastal State,[1] these powers are also characterized by their **territorial imprint**, taking into account that it is possible for the coastal State to reserve large areas of its EEZ for the construction of artificial islands, installations and structures, which may even grow larger in light of the right to establish safety zones around them. Viewed from this perspective, the conclusion drawn by one authority according to whom the EEZ ought to be considered 'as a zone within which the coastal State is entitled to exercise limited spatial jurisdiction',[2] cannot be completely rejected.

II. Historical Background

3 Art. 60 is based on Art. 5 (2)-(7) of the 1958 Geneva Convention on the Continental Shelf,[3] which addresses the coastal State's right to

> 'construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.'[4]

Prior to the submission of the first proposals concerning acceptance of the regime of the exclusive economic zone (EEZ), at the Sea-Bed Committee in 1971 Belgium suggested that the future work of Sub-Committee II should, *inter alia*, focus on the issue of jurisdiction over artificial islands, or artificial installations on the high seas. It argued that under the relevant provisions of the 1958 Geneva Convention,

[1] See *Proelss* on Art. 55 MN 16.
[2] *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 132.
[3] Convention on the Continental Shelf of 29 April 1958, 499 UNTS 311.
[4] Art. 5 (2) Convention on the Continental Shelf.

> 'an installation which is not used for the exploration or exploitation of the natural resources of the continental shelf does not come under the jurisdiction of the coastal State. […] Thus there appears to be something of a judicial and juridical vacuum, at variance with international public order.'[5]

Later on it submitted a working paper with the aim to give a brief review of the problems arising in respect of the matter of jurisdiction over artificial islands or installations on the high seas not used for the exploration or exploitation of the natural resources of the continental shelf. This document was based on the assumption that

> '[t]he question of artificial islands raises two separate problems: firstly, that of the jurisdiction to which they are to be subject and, secondly, that of the right of states to erect such structures and the conditions which they must observe in doing so.'[6]

In order to address these problems, Belgium presented a proposal for a provision prescribing the rights of the coastal State in respect of the construction of artificial islands and immovable installations on the continental shelf serving purposes other than the exploration or exploitation of the natural resources.[7] This text foresaw the designation of safety zones surrounding the objects concerned extending not more than 500m. Interestingly, Art. (d) of the proposal required the coastal State to publish its plans to construct such an installation and to take into consideration any observations submitted to it by other States.

A proposal submitted by a group of Latin American States to the Sea-Bed Committee in 1973 linked the issue of jurisdiction of the coastal State concerning the emplacement and use of artificial installations not covered by the 1958 Geneva Convention on the Continental Shelf to the concept of the patrimonial sea.[8] According to a US proposal, the coastal State was considered to have the exclusive right to authorize and regulate in the area what later became accepted as EEZ with regard to 'the construction, operation and use of off-shore installations affecting its economic interests'.[9] The proposal contained a definition of the term 'installations',[10] provided for the right to establish reasonable safety zones around them in which the coastal State would be entitled to 'take appropriate measures to protect persons, property, and the marine environment',[11] and clarified that installations would not possess the status of islands.[12] 4

In the course of UNCLOS III, negotiating parties further expanded on the proposals discussed in the Sea-Bed Committee. A text submitted by Nigeria essentially followed the language of the US proposal but for the first time limited the purpose of the safety zones to 'ensure the safety both of its installations and of navigation.'[13] Moreover, it contained a separate provision addressing the relationship between installations on the one hand and international navigation on the other, which read: 5

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[5] Sea-Bed Committee, Letter dated 23 April 1971 from the Representative of Belgium Addressed to the Secretary-General, UN Doc. A/AC.138/35 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 65 *et seq.*

[6] Sea-Bed Committee, Belgium; Working Paper Concerning Artificial Islands and Installations, UN Doc. A/AC.138/91 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-II), 9.

[7] *Ibid.*, 11 (Art. (c)).

[8] Sea-Bed Committee, Colombia, Mexico and Venezuela: Draft Articles on Treaty, UN Doc. A/AC.138/SC.II/L.21 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 19, 20 (Art. 7); see also Sea-Bed Committee, Ecuador, Panama and Peru: Draft Articles for Inclusion in a Convention on the Law of the Sea, UN Doc. A/AC.138/SC.II/L.27 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 30, 32 (Art. 12); Sea-Bed Committee, Argentina: Draft Articles, UN Doc. A/AC.138/SC.II/L.36 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 78, 81 (paras. 24–26), referring in para. 26 to the duty of the coastal State to remove disused installations.

[9] Sea-Bed Committee, US: Draft Articles for a Chapter on the Rrights and Duties of States in the Coastal Sea-bed Economic Area, UN Doc. A/AC.138/SC.II/L.35 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 75 (Art. 1 (3)(a)).

[10] *Ibid.*, Art. 1 (5)(a). The definition read: 'all off-shore facilities, installations or devices other than those which are mobile in their normal mode of operation at sea'.

[11] *Ibid.*, Art. 1 (4). According to the proposal, the breadth of the safety zone would be determined by the coastal State and should conform to international standards in existence or to be established.

[12] *Ibid.*, Art. 1 (5)(b).

[13] UNCLOS III, Nigeria: Revised Draft Articles on the Exclusive Economic Zone, UN Doc. A/CONF.62/C.2/L.21 (1974), OR III, 199 (Art. 1 (4)).

> 'A coastal State shall not erect or establish artificial islands and other installations, including safety zones around them, in such a manner as to interfere with the use by all States of recognized sea lanes and traffic separation schemes essential to international navigation.'[14]

Bringing together the main elements contained earlier proposals, a text submitted by the US applicable to the continental shelf and the EEZ substantiated the idea that the breadth of the safety zones (which were considered to serve the purpose of ensuring the safety both of the installations and of navigation) should conform to applicable international standards in existence or to be established by what is today the IMO.[15] Where such standards were absent, the maximum distance for the extension of safety zones would be 500 m around the installations. The proposal also adopted the definition of the term 'installation' from the earlier proposal referred to above, and codified a duty of all States to respect the safety zones as well as a duty of the coastal State to entirely remove disused or abandoned installations. Implicitly relying on the proposal submitted by Nigeria, it made the establishment of installations and safety zones around them dependent on the requirement that no interference ought to be caused to the use of recognized sea lanes essential to international navigation. The US thereby tried to take into account its major interest to refuse as far as possible interferences with freedom of navigation – a crucial factor also in respect of the utilizability of its navy.

6 Based upon this proposal, the Evensen Group submitted a proposal in the course of the Third Session (1975) containing a provision that came close to what is codified today in Art. 60.[16] In particular, it prescribed the different categories of devices similar to Art. 60 (1) and listed in an exemplary manner the fields as to which the coastal State is entitled to exercise jurisdiction ('customs, fiscal, health, safety and immigration'). Art. 48 of the Informal Single Negotiating Text/Part II slightly rephrased and renumbered individual parts of the text submitted the Evensen Group, but did not include any substantial changes.[17] This provision was adopted almost *verbatim* in Art. 48 of the Revised Single Negotiating Text/Part II[18] which, again, was repeated with only minor change in Art. 60 of the Informal Composite Negotiating Text (ICNT).[19] Informal proposals submitted in the course of the Fourth and Fifth Sessions were not accepted. They were considered as either being superfluous,[20] or far too far-reaching respectively in light of the danger of a 'territorialisation' of the EEZ.[21]

7 The final stage of negotiations witnessed considerable debate on two issues, namely the idea of abandoning the categorization of structures codified today in Art. 60 (1) in order to ensure that the coastal State is entitled to exercise jurisdiction over all installations and structures in its EEZ on the one hand,[22] and the removal of abandoned or disused installations and structures

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[14] *Ibid.*, Art. 3 (4).

[15] UNCLOS III, USA: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47 (1974), OR III, 222, 225 (Art. 28).

[16] UNCLOS III, The Economic Zone (1975, mimeo.) reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1983), 209, 212 (Art. 4).

[17] UNCLOS III, Informal Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 159 (Art. 48).

[18] UNCLOS III, Revised Single Negotiating Text, Part II, UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 161 (Art. 48).

[19] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 13 (Art. 60).

[20] *Cf.* UNCLOS III, Peru: Article 48 (RSNT II), reproduced in: Platzöder (note 16), 434 (Art. 48 (9)).

[21] *Cf.* the proposal submitted by India: UNCLOS III, India: Article 48 (ISNT II), reproduced in: Platzöder (note 16), 294 *et seq.*, proposing to delete the provisions on safety zones and instead include a rule according to which '[t]he coastal State may designate an area of the exclusive economic zone, to be referred to as the designated area, in which the coastal State may prohibit or regulate the entry and passage of foreign ships […]'. According to the proposal, this area was not limited to the safety of installations. Rather, the coastal State was considered to be entitled to also take measures concerning the protection of the mineral or living resources, the protection of the marine environment and the prevention of smuggling.

[22] UNCLOS III, Informal Suggestion by Peru, UN Doc. C.2/Informal Meeting/9 (1978, mimeo.) reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. V (1984), 13, 15 (Art. 60 (1)); UNCLOS III, Informal Suggestion by Brazil and Uruguay, UN Doc. C.2/Informal Meeting/11 (1978), reproduced in: *ibid.*, 19 (Art. 60 (1)).

on the other. While the first issue was not further pursued, probably in light of the generally accepted emphasis of the coastal State's sovereign rights on economic uses, the other one was. A memorandum submitted by the Oil Industry International Exploration and Production Forum (E&P Forum) argued that the provision contained in the ICNT, which prescribed an unconditional duty to 'entirely remove' any abandoned or disused installation or structure, should be substituted by a more flexible solution.[23] Taking into account that '[r]emoval is expected to cost hundreds of millions of dollars and will ultimately be at the expense of the fiscal authorities (through tax deductions in respect of the reserve created to pay for removal) and the consumers',[24] the proposal militated in favor of clarifying that 'removal will only be required "when the installations and structures represent a danger to navigation or to other legitimate uses of the sea or to the environment".'[25] While the revised versions of the ICNT did at first not include the suggested amendment, the negotiating parties continued to discuss the matter. Eventually, the UK submitted a text in the course of the Eleventh Session (1982)[26] that, following minor drafting adjustments, was included in today's Art. 60 (3) instead of the former second sentence. It generally followed the line advocated by the E&P Forum, but arguably limited the scope of discretion of the coastal State concerning the decision when to remove a disused or abandoned installation or structure in a stronger fashion. France suggested by way of formal amendment to further substantiate when installations or structures would have to be entirely removed, or dismantled respectively.[27] This amendment was, however, not pressed to a vote by France.[28]

III. Elements

1. 'exclusive right to construct and to authorize and regulate the construction, operation and use of'

The first element of Art. 60 allocates an 'exclusive right' to the coastal State to construct and 8
to authorize and regulate the construction, operation and use of artificial islands, installations and structures. In contrast to Art. 60 (2), which refers to 'exclusive jurisdiction', Art. 60 (1) speaks of an 'exclusive right', but it is submitted that no difference in quality and scope of the pertinent powers of the coastal State results from the different terminology, also taking into account that Art. 56 (1)(b)(i) merely makes reference to the 'jurisdiction'. However, it is crucial that the powers of the coastal State are **exclusive** in the sense that no other State is entitled to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures in the EEZ without the coastal State's consent.[29] As the exclusive right of the coastal State not only covers the construction of these objects, but extends to the authorization and regulation of their construction, operation and use, Art. 60 (1) ought to be seen as the legal basis for the coastal State to enact laws and regulations prescribing the procedures for the granting of licenses to other actors, such as State-owned or private companies, that may then construct, operate and use the objects concerned. Furthermore, the jurisdiction to prescribe allocated to the coastal State covers, e. g., the enactment and imple-

[23] UNCLOS III, Memorandum of E&P Forum (1980, mimeo.), reproduced in: Platzöder (note 16), 533 *et seq*.
[24] *Ibid.*, 533 (para. 2).
[25] *Ibid.*, 534 (para. 4).
[26] UNCLOS III, Informal Proposal by the United Kingdom, UN Doc. C.2/Informal Meeting/66 (1982, mimeo.) reproduced in: Platzöder (note 22), 72 (Art. 60 (3)).
[27] UNCLOS III, France: Amendments, UN Doc. A/CONF.62/L.106 (1982), OR XVI, 221.
[28] UNCLOS III, Report of the 175th Plenary Meeting, UN Doc. A/CONF.62/SR.175 (1982), OR XVI, 131 (para. 10).
[29] *Florian H. Th. Wegelein*, Marine Scientific Research: The Operation and Status of Research Vessels and Other Platforms in International Law (2005), 150, has concluded that 'exclusive' in terms of Art. 60 (1) means that 'the emplacing State may not regulate even if the coastal State has not taken any regulatory measures.' See also PCA, *South China Sea Arbitration* (Philippines *v.* China), Award of 12 July 2016, para. 1035, available at: http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf.

mentation of building and mining laws as well as safety, environmental and labour standards, provided that these measures are directly applicable to the construction, operation and use of artificial islands, installations and structures. Art. 58 (2) in conjunction with Art. 92 (1) makes it impossible for the coastal State to extend its jurisdiction to supply vessels and other ships flying the flag of a State other than the coastal State calling at one of the said objects.

2. '(a) artificial islands; (b) installations and structures for the purposes provided for in article 56 and other economic purposes; (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone'

9 Art. 60 (1) distinguishes between **three categories of objects**, namely artificial islands, installations and structures. While the coastal State's exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands is not bound to any specific purpose, installations and structures either must serve the purposes provided for in Art. 56 and other economic purposes (lit. b), or may interfere with the exercise of the rights of the coastal State in the zone (lit. c). Due to these differing requirements, it is mandatory to identify criteria that make it possible to assess the specific nature of the objects mentioned in Art. 60 (1). At the same time, the fact that Art. 56 (1)(b)(i) allocates jurisdiction to the coastal State with regard to the establishment and use of artificial islands, installations and structures, without further distinguishing between the three categories of objects, suggests that artificial islands, installations and structures also share certain features.[30]

10 As far as the common features are concerned, it should first be noted that the Convention does not define any of these terms. However, an *argumentum e contrario* can be deduced from Art. 121 (1) which defines 'island' as 'a *naturally* formed area of land, surrounded by water, which is above water at high tide'.[31] One can conclude therefrom that all objects referred to by Art. 60 (1) must be **man-made**.[32] Furthermore, artificial islands, installations and structures differ from ships in the permanence of their location, i. e., their **immobility**.[33] But does this necessarily result in excluding drilling vessels as well as semi-submersible dynamically positioned offshore oil drilling rigs such as the *Deepwater Horizon*, which sank in April 2010 following a catastrophic blowout in the Gulf of Mexico, from the scope of Art. 60? And how to deal with units that cannot be used for maritime navigation *sensu stricto* because they are not self-propelled? It is true that most definitions of the terms 'ship' and 'vessel' provided for by international treaty law, national legislation and legal doctrine suggest that it is only possible to speak of a ship if the unit is self-propelled.[34] That said, it is submitted that the situation ought to be assessed differently in the context of Art. 60, depending on whether the device concerned is primarily used for economic purposes other than navigation, or for navigation. Thus, if a device first and foremost is used for drilling activities and is only dragged (or even sails) to another location in order to continue drilling there, it arguably ought to be regarded as an installation in terms of Art. 60 (1).

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[30] A definition contained in a relevant UN DOALOS publication (UN DOALOS, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Appendix I: Consolidated Glossary of Technical Terms Used in the United Nations Convention on the Law of the Sea (1989), 47, 56, available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/The%20Law%20of%20the%20Sea_Baselines.pdf) does not distinguish between the three categories of objects.

[31] Italics added.

[32] UN DOALOS Baselines (note 30), 56; see also *Rainer Lagoni*, Künstliche Inseln und Anlagen im Meer, Jahrbuch für Internationales Recht 18 (1975), 241, 243 *et seq.*; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016), 95; *Alex G. Oude Elferink*, Artificial Islands, Installations and Structures, MPEPIL, para. 3, available at: http://www.mpepil.com.

[33] See also the definition of the term 'installations' proposed by the USA in 1973 to the Sea-Bed Committee (note 10) as well as the Belgian proposal (note 7), referring to 'artificial islands or immovable installations'.

[34] *Alexander Proelss/Tobias Hofmann*, The Operation of Gliders under the International Law of the Sea, ODIL 46 (2015), 167, 174–177.

Similar to islands in terms of Art. 121, the objects covered by Art. 60 (1) must also be completely **surrounded by water** in order to provide for their distinguishability from land reclamation measures. That Art. 5 (2) of the Geneva Convention on the Continental Shelf speaks of 'installations and other devices' has convincingly been taken as an indication that installations have to be of a certain size,[35] and the same is presumably true for artificial islands and structures. In any event, this provision as well as Art. 209 (2) of the Convention, which refers to 'vessels, installations, structures and *other* devices', suggests that 'device' is a generic term that encompasses all categories of objects used in the marine environment.[36] 11

Whether or not the objects mentioned in Art. 60 (1) all have to be **above water at high tide** is subject for debate. The definition of 'island' codified in Art. 121 (1) clearly militates in favour of a positive response in respect of artificial islands,[37] but as far as installations and structures are concerned, the negotiating history suggests that the answer should be no.[38] It has furthermore been proposed that artificial islands are constructed by filling natural matter (e. g. rock, gravel, sand), whereas installations and structures consist of man-made materials such as steel and concrete and are tied to the seafloor.[39] While Art. 60 (1) does not require to distinguish between installations and structures, one authority has suggested that installations are usually characterized by the fact that they can be moved from one site to another without losing its identity.[40] 12

As stated, the wording of Art. 60 (1) suggests that the coastal State's exclusive rights are not limited to any specific purpose as far as artificial islands are concerned (Art. 60 (1)(a)), but installations and structures must usually serve the purposes provided for in Art. 56 and other economic purposes (Art. 60 (1)(b)). Indeed, the **direct connection to economic purposes** necessary under Art. 60 (1)(b) echoes the wording of Art. 56 (1)(a) and thus reflects the functional nature of the coastal State's rights in the EEZ.[41] The more it is surprising that artificial islands can be constructed for any purpose, also taking into account that these objects would normally be larger and therefore have the potential to interfere in a more significant way with the freedoms of other States in terms of Art. 58 (1).[42] Nevertheless, the wording of Art. 60 (1)(a) makes it impossible to interpret the pertinent rights of the coastal State in a restrictive manner as only covering economic objectives, and it has been speculated by one authority that the reason for taking an economic perspective vis-à-vis installations and structures was to prevent the coastal State from exercising exclusive rights and jurisdiction over objects used for military purposes (the negotiating history does not seem to provide any formal evidence for the reasons of the distinction made in Art. 60 (1)).[43] In light of the aforementioned, the practice of some 20 States that have proclaimed jurisdiction over **all types** of installations and structures, 13

[35] *Tullio Treves*, Military Installations, Structures and Devices on the Seabed, AJIL 74 (1980), 808, 841, arguing that the concept of 'structure' would not include relatively small objects such as some of those used for the tracing of submarines and navigational aids.

[36] *Edward D. Brown*, The Significance of a Possible EC EEZ for the Law Relating to Artificial Islands, Installations, and Structures, and to Cables and Pipelines, in the Exclusive Economic Zone, ODIL 23 (1992), 115, 123; *Alexander Proelss/Chang Hong*, Ocean Upwelling and International Law, ODIL 43 (2012), 371, 379.

[37] See *South China Sea Arbitration* (note 29), para. 1037: 'China has elevated what was originally a reef platform that submerged at high tide into an island that is permanently exposed. Such an island is undoubtedly "artificial" for the purposes of Article 60.'

[38] The proposal submitted to the Sea-Bed Committee by Colombia, Mexico and Venezuela (note 8) spoke of 'artificial islands and any kind of facilities on the surface of the sea, in the water column and on the sea-bed and subsoil of the patrimonial sea'. Furthermore, in 1974, nine States submitted a proposal referring to the 'emplacement and use of artificial islands and other installations on the surface of the sea, in the waters and on the sea-bed and subsoil of the economic zone'; see UNCLOS III, Canada *et al.*: Working Paper, UN Doc. A/CONF.62/L.4 (1974), OR III, 81, 83 (Art. 16). See also *Nikos Papadakis*, The International Legal Regime of Artificial Islands (1977), 33–35; *Oude Elferink* (note 32), para. 5.

[39] *Derek W. Bowett*, The Legal Regime of Islands in International Law (1979), 115; but see *Robin R. Churchill/Alan V. Lowe*, Law of the Sea (3rd edn. 1999), 168; *Rothwell/Stephens* (note 32), 95.

[40] *Lagoni* (note 32), 244.

[41] See: *Proelss* on Art. 55 MN 16; *Proelss* on Art. 56 MN 11.

[42] *Churchill/Lowe* (note 39), 168.

[43] See *ibid.*, relying on *Francisco Orrego Vicuña*, The Exclusive Economic Zone (1989), 74 *et seq.*

not only those constructed for economic purposes,[44] is arguably difficult to be reconciled with the provisions of the Convention. Rather, as Art. 58 (1) does explicitly not refer to the 'freedom to construct artificial islands and other installations permitted under international law' in terms of Art. 87 (1)(d), the construction, operation and use of installations and structures serving non-economic (e. g. military) purposes should arguably be regarded as generally being covered by Art. 59.[45]

14 As far as States are concerned that have **refrained from claiming an EEZ**, the question arises whether they are entitled to exercise the exclusive right to construct, operate and use any of the objects relevant here on the basis of Art. 80. This provisions prescribes that 'Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf'. However, it should not be ignored that Art. 80 is part of Part VI which is dedicated (and limited) to the purpose of exploring the continental shelf and exploiting its natural resources (*arg. e* Art. 77 (1)). The better reasons thus seem to militate in favour of accepting that Art. 80 (which is only applicable *mutatis mutandis*) cannot be relied upon as separate legal basis for the construction and authorization, or the regulation of the construction, operation and use, of artificial islands, installations and structures serving purposes other than exploring the continental shelf and exploiting its natural resources.[46]

15 Art. 60 (1)(c) is particularly difficult to understand. A literal reading of this provision would imply that the coastal State may construct and authorize, and regulate the construction, operation and use of, installations and structures serving purposes other than economic ones only where the objects concerned 'may interfere with the exercise of the rights of the coastal State in the zone'. It has been proposed that this reading 'will lead to a strange consequence'.[47] However, on closer examination it seems that the sole purpose of Art. 60 (1)(c) is to make it impossible for other States to rely on Art. 59 concerning the construction and authorization of installations and structures that serve non-economic purposes, if such course of action may result in interferences with the rights of the coastal State in terms of Art. 56 (1). Based on this understanding, Art. 60 (1)(c) limits the scope of Art. 59 and clearly results in preference being given to the position of the coastal State with regard to the construction and operation of installations and structures in general, provided that the coastal State does not rely on potential interferences with its rights in an abusive manner (*cf.* Art. 300).

3. 'exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations'

16 Art. 60 (2) allocates to the coastal State exclusive jurisdiction over artificial islands, installations and structures in terms of Art. 60 (1). Thus, it does not address the issue of construction and authorization of the objects concerned, but the prescription and enforcement[48] of rules and regulations applicable on and to them. Even though an overlap

[44] See the table of relevant State practice provided by *Sophia Kopela*, The 'Territorialisation' of the Exclusive Economic Zone: Implications for Maritime Jurisdiction, 3–14, available at: https://www.dur.ac.uk/resources/ibru/conferences/sos/s_kopela_paper.pdf. Three States, namely Brazil, Cape Verde and Uruguay, already submitted corresponding declarations upon ratification of the Convention; see http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

[45] *Tanaka* (note 2), 133. This conclusion reinforces the argument presented in the context of Art. 58 that military activities other than mere passage through the EEZ should generally be considered as being covered by Art. 59; see *Proelss* on Art. 58 MN 18. Note, however, that Art. 60 (1)(c) arguably limits the scope of Art. 59 (see *infra*, MN 14).

[46] *Proelss* on Art. 56 MN 19; *Churchill/Lowe* (note 39), 168; but see the broader position taken by *Maggio* on Art. 80 MN 17; *cf.* also *Maggio* on Art. 80 MN 15 arguing that the scope of Art. 80 is 'necessarily limited to such constructions that are attached to the seabed.'

[47] See also *Tanaka* (note 2), 132 (footnote 30).

[48] That Art. 60 (2) also includes enforcement jurisdiction was emphasized by ITLOS, *The 'Arctic Sunrise'* (Netherlands *v.* Russia), Order of 22 November 2013, Dissenting Opinion of Judge Golitsyn, para. 23, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf.

exists between the first two paragraphs of Art. 60 in respect of the regulation of the operation and use of artificial islands, installations and structures, the main focus of Art. 60 (2) perfectly justifies reference being made to the concept of 'jurisdiction' instead of 'exclusive right'. The 'jurisdiction' of the coastal State is furthermore 'exclusive' in the sense that no other State is entitled to prescribe and enforce rules and regulations applicable on and to artificial islands, installations and structures in the EEZ. The wording of Art. 60 (2) demonstrates ('including') that the list of areas of jurisdiction mentioned in this provision, which is following the models of Arts. 21 (2)(h) and 33,[49] is **not exhaustive**. The coastal State is thus equally entitled to prescribe and enforce environmental regulations (including nature conservation standards),[50] or to exercise criminal jurisdiction with regard to offenses committed on or against artificial islands, installations and structures.[51]

17 In contrast, in light of the principle of flag State jurisdiction, the rules and regulations enacted by the coastal State based on its exclusive jurisdiction in terms of Art. 60 (2) cannot lawfully be extended to **supply ships or other vessels** flying the flag of a State other than the coastal State which call at one of the objects referred to by this provision. Different to ports, neither artificial islands, installations, structures nor the safety zones established around them are part of the territory of the coastal State. This conclusion is backed by Art. 60 (8), according to which artificial islands, installations and structures do not possess the status of islands, and they are not eligible to generate a territorial sea.[52] While Art. 60 (6) requires all ships to respect the safety zones established by the coastal State, it only demands compliance with the generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones (see *infra*, MN 29–30). The coastal State can thus not be considered as being entitled to unilaterally extend its domestic law (such as, e. g., labour standards) enacted on the basis of Art. 60 (2) to foreign-flagged ships. As far as the protection of the marine environment is concerned, it is submitted that also Art. 208 cannot be invoked by the coastal State in this respect, as this provision arguably only covers the prevention, reduction and control of pollution of the marine environment arising directly from artificial island, installations and structures.[53]

4. 'Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained'

18 Art. 60 (3) requires the coastal State to give **due notice** of the construction of such artificial islands, installations or structures, and to maintain permanent means for giving warning of their presence. The 'due notice' criterion only applies to the construction of said objects (and is thus related to Art. 60 (1)). It substantiates the more general 'due regard' clause codified in Art. 56 (2) with particular regard to navigation.[54] By notifying other States of its intention to construct an artificial island, installation or structure, the coastal State 'activates' its exclusive right in terms of Art. 60 (1), thereby mobilizing the primacy of the coastal State's legal position embodied in the concept of rebuttable presumption that has been identified in the context of Art. 56 as a general guideline for the avoidance of conflicts of uses.[55] Viewed from this perspective, Art. 60 (3) contains evidence that marine spatial planning in the EEZ ought to be

[49] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 585.

[50] *Alexander Proelss*, The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited, Ocean Yearbook 26 (2012), 87, 106; *Rainer Lagoni*, Die Errichtung von Schutzgebieten in der ausschließlichen Wirtschaftszone aus völkerrechtlicher Sicht, Natur und Recht 24 (2002), 121, 124.

[51] Nordquist/Nandan/Rosenne (note 49), 585.

[52] Note that sovereignty over the territorial sea is an extension of sovereignty over land territory, which is why only sovereign land territory can generate a territorial sea. See *Barnes* on Art. 2 MN 15.

[53] *Proelss* (note 50), 106 *et seq*.

[54] *Rothwell/Stephens* (note 32), 95.

[55] See *Proelss* on Art. 56 MN 27, 31.

considered as an activity that is generally in line with the international law of the sea. The 'due notice' criterion would usually require the competent agency to announce authorization of the construction of an object in terms of Art. 60 (1) by registering it in the official nautical charts and other official shipping publications of the coastal State. In 1989, the International Maritime Organization (IMO) adopted a document addressing, *inter alia*, safety of navigation around offshore installations and structures,[56] which substantiates in its Annex the 'due notice' criterion by referring to the publication of notices to mariners (para. 1.1), radio-warnings (para. 4.2) and the need to show all permanent installations and structures on all appropriate navigational charts (para. 5).

19 The second element of Art. 60 (3), the duty to maintain permanent means for giving warning of the presence of artificial islands, installations or structures, must be interpreted for reasons of safety of navigation to extend to all phases of operation of these objects, ranging from their construction and use to their decommissioning. It would usually be implemented by way of **navigational marks and lights**. The coastal State must generally be held to be under a duty to provide for the functional capability of these devices. Taking into account their comparatively small size (*supra*, MN 10), navigational marks and lights will usually not qualify themselves as installations in terms of Art. 60 (1), also taking into account that their deployment is not directly connected to the economic purposes referred to in Art. 56 (1)(a), but to safety of shipping.[57]

5. 'installations or structures which are abandoned or disused shall be removed to ensure safety of navigation […]'

20 The third element of Art. 60 (3) addresses the controversial issue of removal of abandoned or disused installations and structures. It should be noted from the outset that notwithstanding the use of the word 'shall' which suggests existence of a legally binding obligation, there is **no absolute duty** to remove abandoned or disused installations and structures under the Convention.[58] This may be demonstrated by referring to the fact that the obligation to remove has been subjected to three caveats, namely (1) that the removal ought to be done in order to ensure safety of navigation, (2) by taking into account any generally accepted international standards, and (3) by having due regard to fishing, the protection of the marine environment and the rights and duties of other States. Thus, in areas of the EEZ that are not regularly used for purposes of navigation, in particular of other States, removal of abandoned or disused installations and structures is not mandatory. Moreover, the requirement to have due regard to fishing and the protection of the marine environment may arguably also be understood as making it legally possible to dump or leave wholly or partly in place an installation or structure in order to create an artificial reef, provided that the potential effects of the object on the marine environment are strictly minimized and, based on the current state of scientific knowledge, deemed acceptable in the specific case. The situation under the Convention as it stands today echoes the negotiating history of Art. 60, which experienced a shift from an unconditional duty to entirely remove towards a more flexible approach (see *supra*, MN 7).

21 Art. 60 (3) refers to 'any generally accepted international standards established in this regard by the competent international organization'. When used in the singular form by the Convention, the term 'competent international organization' is generally held to refer to the

[56] IMO, Safety Zones and Safety of Navigation around Offshore Installations and Structures, IMO Res. A671(16) of 19 October 1989.

[57] Note that the Ordinance on Offshore Installations Seaward of the Limit of the German Territorial Sea of 23 January 1997 (available at: http://faolex.fao.org/docs/pdf/ger98801E.pdf), by which Germany has implemented, *inter alia*, Art. 60 of the Convention, does not consider navigational marks as installations in terms of the Ordinance.

[58] Nordquist/Nandan/Rosenne (note 49), 585; *Alexander Proelss*, Ausschließliche Wirtschaftszone (AWZ), in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 222, 254.

IMO.[59] Indeed, the IMO adopted a set of relevant **guidelines and standards** in 1989 (again refraining from establishing an absolute duty to remove abandoned or disused installations and structures).[60] Taking into account that this document expressly refers to Art. 60, no reason exists why it should not be applied to installations and structures serving other purposes than the exploration of the continental shelf and the exploitation of its natural resources such as, e. g., offshore wind energy platforms. It is subject to debate, however, whether the content of the document concerned, which is, taken by itself, not legally binding, can be considered as being 'generally accepted' without further investigation.[61] Indeed, the practice of coastal States worldwide seems to militate against any presumption in favour of removing abandoned or disused installations and structures.[62]

22 It should be noted that the duty prescribed by Art. 60 (3) has been **further developed on the global and regional levels**. In this respect, the 1996 London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,[63] which entered into force in 2006, considers 'any abandonment or toppling at site of platforms or other man-made structures at sea, for the sole purpose of deliberate disposal' as 'dumping', but these objects are, according to para. 1.4 of Annex 1 to the Protocol, among the wastes and other matter that may be considered for dumping by way of exception. On the regional level, Art. 1 (b) of Annex II to the OSPAR Convention[64] even prescribes that the general prohibition of the dumping of wastes or other matter is not applicable to offshore installations. Having said that, in 1998 the parties to the OSPAR Convention adopted Decision 98/3, according to which '[t]he dumping, and the leaving wholly or partly in place, of disused offshore installations within the maritime area is prohibited.'[65] While exceptions to this legally binding[66] rule exist, these require the competent authority to satisfy itself that an assessment undertaken in accordance with Annex 2 of the OSPAR Convention shows that there are significant reasons why an alternative disposal mentioned below is preferable to reuse or recycling or final disposal on land.[67] Furthermore, installations other than footings of steel installations placed in the maritime area before 9 February 1999 and certain concrete installations may only be dumped or left wholly or partly in place, 'when exceptional and unforeseen circumstances resulting from structural damage or deterioration, or from some other cause presenting equivalent difficulties, can be demonstrated.'[68] The parties to the OSPAR Convention have thus, in conformity with the 1989 IMO guidelines,[69] significantly tightened the general requirements of Art. 60 (3).

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[59] UN, Impact of the Entry Into Force of the 1982 United Nations Convention on the Law of the Sea on Related Existing and Proposed Instruments and Programmes, UN Doc. A/52/491 (1997), para. 9; IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.8 (2014), 7.

[60] IMO, Guidelines and Standards for the Removal of Offshore Installations and Standards on the Continental Shelf and in the Exclusive Economic Zone, IMO Res. A.672(16) of 19 October 1989, Annex.

[61] According to the majority view in legal scholarship, it is not mandatory for a standard to be valid under customary international law in order to become 'generally accepted'; see *Erik Jaap Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 172–178.

[62] For references see Nordquist/Nandan/Rosenne (note 49), 586.

[63] London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 17 November 1996, 1046 UNTS 12011.

[64] Convention for the Protection of the Marine Environment of the North-East Atlantic of 22 September 1992, 2354 UNTS 67.

[65] OSPAR, Decision on the Disposal of Disused Offshore Installations, Decision 98/3 (1998), Ref. § B-5.6, para. 2, available at: http://www.ospar.org/convention/agreements?q=offshore+installations&t=32282&a=&s=.

[66] *Cf.* Art. 13 (2) OSPAR Convention, according to which decisions adopted by the contracting parties have binding force.

[67] Decision on the Disposal of Disused Offshore Installations (note 65), para. 3.

[68] *Ibid*., para. 3 (c).

[69] See IMO Guidelines (note 60), para. 1.4: 'Nothing in these guidelines and standards is intended to preclude a coastal State from imposing more stringent removal requirements for existing or future installations or structures on its continental shelf or in its exclusive economic zone.'

23 Art. 60 (3) prescribes that **appropriate publicity** shall be given to the depth, position and dimensions of any installations or structures not entirely removed. This has been further developed by the IMO as implying that notification of non-removal or partial removal should be forwarded to the IMO.[70]

6. 'coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures'

24 Art. 60 (4) entitles the coastal State to establish reasonable safety zones around artificial islands, installations and structures 'in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.' The wording ('where necessary') and telos of this provision suggest that safety zones may only be designated if and to the extent to which they serve the purpose of ensuring the safety of navigation and the objects concerned, but in light of the exclusive rights and jurisdiction of the coastal States over the devices mentioned in Art. 60 (1) it seems difficult to deny the coastal state a broad scope of discretion as to the necessity of the zones. While the term 'reasonable' is further developed by Art. 60 (5), 'appropriate measures' would arguably range from the designation of traffic lanes and use restrictions to complete prohibitions to enter the safety zones. Art. 60 (5) limits the coastal State's discretion by requiring that the safety zones must be somehow related to the nature and function of the artificial islands, installations or structures.

25 The text of the provision is not unambiguous. In particular, it may be asked whether the coastal State is entitled to **extend the measures adopted on the basis of its exclusive jurisdiction** under Art. 60 (2) to the safety zones, or whether it may only take appropriate measures that are directly related to the safety of navigation and of the artificial islands, installations and structures. Would it be possible for the coastal State to, e. g., apply domestic standards for the protection of the marine environment to the safety zones established around its offshore installations? In this respect, it is submitted that the establishment of a zone in terms of Art. 60 (4) must arguably be induced by safety reasons, i. e., creating a safety zone for environmental or nature conservation purposes would not be in line with the Convention.[71] But what if the coastal state has lawfully established a safety zone around one of its installations and then decides to make its domestic environmental protection standards applicable to that zone? In this respect, one authority has argued that in light of the coastal State's obligation under Art. 208 (1), and given the close spatial and functional correlation between the installations and the safety zones surrounding them, the jurisdiction of the coastal State would include the right to apply its domestic environmental protection standards to the safety zone.[72] In contrast, this author has reasoned that such a broad understanding would essentially ignore the functionally limited nature of the concept of safety zones that is embodied in the language of Art. 60 (4) and (5), and that it would go too far to apply all areas of jurisdiction of the coastal State, including the fields of customs, fiscal, health, safety and immigration, within these zones.[73] In the '*Arctic Sunrise*' *Case*, Judges Wolfrum and Kelly seem to have argued for a broad understanding by holding that

[70] IMO Guidelines (note 60), para. 1.3.

[71] *Uwe Jenisch*, Offshore-Windenergieanlagen im Seerecht, Natur und Recht 19 (1997), 373, 378. See, e. g., Ordinance on Offshore Installations Seaward of the Limit of the German Territorial Sea (note 57), Art. 7, stating that safety zones may be established 'if this is necessary to ensure the safety of shipping or of the installations.'

[72] *Lagoni* (note 50), 124.

[73] *Proelss* (note 50), 107; see also Nordquist/Nandan/Rosenne (note 49), 586; *Rothwell/Stephens* (note 32), 95: 'if directed to securing the safety of the features'. – Note that the ITLOS held in the *M/V 'Saiga' Case* that '[i]n the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (article 60, paragraph 2). In the view of the Tribunal, the Convention

> '[t]he situation is different in respect of artificial islands and installations where the coastal State according to article 60, paragraph 2, of the Convention enjoys exclusive jurisdiction and in the safety zones around such artificial islands or installations. This includes legislative jurisdiction as well as the corresponding enforcement jurisdiction.'[74]

Similarly, Judge GOLITSYN stated in his dissenting opinion in general terms that

> '[r]eference in article 60, paragraph 4, to the right of the coastal State to take appropriate measures means that under the Convention the coastal State has the authority to take appropriate measures to ensure compliance with its *regulations governing activities within safety zones*, in other words to take the necessary enforcement measures.'[75]

It is not completely clear, however, whether these statements necessary imply that the coastal State is entitled to extend its entire jurisdiction applicable to its artificial islands, installations and structures to the safety zones, irrespective of whether the safety of navigation or of the features themselves is affected.

7. 'The breadth of the safety zones shall be determined by the coastal State […]'

26 Art. 60 (5) allocates to the coastal State considerable discretion as to determining the **breadth of the safety zones**, also taking into account that so far no 'applicable international standards' have been adopted within the IMO. The second sentence of Art. 60 (5) limits the coastal State's discretion in both a substantial and spatial way: It requires that the extent as well as the implementation (*supra*, MN 23) of the safety zones must be somehow ('reasonably') related to the nature and function of the artificial islands, installations or structures. It furthermore establishes a maximum seaward extension of 500 m around the objects concerned, measured from each point of their outer edge, with the exception that generally accepted international standards, or a recommendation by the IMO, would authorize the coastal State to establish safety zones that may exceed 500 m.[76] Such authorization has so far not been adopted.

27 Taking into account that offshore wind energy devices, in contrast to offshore oil and gas installations, are usually build in the shape of clusters of dozens of individual installations, the coastal State will usually decide to establish one single safety zone surrounding the entire farm. However, such course of action can only be considered as lawful under the Convention if the distance between the individual wind turbines is no more than 500 m. It is thus not possible to circumvent the requirements of Art. 60 (5) by way of denomination and notification of a group of installations as offshore wind energy farm.

28 The last element of Art. 60 (5) extends the applicability of the **'due notice' criterion** codified in Art. 60 (3) to the safety zones. The IMO has called upon the coastal State to require operators of offshore installations or structures to take adequate measures to prevent infringements of safety zones around these devices, and to make use in this respect of 'effective lights and sound signals, racons, permanent visual look-out and radar watch, listening for and warning vessels on VHF channel 16 or other appropriate radio frequencies'.[77]

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does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above' (ITLOS, *The M/V 'Saiga'* (St. Vincent and the Grenadines *v.* Guinea), Merits, Judgment of 1 July 1999, ITLOS Reports (1999), 10, para. 127).

[74] *The 'Arctic Sunrise' Case* (note 48), Joint Separate Opinion of Judges Wolfrum/Kelly, para. 12; but see *ibid.*, para. 14: existence of enforcement functions enjoyed by the coastal State '*in respect of the protection of the platform* within the safety zone' (italics added).

[75] *The 'Arctic Sunrise' Case* (note 48), Dissenting Opinion of Judge Golitsyn, para. 25 (italics added).

[76] See also IMO Implications of UNCLOS (note 59), 39.

[77] IMO Safety Zones (note 56), Annex, para. 1.3.

8. 'All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.'

29 Art. 60 (6) prescribes a duty of all ships to respect the safety zones established by the coastal State and to comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones. Notwithstanding its wording, the obligation established by this provision is not directly addressed to ships. Rather, Art. 60 (6) must be read in terms of a **duty of the flag State to ensure**[78] that ships flying its flag fulfill, when travelling through of EEZ of the coastal State, the requirement codified therein.[79] Such a reading corresponds to Art. 58 (1) which clarifies that freedom of navigation constitutes a right of States, not of ships or its masters.[80] Art. 60 (6) thus *a priori* limits the freedom of navigation of other States in the EEZ.

30 The 'generally accepted international standards' referred to by Art. 60 (6) have been developed by way of Recommendation on Safety Zones and Safety of Navigation around Offshore Installations and Structures adopted by the IMO in 1989.[81] The pertinent requirements include calls for (1) navigating with caution, 'giving due consideration to safe speed and safe passing distances taking into account the prevailing weather conditions and the presence of other vessels or dangers', (2) taking early and substantial avoiding action, (3) using any routeing systems established in the area, and (4) maintain a continuous listening watch on the navigating bridge on appropriate radio frequencies.[82]

9. 'Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.'

31 While likewise being dedicated to the issue of navigation, Art. 60 (7) is, in contrast to paragraph 6, not addressed to the flag State. Rather, it prescribes a duty of the coastal State to refrain from establishing artificial islands, installations and structures, and the safety zones surrounding them, where 'interference may be caused to the use of recognized sea lanes essential to international navigation'. The flexible wording of the provision made it inevitable for the IMO to further develop the obligation codified therein. In order to avoid conflicts between the exclusive right of the coastal State to construct and operate artificial islands, installations and structures under Art. 60 (1) on the one hand and freedom of navigation on the other, the IMO called upon coastal States to study from the outset, i. e., prior to the authorization of a specific installation, the 'pattern of shipping traffic through offshore resource exploration areas at an early stage so as to be able to assess potential interference with marine traffic passing close to or through such areas at all stages of exploitation'.[83] It furthermore adopted Resolution A.572(14) establishing general provisions on ships' routeing,[84] which applies to areas where routeing schemes have been put into place by the IMO in order to enhance safety of international navigation. Paragraph 3.10 of this document recommends coastal States to 'ensure, as far as practicable, that oil rigs, platforms and other similar

[78] For deducing a 'responsibility to ensure' see ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, paras. 125–129, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/.

[79] Nordquist/Nandan/Rosenne (note 49), 587, who accidentally refer to the coastal State; IMO Safety Zones (note 56), para. 1 (d). See also CJEU, Case C-308/06, Judgment of 3 June 2008, *Intertanko* [2008] ECR I-4057, paras. 59, 61.

[80] *Proelss* on Art. 58 MN 9.

[81] IMO Safety Zones (note 56), Annex; see also IMO Implications of UNCLOS (note 59), 39.

[82] IMO Safety Zones (note 56), Annex, para. 2.

[83] *Ibid*., para. 1 (a).

[84] IMO, General Provisions on Ships' Routeing, IMO Res. A.572(14) of 20 November 1985, Annex.

structures are not established within routeing systems adopted by the IMO'. If temporary or permanent positioning of installations cannot be avoided (e. g. because of findings of important exploitation prospects), the coastal State is asked to submit temporary or permanent amendments to the scheme to the IMO.[85] The latter recommended practice demonstrates that the IMO does not seem to act on the assumption that interferences caused by the objects addressed in Art. 60 to international navigation must mandatorily be avoided – an assumption that can arguably be based on the use of the words 'may not' instead of 'must not' in Art. 60 (7). Rather, the coastal State is obliged to refrain from constructing, operating and using artificial islands, installations and structures in areas relevant for international navigation only insofar as the exercise of its sovereign rights in terms of Art. 56 (1)(a) is otherwise not made impossible, or considerably impeded.

32 It should be noted that the scope of the term 'recognized sea lanes essential to international navigation' is not limited to areas with regard to which the IMO has adopted routeing schemes. Rather, recognition of a sea lane essential to international navigation presumes an element of international custom, namely that the sea area concerned is frequently and on a larger scale used by ships flying the flags of a certain number of States. Against this background, straits used for international navigation,[86] approaches to internationally relevant ports and harbours, and traditional shipping lanes that are substantially used for international navigation may arguably be regarded as falling within the scope of Art. 60 (7).[87]

10. 'Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.'

33 Art. 60 (8) clarifies that the status of artificial islands, installations and structures is not the same as that of islands. Islands are either (part of) the territory of a sovereign State or (e. g. in the case of islands that newly emerge due to volcanic activity) *terra nullius* that may be occupied by another State. Therefore, they have a status similar to land territory.[88] As sovereign territory, islands are generally capable of generating maritime zones under the international law of the sea (*cf.* Art. 121 (2)). Only in case the island concerned ought to be qualified as a rock which cannot sustain human habitation or economic life of its own, it does not have an EEZ or continental shelf.[89] In contrast, artificial islands, installations and structures are **not part of the territory of the coastal State**, and the State does not exercise territorial sovereignty, but only exclusive jurisdiction over these features (see *supra*, MN 16–17). Due to the fact that only land or (natural) island territory is capable of generating a territorial sea, the first part of the second sentence of Art. 60 (8) is self-explanatory. However, as the Convention identifies the baseline as the starting point for measuring the breadth of the territorial sea (*cf.* Art. 5), the message contained in Art. 60 (8) indirectly results in the inapplicability of the law on baselines to artificial islands, installations and structures, and thus complements Art. 60 (5) which states that safety zones establishes around these objects are measured from each point of their outer edge. The final element of Art. 60 (8) takes into account that the presence of (natural) islands has been accepted by the ICJ as constituting a geographical circumstance relevant for the delimitation of the territorial sea, EEZ and

[85] *Ibid.*, Annex, paras. 3.10 and 3.11.

