

CHAPTER II LITERATURE REVIEW

A. Conceptual and Legal Framework

1. The Review of Baselines

a. Definition of Baselines

Neither UNCLOS nor any legal experts had given an absolute definition of baseline. However, from the derivation of UNCLOS on baseline, a baseline is the line from which the seaward limits of a State's territorial sea and certain other maritime zones of jurisdiction are measured.

The coastal State itself has to determine the baseline, which must then be shown on charts or defined by adequate geographical co-ordinates and given adequate publicity.⁶ Particular care must be taken where the establishment of the baseline could have an effect on the rights of a State with an opposite or adjacent coast.⁷

b. Essentiality of Baselines

An intimate connection exists between baselines and the delimitation of maritime zones. Baselines are crucial to the definition of maritime claims and the delimitation of maritime boundaries. The United Nations Convention on the Law of the Sea (UNCLOS) provides for several distinct types of baseline. These

⁶ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.16

⁷ "Baseline", www.bernaerts-sealaw.com/Baseline.pdf, accessed on 27 October 2015

various baselines are discussed relative to their practical application.

A key achievement of the United Nations Convention on the Law of the Sea (UNCLOS) was that it established a clear framework for the limits of coastal State claims to maritime jurisdiction. Accordingly, baselines serve its function as a measurement to the territorial sea, contiguous zone, exclusive economic zone and the continental shelf which in return, defining the limits of national claims to maritime zones.

c. Methods to Measure Baselines

1) Normal Baseline

The predominant type of baseline in use by coastal States is the “normal baseline” measured with “the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.”

“Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.”⁸

Such baselines represent a coastal State’s ‘default’ baselines in that they require no formal declaration or due publicity. The low-water line is the intersection of the plane of low water with the shore. The absence of a reference to a

⁸ UNCLOS, *Op.Cit.*, Art.5

particular low-water line in Article 5 of the UNCLOS implies that this choice is left up to the coastal State. It is worth noting that use of a normal baseline has the advantage of advancing the low-water line further down the beach, as it were, thereby expanding and maximising the coastal State's land territory and simultaneously potentially enhancing the scope of its claims to maritime jurisdiction by advancing the starting point for measuring its maritime claims.

However, the direct relationship between the position of normal baselines and the limits of maritime jurisdiction is potentially and increasingly problematic. This is the case because, just as the coast is dynamic and susceptible to change over time, so too, inevitably, is the location of the low-water line. The implication of this is that as normal baselines change over time, so too will the maritime jurisdictional limits measured from them should the critical base-points along that baseline upon which the outer limits of maritime claims depend be affected.⁹

While the inherently unstable nature of many coasts and, therefore, of normal low-water line baselines has long been recognised, the incoming climate change and particularly, significant sea level rise have led to suggestions

⁹ Michael W. Reed, "Shore and Sea Boundaries", pg. 185

that normal baselines, and thus the maritime spaces under national jurisdiction measured from them, are under increasing threat. Such concerns arise from the likelihood that should sea levels rise, the low-water line will inevitably retreat inland.

In this context it can be observed that while the challenges posed by climate change and sea level rise were apparently not anticipated by the drafters of the Convention, they nonetheless proved themselves to be open to the fixing of baselines and limits under certain circumstances—notably with regard to unstable coasts, outer continental shelf limits, and also maritime boundaries.

2) Straight Baselines

The UNCLOS also provides options in terms of baselines defined by straight baselines, as an alternative to normal, low-waterline baselines. The general objective of these provisions is to recognise and address coastal complexity through approximation or generalisation of the low-water line. Straight baselines act as a substitution for normal baselines along sections of the coast which meets the conditions laid down in Article 7 of the 1982 UNCLOS.

“1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed

in drawing the baseline from which the breadth of the territorial sea is measured.

2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.

3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.

6. The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.”

Expansive claims to straight baselines have been excessive over these decades. Such excessive claims arise from the lack of objectivity within Article 7 of 1982 UNCLOS, which has therefore been open to varied interpretation. Article 7 of the UNCLOS allows coastal States to define straight baselines “where the coastline is deeply indented and cut into, or if there is a fringe of islands along

the coast in its immediate vicinity.” Unfortunately, Article 7 contains no indication as to the depth or frequency of such deep indentations or cuts into the coast line needed for a particular stretch of coastline to qualify for the application of straight baselines.¹⁰ While the intention of Article 7 is to allow for the simplification or approximation of complex coasts may be clear, its practical implementation has proved to be highly problematic. Indeed, the loose terminology and criteria contained in Article 7 would allow any coastal country, anywhere in the world, to draw straight baselines along its coast.”¹¹ This results in many coastal States interpreting Article 7 to their maximum advantage. In fact, the existence of clearly excessive straight baseline claims has not prevented coastal States from resolving their overlapping maritime jurisdictional claims, which are partially attributed to baseline issues through boundary delimitation. In such cases the straight baselines in question tend to cancel one another out.

3) Archipelagic Baselines

There are quite a number of States which fall within the definition of an archipelagic State. Article 46 of

¹⁰ United States Department of State, “Developing Standard Guidelines for Evaluating Straight Baselines”, (Washington D.C: Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, 1987), pg.106

¹¹ J.R.V. Prescott, “The Maritime Political Boundaries of the World”, (London: Methuen, 1985), pg.64

UNCLOS explains about archipelago and archipelagic State.

It defines archipelago as a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such. Whereas it also defines the archipelagic State is a State that is constituted wholly by one or more archipelagos.

Although the definition of either archipelago or archipelagic State is rather wide and imprecise (for example, nothing is said about the number of islands or their size and proximity to one another), some of the difficulties might arise as a result are in practice avoided by the fact that the extent to which archipelagic baselines