[86] For an analysis of the element 'use for international navigation' see *Jia* on Art. 37 MN 10–13.

[87] Consenting *Papadakis* (note 38), 111; but see *Papanicolopulu* on Art. 261 MN 4, arguing that the category of sea lanes referred to in Art. 60 (7) would probably be narrower than the category of 'established international shipping routes' mentioned in Art. 261.

[88] See also Art. 121 (2) referring to the provisions of the Convention 'applicable to other land territory'. A detailed analysis of the status of islands is provided by *Talmon* on Art. 121 MN 7–26.

[89] For details see *Talmon* on Art. 121 MN 27 *et seq.*

continental shelf between States with opposite or adjacent coasts.[90] It thus clarifies that artificial islands, installations and structures do not at all affect boundary delimitation.

Article 61
Conservation of the living resources

1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.

3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

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[90] For references see *Symmons* on Art. 15 MN 13–14, 27–34 and *Tanaka* on Art. 74 MN 24.

(2012), 149–183; *Yoshifumi Tanaka*, A Dual Approach to Ocean Governance (2008); *Francisco O. Vicuña*, The Exclusive Economic Zone: Regime and Legal Nature under International Law (1989)

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Cases: ICJ, *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland *v.* Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 3; PCA, *The North Atlantic Coast Fisheries Case* (Great Britain *v.* United States of America), Award of 7 September 1910, RIAA XI, 167; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf; PCA (Arbitral Tribunal Constituted under Annex VII UNCLOS), *The Chagos Marine Protected Area Arbitration* (Mauritius/United Kingdom of Great Britain and Northern Ireland), Award of 18 March 2015, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1429; ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/

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I. Purpose and Function

1 The establishment of the exclusive economic zone (EEZ) means that most of the world's fish stocks are now subject to the jurisdiction of coastal States. It is estimated that about 95 % of the capture fisheries take place in waters within 200 nautical miles of the coast.[1] Whilst Art. 56 of the Convention confers sovereign rights to explore and exploit the living resources in the EEZ,[2] such rights also come with a responsibility to conserve and manage these resources. Indeed, one of the principal rationales for extending coastal State jurisdiction was to permit greater control of fisheries by coastal States. In the words of one proponent of the EEZ at UNCLOS III, 'only the coastal State was in a position to apply the necessary conservation measures and plan the development of ocean species'.[3] This view was based on the assumption that the ability to fish would be effectively controlled and regulated by the coastal State so as to reduce over-capitalization of fishing fleets and therewith the potential for overfishing. Both of these objectives have been quite difficult to achieve in practice, however.[4]

2 The purpose of Art. 61 is to set out the basic obligations of a coastal State in relation to the conservation and management of living resources in the EEZ. It applies only to living resources and there is no equivalent provision for non-living resources, such as oil and gas.[5] The term 'living resource' – which was conceived and has hitherto been applied in relation to fisheries – may be interpreted as including the later concept of biodiversity in accordance with the Convention on Biological Diversity (CBD),[6] to which all States Parties to the 1982 Convention are also party,[7] thus allowing a broader interpretation of the provision in relation to conservation, sustainable use and impacts on ecosystems within the EEZ.[8] It remains subject to debate, however, whether such an evolutionary interpretation would also lead to the inclusion of marine genetic resources under Art. 61 and the applicability of the provisions on access to the surplus under Art. 62 to such resources.[9]

3 It should be noted that several key elements of Art. 61 can be found *verbatim* in Art. 119 UNCLOS, under the heading Conservation of the Living Resources of the High Seas, namely: the determination of the total allowable catch (TAC) on the basis of scientific evidence available; the designation of measures to maintain or restore populations of harvested species at levels that can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors including the special requirements of developing States; the need to take into

[1] See e. g. UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21), Ch. 17.70.

[2] For further information, see *Proelss* on Art. 56 MN 8–15.

[3] Statement of Zuleta Torres (Colombia), Second Committee UNCLOS III, 29th Meeting, UN Doc. A/CONF.62/C.2/SR.29 (1974), OR II, 224, 225.

[4] *Donna Christie*, The Conservation and Management of Stocks Located Solely within the Exclusive Economic Zone, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 395, 396.

[5] *David M. Ong*, Towards an International Law for the Conservation of Offshore Hydrocarbon Resources within the Continental Shelf?, in: David Freestone/Richard Barnes/David M. Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 93, 96.

[6] Art. 2 CBD defines biodiversity as 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'.

[7] *Yoshifumi Tanaka*, A Dual Approach to Ocean Governance (2008), 134. For further information, *cf.* Status of Multilateral Treaties Deposited with the Secretary General, available via: http://treaties.un.org.

[8] *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd edn. 2009), 750: '[T]he CBD may have modified the fisheries provisions of UNCLOS' to the extent necessary to ensure that fishing activities do not cause or threaten serious damage to biodiversity in light of CBD Art. 22, while also acknowledging that certain concepts in the 1982 Convention can be 'readily interpreted to include measures aimed at the protection of marine biodiversity'.

[9] *Charlotte Salpin*, The Law of the Sea: A Before and an After Nagoya?, in: Elisa Morgera/Matthias Buck/Elsa Tsioumani (eds.), The 2010 Nagoya Protocol on Access and Benefit-sharing: Implications for International Law and Implementation Challenges (2012), 149 *et seq.*

account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards; and the obligation to contribute to and exchange available scientific information on a regular basis through international organizations.[10]

Art. 61 is not a self-standing provision; it must be read in light of the other provisions in Part V of the Convention relating to the conservation and management of living resources, notably Arts. 62–73. In addition, it should be read in light of the general obligations concerning the protection of the marine environment, rare or fragile ecosystems and the habitat of depleted, threatened or endangered species (→ Art. 192; Art. 194; Art. 196).[11] International legal developments related to the precautionary and ecosystem approach, furthermore, warrant an evolutionary interpretation of Art. 61.[12] 4

II. Historical Background

A duty to conserve fish in coastal waters was arguably already in existence at the turn of the 20th century. In the *North Atlantic Coast Fisheries Case*, the arbitral tribunal held that 'Great Britain, as the local sovereign, has the duty of preserving and protecting the fisheries. In so far as it is necessary for that purpose, Great Britain is not only entitled, but obliged to provide for the protection and preservation of the fisheries.'[13] 5

The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (High Seas Fishing Convention) already contained certain provisions to which the origin of Art. 61 can be traced back. Although the High Seas Fishing Convention prohibited coastal States from taking enforcement action against foreign nationals fishing in the high seas adjacent to their territorial waters,[14] it did recognize that coastal States have 'a special interest' in maintaining the productivity of high seas fisheries adjacent to their territorial sea.[15] To balance these two approaches, the High Seas Fishing Convention established a 'convoluted procedure'[16] allowing unilateral conservation measures in these areas where agreement with third States could not be reached. Accordingly, such unilateral conservation measures would be valid for third States if: there was a need for urgent application of these measures in the light of the existing knowledge of the fishery; the measures adopted were based on appropriate scientific findings; and they did not discriminate in form or in fact against foreign fishermen.[17] The unilateral measures would then be subject to endorsement or overruling by a special fisheries commission with binding decision-making powers.[18] 6

The duty of conservation was also recognized in the *Fisheries Jurisdiction Case* (UK *v.* Iceland) in 1974. Judge Nagendra Singh, in his declaration in that case, noted that: 7

> 'The law pertaining to fisheries must accept the primacy for the need of conservation based on scientific data. This aspect has been properly emphasized to the extent needed to establish that the exercise of preferential rights of the coastal State, as well as the historic rights of other States dependent on the same fishing grounds, have all to be subject to the over-riding consideration of proper conservation of the fishery resources for the benefit of all concerned. This conclusion would appear warranted if this vital source of man's nutrition is to be preserved and developed for the community.'[19]

[10] For further information, see *Rayfuse* on Art. 119 MN 14 *et seq.*

[11] *Tanaka* (note 7), 134.

[12] On the precautionary and the ecosystem approaches, see further *Czybulka* on Art. 192 MN 3, Art. 194 MN 12, 32–34 and Art. 196 MN 9, 19; *Stephens* on Art. 198 MN 13, Art. 199 MN 8 and Art. 201 MN 5; *Rayfuse* on Art. 119 MN 33–25.

[13] PCA, *The North Atlantic Coast Fisheries Case* (Great Britain *v.* United States of America), Award of 7 September 1910, RIAA XI, 167.

[14] Art. 6 (4) High Seas Fishing Convention.

[15] Art. 6 (1) High Seas Fishing Convention.

[16] *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 296.

[17] Art. 7 High Seas Fishing Convention.

[18] Art. 6 (5) and Arts. 9–11 High Seas Fishing Convention, as summarized by *Rothwell/Stephens* (note 16), 296.

[19] ICJ, *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland *v.* Iceland), Merits, Judgment of 25 July 1974, Declaration by Nagrenda Singh, ICJ Reports (1974), 3, 40.

8 It was on this basis that the ICJ ordered the parties to the dispute to negotiate an equitable solution to their differences, taking into account *inter alia* the 'conservation and development of the fishery resources' in question.[20] The judgment in the *Fisheries Jurisdiction Case* (UK *v.* Iceland) was rendered whilst negotiations at UNCLOS III were already underway, and the Court noted that '[t]he very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to proceed to the codification of that law on a universal basis, including the question of fisheries and conservation of the living resources of the sea.'[21] Indeed, the need for conservation had grown even greater over time as there was increasing evidence that many fish stocks were threatened by overfishing.[22]

9 From the outset, the discussions at UNCLOS III concerning coastal State jurisdiction over fisheries assumed that such States must take measures to conserve and manage the fish stocks under their control. The crucial question concerned how much discretion the coastal State should have in deciding on appropriate conservation and management measures. On the one hand, some States proposed granting complete authority to the coastal State to decide such matters.[23] On the other hand, some States were of the opinion that international fishery organizations and other fishing States should also have a role in managing fish stocks in the EEZ.[24]

10 A compromise was achieved between these two positions during the negotiations. The provision included in the negotiating text gave broad discretion to the coastal State to regulate fish stocks in their EEZ, whilst requiring it to take into account the recommendations of global, regional and subregional organizations. Despite several unsuccessful attempts to reduce the discretion of coastal States[25], the final text of the Convention incorporates this basic compromise position (→ Art. 61 (2); Art. 61 (3)).

III. Elements

1. 'conservation and management measures'

11 Unlike the sequence of paragraphs in Art. 61, the following sub-sections will start with a discussion of the overall conservation and sustainable management objectives enshrined in Art. 61 (2), and then continue focusing on the central link of conservation and sustainable management with the concept of maximum sustainable yield (MSY) reflected in Art. 61 (3). Both of these factors are related to the determination of the TAC which is dealt with in Art. 61 (1) and is a prominent example of a conservation and management measure that must be taken by coastal States. The analysis will then turn to other possible conservation measures. Criteria for the determination of conservation and management measures are discussed, followed by an analysis of the role of science, precaution, exchange of information and cooperation with international organizations.

12 Art. 61 (2) requires coastal States to take 'proper conservation and management measures' in relation to the living resources of the EEZ. The basic objective of such measures is to ensure that such living resources are 'not endangered by over-exploitation'. The provision has been criticized for not specifying the unit to be maintained (stock,

[20] *Ibid.*, 34 (para. 79).

[21] *Ibid.*, 23 (para. 53).

[22] In 1987 it noted that 'most major familiar fish stocks throughout the waters over continental shelves, which provide 95 per cent of the world's fish catch, are now threatened', Secretary General, Report of the World Commission on Environment and Development, UN Doc. A/42/427 (1987), Annex (Our Common Future).

[23] See e. g. Second Committee UNCLOS III, Gambia *et al.*: Draft Articles on the Exclusive Economic Zone, UN Doc. A/CONF.62/C.2/L.82 (1974), OR III, 240.

[24] See e. g. Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on the Economic Zone, UN Doc. A/CONF.62/C.2/L.38 (1974), OR III, 214, 215 (Article 12).

[25] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 606–608.

species, biomass) or the precise level at which it is to be maintained.[26] The term 'endangered' is neither defined by the Convention, and as noted by BURKE, the meaning of this term is not obvious. BURKE argues that 'the concept of "endangered" might be interpreted as implying a threat to survival, i. e., in danger of extinction, but it seems doubtful if this is very meaningful or helpful.'[27] He therefore proposes that the term should be understood to refer to 'reductions in abundance that amount to commercial extinction, or, more strictly, to reductions of such magnitude that a species is likely to become endangered unless protective action is taken.'[28] This appears to be the best understanding of the term in light of the obligation found in Arts. 61 (3) to 'also' aim to maintain or restore populations of fish at levels that will produce the MSY.

2. 'maximum sustainable yield'

The concept of MSY is at the centre of the regime for the conservation and management 13
of living resources in the Convention (see also → Art. 119). It refers to the maximum catch that can be taken without negatively affecting the ability of a stock to maintain its population size. The term 'population' is not defined in the Convention, but can be understood as 'a group of fish of one species sharing common ecological and genetic features and more likely to breed with one another than with individuals from another such group.'[29]

MSY is a biological concept that in principle can be calculated in an objective manner by 14
the coastal State, provided that it has the relevant scientific information. However, the concept of MSY has been widely criticized by fisheries scientists and other commentators,[30] significantly because of the 'factual obstacles inherent in determining cause and effect in respect of the use of living resources.'[31] Whatever the merits of this debate, it is clear that coastal States have discretion to deviate from the objective of MSY when setting their conservation and management targets because Art. 61 (3) refers to MSY

> 'as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.'[32]

What environmental or economic factors should be taken into account will be up to the coastal State to decide and they would appear to have broad discretion in this regard. Indeed, despite the fact that the Convention makes no explicit reference to social factors, BURKE argues that 'the other treaty provisions *in toto* convey ample authority on the coastal [S]tate to take such factors into account.'[33] Nonetheless, in the light of the object and purpose of this provision, as well as contemporary international environmental law, it is possible to conclude that MSY should be seen as acting as the *upper* limit beyond which harvesting levels are no longer sustainable: accordingly, coastal States are not allowed to set the qualified MSY above the biological MSY level.[34] This is further confirmed by the

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[26] E. g. *Marion Markowski*, The International Law of EEZ Fisheries (2010), 26.
[27] *William T. Burke*, U.S. Fishery Management and the New Law of the Sea, AJIL 76 (1982), 24, 32.
[28] *Ibid*., 32.
[29] *Markowski* (note 26), 26.
[30] See e. g. the discussion in *Douglas M. Johnston*, International Law of Fisheries (1965), 49–55; *David J. Attard*, The Exclusive Economic Zone in International Law (1987), 153; *Francisco O. Vicuña*, The Exclusive Economic Zone: Regime and Legal Nature under International Law (1989), 51.
[31] *Richard Barnes*, The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation? in: David Freestone Richard Barnes/David M. Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 235 and 242.
[32] Emphasis added.
[33] *Burke* (note 27), 36.
[34] *Markowski* (note 26), 27–28; see the more pessimistic comments by *Barnes* (note 31), 243–244.

international target established to encourage and monitor States' efforts to achieve sustainable fisheries and restore depleted stocks to levels that can sustain the MSY.[35]

15 A coastal State may also have to take into account the interests of other States in determining conservation and management measures, if Art. 61 is read in light of Art. 56(2), which requires a coastal State to 'have due regard to the rights and duties of other States' when 'exercising its rights and performing its duties under the Convention.' For example, in the *Chagos Arbitration*, the United Kingdom was held to have violated Art. 56(2) by declaring a no-take marine protected area in the waters around the Chagos archipelago, because it had failed to consult with Mauritius in breach of an agreement between the two countries dating back to Mauritian independence.[36] The Arbitral Tribunal elaborated that having 'due regard' entails consideration of the 'nature of rights held by [other countries], their importance, the extent of the anticipated impairment, the nature and importance of activities contemplated […] and the availability of alternative approaches' leading to a 'conscious balancing of rights and interests, suggestions of compromise and willingness to offer reassurances […], and an understanding of [other countries'] concerns in connection with the proposed activity.'[37]

3. 'allowable catch'

16 There are several types of conservation and management measures at the disposal of the coastal State to meet the objectives of Art. 61.[38] One measure which would seem to be obligatory is the calculation of the 'allowable catch'. Art. 61 (1) says in mandatory terms that 'the coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.' It has been suggested that this concept applies to both the overall catch in the EEZ and the allowable catch of individual stocks.[39] The provision does not differentiate between the commercially exploited and other fish stocks, thus in principle applying irrespective of the significance of fish stocks for the fishing industry. Indeed, the International Tribunal for the Law of the Sea has stressed that 'in accordance with the Convention, the adoption by the coastal State of conservation and management measures for all living resources within its exclusive economic zone is mandatory'.[40] In practice, however, it is the allowable catch of commercially significant stocks that has generated most State practice as it is more important in light of the overarching duty to ensure that populations of harvestable species are maintained at levels that can produce the MSY. A recent review of State practice suggests that priority TACs are determined for fish stocks explored at or close to the maximum sustainable limit, but there is no consistent implementation of the obligation to establish TACs for all commercially significant stocks.[41] One significant exception is the practice of the United States, which through a 2006 amendment to the Magnuson-Stevens Fishery Conservation and Management Act requires annual catch limits to be set for all managed fisheries, whether or not they are currently overfished.[42]

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[35] UN World Summit on Sustainable Development, Report of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002), 6 (Plan of Implementation of the World Summit on Sustainable Development), 23 (para. 31(a)); and follow-up by the General Assembly: e. g., GA Res. 65/38 of 7 December 2010, para. 2.

[36] PCA (Arbitral Tribunal Constituted under Annex VII UNCLOS), *The Chagos Marine Protected Area Arbitration* (Mauritius/United Kingdom of Great Britain and Northern Ireland), Award of 18 March 2015, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1429.

[37] *Ibid.*, paras. 519 and 535.

[38] *Cf.* also the wording of Art. 119 (1): 'In determining the allowable catch and establishing other conservation measures'. For further information, see *Rayfuse* on Art. 119 MN 14–21.

[39] Nordquist/Nandan/Rosenne (note 25), 609.

[40] ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 96, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/.

[41] *Markowski* (note 26), 109–112.

[42] Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 16 USC 1801. See *Juliet Eilperin*, US Tightens Fishing Policy, Setting 2012 Catch Limits for All Managed Species, Washington Post, 8 January 2012. Note however, that the United States is currently not party to the Convention and therefore this practice is not carried out in order to fulfill specific obligations under Arts. 61 or 119.

4. Other Conservation Measures

The allowable catch is not the only conservation tool at the disposal of the coastal State. 17
The provision refers to 'proper conservation measures'. Some content can be given to this phrase by referring to Art. 62 which lists some of the types of measures that may be included in coastal State legislation, including licensing of fishermen, fishing vessels and equipment; regulating seasons and areas of fishing; regulating the types, sizes and number of fishing vessels that may be used; regulating the types, sizes and amount of gear that might be used; and fixing the age and size of fish that may be caught. Once again, the coastal State would seem to have a broad degree of discretion in deciding what conservation and management measures to utilize. Relevant international standards, however, increasingly influence coastal States' choice of appropriate conservation measures.

5. Generally Recommended International Minimum Standards

In determining its conservation and management measures, a coastal State must, pursuant 18
to Art. 61 (3), take into account 'any generally recommended international minimum standards, whether subregional, regional or global'. This reference is broad enough to cover a wide variety of fisheries standards adopted at the international level. In particular, it will cover several instruments adopted through the Food and Agriculture Organization (FAO) Fisheries Committee.[43] Prominent examples of generally recommended international standards adopted by the FAO include the Code of Conduct for Responsible Fisheries,[44] and the associated International Plans of Action which deal with Sharks, Seabirds, Fishing Capacity[45], and Illegal, Unreported and Unregulated Fishing.[46]

Relevant international standards also include generally recommended international 19
minimum standards adopted by other regional or subregional bodies, including many regional fisheries management organizations. Moreover, it is not limited to instruments adopted by fisheries organizations and it may also apply to the recommendations adopted by environmental organizations.[47] For example, decisions of the CBD Conference of the Parties relating to the conservation and sustainable use of marine biological diversity are relevant for coastal States when drawing up their conservation and management measures.[48] CBD guidance has thus elaborated on the concept of integrated marine and coastal management, including the ongoing assessment and monitoring of marine and coastal living resources, their interactions and impacts on ecosystems;[49] maintenance of the productivity and biodiversity of important and vulnerable marine areas; elimination of

[43] See *James Harrison,* Making the Law of the Sea (2011), 225.

[44] FAO, Code of Conduct on Responsible Fisheries (1995). See generally *Gerald Moore*, The Code of Conduct for Responsible Fisheries, in: Hey (note 4), 85.

[45] FAO, International Plan of Action for the Conservation and Management of Sharks, International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, International Plan of Action for the Management of Fishing Capacity (1999). These plans were adopted at the 23rd session of the FAO Fisheries Committee in February 1999 and endorsed by the FAO Council in June 1999.

[46] FAO, International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (2001). This plan was adopted at the 24th session of the FAO Fisheries Committee in March 2001 and endorsed by the FAO Council in June 2001.

[47] Art. 31 (3) Vienna Convention on the Law of Treaties.

[48] See the so-called Jakarta Mandate on Marine and Coastal Biodiversity, COP CBD, Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/2/19 (1995), 59 (Decision II/10); the programme of work on marine and coastal biodiversity annexed to COP CBD, Report of the Fourth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/4/27 (1998), 84, 85 (Decision IV/5, Annex); COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Seventh Meeting: VII/5 Marine and Coastal Biological Diversity, UN Doc. UNEP/CBD/COP/DEC/VII/5 (2004), 10 (Annex, Elaborated Programme of Work on Marine and Coastal Biological Diversity).

[49] COP CBD Decision IV/5 (note 48), 85 (Annex, Basic Principles).

destructive fishing practices;[50] and more recently also the assessment of the impacts of climate change on the sustainability of fish stocks and the habitats that support them and the integration of climate change-related concerns into relevant national strategies.[51] Particular attention has been paid to the establishment of marine protected areas (MPAs) (see also → Art. 211 (6)), as an essential component of integrated coastal management,[52] and as a key 'conservation measure' under Art. 61 (2). International goals have been established to increase the coverage of MPAs, their effective and equitable management, their ecological representativeness and connectivity with a view to establishing representative networks.[53] To these ends, CBD parties have adopted 'Scientific Criteria for Identifying Ecologically or Biologically Significant Marine Areas in Need of Protection in Open-Ocean Waters and Deep-Sea Habitats' and 'Scientific Guidance for Selecting Areas to Establish a Representative Network of Marine Protected Areas, Including in Open-Ocean Waters and Deep-Sea Habitats',[54] supporting the involvement of indigenous and local communities in the establishment and management of MPAs and the integration of their traditional knowledge.[55] The international community, however, is still elaborating clarifications on the objective and management of MPAs for fisheries purposes.[56]

20 In addition, the ecosystem approach[57] (→ Art. 194 (5)) as elaborated under the CBD entails a management process aimed at integrating management of land, water and living resources, and promoting conservation and sustainable use in an equitable way. This is also a social process: different interested communities must be involved through the development of efficient and effective structures and processes for decision-making and management.[58] Within this process, traditional knowledge of local and indigenous communities should also be integrated.[59] Along similar lines, the FAO Code of Conduct calls upon States to seek to identify relevant domestic parties that have a legitimate interest in the use and management of fisheries resources and establish arrangements for consulting them to gain their collaboration in achieving responsible fisheries.[60] The participatory aspect of the ecosystem approach thus allows for the implementation of relevant international human rights obligations of coastal States, namely their obligation to ensure early and meaningful participation of concerned indigenous and local communities in decision-making processes on the conservation of traditional marine fishing grounds or that may affect traditional fishing practices or their rights.[61]

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[50] COP CBD Decision VII/5 (note 48), 14 (Operational Objective 2.1.(i) and (h)).

[51] COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Tenth Meeting: X/29. Marine and Coastal Biodiversity, UN Doc. UNEP/CBD/COP/DEC/X/29 (2010), 2 (para. 7); GA Res. 65/37 of 7 December 2010, para. 3.

[52] See discussion in *Tanaka* (note 7), 182–184; and the author's conclusion that 'MPAs are not a tool for integrated coastal management, but the integrated management approach is needed for the proper management of MPAs' to ensure compatibility and effectiveness of MPAs, freedom of navigation and fisheries regulation, *ibid*., 197.

[53] Plan of Implementation of the World Summit on Sustainable Development (note 35), 25 (para. 32 (c)); see also Decision VII/5 (note 48), 3–4 (paras. 18–19); see also COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Tenth Meeting: Decision X/2. The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets, UN Doc. UNEP/CBD/COP/DEC/X/2 (2010), 9 (Annex, Target 11).

[54] COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Eleventh Meeting: Decision IX/20. Marine and Coastal Biodiversity, UN Doc. UNEP/CBD/COP/DEC/IX/20 (2008), 11 (Annex II); acknowledged in GA Res. 65/37 of 7 December 2010, para. 180. For a discussion, *Daniela Diz*, Marine Biodiversity: Unravelling the Intricacies of Global Frameworks and Applicable Concepts, in: Elisa Morgera/Jona Razzaque (eds.), Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law (2016).

[55] COP CBD Decision IX/20 (note 54), 5 (paras. 26–27).

[56] See e. g. GA Res. 65/37 of 7 December 2010, para. 123.

[57] For further information, *cf. infra*, MN 26–27.

[58] COP CBD Decision X/29 (note 51), 4 (para. 13(h)) and 15 (Annex, lit. d).

[59] Art. 8 (j) CBD; see also Art. 12.12 FAO Code of Conduct.

[60] Art. 7.1.2 FAO Code of Conduct.

[61] Art. 27 International Covenant on Civil and Political Rights; UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 of 13 September 2007 (universally endorsed); UNCED, The Rio Declaration on the

6. Best Available Scientific Evidence and the Precautionary Principle

21 Another important factor to be taken into account by the coastal State is scientific information about the state of fish stocks in its waters. Scientific information is clearly critical to the making of decisions about the conservation and management of fish stocks. Art. 61 (2) (*cf.* also → Art. 119 (1)(a)) requires the coastal State to take into account the 'best available scientific evidence available to it'[62] in designing its conservation and management measures. While Art. 61 (2) does not positively require coastal States to undertake scientific research (→ Part XIII), it has been argued that the primary obligation to conserve living resources in the EEZ 'reasonably imposes the burden of acquiring data that make this obligation achievable.'[63]

22 The requirement to take into account scientific evidence does not prevent a coastal State from adopting a precautionary approach to fisheries conservation and management. It is arguable that the precautionary approach is today a generally accepted principle of international law.[64] This principle has been incorporated in many fisheries instruments adopted since the 1982 Convention, as well as by the CBD Conference of the Parties in relation to marine biological diversity.[65] The General Assembly, which is the one of the principal international institutions that reviews implementation of the EEZ fisheries provisions,[66] also periodically recalls the importance of a precautionary approach to EEZ fisheries.[67] According to the best known formulation of the precautionary approach, 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'[68] It follows that it is not necessary to have scientific proof that a fish stock is overexploited prior to taking conservation and management measures. According to the precautionary approach, it is better to act earlier in order to prevent any irreversible harm to the fish stock, including by halting fishing activities.[69]

23 Notably, international standards have provided detailed guidance on how to apply the precautionary principle to fisheries management through the concept of 'reference points'. Reference points 'identify the safe biological limit for harvesting, and other relevant constraints'.[70] The FAO differentiates between 'conceptual' reference points that capture in broad terms the management objective for the fishery and 'technical' reference points, which can be calculated or quantified on the basis of biological or economic characteristics of the fishery; as

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Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration), Principle 22; Agenda 21, Ch. 17.82 (b) and 17.83; Art. 6.18 FAO Code of Conduct. See discussion by *Markowski* (note 26), 83–90.

[62] *Cf.* also *Franckx/Boone* on Art. 234 MN 31 for the same term used in another context.

[63] *William T. Burke*, The New International Law of Fisheries: UNCLOS 1982 and Beyond (1994), 57.

[64] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 135: 'The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law', available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf. For the precautionary approach/principle as codified in UNCLOS, see also *Czybulka* on Art. 192 MN 3, Art. 194 MN 12, 32–34 and Art. 196 MN 9, 19; *Stephens* on Art. 198 MN 13, Art. 199 MN 8 and Art. 201 MN 5.

[65] COP CBD Decision IV/5 (note 48), 86 (Annex, para. 4): 'The precautionary approach, as set out in decision II/10, annex II, paragraph 3 (a), should be used as a guidance for all activities affecting marine and coastal biological diversity'.

[66] *Barnes* (note 31), 258–259.

[67] GA Res. 66/68 of 6 December 2011, para. 7 calls upon 'all States, directly or through regional fisheries management organizations and arrangements, to apply widely, in accordance with international law and the Code, the precautionary approach and the ecosystem approach'.

[68] Principle 15 Rio Declaration.

[69] *Markowski* (note 26), 43–50.

[70] *Birnie/Boyle/Redgwell* (note 6), 675.

well as between 'target' reference points, indicating a state of a fishing and/or resource which is considered to be desirable and at which management action, whether during development or stock rebuilding, should aim, from 'limit' reference points, indicating a state of a fishery and/or a resource which is considered to be undesirable and which management action should avoid.[71] The FAO Code of Conduct on Responsible Fisheries calls upon States to apply 'widely' the precautionary approach to fisheries conservation and management, by taking into account

> 'uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distribution of fishing mortality and the impact of fishing activities, including discards, on non-target and associated or dependent species, as well as environmental and socio-economic conditions'.[72]

The Code also calls for including the need to determine target reference points and stock-specific limit reference points with a view to determining in advance conservation measures if reference points are exceeded and limit reference points approaches, and to applying these measures automatically.[73]

24 The UN Fish Stocks Agreement (UNFSA) contains an obligation on coastal States to apply the precautionary approach widely to the conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks found within their EEZ.[74] Annex II UNFSA contains guidelines for application of the precautionary approach through the identification of two types of precautionary reference points: on the one hand, States are to determine 'conservation' or 'limit' reference points, which set boundaries for safe biological limits within which the stock can produce MSY; and on the other hand, 'management' or 'target' reference points that are intended to represent management objectives.[75] Against this background, the guidelines require States to ensure that the risk of exceeding conservation reference points is very low and that management reference points are not exceeded on average.[76] When reference points are approached, they should not be exceeded; and if they are exceeded, States are mandated to take measures without delay for restoring stocks.[77] In addition, if a natural event adversely affects the status of stocks, States are required to adopt temporary emergency measures in order to avoid worsening the situation by over-fishing an affected stock.[78] In relation to exploratory fisheries, 'cautious conservation and management measures' are to remain in force until sufficient information has been acquired to permit a proper assessment of the impact of fishing upon the long-term sustainability of the stocks.[79] The precautionary principle as applied in the UNFSA is thus not an 'absolutist concept', but rather calls for stock management to be handled 'in a precautionary manner' by taking into account uncertainties related to size and productivity of fish stocks, levels and distribution of fish mortality, and the impact of fishing activities on associated or dependent species, including existing and predicted environmental and socio-economic conditions,[80] without automatically preventing fishing once reference points are reached. This determination thus remains to be made on an ad hoc basis.[81]

25 Against this backdrop, the notion of 'best' scientific evidence found in Art. 61 suggests that States are under a duty to keep their conservation and management measures under review on the basis of the most up-to-date scientific evidence that is available to them. This

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[71] *John F. Caddy/Rubin Mahon*, Reference Points for Fisheries Management: FAO Fisheries Technical Paper. No. 347 (1995).

[72] Arts. 7.5.1 and 7.5.2 FAO Code of Conduct.

[73] Art. 7.5.3 FAO Code of Conduct; see also *Moore* (note 44), 97.

[74] Art. 6 UNFSA. See also the discussion on the relevance of the UNFSA for the interpretation of the Convention in *Harrison/Morgera* on Art. 63 MN 8.

[75] *Moritaka Hayashi*, The Straddling and Highly Migratory Fish Stocks Agreement, in: Hey (note 4), 55, 60.

[76] *Ibid.*

[77] Art. 6 (4) UNFSA.

[78] Art. 6 (7) UNFSA.

[79] Art. 6 (6) UNFSA.

[80] Art. 6 (3)(c) UNFSA.

[81] *David Freestone*, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement, in: Hey (note 4), 287, 320–321.

means that precautionary measures are temporary and they must be kept under review by the coastal State. Thus, if additional scientific evidence concerning the conservation status of a stock comes to light, States must consider adapting or changing their conservation and management measures in light of these new findings. This is in line with the ecosystem approach and its support for 'adaptive management' based on environmental impact assessment, impact management, and the proactive identification and management of gaps in knowledge with a view to fuelling a process of continuous learning.[82] Contracting parties to the CBD are specifically called upon to undertake environmental impact assessments and strategic environmental assessments to further strengthen sustainable use of living resources in areas within national jurisdiction.[83]

7. Exchange of Available Scientific Information

26 In addition to the need for the coastal State to conduct its own research into fish stocks in its EEZ in order to gather relevant scientific evidence for the purposes of Art. 61, Art. 62 (4)(f) of the Convention permits the coastal State to require foreign vessels fishing in its EEZ to conduct specified fisheries research programmes. However, scientific evidence may also come from other sources such as research conducted by another State, inter-governmental organizations or non-governmental organizations. To ensure that States have access to a wide range of scientific sources, Art. 61 (5) calls for the regular exchange of available scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks through competent international organizations. The importance of the enhanced collection and sharing of fisheries data was also stressed in Agenda 21.[84]

8. Cooperation with Competent Organizations

27 Art. 61 points to two instances of cooperation with competent international organizations: in the adoption of proper conservation and management measures to avoid overexploitation (Art. 61 (2)) and in relation to the exchange of available scientific information (Art. 61 (5)). In both cases, the Convention foresees the possibility for relevant organizations to operate at the global, regional or sub-regional level. The most notable global organization is the FAO, which performs both normative and technical activities that can support member countries in the conservation of living resources, and also provides statistical and other data on fish stocks and fishing efforts. In fact, the FAO Constitution specifically requires member States to communicate to the Organization all official reports and statistics concerning fisheries,[85] thereby allowing the FAO to undertake the worldwide collection, compilation, analysis and diffusion of data and information in fisheries and aquaculture. In addition, the FAO has supported the strengthening of national capacity in the collecting, analysis and use of accurate, reliable and timely data, as well as cooperated in international efforts directed towards the development of standard concepts, definitions, classifications and methodologies for the collection and collation of fishery statistics.[86] Regional fisheries management organizations[87] have also, within their area of competence, contributed to the collection and exchange of scientific information.

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[82] COP CBD, Report of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/5/23 (2000), 103 (Decision V/6) and COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Seventh Meeting: VII/11 Ecosystem Approach, UN Doc. UNEP/CBD/COP/DEC/VII/11 (2004).

[83] COP CBD Decision X/29 (note 51), 4 (para. 13(h)).

[84] Agenda 21, Ch. 17.87.

[85] Arts. XI (5) and XVI Constitution of the Food and Agriculture Organization of the United Nations, 16 October 1945, available at: http://www.fao.org/docrep/meeting/022/k8024e.pdf.

[86] For further information, *cf.* the website of the FAO Fisheries and Aquaculture Department which provides statistics and information on fisheries: http://www.fao.org/fishery/topic/2017/en.

[87] See for an overview on fishery organizations specialized in migratory species, *Owen* on Annex I.

9. Associated Species

28 Art. 61 is not solely concerned with the conservation of target species. Coastal States are also obliged to take into account the effect of fishing on associated or dependent species (→ Art. 61 (4)). These words have been criticized as '[having] no firm, generally accepted usage and [being] vague in nature'[88] and for qualifying these aspects as mere considerations subject to use concerns.[89] Nonetheless, it is suggested that they should be interpreted broadly, particularly in light of the obligation found in Part XII of the Convention whereby States must take measures to 'protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life' (→ Art. 194 (5)).[90] In other words, it can generally be said that the coastal State must apply the ecosystem approach to its conservation and management measures. This position is supported by interpreting the Convention in light of other developments in international environmental law. In particular, the ecosystem approach to marine resource management is recommended in consensus decisions adopted by the CBD Conference of the Parties,[91] notably the CBD work programme on marine and coastal biodiversity which calls for the identification of key variables or interactions, for the purpose of assessing and monitoring: first, components of biological diversity; second, the sustainable use of such components; and, third, ecosystem effects[92] The ecosystem approach is also stressed by the FAO Code of Conduct[93] and was adopted as a global goal by the World Summit on Sustainable Development in 2002.[94] The principle is elaborated in other more specific instruments such as the International Plan of Action on Seabirds and the International Plan of Action on Bycatch and Discards. These instruments would qualify as generally recommended international minimum standards and they need to be taken into account by coastal States in accordance with Art. 61 (3).

29 One practical outcome of the ecosystem approach is that the coastal State may set an allowable catch not only for species which are directly targeted by a fishery, but also for associated species or so-called by-catch. To this end, Art. 61 (4) mandates coastal States to 'take into consideration' effects on associated or dependent species 'with a view to managing or restoring populations of [these] species above levels at which their reproduction may become seriously threatened.' This position is supported by the International Guidelines on Bycatch Management and Reduction of Discards which lists 'limits and/or quotas on bycatches' amongst the measures that can be taken by States in this regard.[95] The UN General Assembly has urgently called upon States to 'develop and implement effective management measures to reduce the incidence of catch of non-target species, including utilization of selective fishing gear, where appropriate.'[96] Parties to the Convention on Migratory Species urged to assess the risk of bycatch arising from their gillnet fisheries, as it relates to migratory species, and increase efforts to collaborate with regional fisheries

[88] *Attard* (note 30), 154.
[89] *Barnes* (note 31), 244.
[90] *Markowski* (note 26), 30–31.
[91] COP CBD Decision IV/5 (note 48), 84, 85 (Annex, para. 2).
[92] *Ibid.*
[93] FAO, International Guidelines on Bycatch Management and Reduction of Discards (2011), 13 (para. 7.3). The Guidelines were endorsed by the FAO Committee on Fisheries at its 29th session in February 2011, see FAO, Report of the Twenty-Ninth Session of the Committee on Fisheries, FAO Doc. FIPI/R973 (2011), 8–9 (para. 50).
[94] Plan of Implementation of the World Summit on Sustainable Development (note 35), 23 (para. 30(d)) and follow-up by GA Res. 65/37 of 7 December 2010, para. 111.
[95] COP CBD Decision V/6 (note 82); COP CBD Decision VII/11 (note 82).
[96] GA Res. 66/68 of 6 December 2008, para. 84.

management organizations (RFMOs) in this regard[97] and they have also adopted action plans with the aim of reducing bycatch in relation to specific migratory species, including sharks[98] and sea turtles.[99]

10. Outlook

Although international monitoring of coastal States' implementation of Art. 61 has not been very systematic, in 2010 CBD parties established a global target that may contribute to closer international scrutiny of State practice in this respect: the target provides that by 2020 all fish is managed and harvested sustainably, legally and applying the ecosystem approach, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits.[100] To this end, CBD parties are called upon to ensure the sustainability of fisheries, by managing the impacts of fisheries on species and the wider ecosystem through implementing the ecosystem approach; minimizing the detrimental impacts of fishing practices; mitigating and managing by-catches sustainably and reducing discards, in order to attain a sustainable exploitation level of marine fishery resources and thereby contributing to a good environmental status in marine and coastal waters; and integrating climate change considerations in that context.[101] **30**

Article 62
Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.

2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, inter alia, to the following:

[97] COP CMS, Bycatch of CMS-Listed Species in Gillnet Fisheries, UN Doc. UNEP/CMS/Resolution 10.14 (2011).

[98] See COP CMS, Memorandum of Understanding on the Conservation of Migratory Sharks, UNEP Doc. CMS/Sharks/Outcome 1.2 (2012), Annex 3 (Conservation Plan).

[99] See Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia Conservation and Management Plan (2009); Conservation and Management Plan for Marine Turtles of the Atlantic Coast of Africa (2008); Single Species Action Plan for the Loggerhead Turtle (Caretta caretta) in the South Pacific Ocean (2014).

[100] COP CBD Decision X/2 (note 53), 6 (Annex).

[101] COP CBD Decision X/29 (note 51), 12–13 (paras. 64–65, 67).

(a) **licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;**
(b) **determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;**
(c) **regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;**
(d) **fixing the age and size of fish and other species that may be caught;**
(e) **specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;**
(f) **requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;**
(g) **the placing of observers or trainees on board such vessels by the coastal State;**
(h) **the landing of all or any part of the catch by such vessels in the ports of the coastal State;**
(i) **terms and conditions relating to joint ventures or other cooperative arrangements;**
(j) **requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;**
(k) **enforcement procedures.**

5. Coastal States shall give due notice of conservation and management laws and regulations.

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Documents: European Parliament Directorate-General for Internal Policies, The Role of China in World Fisheries (2012); FAO, State of the World Fisheries and Aquaculture (2010); FAO, Code of Conduct on Responsible Fisheries (1995); FAO, Report of the Expert Consultation on the Conditions of Access to the Fish Resources of the Exclusive Economic Zone, Doc. FIPP/R293 (1983); FAO, Voluntary Guidelines for Securing Small-scale Fisheries in the Context of Food Security and Poverty Eradication (2014); UN Declaration on the

Rights of Indigenous Peoples, GA Res. 61/295 of 13 September 2007; UN Special Rapporteur on the Right to Food, Interim Report on the Right to Food, UN Doc A/67/268 (2012)

Cases: *Dispute Concerning Filleting in the Gulf of St Lawrence* (France *v.* Canada), Award of 17 July 1986, ILR 82, 590; ICJ, *Fisheries Jurisdiction Case* (Federal Republic of Germany *v.* Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 175; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10; ITLOS, *The M/V 'Virginia G' Case* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, available at: http://www.itlos.org/index.php?id=171; ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/; PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, available at: https://www.pcacases.com/web/view/7

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I. Purpose and Function

Art. 62 provides complementary obligations concerning the exercise of coastal States' sovereign rights for the purpose of sustainably managing the living natural resources in the exclusive economic Zone (EEZ) (→ Art. 56 (1)(a)). Whilst Art. 61 sets out the obligation to conserve fish stocks, Art. 62 focuses on economic and equitable considerations arising from the recognition that fish are a valuable resource which should not be squandered. It was a common position at UNCLOS III that '[t]he waste of biological resources which would result from [excluding other non-coastal States from fishing in the EEZ] could not be justified at a time when there was a world shortage of protein.'[1] Since the conclusion of UNCLOS, fish has become an even more important source of food for many people. According to the Food and Agriculture Organization (FAO), marine capture fisheries provided about 115 million tonnes of fish for human consumption in 2008 and '[g]lobally, fish provides more than 1.5 billion people with almost 20 percent of their average per capita intake of animal protein, and 3.0 billion people with at least 15 per cent of such protein.'[2] It is therefore vital that the fisheries regime continues to allow people to have access to this source of nutrition. It is this purpose which is served by the concept of optimum utilization. **1**

The underlying function of Art. 62 is to allow other States to have access to fish stocks if the coastal State cannot harvest those stocks itself. It therefore acts as a balance against the allocation of EEZs to coastal States[3]. The objective of optimum utilization is 'without prejudice' to Art. 61 which means that this objective does not remove the need for a State to set an allowable catch based upon, *inter alia*, the conservation status of a fish stock. Rather Art. 62 regulates *access* to the allowable catch. Art. 62 introduces an obligation for the coastal State to calculate its own harvesting capacity in order to determine whether there is a surplus in the allowable catch. Art. 62 then indicates both the way in which the coastal State should allocate the surplus of the allowable catch and the conditions which may be attached to access to living resources in its EEZ. Art. 62 must be read in connection with Arts. 69 and 70 **2**

[1] Statement of Lapointe (Canada), Second Committee UNCLOS III, 29th Meeting, UN Doc. A/CONF.62/C.2/SR.29 (1974), OR II, 224, 225. See also FAO, Report of the Expert Consultation on the Conditions of Access to the Fish Resources of the Exclusive Economic Zone, Doc. FIPP/R293 (1983), para. 10.

[2] FAO, State of the World Fisheries and Aquaculture (2010), 3.

[3] For further information, see *Proelss* on Art. 56.

which deal with the particular rights of land-locked and geographically disadvantaged States in relation to the living resources of the EEZ.

II. Historical Background

3 The provisions on access to fish stocks and the allocation of fishing rights developed alongside the general framework for fisheries management in the EEZ.[4] Once it had been agreed that coastal States would have certain rights to manage fish stocks in their adjacent waters, it became necessary to address the extent of those rights and whether other States would have any access to fish in the EEZ at all. As noted above, many States were concerned about the need to maximize catches in order to satisfy rising demands for food. An early proposal by the United States thus provided that

> 'in order to assure the maximum utilization and equitable allocation of coastal and anadromous resources, the coastal State […] may reserve to its flag vessels that portion of the allowable annual catch they can harvest [and] the coastal State shall provide access by other States, under reasonable conditions, to that portion of the resources not fully utilized by its vessels […].'[5]

Whilst there was little disagreement amongst delegates over the principle of access for other States to the surplus of the allowable catch, there were divergent opinions on which States should have access to fish stocks and whether the Convention should establish a system of hierarchy. The US proposal cited above proposed that priority should be given to 'States that have traditionally fished for a resource' followed by 'other States in the region, particularly landlocked States and other States with limited access to the resources, with whom joint or reciprocal arrangements had been made.'[6] Thus, they sought to preserve the status quo prior to the establishment of the EEZ, including their own distant-water fishing fleet. Unsurprisingly, this position was shared by other States which had traditionally engaged in distant water fishing activities. For instance, the Eastern European Socialist States suggested that priority should be given to '[S]tates which have borne considerable material and other costs of research, discovery, identification and exploitation of living resource stocks or which have been fishing in the region involved' followed by 'developing countries, land-locked countries, countries with narrow access to the sea or with narrow continental shelves, and countries with very limited living resources', with any other surplus going to 'all other States without discrimination'.[7] In contrast, other States proposed giving priority to developing land-locked States and geographically disadvantaged States.[8] The compromise position that was adopted in the negotiating text required the coastal State to 'take into account all relevant factors', albeit with no particular priority.[9] However, not all States were satisfied with this compromise and the issue remained a point of controversy on the agenda of the Conference.

4 The negotiation of Art. 62 was closely connected with the question of the rights of land-locked and geographically disadvantaged States more generally (→ Art. 69; Art 70). As the issue remained unresolved by the seventh session of the Conference in 1978, it was sent to a special negotiating group under the chairmanship of Satya Nandan of Fiji. He proposed an amendment to the draft text of Art. 62, providing that the coastal State should have

[4] For further information on the development of fisheries in the EEZ, *cf. Harrison/Morgera* on Art. 61 MN 5 *et seq*.

[5] Sea-Bed Committee, United States: Revised Draft Fisheries Article, UN Doc. A/AC.138/SC.II/L.9 (1972), 2.

[6] *Ibid.* See also Second Committee UNCLOS III, United States of America: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47 (1974), OR III, 222.

[7] Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on the Economic Zone, UN Doc. A/CONF.62/C.2/L.38 (1974), OR III, 214–216.

[8] See Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 627.

[9] UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 160 (Article 51).

'particular regard' to the interests of land-locked and geographically disadvantaged States, especially the developing States in those categories.[10] The formula was inserted into the Informal Composite Negotiating Text (ICNT) at the eighth session of the Conference in 1978. Despite this change, the land-locked and geographically disadvantaged States continued to express concern that the negotiating text did not meet their needs.[11] These States made further proposals for amendment, but none of them gained sufficient support to justify altering the draft negotiating text. By this stage modifications to the ICNT could only be made if they benefited from 'widespread and substantial support prevailing in the Plenary'.[12] Whilst minor drafting changes were made to what would become Art. 62 in the final sessions of the Conference, the substance of this provision reflected the compromise that had been suggested by NANDAN in 1978.

III. Elements

1. 'The coastal State shall promote the optimum utilization'

The laconic provision in Art. 62 (1) clarifies that coastal States have an obligation to promote the objective of 'optimum utilization' of the living resources in the EEZ. The term 'optimum utilization' is not expressly defined by the Convention. Considering the provision in its context, however, it is clear that this phrase is *not* to be interpreted as the full utilization of the resource.[13] Rather, the language of Art. 62 makes clear that it is subordinated to Art. 61 and it follows that 'optimum utilization' refers to the optimum utilization of the allowable catch which has been set in accordance with Art. 61. Thus, Art. 62 does not override the obligation on the coastal State to pursue the objective of promoting the maximum sustainable yield. 5

2. 'shall determine its capacity to harvest […] access to the surplus'

According to Art. 62 (2), 'the coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone' and 'where [it] does not have the capacity to harvest the entire allowable catch', it shall 'give other States access to the surplus of the allowable catch'. The calculation of the surplus is therefore critical for the application of the provisions relating to the idea of optimum utilization and the allocation of fishing rights in the EEZ to other States. 6

Whilst there is a definite obligation on a coastal State to determine its capacity to harvest the living resources of the EEZ, it would appear that the coastal State has a broad discretion in doing so. The concept of 'harvesting capacity' is left undefined by the Convention. Perhaps the most obvious way of calculating harvesting capacity is by reference to those nationals of the coastal State involved in harvesting fish stocks in the EEZ. Nationals clearly include natural persons but it may also be interpreted to include fishing vessels flagged in the coastal State (→ Art. 91), regardless of the nationality of the crew.[14] The consequence of 7

[10] UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Resumed Seventh Session, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 88 (Explanatory Memorandum on the Proposals (NG4/9/Rev.2) by the Chairman of Negotiating Group 4 – Ambassador Satya Nandan).

[11] Nordquist/Nandan/Rosenne (note 8), 633–634.

[12] UNCLOS III, Organization of Work: Decisions Taken by the Conference at its 90th Meeting on the Report of the General Committee, UN Doc. A/CONF.62/62 (1978), OR IX, 6, 8 (para. 10).

[13] *David Freestone*, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 287, 301.

[14] This is the interpretation of nationals adopted in the 1958 Convention on Fishing and the Conservation of the Living Resources of the High Seas, *cf.* its Art. 14: 'the term "nationals" means fishing boats or craft of any size having the nationality of the State concerned, according to the law of that State, irrespective of the nationality of the members of their crews'.

this wider interpretation is that it opens up the possibility for a coastal State to artificially increase its harvesting capacity by allowing nationals of another State to fish in vessels flying their flag. Yet, such a practice would be completely in accordance with international law. For example, in the *Dispute Concerning Filleting within the Gulf of Lawrence*, the arbitral tribunal held that

> 'the right for a State to determine through its legislation the conditions for the registering of ships in general and fishing vessels in particular falls within the sole competence of the said State, to the extent that there is a substantial link between the State and the ship and that the State of the flag actually exercises its jurisdiction and control over the ships flying its flag.'[15]

In that case, the tribunal refused to look beyond the fact of registration to determine the origins of the vessel. More recently, the International Tribunal for the Law of the Sea has confirmed in *The M/V 'Saiga' (No. 2) Case* that

> 'the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more 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.'[16]

In other words, genuine link does not require the vessel to be owned or operated by a national of the flag State. It follows that

> 'each coastal [S]tate is free to introduce foreign capital and to obtain technical assistance from foreign nations, and it is also free to allow any foreign nations or foreign enterprises it chooses to engage in fishing activities through concessionary agreements and to secure the maximum of the total allowable catch for itself.'[17]

Oda has criticized this aspect of Art. 62 because 'the principle of access […] to the surplus will eventually become meaningless.'[18] The only apparent restriction on the coastal State is that it acts in good faith (→ Art. 300)[19], although it must be asked whether or not this is a sufficient safeguard against abuse of the right by coastal States.

8 It is not only commercial fisheries which must be taken into account when calculating the harvesting capacity. Indeed, international law may require coastal States to take particular care to protect subsistence fisheries. According to the FAO Code of Conduct[20], States are called upon to 'guarantee where appropriate, preferential access to subsistence, artisanal and small-scale fisherman to traditional fishing grounds.'[21] Furthermore, taking into account human rights instruments and the Convention on Biological Diversity, States must arguably ensure that indigenous peoples and local communities benefit from the management system and are allocated a fair share of fishing rights in order to adequately protect subsistence

[15] *Dispute Concerning Filleting in the Gulf of St Lawrence* (France *v.* Canada), Award of 17 July 1986, ILR 82, 590 (para. 27).

[16] ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgement of 1 July 1999, ITLOS Reports (1999), 10, para. 83.

[17] *Shigeru Oda*, Fisheries under the United Nations Convention on the Law of the Sea, AJIL 77 (1983), 739, 734. See also *David J. Attard*, The Exclusive Economic Zone in International Law (1987), 159–160.

[18] *Ibid.*, 744.

[19] See also *Dispute Concerning Filleting within the Gulf of St Lawrence* (note 15), para. 27: 'It should therefore be concluded that the registration of trawlers referred to in Art. 4(b) [of the 1972 Treaty between Canada and France], effected in conformity with the provisions of French legislation, was considered by the Parties, together with the principle of good faith which is of necessity a principal factor in the performance of treaties, as affording a sufficient guarantee against any risk of the French Party exercising its rights abusively.' See also *Attard* (note 17), 160.

[20] FAO, Code of Conduct on Responsible Fisheries (1995).

[21] Art. 6.18 FAO Code of Conduct.

fishing activities and sustainable customary practices.[22] Some States have adopted legislation which explicitly accords fishing rights to subsistence fishing communities.[23]

It appears that a coastal State can make a unilateral determination of its harvesting capacity and there is no right for other States to participate in this process.[24] Nor is this likely to be an issue that can be challenged under the dispute settlement procedures in the Convention (→ Part XV) as Art. 297 (3)(a) provides that 9

> 'the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.'[25]

Such disputes may only be submitted to conciliation in accordance with Annex V, Section 2 of the Convention if it is alleged that a coastal State has 'arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing.'[26] This provision confirms the broad discretion that coastal States have in determining their harvesting capacity, as decisions of a conciliation commission are not binding.[27]

It also emerges from practice that the concept of surplus may have 'played a very limited role', at least in relation to the European Union's access agreements[28]: with regards to access to EU waters by third-country vessels, this was permitted on a reciprocal basis to maintain existing fishing patterns even if no surplus catch was available in EU waters; and with respect to EU vessels access to third-country waters, access agreements were concluded without being explicitly based on access to the surplus but rather other criteria.[29] 10

3. 'In giving access to other States […] the coastal State shall take into account […]'

If a coastal State determines that there is a surplus, it must decide how to allocate that surplus to other States. In this regard, Art. 63 (3) provides that in allocating the surplus of its allowable catch, 'the coastal State shall take into account all relevant factors'. The provision lists several such factors, including the significance of the living resources to the local economy of the coastal State and its other national interests, the rights of land-locked and geographically disadvantages States (→ Art. 69; Art. 70), the requirements of developing States, and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks. It is clear that this list is illustrative and other relevant factors can be taken into account.[30] Of perhaps greater significance is the lack of any explicit hierarchy. 11

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[22] Art. 1 (2) International Covenant on Economic, Social and Cultural Rights; Art. 26 UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 of 13 September 2007; FAO, Voluntary Guidelines for Securing Small-scale Fisheries in the Context of Food Security and Poverty Eradication (2014); and Art. 10 (c) of the Convention on Biological Diversity, which provides that 'each Contracting Party shall, as far as possible and appropriate, […] protect and encourage customary usage of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements'. See discussion in: UN, Report of the Special Rapporteur on the Right to Food, UN Doc. A/67/268 (2012) and *Marion Markowski*, The International Law of EEZ Fisheries (2010), 89–90 and 100–101.

[23] See South Africa's Marine Living Resources Act 1998, as discussed in *Emma Witbooi*, Fishing Rights: A New Dawn for South Africa's Marine Subsistence Fishers, Ocean Yearbook 19 (2005), 74–104.

[24] *Attard* (note 17), 159 and 165.

[25] Emphasis added.

[26] Art. 297 (3)(b)(ii). For further information, see *Serdy* on Art. 297 MN 20–23.

[27] Art. 7 (2) Annex V UNCLOS. Moreover, Art. 8 of Annex V confirms that parties to a dispute have the right to reject the proposals of the Conciliation Commission.

[28] *Robin R. Churchill/Daniel Owen*, The EC Common Fisheries Policy (2010), 330.

[29] *Ibid.*

[30] Nordquist/Nandan/Rosenne (note 8), 637.

As noted above, several proposals were made at UNCLOS III to introduce a hierarchy but none were successful. The result is, in the words of one author, that the coastal State has 'the broadest discretion to decide to whom and under what conditions access will be granted'.[31] In this regard, Orrego Vicuña notes that 'it is precisely because this discretionary power is linked to the sovereign and exclusive nature of the coastal State's rights that the chief criterion that will guide the granting of access will be its own national interest.'[32]

12 One of the effects of Art. 62 (3) is to extinguish any historical rights to fish that other States may have previously had in coastal waters prior to the establishment of the EEZ. This differs from the position adopted by the International Court of Justice in the *Fisheries Jurisdiction Case* (Federal Republic of Germany *v.* Iceland) where a condition for Iceland extending its jurisdiction was to recognize the rights of those States which had historically fished in the vicinity of its coast.[33] In contrast, there is no automatic right under UNCLOS to continue fishing in waters where fishing has traditionally taken place. Rather, such States are but one category of States which may be permitted access to the surplus under Art. 62 (3). This interpretation of Art. 62 was confirmed by the Tribunal in the *South China Sea Arbitration*, which noted that 'the notion of sovereign rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources.'[34]

13 The only possible indication of any hierarchy in Art. 62 (3) is the requirement that the coastal State should have 'particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein'. Arts. 69 and 70 deal with the rights of land-locked and geographically disadvantaged States in relation to the living resources of the EEZ. Yet, the cross-reference to these provisions falls short of granting a preference to land-locked and geographically disadvantaged States in allocating the surplus of the allowable catch. Taking into account the language of the provision, as well as the breadth of the discretion of coastal States, it would seem reasonable to conclude that

> 'the variety of considerations which the coastal State may entertain in giving other States the right of access to the surplus of the living resources of its exclusive economic zone confirms that this right of access is a relative right'.[35]

Moreover, in practice, Attard has observed that 'there is no firm evidence to support this view that the consideration accorded to the rights of [land-locked and geographically disadvantaged States] referred to in Article 62 (3) is taken into account by [S]tates.'[36]

14 Indeed, there is a question whether the surplus must be allocated at all by the coastal State. The inclusion of 'the importance of the living resources of the area to the economy of the coastal State', as well as its 'other national interests', in the list of factors to be taken into account by the coastal State suggests that there may be situations where the coastal State might legitimately decide not to allocate the surplus to another State, at least temporarily. It is these factors which would explain the practice of some States in withholding part of the allowable catch as a reserve against the possible increase in their harvesting capacity at a later stage in the fishing season. Whilst some commentators have questioned the legality of such a

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[31] *Francisco O. Vicuña*, The Exclusive Economic Zone: Regime and Legal Nature under International Law (1989), 54.

[32] *Ibid.*, 54–55.

[33] ICJ, *Fisheries Jurisdiction Case* (Federal Republic of Germany *v.* Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 175, para. 61.

[34] PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, para. 243, available at: https://www.pcacases.com/web/view/7. See also paras. 800–804, in which the Tribunal distinguishes the position of customary fishing rights in the territorial sea and archipelagic waters on the one hand and in the exclusive economic zone on the other hand.

[35] Nordquist/Nandan/Rosenne (note 8), 636–637 (MN 62.16(g)).

[36] *Attard* (note 17), 169.

practice[37], it can be explained on the basis of the importance of economic factors or other national interests which are legitimate factors for the coastal State to take into account in deciding how to allocate its surplus.

15 Current practice indicates that coastal States' laws do not specify any factors to be taken into account in allocating the surplus,[38] so that it is left entirely to negotiations with States seeking access to the EEZ. Negotiations may take place with the flag State or in some circumstances the coastal State may negotiate directly with fishing operators. In the case of State-to-State negotiations, it is common for the States concerned to conclude an access agreement. There are two principal types of such agreement.[39] Firstly, agreements may provide a medium term framework for fisheries cooperation which set general principles but require specific decisions concerning access to be made on an annual basis, either by agreement between the parties or unilaterally by the coastal State. Alternatively, an access agreement may be a self-contained agreement which specifies the details of the access offered by the coastal State in the agreement itself, including the number of vessels authorized and the payment to be made.

16 In the majority of cases, developing States' EEZ are accessed by distant-water fishing fleets from developed countries, so questions have emerged as to the unequal bargaining power in the negotiations on access. In particular the General Assembly has called for access agreements with developing countries 'on equitable and sustainable basis' with a view to assisting the realization of the benefits from the development of fisheries resources in developing States.[40]

17 As a major distant water fishing entity, the EU provides an important source of practice concerning the conclusion of access agreements. In the past, the EU has simply entered into agreements to pay coastal States in return for access to their fish stocks. The more recent practice of the EU reflects a more serious regard for the needs of developing countries to benefit from the arrangement and general cooperation agreements between the EU and developing countries increasingly seek to promote the sustainable utilization of fish stocks within the coastal State. For instance, in the Cotonou Agreement between the EU and its Member States, and 77 African, Caribbean and Pacific (ACP) countries, parties – which include 'nearly all developing States' with which the EU concluded access agreements[41] – 'expressed their willingness' to negotiate fisheries agreements aimed at guaranteeing 'sustainable' and mutually satisfactory conditions for fishing activities in ACP States.[42] In its 2010 version, the Cotonou Agreement further provides that, with reference to marine resources within the EEZs of ACP States, cooperation aims at further developing these sectors in ACP countries to increase the associated social and economic benefits in a sustainable manner in light of the contribution of these sectors to employment creation, revenue generation, food security, livelihoods of rural and coastal communities and poverty reduction. The agreement identifies in detail the cooperation activities to be undertaken to this end, including: development and implementation of national and regional sustainable aquaculture and fisheries development strategies and management plans; mainstreaming of aquaculture and fisheries into national and regional development strategies; and the development of joint ventures for investment in the sector. Notably, the

[37] *John W. Kindt*, The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species, and the Highly Migratory Species, Syracuse Journal of International Law and Commerce 11 (1984), 9, 30: 'By precluding foreign fishermen from catching the available surplus of U.S fish, this provision appears to violate the letter and spirit of article 62 of the LOS Convention' See the more nuanced comments of *William T. Burke*, U.S. Fishery Management and the New Law of the Sea, AJIL 76 (1982), 24, 39.

[38] *Markowski* (note 22), 67.

[39] See *Jean Carrox/Michel Savini*, The Practice of Coastal States Regarding Foreign Access to Fishery Resources, in: FAO Fish Resources Report (note 1), Annex 2.

[40] GA Res. 61/105 of 6 March 2007, para. 100.

[41] *Churchill/Owen* (note 28), 345.

[42] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, Signed in Cotonou on 23 June 2000, OJEU 2000, L 317/3 (Cotonou Agreement). See Art. 23 of its 2010 revision at: http://ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf.

new provision anticipates a high-level consultation, including at ministerial meetings, upon joint agreement with a view to developing, improving or strengthening ACP-EU development cooperation in this sector. It also requires that any fisheries agreements that may be negotiated between the EU and ACP States pay due consideration to consistency with development strategies in this area.

18 Turning to the EU's practice concerning fisheries access agreements themselves, the EU has attempted to shift from a so-called practice of 'pay, fish and leave' bilateral access agreements to a new generation of 'Fisheries Partnerships Agreements', launched in 2002, that aims to provide a legal basis through policy dialogue about sensitive sustainability issues with developing coastal States.[43] These agreements thus aim to strengthen cooperation between the EU and third States in the promotion of sustainable fisheries in the third-State waters through the joint monitoring of the State of fisheries resources by a joint scientific committee and consultations on sustainable fisheries measures.[44] According to these agreements, the EU financial contribution is to be divided between payment for access and support for fisheries management activities in the coastal State, with a defined percentage of payment to be devoted to the promotion of conservation of resources and sustainable development in the coastal State.[45] These agreements, however, have been criticised for their limited attention to subsistence fisheries in coastal States.[46]

19 Although it is not a party to the Convention, the practice of the United States concerning allocation of fisheries surplus also provides an interesting illustration of the manner in which this power can be used. The relevant domestic legislation explicitly provides that 'allocations of [the total allowable level of foreign fishing] are discretionary'[47] and 'the Secretary of State […] determines the allocation among foreign nations of fish species and species groups.'[48] National laws dictate a number of considerations to be taken into account when determining access to fish stocks in United States waters, which not only include issues mentioned in the Convention, such as 'whether, and to what extent, the fishing vessels of such nation have traditionally engaged in fishing in such fishery'[49] and 'whether, and to what extent, such nation requires the fish harvested from the exclusive economic zone for its domestic consumption'[50], but also issues related to trade[51] and cooperation in the enforcement of fisheries regulations.[52] Indeed, the so-called Packwood Amendment requires the Secretary of State to reduce access to US fish stocks by 50 % if a foreign fishing vessel is flagged in a country which is certified as 'conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling.'[53] The threat of certification and withdrawal of access to fisheries resources was used by the United States in the 1980s as a means to persuade Japan to withdraw its reservations to the moratorium on commercial whaling.[54] This power was subsequently exercised when Japan commenced its scientific whaling programme in 1987, but as noted by one commentator, 'the action was less significant as it appeared [as] the U.S. fishery-management councils already had concluded that the fish stocks in the U.S. fishery-conservation zone were too low [and] Japan had consequently not been allocated a quota

[43] See generally, *Churchill/Owen* (note 28); reference to Fisheries Partnership Agreements can be found in the Art. 53 (1) Cotonou Agreement.

[44] *Churchill/Owen* (note 28), 346–348.

[45] *Ibid.*, 348.

[46] *John Vogler/Charlotte Bretherton*, The European Union as a Sustainable Development Actor: the Case of External Fisheries Policy, Journal of European Integration 30 (2008), 401.

[47] § 600.516(a) Magnuson-Stevens Fishery Conservation and Management Act (US).

[48] § 600.517 Magnuson-Stevens Fishery Conservation and Management Act (US).

[49] 16 US Code § 1824(e)(1)(E)(vi).

[50] 16 US Code § 1824(e)(1)(E)(iv).

[51] 16 US Code § 1824(e)(1)(E)(i) and (ii).

[52] 16 US Code § 1824(e)(1)(E)(iii).

[53] 16 US Code § 1824(e)(2).

[54] See *Sean D. Murphy*, United States Practice in International Law, vol. 1 (2011), 171–172.

for 1988.'[55] Nevertheless, this example illustrates the exercise of fisheries quotas as a tool to promote a range of policy objectives, which would seem to be compatible with the provisions of the Convention.

20 The United States has also used fisheries access agreements to the benefit of its distant-water fishing fleet. The most important of these agreements is the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America.[56] The treaty applies to the waters of several States in the Pacific, including Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, the Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Solomon Islands, Tonga, Tuvalu, Vanuatu, and Western Samoa. Under the agreement, US fishing vessels are permitted to engage in fishing in the waters of the Pacific Island parties in accordance with the terms and conditions contained in annexes to the treaty[57], whereas the United States agrees to 'cooperate with the Pacific Island parties through the provision of technical and economic support to assist the Pacific Island parties to achieve the objective of maximizing benefits from the development of their fisheries resources.'[58] The economic benefits include a lump-sum access fee[59] and the treaty also specifies that US vessels should use, as appropriate, the canning, transshipment, slipping and repair facilities located in the Pacific Island parties, purchase as appropriate equipment and supplies form these parties, and employ as appropriate nationals from the parties on board US fishing vessels.[60] The treaty first entered into force in 1988 and its application was provisionally extended on a number of occasions. A revised version of the treaty was agreed in principle in June 2016, although it is subject to further review before it can be opened for signature.[61]

21 China, Korea and Japan are also all significant distant-water fishing nations but information concerning their practice is more difficult to come by as access agreements are not necessarily published. Generally speaking, one source suggests that 'most of this access is based on the payment of license fees by individual vessels to coastal countries, rather than a broad country-to-country agreement.'[62]

22 Like other discretionary decisions of the coastal State relating to EEZ fisheries, decisions concerning the allocation of the surplus are not subject to binding dispute settlement (→ Art. 297 (3)(a)).

4. 'Nationals of other States […] shall comply with […] laws and regulations'

23 When a coastal State does allocate fishing rights to other States in the EEZ, the Convention leaves no doubt that the coastal State maintains the right to regulate the foreign vessels fishing in its waters. In particular, Art. 62 (4) makes clear that nationals of other States must comply with the conservation measures adopted by the coastal State under Art. 61 and with 'the other terms and conditions established in the laws and regulations of the coastal State'. The paragraph goes on to list a series of subjects which may be regulated by the coastal State, including licensing, quotas, and other specific regulations relating to fishing vessels and fishing gear.

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[55] *Ibid.*, 172.

[56] Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America, 2 April 1987, UNTS 2176, 93.

[57] Art. 3 (1) Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America.

[58] Art. 2 (1) Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America.

[59] *Stephen Mbithi Mwikya*, Fisheries Access Agreements: Trade and Development Issues (2006), 7.

[60] Art. 2 (2) Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America.

[61] See Press Release from the US Department of State, 29 June 2016, available at http://www.state.gov/r/pa/prs/ps/2016/06/259201.htm.

[62] *Mwikya* (note 59), 8. For further information, see *supra*, MN 9.

24 The inclusion of the term '*inter alia*' makes clear that this list is illustrative and coastal States may adopt other forms of law and regulations, provided they are consistent with the Convention. At the same time, the coastal States powers are not unlimited. As noted by the arbitral tribunal in the *Dispute Concerning Filleting in the Gulf of St Lawrence*, 'although the list is not exhaustive, it does not appear that the regulatory authority of the coastal State normally includes the authority to regulate subjects of a different nature than those described'.[63] In that case, there was a dispute concerning whether Canada could regulate the filleting of fish by French freezer trawlers in the Gulf of St Lawrence. The tribunal indicated that, in its opinion, 'the regulation of filleting at sea cannot a priori be justified by coastal State powers under the [UNCLOS].'[64] This interpretation of the Convention has been criticized as being too restrictive by many commentators[65] and it arguably gives too little weight to the fact that the Convention permits a broad range of coastal State regulations including some regulations that do not relate directly to fishing activity itself, such as requiring that all or part of the catch is landed in the ports of the coastal State(→ Art. 62 (4)(h)). Nevertheless, the point that coastal State powers in the EEZ are not unlimited is undoubtedly correct (→ Art. 56). Indeed, more recent tribunals appear to have adopted a broader understanding of the right to regulate living resources in the EEZ. Drawing upon relevant State practice and international treaties, the International Tribunal for the Law of the Sea (ITLOS) confirmed in *The M/V 'Virginia G' Case* that the power to regulate fishing under Part V of the Convention extends to the regulation of bunkering of fishing vessels.[66]

25 The precise terms and conditions attached to access will depend on the arrangements between the coastal State and the State requesting access. In some cases, such terms and conditions are negotiated between the two parties, whereas in other cases the terms and conditions are set unilaterally by the coastal State.[67] In the latter case, it may be against the requirement of good faith (→ Art. 300) if the coastal State's regulations in effect preclude other States from taking the surplus allocation. In other words, these requirements are expected to be reasonable and relate to legitimate conservation and management goals, taking into account alternative measures.[68]

26 Art. 62 (4)(a) makes a particular reference to 'the payment of fees and other forms of remuneration' which makes it clear that a coastal State can demand compensation for the right to fish in its EEZ. Whilst the Convention mentions 'compensation in the field of financing, equipment and technology relating to the fishing industry' (→ Art. 62 (4)(a), it is common practice for States to accept other forms of compensation that are not at all related to fishing.[69]

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[63] *Dispute Concerning Filleting within the Gulf of St Lawrence* (note 15), para. 52. See also *Carl A. Fleischer*, The Exclusive Economic Zone under the Convention Regime and in State Practice, in: Albert W. Koers/Bernard H. Oxman (eds.), The 1982 Convention on the Law of the Sea (1984), 241, 275: 'it seems reasonable to conclude that the regulatory powers of a coastal [S]tate cannot be unlimited. For example, it may not freely issue and enforce rules on the construction and equipment of foreign vessels that would make it impossible in practice to enjoy fishing rights existing under international law'. Nevertheless, Fleischer concludes that the regulatory authority of the coastal State is 'intended to be rather broad', *ibid.*, 276.

[64] *Dispute Concerning Filleting within the Gulf of St Lawrence* (note 15), para. 52.

[65] Indeed, the dissenting arbitrator in the case found that '[t]here is no doubt that, in the absence of any agreement or arrangement to the contrary, the coastal State may regulate processing, including filleting', *Dispute Concerning Filleting within the Gulf of St Lawrence* (note 15), Dissenting Opinion of Donat Pharand, para. 17. See also *Ted L. McDorman*, French Fishing Rights in Canadian Waters: The 1986 La Bretagne Arbitration, International Journal of Estuarine and Coastal Law 4 (1989) 52, 58–59; *William T. Burke*, Coastal State Fishery Regulation under International Law: A Comment on the La Bretagne Award of July 17, 1986, San DiegoLRev 25 (1988), 495, 502–503.

[66] ITLOS, *The M/V 'Virginia G' Case* (Panama *v.* Guinea-Bissau), Judgment of 14 April 2014, para. 217, available at: http://www.itlos.org/index.php?id=171.

[67] See FAO Fish Resources Report (note 1), para. 11.

[68] *Markowski* (note 22), 142–146.

[69] See e. g. *Attard* (note 17), 173–174. He gives the interesting example of the 1974 Mauritania/Greece Fisheries Agreement under which Greek vessels had to pay a fee based on tonnage and the Greek government also agreed to build a hotel. See also *Gerald Moore*, National Legislation for the Management of Fisheries under Extended Coastal State Jurisdiction, Journal of Maritime Law and Commerce 11 (1980), 153.

A major problem has arisen with the enforcement of laws and regulations against foreign fishing vessels. Generally, a foreign fishing vessel which has been allowed access to resources within the EEZ is subject to the full authority of the coastal State, subject to some limitations set out in Art. 73.[70] Indeed, 'in light of the special rights and responsibilities given to the coastal State in the [EEZ] under the Convention, the primary responsibility for taking the necessary measures to prevent, deter and eliminate [illegal, unreported and unregulated (IUU)] fishing rests with the coastal State.'[71] In practice, however, many developing coastal States do not have the financial or technical resources to effectively enforce their law and regulations and IUU fishing by foreign vessels is a significant issue.[72] In this regard, the EU's fisheries access agreements have been criticised for the failure of EU vessels to observe third States' fisheries legislation and applicable EU law.[73] While EU law on fisheries conservation applies to EU vessels fishing in third-State waters, including with regard to driftnets, shark finning and encircling of marine mammals with purse seine nets, it has been argued that in case of a conflict with the third State's laws, the latter would prevail.[74] The vessels of other distant fishing nations have also been criticized for IUU fishing.[75] The Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States expressly addresses this issue by specifically for continuing flag State responsibility. Art. 4 of that treaty provides that 'the Government of the United States shall take the necessary steps to ensure that nationals and fishing vessels of the United States refrain from fishing in the Licensing Area and in waters closed to fishing pursuant to Annex I, except as authorized in accordance with Article 3', including taking reasonable measures to assist the Pacific Island parties in investigations of any alleged breach of the treaty or bringing proceedings itself against the delinquent vessel. **27**

The ITLOS recently confirmed that flag States retain some responsibility under the Convention for ensuring compliance by their vessels with the laws and regulations adopted by the coastal State. In its *SRFC Advisory Opinion*, delivered on 2 April 2015, the Tribunal held that **28**

> 'article 62, paragraph 4, of the Convention imposes an obligation on States to ensure that their nationals engaged in fishing activities within the exclusive economic zone of a coastal State comply with the conservation measures and with the other terms and conditions established in its laws and regulations.'[76]

They clarified that this is a due diligence obligation, which requires the flag State to 'take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.'[77] The Tribunal identified a number of necessary measures, including ensuring that its vessels are properly marked, adopting legislation prohibiting its vessels from fishing in the EEZ of another state without authorization, and developing enforcement mechanisms to monitor and secure compliance with these laws, including sanctions that are 'sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.'[78] The explicit identification of this duty may go some way to addressing deficiencies in enforcement by the

[70] For further information, see *Harrison* on Art. 73.

[71] ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 106, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/.

[72] See European Parliament Directorate-General for Internal Policies, The Role of China in World Fisheries (2012), 72–73.

[73] *Churchill/Owen* (note 28), 348–349.

[74] *Ibid.*, 332–333.

[75] See e. g. The Role of China in World Fisheries (note 72), 72–73.

[76] *SRFC Advisory Opinion* (note 71), para. 123.

[77] *Ibid.*, para. 129.

[78] *Ibid.*, para. 138. See also *The South China Sea Arbitration* (note 34), paras. 740–744, supporting the existence of a due diligence obligation on flag states to control the activities of vessels flying their flag when fishing in the exclusive economic zone of another state. A closer reading reveals the Tribunal adopts a slightly different interpretation of Art. 62(4), which it finds 'imposes an obligation directly on private parties engaged in fishing […]' (para. 741).

coastal State, but it is also necessary to work out precisely how the responsibilities of flag State interface with the responsibilities of the coastal State in this context.

29 Art. 62 (5) requires the coastal State to give 'due notice' of conservation and management laws and regulations. It does not specify what form this due notice must take and it may presumably be satisfied by the publication of laws and regulations.[79]

Article 63
Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it

1. 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 organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

2. 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, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

Bibliography: *David H. Anderson*, Straddling and Highly Migratory Fish Stocks, MPEPIL, available at: http://www.mpepil.com; *David J. Attard*, The Exclusive Economic Zone in International Law (1987); *Kaare Bangert*, Fisheries Agreements, MPEPIL, available at: http://www.mpepil.com; *Kaare Bangert*, Fish Stocks, MPEPIL, available at: http://www.mpepil.com; *Donna R. Christie*, The Conservation and Management of Stocks Located Solely within the Exclusive Economic Zone, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 395–419; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Robin R. Churchill*, Managing Straddling Fish Stocks in the North-East Atlantic: A Multiplicity of Instruments and Regime Linkages – but How Effective a Management?, in: Olav Schram Stokke (ed.), Governing High Seas Fisheries: The Interplay of Global and Regional Regimes (2001); *David Freestone*, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 287–325; *James Harrison*, Making the Law of the Sea (2011); *Tore Henriksen*, Revisiting the Freedom of Fishing and Legal Obligations of States not Party to Regional Fisheries Management Organizations, ODIL 40 (2009), 80–96; *Ellen Hey*, The Regime for the Exploitation of Transboundary Marine Fisheries Resources (1989); *Moritaka Hayashi*, The Straddling and Highly Migratory Fish Stocks Agreement, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 55–83; *John W. Kindt*, The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species, and the Highly Migratory Species, SJILC 11 (1984), 9–46; *Barbara Kwiatkowska*, The High Seas Fisheries Regime: At a Point of No Return?, IJMCL 8 (1993), 327–358; *Jean-Jacques Maguire/Michael Sissenwine/Jorge Csirke/Richard Grainer/Serge Garcia*, The State of World Highly Migratory, Straddling and Other High Seas Fishery Resources and Associated Species: FAO Fisheries Technical Paper 495 (2006); *Marion Markowski*, The International Law of EEZ Fisheries (2010); *L. Dolliver M. Nelson*, Exclusive Economic Zone, MPEPIL, available at: http://www.mpepil.com.; *L. Dolliver M. Nelson*, The Development of the Legal Regime of High Seas Fisheries, in: Alan Boyle/David Freestone (eds.), International Law and Sustainable Development (1999), 113–134; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993)

Documents: European Commission, Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Certain Measures Directed to Non-Collaborating Countries for the Purpose of the Conservation of Fish Stocks, SEC(2011) 1576 final (2011); Secretary-General, The Status and Implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention for the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement) and Its Impact on Related or Proposed Instruments Throughout the United Nations System, with Special Reference to Implementation of Part VII of the

[79] The term 'due notice' is frequently used within the Convention, see e. g. → Arts. 51 (2), 60 (3), (5), 147 (2)(a).

Fish Stocks Agreement, Dealing With the Requirements of Developing States, UN Doc. A/58/215 (2003); UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9–479 (Agenda 21)

Cases: ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/; PCA (Arbitral Tribunal Constituted Under Annex VII UNCLOS), *Atlanto-Scandian Herring Arbitration* (The Kingdom of Denmark in Respect of the Faroe Islands/European Union), Termination Order of 23 September 2014, available at: http://www.pcacases.com/web/view/25; WTO, *European Union – Measures on Atlanto-Scandian Herring*, Joint Communication from Denmark in respect of the Faroe Islands and the European Union of 21 August 2014, WT/DS469/3

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I. Purpose and Function

Art. 63 singles out two groups of resources that do not occur exclusively within the exclusive economic zone (EEZ) of a single coastal State, namely transboundary stocks – that is stocks that occur within the EEZ of two or more coastal States and straddling stocks, i. e. stocks that occur both within the EEZ of the coastal State and in the adjacent high seas.[1] For these stocks, arrangements additional to the coastal State's measures (→ Art. 61) are required to ensure effective conservation and management.[2] Art. 63 sets out specific requirements concerning transboundary cooperation between coastal States, in relation to transboundary stocks, and between coastal and other States fishing straddling stocks in adjacent high seas. These obligations also apply to associated species. These obligations are considered 'part at least of the general principles of international law, if not of international custom'.[3] **1**

Both provisions contained in Art. 63 create an obligation to enter into negotiations (*pacta de negotiando*) rather than an obligation to reach an agreement (*pacta de contrahendo*); thus they require coastal States to 'enter into negotiations in good faith, respond to genuine attempts at negotiations, and to be prepared to modify their original positions.'[4] The International Tribunal for the Law of the Sea (ITLOS), classifying these as due diligence obligations, has also held that: **2**

[1] Note that the Convention does not use these terms. However, see *David H. Anderson*, Straddling and Highly Migratory Fish Stocks, MPEPIL, para. 2, available at: http://www.mpepil.com. For a discussion of the difference between biological and legal concepts of stocks, as well as the inconsistent use of the term stock (as opposed to species) in the Convention and other relevant international agreements, see *Kaare Bangert*, Fish Stocks, MPEPIL, paras. 1–6, available at: http://www.mpepil.com.

[2] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 641.

[3] *Marion Markowski*, The International Law of EEZ Fisheries (2010), 55.

[4] *Ellen Hey*, The Regime for the Exploitation of Transboundary Marine Fisheries Resources (1989), 116–118 and 158–159; *Markowski* (note 3), 51; Nordquist/Nandan/Rosenne (note 2), 646. See also ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 210 where the Tribunal says that this provision requires 'the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention', available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/ For further information on the concept of good faith, see *O'Brien* on Art. 300.

> 'the consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks'.[5]

Failure to comply could lead to international responsibility and it has been noted that:

> 'any dispute arising from the alleged failure to comply with the obligation under article 63, paragraph 1, of the Convention, unlike those disputes arising from the exercise of sovereign rights of the coastal State with respect to the living resources in its EEZ, can be submitted to the compulsory procedure under Part XV, section 2, of the Convention.'[6]

II. Historical Background

3 The problem of straddling fish stocks had already been recognized at UNCLOS I, and it received an innovative solution in the 1958 Convention on Fishing and the Conservation of the Living Resources of the High Seas (High Seas Fishing Convention). The High Seas Fishing Convention recognized that coastal States had a 'special interest' in the management of fish stocks in waters adjacent to their territorial sea[7], and it provided that

> 'any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months.'[8]

Such unilateral measures were under the conditions laid down in Art. 7 (2) High Seas Fishing Convention binding on other member States. At the same time, the High Seas Fishing Convention established a special procedure whereby other States could challenge any unilateral measures adopted by a coastal State through a special commission.[9] These provisions aimed to ensure an effective regime for the conservation of fish stocks in coastal waters and compatibility between measures taken by the coastal State and other fishing States. They were, however, highly controversial and the High Seas Fishing Convention received the lowest rate of acceptance amongst the instruments adopted at UNCLOS I.[10]

4 Even though States had agreed to extend the fisheries jurisdiction of coastal States at UNCLOS III,[11] the question of compatibility between conservation measures taken by coastal States and other fishing States still arose in the negotiations concerning the EEZ. At the 1972 session of the Sea-Bed Committee, a working paper was submitted by Canada suggesting that an appropriate management mechanism for 'wide-ranging species' could be an 'international authority'.[12] The drafters then considered alternative approaches such as favoring close consultation between international institutions and coastal States or simply cooperation.[13] A proposal to allow invoking the dispute settlement mechanism of the Convention to determine measures to be applied in adjacent areas for the conservation of straddling stocks where no agreement on such measures could be reached by parties concerned was eventually withdrawn at the eleventh session of UNCLOS III[14] and States settled on a provision which simply required cooperation between relevant States. The

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[5] *SRFC Advisory Opinion* (note 4), para. 210.
[6] *SRFC Advisory Opinion* (note 4), Separate Opinion of Judge Paik, para. 38.
[7] Art. 6 (1) High Seas Fishing Convention.
[8] Art. 7 (1) High Seas Fishing Convention.
[9] Arts. 7 (4) and 9 High Seas Fishing Convention.
[10] See *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 479–480 (Appendix 2, Table B).
[11] For further information, see *Proelss* on Art. 55 MN 7–13.
[12] Sea-Bed Committee, Management of the Living Resources of the Sea: Working Paper Submitted by the Delegation of Canada, UN Doc. A/AC.138/SC.II./L.8 (1972), 3 (para. d).
[13] Nordquist/Nandan/Rosenne (note 2), 641–645.
[14] *L. Dolliver M. Nelson*, Exclusive Economic Zone, MPEPIL, para. 55, available at: http://www.mpepil.com.

result is, however, framed in vague and essentially hortatory language, and it has been characterized as part of the 'unfinished agenda' of the Convention.[15] Indeed, UNCLOS has been supplemented by other instruments on this topic, notably the UN Fish Stocks Agreement (UNFSA).

III. Elements

1. 'stocks […] occur[ing] within the exclusive economic zone of two or more coastal States'

Art. 63 (1) creates an obligation for the coastal State to 'seek to agree' with other concerned coastal States upon necessary measures for the management of transboundary stocks. This entails that States must seek to adopt jointly or coordinate their conservation measures, jointly determine a total allowable catch (→ Art. 61) for these stocks and allocate the total allowable amongst themselves. In the absence of agreement, however, coastal States would seem to be able to set their own allowable catch in accordance with Art. 61. In light of Art. 300, States should do so in good faith and should exercise their rights in a manner which would not constitute an abuse of right. Yet, there is a danger that such unilateral action will nevertheless undermine the long-term sustainability of a stock if the disagreement between the coastal States continues. The dispute between Iceland and Faroe Islands and the EU on the joint management of the stock of North East Atlantic mackerel[16] provides a useful example: lack of agreement among coastal States is compounded by the setting of autonomous catch limits at very high levels that arguably posed a threat to the sustainability of the stock. As mackerel fisheries by Iceland and the Faroe islands are mostly carried out in their EEZs, they are not subject to the competence of the North East Atlantic Fisheries Commission, the regional fisheries management organization in charge of management of mackerel in international waters of the North-east Atlantic, and mackerel would not meet the criteria for listing under the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The EU has been considering various options to persuade Iceland and Faroe Islands to cooperate.[17] Following the adoption of trade sanctions by the EU, legal proceedings were initiated by the Faroe Islands under both the WTO Agreement and the Convention, but the litigation was subsequently terminated following a settlement by the parties.[18] 5

Within its own portion of total allowable catch, each State may regulate access to the fisheries for both nationals and third State vessels individually.[19] Thus, coastal States retain their rights under Arts. 56, 61 and 62.[20] The reference to 'development' of these stocks emphasizes the 6

[15] *Barbara Kwiatkowska*, The High Seas Fisheries Regime: At a Point of No Return?, IJMCL 8 (1993), 327; see also *David Freestone*, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 287, 291.

[16] For details of this dispute stretching back to 2010, see http://www.scottishpelagic.co.uk/news_views/mackerel_dispute.htm.

[17] European Commission, Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Certain Measures Directed to Non-Collaborating Countries for the Purpose of the Conservation of Fish Stocks, SEC(2011) 1576 final (2011). See also Commission Implementing Regulation (EU) No. 793/2013 of 20 August 2013, OJ 2013 L 223, 1, establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock.

[18] See WTO, *European Union – Measures on Atlanto-Scandian Herring*, Joint Communication from Denmark in respect of the Faroe Islands and the European Union of 21 August 2014, WT/DS469/3; PCA (Arbitral Tribunal Constituted under Annex VII UNCLOS), *Atlanto-Scandian Herring Arbitration* (The Kingdom of Denmark in Respect of the Faroe Islands/European Union), Termination Order of 23 September 2014, available at: http://www.pcacases.com/web/view/25.

[19] *Hey* (note 4), 55–56, 68 and 91; *Markowski* (note 3), 50–51; *L. Dolliver M. Nelson*, The Development of the Legal Regime of High Seas Fisheries, in: Alan Boyle/David Freestone (eds.), International Law and Sustainable Development (1999), 121.

[20] *David J. Attard*, The Exclusive Economic Zone in International Law (1987), 183.

possibility of exploiting little-used stocks more effectively and, read in conjunction with the requirements in Art. 61, points to the need for a long-term strategy of maintaining transboundary stocks as a viable resource.[21] Indeed, ITLOS has stressed that the term 'development' as used in Art. 63 must be understood to mean that 'these stocks should be used as fishery resources within the framework of a sustainable fisheries management regime,' noting that this may include 'more effective fisheries management schemes to ensure the long-term sustainability of exploited stocks' but also stock restoration.[22]

2. 'stocks […] occur[ing] both within the exclusive economic zone and in an area beyond and adjacent to the zone'

7 Art. 63 (2) creates a similar obligation to that in Art. 63 (1) for concerned coastal States and States fishing for straddling stocks in the adjacent high seas. The term straddling stocks is not used in Art. 63 (2), but it is a term that was first employed in Agenda 21 in its call for the negotiation of an implementing agreement[23] and it is used in the UNFSA, albeit without being concretely defined.[24] The Food and Agriculture Organization (FAO) includes mackerel, squids and pollock among straddling stocks.[25]

8 Under Art. 63 (1), States must 'seek to agree' on conservation measures. The result is that 'the coastal State has a say over conservation in the area of the high seas adjacent to its EEZ, even if it does not fish there; and that fishing States' freedom of fishing in that area is subject to the rights and interests of the coastal State, as is expressly confirmed in Art. 116 (b).'[26] This is justified by the fact that unrestrained fishing of straddling stocks in the high seas would render useless any measure adopted in the EEZ and vice versa.[27] Two elements, however, differentiate Art. 63 (2) from Art. 63 (1). First of all, the agreement on necessary measures only concerns the area beyond the EEZ, as no cooperative arrangement is expressly required for the whole range of the stocks.[28] Thus, the discretion of coastal States to adopt conservation and management measures within their own EEZ is not affected by this article. Second, the international obligation related to straddling stocks has been elaborated in the UNFSA.[29] Thus, for State parties to UNCLOS that are also parties to the UNFSA,[30] the obligation enshrined in Art. 63 (2) is complemented by the more specific requirements found in the UNFSA. Most of the provisions of the UNFSA are directed at fishing on the high seas for straddling (and highly migratory) stocks. However, several provisions are made specifically applicable to the EEZ, namely its general principles (Art. 5 UNFSA), the precautionary approach (Art. 6 UNFSA) and compatibility provisions (Art. 7 UNFSA).[31] This results in 'placing obligations on coastal States with regard to the conservation and management of such stocks within their EEZs'.[32] It has thus been observed that 'with regard to the management of straddling stocks within national

[21] Nordquist/Nandan/Rosenne (note 2), 647. *SRFC Advisory Opinion* (note 4), para. 198.

[22] *SRFC Advisory Opinion* (note 4), para. 198.

[23] UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21), Ch. 17.45, 17.49.

[24] *Bangert* (note 1), para. 6.

[25] *Jean-Jacques Maguire et al.*, The State of World Highly Migratory, Straddling and Other High Seas Fishery Resources and Associated Species: FAO Fisheries Technical Paper 495 (2006). *Cf.* also *Owen* on Annex I.

[26] *Anderson* (note 1), para. 6.

[27] Nordquist/Nandan/Rosenne (note 2), 647.

[28] *Attard* (note 20), 184.

[29] Art. 7 (1)(a) UNFSA replicates Art. 63 (2) UNCLOS.

[30] At the time of writing the UNFSA counts 78 parties, with 2 parties (Iran and the US) not being party to UNCLOS, *cf.* the table elaborated by the UN DOALOS, available at: http://www.un.org/Depts/los/reference_files/status2010.pdf.

[31] Art. 3 UNFSA.

[32] *Markowski* (note 3), 17.

jurisdiction, the [Fish Stocks] Agreement heightens the degree of obligation on the coastal state imposed by Article 61 of the Convention'.[33]

9 The UNFSA expands upon the concepts used in UNCLOS by including more contemporary notions related to long-term sustainability of fish stocks, the protection of species within the same ecosystem; the prevention and elimination of overfishing and excess fishing capacity; minimizing pollution and discard; protection of marine biodiversity, and impact assessment.[34] In addition, Art. 7 UNFSA requires compatible management of fisheries within and beyond national jurisdiction, taking into account the conservation and management measures 'adopted and applied' by the coastal State and it requires States to ensure that measures established for the high seas do not undermine the effectiveness of such measures. On the other hand, States are to take into account previously agreed measures for relevant high seas areas, biological characteristics of the stocks and the relationships between the distribution of stocks, the fisheries and the geographical particularities of the region concerned, but also respective dependence on the stocks of concerned coastal and fishing States.[35] This provision has been interpreted as 'requiring the coastal [S]tate to provide leadership in fisheries management by actually applying Article 61 principles within the EEZ before obligations for compatible exploitation can be imposed on high seas fisheries.'[36] The obligations are coupled with the duty to inform other concerned States about the measures adopted for stocks concerned and to make every effort to reach a provisional arrangement pending the agreement on compatible measures.[37] The FAO Code of Conduct for Responsible Fisheries,[38] as a non legally-binding instrument that offers principles and standards applicable to the conservation, management and development of all fisheries including within the EEZ, thus providing a framework for national and international efforts[39] in the implementation of Art. 63 of the Convention, calls for compatibility of conservation and management measures for transboundary and straddling fish stocks to be achieved in a manner consistent with the rights, competences and interests of the States concerned.[40]

10 Besides applying directly to its parties, it can also be argued that the UNFSA can be used as a subsequent agreement to inform the interpretation of UNCLOS in accordance with Art. 31 (3) of the Vienna Convention on the Law of Treaties.[41] However, the ability to use the UNFSA as an interpretative agreement depends on there being particular words in UNCLOS that require interpretation; it would not allow new obligations to be imposed on States Parties without some connection to the original wording of the Convention.[42] In addition, it would be necessary for UNCLOS parties to agree that the interpretation coloured by the UNFSA would not 'prejudice' their rights, jurisdiction and duties under the Convention, as required by Art. 4 UNFSA. It is also possible that certain obligations in the UNFSA have become customary international law and are therefore binding on States Parties to UNCLOS in that way, whether or not they are a party to the UNFSA itself. This argument may apply to the general obligations to pursue an ecosystem approach and a precautionary approach.[43]

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[33] *Donna R. Christie*, The Conservation and Management of Stocks Located Solely within the Exclusive Economic Zone, in: Hey (note 14), 395, 413.

[34] *Ibid.*, 414.

[35] Art. 7 (2) UNFSA; see also *Moritaka Hayashi*, The Straddling and Highly Migratory Fish Stocks Agreement, in: Hey (note 15), 51, 61–62.

[36] *Christie* (note 33), 414.

[37] Arts. 7 (5) and 7 (7)-(8) UNFSA; *Hayashi* (note 35), 61–62.

[38] FAO, Code of Conduct on Responsible Fisheries (1995).

[39] Preamble FAO Code of Conduct.

[40] Art. 7.3.2 FAO Code of Conduct.

[41] *Freestone* (note 15), 313.

[42] *Tore Henriksen*, Revisiting the Freedom of Fishing and Legal Obligations of States not Party to Regional Fisheries Management Organizations, ODIL 40 (2009), 80, 81; *James Harrison*, Making the Law of the Sea (2011), 108.

[43] For further information on the ecosystem and the precautionary approach within UNCLOS, *cf. Czybulka* on Art. 192 MN 3, Art. 194 MN 12, 32–34 and Art. 196 MN 9, 19; *Stephens* on Art. 198 MN 13, Art. 199 MN 8 and Art. 201 MN 5; *Rayfuse* on Art. 119 MN 33–25.

Indeed, many of the general principles found in the UNFSA are today reflected in other international fisheries instruments which suggests that they have received a degree of acceptance amongst the international community.[44] At the same time, some rules in the UNFSA are clearly intended to apply only to the parties. This is true of the provisions on enforcement and dispute settlement in Arts. 21 and 27–32 UNFSA respectively which are expressed as obligations for the 'States Parties' and they are therefore less likely to have influenced customary international law.

3. 'associated species'

11 Art. 63 also makes reference to stocks that are 'associated'[45] with transboundary or straddling stocks. The expression is broad and does not clarify the intensity of the link or causal relation between target species and associated species, or whether the relationship is to be determined exclusively on the basis of biological criteria, or also economic and legal ones.[46] Given that the expression is also used in the UNFSA, it has been argued that it should be interpreted in light of the precautionary approach and the international obligation to conserve biodiversity, with a view to underlining the need for integrated management based on an ecosystem approach.[47] This is certainly the correct interpretation in light of the obligations arising from the Convention on Biological Diversity and international standards on the ecosystem approach.

4. 'States shall seek, either directly or through appropriate […] organizations, to agree upon the measures necessary for the conversation'

12 Two options are envisaged to ensure cooperation in relation to transboundary and straddling stocks: States can cooperate directly among themselves, or they can do so through subregional or regional organizations.[48] While the Convention does not express a preference for either form of cooperation, the FAO Code of Conduct encourages States concerned in the case of straddling stocks to cooperate 'where appropriate, through the establishment of a bilateral, subregional or regional fisheries organization or arrangement'.[49] Moreover, the UNFSA provides that

> '[w]here a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall **give effect to their duty to cooperate** by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement.'[50]

In addition, the UNFSA encourages States to establish regional fisheries management organizations or arrangements where they do not already exist.[51] Overall, relevant international instruments fall short of creating an obligation to establish regional fisheries bodies for

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[44] See further *Harrison* (note 42), 108–113. See also *Erik Franckx*, Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea, Tulane Journal of International and Comparative Law 8 (2000), 49–81.

[45] In similar contexts this term can also be found in Arts. 61 (4) and Art. 119 (1)(b).

[46] *Bangert* (note 1), para. 7.

[47] *Ibid.* See *Harrison/Morgera* on Art. 61 MN 19.

[48] For examples, see discussion in *Robin R. Churchill*, Managing Straddling Fish Stocks in the North-East Atlantic: A Multiplicity of Instruments and Regime Linkages – but How Effective a Management?, in: Olav Schram Stokke (ed.), Governing High Seas Fisheries: The Interplay of Global and Regional Regimes (2001) 235–272.

[49] Art. 7.1.3 FAO Code of Conduct.

[50] Art. 8 (3) UNFSA (emphasis added).

[51] Art. 8 (5) UNFSA.

straddling stocks,[52] although in practice they have led to the modification of pre-existing regional arrangements and the creation of new ones.[53]

UNCLOS provides no information on the specific goals of cooperation. However, this is another area in which the UNFSA fills in gaps by identifying the issues which should be regulated by subregional and regional fisheries management organizations and arrangements.[54] In practice, the principles in the UNFSA have been broadly taken into account by States when establishing new subregional or regional fisheries organizations, or in adapting existing organizations which have competence to manage straddling fish stocks.[55] It should be finally noted that ITLOS emphasized the need to seek the cooperation also of States that are not members of a regional organization but share the same stocks, directly or through appropriate internationhal organizations, in order to ensure the effectiveness of conservation and sustainable management of these stocks in the whole of their geographic distribution or migrating area.[56] **13**

Article 64
Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

Bibliography: *Robin Allen*, International Management of Tuna Fisheries: Arrangements, Challenges and Ways Forward, FAO Fisheries and Aquaculture Technical Paper 536 (2010); *David H. Anderson*, Straddling and Highly Migratory Fish Stocks, MPEPIL, available at: http://www.mpepil.com; *David J. Attard*, The Exclusive Economic Zone in International Law (1987); *Patricia W. Birnie*, Marine Mammals: Exploiting the Ambiguities of Article 65 of the Convention on the Law of the Sea and Related Provisions: Practice under the International Convention for the Regulation of Whaling, in: David Freestone/Richard Barnes/David M. Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 261–280; *Holly Edwards*, When Predators Become Prey: The Need for International Shark Conservation, OCLJ 12 (2007), 305–354; *Sonja Fordham/Coby Dolan*, A Case Study in International Shark Conservation: The Convention on International Trade in Endangered Species and the Spiny Dogfish, Golden Gate University Law Review 34 (2004), 531–571; *John W. Kindt*, The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species, and the Highly Migratory Species, SJILC 11 (1984), 9–46; *Marion Markowski*, The International Law of EEZ Fisheries (2010); *Renee Martin-Nagle*, Current Legal Developments: Convention on Trade in Endangered Species (CITES), IJMCL 25 (2010), 609–620; *L. Dolliver M. Nelson*, Exclusive Economic Zone, MPEPIL, available at: http://www.mpepil.com.; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Erika Techera/Natalie Klein*, Fragmented Governance: Reconciling Legal Strategies for Shark Conservation and Management, Marine Policy 35 (2011), 73–78; *Margaret Young*, Protecting Endangered Marine Species: Collaboration between the Food and Agriculture Organization and the CITES Regime, Melb. J. Int'l L 11 (2010), 441–490

[52] *Hayashi* (note 35), 67.

[53] See *Kaare Bangert*, Fisheries Agreements, MPEPIL, available at: http://www.mpepil.com.

[54] Arts. 9–10 UNFSA.

[55] See e. g., Secretary-General, The Status and Implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention for the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement) and Its Impact on Related or Proposed Instruments Throughout the United Nations System, with Special Reference to Implementation of Part VII of the Fish Stocks Agreement, Dealing With the Requirements of Developing States, UN Doc. A/58/215 (2003).

[56] *SRFC Advisory Opinion* (note 4), paras. 215 and 218.

Documents: COP CITES, Conservation and Management of Sharks (Class Chondrichthyes), Resolution Conf. 12.6 (Rev. CoP15) (2010); COP CITES, Fifteenth Meeting of the Conference of the Parties: Interpretation and Implementation of the Convention: Species Trade and Conservation, COP15 Doc. 52 (Rev. 1) (2010); FAO, International Plan of Action for the Conservation and Management of Sharks, International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, International Plan of Action for the Management of Fishing Capacity (1999); Joint Meeting of Tuna Regional Fisheries Organizations, Report of the Second Joint Meeting of Tuna Regional Fisheries Management Organizations (RFMOs) (2009); Joint Meeting of Tuna Regional Fisheries Organizations, Report of the Joint Meeting of Tuna RFMOs (2007); Standing Committee CITES, Sixty-Second Meeting of the Standing Committee: Strategic Matters: Cooperation with Other Organization, SC62 Doc. 14.6 (2012), Annex (Guidelines for Cooperation Between The International Commission For the Conservation of Atlantic Tunas (ICCAT) and The Conference of The Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); UN Conference on Sustainable Development, The Future We Want, UN Doc. A/CONF.216/L.1 (2012); UNEP/CMS, Memorandum of Understanding on the Conservation of Migratory Sharks, 12 February 2010

Cases: ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280; ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21/

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I. Purpose and Function

1 Highly migratory species comprise tuna, marlin, swordfish, sharks and some other species of marine mammals. They raise specific concerns in the context of exclusive economic zone (EEZ) fisheries as their conservation and management is 'difficult without international agreement'.[1] Thus, Art. 64 mandates cooperation between coastal States and other States fishing highly migratory species. The provision applies to the discrete list of species listed in Annex I which includes many highly commercially valuable species such as tuna, swordfish and marlin.[2]

2 Compared to Art. 63, Art. 64 creates a notably stronger obligation to cooperate, albeit it does not go as far as requiring States to reach agreement.[3] It does not just require States to enter into negotiations, rather it requires that they engage in the coordinated or joint determination and allocation of the total allowable catch for highly migratory species, inclusive of the catch taken within the EEZ. As noted by the International Tribunal for the Law of the Sea, States must 'consult with one another in good faith' and 'the consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.'[4] However, if agreement cannot be reached, Art. 64 does not impede coastal

[1] *David J. Attard*, The Exclusive Economic Zone in International Law (1987), 184; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 649.

[2] For a comprehensive analysis, see *Owen* on Annex I. One study valued the tuna industry at US$ 42.21 billion; see Pew Charitable Trusts, Netting Billions: A Global Valuation of Tuna (2016).

[3] The Permanent Court of International Justice stated that 'an obligation to negotiate does not imply an obligation to reach agreement', PCIJ, *Railway Traffic between Lithuania and Poland*, Advisory Opinion of 15 October 1931, PCIJ Series A/B 108, 116.

[4] ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 210, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-21.

States from exercising their sole right to determine the conditions under which fishing may take place, enforcement responsibilities and the control over research and data collection.[5] Without derogating from the rights of the coastal States to regulate and manage highly migratory species within its EEZ, Art. 64 nevertheless implies that these unilateral decisions cannot be taken *only* in consideration of the coastal State's interests.[6] In the *Southern Bluefin Tuna Cases*, for instance, New Zealand and Australia alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, failing in good faith to cooperate with New Zealand and Australia with a view to ensuring the conservation of the stocks in accordance with Art. 64.[7] In prescribing provisional measures in the case, the International Tribunal for the Law of the Sea concluded that 'Australia, Japan and New Zealand should resume negotiations without delay *with a view to reaching agreement* on measures for the conservation and management of southern bluefin tuna.'[8]

The interpretation of this provision needs to take into account several successive developments, such as the UN Fish Stocks Agreement (UNFSA), the creation of Regional Fisheries Management Organizations (RFMOs) and the relevance of multilateral environmental agreements. 3

II. Historical Background

Given that coastal States only had limited jurisdiction over fishing prior to the development of the EEZ, highly migratory species had not arisen in international negotiations as a distinct issue up until that time. However, given the economic importance of many highly migratory stocks for distant water fishing fleets, controversy surrounded the question as to whether highly migratory species should fall under the EEZ regime during discussions at UNCLOS III. At the 1971 session of the Sea-Bed Committee, the United States proposed empowering international fisheries organizations to regulate living resources including 'highly migratory oceanic stocks'.[9] Debates ensued as to the degree to which international fisheries organizations would be responsible for managing such species or whether States should rather regulate these stocks in agreement or consultation with relevant international organizations.[10] Eventually, the proposals to require cooperation only through international organizations were not accepted and Art. 64 allows both bilateral cooperation and cooperation through international organizations to be pursued at the same time, as it also allows for cooperation through more than one mechanism for the same fishery.[11] A proposal to include an obligation to adopt conservation measures within the EEZ that are no less effective than international standards was unsuccessful.[12] 4

In its final form, Art. 64 (2) makes clear that other provisions on EEZ fisheries are applicable to highly migratory species, and therefore 'confirms the sovereign rights of coastal 5

[5] *Marion Markowski*, The International Law of EEZ Fisheries (2010), 51.

[6] *Attard* (note 1), 186.

[7] ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280, paras. 28 (i)(d), 29 (1)(d).

[8] *Ibid.*, para. 90 (1)(e) (emphasis added).

[9] Nordquist/Nandan/Rosenne (note 1), 650. For a detailed analysis of the US proposal, see *Owen* on Annex I MN 3 *et seq.*

[10] Nordquist/Nandan/Rosenne (note 1), 650–656.

[11] *Ibid.*, 657.

[12] Second Committee UNCLOS III, United States of America: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47 (1974), OR III, 222, 223–224 (Article 19): 'Fishing for highly migratory species listed in the annex within the economic zone shall be regulated by the coastal States, and beyond the economic zone by the State of nationality of the vessel, in accordance with regulations established by appropriate international or regional fishing organizations pursuant to this article.' See also *John W. Kindt*, The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species, and the Highly Migratory Species, SJILC 11 (1984), 9, 22–23.

states to manage highly migratory species in their EEZ'.[13] Nowadays 'the large majority of States claim jurisdiction over all EEZ living resources including highly migratory species.'[14]

III. Elements

1. 'highly migratory species listed in Annex I'

6 Art. 64 applies to those species listed in Annex I of the Convention. The reference to Annex I, entitled 'Highly Migratory Species', is however problematic. First of all, the Convention does not contain any provision for its adjustment in light of increased knowledge, beyond the normal, somewhat cumbersome, amendment procedures.[15] Second, some of the species listed in Annex I would also fall within the scope of other provisions in Part V. This is particularly problematic for cetaceans, as Annex I contains 'some but not all cetaceans' which are specifically addressed by Art. 65.[16] It has been argued, therefore, that when Art. 64 applies to the cetaceans listed in Annex I in the EEZ, it operates as *lex generalis*, while Art. 65 is a *lex specialis* which enables coastal States or international organizations to prohibit, limit or regulate marine mammals more strictly than Art. 64 would otherwise allow.[17]

2. 'shall co-operate […] with a view to ensuring conservation and promoting the objective of optimum utilization'

7 Art. 64 obliges cooperation towards the conservation and optimum utilization of highly migratory species, to the extent possible throughout their range, both within and beyond the EEZ.[18] The reference to the dual goal of ensuring conservation and promoting optimum utilization reflects Arts. 61 (2) and 62 (1) in framing the management of highly migratory species as an economic resource.[19] It has thus been noted that Art. 64 does not override the provisions of Arts. 56, 61–62 of the Convention,[20] leading to the criticism that it 'does not go far enough in promoting its goals' and is ultimately seen as treating highly migratory species no differently from others subject to Part V of the Convention.[21]

8 It has been argued that in light of the widespread acceptance of the obligations contained in Art. 64 as reflected in State practice, these obligations are considered a shared responsibility among coastal States and States fishing highly migratory species and may be considered 'part at least of the general principles of international law, if not of international custom'.[22]

9 As has been observed in relation to Art. 63 (2), the international obligation related to highly migratory stocks has been elaborated in the UNFSA: for States Parties to UNCLOS that also are parties to the UNFSA, the obligation enshrined in Art. 64 is thus complemented by the more specific requirements found in the UNFSA that are made specifically applicable to the EEZ, namely its general principles (Art. 5 UNFSA), the precautionary approach (Art. 6 UNFSA) and

[13] *Patricia W. Birnie*, Marine Mammals: Exploiting the Ambiguities of Article 65 of the Convention on the Law of the Sea and Related Provisions: Practice under the International Convention for the Regulation of Whaling, in: David Freestone/Richard Barnes/David M. Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 261, 273.

[14] *Attard* (note 1), 186.

[15] *David H. Anderson*, Straddling and Highly Migratory Fish Stocks, MPEPIL, para. 7, available at: http://www.mpepil.com. For further information, *cf. Owen* on Annex I.

[16] *Birnie* (note 13), 263. See also *Owen* on Annex I MN XX.

[17] *Birnie* (note 13), 274; Nordquist/Nandan/Rosenne (note 1), 664.

[18] *David Freestone*, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 287, 302; Nordquist/Nandan/Rosenne (note 1), 657.

[19] Nordquist/Nandan/Rosenne (note 1), 657.

[20] *L. Dolliver M. Nelson*, Exclusive Economic Zone, MPEPIL, para. 57, available at: http://www.mpepil.com. For further information, *cf. Owen* on Annex I.

[21] *Kindt* (note 12), 21.

[22] *Markowski* (note 5), 55.

compatibility provisions (Art. 7 UNFSA).[23] Moreover, the UNFSA provides specific details concerning the issues which should be regulated by subregional and regional fisheries management organizations and arrangements responsible for highly migratory stocks.[24]

3. 'directly or through appropriate international organizations'

Although Art. 64 leaves it open to relevant States whether to cooperate directly or through international organizations, it expresses preference for the latter option by encouraging States to cooperate to establish such organizations in regions where they do not exist.[25] Several RFMOs deal with highly migratory species, in particular tuna: Inter-American Tropical Tuna Commission, International Commission for the Conservation of Atlantic Tuna (ICCAT), Indian Ocean Tuna Commission, Western Indian Ocean Tuna Organization and the Commission for the Conservation of the Southern Bluefin Tuna.[26] To provide an example, ICCAT is tasked with carrying out studies of the populations of tuna and tuna-like fishes and such other species of fishes exploited in tuna fishing in the Convention area as are not under investigation by another international fishery organization, and making recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch.[27] The most recent Western and Central Pacific Fisheries Commission, which was created in 2004, is tasked to 'to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 Convention and the Agreement'.[28] According to a Food and Agriculture (FAO) study: **10**

> 'The tuna RFMOs use similar processes to develop and agree on conservation and management measures. They collect or assemble data about the fisheries, carry out a scientific assessment of the state of the stocks, using either dedicated scientific experts or a committee of scientists drawn from members and cooperating participants, or some combination of those arrangements. The best scientific advice is presented to their governing commission, which then develops any management measures it believes necessary in the light of the scientific advice and other relevant factors […]. [Their] rather unwieldy decision-making processes tend to result in lowest common denominator decisions rather than producing forward-looking and precautionary conservation and management measures.'[29]

Following the adoption and entry into force of the UNFSA, several RFMOs have reviewed their performance. A recent FAO study, however, concludes that the UNFSA, the precautionary approach and the setting of limit points, 'seem to have had little effect on management by the tuna RFMOs'.[30] Accordingly, the General Assembly continues to highlight the persistent need to carry out and publish the results of such reviews for all RFMOs, as well as the more general need for RFMOs to modernize their mandates to fully incorporate the precautionary and ecosystem approaches to fisheries management and biodiversity considerations, including the conservation and management of ecologically related and dependent species and protection of their habitat; and improve transparency through the development of transparent criteria for the allocation of fishing opportunities.[31] At the 2012 UN Conference on Sustainable Development, governments agreed on 'the need for transparency and accountability in fisheries management by regional fisheries management organizations', as well as the need for RFMOs not only to regularly undertake independent performance **11**

[23] Art. 3 UNFSA.

[24] Arts. 9–10 UNFSA. See also *Harrison/Morgera* on Art. 63 and *Owen* on Annex I.

[25] *Markowski* (note 5), 52.

[26] *Nelson* (note 20), para. 56.

[27] Arts. IV, VII International Convention for the Conservation of Atlantic Tunas, 14 May 1966, UNTS 673, 63.

[28] Art. II Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 5 September 2000, UNTS 2275, 43.

[29] *Robin Allen*, International Management of Tuna Fisheries: Arrangements, Challenges and Ways Forward, FAO Fisheries and Aquaculture Technical Paper 536 (2010), 8.

[30] *Ibid.*, 30.

[31] GA Res. 65/38 of 7 December 2010, paras. 107–108, 99 and 105.

reviews, but also to strengthen the comprehensiveness of those reviews, to make their results publicly available, and to implement their recommendations.[32]

12 RFMOs have also engaged in wider coordination among themselves: notably, the tuna-related organizations have convened joint meetings since 2007[33] and adopted Course of Actions with a view to addressing jointly the excessive global fishing capacity for tunas.[34] Nonetheless, the performance of RFMOs remains a cause of concern, and has motivated a proposal to list Atlantic Bluefin Tuna under Appendix I[35] of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which would have had the effect of prohibiting commercial trade in that fish. Whilst the proposal was unsuccessful, it brought to the attention of the international community the continued inadequacy of the management by the ICCAT and the possibility of resorting to other international instruments to address such inadequacy.[36] As a follow-up to the failed proposal, the Secretariats of CITES and ICCAT are elaborating guidelines for cooperation.[37]

4. Sharks as an Example of Highly Migratory Species Listed in Annex I

13 Annex I includes certain 'oceanic sharks' amongst the highly migratory fish stocks regulated by Art. 64. Several recent international instruments have focused on sharks, because of their close stock-recruitment relationship, long recovery times in response to over-fishing and complex spatial structures (size/sex segregation and seasonal migration), providing evidence of State practice complying with the obligation enshrined in Art. 64 of cooperating through appropriate international organizations. In 1999 the FAO adopted an International Plan of Action (IPOA) for the Conservation and Management of Sharks, aimed at ensuring their long-term sustainable use.[38] The IPOA, which is voluntary in nature, applies to States in the waters of which sharks are caught by their own or foreign vessels, thereby including the EEZ, and to States the vessels of which catch sharks on the high seas. It calls upon States to develop, implement and monitor a national plan of action for conservation and management of shark

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[32] UN Conference on Sustainable Development, The Future We Want, UN Doc. A/CONF.216/L.1 (2012), 32 (para 172).

[33] First global summit of Tuna RFMOs was held in Kobe, Japan, January 2007. For further information, see http://www.tuna-org.org/.

[34] The first global summit adopted a Course of Actions with recommendations to standardize the presentation of stock assessments and to base management decisions upon the scientific advice, including the application of the precautionary and ecosystem-based approach leading to the establishment of measures to minimize the adverse effect of fishing for highly migratory fish species on ecologically related species, particularly sea turtles, seabirds and sharks, taking into account the characteristics of each ecosystem and technologies used to minimize adverse effect., see Joint Meeting of Tuna Regional Fisheries Organizations, Report of the Joint Meeting of Tuna RFMOs (2007), Appendix 14 (TunaRFMOs2007/16).The second Joint Tuna RFMOs Meeting, San Sebastian, 2009, adopted a follow-up Course of Actions: Joint Meeting of Tuna Regional Fisheries Organizations, Report of the Second Joint Meeting of Tuna Regional Fisheries Management Organizations (RFMOs) (2009). This was acknowledged by the General Assembly, which encouraged continued implementation, see GA Res. 65/38 of 7 December 2010, paras. 102–103. See generally, *Anderson* (note 15), para. 21.

[35] COP CITES, Fifteenth Meeting of the Conference of the Parties: Interpretation and Implementation of the Convention: Species Trade and Conservation, COP15 Doc. 52 (Rev. 1) (2010).

[36] *Renee Martin-Nagle*, Current Legal Developments: Convention on Trade in Endangered Species, IJMCL 25 (2010), 609.

[37] Standing Committee CITES, Sixty-Second Meeting of the Standing Committee: Strategic Matters: Cooperation with Other Organization, SC62 Doc. 14.6 (2012), Annex (Guidelines for Cooperation Between The International Commission For the Conservation of Atlantic Tunas (ICCAT) and The Conference of The Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)).

[38] FAO, International Plan of Action for the Conservation and Management of Sharks, International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, International Plan of Action for the Management of Fishing Capacity (1999). For further information, see *Erika Techera/Natalie Klein*, Fragmented Governance: Reconciling Legal Strategies for Shark Conservation and Management, Marine Policy 35 (2011), 73; *Holly Edwards*, When Predators Become Prey: The Need for International Shark Conservation, OCLJ 12 (2007), 305; *Margaret Young*, Protecting Endangered Marine Species: Collaboration between the Food and Agriculture Organization and the CITES Regime, Melb. J. Int'l L.11 (2010), 441.

stocks.[39] Where transboundary, straddling, highly migratory and high seas stocks of sharks are exploited by two or more States, the States concerned should strive to ensure effective conservation and management of the stocks, including through the adoption of regional or sub-regional plans.[40] The General Assembly has called upon States and RFMOs to urgently adopt measures to implement the IPOA.[41] More recently it has called upon States to take immediate and concerted action to improve implementation of and compliance with regional arrangements and national measures regulating shark fisheries and incidental catch of sharks, in particular those prohibiting fisheries conducted for the sole purpose of harvesting shark fins, as well as upon RFMOs to take precautionary conservation and management measures for sharks taken in fisheries.[42] Certain States have taken legislative action to ban shark-finning.[43]

Environmental treaties also regulate some species of shark, thus confirming that the relevant treaty bodies can operate as 'appropriate international organizations' for the purposes of Art. 64. The parties to CITES, which includes *Cetorhinus maximus* (Basking shark), *Rhincodon typus* (Whale shark) and *Carcharodon carcharias* (Great white shark) in Appendix II CITES, urged FAO to take steps to actively encourage relevant States to develop national plans and encouraged parties to report directly to the CITES Secretariat on the implementation of national and regional plans.[44] In parallel, under the Convention on the Conservation of Migratory Species of Wild Animals (CMS), a Memorandum of Understanding (MoU) on the Conservation of Migratory Sharks was concluded in 2010,[45] covering seven shark species listed on the CMS Appendices: Basking Shark, Great White Shark, Whale Shark, Shortfin and Longfin Mako Shark, Porbeagle and Northern hemisphere populations of the Spiny Dogfish. The CMS MoU aims to achieve and maintain a favourable conservation status for migratory sharks based on the best available scientific information, taking into account the socio-economic and other values of these species for the people of the signatories, through the application of the precautionary and ecosystem-based approach and with the 'fullest possible cooperation' among governments, intergovernmental organizations, nongovernmental organizations, stakeholders of the fishing industry and local communities. **14**

Article 65
Marine mammals

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.

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[39] *Allen* (note 29), 11, 13–14 (paras. 17–24).

[40] *Ibid*., 14–15 (paras. 25–26).

[41] GA Res. 61/105 of 8 December 2006, para. 10.

[42] GA Res. 65/38 of 7 December 2010, paras. 13–15.

[43] E. g. Central America Fisheries and Aquaculture Organization, Regulation OSP-05-11 to Ban the Practice of Shark Finning in the States Parties of SICA of November 2011, which is legally binding upon domestic and foreign vessels that catch and land sharks in areas under the jurisdiction of Belize, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and Panama, as well as to vessels fishing in international waters that fly the flag of these countries.

[44] COP CITES, Conservation and Mangement of Sharks (Class Chondrichthyes), Resolution Conf. 12.6 (Rev. CoP15) (2010), available at: http://www.cites.org/eng/res/12/12-06R15.php. *Sonja Fordham/Coby Dolan,* A Case Study in International Shark Conservation: The Convention on International Trade in Endangered Species and the Spiny Dogfish, Golden Gate University Law Review 34 (2004), 531–571.

[45] UNEP/CMS, Memorandum of Understanding on the Conservation of Migratory Sharks, 12 February 2010, available at http://www.cms.int/species/sharks/MoU/Migratory_Shark_MoU_Eng.pdf.

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Documents: COP CITES, Illegal Trade in Whale Meat, Resolution Conf. 9.12 (CoP9) (1994); International Whaling Conference, Report of the Drafting Committee at the International Whaling Conference, Doc. IWC/49 (1946); UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9-479 (Agenda 21); UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 6–28 (Action Plan for the Human Environment); UNEP/CMS, Memorandum of Understanding Concerning Conservation Measures for the Eastern Atlantic Populations of the Mediterranean Monk Seal (*Monachus Monachus*)), 18 October 2007; UNEP/CMS, Memorandum of Understanding on the Conservation and Management of Dugongs and their Habitats Throughout Their Range, 31 October 2007; UNEP/CMS, Memorandum of Understanding for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region, 9 September 2006

Cases: *Award between the United States and the United Kingdom, Relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (United States *v.* United Kingdom), Decision of 15 August 1893, RIAA XXVIII, 263; GATT Panel Report, *US – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155; Report of the WTO Appellate Body, *United States – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012; ICJ, *Case Concerning Whaling in the Antarctic* (Australia *v.* Japan; New Zealand Intervening), Merits, Judgment of 31 March 2014, ICJ Reports (2014), 226

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I. Purpose and Function

1 There are around 120 species of marine mammals including cetaceans (whales, dolphins and porpoises), pinnipeds (seals and walrus) and sirenians (dugong).[1] Art. 65 singles out marine mammals for special treatment because of their exceptional vulnerability to capture and adverse effects of other human interference, their highly migratory nature[2], and their interest

[1] *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 308.

[2] See for information on the relationship between Arts. 64 and 65 also *Harrison/Morgera* on Art. 64 MN 6.

both from economic, aboriginal use and conservation viewpoints.[3] UNCLOS empowers States to give particular consideration to marine mammals in the context of the exclusive economic zone (EEZ) fisheries and subject them to a stricter management regime that is provided by Arts. 61–62.[4] In avoiding reference to 'utilization', the Convention allows the prohibition or limitation of the exploitation of marine mammals,[5] although it does not *require* States to adopt stricter regulation.[6]

Art. 65 represents an attempt to address the problems that had emerged in the negotiation and implementation of previous agreements seeking to prevent the over-exploitation of marine mammals, and in particular cetaceans: thus, in allowing coastal States and competent international organizations to develop stricter measures to conserve marine mammals, it preserves the central role played in this endeavour by various international bodies.[7] 2

Art. 65 includes a competency clause relating to marine mammals within the EEZ, and a cooperation clause, which applies to all marine mammals but which specifically mentions cetaceans.[8] The cooperation clause, which is repeated verbatim in Ch. 17 of Agenda 21,[9] is considered part of customary international law.[10] The application of Art. 65 is extended to the high seas by virtue of Art. 120. 3

II. Historical Background

The *Bering Fur Seal Arbitration* of 1893[11] is considered the 'origins of the legal rules relevant to the conservation and management of marine mammals', as it concerned the legality of pelagic sealing beyond the territorial sea.[12] The arbitral tribunal recognised the need for the protection of fur seals, even if it did not find that the United States had exclusive jurisdiction over the fur seals in the Bering Sea outside its territorial waters. The tribunal thus adopted a series of regulations aimed at the protection of fur seals, including a no-sealing zone, an annual closed season, a licensing system for vessels engaged in pelagic sealing, a prohibition on using certain fishing gear and an exception for aboriginal sealing.[13] Following the decision, a regional convention was concluded for the protection of seals. The 1911 Convention between the United States, Great Britain, Russia and Japan for the Preservation for the Preservation and Protection of Fur Seals and Sea Otters in the North Pacific Ocean[14] was eventually substituted by the 1957 Interim Convention on Conservation of North Pacific Fur Seals[15] and the Protocol amending and extending the Interim Convention on Conservation of North Pacific Fur Seals of 4

[3] *Patricia W. Birnie*, Marine Mammals: Exploiting the Ambiguities of Article 65 of the Convention on the Law of the Sea and Related Provisions: Practice under the International Convention for the Regulation of Whaling, in: David Freestone/Richard Barnes/David M. Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 261, 264.

[4] *Ibid.*, 274.

[5] *David Freestone*, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 287, 302 (footnote 62); *David J. Attard*, The Exclusive Economic Zone in International Law (1987), 189.

[6] *Alexander Proelss*, Marine Mammals, MPEPIL, para. 13, available at: http://www.mpepil.com.

[7] *Birnie* (note 3), 262.

[8] *Ted McDorman,* Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention, ODIL 29 29 (1998), 179, 181–182.

[9] UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21).

[10] *McDorman* (note 8), 187.

[11] *Award between the United States and the United Kingdom, Relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (United States *v.* United Kingdom), Decision of 15 August 1893, RIAA XXVIII, 263.

[12] *Proelss* (note 6), paras. 5–8.

[13] *Bering Fur Seal Arbitration* (note 11), 263.

[14] Convention between the United States, Great Britain, Russia and Japan for the Preservation for the Preservation and Protection of Fur Seals and Sea Otters in the North Pacific Ocean, 7 July 1911, US Treaty Series No. 564.

[15] Interim Convention on Conservation of North Pacific Fur Seals, 9 February 1957, UNTS 314, 105.

1976[16]. Similar treaties were adopted to address the conservation and management of seal populations in other parts of the world, notably the 1972 Convention for the Conservation of Antarctic Seals.[17]

5 Another category of marine mammals subject to early regulation was cetaceans. Whales have been exploited by mankind for many centuries as a source of food and more importantly oil. The first industrial whaling is thought to have started in Europe in the eleventh or twelfth centuries but by the nineteenth century, the whaling industry had extended its operations around the world.[18] The first global instrument for the management of cetaceans was the 1931 Convention on the Regulation of Whaling,[19] which was succeeded by the 1937 International Agreement for the Regulation of Whaling of 1937[20] and the 1946 International Convention for the Regulation of Whaling (ICRW). It should be further noted that the 1958 Convention on the High Seas and the Convention on Fishing and Conservation of the Living Resources of the High Seas did not deal specifically with marine mammals.

6 Against this background, the special conservation and regulatory needs of marine mammals were discussed at UNCLOS III under the 'strong pressure applied by environmental groups backed by the United States'.[21] What became Art. 65 originated in a Maltese proposal made in the Sea-Bed Committee on the development of conservation for 'sea mammals'.[22] The United States proposed to devote a separate provision to marine mammals.[23] Successive versions of the relevant draft led to a 'self-standing provision'[24] which signalled that Art. 65 was going to be in addition to Art. 64, thus 'free[ing] the coastal [S]tate of challenge if it should decide to forbid exploitation of any marine mammal within its EEZ'.[25] Negotiations were nonetheless difficult because of polarized positions on whaling, so the resulting provision ended up being 'one of the most opaque articles in the [Convention]'.[26]

III. Elements

1. 'marine mammals'

7 Art. 65 is marred with ambiguities to the extent that 'both proponents and opponents of whaling argue that the Convention supports their position'.[27] First of all, 'marine mammals' are not defined in the Convention, but the term can be understood as referring to aquatic warm-blooded and air-breathing species which are characterized by the production of milk

[16] Protocol Amending and Extending the Interim Convention on Conservation of North Pacific Fur Seals, 7 May 1976, UNTS 1082, 298.

[17] Convention for the Conservation of Antarctic Seals, 1 June 1972, UNTS 1080, 175.

[18] See *Patricia W. Birnie*, International Regulation of Whaling, vol. 1 (1985), 49–70.

[19] Convention for the Regulation of Whaling, 24 September 1931, LNTS 155, 349.

[20] International Agreement for the Regulation of Whaling, 8 June 1937, LNTS 190, 79. See discussion in *Proelss* (note 4), paras. 9–11.

[21] *Attard* (note 5), 189.

[22] Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Areas under Their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), 33, cited in: GAOR 28th Sess. Suppl. 21 (A/9021) vol. I, 64. See comments by *Patricia W. Birnie*, The Conservation and Management of Marine Mammals and Anadromous and Catadromous Species, in: Hey (note 5), 357, 370; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 660.

[23] Second Committee UNCLOS III, United States of America: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47 (1974), 222, 224 (Article 20).

[24] *L. Dolliver M. Nelson*, Exclusive Economic Zone, MPEPIL, para. 62, available at: http://www.mpepil.com.

[25] Nordquist/Nandan/Rosenne (note 21), 663 (MN 65.11(a)).

[26] *Birnie* (note 3), 261.

[27] *Cinnamon P. Carlarne*, Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies, Virginia Environmental Law Journal 24 (2005), 1, 30.

in female mammary glands.[28] Many marine mammals are further characterized by the cyclic nature of their migration between breeding and feeding grounds, relatively low reproduction rate and complex social structures.[29] The term encompasses cetaceans, pinnipeds, sirenians, sea otters and polar bears which are all 'to a greater or lesser degree endangered species'[30], with cetaceans referring to whales, dolphins and porpoises more specifically.[31]

2. 'Nothing […] restricts the right of a coastal State […] to prohibit, limit or regulate the exploitation'

8 As can be deduced from the fact that the text of Art. 65 omits reference to the term 'optimum utilization' (→ Art. 62 (1); Art. 64 (1)), this provision establishes a limited exception to the objective of optimum utilization by permitting coastal States to prohibit or limit the exploitation of marine mammals. In other words, coastal States are not obliged to set an allowable catch for marine mammals under Art. 61 (1) of the Convention, nor are they obliged to permit access to the allowable catch by other States in accordance with Art. 62. Birnie also argues that Art. 65 prevails over Art. 61 (4), in that the obligation to cooperate for the prohibition, limitation or stricter regulation of marine mammals supersedes the consideration of the effects of management measures on stocks of other species associated with or dependent upon marine mammals with a view to maintaining or restoring associated or dependent species above levels at which their reproduction may become seriously threatened.[32] In other words, marine mammals cannot be subject to less strict regulation on the grounds that it would be necessary to maintain or restore associated or dependent species.

3. 'States shall co-operate with a view to the conservation of marine mammals'

9 The second function of Art. 65 is to establish a duty for States to 'cooperate with a view to the conservation of marine mammals'. A special reference is made to cetaceans, in relation to which States are under an obligation to 'work through the appropriate international organizations for their conservation, management, and study'. This description suggests that such organizations play a different role than other regional fisheries management organizations set up to regulate fishing. Art. 65 does not, however, clearly establish when an international organization would be 'appropriate' for the purposes of the establishment of a distinct regime for marine mammals. It has been argued that 'it is only where the coastal [S]tate opts to delegate such jurisdiction to an international organization, that the organization becomes "appropriate" in the sense of the first sentence of article 65.'[33]

10 With specific regard to the cooperation clause in the second sentence of Art. 65, the expression 'work through' is considered insufficient to determine the 'degree or means of collaboration required'.[34] It would seem that Art. 65 does not require States to become members of relevant international organizations or even to adhere to the regulations adopted by these organizations.[35] It has thus been argued that the obligation to 'work through' could be satisfied by mere cooperation with scientific bodies of relevant international organizations or active engagement in the organization as observers.[36] Canada in particular had made a declaration noting that Art. 65 does not entail an obligation to work

[28] *Birnie* (note 3), 264. Note that the ICRW does not define whales either, but rather refers to species listed in an Annex; *Jochen Braig*, Whaling, MPEPIL, para. 6, available at: http://www.mpepil.com.
[29] *Proelss* (note 6), paras. 1–2.
[30] *Ibid.*
[31] *Ibid.*
[32] *Birnie* (note 3), 275.
[33] *McDorman* (note 8), 182.
[34] *Birnie* (note 22), 370.
[35] *Proelss* (note 6), para. 14.
[36] *Braig* (note 28), para. 41; *McDorman* (note 8), 182–187.

through more than one appropriate international organization and in all events such obligation is triggered only when the status of the stock is such that the attention of the appropriate international organization is necessary to assist in the conservation, management and study of the stock.[37]

11 Notwithstanding its limitations, this provision has been considered particularly significant for its inclusion in a comprehensive treaty, the preamble of which reflects the international community's awareness of the complex management problems concerning marine living resources and the relevance of legal developments before and after the Convention.[38] In addition, the lack of reference to exploitation and the emphasis on conservation could be considered apt to support the adoption of moratoria, although the specific choice of means of enforcement is left to relevant coastal States on the basis of Art. 62, and international organizations.[39] Several States have indeed established through national legislation sanctuaries for marine mammals in their EEZ.[40]

4. 'in the case of cetaceans [States] shall in particular work through the appropriate international organziations for their conservation, management and study'

12 As Birnie emphasizes, Art. 65 cannot be understood by reference only to the drafting history of the Convention, but also of the 'more than a hundred years' of international attempts to introduce protective measures for marine mammals.[41] Successive international developments in relation to the conservation and sustainable use of marine mammals are equally relevant to interpret Art. 65.

13 One such global agreement is certainly the ICRW which applies to all waters in which whaling is undertaken,[42] thus also to the EEZ.[43] While the ICRW was conceived as a treaty for the preservation of whale stocks to ensure the continuation of the whaling industry,[44] it led to the adoption of the so-called moratorium on commercial whaling in 1982,[45] following a recommendation adopted at the Stockholm Conference on the Human Environment.[46] The moratorium is still in place, although parties to the ICRW continue to debate whether the Convention has become a conservation rather than a sustainable use instrument: parties have established whale sanctuaries[47] and adopted non-binding recommendations on conservation issues such as the impacts of climate change on whales and trade in whale products, but also adopted a Revised Management Procedure in 1994 with a view to resuming commercial

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[37] *McDorman* (note 8), 183.

[38] *Birnie* (note 3), 262.

[39] *Id.* (note 21), 370–371.

[40] See examples discussed in *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 318–319.

[41] *Birnie* (note 3), 261.

[42] Art. I ICRW.

[43] The ICRW itself is conceived as setting minimum standards and therefore States may adopt and enforce laws or regulations within their jurisdiction which give additional protection to whales provided they are not inconsistent with the provisions of the ICRW; see International Whaling Conference, Report of the Drafting Committee at the International Whaling Conference, Doc. IWC/49 (1946).

[44] *Braig* (note 28).

[45] Paragraph 10 (e) of the Schedule to the ICRW provides that 'catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whales stocks and consider the modification of this provision and the establishment of other catch limits'.

[46] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 6 (Action Plan for the Human Environment).

[47] Sanctuaries have been adopted in the Indian Ocean and the Southern Ocean; see ICRW, Schedule, para. 7. Several IWC members are also proposing the establishment of a third sanctuary in the South Atlantic Ocean and the proposal will be discussed at the 2016 meeting of the IWC. Note that the legality of the establishment of sanctuaries under the ICRW is contested: *Elisa Morgera*, Whale Sanctuaries: An Evolving Concept within the International Whaling Commission, ODIL 35 (2004), 319.

whaling in the future once the accompanying revised management scheme on enforcement is completed.[48] As a result of polarized views on the ultimate aim of this convention[49], the International Whaling Commission's activity has resulted in periodic meetings in which 'rival groups [of States] agree to disagree on crucial issues'.[50]

Notably, UNCLOS does not refer explicitly to the International Whaling Commission (IWC), the only international organization related to marine mammals that was in existence at the time of its negotiation. This omission, and the reference to international organizations in plural, implicitly recognizes the dissatisfaction with the IWC's activities to conserve marine mammals and leaves the door open for the application of other international instruments.[51] Other relevant institutions in fact include the UN Environment Programme, with its regional seas conventions, and the Food and Agriculture Organization of the United Nations, as well as other international organizations that address activities that negatively impact on marine mammals, such as land-based sources of marine pollution.[52] **14**

One global international regulatory instrument is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[53] which currently lists all whale species in its Appendix I, reflecting the IWC moratorium on commercial whaling[54] as well as in recognition of the fact that 'international trade in whale meat and other products [otherwise lacks] adequate international monitoring or control'.[55] In further acknowledgement that any illegal trade in whale products undermines the effectiveness of both CITES and the IWC, CITES parties also authorized the Secretariat to exchange information and consult with the IWC on all proposals to list or delist cetaceans from its Appendices.[56] **15**

Several regional arrangements should also be regarded as relevant for the purposes of Art. 65. First of all, certain whaling countries (Norway, Iceland, Greenland and the Faroe Islands) established the Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, which established the North Atlantic Marine Mammal Commission with the objective to contribute through regional consultation and cooperation to the conservation, rational management and study of marine mammals in the North Atlantic.[57] While this organization is largely seen as an alternative forum to the IWC, it has so far not functioned as a regulatory body but only as a forum for data collection.[58] **16**

The Convention on the Conservation of Migratory Species of Wild Animals (CMS) is also a salient international framework that has focused on marine mammals, listing several cetaceans **17**

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[48] *Proelss* (note 6), paras. 15–17, refers to the revised management scheme as 'widely considered as one of the most rigorous and conservative management schemes for living marine resources ever developed'; while *Carlarne* (note 27), 14–21 notes criticism for its inadequate ecosystem approach.

[49] See ICJ, *Case Concerning Whaling in the Antarctic* (Australia v Japan; New Zealand Intervening), Merits, Judgment of 31 March 2014, ICJ Reports (2014), 226, para. 56, where the Court highlighted that 'amendments to the Schedule and recommendations by the IWC may put an emphasis on one or other objective pursued by the Convention, but cannot alter its object and purpose.'

[50] *Birnie* (note 3), 275.

[51] *Ibid.*

[52] *Ibid.*, 265, 272.

[53] *Erik Franckx*, The Protection of Biodiversity and Fisheries Management: Issues Raised by the Relationship between CITES and LOSC, in: David Freestone *et al.* (eds.), The Law of the Sea: Progress and Prospects (2006), 210.

[54] *Birnie* (note 3), 276; *Proelss* (note 6), para. 18; *Alexander Gillespie*, Whaling Diplomacy (2005), 337–338. Although attempts have been made to down-list certain whale species, these have been so far unsuccessful, *ibid.*, 338–345.

[55] COP CITES, Illegal Trade in Whale Meat, Resolution Conf. 9.12 (CoP9) (1994); see comments by *Gillespie* (note 53), 328.

[56] COP CITES, Conservation of Cetaceans, Trade in Cetacean Specimens and the Relationship with the International Whaling Commission, Resolution Conf. 11.4 (Rev. CoP 12) (2000); see also *Gillespie* (note 54), 328, who also reports on IWC resolutions on trade in whale products before and after the adoption of CITES; *Carlarne* (note 27), 22–28.

[57] Art. 2 Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic.

[58] *Proelss* (note 6), paras. 19–20; *Carlarne* (note 26), 29.

in its appendices, and having become 'the foremost international body' for the conservation of small cetaceans in particular.[59] In addition, a series of regional conservation agreements have been developed in the framework of CMS, such as the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, the Agreement on the Conservation of Seals in the Wadden Sea, the Memorandum of Understanding on the Conservation and Management of Dugongs and their Habitats throughout their Range,[60] the Memorandum of Understanding concerning Conservation Measures for the Eastern Atlantic Populations of the Mediterranean Monk Seal,[61] and the Memorandum of Understanding for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region.[62] These agreements have been considered pure conservation treaties, being based on the precautionary approach and having led to the adoption of comprehensive conservation and management plans.[63] Notably these agreements recognize in their preambles 'the importance of other global and regional instruments […] such as the [ICRW]'.[64] In 2011 CMS parties adopted a Global Programme of Work for Cetaceans,[65] including global collaborative action to address entanglement and by-catch and climate change as a high priority; ship strikes, pollution, marine noise and habitat and feeding ground degradation as a lower priority; as well as the development of a formal process within CMS for providing comments to CITES on proposals to amend the latter's Appendices and to seek comments from CITES on proposals to amend the CMS Appendices.[66]

18 Other relevant agreements include the 1998 Agreement on the International Dolphin Conservation Programme,[67] which aims to progressively reduce the incidental dolphin mortalities in tuna purse-seine fishery to levels approaching zero through the setting of annual limits and the long-term sustainability of the tuna stocks in the Agreement area. Its implementation is being coordinated by the ICCAT. Another prominent instrument is the 1999 Agreement between France, Italy and Monaco establishing the Ligurian Sea Sanctuary in the Mediterranean Sea establishing an area within which killing, attempt to taking and harassment of cetaceans (including small cetaceans) is prohibited, as well as providing an innovative framework to regulate habitat preservation (in terms of prevention of pollution and restriction to navigation), fishing techniques, scientific research, whale-watching, and education activities.[68]

19 Some States have also unilaterally addressed this issue by banning imports of fish caught using techniques which may be harmful to marine mammals. However, such action has

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[59] *Gillespie* (note 54), 333.

[60] UNEP/CMS, Memorandum of Understanding on the Conservation and Management of Dugongs and their Habitats throughout Their Range, 31 October 2007, available at: http://www.cms.int/species/dugong/pdf/Annex_08_Dugong_MoU.pdf.

[61] UNEP/CMS, Memorandum of Understanding Concerning Conservation Measures for the Eastern Atlantic Populations of the Mediterranean Monk Seal (*Monachus Monachus)*, 18 October 2007, available at: http://www.cms.int/species/monk_seal/Monk_Seal_MoU_with_signatures_En.pdf.

[62] UNEP/CMS, Memorandum of Understanding for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region, 9 September 2006, available at: http://www.cms.int/species/pacific_cet/_CMS_Pacific_Cetaceans_MoU_E_amended.pdf.

[63] *Proelss* (note 6), para. 23. For other relevant agreements, see *ibid.*, paras. 25–26.

[64] E. g., Recital 11 Preamble ACCOBAMS. This reflects the conflict clause in Art. XII (2) CMS, *Gillespie* (note 54), 332.

[65] COP CMS, Global Programme of Work for Cetaceans, UN Doc. UNEP/CMS/Resolution 1.15 (2011).

[66] *Ibid.*

[67] Agreement on the International Dolphin Conservation Program, 15 May 1998, available at: http://iattc.org/PDFFiles2/AIDCP-amended-Oct-2009.pdf. It was adopted by the 35th Intergovernmental Meeting on the Conservation of Tunas and Dolphins in the Eastern Pacific Ocean; the Secretariat is hosted in Inter-American Tropical Tuna Commission (ICCAT).

[68] L'Accord relatif à la création en Méditerranée d'un Sanctuaire pour le Mammifères Marins, 25 November 1999 (original languages are French and Italian), available at: http://www.oceanlaw.net/texts/sanctuary_fr.htm For a legal analysis of the treaty, see *Tullio Scovazzi*, The Mediterranean Marine Mammals Sanctuary, IJMCL 16 (2001), 132.

sometimes been challenged as a violation of international trade rules.[69] The most recent of these cases concerned a United States measure designed to promote the conservation of dolphins by imposing strict conditions for the use of a 'dolphin-safe' label on tuna products imported into the United States. In response to a challenge by Mexico, the Appellate Body of the World Trade Organization found there was a violation of the non-discrimination provision in the Agreement on Technical Barriers to Trade because tuna caught in the Eastern Tropical Pacific had to meet more stringent conditions in order to be labeled 'dolphin-friendly' compared with tuna caught in other parts of the world.[70] At the same time, the Appellate Body confirmed that the Agreement on Technical Barriers to Trade allowed the United States to adopt a unilateral standard which was stricter than the standards contained in the 1998 Agreement on the International Dolphin Conservation Programme to which it was a party.[71]

It can be concluded that Art. 65 is 'a framework' provision the implementation of which is dependent on more specific regional and global agreements.[72] Its merit has been allowing, if not encouraging, continued debate on marine mammals regulation in a variety of international fora[73] and to some extent also their cooperation.[74] 20

Article 66
Anadromous stocks

1. States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks.

2. The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landward of the outer limits of its exclusive economic zone and for fishing provided for in paragraph 3(b). The State of origin may, after consultations with the other States referred to in paragraphs 3 and 4 fishing these stocks, establish total allowable catches for stocks originating in its rivers.

3. (a) **Fisheries for anadromous stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin. With respect to such fishing beyond the outer limits of the exclusive economic zone, States concerned shall maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and the needs of the State of origin in respect of these stocks.**

(b) **The State of origin shall cooperate in minimizing economic dislocation in such other States fishing these stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred.**

(c) **States referred to in subparagraph (b), participating by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for**

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[69] See e. g. GATT Panel Report, *US – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155.

[70] Report of the WTO Appellate Body, *US – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012, para. 297: 'the United States has not demonstrated that the difference in labeling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is 'calibrated' to the risks to dolphins arising from difference fishing methods in different areas of the ocean'.

[71] *Ibid.*, para. 401.

[72] *Proelss* (note 6), para. 14.

[73] *Birnie* (note 3), 266.

[74] E. g., the above-mentioned cooperation between CITES and the IWC and also the, IWC, Memorandum of Understanding between the Secretariat of the IWC and the Secretariat of the CMS, Appendix 2, IWC 52nd Meeting Report (2001), where the two bodies 'to the extent possible, coordinate their programme of activities to ensure that their implementation is complementary and mutually supportive', *Gillespie* (note 54), 332–337.

that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.

(d) **Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.**

4. In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall cooperate with the State of origin with regard to the conservation and management of such stocks.

5. The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations.

Bibliography: *David J. Attard*, The Exclusive Economic Zone in International Law (1987); *Patricia W. Birnie*, The Conservation and Management of Marine Mammals and Anadromous and Catadromous Species, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 357–393; *Jill L. Bubier*, International Management of Atlantic Salmon, ODIL 19 (1988), 35–57; *Walter W. Crozier/Pieter-Jan Schön/Gerald Chaput/Ted (E.C.E.) Potter/Niall Ó. Maoiléidigh/Julian C. MacLean*, Managing Atlantic Salmon (*Salmo salar L.*) in the Mixed Stock Environment: Challenges and Considerations, ICES Journal of Marine Science 61 (2004); *William T. Burke*, Anadromous Species and the New Law of the Sea, ODIL 22 (1991), 95–131; *William T. Burke*, U.S. Fishery Management and the New Law of the Sea, AJIL 76 (1982), 24–55; *Parzival Copes*, The Law of the Sea and Management of Anadromous Fish Stocks, ODIL 4 (1977), 233–259; *Douglas Guilfoyle*, Shipping Interdiction and the Law of the Sea (2009); *Moritaka Hayashi*, Fisheries in the North Pacific: Japan at a Turning Point, ODIL 22 (1991), 343–364; *Ellen Hey*, The Regime for the Exploitation of Transboundary Marine Fisheries Resources (1989); *John W. Kindt*, The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species, and the Highly Migratory Species, SJILC 11 (1984), 9–46; *George S. Myers*, Usage of Anadromous, Catadromous and Allied Terms for Migratory Fishes, Copeia (1949), 89–97; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993)

Documents: FAO, Code of Conduct for Responsible Fisheries (1995); Large-scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas, GA Res. 44/225 of 22 December 1989; NASCO, Regulatory Measure for Fishing for Salmon at West Greenland for 2012, 2013, 2014, Doc. WGC(12)12 (2012); NASCO, Resolution on Fishing for Salmon on the High Seas, Res. CNL(92)54 (1992); NASCO, Protocol Open for Signature by States Not Parties to the Convention for the Conservation of Salmon in the North Atlantic Ocean, Res. CNL(92)53 (1992); NASCO/NEA, Decision Regarding the Salmon Fishery in Faroese waters in 2013, 2014, 2015, Doc. NEA(12)7 (2012); North Pacific Anadromous Fish Commission, Annual Report 2010 (2010)

Cases: *Award between the United States and the United Kingdom, Relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (United States *v.* United Kingdom), Decision of 15 August 1893, RIAA XXVIII, 263

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I. Purpose and Function

1 Anadromous species present a particular problem for conservation and management because of their peculiar migratory habits; they originate in the rivers and lakes of a single

State, before migrating out to sea where they spend the majority of their adult lives. Towards the end of their lives, these fish return to the same river in which they were born in order to breed. It follows that much of the cost associated with conserving and managing anadromous species falls upon the State of origin, as they must ensure that the fish can pass in and out of their rivers. The State of origin must often make a choice between using a river for fish rearing as opposed to other uses.[1] Where it is possible to combine these uses, it can come at a high financial cost. Moreover, the State of origin must protect the spawning rivers from pollution, an aim which may require the abatement of otherwise economically valuable activities.

The conservation and management regime established by Art. 66 is designed to take into account the particular circumstances of anadromous fish and to compensate the State of origin for the measures that it must take in order to promote the conservation of its anadromous stocks. It achieves this by giving certain rights to the State of origin to manage anadromous fish stocks. 2

Art. 66 operates as *lex specialis*. Whilst Art. 61 may remain relevant in relation to the adoption of appropriate regulatory measures, including a total allowable catch, Art. 66 provides a special framework for determining which States may participate in fishing for anadromous species, replacing the general provisions of Art. 62. 3

Art. 66 also restricts the rights of other States to fish for anadromous species on the high seas. Thus, Art. 66 operates as an important exception to freedom of fishing on the high seas as established in Art. 87 (1)(e) and concretized in Art. 116.[2] 4

II. Historical Background

Prior to the conclusion of UNCLOS, anadromous species were largely subject to freedom of fishing on the high seas, subject to any particular arrangement entered into by States.[3] Indeed, in the *Bering Fur Seals Arbitration*, the Tribunal explicitly rejected the argument that a State of origin should have preferential rights over a species originating in its territory; it found that 'the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Bering Sea, when such seals are found outside the ordinary three-mile limit.'[4] 5

Several States at UNCLOS III sought to restrict the exploitation of anadromous species as part of a broader package regulating access to fish. For its part, Ireland proposed that the State of origin was to be 'the sole harvester of [anadromous] stocks'.[5] Other proposals would have permitted the continuation of fishing by other States on the high seas subject to the control of the State of origin.[6] 6

A compromise was achieved through informal consultations undertaken through the Evensen Group which presented a draft text to the third session of the Conference in 1975.[7] 7

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[1] See *Parzival Copes*, The Law of the Sea and Management of Anadromous Fish Stocks, ODIL 4 (1977), 233, 243–244.

[2] For further information, see *Rayfuse* on Art. 116.

[3] There were some treaties which sought to restrict fishing for salmon on the high seas; see e. g. *Moritaka Hayashi*, Fisheries in the North Pacific: Japan at a Turning Point, ODIL 22 (1991), 343, 344–349.

[4] *Award between the United States and the United Kingdom, Relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (United States *v.* United Kingdom), Decision of 15 August 1893, RIAA XXVIII, 263, 269.

[5] Statement of O'Meallain (Ireland), Second Committee UNCLOS III, 22nd Meeting, UN Doc. A/CONF/C.2/SR.22 (1974), 171, 181 (para. 142). See also the proposal of Ireland which would have had the effect of banning fishing for anadromous species beyond the exclusive economic zone (EEZ), Second Committee UNCLOS III, Ireland: Draft Article on Anadromous Species, UN Doc. A/CONF.62/C.2/L.41 (1974), OR III, 220.

[6] E. g. Sea-Bed Committee, United States: Revised Draft Fisheries Article, UN Doc. A/AC.138/SC.II/L.9 (1972). See also Second Committee UNCLOS III, Canada: Working Paper on the Special Case of Salmon – the Most Important Anadromous Species, UN Doc. A/CONF.62/C.2/L.81 (1974), OR III, 240.

[7] UNCLOS III, The Economic Zone (1975, mimeo.), reproduced in: Renate Platzöder, The Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1982), 209, 209 (Article 13).

According to this document, high seas fishing for anadromous species could continue, but only subject to the agreement of the State of origin. A version of this text was incorporated into the negotiating text at the end of the third session and further refinements were made over the following sessions. In particular, the text was amended to replace the reference to the 'exclusive economic zone' with a reference to 'waters landward of the outer limits of the exclusive economic zone' in order to emphasize that the provision applied to internal waters and territorial sea, as well as the EEZ.[8]

III. Elements

1. 'anadromous stocks'

8 Anadromous fish are those species which 'spend most of their lives in the sea and migrate to fresh water to breed'.[9] By far the most commercially important species of anadromous fish is the salmon but the category also includes some species of shad, trout, striped bass, smelt and sturgeon.

2. 'States [of origin] shall have the primary interest in and responsibility for such stocks'

9 Art. 66 (1) recognizes that 'States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks'. These States are thereafter referred to as the 'State of origin' and the identification of this category of States is central to the operation of the provision. The language is not completely free from ambiguity. The term 'originate' could conceivably refer to a State through whose rivers the stocks pass through prior to entering the open ocean. The better interpretation of this term, however, is where the stocks spawn.[10] It follows that there is a single State of origin for any particular anadromous stock and it is this State which has the primary interest in and responsibility for the conservation and management of the stock. This interpretation is supported by the fact that Art. 66 (2) refers to 'the State of origin' in the singular.

10 Whilst the State of origin has the primary interest in anadromous stocks, it does not follow that it has an exclusive right to fish those stocks. Article 66 regulates the circumstances in which other states may fish for anadromous species.

3. 'Fisheries for anadromous stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones'

11 Art. 66 (3)(a) provides that '[f]isheries for anadromous stocks shall be conducted only in waters landward of the outer limits of the exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin.' Thus, the general rule is that fishing for anadromous stocks shall not take place on the high seas. This is an exception to the principle of freedom of fishing on the high seas (→ Art. 87 (1)(e); Art. 116) and it is explicitly recognized in Art. 116 (b) which makes freedom of fishing on the high seas subject to the rights, duties, and interests of coastal States provided for, *inter alia*, in Art. 66.

12 The one exception to the ban on high seas fishing for anadromous species is where it would cause 'economic dislocation' for other States. The purpose of this exception is to

[8] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 674.

[9] *George S. Myers*, Usage of Anadromous, Catadromous and Allied Terms for Migratory Fishes, Copeia (1949), 89, 94.

[10] *John W. Kindt*, The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species, and the Highly Migratory Species, SJILC 11 (1984), 9, 20–21; *William T. Burke*, U.S. Fishery Management and the New Law of the Sea, AJIL 76 (1982), 24, 45.

permit nationals of those States which had traditionally fished for anadromous species to continue fishing those stocks. However, it would appear to exclude those States which have not previously fished for anadromous species from commencing high seas fishing.[11] Indeed, it has been suggested that this provision was inserted in order to accommodate the interests of Japan whose nationals had traditionally been active in fishing for salmon in the high seas of the North Pacific Ocean.[12] The need for the State or origin to take into account the interests of other States is stressed by Art. 66 (3)(b) which obliges the State of origin to 'co-operate in minimizing economic dislocation in such other States fishing those stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred'. This provision suggests that the State of origin cannot arbitrarily refuse to permit other States to fish for anadromous stocks on the high seas where there is evidence that a ban might lead to economic dislocation.

13 It is not entirely clear what is meant by 'economic dislocation' in this provision. In particular, it can be asked whether any economic dislocation will suffice or whether there is a *de minimis* standard. Another question is whether or not it grants a right for other States to continue fishing for anadromous stocks on the high seas on a permanent basis. BURKE interprets this provision to mean that 'high seas fishing for anadromous species is an activity that is to be progressively eliminated' and 'this is to be accomplished by continuously restricting the level of effort until it is no longer economical to continue'.[13] This interpretation perhaps goes beyond the ordinary meaning of the text and it would seem to be open to the concerned States to decide how long high seas fishing should continue.

14 Where high seas fishing does continue, it is clear from Art. 66 that it is subject to the agreement of the State of origin. In this regard, the Convention provides that 'with respect to fishing beyond the outer limits of the exclusive economic zone, States concerned shall maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and the needs of the State of origin in respect of those stocks.'[14] Ideally such consultations would result in an agreement on the appropriate regulatory measures. If a State cannot reach agreement with the State of origin, however, it would appear that it cannot fish for anadromous species on the high seas. According to Art. 66 (2), any fishing on the high seas must comply with the regulatory measures and total allowable catch (→ Art. 61 (1)) set by the State of origin.

15 An implicit condition for other States to fish for anadromous species on the high seas is participation in any 'measures to renew anadromous species' taken by the State of origin, and Art. 66 contemplates 'possible payments to the State of origin to support conservation measures'.[15] This quid pro quo is further expressed in Art. 66 (3)(c) which provides that

> 'States referred to in subparagraph (b), participating by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.'

16 Although the State of origin has the ability to set 'appropriate regulatory measures' for anadromous stocks on the high seas, its authority does not extend to the unilateral enforcement of those measures. Art. 66 (3)(d) makes clear that 'enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned'. Thus, the principle of exclusive flag State jurisdiction (→ Art. 92 (1)) continues to apply to the enforcement of conservation measures, in the absence of an agreement to the contrary. This is clearly a problem for the State of origin because, even if it could detect unlawful fishing by other States, it cannot

[11] In agreement, see *William T. Burke*, Anadromous Species and the New Law of the Sea, ODIL 22 (1991), 95, 104.
[12] *Ibid.*, 106–107.
[13] *Ibid.*, 105.
[14] Art. 66 (3)(a).
[15] *Burke* (note 11), 106.

take unilateral action. Rather, under general international law, it is limited to informing the flag State of the unlawful activity.

17 The Anadromous Stocks Convention deals to some extent with the problem of enforcement on the high seas. According to its Art. V, 'the duly authorized officials of any Party may board vessels of the other Parties which can be reasonably believed to be engaged in fishing for or incidental taking of anadromous fish.' The powers of the authorized officials include the inspection of the vessel and its equipment, as well as the ability to arrest the vessel and bring it back to port. However, only the flag state is authorized to take enforcement proceedings against a delinquent vessel and the vessel must be handed over to the flag State as promptly as practicable.[16] This provides a good example of the type of cooperation in enforcement that can be agreed by interested parties under Art. 66 (3)(d). This mechanism only allows action against another party to the Convention and the activities of non-parties remains a problem.

18 Both the Anadromous Stocks Convention and the Convention for the Conservation of Salmon in the North Atlantic Ocean (Salmon Convention) contain provisions which require the parties to invite the attention of any non-party to activities of its vessels which appear to adversely affect the conservation of anadromous stocks.[17] Indeed, a flag State is arguably under an obligation to take such measures as are necessary to ensure that its vessels do not violate relevant conservation and management measures.[18] In practice, flag States often cooperate upon request from States of origin to inspect vessels, either on an ad hoc basis[19] or through standing cooperative arrangements.[20] Moreover, port State measures are increasingly used to follow up alleged IUU fishing activities on the high seas.[21]

19 In practice, there is little fishing for anadromous species on the high seas today. Both of the major treaties which have been concluded to regulate the conservation and management of anadromous species have prohibited the taking of such species on the high seas.[22] Indeed, the Anadromous Stocks Convention not only addresses direct fishing for anadromous stocks, but it also regulates the incidental taking of anadromous species, providing that 'incidental taking of anadromous fish shall be minimized to the maximum extent possible'.[23] The Annex to the Anadromous Stocks Convention provides guidance on how states should minimize the taking of incidental catch of anadromous species and the North Pacific Anadromous Fish Commission is empowered to recommend additional measures to avoid or reduce incidental taking of anadromous fish on the high seas.[24]

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[16] Art. V (2) Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, 11 February 1992, TIAS 11465 (Anadromous Stocks Convention).

[17] Art. IV (1) Anadromous Stocks Convention; Art. 2 (3) Convention for the Conservation of Salmon in the North Atlantic Ocean, 2 March 1982, UNTS 1338, 33. See also NASCO, Protocol Open for Signature by States Not Parties to the Convention for the Conservation of Salmon in the North Atlantic Ocean, Res. CNL(92)53 (1992); NASCO, Resolution on Fishing for Salmon on the High Seas, Res. CNL(92)54 (1992).

[18] See e. g. Art. III (1)(a) Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 24 November 1993, UNTS 2221, 120; FAO, Code of Conduct for Responsible Fisheries (1995), Art. 6.10.

[19] An example is the agreement of the Cambodian government to allow the US coastguard to board a Cambodian flagged vessel suspected of high seas drift net fishing for salmon in the North Pacific in April/May 2010. For further examples, see *Douglas Guilfoyle*, Shipping Interdiction and the Law of the Sea (2009), 120–124.

[20] E. g. the Memorandum of Understanding between the Government of the United States of America and the Government of the People's Republic of China on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215 of December 20, 1991, 3 December 1993. For an explanation of the Memorandum of Understanding and its implementation, see *Guilfoyle* (note 19), 119–120.

[21] See e. g. the enforcement activities reported by the Republic of Korea at the 18th Annual Meeting of the North Pacific Anadromous Fish Commission, North Pacific Anadromous Fish Commission, Annual Report 2010 (2010), 61–62.

[22] Art. III (1)(a) Anadromous Stocks Convention; Art. 2 (1) Salmon Convention.

[23] Art. III (1)(b) Anadromous Stocks Convention. It continues in Art. III (1)(c): 'the retention on board of fishing vessel of anadromous fish taken as an incidental taking in a fishing activity directed at non-anadromous fish shall be returned immediately to the sea'.

[24] Art. IX (12) Anadromous Stocks Convention.

4. 'anadromous stocks migrat[ing] into or through the waters […] of a State other than the State of origin'

20 The majority of fishing for anadromous species takes place landward of the outer limits of the EEZ. The State of origin, if it has claimed an EEZ, clearly has a right to fish for such species (→ Art 56 (1)(a)). In addition, anadromous species may migrate through the territorial sea (→ Art. 2) or EEZ of other coastal States, and such States will also have sovereign rights over the living resources within their jurisdiction. As noted by COPES, the problem of interception by neighbouring States is 'more serious to the [S]tate of origin than that of high seas fishing in at least one respect: the [S]tate of origin is faced with the absolute authority of the intercepting coastal [S]tate in that [S]tate's own waters'.[25] Unlike States wishing to fish on the high seas, other coastal States do not need the permission of the State of origin to fish for anadromous species within their EEZ.[26] Yet, it does not follow that they have complete freedom to fish for these stocks. The Convention deals with this issue by imposing a duty of cooperation on the relevant States in Art. 66 (4). This is a more specific duty than the duty of cooperation in Art. 63 (1) which otherwise applies where the same stock occurs within the EEZ of one or more coastal States.

21 One example of such cooperation is the 1985 Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon.[27] These countries have been cooperating on the taking of salmon stocks originating in their rivers for many years.[28] The 1985 Treaty establishes a framework for cooperation whereby the two States seek to 'prevent overfishing', provide for 'optimum production', and to 'provide for each Part to receive the benefits equivalent to the production of salmon originating in its waters'.[29] Notably, the treaty recognizes 'the desirability in most cases of reducing interceptions', although this objective has to be balanced against 'the desirability in most cases of avoiding undue disruption of existing fisheries'.[30]

22 The Salmon Convention also establishes an institutional framework for the purposes of contributing to the conservation, restoration, enhancement and rational management of salmon stocks in the North Atlantic Ocean.[31]

23 It is less clear what happens when coastal States cannot agree on an appropriate conservation regime. BURKE suggests that the State of origin has the ability to set a total allowable catch in this situation.[32] This argument is based upon the text of Art. 66 (1) which provides that 'the State of origin may, after consultations with the other States referred to in paragraph 3 and paragraph 4 fishing these stocks, establish total allowable catches for stocks originating in its rivers'. Yet, it would appear that the State of origin cannot dictate other regulatory measures to coastal States. Art. 66 (2) only confers a right on the State of origin to set 'appropriate regulatory measures' for fishing in waters landward of the outer limits of its own EEZ and on the high seas; this provision does not extend to the waters landward of the outer limits of the EEZ of other States. Thus, other coastal States appear to have some discretion to adopt their own regulatory measures. Moreover, UNCLOS does not deal with the situation of mixed stocks

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[25] *Copes* (note 1), 251.

[26] *David J. Attard*, The Exclusive Economic Zone in International Law (1987), 188.

[27] Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon, 28 January 1985, UNTS 1469, 358.

[28] See e. g. 1930 Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fisheries of the Fraser River System, 26 May 1930, LNTS 184, 305, as well as its associated protocols.

[29] Art. III (1) Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon.

[30] Art. III (3) Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon. Interception is defined in Art. I (4) of the 1985 Treaty as 'the harvesting of salmon originating in the waters of one Party by a fishery of the other Party'.

[31] See *infra* MN 25.

[32] *Burke* (note 11), 114.

where salmon originating in the rivers of different States intermingle at sea.[33] In this situation, it would seem that cooperation between States is imperative in order to ensure the successful conservation of anadromous species.

5. 'The State of origin […] and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article'

24 It is clear that 'the successful implementation of article 66 depends very much on cooperation among the concerned [S]tates'.[34] Art. 66 (5) explicitly calls for the State of origin and other interested States to implement their duty of consultation and cooperation through regional organizations. This provision is worded in mandatory language ('shall') although the effect of the provision is softened by the words 'as appropriate'. In practice, several international organizations exist which seek to manage stocks of anadromous species.

25 In the Atlantic Ocean, the only anadromous stock to be regulated on a cooperative basis is salmon. At the time of writing, there were six parties[35] to the Salmon Convention which establishes the North Atlantic Salmon Conservation Organization (NASCO).[36] The objective of NASCO is to 'contribute through consultation and co-operation to the conservation, restoration, enhancement and rational management of salmon stocks subject to this Convention, taking into account the best scientific evidence available to it'.[37] As well as banning fishing for salmon on the high seas, the Salmon Convention also prohibits fishing for salmon beyond 12 nautical miles (nm) with the exception of West Greenland and the Faroe Islands where fishing is generally permitted up to 40 nm and 200 nm respectively.[38] Whilst NASCO cannot adopt decisions concerning the management of salmon harvests within the area of fisheries jurisdiction of the parties[39], it has the power to regulate fishing within the jurisdiction of one party where it affects salmon originating in the rivers of another party.[40] NASCO carries out most of its work through a series of regional commissions, namely the North American Commission, the West Greenland Commission and the North-East Atlantic Commission.[41] Each Commission has the power to agree on regulatory measures, including quotas, for the fishing of mixed stocks.[42] The commissions operate by unanimity so that all members of a Commission must agree to a proposed measure[43]; regulatory measures proposed by a Commission become binding on its members at a point in time specified by the Secretary or the Commission itself.[44] In particular, NASCO has sought to regulate the distant water mixed stock fisheries in West Greenland and the Faroe Islands with the

[33] For an assessment of the problems of managing mixed stocks, see *Walter W. Crozier et al*, Managing Atlantic Salmon (*Salmo salar L.*) in the Mixed Stock Environment: Challenges and Considerations, ICES Journal of Marine Science 61 (2004), 1344–1358.

[34] *Patricia W. Birnie*, The Conservation and Management of Marine Mammals and Anadromous and Catadromous Species, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 357, 373.

[35] Canada, Denmark (in respect of the Faroe Islands & Greenland), the European Union, Norway, the Russian Federation and the United States of America. According to the NASCO website, Iceland withdrew from NASCO with effect from 31 December 2009 because of financial considerations, but has indicated that it intends to re-accede to the Convention when the economic situation improves: http://www.nasco.int/about.html.

[36] Art. 3 (1) Salmon Convention. For an assessment of the early work of the Commission, see *Jill L. Bubier*, International Management of Atlantic Salmon, ODIL 19 (1988), 35.

[37] Art. 3 (2) Salmon Convention.

[38] Art. 2 (2) Salmon Convention.

[39] Art. 4 (2) Salmon Convention.

[40] Arts. 7 (1) and 8 Salmon Convention.

[41] Arts. 7–11 Salmon Convention.

[42] Arts. 7 (1)(b) and 8 (b) Salmon Convention. The powers of the North American Commission differ slightly from the powers of the other two Commissions.

[43] Art. 11 (3) Salmon Convention.

[44] Art. 13 (2) Salmon Convention. Members may also lodge an objection after the adoption of a regulatory measure which prevents the measure becoming binding on all members of the Commission, Art. 13 (3) Salmon Convention.

adoption of decisions or regulatory measures limiting the amount of fish caught.[45] Another function of the commissions is to make recommendations concerning scientific research.[46] NASCO does not have its own scientific body but it cooperates closely with International Council for the Exploration of the Seas[47] for the purposes of gathering scientific data on salmon stocks within the Convention area.

26 The Anadromous Stocks Convention establishes the North Pacific Anadromous Fish Commission whose objective is to promote the conservation of anadromous stocks in the waters of the North Pacific Ocean and its adjacent seas north of 33 degrees north latitude and beyond 200 nm from national baselines.[48] The Commission regulates fishing for Chum Salmon, Coho Salmon, Pink Salmon, Sockeye Salmon, Chinook Salmon, Cherry Salmon, Steelhead Trout. At the time of writing, there were five members of the Commission.[49] The Commission replaced the more fragmented regime which had previously applied to salmon fisheries in the North Pacific.[50] In contrast to the North Atlantic Salmon Fisheries Organization, the North Pacific Anadromous Fish Commission cannot make any recommendations for measures for the conservation of anadromous species within national jurisdiction. Rather its mandate is limited to promoting cooperation in areas beyond national jurisdiction. As noted above, the Anadromous Stocks Convention prohibits fishing for anadromous stocks on the high seas and the main role of the Commission is therefore related to the enforcement of this ban.[51] In doing so, the Commission has significantly contributed to the promotion of the moratorium on large-scale pelagic drift net fishing adopted by the United Nations General Assembly in 1989.[52] The Commission is also responsible for coordinating the conduct of scientific research and the exchange of information relating to anadromous stocks.[53] In addition, the Commission is competent to consider matters related to the incidental taking of anadromous species[54] and the conservation of ecologically related species.[55]

27 As noted above, Canada and the United States also cooperate on the issue of interception bilateral arrangements. The 1985 Treaty between the Government of Canada and the Government of the United States of America concerning Pacific Salmon establishes a Pacific Salmon Commission composed of representatives of both parties. The Commission has powers to recommend regulations to the parties on the management and conservation of salmon. On adoption by the parties, fisheries regimes proposed by the Commission become binding and the parties are under a duty to establish and enforce regulations to implement these fisheries regimes.[56]

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[45] In all but two years since 1998, an internal-use only fishery has been allowed in West Greenland, see NASCO, Regulatory Measure for Fishing for Salmon at West Greenland for 2012, 2013, 2014, Doc. WGC(12)12 (2012). There has also been no commercial salmon fishery in the Faroe Islands since the early 1990s, see NASCO/NEA, Decision Regarding the Salmon Fishery in Faroese waters in 2013, 2014, 2015, Doc. NEA(12)7 (2012).

[46] Arts. 7(1) (d) and 8(c) Salmon Convention.

[47] For further information on the International Council for the Exploration of the Seas, see www.ices.dk.

[48] Art. VIII Anadromous Stocks Convention.

[49] Canada, Japan, Republic of Korea, the Russian Federation, and the United States, see http://www.npafc.org/new/about_convention.html.

[50] See *Moritaka Hayashi*, Fisheries in the North Pacific: Japan at a Turning Point, ODIL 22 (1991), 343, 344–352.

[51] Art. V Anadromous Stocks Convention. See *supra* MN 25.

[52] Large-scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas, GA Res. 44/225 of 22 December 1989.

[53] Art. VII Anadromous Stocks Convention.

[54] Art. III (1)(b) Anadromous Stocks Convention.

[55] Art. VIII (3) Anadromous Stocks Convention.

[56] Art. IV Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon.

Article 67
Catadromous species

1. A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the ingress and egress of migrating fish.

2. Harvesting of catadromous species shall be conducted only in waters landward of the outer limits of exclusive economic zones. When conducted in exclusive economic zones, harvesting shall be subject to this article and the other provisions of this Convention concerning fishing in these zones.

3. In cases where catadromous fish migrate through the exclusive economic zone of another State, whether as juvenile or maturing fish, the management, including harvesting, of such fish shall be regulated by agreement between the State mentioned in paragraph 1 and the other State concerned. Such agreement shall ensure the rational management of the species and take into account the responsibilities of the State mentioned in paragraph 1 for the maintenance of these species.

Bibliography: *Patricia Birnie*, The Conservation and Management of Marine Mammals and Anadromous and Catadromous Species, in: Ellen Hey (ed.), Developments in International Fisheries Law (1999), 357–393; *David Freestone/Kate K. Morrison*, The Sargasso Sea Alliance: Seeking to Protect the Sargasso Sea IJMCL 27 (2012), 647–655; *Ellen Hey*, The Regime for the Exploitation of Transboundary Marine Fisheries Resources (1989); *George S. Myers*, Usage of Anadromous, Catadromous and Allied Terms for Migratory Fishes, Copeia (1949), 89–97; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015)

Documents: COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Eleventh Meeting: XI/17. Maine and Coastal Biodiversity: Ecologically or Biologically Significant Marine Areas (EBSAs), UN Doc. UNEP/CBD/COP/DEC/XI/17 (2012); CMS, Report of the 11th Meeting of the Conference of the Parties to the Convention on Migratory Species of Wild Animals (4–9 November 2014), UN Doc. UNEP/CMS/COP11/REPORT (2014)

Cases: ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14; *Lac Lanoux Arbitration* (France *v.* Spain), Award of 16 November 1957, ILR 24, 101

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I. Purpose and Function

1 In recognition of the fact that catadromous species have a close relationship with the State in whose waters they spend the majority of their time, Art. 67 establishes a *lex specialis* to address the exploitation (→ Art. 56 (1)(a); Art. 62) of catadromous species.

II. Historical Background

UNCLOS is the first multilateral instrument to specifically regulate catadromous species as a separate category from other fish stocks. Whilst catadromous species are economically less important than the other species for which a special regime is created (→ Arts. 63–66), a single article was dedicated to the subject from the very beginning of UNCLOS III. The Main Trends Working Paper[1] prepared at the second session of the Conference contained a single proposal in which 'preferential rights' were granted to the State in whose waters the fish spend the greater part of their life cycle.[2] The proposal for catadromous species was further developed by the Evensen Group at the third session of the Conference. This group agreed that the State in whose waters catadromous species spend the greater part of their life cycle should have preferential rights.[3] Where catadromous species migrated through the jurisdiction of other coastal States prior to entering the waters of the State where they spent the greater part of their life cycle, the proposal called for cooperation between the States concerned with a view to agreeing on a scheme for the rational management of the species. The text of the Evensen Group was incorporated with some minor changes into the negotiating text at the end of the third session.[4] The final version of Art. 67 closely mirrors the text agreed at that time, subject only to some minor drafting changes. 2

III. Elements

1. 'catadromous species'

Catadromous species are those species of fish which spend most of their lives in fresh water but which migrate to sea to breed. Unlike highly migratory species, there is no list of species which are covered by Article 67 of the Convention.[5] Nor is there a definition of 'catadromous species' in the Convention. The scope of the provision is therefore open to interpretation. As noted by Myers, 'there has never been much variation in the general usage of this term, although […] there may be some question in regard to how far into brackish or salt water a fish must go to be called catadromous.'[6] The most prominent catadromous fish is the freshwater eel, species of which are found across the globe.[7] Several species of freshwater eel, including the European eel (*Anguilla anguilla*), Japanese eel (*Anguilla japonica*), and the American eel (*Anguilla rostrata*), are considered under threat by the International Union on the Conservation of Nature.[8] 3

[1] UNCLOS III, Statement of Activities of the Conference During its First and Second Sessions, UN Doc. A/CONF.62/L.8/Rev.1 (1974), OR III, 93, 107 (Main Trends Working Paper).

[2] *Ibid.*, 125.

[3] UNCLOS III, The Economic Zone (1975, mimeo.), reproduced in: Renate Platzöder, The Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1982), 209, 217 (Art. 14).

[4] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 682.

[5] *Cf. Harrison/Morgera* on Art. 64.

[6] *George S. Myers*, Usage of Anadromous, Catadromous and Allied Terms for Migratory Fishes, Copeia (1949), 89, 94.

[7] Nordquist/Nandan/Rosenne (note 4), 681. Freshwater eels fall within the Anguillidae family of fishes, which comprises 19 species and 6 sub-species.

[8] For information on conservation status and specific threats, see e. g. the IUCN Red List, available at: http://www.iucnredlist.org/.

2. '[the host] State […] shall have responsibility for the management'

4 Responsibility for the management of catadromous species resides with the coastal State in whose waters the species spend the 'greater part of their life cycle'. The provision assumes there is one State which bears this responsibility, therefore it is an exclusive responsibility.[9]

5 Art. 67 (2) does not exclude the other rules in Part V concerning the conservation of fish stocks. Thus, the coastal State is obliged to set an allowable catch as well as to promote the objective of optimum utilization in accordance with Arts. 61 and 62. As a consequence, other States may be permitted to exploit the surplus of the allowable catch which cannot be taken by the host State.

6 In addition to the general obligations relating to fisheries in the EEZ, Art. 67 (1) imposes further obligations on the host State, requiring it to 'ensure the ingress and egress of migrating fish'. This may include keeping the river clear from obstacles or installing special facilities to assist migratory fish, such as fish ladders.

3. 'Harvesting of catadromous species shall be conducted only in waters landwards of the outer limits of exclusive economic zones'

7 Art. 67 deviates from the general rule of freedom of fishing on the high seas (→ Art. 87 (1)(e); Art. 116) by providing that 'harvesting of catadromous species shall be conducted only in waters landward of the outer limits of exclusive economic zone'.[10] Thus, fishing for catadromous species on the high seas is totally prohibited under the Convention. The purpose of this prohibition is to prevent the capture of juveniles.[11] In practice, states have also recognized the importance of protecting the spawning grounds of some catadromous species from other threats. In 2014, the representatives of Bermuda, the Azores, Monaco, the United Kingdom and the United States of America adopted the Hamilton Declaration, identifying the Sargasso Sea, which is the spawning ground for the European eel (*Anguilla anguilla*) and the American eel (*Anguilla rostrata*), as 'an important open ocean ecosystem … which deserves recognition by the international community for ist high ecological and biological significance, its cultural importance and its outstanding universal value.'[12] Under the Declaration, a Sargasso Sea Commission was established to encourage and facilitate voluntary collaboration toward the conservation of the Sargasso Sea.'[13]

4. 'catadromous fish migrat[ing] through the exclusive economic zone of another State'

8 In many situations, catadromous species will migrate between the waters of several coastal States. Other States are permitted to harvest catadromous species whilst they are present in their EEZ (→ Art. 56 (1)(a)), or territorial sea (→ Art. 2). Art. 67 (3) requires these States to cooperate with the host State concerning the management and harvesting of the fish. The purpose of such cooperation is to reach an agreement which 'shall ensure the rational management of the species and take into account the responsibilities of the [host state] for the maintenance of these species'.

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[9] For a similar argumentation, see *Harrison* on Art. 66 MN 9.

[10] Art. 67 (2).

[11] *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 247.

[12] Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, para. 1; adopted at Hamilton Bermuda, 11 March 2014, available at: http://www.sargassoalliance.org/hamilton-declaration. Prior to this decision, the Sargasso Sea was described as an Ecologically and Biologically Significant Marine Area by the Conference of the Parties to the Convention on Biological Diversity, in part because of the fact that it is 'the only breeding location for European and American eels[…]'; see CBD COP Decision XI/17 (2012), Annex, 23.

[13] *Ibid*., para. 6. See also *David Freestone/Kate K. Morrison*, The Sargasso Sea Alliance: Seeking to Protect the Sargasso Sea IJMCL 27 (2012), 647–655.

This is one of the only references in the Convention to 'rational management'. Yet, similar provisions are found in other international agreements, and these instruments could be used to inform the interpretation of the Convention.[14] One example is the 1975 Statute on the River Uruguay[15] which requires the parties (Argentina and Uruguay) to contribute to the 'optimum and rational management of the river'. In the *Case concerning Pulp Mills on the River Uruguay*, the International Court of Justice interpreted the relevant provision of the 1975 Statute as requiring 'a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities on the other'.[16] According to the Court, it was up to the parties to achieve such a balance through the institutional mechanisms established by the Statute. **9**

In this light, it would appear that the objective of 'rational management' in Art. 67 requires interested States to negotiate a balance between their respective interests in fishing for catadromous species, whilst also taking into account the long-term conservation needs of those resources. At the same time, paragraph 3 suggests that the 'responsibilities of the [host State] shall be taken into account in such negotiations'. HEY therefore concludes that the States involved in the negotiations are not equal but rather that **10**

> 'the interest of the state in whose waters [a catadromous species] spends the greater part of its life cycle are given special consideration. One can therefor [sic] assume that the interests of the state in whose waters the species spends the greater part of its life cycle will be dominant in determining the measures to be adopted.'[17]

Clearly States must use their best efforts to reach such an agreement: 'paragraph 3 [of Article 67] implies the obligation of the States concerned to negotiate such an agreement in good faith.'[18] Yet, it is not clear what happens if agreement is not possible.[19] Art. 67 (3) is not phrased as a duty to 'seek to agree' or a duty to 'cooperate', as are Arts. 63 and 64. Rather, it requires that 'management, including harvesting, of such fish shall be regulated by agreement'. This statement, interpreted in the context of the whole of the article, could lead to the conclusion that no harvesting may take place without the agreement of the host State as it is the latter State which alone has 'responsibility for management'. Yet, this conclusion is put into question by the fact that Art. 67 (2) subjects harvesting 'to this article and other provisions of this Convention concerning fishing in these zones', suggesting that Art. 67 does not derogate from the sovereign rights of coastal States over the living resources in their EEZ (→ Art. 56 (1)(a)). From this perspective, other coastal States will have the right to harvest catadromous species, even in the absence of an agreement with the host State, albeit under the obligation to avoid undermining the host State's management efforts.[20] This outcome is compatible with general principles of international law which do not require prior consent of another State for the use of a shared resource.[21] **11**

In November 2014, the European eel was added to Appendix II of the Convention on Migratory Species.[22] As a result, range states that are party to this treaty are under an **12**

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[14] *Cf.* Art. 31 (3)(c) Vienna Convention on the Law of Treaties.

[15] Statute of the River Uruguay, 26 February 1975, UNTS, 1295, 339.

[16] ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14, para 175.

[17] *Ellen Hey*, The Regime for the Exploitation of Transboundary Marine Fisheries Resources (1989), 67–68.

[18] Nordquist/Nandan/Rosenne (note 4), 685. For further information on the concept of good faith within UNCLOS, see *O'Brien* on Art. 300 MN.

[19] Nordquist/Nandan/Rosenne (note 4), 685.

[20] See also *Tanaka* (note 8), 234: 'it seems at least arguable that Article 67(3) does not allow the host State to unilaterally exercise its jurisdiction in the EEZ of another State where catadromous fish migrate.'

[21] See e. g. *Lac Lanoux Arbitration* (France *v.* Spain), Award of 16 November 1957, ILR 24, 101, 130.

[22] See CMS, Report of the 11th Meeting of the Conference of the Parties to the Convention on Migratory Species of Wild Animals (4–9 November 2014), UN Doc. UNEP/CMS/COP11/REPORT, paras 549–550.

obligation to 'endeavour to conclude' agreements for the conservation of the species[23], with a view to restoring the species to a favourable conservation status.[24] Such negotiations may lead to the adoption of an international treaty or memorandum of understanding, which could facilitate cooperation between the range states of the European eel, allowing them to fulfill their obligations under Article 67(3) of the United Nations Convention on the Law of the Sea.

Article 68
Sedentary species

This Part does not apply to sedentary species as defined in article 77, paragraph 4.

Bibliography: *Anthony Aust*, Handbook of International Law (2005); *Issam Azzam*, The Dispute between France and Brazil over Lobster Fishing in the Atlantic, ICLQ 13 (1964), 1453–1459; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd ed. 1997); *Chie Kojima*, Fisheries, Sedentary, MPEPIL, available at: http://www.mpepil.com; *Shigeru Oda*, The Geneva Conventions on the Law of the Sea: Some Suggestions for Their Revision, Natural Resources Lawyer 1 (1968), 103–113; *Richard Young*, Sedentary Fisheries and the Convention on the Continental Shelf, AJIL 55 (1961), 359–373; *Shirley V. Scott*, The Inclusion of Sedentary Fisheries within the Continental Shelf Doctrine (1992) ICLQ 41, 788–807

Documents: ILC, Report on the Regime of the High Seas the Territorial Sea by Mr. J. P. A Francois, Special Rapporteur, UN Doc. A/CN.4/97 (1956), reproduced in: ILC Yearbook (1956), vol. II, 1–12; ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4–12; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; ILC, Report of the International Law Commission, UN Doc. A/2456 (1953), GAOR 8th Sess. Suppl. 9

Cases: PCA, *The Chagos Marine Protected Area Arbitration* (Mauritius/United Kingdom of Great Britain and Northern Ireland), Award of 18 March 2015, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1429; PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, available at: https://www.pcacases.com/web/view/7

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I. Purpose and Function

1 This short provision excludes sedentary species from the regime established by Part V of the Convention. It does not follow that coastal States do not have jurisdiction over sedentary species; rather it means that the legal basis for the exercise of sovereign rights over sedentary species is not the exclusive economic zone (EEZ) regime in Part V, rather the continental shelf regime in Part VII of the Convention. Art. 77 confirms that coastal States have exclusive rights to all natural resources on the continental shelf. The different legal basis has certain implications for the scope of rights and obligations possessed by the coastal State, as explained below.

II. Historical Background

2 The continental shelf regime developed prior to the regime for the EEZ. The first significant claim to a continental shelf was made by the United States in the now famous

[23] Art. 4(3) Convention on Migratory Species.
[24] Art. 5(1) Convention on Migratory Species.

Truman Proclamation[1]. Although the Proclamation was focused on petroleum and other mineral resources, it covered all categories of natural resources, including living resources.

The inclusion of living and non-living resources in the regime for the continental shelf was also supported by the work of the International Law Commission (ILC) in preparing its Draft Articles concerning the Law of the Sea.[2] Despite several proposals to limit the scope of the draft articles on the continental shelf to mineral resources, the final draft articles refer to 'natural resources' and the commentary makes clear that the provision covers living and non-living resources of the seabed.[3] Early drafts of the relevant provisions prepared by the ILC referred to resources which were 'permanently attached to the bed of the sea'.[4] This language was dropped at a later stage. 3

The discussion about whether it was appropriate to include living resources in the regime for the continental shelf continued at UNCLOS I.[5] Ultimately the position of the ILC was confirmed and a clause was added to the 1958 Convention on the Continental Shelf which explicitly provided that 4

> '[t]he natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.'[6]

It is this wording which is today reproduced in UNCLOS and which is incorporated by reference into Art. 68.

III. Elements

1. Sedentary Species

An important question is what is meant by the term sedentary species. Whilst a definition of this term is found in Art. 77 (4), it is still ambiguous. There is general agreement that sedentary species include chanks, clams, oysters, mussels scallops, sponges, and corals.[7] It is also clear that the concept does not include so-called bottom fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or breed there.[8] At the same time, there are some species over which there is no agreement on whether they fall within the definition of sedentary species. As noted by one commentator, 'the conclusion is inescapable that in nature there is no simple line of demarcation between sedentary and other fish, but only a long series of gradations from the unquestionably fixed at one extreme to the unquestionably free at the other'.[9] In particular, it is not clear whether certain species of crustaceans fall within this category. Thus, as recounted by Churchill and Lowe: 5

[1] Presidential Proclamation No. 2667 concerning the Policy of the United States with respect to the natural Resources of the Subsoil and the Sea Bed of the Continental Shelf, 28 September 1945, Department of the State Bulletin 13 (1945), 485.

[2] ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4.

[3] *Ibid.*, 11 (Art. 68); ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 45 (Art. 68).

[4] ILC, Report of the International Law Commission, UN Doc. A/2456 (1953), GAOR 8th Sess. Suppl. 9, 12.

[5] See *Shigeru Oda*, The Geneva Conventions on the Law of the Sea: Some Suggestions for their Reform, Natural Resources Lawyers 1 (1968) 103, 104.

[6] Art. 2 (4) Convention on the Continental Shelf. For a history, see *Richard Young*, Sedentary Fisheries and the Convention on the Continental Shelf, AJIL 55 (1961), 359, 366–367.

[7] See *Chie Kojima*, Fisheries, Sedentary, MPEPIL, para. 2, available at: http://www.mpepil.com. The inclusion of coral within the concept of sedentary species was expressly confirmed in PCA, *The Chagos Marine Protected Area Arbitration* (Mauritius/United Kingdom of Great Britain and Northern Ireland), Award of 18 March 2015, para. 304, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1429.

[8] ILC Law of the Sea Articles with Commentaries (note 3), 45 (Art. 68).

[9] *Young* (note 6), 365, giving an interesting list of examples, including the bêche de mer and the gold-lip pearl oyster.

> 'it was […] controversial whether crabs and lobsters fell within the definition of sedentary species; and this controversy gave rise to several disputes, such as the USA-Japan dispute over the king crab fishery in the eastern Behring Sea and the Franco-Brazilian dispute over the lobster fishery off the Brazilian coast'.[10]

The fact that coastal States now have the right to exploit all fisheries within 200 nautical miles (→ 56 (1)(a)) means that the controversy is less significant than in the past. Nevertheless, the scope of sedentary species is still an important issue as it defines the particular rights and obligations of the coastal State.

2. Rights and Obligations of the Coastal State in Relation to Sedentary Species

6 The effect of this provision is to exclude sedentary species from the EEZ regime. There are two principal consequences of this exclusion. Firstly, it is clear that the coastal State is not obliged to allow other States to fish for the surplus (→ 62 (2)) of sedentary species. Yet, it can be asked whether or not other States may have acquired rights to such fisheries in other ways, for example through historic fishing activities. In the view of the ILC, 'the coastal State must respect, in this (sic.) connexion, the existing right of other States.'[11] Indeed, the ILC suggested that 'it might be desirable to insert a provision to that effect in the articles themselves.'[12] However, no such provision is found in either the Convention on the Continental Shelf or UNCLOS. This raises doubts about whether or not the rights of such States are protected.[13] Indeed, Art. 77 (2) of the Convention says that 'if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.' This would seem to suggest that the rights of coastal States are indeed exclusive and any historic rights have been extinguished. There is also some support for this position in State practice[14] and it would also appear to have been confirmed in the *South China Sea Arbitration*, where the Tribunal held that

> 'the text of the Convention […] comprehensively addresses the rights of other States within the areas of the exclusive economic zone and continental shelf and leaves no space for an assertion of historic rights.'[15]

7 Secondly, the exclusion seems to suggest that coastal States are not under an express duty to conserve and manage the natural resources of the continental shelf in the same way that they are in relation to other living resources in the EEZ. Art. 77 (1) simply provides that 'the coastal State exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources.' It does not follow, however, that the coastal State has no duty to take measures to conserve the natural resources of the continental shelf.[16] Although there is no such duty in Part VII of the Convention, there are a number of arguments which support the view that coastal States are under a duty to conserve sedentary fisheries. Thus, Kojima highlights that '[Art. 193] explicitly states that States have the sovereign right to exploit their natural resources pursuant to their environmental policies

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[10] *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd ed. 1997), 151–152; see also *Issam Azzam*, The Dispute between France and Brazil over Lobster Fishing in the Atlantic, ICLQ 13 (1964), 1453.

[11] ILC, Report on the Regime of the High Seas the Territorial Sea by Mr J. P. A Francois, Special Rapporteur, UN Doc. A/CN.4/97 (1956), reproduced n: ILC Yearbook 1956, vol. II, 1, 7.

[12] *Ibid.*

[13] *Young* (note 6), 371.

[14] See e. g. the discussion of Australian practice by Scott whereby Australia asserted exclusive jurisdiction over pearl fishing on its continental shelf despite long-standing fishing activities which had been carried out by Japanese fishermen in this area: *Shirley V. Scott*, The Inclusion of Sedentary Fisheries within the Continental Shelf Doctrine (1992) ICLQ 41, 788–807.

[15] PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, available at: https://www.pcacases.com/web/view/7.

[16] *Cf. Anthony Aust*, Handbook of International Law (2005), 299.

and in accordance with their duty to protect and preserve the marine environment.'[17] Indeed, this provision would appear to reflect a general principle of international law which is also found in other international instruments. For instance, contracting parties to the Convention on Biological Diversity are under a legal obligation to promote the conservation and sustainable use of biological resources.[18] This duty applies to all biological resources within the limits of its national jurisdiction[19] which clearly includes the continental shelf.

Article 69
Right of land-locked States

1. Land-locked States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62.

2. The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account, inter alia:

(a) **the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State;**

(b) **the extent to which the land-locked State, in accordance with the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional or regional agreements in the exploitation of living resources of the exclusive economic zones of other coastal States;**

(c) **the extent to which other land-locked States and geographically disadvantaged States are participating in the exploitation of the living resources of the exclusive economic zone of the coastal State and the consequent need to avoid a particular burden for any single coastal State or a part of it;**

(d) **the nutritional needs of the populations of the respective States.**

3. When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall cooperate in the establishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing land-locked States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 2 shall also be taken into account.

4. Developed land-locked States shall, under the provisions of this article, be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.

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[17] *Kojima* (note 7), para. 18. Article 192 might also be relevant in this context; see *South China Sea Arbitration* (note 15), para. 956.

[18] Art. 10 Convention on Biological Diversity (CBD).

[19] Art. 4 CBD.

5. The above provisions are without prejudice to arrangements agreed upon in subregions or regions where the coastal States may grant to land-locked States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.

Bibliography: *David J. Attard*, The Exclusive Economic Zone in International Law (1987); *Susan Ferguson*, UNCLOS III: Last Chance for Landlocked States?, San DiegoLRev 14 (1977) 637–655; *Shunmugam Jayakumar*, The Issue of the Rights of Landlocked and Geographically Disadvantaged States in the Living Resources of the Economic Zone, VJIL 18 (1977), 69–120; *Francisco O. Vicuña*, The Exclusive Economic Zone: Regime and Legal Nature under International Law (1989); *Mpazi A. Sinjela*, Land-Locked States and the UNCLOS Regime (1983); *Surya P. Subedi*, The Marine Fishery Rights of Land-locked States with Particular Reference to the EEZ, IJECL 2 (1987), 227–239; *Stephen C. Vascianne*, Land-Locked and Geographically Disadvantaged States in the International Law of the Sea (1990)

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I. Purpose and Function

1 Art. 69 serves to clarify the extent of the rights of land-locked States (LLS) (→ Art. 124 (1)(a)) in relation to accessing the marine living resources of another State. It provides details as to the manner in which a coastal State should have 'particular regard' to the rights of LLS when allocating the surplus under Art. 62. It also confers additional rights on LLS even when there is no surplus. Art. 69 must be read alongside Arts. 71 and 72 which set out the limitations of the rights granted.

II. Historical Background

2 Although they have no direct access to the sea, LLS have always had a right to use the high seas on an equal basis with all other States.[1] Art. 2 of the 1958 Convention on the High Seas (High Seas Convention) provided that the high seas were 'open to all nations'[2] and Art. 3 of the same treaty went on to say that 'in order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea'. The High Seas Convention thus established a duty for coastal States and LLS to negotiate on terms of access to the oceans.[3]

3 This principle was not itself challenged at UNCLOS III and the Convention ultimately confirmed that 'the high seas are open to all States, whether coastal or land-locked'.[4] At the

[1] For a more detailed treatment of the history of LLS and their rights regarding access to and use of the oceans, see *Uprety/Maggio* on Art. 125 MN 3–30.

[2] Art. 2 High Seas Convention. Art. 4 of that Convention similarly provided that 'every state, whether coastal or not, has the right to sail ships under its flag on the high seas'.

[3] Art. 3 (2) High Seas Convention.

[4] Art. 87 (1).

same time, the area of the oceans which falls under the high seas regime was dramatically reduced by virtue of the agreement upon the establishment of the exclusive economic zone (EEZ). As noted in an Explanatory Memorandum submitted by the Group of Land-Locked and Geographically Disadvantaged States (LLGDS) to the 1978 session of UNCLOS III, 'the [EEZ] claims of the coastal states would exclude the LLGDS from the greatest part of easier accessible maritime resources the exploration of which, under the legal regime existing so far, has been open to all States'.[5] Thus, the LLS argued that they should also have some rights to access the resources in the EEZ. Their arguments could be based on claims of 'equity, fairness and justice' and the need to avoid 'economic inequalities among various States in the same region or subregion'.[6]

Whilst there was some sympathy with the view that the extension of coastal State jurisdiction should not be detrimental to LLS, the precise rights to be accorded to LLS was hotly contested at UNCLOS III.[7] LLS acted as a group at the Conference along with States who declared themselves to be geographically disadvantaged (→ Art. 70). The group consisted of 55 States, 29 of which were land-locked.[8] The establishment of the group was significant as it gave these States much more power than they would have been able to wield individually. In particular, the group took an active role in the negotiations on resources in the EEZ, arguing that LLGDS should have 'equal and non-discriminatory access'.[9] Other early proposals also talked about 'equitable and non-discriminatory access'.[10] Some proposals (e. g. that of Bolivia and Paraguay) even suggested regional economic zones in which all States in each region would enjoy equal rights of exploitation.[11] However, this was opposed by many coastal States who argued that it was incompatible with the idea of sovereign rights in the EEZ (→ Art. 56 (1)(a)). **4**

The issue of LLGDS rights in the EEZ proved to be one of the most intractable issues at UNCLOS III. When little progress was made through the formal negotiations, attempts were made to forge a compromise through informal consultations. The Nandan Group or Group of 21 was formed at the fifth session of the Conference in 1976 to address this topic. The group was chaired by Satya Nandan of Fiji and its membership was composed of 10 of the more moderate members of the LLGDS and 10 of the more moderate coastal States.[12] However, the group was unable to produce a compromise text that was acceptable to all sides. **5**

By the beginning of the 1978 session, major progress had been made on many issues on the agenda of the Conference, but substantial differences remained in relation to seven 'hard-core unresolved issues', including the treatment of LLGDS. These issues were allocated to smaller negotiating groups. Negotiating Group 4 dealt with, *inter alia*, the rights of LLGDS. This time, the negotiators were successful in producing a compromise text[13] which, subject to **6**

[5] UNCLOS III, Group of Land-locked and Geographically Disadvantaged States: Explanatory Memorandum on the Rights of the LLGDS in the Economic Zone (1978, mimeo.), reproduced in: Renate Platzöder (ed.), The Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1982), 497.

[6] *Mpazi A. Sinjela*, Land-Locked States and the UNCLOS Regime (1983), 283.

[7] See generally *Susan Ferguson*, UNCLOS III: Last Chance for Landlocked States?, San DiegoLRev 14 (1977), 37–655; *Shunmugam Jayakumar*, The Issue of the Rights of Landlocked and Geographically Disadvantaged States in the Living Resources of the Economic Zone, VJIL 18 (1977), 69–120.

[8] See Myron H. Nordquist (ed.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. I (1985), 72.

[9] See Second Committee UNCLOS III, Afghanistan *et al.*: Draft Articles on Participation of Land-locked and Other Geographically Disadvantaged States in the Exploration and Exploitation of the Living and Non-living Resources in the Area beyond the Territorial Sea, UN Doc. A/CONF.62/C.2/L.39 (1974), OR III, 216.

[10] See also the draft articles submitted by 17 African States, Second Committee UNCLOS III, Gambia *et al.*: Draft Articles on the Exclusive Economic Zone, UN Doc. A/CONF.62/C.2/L.82 (1974), OR III, 240.

[11] Second Committee UNCLOS III, Bolivia and Paraguay: Draft Articles on the 'Regional Economic Zone' of Transit States, UN Doc. A/CONF.62/C.2/L.65 (1974), OR III, 234.

[12] Nordquist (note 8), 109.

[13] UNCLOS III, Explanatory Memorandum of the Proposals by the Chairman of Negotiating Group 4, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 88.

some minor modifications, was incorporated into the Informal Composite Negotiating Text.[14] Despite the existence of continuing objections from States on both sides of the argument, it is this version of the text, imperfect as it was, which found its way into the final text of the Convention.[15]

III. Elements

1. 'Land-locked States'

7 A LLS is defined in the Convention as 'a State which has no sea-coast'.[16] Unlike the term 'geographically disadvantaged State' discussed in Art. 70, this is an objective definition which can only be met based upon geographical fact. Accordingly, there are 44 LLS in the world, including two double land-locked countries (Liechtenstein and Uzbekistan), which will benefit from the rights in Art. 69.[17]

2. 'right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus'

8 Art. 69 relates to the allocation of a surplus of the allowable catch which cannot be harvested by the coastal State itself. It must therefore be read in light of Art. 62 which sets out the duty of the coastal State to calculate the surplus.

9 Pursuant to Art. 69 (1), LLS have the 'right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus'. This is clearly not an absolute right, and the coastal State would appear to have a broad discretion not only to decide on when it is equitable for a LLS to participate in harvesting the surplus of the allowable catch, but also what is an appropriate part of the surplus to be allocated to a LLS. Whereas Art. 62 says that the coastal State shall have 'particular regard' to the provisions of Art. 69 in deciding on allocating any surplus, this would not appear to give any absolute preference to the rights of LLS over and above other categories of States.[18] UNCLOS therefore falls a long way short of the equal access to resources that had been demanded by the LLGDS Group at the beginning of the negotiations. Nevertheless, Art. 69 (5) makes clear that the coastal State may grant more favourable access to LLS than is required to under the Convention. This provision stresses the discretion of the coastal State in these matters.

3. 'of the exclusive economic zones of coastal States of the same subregion or region'

10 One question that arises in relation to Art. 69 is to which EEZs does a LLS have a right of access. The Convention refers access to the resources of 'coastal States of the same subregion or region'. There is no fixed definition of subregion or region in the Convention, and therefore the provision allows some flexibility in determining to which resources a LLS may seek access. Certainly, the provision applies to neighbouring States but it would also seem to go beyond that to include States within a broader geographical area. An additional restriction applies to developed LLS which shall be entitled to participate in the exploitation of living resources only in the EEZ of other developed States in the same region or subregion.[19]

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[14] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 16 (Article 69).

[15] See Nordquist (note 8), 727–730.

[16] Art. 124 (1)(a).

[17] For details, see *Uprety/Maggio* on Art. 124 MN 2(footnote 2).

[18] *Francisco O. Vicuña*, The Exclusive Economic Zone: Regime and Legal Nature under International Law (1989), 57; see *Stephen C. Vascianne*, Land-Locked and Geographically Disadvantaged States in the International Law of the Sea (1990) 53; *cf.* also *Harrison/Morgera* on Art. 62 MN 13.

[19] See *infra*, MN 15.

4. 'the coastal State and other States concerned shall co-operate in the establishment of equitable arrangements'

Unlike other States mentioned in Art. 62, the rights of LLS do not only apply when there is a surplus of the allowable catch. Rather, 'this provision weighs heavily in favour of the disadvantaged States and puts them on a better footing then those States claiming access under Article 62 (2).'[20] Thus, Art. 69 (3) grants additional rights of participation to LLS. The key part of this provision is the duty to 'cooperate in the establishment of equitable arrangements'. What is equitable will clearly depend on the circumstances of a particular case. Ultimately, the establishment of such equitable arrangements would appear to require the consent of the coastal State. As noted by Vicuña, 'this apparent restriction in reality results in an increased control that the coastal State can exercise by means of the negotiation of the terms and conditions applicable to access.'[21] Moreover, it should also be noted that there is an exception in Art. 71 which excludes completely the application of Art. 69 'in the case of a coastal State whose economy is overwhelmingly dependent on the exploitation of the living resources of the exclusive economic zone'. **11**

This provision also falls far short of the hopes expressed by LLGDS at UNCLOS III and Art. 69 has been criticized as being at best 'too general'[22], and worse as 'vague, elastic and windy'.[23] As noted by Vascianne, the LLGDS simply did not have the bargaining power to force through their proposals as coastal States were in the superior bargaining position, being able to implement unilateral measures in the absence of agreement at the Conference.[24] This perhaps explains why the LLGDS consented to a weaker formulation of their rights than they wanted. Even those rights that they do have in Art. 69 rely upon implementation in good faith (→ Art. 300) by coastal States. In this respect there is little evidence of State practice implementing Art. 69.[25] **12**

5. 'Developed land-locked States'

The benefits of Art. 69 are primarily directed at developing LLS and Art. 69 (4) contains a restriction which applies to developed LLS. Accordingly, developed LLS may only participate in the exploitation of living resources in the EEZ of another developed State. Moreover, such participation may only occur 'taking into account the need to minimize detrimental effects on the fishing communities and economic dislocation in States whose nationals have habitually fished in the area'. In other words, there is an express direction to take into account the interests of local and traditional fishing communities before allocating new rights to fishing operations based in developed land-locked countries. In this regard, both Spain and Malta expressed their understanding that 'access to fishing in the exclusive economic zone of third States by vessels of developed land-locked and geographically disadvantaged States is dependent upon the prior granting of access by the coastal States in question to the nationals of other States which have habitually fished in the said zone.'[26] **13**

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[20] *David J.Attard*, The Exclusive Economic Zone in International Law (1987), 200–201.

[21] *Vicuña* (note 18), 56.

[22] *Attard* (note 20), 201.

[23] *Surya P. Subedi*, The Marine Fishery Rights of Land-locked States with Particular Reference to the EEZ, IJECL 2 (1987), 234.

[24] *Vascianne* (note 18), 19.

[25] Writing at the time of the entry into force of the Convention, the UN Division on Ocean Affairs and the Law of the Sea stated that 'Morocco and Togo are the only coastal States which indicate their readiness to allow neighbouring land-locked States access to the living resources of their exclusive economic zones': UN DOALOS, The Law of the Sea: Practice of States at the Time of the Entry into Force of the United Nations Convention on the Law of the Sea (1994), 31.

[26] Declaration of Malta of 20 May 1993 and the Declaration of Spain of 15 January 1997, available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

14 Art. 69 (4) underlines the objective of Art. 69 as more of a means to address economic inequalities, rather than geographical inequalities per se. This restriction is largely intended to apply to the European LLS who 'are in an analytically distinct class from developing land-locked countries which have yet to overcome basic problems of transit'.[27] Nevertheless, there is no specific definition of 'developed' LLS and the term is capable of being interpreted in an evolutionary manner so that LLS which were developing at the time that the Convention was concluded may become developed LLS in the future.

6. 'arrangements agreed upon in subregions or regions'

15 The majority of provisions in Art. 69 assume that a LLS will negotiate access to the living resources of another coastal State on a bilateral basis. Art. 69 (5), however, permits the formation of plurilateral arrangements within a subregion or region whereby 'the coastal States may grant to land-locked States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zone'. This provision echoes earlier proposals by several States, including Bolivia and Paraguay, who supported the introduction of so-called 'regional economic zones' to be jointly established by groups of coastal States and their neighbouring States.[28] Art. 69 (5) confirms that coastal States may fulfill their obligations through a regional arrangement and some authors have suggested that this may be one of the best ways to make the most of the rights of LLGDS under the Convention.[29] At the same time, it is clear that this is only an option and no coastal State is under an obligation to enter into such an arrangement without its agreement.

Article 70
Right of geographically disadvantaged States

1. Geographically disadvantaged States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62.

2. For the purposes of this Part, "geographically disadvantaged States" means 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 zones of their own.

3. The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account, inter alia:

(a) **the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State;**

(b) **the extent to which the geographically disadvantaged State, in accordance with the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional or regional agreements in the exploitation of living resources of the exclusive economic zones of other coastal States;**

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[27] *Vascianne* (note 18), 6.

[28] Bolivia and Paraguay: Draft Articles (note 11). It should be noted that the proposal extended beyond fisheries to mineral resources and marine scientific research.

[29] *Subedi* (note 23), 238–239.

(c) **the extent to which other geographically disadvantaged States and land-locked States are participating in the exploitation of the living resources of the exclusive economic zone of the coastal State and the consequent need to avoid a particular burden for any single coastal State or a part of it;**
(d) **the nutritional needs of the populations of the respective States.**

4. When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall cooperate in the establishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing geographically disadvantaged States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 3 shall also be taken into account.

5. Developed geographically disadvantaged States shall, under the provisions of this article, be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.

6. The above provisions are without prejudice to arrangements agreed upon in subregions or regions where the coastal States may grant to geographically disadvantaged States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.

Bibliography: *Lewis M. Alexander*, The 'Disadvantaged States' and the Law of the Sea, Marine Policy 5 (1981), 185–193; *Lucius Caflisch*, What is a Geographically Disadvantaged State?, ODIL 18 (1987), 641–663; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Jean-Francois Pulvenis*, La Notion de l'état geographiquement désavantagé et le nouveau droit de la mer, AFDI 22 (1976), 678–719; *Stephen C. Vascianne*, Land-Locked and Geographically Disadvantaged States in the International Law of the Sea (1990)

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I. Purpose and Function

Although some coastal States will inherently have less access to marine resources than others, Art. 70 serves to compensate for some of the disadvantages that arise from the geographical position of certain States. Thus, Art. 70 provides details as to the manner in which a coastal State should have 'particular regard' to the rights of geographically disadvantaged States when allocating the surplus of its allowable catch under Art. 62, as well as defining the extent of rights pertaining to geographically disadvantaged States if **1**

there is no surplus. Art. 70 must be read in conjunction with Arts. 71 and 72 which impose limitations on the exercise of the rights under Art. 70.

II. Historical Background

2 The demands of geographically disadvantaged States at UNCLOS III were very similar to the demands of land-locked States (LLS); due to the geographical disadvantages imposed on them by nature, resulting in restricted access to the sea, they argued that the legal regime should provide compensation by granting them equitable access to marine resources which would otherwise fall under the jurisdiction of other coastal States. As a result, the drafting history of Art. 70 largely mirrors that of Art. 69.[1] At the seventh session of the Conference in 1978, the issue of access to resources for geographically disadvantaged States was submitted to a special negotiating group under the chairmanship of SATYA NANDAN of Fiji.[2] Following these negotiations, the Chair of the negotiating group presented a compromise position which referred to the rights of 'States with special geographical characteristics'.[3] This compromise was subsequently incorporated into the Informal Composite Negotiating Text.[4] At the very final session of the Conference in 1982, it was agreed, partly at the request of the Drafting Committee, to amend the text to refer to 'geographically disadvantaged States' instead of 'States with special characteristics', although proposals to broaden the definition of these States were resisted. No changes to the substantive rights of geographically disadvantaged States introduced at this stage.[5]

III. Elements

1. 'Geographically disadvantaged States'

3 Geographically disadvantaged States[6] are defined for the purposes of Part V 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 zones of their own.'[7]

It follows that there are two distinct categories of geographically disadvantaged States.

4 Firstly, there are those countries without an exclusive economic zone (EEZ) of their own. This is a discrete and clearly identifiable category. Secondly, there are those countries whose geographical situation makes them dependent upon the exploitation of the living resources of the EEZ of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof. This is a less clearly defined category of States. VASCIANNE argues that the reference to the inability of States to satisfy the nutritional requirements of their populations is too vague and therefore he suggests that

[1] *Cf. Harrison* on Art. 69 MN 2 *et seq.*

[2] See Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 761.

[3] UNCLOS III, Explanatory Memorandum of the Proposals by the Chairman of Negotiating Group 4, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 88.

[4] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 16 (Article 70).

[5] See generally, Nordquist/Nandan/Rosenne (note 2), 763–765.

[6] See generally, *Lucius Caflisch*, What Is a Geographically Disadvantaged State?, ODIL 18 (1987), 641–663; *Jean-Francois Pulvenis*, La notion de l'état geographiquement désavantagé et le nouveau droit de la mer, AFDI 22 (1976), 678–719.

[7] Art. 70 (2). On geographically disadvantaged States, also see *Winkelmann* on Art. 122 MN 14 *et seq.*

> 'this category must be confined to States which, because of their limited resource potential of their coastal waters, established a pattern of fishing off the coasts of neighbouring States prior to the emergence of the EEZ as a legal concept.'[8]

Whilst this interpretation has the advantage of limiting the number of States which fall within the category, it has the effect of closing the category at the time at which the Convention was concluded. Thus, it would prevent any States which may become geographically disadvantaged in the future from claiming this status. Moreover, it conflates geographically disadvantaged States with States which have habitually fished in the zone, despite the fact that these are treated as two separate categories in Art. 62. It is not clear therefore that this interpretation is compatible with the ordinary meaning of the Convention, and it is likely that the issue must be decided on a case-by-case basis. In practice, many States have claimed the status of a geographically disadvantaged State in the declarations made under Art. 310 and the lack of opposition from other States Parties may be considered as evidence supporting these claims.[9]

2. 'right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus'

The rights of geographically disadvantaged States under Art. 70 are almost identical to 5
those of LLS under Art. 69.[10] Art. 70 (1) relates to the allocation of a surplus of the allowable catch which cannot be harvested by the coastal State itself. It must therefore be read in light of Art. 62 which sets out the duty of the coastal State to calculate the surplus. Art. 70 (1) refers to the 'right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus'. In common with Art. 69, this provision clearly does not create an absolute right and it is up to the coastal State to decide upon access to its surplus. Indeed, the coastal State would appear to have a broad discretion not only to decide on when it is equitable for a geographically disadvantaged State to participate in harvesting the surplus of the allowable catch, but also what is an appropriate part of the surplus to be allocated to such a State. Several factors to be taken into account by the coastal State are listed in paragraph 3.

3. 'When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch'

Art. 70 also addresses the situation where there is no surplus in the allowable catch. 6
According to paragraph 4, a coastal State must cooperate in the establishment of 'equitable arrangements' to allow for participation of developing geographically disadvantaged States of the same subregion or region in the exploitation of the living resources of its EEZ. This is the same language that is used in Art. 69 (3). What is equitable will clearly depend on the circumstances of a particular case, although some considerations are suggested in Art. 70 (3). Ultimately, the establishment of such equitable arrangements would appear to require the consent of the coastal State, and the provision therefore falls short of creating any absolute rights for geographically disadvantaged States.

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[8] *Stephen C. Vascianne*, Land-Locked and Geographically Disadvantaged States in the International Law of the Sea (1990), 11.

[9] See e. g. the Declaration of Romania of 17 December 1996; the Declaration of the Republic of Moldova of 6 February 2007; the Declaration of the Federal Republic of Germany of 14 October 1994; the Declaration of Ukraine of 26 July 1999, available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&-chapter=21&Temp=mtdsg3&lang=en.

[10] For a perspective on the problems faced by geographically disadvantaged states, see *Lewis M. Alexander*, The 'Disadvantaged States' and the Law of the Sea, Marine Policy 5 (1981), 185–193.

4. 'only in the exclusive economic zones of developed coastal States of the same subregion or region'

7 Art. 70 (5) limits the rights of developed geographically disadvantaged States so that they may only participate in the exploitation of the surplus of other developed coastal States in the same subregion or region. Moreover, developed geographically disadvantaged States only benefit from this provision if the coastal State has also had regard to 'the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone'. In other words, the interests of developed geographically disadvantaged States would not appear to take priority over the interests of distant water fishing nations or local fishing communities. The objective of this provision would seem to be the same as Art. 69 (4), which limits the rights of developed LLS in a similar manner.[11] A problem with both provisions is that there is no objective definition of a developed State and therefore it is uncertain to which States this paragraph applies.

5. 'without prejudice to arrangements'

8 Art. 70 (6) mirrors Art. 69 (5) by allowing States to establish subregional and regional arrangements to implement the benefit-sharing provisions in the Convention. There would seem to be no reason why a subregional or regional arrangement entered into by coastal States could not encompass both LLS and geographically disadvantaged States, thereby serving to implement Arts. 69 and 70 of the Convention.

Article 71
Non-applicability of articles 69 and 70

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.

Bibliography: *David J. Attard*, The Exclusive Economic Zone in the Law of the Sea Convention (1987); *Shunmugam Jayakumar*, The Issue of the Rights of Landlocked and Geographically Disadvantaged States in the Living Resources of the Economic Zone, VJIL 18 (1977), 69–119; *Stephen C. Vascianne*, Land-Locked and Geographically Disadvantaged States in the International Law of the Sea (1990)

Cases: ICJ, *Fisheries Case* (United Kingdom *v.* Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116; ICJ, *Fisheries Jurisdiction Case* (Federal Republic of Germany *v.* Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 175

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I. Purpose and Function

1 Art. 71 bars the application of Arts. 69 and 70 in the case of a coastal State whose economy is overwhelmingly dependent on the exploitation of living resources in the EEZ.

[11] See also *Harrison* on Art. 69 MN 14.

The exception permits such a State to exclude land-locked[1] and geographically disadvantaged States (→ 70 (2)) from accessing the living resources of its EEZ, whether or not there is a surplus of its allowable catch.

II. Historical Background

Art. 71 draws upon a trend in international jurisprudence of taking into account the dependence of a coastal State on its fisheries in determining fishing rights. For example, in the *Fisheries Case*, the International Court of Justice (ICJ) had noted that 'the inhabitants of the [Norwegian] coastal zone derive their livelihood essentially from fishing' and this was one of 'the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law'.[2] Dependence on fishing was reflected even more clearly in the *Fisheries Jurisdiction Case* (Federal Republic of Germany *vs.* Iceland) where the ICJ held that 'the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation'.[3] 2

The idea of special dependence had been introduced by Iceland into the negotiations at UNCLOS II where it had proposed that 3

> 'where a people is overwhelmingly dependent upon its coastal fisheries for its livelihood or economic development and it becomes necessary to limit the total catch of a stock or stocks of fish in areas adjacent to the coastal fisheries zone, the coastal State shall have preferential rights under such limitations to the extent rendered necessary by its dependence on fisheries'.[4]

Those negotiations failed to lead to any agreement and the fisheries issue continued to cause international friction until the opening of negotiations for a new convention on the law of the sea in 1973.

The issue of special dependence of the coastal State was raised again at UNCLOS III in discussions on access to the living resources of the EEZ.[5] Art. 71 has its origins in the draft articles submitted by the Evensen Group to the 1975 session of the Conference which provided that the rights of access for land-locked and geographically disadvantaged States should 'avoid effects which would be detrimental to the fishing communities of the coastal State or its fishing industry'.[6] Further negotiations led to the inclusion of a separate provision completely excluding the application of Arts. 69 and 70 in the case of coastal States which are overwhelming dependent on the living resources of its EEZ. 4

III. Elements

1. 'articles 69 and 70 do not apply'

The interest of the coastal State in its fisheries resources is already a factor that can be taken into account in deciding on access to the surplus of its allowable catch under Art. 62. The effect 5

[1] For further information, see *Uprety/Maggio* on Art. 124.

[2] ICJ, *Fisheries Case* (United Kingdom *v.* Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116, 142.

[3] ICJ, *Fisheries Jurisdiction Case* (Federal Republic of Germany *v.* Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 175, para. 63.

[4] UNCLOS II, Iceland: Proposal, UN Doc. A/CONF.19/C.1/L.7 (1960), OR I, 168.

[5] See Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 769.

[6] See UNCLOS III, The Economic Zone (1975, mimeo.), reproduced in: Renate Platzöder (ed.), The Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1982), 215 (Art. 9).

of Art. 71 is to go one step further and to completely exclude the rights of land-locked and geographically dependent States in the EEZ where coastal states are overwhelmingly dependent on fisheries. It excludes the rights of these States not only in relation to access to the surplus of the allowable catch, but also any rights that these States may have to equitable participation in exploiting the living resources of the EEZ (→ Art. 69 (3); Art. 70 (4)).

2. 'in the case of a coastal State whose economy is overwhelmingly dependent on the exploitation'

6 The question that arises in relation to this provision is what is meant by 'overwhelming dependence'. The ordinary meaning of the term is that the economy of the whole nation must be overwhelmingly dependent on fishing, not just the economy of a particular part of the State.[7] It was suggested by JAYAKUMAR, writing during the negotiations, that this provision was intended to apply to Iceland.[8] However, it is not drafted in a way which is restricted to any single State and it must remain an open category.[9] At the same time, it is not entirely clear how to define 'overwhelming dependence', and some authors warn that some States could invoke Art. 71 as means of eroding the rights of land-locked and geographically disadvantaged States.[10] Unfortunately, the interpretation of this provision would appear to fall within the exception to compulsory dispute settlement (→ Art. 297 (3)) as it relates to the 'sovereign rights with respect to the living resources in the exclusive economic zone'.

Article 72
Restrictions on transfer of rights

1. Rights provided under articles 69 and 70 to exploit living resources shall not be directly or indirectly transferred to third States or their nationals by lease or licence, by establishing joint ventures or in any other manner which has the effect of such transfer unless otherwise agreed by the States concerned.

2. The foregoing provision does not preclude the States concerned from obtaining technical or financial assistance from third States or international organizations in order to facilitate the exercise of the rights pursuant to articles 69 and 70, provided that it does not have the effect referred to in paragraph 1.

Bibliography: *David J. Attard*, The Exclusive Economic Zone in the Law of the Sea Convention (1987); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993)

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[7] Nordquist/Nandan/Rosenne (note 5), 772.

[8] *Shunmugam Jayakumar*, The Issue of the Rights of Landlocked and Geographically Disadvantaged States in the Living Resources of the Economic Zone, VJIL 18 (1977), 69, 91.

[9] *Stephen C. Vascianne*, Land-Locked and Geographically Disadvantaged States in the International Law of the Sea (1990), 56.

[10] See e. g. *David J. Attard*, The Exclusive Economic Zone in the Law of the Sea Convention (1987), 202; *Vascianne* (note 9), 57.

I. Purpose and Function

The purpose of Art. 72 is to prevent the benefits of those rights conferred on land-locked and geographically disadvantaged States under Arts. 69 and 70 of the Convention from being transferred to third States. It makes clear that these provisions are intended to directly benefit only the States which qualify for the rights under the terms of the Convention. 1

II. Historical Background

Whilst there was broad agreement in the negotiations at UNCLOS III that there should be restrictions on the transfer of rights of land-locked and geographically disadvantages States, the precise details of such restrictions were contested.[1] Opinions were split amongst the group of Land-Locked and Geographically Disadvantaged States (LLGDS) on the one hand and the coastal States on the other hand. In particular, the LLGDS strongly urged that joint ventures and other similar collaborations aimed at facilitating the exercise of rights by the fishing States should be permitted.[2] However, the language that was ultimately adopted in the draft negotiating text and which survived with only minor changes in the final Convention was a compromise formula which appears to reject this view, without providing any particular certainty over the precise scope of the prohibition.[3] 2

III. Elements

1. 'Rights provided for under articles 69 and 70 […] shall not be […] transferred to third States'

The effect of Art. 72 is to prohibit the transfer of rights provided to LLGDS under Arts. 69 and 70 of the Convention to third States or their nationals. It prohibits both the direct transfer and the indirect transfer of such rights. It specifically mentions three types of transfer that would be prohibited, namely leases, licences and joint ventures. However, it also covers any other arrangement which 'has the effect of such transfer'. Despite attempts by the LLGDS to introduce an amendment which would have permitted joint ventures provided they did not have the effect of transferring the rights concerned, it seems fairly clear from the text that all forms of joint ventures are prohibited, regardless of their effect. 3

2. 'unless otherwise agreed by the States concerned'

Art. 72 (1) does not prohibit the transfer of relevant rights if there is the agreement of 'the States concerned'. Whilst earlier drafts of the negotiating text had referred to 'the express consent of the coastal State'[4], this wording was removed at the sixth session in 1976 and replaced by a reference to the agreement of 'the States concerned'.[5] Although there is now no reference to the consent of the coastal State, it can be assumed that the coastal State is a 'concerned State' for the purposes of this provision, and it therefore must consent to any transfer of rights if they are to take place. 4

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[1] See generally Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 779.

[2] See e. g. UNCLOS III, Singapore: Articles 45–60 (ISNT II) (1976, mimeo.), reproduced in: Renate Platzöder (ed.), The Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1982), 290, 291.

[3] See Nordquist/Nandan/Rosenne (note 1), 782.

[4] *Ibid.*, 779.

[5] *Ibid.*, 781.

3. 'articles 69 and 70'

5 It is notable that this provision applies only to the rights of LLGDS provided for in Arts. 69 and 70 and 'not to other States benefiting under the general-surplus rule found in Article 62'.[6] Yet, it does not follow that the rights of other States to fish for the surplus of the allowable catch in the EEZ are transferable. Given that access to the surplus is subject to terms and conditions specified by the coastal State, the coastal State may also expressly prohibit other States from transferring their rights if it so wishes.

4. 'does not preclude the States concerned from obtaining technical assistance'

6 Art. 72 (2) was introduced at the fourth session of the Conference on the basis of a proposal from Austria.[7] It permits LLGDS to receive financial and technical assistance from third States or international organizations to assist them in exercising their rights, provided that such assistance does not involve a transfer of rights. Thus they might receive financial grants to support their fishing activities or they may employ experts to assist them in developing an efficient fishing fleet. For example, such support might be provided by the Food and Agriculture Organization of the United Nations (FAO) as part of its technical assistance programme.[8]

Article 73
Enforcement of laws and regulations of the coastal State

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

Bibliography: *David Anderson*, Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements, 11 IJMCL (1996), 165–177; *Erik Franckx*, "Reasonable Bond" in the Practice of the International Tribunal for the Law of the Sea, 32 CWILJ (2001–2002), 303–342; *James Harrison*, Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone – Law and Practice, in: Henrik Ringbom (ed.), Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea (2015); *Danièle Mangatelle*, Coastal State Requirements for Foreign Fishing, FAO Legislative Study No. 57 (1996); *Bernard H. Oxman*, The M/V 'Saiga' (Saint Vincent and the Grenadines *v.* Guinea). ITLOS Case No. 1, AJIL 92 (1998), 278–282

Documents: FAO, Code of Conduct for Responsible Fisheries (1995)

Cases: ITLOS, *The M/V 'Saiga' (No. 1) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 4 December 1997, ITLOS Reports (1997), 16; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10; ITLOS, *The 'Monte Confurco' Case*

[6] *David J. Attard*, The Exclusive Economic Zone in the Law of the Sea Convention (1987), 201.
[7] UNCLOS III, Austria: Article 59 (1976, mimeo.), reproduced in: Platzöder (note 2), 315.
[8] See http://www.fao.org/fishery/topic/16065/en.

(Seychelles *v.* France), Judgment of 18 December 2000, ITLOS Reports (2000), 86; ITLOS, *The 'Volga' Case* (Russian Federation *v.* Australia), Judgment of 23 December 2002, ITLOS Reports (2002), 10; ITLOS, *The 'Tomimaru' Case* (Japan *v.* Russian Federation), Judgment of 6 August 2007, ITLOS Reports (2005–2007), 74; ITLOS, *The M/V 'Virginia G' Case* (Panama *v.* Guinea-Bissau), Judgment of 14 April 2014

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I. Purpose and Function

UNCLOS confers significant rights on coastal States to manage the living resources located in its EEZ. This includes legislative jurisdiction to prescribe a total allowable catch (→ Art. 61 (1)) and to set laws and regulations relating to the licensing and regulation of fishing activities (→ Art. 62 (4)). Art. 73 confirms that the coastal State may also exercise enforcement jurisdiction in relation to such laws and regulations. This provision supplements Art. 62 (4)(k) which specifies that the coastal State has the right to establish enforcement procedures in relation to foreign fishing vessels to which it grants access to the surplus (→ Art. 62 (2)) of its allowable catch. **1**

At the same time, the enforcement jurisdiction of coastal States in not unlimited. The Convention imposes important limits on the exercise of the enforcement powers of coastal States. These safeguards are set out in Art. 73 (2)-(4). They seek to ensure that coastal States do not misuse their enforcement powers and encroach on the rights of other States to access the living resources of the exclusive economic zone (EEZ). In this way, Art. 73 confirms the view that coastal States do not exercise full sovereignty in the EEZ,[1] rather they possess limited rights conferred on them by the Convention. **2**

II. Historical Background

The negotiation of Art. 73 was very much tied to the development of the nature of the substantive rights possessed by the coastal State in the EEZ. Thus, early proposals on the subject varied enormously, depending on the position of a particular State. One such proposal relating to the punishment of fishing vessels for violation of conservation and management measures prescribed by the coastal State suggested that **3**

> '[a]rrested vessels and their crew shall be entitled to release upon the posting of a reasonable bond or other security. Imprisonment or other forms of corporal punishment in respect of conviction for fishing violations may be imposed only by the State of nationality of the vessel or individual concerned.'[2]

[1] For further information, see *Proelss* on Art. 55 MN 15–18 and on Art. 56 MN 8–10.

[2] UNCLOS III, United States: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47, OR III, 222, 224 (Article 21(3)).

Similar provisions were incorporated into the set of articles prepared by the Evensen Group which was in turn highly influential on the text of the informal negotiating text.[3] Indeed, few substantive changes were made to this draft text before the adoption of the Convention in 1982.

III. Elements

1. 'measures […] necessary to ensure compliance with the laws and regulation adopted'

4 Art. 73 confers quite broad rights on a coastal State to enforce its laws and regulations relating to living resources in the EEZ. Indeed, the rights of coastal States to enforce fisheries laws and regulations are considerably greater than the rights it possesses to enforce rules for the prevention of pollution from vessels, which are governed by Art. 220.[4] Coastal States can exercise enforcement powers both against vessels which are not authorized to fish in its EEZ, as well as to ensure compliance with laws and regulations by those vessels which are authorized to fish in the EEZ. The International Tribunal for the Law of the Sea (ITLOS) has been confirmed that the power to regulate fishing under Part V of the Convention extends to the regulation of bunkering of fishing vessels.[5]

5 Nevertheless there are limits to the rights of coastal States. Art. 73 limits the enforcement jurisdiction of coastal States to measures which are 'necessary to ensure compliance with the laws and regulations adopted by it in conformity with [the] Convention'. Several possible measures are explicitly identified, notably 'boarding, inspection, arrest and judicial proceedings'. Thus, there is no doubt that the officials of the coastal State may stop and search a suspect vessel and if there is evidence of a violation, they may bring the vessel to port and start criminal proceedings in the national courts. It should be noted that this list is only illustrative and a coastal State may take other enforcement measures.

6 Whatever measures are taken by a coastal State must, however, be necessary. The inclusion of this condition raises a question about how strictly it will be interpreted by international courts and tribunals. As has been noted elsewhere, the term 'necessary' can have a number of different meanings, ranging from 'indispensible' to 'making a contribution to.'[6] In the context of boarding, inspection and arrest of foreign fishing vessels in the EEZ, it is likely that the coastal State would have a broad margin of appreciation in deciding what measures are 'necessary.'[7] If the threshold for the exercise of enforcement powers is set too high, it could create an impediment on the coastal State fulfilling its obligations relating to the conservation and management of living resources in the EEZ.

7 In *The M/V 'Virginia G' Case*, ITLOS held that the requirement for enforcement measures to be necessary also applied to the imposition of penalties on foreign fishing vessels.[8] In that concrete case, the majority of the Tribunal held that the confiscation of the vessel and the fuel oil was unnecessary, taking into account, *inter alia*, the fact that the other fishing vessels involved in the bunkering operation had not been subjected to such strict penalties.[9] These circumstances led the Tribunal to conclude that the confiscation of the vessel and the fuel oil on board was not necessary for the purposes of Art. 73 (1). The

[3] UNCLOS III, The Economic Zone (1975, mimeo.), reproduced in: Renate Platzöder, The Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1982), 209.

[4] *Cf.* also *Hamamoto* on Art. 220.

[5] ITLOS, *The M/V 'Virginia G' Case* (Panama *v.* Guinea-Bissau), Judgment of 14 April 2014, para. 217.

[6] *Korea – Various Measures on Beef*, WTO Appellate Body Report, 11 December 2000, para. 161.

[7] See *James Harrison*, Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone – Law and Practice, in: Henrik Ringbom (ed.), Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea (2015) 221–222.

[8] *The M/V 'Virginia G' Case* (note 5), para. 257.

[9] *Ibid.*, paras. 268–9.

approach taken by the Tribunal was, however, criticized in a joint dissenting opinion of Vice-President Hoffman and Judges Chandrasekhara Rao, Marotta Rangel, Kateka, Gao, and Bougeutaia, in which they argued that the Tribunal should only find that a measure was unnecessary if 'there is a manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous.'[10] They went on to say that 'the term "sovereign rights" ought to carry with it a degree of deference to the coastal State in its exercise of those rights.'[11] On the basis of this interpretation, the dissenting judges did not agree that a violation of Art. 73 (1) had occurred. This decision thus demonstrates a split in the jurisprudence as to how much deference should be granted to coastal States in the exercise of their sovereign rights under the Convention.

8 As well as applying the concept of necessity to fisheries penalties, the Tribunal in *The M/V 'Virginia G' Case* also suggested that the measures taken by Guinea-Bissau should be subject to a test of reasonableness. Although reasonable is not expressly included in the relevant provisions of the Convention, the Tribunal nevertheless held that 'the principle of reasonableness applies generally to measures under article 73 of the Convention.'[12] On the facts, the majority of the Tribunal found that the confiscation of the vessel and the fuel oil was also unreasonable.[13]

9 The Convention itself contains very few explicit rules concerning how the enforcement powers of the coastal State should be carried out in practice. Nevertheless, it is generally accepted that the powers of the coastal State include the possibility to use force where necessary.[14] In *The M/V 'Saiga' (No. 2) Case*, ITLOS was willing to read such rules into the Convention by reference to 'considerations of humanity'. Thus, it held that

> '[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.'[15]

On the facts of that particular case, the Tribunal found that the Guinean authorities had violated these rules, by firing live ammunition from a fast-moving patrol boat without warnings and by firing indiscriminately while on the deck of the vessel, including using gunfire to stop the engine of the ship.[16] The way in which an arrest is carried out is also subject to the conditions found in Article 225 of the Convention (→ Art. 225).[17]

10 It should also be noted that this provision only applies to the enforcement of fisheries laws and regulations in EEZ, not to the enforcement of fisheries laws and regulations in the territorial sea where a coastal State may have much broader discretion (→ Art. 21; Art. 25).

11 The basic provisions in the Convention may also be supplemented by other agreements entered into by the coastal State and the flag state of vessels that have been authorized to fish in the EEZ.

2. 'Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond'

12 If the coastal State does exercise its powers of arrest, Art. 73 provides that it must offer to promptly release the vessels or crews pending a trial on payment of a bond or other financial

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[10] ITLOS, *The M/V 'Virginia G' Case* (Panama *v.* Guinea-Bissau), Joint Dissenting Opinion of Vice-President Hoffman and Judges Chandrasekhara Rao, Marotta Rangel, Kateka, Gao, and Bougeutaia, para. 54.

[11] *Ibid.*, para. 49.

[12] *The M/V 'Virginia G' Case* (note 5), para. 270.

[13] *Ibid.*

[14] *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 794.

[15] ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment 1 July 1999, ITLOS Reports (1999), 10, para. 155.

[16] *Ibid.*, paras. 157–159.

[17] See *Harrison* (note 7) 228–229.

security in order to guarantee their participation in any criminal proceedings. As noted by ITLOS in *The Monte Confurco Case*:

> 'Article 73 identifies two interests, the interest of the coastal State to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crews from detention on the other. It strikes a fair balance between the two interests. It provides for release of the vessel and its crew upon the posting of a bond or other security, thus protecting the interests of the flag State and of other persons affected by the detention of the vessel and its crew.'[18]

The balance of these interests is achieved through the setting of the reasonable bond.[19] Art. 292 provides a procedure through which the reasonableness of a bond can be challenged by or on behalf of the flag State.[20] ITLOS exercises residual jurisdiction over such disputes, although States may agree on another forum[21].

13 The prompt release provision in Art. 73 (2) only applies to vessels that have been arrested under laws and regulations relating to the exploration, exploitation, conservation and management of living resources in the EEZ. In the very first case to come before it, ITLOS took a broad view of the application of the prompt release provision in Art. 73 (2). By a majority, it held that 'laws or regulations on bunkering of fishing vessels may arguably be classified as laws or regulations on activities within the scope of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone.'[22] Arguably, this decision was a result of the standard of appreciation applied by the Tribunal in the case, namely 'whether the allegations made are arguable or are of a sufficiently plausible character'.[23] Indeed, ITLOS expressly stated that '[it] does not foreclose that if a case were presented to it requiring a full examination of the merits it would reach a different conclusion'.[24] However, as noted above, ITLOS has subsequently confirmed that the power to regulate fishing under Part V of the Convention extends to the regulation of bunkering of fishing vessels.[25]

14 The Tribunal also had a chance to interpret Art. 73 (2) in *The 'Volga' Case*, where it held that:

> '[T]he expression "bond or financial security" in article 73, paragraph 2, should, in the view of the Tribunal, be interpreted as referring to a bond or security of a financial nature. […] It follows from the above that the non-financial conditions cannot be considered components of a bond or other financial security for the purpose of applying article 292 of the Convention in respect of an alleged violation of article 73, paragraph 2 of the Convention.'[26]

Taking into account the object and purpose of the bond requirement, ITLOS concluded that

> 'a "good behaviour bond" to prevent future violations of the laws of a coastal State cannot be considered as a bond or security within the meaning of article 73, paragraph 2, of the Convention read in conjunction with article 292 of the Convention.'[27]

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[18] ITLOS, *The 'Monte Confurco' Case* (Seychelles *v.* France), Judgment 18 December 2000, ITLOS Reports (2000), 86, para. 70.

[19] *Ibid.*, para. 72. See generally *Erik Franckx*, "Reasonable Bond" in the Practice of the International Tribunal for the Law of the Sea, 32 CWILJ (2001–2002), 303–342; see also *Treves* on Art. 292 MN 28–32.

[20] For further information, see *Treves* on Art. 292.

[21] *Ibid.*

[22] ITLOS, *The M/V 'Saiga' (No. 1) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment 4 December 1997, ITLOS Reports (1997), 16, para. 63. For a general comment on the judgment, see *Bernard H. Oxman*, The M/V 'Saiga' (Saint Vincent and the Grenadines *v.* Guinea). ITLOS Case No. 1, AJIL 92 (1998), 278.

[23] *Ibid.*, para. 51.

[24] *Ibid.*, para. 51.

[25] *The M/V 'Virginia G' Case* (note 5), para. 217.

[26] ITLOS, *The 'Volga' Case* (Russian Federation *v.* Australia), Judgment of 23 December 2002, ITLOS Reports (2002), 10, para. 77.

[27] *Ibid.*, para. 80.

Thus, the requirement for the vessel to carry a vessel monitoring system pending the conclusion of the criminal proceedings was not permissible under the Convention.[28]

In *The 'Volga' Case*, the respondent also challenged the bail conditions imposed on the crew members. Initially, the crew members had been released from custody, but they had been required to surrender their passports and seaman's papers to the Australian authorities and to stay within the Perth metropolitan area. After appealing these bail conditions, the crew concerned were permitted to return to Spain, but they were required to surrender their passports and seaman's papers to the Australian embassy in Madrid, and they were also required to report monthly to consular officials. The Tribunal did not deal with this point in its decision.[29] However, in light of its reasoning on the other aspects of the case, it is likely that any non-financial conditions attached to the release of the crew would also be contrary to the requirements of Art. 73 (2). 15

3. 'Coastal State penalties […] may not include imprisonment […] [or] corporal punishment'

Art. 73 (3) deals with the powers of a coastal State to impose punishments for violations of fisheries laws and regulations if an offender is found guilty at trial. It imposes negative restrictions on the types of punishments that may be used by a coastal State. Firstly, it completely prohibits corporal punishment for fisheries offences. Secondly, it restricts the use of imprisonment as a form of punishment. However, unlike corporal punishment, it does not completely prohibit imprisonment. Imprisonment may still be imposed as a punishment with the agreement of the concerned State. This can be contrasted with the position relating to the punishment of rules relating to the protection of the marine environment where 'monetary penalties only may be imposed' (→ Art. 230 (1)). It is not clear what is meant by 'concerned State' in this context. It presumably includes the flag State that must be informed of any penalties imposed by the coastal State in accordance with Art. 73 (4). However, it may also include the State of nationality of the offender. In practice, the vast majority of States do not permit imprisonment as a sanction for unauthorized fishing[30] and many fisheries access agreements explicitly prohibit imprisonment as a penalty for fisheries offences.[31] At the same time, imprisonment may still be used as a penalty for non-fisheries related offences, such as the assault of fisheries inspection officers.[32] 16

The Convention does not impose positive requirements on coastal States in relation to the criminalization of illegal fishing. In this sense, UNCLOS differs from other fisheries instruments that may be relevant in these circumstances. For instance, the UN Fish Stocks Agreement (UNFSA) provides that 17

> '[s]anctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities. Measures applicable in respect of masters and

[28] However, see the dissenting opinions of Judge Anderson and Judge Ad Hoc Shearer, in *The 'Volga' Case* (note 26).

[29] *The 'Volga' Case* (note 26), para. 74.

[30] See e. g. *Danièle Mangatelle*, Coastal State Requirements for Foreign Fishing, FAO Legislative Study No. 57 (1996), Table E (Penalties for Unauthorized Fishing).

[31] E. g. Art. XI (2) Agreement between the Government of the United States of America and the European Economic Community Concerning Fisheries off the Coasts of the United States: 'In any case arising out of fishing activities under this Agreement, the penalty for violation of fishery regulations shall not include imprisonment except in the case of an enforcement related offense such as assault on an enforcement officer or refusal to permit boarding and inspection'; Art. IX (b) Colombia and Jamaica Fishing Agreement (with annex): 'the punishment to be imposed *by* the Colombian Authorities on Jamaican fishermen or crew members who commit any violation of the regulations relating to fishing activities under this Agreement or regulations related to fishing or the conservation of living resources shall not include imprisonment'. Emphasis added.

[32] See also *David Anderson*, Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements, 11 IJMCL (1996), 170.

> other officers of fishing vessels shall include provisions which may permit, inter alia, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.'[33]

A broader statement to this effect is also found in the Food and Agriculture Organization Code on Conduct on Responsible Fisheries which says that

> 'States should ensure that laws and regulations provide for sanctions applicable in respect of violations which are adequate in severity to be effective, including sanctions which allow for the refusal, withdrawal or suspension of authorizations to fish in the event of non-compliance with conservation and management measures in force.'[34]

18 Within the limits set by Art. 73, coastal states clearly have some discretion as to the types of penalties that they may impose on fishing vessels which are found to have violated their laws and regulations. Although it is not explicitly mentioned by Art. 73, ITLOS has confirmed that such penalties may include the confiscation of a fishing vessel.[35] However, it has made clear that the imposition of such measures should not be taken in such as way as to 'prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag state from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law.'[36] It would appear from this statement that the Tribunal would be willing to police compliance with international human rights standards in the context of judicial proceedings against foreign fishing vessels.

4. 'In cases of arrest or detention […] the coastal State shall promply notify the flag State'

19 Art. 73 (4) establishes a duty on the coastal State to 'promptly notify the flag State, through appropriate channels, of action taken and of any penalties subsequently imposed' where the coastal State has arrested or detained the foreign vessel. The provision leaves it to the discretion of the coastal State to choose an appropriate channel and any mention of consular or diplomatic channels were dropped from the text in the drafting process.[37]

20 This provision only requires notification of the flag State. It is clear under international law that the flag State is competent to seek redress on behalf of crew members, regardless of their nationality, when they have been injured in connection with an injury to the vessel.[38] This position was supported by ITLOS in the *M/V 'Saiga' (No. 2) Case* where the Tribunal dismissed objections of Guinea, finding that 'the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag [S]tate. The nationalities of these persons are not relevant.'[39] Moreover, in its commentary to the Draft Articles on Diplomatic Protection, the International Law Commission makes clear that

> 'the right of the flag [S]tate to seek redress for the ships' crew is not limited to redress for injuries sustained during or in the course of an injury to the vessel but extends also to injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a

[33] Art. 19 (2) UNFSA.

[34] FAO, Code of Conduct for Responsible Fisheries (1995), Art. 7.7.2.

[35] ITLOS, *The 'Tomimaru' Case* (Japan *v.* Russian Federation), Judgment 6 August 2007, ITLOS Reports (2005–2007), 74, para. 72.

[36] *Ibid.*, para. 76.

[37] Nordquist/Nandan/Rosenne (note 4), 795. *Cf.* also *Papanicolopulu* on Art. 244 MN 5–8 for the term 'appropriate channel' used in another context.

[38] ILC, Report of the International Law Commission: Draft Articles on Diplomatic Protection with Commentaries, UN Doc. A/61/10 (2006), GAOR 61st Sess. Suppl. 10, 22, 90–91 (Art. 18, para. 1): as the commentary of the ILC makes clear, this right cannot be categorized as diplomatic protection although 'there is nevertheless a close resemblance between this type of protection and diplomatic protection'.

[39] *M/V 'Saiga' (No. 2) Case* (note 6), para. 106.

consequence of the injury to the vessel. Thus such a right would arise where members of the ship's crew are illegally arrested and detained after the illegal arrest of the ship itself.'[40]

Indeed, Art. 292 confirms that an application for prompt release of the vessel or its crew may be made by or on behalf of the flag State of the vessel.[41]

21 At the same time, it is clear that the State of nationality of a crew member also retains the right to exercise diplomatic protection on behalf of its nationals.[42] Indeed, States have a right under Art. 36 of the Vienna Convention on Consular Relations (VCCR) to communicate with their nationals and 'to have access to them' when they are arrested by another State. Even though the coastal State may not have a duty under UNCLOS to inform any State other than the flag State, there is a duty under the VCCR to 'inform the consular post of the sending State if […] national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner'.[43] This duty thus supplements the duty under Art. 73 (4) to notify the flag State. However, the State of nationality of a crew member does not possess the right to institute prompt release proceedings under Art. 292 of the Convention.

5. Compensation for Injurious Use of Enforcement Powers

22 At the seventh session of the Conference, the USSR proposed adding a provision whereby 'if the arrest or detention of a foreign vessel is unjustified, the coastal State shall be required to compensate the owner of the vessel for any loss concerned'.[44] This proposal was not, however adopted, and there is no provision which provides for compensation if a coastal State misuses any of its enforcement powers under Art. 73. Nevertheless, this possibility must be assumed to exist under the customary international law of State responsibility, whereby a State which has committed an internationally wrongful act 'is under an obligation to make full reparation for the injury concerned'.[45]

23 The ability to claim such compensation is complicated by the fact that the exercise of enforcement powers of the coastal State in the EEZ is potentially shielded from challenge under the Convention dispute settlement procedures. Under Art. 298 (1)(b), States Parties to the Convention may exclude 'disputes concerning law enforcement activities in regard to the exercise of sovereign rights' from the compulsory dispute settlement proceedings. Many States have chosen to exercise this option.[46]

Article 74
Delimitation of the exclusive economic zone between States with opposite or adjacent coasts

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

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[40] Draft Articles on Diplomatic Protection with Commentaries (note 38), 94 (Art. 18, para. 9).

[41] See also Treves on Art. 292 MN 33–34.

[42] ILC, Report of the International Law Commission: Draft Articles on Diplomatic Protection, UN Doc. A/61/10 (2006), GAOR 61st Sess. Suppl. 10,16, 21 (Art. 18).

[43] Art. 36 (1)(b) VCCR.

[44] UNCLOS III, Informal Suggestion by the USSR: Part V, UN Doc. C.2/Informal Meeting/33 (1978, mimeo.), reproduced in: Renate Platzöder (ed.), The Third United Nations Conference on the Law of the Sea: Documents, vol. V (1984), 41 (Article 73).

[45] ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex (Art. 31 (1)). See also *M/V 'Saiga' (No. 2) Case* (note 6), paras. 170–172.

[46] For a list of States which have taken up the optional exclusion under Art. 298 (1)(b) UNCLOS, see Declarations and Reservations to UNCLOS, available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=-TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

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

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

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

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I. Purpose and Function

Art. 74 provides rules concerning the delimitation of the exclusive economic zone (EEZ). **1**
Art. 74 formulates essentially identical rules as exist for the delimitation of the continental shelf under Art. 83. Art. 74 consists of four provisions. Art. 74 (1) contains a substantive rule governing the delimitation of the EEZ. Art. 74 (2) provides a procedural rule with regard to the settlement of disputes concerning the delimitation of the EEZ. Art. 74 (3) deals with provisional arrangements before reaching the final agreement. Finally, Art. 74 (4) concerns the relationship between Art. 74 and the special agreement concerning the delimitation of the EEZ.

Maritime spaces in the international law of the sea are, in essence, defined in relation to the **2**
coastal State jurisdiction over each maritime space. Thus, the determination of the spatial extent of coastal State jurisdiction is of central importance in the law. With the emergence of the institutions of the continental shelf (→ Part VI) and the EEZ (→ Part V), in particular, there is a clear trend that States attempt to acquire the largest maritime spaces possible. As a consequence,

the jurisdiction of two or more coastal States overlaps in many parts of the oceans. Without rules governing maritime delimitation in spaces where coastal State jurisdictions overlap, the legal uses of maritime spaces cannot be enjoyed effectively. Maritime delimitation thus occupies the central place within the law of the sea. In this sense, Art. 74, along with Art. 83, is of particular importance in the Convention.

II. Historical Background

3 Maritime delimitation began to take place from the nineteenth century to the beginning of the twentieth century.[1] An early case on this matter can be found in the *Grisbådarna* arbitration between Norway and Sweden of 1909.[2] Furthermore, delimitation of the territorial sea was a subject of discussion at the 1930 the Hague Conference for the Codification of International Law.[3] With the emergence of the concepts of the continental shelf and the EEZ after World War II, in particular, States attempted to acquire the largest maritime spaces possible. The extension of coastal State jurisdiction over these resource-oriented zones gave rise to many maritime delimitation issues in the world oceans. Thus, maritime delimitation became a particularly important issue in the international law of the sea.

4 At UNCLOS I, rules concerning the delimitation of the territorial sea, the contiguous zone and the continental shelf were enshrined in the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ)[4] and the Convention on the Continental Shelf (CSC),[5] respectively. However, the concept of the EEZ was first presented at UNCLOS III and there was thus little State practice with regard to the delimitation of the EEZ. At UNCLOS III,[6] the negotiations concerning the delimitation of the EEZ and those relating to the delimitation of the continental shelf were carried out together.[7] The formulation of Art. 74 (1) and Art. 83 (1) was one of the most contentious issues in the legislative process of the UNCLOS.[8] This is exemplified by the fact that even one year before the adoption of the Convention, no agreement had yet been reached regarding the rules applicable to the delimitation of the EEZ and to the continental shelf.[9] The central issue in the negotiations concerned the delimitation method of the EEZ and the continental shelf. In this regard, a deep disagreement existed between the supporters of 'equidistance' and the supporters of 'equitable principles'. Whilst the equidistance method was already incorporated into Arts. 12 and 24 (3) CTSCZ and Art. 6 CSC, the equitable principles method was given currency in the *North Sea Continental Shelf* judgment of 1969.[10] This

[1] For a general analysis of State practice in this period, see *Daniel P. O'Connell*, The International Law of the Sea, vol. II (1984), 663–673; *Gerard J. Tanja*, The Legal Determination of International Maritime Boundaries (1990), 1–20; *Yoshifumi Tanaka*, Predictability and Flexibility in the Law of Maritime Delimitation (2006), 19–32.

[2] PCA, *Grisbådarna Case* (Norway *v.* Sweden), Award of 23 October 1909, RIAA XI, 147.

[3] *Tanaka* (note 1), 32–35.

[4] Art. 12 CTSCZ and Art. 24 (3) CTSCZ.

[5] Art. 6 CSC.

[6] For a legislative history of these provisions, see Myrion H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 800 *et seq.*; *S. P. Jagota*, Maritime Boundary (1985), 219–272; *Shunji Yanai*, International Law Concerning Maritime Boundary Delimitation, in: David Joseph Attard/Malgosia Fitzmaurice/Norman A Martínez Gutiérrez (eds.), The IMLI Manual on International Maritime Law, Volume I: The Law of the Sea (2014), 309–312; *Thomas Cottier*, Equitable Principles of Maritime Delimitation: The Quest for Distributive Justice in International Law (2015), 213–217; *Tanja* (note 1), 81–116; *Tanaka* (note 1), 44–47. See also Dissenting Opinion of Judge Oda in the *Tunisia/Libya Case*, ICJ, *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports (1982), 18, 234–247 (paras. 131–145).

[7] Nordquist/Nandan/Rosenne (note 6), 801.

[8] *Lucius Caflisch*, The Delimitation of Marine Spaces between States with Opposite and Adjacent Coasts, in: Rene-Jean Dupuy/Daniel Vignes (eds.) A Handbook on the New Law of the Sea (1991), 425, 477.

[9] *Tanaka* (note 1), 46.

[10] ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3, 46 (para. 85) and 53 (para. 101 (C) (1)). See also *Tanaka* on Art. 83 MN 12–14.

opposition was clearly shown by the two contrasting proposals made in Negotiating Group 7 (NG7) during the Seventh Session in 1978. One was based on equidistance as a general rule:

> '1. The delimitation of the Exclusive Economic Zone Continental Shelf [sic] between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstance where this is justified.'[11]

The other proposal relied on agreements concluded in accordance with equitable principles:

> '1. The delimitation of the exclusive economic zone between adjacent or/and opposite States shall be effected by agreement, in accordance with equitable principles taking into account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution.'[12]

Although, in this session, the Chairman of NG7, MANNER, prepared an informal proposal,[13] no compromise materialised between those in support of the 'equidistance' and those favouring 'equitable principles'.[14]

The opposition between two groups was linked to another hard-core issue, namely, that of peaceful settlement of disputes (→ Part XV).[15] Although the supporters of 'equidistance' were, as part of the package, in favour of establishing a compulsory, third-party system for the settlement of delimitation disputes, the supporters of 'equitable principles' have generally rejected the idea of a compulsory judicial procedures.[16] The confrontation between two groups was not solved during the Eighth Session in 1979. Neither of the differences relating to peaceful settlement mechanism could be resolved.[17] 5

In the Ninth Session of 1980, the Chairman of NG7 suggested the following proposal: 6

> 'The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.'[18]

Although the proposal was included as Art. 74/83 of the Informal Composite Negotiating Text (ICNT) Revision 2 of 11 April 1980, the text remained controversial and no consensus was reached on this matter.[19]

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[11] This formula was presented by 20 States. UNCLOS III, Bahamas *et al.*: Informal Suggestions Relating to Paragraphs 1, 2 and 3 of Articles 74 and 84, ICNT, UN Doc. NG//2 (1978, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IX (1986), 392–393. Members of the NG 7/2 (pro-equidistance) group were: Bahamas, Barbados, Canada, Colombia, Cyprus, Democratic Yemen, Denmark, Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, the United Arab Emirates, the United Kingdom and Yugoslavia: *ibid*.

[12] This formula was supported by 27 States: UNCLOS III, Informal Suggestion by Algeria *et al.*, UN Doc. NG 7/10 (1978, mimeo.), reproduced in: Platzöder (note 11), 402. Members of the NG 7/10 (pro-equitable principles) group were: Algeria, Argentina, Bangladesh, Benin, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syria, Somalia, Turkey and Venezuela: *ibid*.

[13] 'The delimitation of the exclusive economic zone/continental shelf between opposite or adjacent States shall be effected by agreement with a view of reaching a solution based upon equitable principles, taking account of all the relevant circumstances, and employing, where local conditions do not make it unjustified, the principle of equidistance': UNCLOS III, Informal Suggestions by the Chairman, UN Doc. NG 7/11 (1978, mimeo.), Platzöder (note 11), 405. Dissenting Opinion of Judge Oda in the *Tunisia/Libya Case* (note 6), 238–239 (para. 136).

[14] UNCLOS III, Report by the Chairman of Negotiating Group 7 on the Work of the Group, UN Doc. NG 7/21 (1978, mimeo.), reproduced in: Platzöder (note 11), 425–426.

[15] Three issues – delimitation criteria, interim measures and settlement of delimitation disputes – were to be settled together as parts of a package solution: UNCLOS III, Report of the Chairman of Negotiating Group 7, UN Doc. A/CONF.62/L.47 (1980), OR XIII, 76 (para. 2).

[16] *Andronico O. Adede*, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea (1987), 182; *Paul C. Irwin*, Settlement of Maritime Boundary Dispute: An Analysis of the Law of the Sea Negotiations, ODIL 8 (1980), 105, 110.

[17] Second Committee UNCLOS III, 57th Meeting, UN Doc. A/CONF.62/C.2/SR.57 (1979) OR XI, 57, 60 (para. 40).

[18] Report of the Chairman of Negotiating Group (note 16), 77 (Annex: Suggestions by the Chairman of Negotiating Group 7).

[19] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII, 54 and 59.

7 In 1981, one year before the adoption of the UNCLOS, Tommy Koh, President of the Third UN Conference on the Law of the Sea, proposed a draft article which would bring about a compromise between the States favouring the equidistance method and those advocating equitable principles. His proposal enjoyed widespread and substantial support in the two most interested groups of delegations and in the Conference as a whole.[20] On 28 August 1981, the draft was eventually incorporated into the Draft Convention,[21] which became, finally, Art. 74 (1) and 83 (1) in the UNCLOS.[22]

8 The reference to the delimitation method was also a matter for discussion in the legislative process of Art. 74 (3). Provisional arrangements were, for the first time, mentioned in a working text of the Convention.[23] In this regard, Informal Single Negotiating Text (ISNT) of 1975, made an explicit reference to 'the median line or the equidistance line', providing that: 'Pending agreement, no State is entitled to extend its exclusive economic zone beyond the median line or the equidistance line.'[24] This provision did seem to imply that the coastal State is entitled to claim its EEZ up to the median line or the equidistance line within areas where delimitation was not or could not be effected. A year later, however, the reference to 'the median line or the equidistance line' was omitted in the Revised Single Negotiating Text (RSNT) of 1976 and Art. 62 (3) RSNT simply stipulated that: 'Pending agreement or settlement, the States concerned shall make provisional arrangements, taking into account the provisions of paragraph 1.'[25] The difference of the two texts was closely linked to the two different approaches emerged in the legislative process of Art. 74 (1): an approach which advocated the equidistance method as a general principle and another approach which is based on the equitable principles method. The delegations taking the first approach supported a provision on provisional arrangements along the median or equidistance line, whilst those delegations which favoured delimitation in accordance with the equitable principles supported the formulation of the ICNT.[26] In the end, the formulation of Art. 62 (3) of the RSNT was maintained in the ICNT of 1977[27] and in the ICNT, Revision 1, of 1979.[28] In search for a compromise, however, a compromise formula was proposed by a private group convened by the Chairman of NG7 as follows:[29]

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

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[20] UNCLOS III, 154th Plenary Meeting, UN Doc. A/CONF.62/SR.154 (1981), OR XV, 39 (Report of the President on the Consultation on Delimitation). See also: UNCLOS III, Proposal on Delimitation, UN Doc. A/CONF.62/WP.11 (1981, mimeo.), reproduced in: Platzöder (note 11), 474; *Tanja* (note 1), 114–115.

[21] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 187.

[22] UNCLOS III, 184th Plenary Meeting, UN Doc. A/CONF.62/SR.184 (1982), OR XVII, 4, 5.

[23] For a legislative history of Art. 74 (3), see in particular, *Rainer Lagoni*, Interim Measures Pending Maritime Delimitation Agreements, AJIL 78 (1984), 349 *et seq*.

[24] UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 162 (Art. 61 (3)).

[25] UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 164.

[26] *Lagoni* (note 23), 351.

[27] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 16 (Art. 74 (3)).

[28] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 52 (Art. 74 (3)).

[29] UNCLOS III, Report of the Chairman of Negotiating Group 7, UN Doc. A/CONF.62/L.47 (1980), OR XIII, 76, 77. See also *Lagoni* (note 23), 353.

The formula was inserted in the ICNT, Revision 2 of 1980.[30] The formulation of the ICNT, Revision 2, remained unchanged in the 1981 Draft Convention[31] and it eventually became Art. 74 (3).

Art. 74 (2) was formulated at a comparatively early stage and the same text of the provision was provided in the ICNT of 1977. After this point, no further changes were made to this provision. The same text of Art. 74 (4) can be seen in the ISNT, of 1975.[32] No change was made concerning this provision in the subsequent negotiating texts. **9**

III. Elements

1. 'The delimitation of the exclusive economic zone'

The concept of the EEZ comprises the seabed and its subsoil, the waters superjacent to the seabed and the airspace above the waters (→ Art. 56 (1)).[33] Accordingly, the delimitation of the EEZ comprises the delimitation of the continental shelf within the EEZ. An issue that arises in this regard is whether or not the maritime boundaries of the continental shelf (the seabed and its subsoil) and the EEZ (superjacent waters to the seabed) would coincide. Considering that the relevant circumstances to be taken into account may be different for the seabed and superjacent waters, one cannot totally deny the possibility that the equitable delimitation line of the seabed and its superjacent waters could differ. Whether a single maritime boundary should be drawn depends on the agreement between relevant States. Where there is no agreement drawing a single maritime boundary and a dispute was submitted an international court, a question arises whether the delimitation lines of the continental shelf and the EEZ should coincide. In international jurisprudence relating to maritime delimitations, however, international courts and tribunals have always drawn a single maritime boundary for the EEZ and the continental shelf on the basis of the agreement of the litigating parties. Even though, as shown in the *Greenland/Jan Mayen Case*, there was no agreement to draw a single maritime boundary,[34] the International Court of Justice (ICJ) established a coincident maritime boundary both for the continental shelf and the fishery zone.[35] With a few exceptions, a considerable majority of maritime delimitation treaties also establish a single maritime boundary for the continental shelf and the EEZ. Notable exceptions include: the 1978 Torres Strait Treaty between Australia and Papua New Guinea[36] and the 1997 Perth Treaty between Australia and Indonesia on the Timor and Arafra Seas.[37] **10**

[30] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII, 54 (Art. 74 (3)).

[31] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 187 (Art. 74 (3)).

[32] ISNT (note 27), 16.

[33] Under Art. 56 (3), the sovereign rights over the seabed and subsoil of the EEZ are to be exercised in accordance with rules governing the continental shelf set out in Part VI.

[34] This is the case of the *Greenland/Jan Mayen* dispute between Denmark and Norway. In this case, the ICJ considered that it was 'not empowered or constrained by any such agreement for a single dual-purpose boundary': ICJ, *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark *v.* Norway), Judgment of 14 June 1993, ICJ Reports (1993), 38, 57 (para. 43).

[35] *Ibid.*, 81–82, para. 94.

[36] Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Straits, And Related Matters, 18 December 1978, ILM 18 (1997), 291; See also *Choon-ho Park*, Australia-Papua New Guinea, Report Number 5-3, in: Jonathan I. Charney/Lewis M. Alexander (eds.), International Maritime Boundaries, vol. I (1993), 929–934; *Henry Burmester*, Torres Strait Treaty: Ocean Boundary Delimitation by Agreement, AJIL 76 (1982), 321; *Ben Milligan*, The Australia-Papua New Guinea Torres Strait Treaty: A Model for Cooperative Management of the South China Sea?, in: Robert C. Beckman (ed.), Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources (2013), 268.

[37] Treaty between the Government of Australia and the Government of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, 14 March 1997, ILM 36 (1997), 1053 (not yet in force).

The Torres Strait Treaty draws four different boundaries: (i) a seabed jurisdiction boundary, (ii) a fisheries jurisdiction boundary, (iii) a single maritime boundary for both the seabed and fisheries, and (iv) a protected zone boundary. The seabed jurisdiction boundary and the fisheries jurisdiction boundary do not coincide. As a consequence, in the 'top hat' area where the boundaries for the seabed and the superjacent waters were separated, Australia exercises fisheries jurisdiction, while Papua New Guinea has seabed jurisdiction. The Perth Treaty also established continental shelf and EEZ boundaries which do not coincide.[38] In addition, the 1970 Agreement between Indonesia and Malaysia creates a sharp triangular zone where Malaysia's territorial sea overlaps Indonesia's continental shelf.[39]

2. 'between States with opposite or adjacent coasts'

11 In the earlier jurisprudence concerning maritime delimitations, international courts and tribunals attached great importance to the distinction between opposite and adjacent coasts when evaluating the applicability of the equidistance method.[40] It is common knowledge that the ICJ rejected the existence of any obligatory method of continental shelf delimitation in the *North Sea Continental Shelf Cases*.[41] In this regard, the Court made a distinction between opposite and lateral equidistance lines. According to the Court,

> '[W]hereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other'.[42]

Furthermore,

> '[T]the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out'.[43]

To the Court, the distorting effect of the equidistance method was one of the important reasons for rejecting the application of that method in a situation of adjacency. Later on, the obligatory character of the equidistance method was also rejected by the ICJ in the *Tunisia/Libya Case,*[44] the *Gulf of Maine Case*[45] and the *Libya/Malta Case*[46] and tribunals in the *Guinea/Guinea-Bissau Arbitration*[47] and *St. Pierre and Miquelon Arbitration*.[48] In international jurisprudence between 1969 and 1992, it appears that international courts and tribunals were less favourable to the application of the equidistance method in a situation of adjacency.[49] However, it cannot pass unnoticed that even in this period, international courts

[38] See *Tanaka* (note 1), 338–343; *Max Herriman/Martin Tsamenyi*, The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development? ODIL 29 (1998), 361; *Victor Prescott*, Current Legal Developments: Australia/Indonesia, IJMCL 12 (1997), 533.

[39] Treaty between the Republic of Indonesia and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries in the Strait of Malacca, 17 March 1970, reproduced in: Charney/Alexander (note 36), 1035.

[40] See *Tanaka* on Art. 83 MN 7.

[41] *North Sea Continental Shelf Cases* (note 10), 49 (para. 90) and 53 (para. 101(B)).

[42] *Ibid.,* at 37, para. 58.

[43] *Ibid.,* para. 59.

[44] *Tunisia/Libya Case* (note 7), 59 (para. 70).

[45] ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada *v.* United States of America), Judgment of 12 October 1984, ICJ Reports (1984), 246, 315 (paras. 162–163).

[46] ICJ, *Case Concerning the Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, ICJ Reports (1985), 13, 38–39 (para. 45). At the stage of establishing the continental shelf boundary, however, the Court applied the equidistance method as a first provisional step, and the equidistance line was adjusted in a second stage on account of relevant circumstances. *Ibid.*, 52–53, para. 73.

[47] *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, RIAA XIX, 149, para. 89. The French text is the authentic one.

[48] *Delimitation of Maritime Areas between Canada and France* (1992), RIAA XXI, 265, para. 38.

[49] The delimitation process in maritime delimitation cases are highly complicating and no detailed examination can be made here. For a detailed analysis of the delimitation process, see *Tanaka* (note 1) 51 *et seq*. See also

and tribunals tended to apply the equidistance method at the first stage of the maritime delimitation between States with opposite coasts.[50]

The ICJ, in the 2001 *Qatar/Bahrain Case*, broke the new ground by clearly accepting the applicability of the equidistance method under customary law in a situation of adjacency. In fact, the Court explicitly stated that it 'will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line'.[51] By the same token, the ICJ, in the *Cameroon/Nigeria Case*, also applied the equidistance method at the first stage of the maritime delimitation relating to adjacent coasts.[52] It can be observed that, presently, international courts and tribunals apply the equidistance line at the first stage of maritime delimitation regardless of the configuration of the coasts, unless there are compelling reasons as a result of which the establishment of a provisional equidistance line is not feasible. In this sense, it could be said that the distinction made between opposite and adjacent coasts has become less important in the international jurisprudence concerning maritime delimitations.[53] 12

3. 'by agreement'

In the 1984 *Gulf of Maine Case*, the Chamber of the ICJ stated that, as a 'fundamental norm' applicable to every maritime delimitation between neighbouring States, maritime delimitation must be sought and effected by means of an agreement in good faith.[54] As shown in the *dictum* of the Chamber, delimitation by agreement is fundamental for the international law of maritime delimitation and the same is true of the delimitation of the EEZ. 13

The reference to 'by agreement' in conjunction with 'in order to achieve an equitable solution' in Art. 74 (1) may seem to contradict the rule of international law according to which States may freely determine the content of agreements in the absence of *jus cogens*. As Art. 74 (1) cannot be considered as *jus cogens*, States may freely conclude any agreements even if they are not equitable.[55] Whilst Art. 74 (1) might seem to stress delimitation by agreement, it is clear that this provision, read together with Art. 74 (2), is not intended to rule out judicial settlement in the absence of such an agreement.[56] In fact, many maritime delimitation disputes have been settled through international adjudication. 14

4. 'article 38 of the Statute of the International Court of Justice'

The reference to 'article 38 of the Statute of the International Court of Justice'[57] leaves some room for discussion in four respects. First, this reference does not spell out the law applicable to maritime delimitation simply by enumerating the sources of international law. 15

Yoshifumi Tanaka, The International Law of the Sea (2nd edn. 2015), 202 *et seq*. and *Tanaka* on Art. 83 MN 12 *et seq*. However, it must be noted that the 1977 *Anglo-French Continental Shelf* arbitration constitutes a notable exception in the period between 1969 and 1992. In the Atlantic region where a lateral delimitation is at issue, the Court of Arbitration applied the equidistance method as a starting point. *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, 30 June 1977–14 March 1978, RIAA XVIII, 3, 112 (para. 240).

[50] *Tanaka* (note 1), 121.

[51] ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar *v.* Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports 2001, 40, 111 (para. 230).

[52] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *v.* Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002, ICJ Reports 2002, 303, 441–442 (paras. 288–290).

[53] *Robert Kolb*, Case Law on Equitable Maritime Delimitation: Digest and Commentaries (2003), 548.

[54] *Gulf of Maine Case* (note 45), 299–300 (para. 112).

[55] *Caflisch* (note 8), 484; *Haritini Dipla*, Le régime juridique des îles dans le droit international de la mer (1984), 221, 225.

[56] *Caflisch* (note 8), 483.

[57] Statute of the International Court of Justice (ICJ Statute). The electronic text is available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

Thus, it is not of much use in determining the applicable law.[58] Arguably, the lack of specificity is the most serious weakness of Art. 74 (1) since an essential issue of maritime delimitations concerns the specific delimitation method.[59] Second, the principal sources defined in Art. 38 are treaty and custom. At least at the time of the adoption of the UNCLOS, however, there was neither a general treaty regulating the delimitation of the EEZ nor customary rules on that subject. Accordingly, some doubts could be expressed regarding the usefulness of the reference to treaty and to custom.[60] Third, since the 'general principles of law recognized by civilized nations' has no role to play in the context of maritime delimitation, the general principles mentioned in Art. 38 ICJ Statute may not be useful.[61] Fourth, the text of Art. 74 (1) refers to Art. 38 ICJ Statute as a whole. However, Art. 38 (2) ICJ Statute defines decisions *ex aequo et bono*, i. e. extra-legal considerations. There may be some scope for arguing that the reference in Art. 74 (1) should have been limited to Art. 38 (1). Yet suggestions to this effect were defeated at UNCLOS III.[62] Given that Art. 38 (2) ICJ Statute applies only when the litigating parties agreed thereto and, to this day, there is no case where the ICJ gave its judgments on the basis of *ex aequo et bono*, the reference to Art. 38 as a whole is not problematic.

5. 'an equitable solution'

16 Art. 74 (1) offers scant explanation about the contents of 'an equitable solution' in the context of maritime delimitations. Thus, the equitableness of maritime boundaries must be evaluated on a case-by-case basis. The concept of equity in the context of maritime delimitations is embodied in the equitable principles, which was declared by the ICJ in the 1969 *North Sea Continental Shelf Cases*.[63] Arguably, equitable principles are at the heart of the international law of maritime delimitation. In relation to this, the Court held that:

> 'Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy'.[64]

17 In the application of equitable principles, however, a central issue involves the applicability of the equidistance method. In the international jurisprudence relating to delimitations of the EEZ and the continental shelf, one can identify two contrasting approaches to this matter: an approach which denies any obligatory method of maritime delimitation and an equidistance/relevant circumstances approach which applies the equidistance method at the first stage and envisages shifting of the provisional equidistance line taking account of relevant circumstances at the second stage of maritime delimitation.[65] In essence, the first approach seeks to maintain maximum flexibility, whilst the second approach aims to enhance predictability in the law of maritime delimitation. The history

[58] *Philippe Cahier*, Les sources du droit relatif à la délimitation de plateau continental, in: Daniel Bardonnet/Jean Combacau/Pierre-Marie Dupuy/Prosper Weil (eds.), Le droit international au service de la paix, de la justice et du développement: mélanges Michel Virally (1991), 175.

[59] Judge Gros called Art. 74 (1), along with Art. 83(1), 'an empty formula'. *Gulf of Maine Case* (note 45), Dissenting Opinion of Judge Gros, 365 (para. 8).

[60] *Caflisch* (note 8), 480–481. The situation differs in continental shelf delimitation. See *Tanaka* on Art. 83 MN 11.

[61] *Hungdah Chiu*, Some Problems Concerning the Application of the Maritime Boundary Delimitation Provisions of the 1982 United Nations Convention on the Law of the Sea Between Adjacent or Opposite States, Md. J. Int'l L. & Trade 9 (1985), 1, 8.

[62] *Caflisch* (note 8), 485.

[63] *North Sea Continental Shelf Cases* (note 10), 46 (para. 85) and 53 (para. 101 (C) (1)).

[64] *Ibid.*, 49–50, para. 91.

[65] In the case of the delimitation of the territorial sea, the equidistance method is clearly incorporated in Art. 15. See also *Symmons* on Art. 15 MN 23–34.

of the law of maritime delimitation shows a vacillation between these two contrasting approaches to equitable principles. It can be argued that the development of the law of maritime delimitation is essentially characterised by the tension between predictability and flexibility in the law.

18 In the 1969 *North Sea Continental Shelf Cases*, the ICJ took the first approach, stating that 'it is necessary to seek not one method of delimitation, but one goal'.[66] It did not admit the existence of any obligatory method of continental shelf delimitation, including the equidistance method.[67] According to this approach, it is the goal which should be stressed, and the law of maritime delimitation should be defined only by this goal, i. e., the achievement of equitable results. As a consequence, no specific method of delimitation, including the equidistance method, is incorporated into the legal domain, and the law of maritime delimitation prescribes only an equitable result. It can be considered that the ICJ's approach emphasises maximum flexibility on the basis of the concept of creative equity or *l'équité créatrice*.[68] According to this approach, however, the normative level of the law of maritime delimitation remains minimum. The Court's approach was further promoted in the 1982 *Tunisia/Libya Case*. In fact, the Court in this case accepted neither the mandatory character of equidistance, nor some privileged status of equidistance in relation to other methods.[69] Thus, the Court drew an illustration delimitation line on the continental shelf without relying on the equidistance method. In the first zone, the Court drew the illustrative continental shelf boundary taking account of the conduct of the parties, a *modus-vivendi* line of delimitation concerning fisheries jurisdiction, the factor of perpendicularity to the coast and the concept of prolongation of the general direction of a land boundary. In the second zone, the Court drew the boundary by considering the general change in the direction of the Tunisian coast and the Tunisian Kerkennah Islands.[70]

19 The ICJ's approach was echoed by the Chamber of the ICJ in the 1984 *Gulf of Maine Case* establishing the delimitation of a single maritime boundary. In this case, the Chamber specified a 'fundamental norm' applicable to every maritime delimitation between neighbouring States. The first part of the norm is that maritime delimitation must be sought and effected by means of an agreement in good faith. The second part of the fundamental norm is: '(2) In either case, 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 circumstances, an equitable result'.[71] According to the Chamber, the law defines neither the equitable criteria nor the practical method, simply advancing the idea of 'an equitable result.'[72] Likewise, the full Court in the 1985 *Libya/Malta Case* stressed the goal, i. e. the equitable result, of maritime delimitation and refused to accept the obligatory character of the equidistance method.[73] The same approach was adopted by the 1985 *Guinea/Guinea-Bissau* arbitration,[74] and the 1992 *St. Pierre and Miquelon Arbitration*.[75]

20 By contrast, the Court of Arbitration in the 1977 *Anglo-French Continental Shelf Arbitration* took an approach different from that of the ICJ in the *North Sea Continental Shelf Cases*. In this case, the Court of Arbitration equated Art. 6 of the 1958 Geneva Convention on the Continental

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[66] *Ibid.*, 50, para 92.

[67] *Ibid.*, para. 101 (B). See also 49, para. 90.

[68] Weil refers to the concept of 'équité autonome' ('autonomous equity'). *Prosper Weil*, Perspectives du droit de la délimitation maritime (1988), 179–181.

[69] *Ibid.*, 79, para. 110.

[70] *Tunisia/Libya Case* (note 7), 84 (para. 118 *et seq.*).

[71] *Gulf of Maine Case* (note 45), 300 (para. 112).

[72] *Ibid.*, 312–313, paras. 157–158; *ibid.*, 315, paras. 162-163.

[73] *Libya/Malta Case* (note 46), 37–39 (paras. 43–45). At the stage of establishing the continental shelf boundary, however, the Court applied the equidistance method as the first provisional step, and the equidistance line was adjusted in a second stage on account of relevant circumstances. In so doing, it *de facto* adopted the corrective-equity approach for the delimitation of the continental shelf between opposite coasts at the operational stage.

[74] *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (1985), RIAA XIX, 149, para. 89.

[75] *Delimitation of Maritime Areas between Canada and France* (note 48), para. 38.

Shelf, as a single combined equidistance-special circumstances rule, to the customary law of equitable principles.[76] The Court of Arbitration then applied the equidistance method with modification in the Atlantic region. The Court's view on this matter bears quoting:

> 'The Court notes that in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection. […] [I]t seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation.'[77]

According to the approach of the Court of Arbitration, the equidistance method is applied at the first stage of delimitation, and then a shift of the equidistance line may be envisaged if relevant circumstances warrant it in order to achieve an equitable result; equity comes into play as a corrective element. This approach is based on the concept of corrective equity or *l'équité correctrice*.[78] Given that equidistance is the only objective method for ensuring predictability of results in the sense that once the base points are fixed, the delimitation line is mathematically determined,[79] the equidistance/relevant circumstances approach or the two-step approach heightens predictability in the law of maritime delimitation.

21 The equidistance/relevant circumstances approach adopted in the *Anglo-French Continental Shelf Arbitration* was echoed by the ICJ in the 1993 *Greenland/Jan Mayen Case*.[80] Given that the ICJ has been less favourable to the equidistance/relevant circumstances approach, the judgment in the *Greenland/Jan Mayen Case* can be considered as a turning point of the case law relating to maritime delimitation. Subsequently the equidistance/relevant circumstances approach was taken by the 1999 *Eritrea/Yemen Arbitration Second Stage*.[81] Further, the ICJ, in the 2001 *Qatar/Bahrain Case*, applied the equidistance/relevant circumstances approach under customary law in the delimitation between States with adjacent coasts.[82] Moreover, in the *Cameroon/Nigeria Case*, the ICJ notably applied the equidistance method at the first stage of maritime delimitations under Art. 74 and 83.[83] According to the Court's interpretation, a specific method, i. e., the equidistance method, should be incorporated into Art. 74 (1) and 83 (1). Given that any reference to a specific delimitation method was omitted in drafting those provisions, this is thought to be a judicial innovation. In the 2006 *Barbados/Trinidad and Tobago Arbitration*, the Arbitral Tribunal took the equidistance/relevant circumstances approach in the operation of maritime delimitation under Art. 74 and 83,[84] even though it did not admit a mandatory character of any delimitation method. The ICJ, in the 2007 *Nicaragua/Honduras Case*, found itself that it cannot apply the equidistance line because of the very active morphodynamism of the relevant area. Accordingly, it established a single maritime boundary by applying the bisector method. Nonetheless, the Court accepted that: '[E]quidistance remains the general rule'.[85] In fact, concerning the delimitation around the islands in the dispute area, the Court applied, without any problem, the equidistance/relevant circumstances approach by

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[76] *Anglo-French Continental Shelf Arbitration* (note 49), 45, para 70.

[77] Emphasis added. *Ibid*., at 116, para 249. The Court took into account the fact that, in the Atlantic region, Art. 6 was applicable. As Art. 6 is the particular expression of a customary law of equitable principles, the result would be the same as if customary law had been applied.

[78] *Weil* (note 68), 179.

[79] *Hugh Thirlway*, The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence, vol. I (2013), 444.

[80] *Greenland/Jan Mayen Case* (note 35), 58–62 (paras. 46–56).

[81] PCA, *Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation* (Eritrea *v*. Yemen), 17 December 1999, RIAA XXII, 335, 365 (paras. 131–132).

[82] *Qatar/Bahrain Case* (note 51), 91 (para. 167) and 111 (para. 230).

[83] *Nigeria/Cameroon Case* (note 53); 441–442 (paras. 288–290).

[84] *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them* (2006), RIAA XXVII, 147.

[85] ICJ, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua *v*. Honduras), Judgment of 8 October 2007, ICJ Reports (2007), 659, 745 (para. 281).

referring to the *Qatar/Bahrain Case*.[86] Hence, it may be argued that the departure from the previous jurisprudence is only partial.[87] In the 2007 *Guyana/Suriname Arbitration*, the Arbitral Tribunal applied the equidistance/relevant circumstances approach more clearly under Art. 74 and 83.[88]

A further development can be seen in the 2009 *Black Sea Case*. In this case, for the first time in its jurisprudence the ICJ adopted the three-stage approach under Arts. 74 and 83. The first stage is to establish the provisional equidistance line. At the second stage, the Court will examine whether there are relevant circumstances calling for the adjustment of the provisional equidistance line in order to achieve an equitable result. At the final and third stage, the Court will verify whether the delimitation line does not lead to an inequitable result by applying the test of disproportionality.[89] Given that the disproportionality test aims to check for an equitable outcome of the maritime delimitation, it may be argued that the three-stage approach also relies essentially on the concept of corrective equity. In this sense, the three-stage approach can be considered as a variation of the equidistance/relevant circumstances approach. It has been applied by the ICJ in its subsequent cases. The three-stage approach was followed by the International Tribunal for the Law of the Sea (ITLOS) in the 2012 *Bay of Bengal Case*[90] and the 2014 arbitration between Bangladesh and India.[91] **22**

In a broad perspective, it can be observed that the law of maritime delimitation is moving from the approach based on the concept of creative equity to the three-stage approach based on the concept of corrective equity.[92] By incorporating the equidistance method into the realm of law, the corrective-equity approach is thought to enhance predictability of the law of maritime delimitation. Equidistance can provide an objective criterion for testing the equitableness of a delimitation line taking relevant circumstances into account.[93] One can thus argue that the three-stage approach would provide a better framework for balancing predictability and flexibility in the law of maritime delimitation.[94] All in all, as the ITLOS aptly observed in the *Bay of Bengal Case*, it may be said that: 'Over time, the absence of a settled method of delimitation prompted increased interest in enhancing the objectivity and predictability of the process'.[95] **23**

Under the three-stage approach, the location of the delimitation line is determined by shifting the provisional equidistance line on the basis of the consideration of relevant circumstances. In broad terms, relevant circumstances can be divided into two categories: geographical and non- **24**

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[86] *Ibid.*, 752 (para. 304).

[87] *Yoshifumi Tanaka*, Current Legal Developments: International Court of Justice, IJMCL 23 (2008), 327, 342–343 (Case Concerning the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (8 October 2007)). See also *Robin Churchill*, Dispute Settlement Under the UN Convention on the Law of the Sea: Survey for 2007, IJMCL 23 (2008), 601, 622–624.

[88] *Arbitration between Guyana and Suriname* (Guyana *v.* Suriname) (2007), RIAA XXX, 1, 93 (para. 335) and 95 (para 342).

[89] ICJ, *Maritime Delimitation in the Black Sea* (Romania *v.* Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61, 101–103 (paras. 115–122).

[90] ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh *v.* Myanmar), Judgment of 14 March 2012, ITLOS Reports 12 (2012), 67–68, para. 240.

[91] *In the Matter of the Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India* (2014), 99-11 (paras. 345–346) available at: http://www.pca-cpa.org.

[92] See also Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 31 October 2001, available at: http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1&PHPSESSID=5c407.

[93] *Tullio Scovazzi*, The Evolution of International Law of the Sea: New issues, New Challenges, RCADI 286 (2000) 39, 200; *Michel Vœlckel*, Aperçu de quelques problèmes techniques concernant la délimitation des frontières maritimes, AFDI 25 (1979), 693, 706–707.

[94] *Tanaka* (note 1), 352 and 354.

[95] *Bay of Bengal Case* (note 90), 65 (para. 228). It is also to be noted that as shown in the *Gulf of Maine Case* (note 45) and the *Libya/Malta Case* (note 46), the ICJ seemed to accept the validity of the corrective-equity approach in the maritime delimitation between States with opposite coasts, even when it supported the result-oriented equity approach.

geographical.[96] Principal geographical elements include configuration of the coast, proportionality, presence of islands, baselines, the presence of third States, whilst non-geographical elements include economic factors, the conduct of the Parties, historic rights, security interests, navigation, environmental factors and traditional livelihood. International jurisprudence presents a clear trend for more importance to be given to geographical than to non-geographical factors. Among multiple geographical factors, proportionality performs a function as an *ex post facto* test of equitableness of the delimitation line at the third stage of maritime delimitation. Further, effects given to islands are always at issue where islands exist in the delimitation area. In this regard, one can recognise three types of effects given to islands: full effect, partial or half effect and no effect ignoring the existence of an island concerned. The existence of third States also constitutes an element to be examined where a decision of international courts and tribunals in a given case may affect the rights of these States over marine spaces. By contrast, with a few exceptions, the role of non-geographical factors remains modest.

6. 'the procedures provided for in Part XV'

25 Under Art. 74 (2), when the parties in dispute cannot reach an agreement with regard to the delimitation of the EEZ 'within a reasonable period of time', the dispute is subject to procedures of dispute settlement in Part XV. However, this provision provides no precision with regard to the phrase 'within a reasonable period of time'.[97] Accordingly, it is less clear when the disputing parties are required to resort to procedures provided in Part XV.

26 Maritime delimitation disputes may be exempted from the compulsory procedure provided for in Section 2 of Part XV in accordance with Art. 298 (1)(a)(i). Where no agreement is reached in negotiations between the parties, they are subject to the compulsory conciliation under Section 2, Annex V.[98] Yet, any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission.[99] The parties shall negotiate an agreement on the basis of the report of the conciliation commission. If these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in Section 2, unless the parties otherwise agree in accordance with Art. 298(1)(a)(ii). Under Art. 298(1)(a)(iii), however, Art. 298(1)(a) does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties.

7. 'in a spirit of understanding and cooperation'

27 According to the Arbitral Tribunal in the *Guyana/Suriname Arbitration*, 'the inclusion of the phrase 'in a spirit of understanding and cooperation' indicates the drafters' intent to require of the parties a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement.[100] It may be said that the phrase 'in a spirit of understanding and cooperation' reflects the principle of good faith. In this regard, it is relevant to note that Art. 300 explicitly contains the obligation of good faith. Following the obligation, States must enter into negotiations in good faith, even though this does not imply an obligation to reach an agreement.[101] Here the *dictum* of the ICJ the *North Sea Continental Shelf Cases* deserves quoting:

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[96] For a detailed analysis of relevant circumstances, see *Malcolm Evans*, Relevant Circumstances and Maritime Delimitation (1987); *Tanaka* (note 1), 151 *et seq*; *Cottier* (note 6), 525 *et seq*.

[97] Nordquist/Nandan/Rosenne (note 6), 815.

[98] See generally *Hamamato* on Annex V.

[99] Art. 298 (1)(a)(i).

[100] *Guyana/Suriname Arbitration* (note 88), 130–132 (para. 461).

[101] *North Sea Continental Shelf Cases* (note 10), 48 (para. 87).

> '[T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.'[102]

8. 'provisional arrangements of a practical nature'

28 Art. 74 (3) contains a positive obligation on the States concerned to make every effort to conclude provisional arrangements of a practical nature pending agreement on delimitation. In this regard, the Arbitral Tribunal in the *Guyana/Suriname Arbitration* stated that: 'provisional arrangements of a practical nature have been recognized as important tools in achieving the objectives of the Convention, and it is for this reason that the Convention imposes an obligation on parties to a dispute to 'make every effort' to reach such arrangements'.[103] Joint exploitation of natural resources is a case in point. In this regard, the ICJ in the *North Sea Continental Shelf Cases* held that agreements for joint exploitation were particularly appropriate where areas of overlapping claims result from the method of delimitation chosen and there is a question of preserving the unity of deposits.[104] In practice, there are some joint development schemes created in areas where delimitation was not or could not be effected.[105]

29 The legislative history of Art. 74 (3) suggests that the concept of provisional arrangements pending delimitation of the EEZ was not considered as a codification of customary international law. Thus, the positive obligation under Art. 74 (3) will be binding only upon State Parties to the UNCLOS.[106] Although Art. 74 (3) does not specify the area to which the provisional arrangements apply, it is reasonable to consider that the obligation under Art. 74 (3) applies to those areas where States hold opposing views.[107] Here, two points must be noted. First, as the ICJ pointedly observed in the *North Sea Continental Shelf Cases*, '[e]vidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim'.[108] Second, the determination of disputing areas is more complicating where the rights of a third State involves in the areas.[109]

30 Art. 74 (3) provides no further precision concerning the meaning of the phrase 'of a practical nature'.[110] Thus, provisional arrangements of a practical nature need to be addressed on a case-by-case basis.[111] One of the practical arrangements relates to the establishment of joint development schemes.[112] The Japan/South Korea Joint Development Zone created in the 1974 Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries is a case in point.[113] Further, in the Timor Sea, the Joint Petroleum Development Area was set out by the 2001 Timor Sea Arrangement between Australia and the United Nations Transitional Administration in East Timor.[114] Moreover, the 2006 Treaty on Certain

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[102] *Ibid.*, 47, para. 85.

[103] *Guyana/Suriname Arbitration* (note 88), 131 (para. 464).

[104] *North Sea Continental Shelf Cases* (note 10), 52 (para. 99). See also *Guyana/Suriname Arbitration* (note 88), 131 (para. 463).

[105] *Tanaka* (note 1), 284 *et seq*. See also *Masayoshi Miyoshi*, The Joint Development of Offshore Oil and Gas in relation to Maritime Boundary Delimitation, IBRU Maritime Briefing 2(5) (1999).

[106] *Lagoni* (note 23), 349 and 354.

[107] *Ibid.*, 356.

[108] *North Sea Continental Shelf Cases* (note 10), 22 (para. 20).

[109] *Lagoni* (note 23), 357.

[110] Nordquist/Nandan/Rosenne (note 6), 815.

[111] For an analysis of provisional arrangements in State practice, see *Natalie Klein*, Provisional Measures and Provisional Arrangements in Maritime boundary Disputes, IJMCL 21 (2006), 432 *et seq*.

[112] *Tanaka* (note 1) 284–287.

[113] Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, 30 January 1974, UNTS 1225, 19778.

[114] Reproduced in: Charney/Smith (note 36), 2769.

Maritime Arrangements in the Timor Sea (CMATS Treaty) aims to allow the exploitation of the Greater Sunrise gas reservoirs to proceed, whilst suspending maritime boundary claims.[115] At the same time, the 2006 Treaty makes it clear that nothing contained in this Treaty shall be interpreted as prejudicing Timor-Leste's or Australia's legal position on the maritime boundaries and as recognition of any right or claim of the other Party to the whole or any part of the Timor Sea.[116] It thus prohibits the Parties from asserting claims to sovereign rights and jurisdiction and maritime boundaries in relation to the other for the period of 50 years.[117] On 23 April 2013, however, the Republic of Timor-Leste instituted arbitral proceedings against Australia with regard to the alleged invalidity of the CMATS Treaty pursuant to the Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 (pending).[118]

31 Likewise, establishing interim fishery arrangements may also be regarded as a provisional arrangement of a practical nature. During the *Gulf of Maine* disputes, for example, Canada and the United States signed an Interim Reciprocal Fisheries Agreement on 24 February 1977 and provisionally implemented pending its entry into force on 26 July 1977. Although the Agreement expired at the end of 1977, the two States have maintained an interim regime of flag-State enforcement procedures in the boundary regions along the lines of the 1977 Agreement pending the entry into force of a 1979 Fisheries Agreement and, subsequently, when that Agreement failed to come into force, pending the proceedings of the *Gulf of Maine Case* before the ICJ.[119] To take another example, the 1998 Agreement on Fisheries between the Republic of Korea and Japan[120] establishes joint fishing zones in the Sea of Japan and in the East China Sea.

9. 'during this transitional period'

32 Art. 74 (3) offers scant explanation about the phrase 'transitional period'. Accordingly, it remains less clear when the transitional period begins and when the obligation is to be suspended. In light of the object and purpose of this provision, it seems reasonable to consider that the obligation must arise as soon as the claims of States overlap in a marine space. The obligation under Art. 74 (3) would also arise when one of the parties in dispute refused to enter into negotiation on the maritime delimitation. It continues to apply if the negotiations between the parties reach a deadlock or are discontinued.[121]

10. 'not to jeopardize or hamper the reaching of the final agreement'

33 Art. 74 (3) also contains a negative obligation not to jeopardize or hamper the reaching of the final agreement. Although Art. 74 (3) contains no indication of what is meant by the phrase

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[115] The Treaty entered into force on 23 February 2007. Text in: Australian Treaty Series, 2007, ATS 12, available at: http://www.austlii.edu.au/au/other/dfat/treaties/2007/12.html. See also *Robin Churchill*, Dispute Settlement in the Law of the Sea: Survey for 2013, IJMCL 30 (2015),1, 46.

[116] Art. 2 (1) CMATS Treaty.

[117] Art. 4 (1) and Art. 12 (1) CMATS Treaty.

[118] See website of the Permanent Court of Arbitration: http://www.pca-cpa.org/showpage.asp?pag_id=1403. See also Information on the Australian Government website at: http://www.foreignminister.gov.au/releases/2013/bc_mr_130503.html. On 11 April 2016, the Democratic Republic of Timor-Leste initiated, for the first time under the UNCLOS, the conciliation against Australia pursuant to Article 298 and Annex V of the Convention. On 19 September 2016, the Conciliation Commission unanimously decided that it is competent with respect to the compulsory conciliation of the matters set out in Timor-Leste's Notification Instituting Conciliation under Section 2 of Annex V of UNCLOS of 11 April 2016. Decision on Australia's Objections to Competence, para. 111, available at: http://www.pcacases.com/web/sendAttach/1921.

[119] *Gulf of Maine Case* (note 45), 283, para. 69.

[120] Entered into force 22 January 1999. UNTS volume number has not yet been determined for this record. The text in English was reproduced in *Sun Pyo Kim*, Maritime Delimitation and Interim Arrangements in North East Asia (2004), 327–338.

[121] *Lagoni* (note 23), 364.

'jeopardize or hamper', the phrase is not intended to preclude some activities by the States concerned within the disputed area, if those activities would not have the effect of prejudicing the final agreement.[122] This point was confirmed by the Arbitral Tribunal in the *Guyana/Suriname Arbitration*.[123] Considering that provisional arrangements can be entered into before the relevant States commence negotiating the final delimitation agreement, this provision can even be said to facilitate the provisional utilization of the area to be delimited.[124]

34 In practice, it is not infrequent that some States claim an EEZ under the condition that its outer limits are determined on the basis of an agreement with States concerned pending such agreements or the outer limits is determined by reference to a median line. The claim of the EEZ will not, by itself, jeopardize or hamper the reaching of the final agreement. However, it is apparent that military activities in a disputing area may jeopardize or hamper the reaching of the final agreement.[125]

35 A contentious issue that arises in this context concerns the unilateral exploration and exploitation of natural resources in disputed areas. A leading case on this matter is the *Aegean Sea Continental Shelf* case between Greece and Turkey.[126] In August 1976, Turkish State Petroleum Company (TPAO) carried out seismic exploration of areas of the continental shelf of the Aegean claimed by Greece as appertaining to it.[127] In response, Greece requested that the ICJ indicate a provisional measure to refrain from all exploration activity or any scientific research in disputed areas of the continental shelf.[128] However, the ICJ declined the request by Greece for three reasons. First, the purpose of these explosions is to send sound waves through the seabed so as to obtain information regarding the geophysical structure of the earth beneath it. No complaint had been made that this form of seismic exploration involved any risk of physical damage to the seabed or subsoil or to their natural resources. Second, the continued seismic exploration activities undertaken by Turkey were of the transitory character, and did not involve the establishment of installations on or above the seabed of the continental shelf. Third, Turkey embarked upon no operations involving the actual appropriation or other use of the natural resources of the disputed areas of the continental shelf.[129] Thus, the Court, in its Order of 1976, found that the circumstances were not such as to require to indicate provisional measures.[130] At the same time, it went to add that:

> '[N]either concessions unilaterally granted nor exploration activity unilaterally undertaken by either of the interested States with respect to the disputed areas can be creative of new rights or deprive the other State of any rights to which in law it may be entitled'.[131]

Even though the Court did not examine the legality of unilateral seismic exploration in disputed areas at the stage of the proceedings of provisional measures, the Order did appear to imply that the seismic exploration of a transitory nature could not be considered as affecting Greece's potential rights to the continental shelf.[132]

36 This view was echoed by the Arbitral Tribunal in the 2007 *Guyana/Suriname Arbitration*. By referring to the Order in the *Aegean Sea Continental Shelf Case* by the ICJ, the Arbitral Tribunal ruled that a distinction must be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do

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[122] Nordquist/Nandan/Rosenne (note 6), 815.
[123] *Guyana/Suriname Arbitration* (note 88), 132 (para. 465).
[124] *Lagoni* (note 23), 354.
[125] *Ibid.*, 365.
[126] ICJ, *Aegean Sea Continental Shelf Case* (Greece *v.* Turkey), Interim Protection, Order of 11 September 1976, ICJ Reports (1976), 3. See also *Tanaka* on Art. 83 MN 18.
[127] *Aegean Sea Continental Shelf* (note 126), 7 (para. 16).
[128] *Ibid.*, 4–5 (para. 2); ICJ, *Aegean Sea Continental Shelf* (Greece *v.* Turkey), Request for the Indication of Interim Measures of Protection Submitted by the Government of Greece of 10 August 1976, ICJ Reports 1976, 63, 66.
[129] *Aegean Sea Continental Shelf* (note 126), 10 (para. 30).
[130] *Ibid.*, 14 (para. 46).
[131] *Ibid.*, 10 (para. 29).
[132] *Klein* (note 111), 432.

not, such as seismic exploration.[133] According to the Arbitral Tribunal, 'acts that do cause physical change would have to be undertaken pursuant to an agreement between the parties to be permissible, as they may hamper or jeopardise the reaching of a final agreement on delimitation', whilst unilateral acts which do not cause a physical change to the marine environment would not have the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary.[134] For the Arbitral Tribunal,

> 'unilateral acts that cause a physical change to the marine environment will generally be comprised in a class of activities that can be undertaken only jointly or by agreement between the parties. This is due to the fact that these activities may jeopardize or hamper the reaching of a final delimitation agreement as a result of the perceived change to the status quo that they would engender. Indeed, such activities could be perceived to, or may genuinely, prejudice the position of the other party in the delimitation dispute, thereby both hampering and jeopardising the reaching of a final agreement.'[135]

Following the Tribunal's view, it can be argued that unilateral activities which physically affect the marine environment are contrary to Art. 74 (3) since these acts may hamper or jeopardize the reaching of a final agreement,[136] whilst seismic testing which does not cause a physical change to the marine environment should be permissible in disputed areas,[137] if there is no objection of the other party.[138]

37 Later, unilateral exploration and exploitation of natural resources in disputed areas was at issue in the 2015 *Ghana/Côte d'Ivoire Case* (provisional measures) before the Special Chamber of ITLOS.[139] In this case, Côte d'Ivoire asked the Special Chamber to prescribe provisional measures that require Ghana to take all steps to suspend all ongoing oil exploration and exploitation operations conducted by Ghana in the disputed area and to refrain from granting any new permit for oil exploration and exploitation there.[140] On the one hand, the Special Chamber ruled that the ongoing exploration and exploitation activities conducted by Ghana in the disputed area would result in a modification of the physical characteristics of the continental shelf and that: '[T]here is a risk of irreparable prejudice where, in particular, activities result in significant and permanent modification of the physical character of the area in dispute and where such modification cannot be fully compensated by financial reparations'.[141] On the other hand, the Special Chamber considered that

> '[T]he suspension of on-going activities conducted by Ghana in respect of which drilling has already taken place would entail the risk of considerable financial loss to Ghana and its concessionaires and could also pose a serious danger to the marine environment resulting, in particular, from the deterioration of equipment'.[142]

Thus the Special Chamber declined to prescribe the provisional measure requested by Côte d'Ivoire that required Ghana to suspend all ongoing oil exploration and exploitation operations in the disputed area, while it prescribed the provisional measure which requires Ghana to take all necessary steps to ensure that no new drilling either by Ghana or under its control takes

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[133] *Guyana/Suriname Arbitration* (note 88), 132–133 (paras. 467–469).

[134] *Ibid.*, 132 (paras. 466–467).

[135] *Ibid.*,137 (para. 480).

[136] It may be relevant to recall that the *Gulf of Maine* dispute between Canada and the United States first developed in relation to the continental shelf as soon as exploration for hydrocarbon resources was begun on each side: *Gulf of Maine Case* (note 45), 279, para. 61.

[137] *Guyana/Suriname Arbitration* (note 88), 137 (para. 481).

[138] In the *Guyana/Suriname Arbitration*, seismic activities did not give rise to objections from either side: *ibid.* Where unilateral exploration of natural resources in disputed areas gave rise to objections for either party, it may be argued that the parties are required to make every effort to conclude provisional arrangements of a practical nature pending agreement on delimitation pursuant to Articles 74(3) and 83(3) UNCLOS.

[139] ITLOS Special Chamber, *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean* (Ghana/Côte d'Ivoire), Request for Provisional Measures, Order of 25 April 2015, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-23/case-no-23-provisional-measures/.

[140] *Ibid.*, para. 25.

[141] *Ibid.*, para. 89.

[142] *Ibid.*, para. 99.

place in the disputed area.[143] The *Ghana/Côte d'Ivoire* Order may be taken to imply that in certain circumstances, unilateral drilling in disputed areas may be permissible before reaching a final agreement on maritime delimitations. Yet, the Special Chamber provides no further precision with regard to a serious danger to the marine environment resulting from the deterioration of equipment. In particular, it appears debatable whether the danger is imminent. Further, as the Special Chamber itself observed, any compensation awarded would never be able to restore the *status quo ante* in respect of the seabed and subsoil,[144] while financial loss can be compensated by financial reparations. Thus there appears to be some scope to reconsider the question whether marine pollution from the degradation of equipment and financial loss to Ghana could provide adequate reasons to decline the main request of Côte d'Ivoire which required Ghana to cease ongoing oil exploitation in the disputed area. Moreover, it is undeniable that ongoing exploitation operations may entail the risk of achieving *fait accompli*. It seems debatable whether the provisional measures prescribed by the Special Chamber would be adequate to prevent a *fait accompli* in the *Ghana/Côte d'Ivoire* dispute.[145]

Furthermore, consideration must be given to access of information about the resources of the **38**
disputed area. In the *Ghana/Côte d'Ivoire Case*, Côte d'Ivoire argued that: 'The past and ongoing collection of information relating to the natural resources of the disputed area by Ghana and by private oil companies is a serious infringement of the disputed rights of Cote d'Ivoire'.[146] In this regard, the Special Chamber of ITLOS, in its Order of 2015, considered that the exclusive right to access to information about the resources of the continental shelf is plausibly among the rights of the coastal State over its continental shelf.[147] In the view of the Special Chamber,

> 'the acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights of Côte d'Ivoire should the Special Chamber, in its decision on the merits, find that Côte d'Ivoire has rights in all or any part of the disputed area'.[148]

It thus prescribed the provisional measure which requires Ghana to

> 'take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain from being used in any way whatsoever to the detriment of Côte d'Ivoir'.[149]

Information of natural resources in a disputed area creates particular sensitivity with the sovereign rights of the coastal State over the EEZ. If credible date concerning natural resources is needed to reach the final agreement, concerted exploration would be desirable.

11. 'without prejudice to the final delimitation'

Arrangements under Art. 74 (3) remain provisional and do not affect the final delimitation. **39**
This seems to suggest that the final delimitation does not need to take into account either the provisional arrangement or any of the activities of the parties undertaken according to the arrangements.[150]

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[143] *Ibid.* (para. 108(1)(a)). In this regard, it is to be noted that exploration and exploitation operations of Ghana are carried out on the Ghana's side of the equidistance line.

[144] *Ibid.* (para. 90).

[145] *Yoshifumi Tanaka*, Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the *Ghana/Côte d'Ivoire* Order of 25 April 2015 before the Special Chamber of ITLOS, ODIL 46 (2015), 324–326.

[146] *Ghana/Côte d'Ivoire Case* (note 140), para. 79. In this regard, Côte d'Ivoire has argued that: "[T]he petroleum companies operating in the dispute triangle are rapidly acquiring invaluable knowledge about the geophysical properties of the continental shelf." Presentation of Mr Wood, Verbatim Record, ITLOS/PV.15/C23/1, 29 March 2015, p. 33.

[147] *Ghana/Côte d'Ivoire Case* (note 140), para. 94.

[148] *Ibid.*, para. 95.

[149] *Ibid.*, para. 108(1)(a).

[150] *Lagoni* (note 23), 359.

12. 'Where there is an agreement in force between the States concerned'

40 Art. 74 (4) is *lex specialis* in relation to Art. 311.[151] Whilst the meaning of this provision is clear, the existence of an agreement relating to a maritime boundary between States may be a matter of dispute. In the 1985 *Guinea/Guinea-Bissau Arbitration*, for instance, the question arose at to whether the Convention of 1886 established the maritime boundary between the two States in West Africa. In this case, the Court of Arbitration took the view that the 1886 Convention had not established a general maritime boundary.[152] It thus drew the course of a single maritime boundary between the territorial sea, the continental shelf and the EEZ appertaining to each State, taking account of the length of the coastlines, the coastal configuration and orientation, and the existence of islands. In the *Guinea-Bissau/Senegal Arbitration*, the Arbitral Tribunal ruled that the exchange of letters on 26 April 1960 between France and Portugal established a maritime boundary for the territorial sea, the contiguous zone, and the continental shelf, even though the boundary did not comprise the EEZ since the concept of the EEZ was unknown at that time.[153] In the 2007 *Nicaragua/Honduras Case*, Honduras claimed that the line of the 15th parallel constituted the maritime delimitation line on the basis of the *uti possidetis juris* principle referred to in the Gámez-Bonilla Treaty and the 1906 Award of the King of Spain. However, the ICJ concluded that the *uti possidetis juris* principle cannot be said to have provided a basis for a maritime delimitation along the 15th parallel.[154] Although Honduras further argued that there was a '*de facto* boundary based on the tacit agreement of the Parties' at the 15th parallel, the Court ruled that there was no tacit agreement in effect between the Parties establishing a legally binding maritime boundary.[155] The *dictum* of the Court in this regard deserves quoting:

> 'The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. […] Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary.'[156]

41 The existence of an agreed maritime boundary was also at issue in the *Peru/Chile Case* of 2014. Peru claimed that no agreed maritime boundary exists between the two countries and asked the Court to plot a boundary line using the equidistance method in order to achieve an equitable result.[157] However, Chile contended that the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement and that those maritime zone entitlements are delimited by a boundary following the parallel of latitude passing through the most seaward boundary marker of the land boundary between Chile and Peru, known as Hito No. 1, having a latitude of 18 21'00" S under WGS 84 Datum.[158] In this regard, the ICJ ruled that in light of the 1954 Special Maritime Frontier Zone Agreement, especially Art. 1 read with the preambular paragraphs, the two States acknowledged in a binding international agreement that a maritime boundary already exists; and that Agree-

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[151] Nordquist/Nandan/Rosenne (note 6), 815.

[152] *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (1985), RIAA XIX, 149, 181 (para. 84) and 196 (para. 130).

[153] *Case Concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, 31 July 1989, RIAA XX, 119, 150, para. 88. Yet Guinea-Bissau disputed the validity of the award of 31 July 1989. It thus instituted proceedings against Senegal before the ICJ and requested the Court to declare that the award is null and void. The Court rejected the submission of the Guinea-Bissau that Arbitral Award of 31 July 1989 is absolutely null and void. ICJ, *Case Concerning the Arbitral Award of 31 July 1986* (Guinea-Bissau *v.* Senegal), Judgment of 12 November 1991, ICJ Reports (1991), 53, 75 (para. 69).

[154] *Nicaragua/Honduras Case* (note 85), 727–729 (paras. 229–236). For the application of the principle of *uti possidetis juris* to maritime boundaries, see *Yoshifumi Tanaka*, Reflections on Maritime Delimitation in the *Nicaragua/Honduras* Case, ZaöRV 68 (2008), 907–909; *Cottier* (note 6), 479–482.

[155] *Nicaragua/Honduras Case* (note 85), 736–737 (paras. 257–258).

[156] *Ibid.*, 735 (para. 253).

[157] ICJ, *Maritime Dispute* (Peru *v.* Chile), Judgment of 24 January 2014, ICJ Reports (2014), 16 (para. 22).

[158] *Ibid.*, 12 (para. 14).

ment cemented the tacit agreement between the parties.[159] Yet, the 1954 Special Maritime Frontier Zone Agreement gives no indication of the nature of the maritime boundary, nor does it indicate its extent. In light of the 1947 Proclamations and the 1952 Santiago Declaration, the Count concluded that the boundary is an all-purpose one.[160] Further, on the basis of an assessment of the entirety of the relevant evidence presented to it, the Court held that the agreed maritime boundary between the Parties extended to a distance of 80 nautical miles along the parallel from its starting-point.[161]

Article 75
Charts and lists of geographical coordinates

1. Subject to this Part, the outer limit lines of the exclusive economic zone and the lines of delimitation drawn in accordance with article 74 shall be shown on charts of a scale or scales adequate for ascertaining their position. Where appropriate, lists of geographical co-ordinates of points, specifying the geodetic datum, may be substituted for such outer limit lines or lines of delimitation.

2. The coastal State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Bibliography: *Shigeru Oda*, A Commentary on the UN Convention on the Law of the Sea (in Japanese), vol. I (1985); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); George K. Walker (ed.), Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention (2012)

Documents: GA, Oceans and the Law of the Sea: Report of the Secretary General, UN Doc. A/RES/68/70 (2013); UN DOALOS, The Law of the Sea: Baselines: An Examination of the relevant Provisions of the United Nations Convention on the Law of the Sea (1989)

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I. Purpose and Function

Since human activities in the oceans are regulated according to multiple jurisdictional zones, vessels and aircrafts cannot safely carry out the conduct of their activities, without knowing the spatial limits of jurisdictional zones of the coastal State. Hence showing the outer limits of each jurisdictional zone on charts, including the outer limit of the EEZ, is of particular importance to identify the user's position at sea. Art. 75 is intended to make the information on the outer limits and delimitation lines of the EEZ available to the 1

[159] *Ibid.*, 38–39 (paras. 90–91).
[160] *Ibid.*, 41(para. 102).
[161] *Ibid.*, 58 (para. 151). However, six judges voted against the majority opinion on this matter: *ibid.,* 72 (para. 198 (3)).

international community. Specifically Art. 74 provides a dual obligation of the coastal State: (i) the obligation to show the outer limits of the EEZ and the delimitation lines of the EEZ on charts or list their geographical coordinates and (ii) the obligation regarding due publicity. Art. 75 is nearly identical to Art. 84.[1] A similar obligation concerning the base-lines is provided in Art. 16 (1).[2]

II. Historical Background

2 The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) contained an obligation to mark the delimitation line of the territorial sea on large-scale charts officially recognized by the coastal State.[3] However, the obligation under Art. 75 UNCLOS is more specific than that of the CTSCZ. In fact, unlike Art. 12 (2) CTSCZ, Art. 75 refers to lists of geographical co-ordinates of points and the geodetic datum. It also contains obligations of due publicity and deposit with the UN Secretary-General. The substance of what became Art. 75 appeared in Art. 61 (5) of the Informal Single Negotiating Text (ISNT) of 1975:[4]

> 'In delimiting the boundaries of the exclusive economic zone, any lines which are drawn in accordance with the provisions of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.'

3 In the Revised Single Negotiating Text (RSNT) of 1976, however, a new provision was inserted on the basis of a Canadian proposal. The new provision, Art. 63, read:[5]

> '1. Subject to this Chapter, the outer limit lines of the exclusive economic zone and the lines of delimitation drawn in accordance with article 62 shall be shown on charts of a scale or scales adequate for determining them. Where appropriate, lists of geographical co-ordinates of points, specifying the geodetic datum, may be substituted for such outer limit lines or lines of delimitation.
> 2. The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.'

The reference to 'lists of geographical co-ordinates points' merits attention, since geographical coordinates would provide greater precision to the depiction of the outer limits of the EEZ.[6]

4 Later, Art. 63 of the RSNT was incorporated in Art. 75 of the Informal Composite Negotiating Text (ICNT), Revision I, of 1979 as follows:[7]

> '1. Subject to this Part, the outer limit lines of the exclusive economic zone and the lines of delimitation drawn in accordance with article 74 shall be shown on charts of a scale or scales adequate for determining them. Where appropriate, lists of geographical co-ordinates of points, specifying the geodetic datum, may be substituted for such outer limit lines or lines, of delimitation.
> 2. The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.'

The phrase 'Subject to this Chapter' included in Art. 63 of the RSNT was replaced by the phrase 'Subject to this Part' in Art. 75. The text of Art. 75 of ICNT, Revision 1, remained

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[1] Thus, see also *Tanaka* on Art. 84.
[2] See *Symmons* Art. 16.
[3] See Art. 12 (2) CTSCZ. See also Art. 4 (6) CTSCZ.
[4] UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 162. For a legislative history of Art. 75, see also Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 818 *et seq*.
[5] UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 164. Art. 62 related to the delimitation of the EEZ.
[6] Nordquist/Nandan/Rosenne (note 4), 819–820.
[7] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 52. Art. 74 provided rules of the delimitation of the EEZ.

unchanged in ICNT, Revision 3.[8] In the Draft Convention on the Law of the Sea (1981), however, the phrase 'determining them' in Art. 75 (1) was replaced by the phrase 'ascertaining their position'. The text of Art. 75 of the Draft Convention finally became Art. 75. Nearly identical obligations are provided in Art. 84. Unlike Art. 84 (2), however, Art. 75 (2) contains no reference to the Secretary-General of the Authority.

III. Elements

1. 'Subject to this Part'

'[T]his Part' means Part V governing the EEZ. Although a similar obligation concerning charts and list of geographical co-ordinates is provided in Art. 16 (1), it contains no reference to 'subject to this Part'.[9] 5

2. 'charts of a scale or scales adequate for ascertaining their position'

Art. 75 (1) obliges the coastal State to show the outer limit lines of the EEZ and the delimitation lines of the EEZ on charts of a scale or scales adequate for ascertaining their position. The same or a similar obligation is provided in Art. 16 (1), 47 (8), and 84 (1). Art. 74 referred to in Art. 75 (1) provides rules concerning the delimitation of the EEZ.[10] 6

According to United Nations Office for Ocean Affairs and the Law of the Sea (UN DOALOS), the scale of a chart is 'an expression of the relationship between a distance measured on the earth's surface and the length that represents it on the chart'.[11] Since Art. 75 (1) offers scant explanation on the scale of a chart, the coastal State can be said to retain discretion on this matter. The scale of the charts should be adequate for the user to determine them to the same degree of accuracy as the coastal State intends.[12] In practice, this is particularly important for the purposes of, *inter alia*, fishing activities and sea communication. 7

3. 'lists of geographical co-ordinates of points'

Under Art. 75 (1), 'where appropriate', the coastal State is allowed to provide lists of geographical co-ordinates of points. In this case, the geodetic datum must be specified. Although the Convention contains no definition of 'geographical co-ordinate', it can be defined as 'angular parameters of latitude and longitude that define the position of a point on the Earth's surface and which, in conjunction with a height, similarly define positions vertically above or below such a point'.[13] By referring to geographic co-ordinates, it becomes possible to define an outer limit of the EEZ with far greater precision. A list of co-ordinates and charts may both be used at the same time. In this case, there will be a need to make clear which is the definitive document and which merely illustrative.[14] While Art. 16 (1) and 47 (8) use the term 'alternatively', Art. 75 (1), along with Art. 84 (1), uses the phrase 'where appropriate'.[15] There 8

[8] UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 34 (Art. 84).

[9] *Shigeru Oda*, A Commentary on the UN Convention on the Law of the Sea (in Japanese), vol. I (1985), 244.

[10] See generally *Tanaka* on Art. 74.

[11] UN DOALOS, The Law of the Sea: Baselines: An Examination of the relevant Provisions of the United Nations Convention on the Law of the Sea (1989), 5.

[12] UNCLOS III, Study on the Future Functions of the Secretary-General under the Draft Convention and on the Needs of Countries, Especially Developing Countries, for Information, Advice and Assistance under the New Legal Regime, UN Doc. A/CONF.62./L.76 (1981), OR XV, 153, 170. See also Nordquist/Nandan/Rosenne (note 4), 819.

[13] George K. Walker (ed.), Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention (2012), 213.

[14] Study on the Future Functions of the Secretary-General (note 12), 179.

[15] Nordquist/Nandan/Rosenne (note 4), 820 (footnote 3).

appears to be few practical difference of legal effect arising from the difference of the language. Under Art. 75 (1), States can deposit the lists of geographical co-ordinates if they wish to do so.

4. 'the geodetic datum'

9 According to UN DOALOS, a datum is the basis of a co-ordinate system and is also known as the horizontal datum or horizontal reference datum. It is associated with a specific reference ellipsoid which best fits the surface (geoid) of the area of interest. It is important to specify the geodetic datum that has been used when a position is defined since geographical co-ordinates differ according to geodetic datums.[16] UN DOALOS encouraged States Parties to the UNCLOS to provide all the necessary information for conversion of the submitted geographic coordinates from the original datum into the World Geodetic System 84 (WGS 84), a geodetic datum system that is used by the UN DOALOS for its internal data storage.[17]

5. 'due publicity'

10 UN DOALOS defines the term 'due publicity' as: 'Notification of a given action for general information through appropriate authorities within a reasonable amount of time in a suitable manner'.[18] Under the UNCLOS, States are obliged to give due publicity to charts or lists of geographical coordinates which indicate the position of baselines, limits and boundaries in Arts. 16 (2), 47 (9), 76 (9) and 84 (2). The obligations to give due publicity are also provided in Arts. 21 (3), 22 (4), 41 (2) and (6), 42 (3), 53 (7) and (10), and 211 (3).[19]

6. 'shall deposit a copy of each such chart or list with the Secretary-General of the United Nations'

11 Under Art. 75 (2), the coastal State is under the obligation to deposit a copy of each chart that shows the outer limit lines of the EEZ and the delimitation lines of EEZ or list of geographical coordinates with the UN Secretary-General. According to UN DOALOS, deposit is addressed to the UN Secretary-General in the form of a Note Verbale or a letter by the Permanent Representative to the United Nations or other person duly authorised to do so. The instrument should be accompanied by the relevant information, clearly state the intention to deposit and specify the relevant UNCLOS articles. The mere adoption of legislation or the conclusion of a maritime boundary treaty registered with the Secretariat cannot be interpreted as an act of deposit with the UN Secretary-General under the UNCLOS, even if they contain charts or lists of coordinates.[20] The UN General Assembly Resolution 68/70 of 9 December 2013 called upon States Parties to the Convention that have not yet done so to deposit with the Secretary-General charts or lists of geographical coordinates, as provided for in the Convention, preferably using the generally accepted and most recent geodetic datums.[21] According to UN DOALOS, some 71 States deposited charts and/or lists of geographical coordinates. Among them, charts and/or lists of geographical coordinates deposited by some 38 States are related to Art. 75 (2).[22]

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[16] UN DOALOS Baselines (note 11), 55.

[17] UN DOALOS, Deposit and Due Publicity-Background Information, para. 4, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/backgroud_deposit.htm.

[18] UN DOALOS Baselines (note 11), 54.

[19] Nordquist/Nandan/Rosenne (note 4), 820; Walker (note 13), 177–178. The list of States which deposited charts and submitted information in compliance with due publicity obligations is available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm.

[20] UN DOALOS (note 11), para. 2.

[21] GA, Oceans and the Law of the Sea: Report of the Secretary General, UN Doc. A/RES/68/70 (2013), para. 6. Information on States which deposited charts and lists of geographical coordinates is available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm.

[22] The relevant data is available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm.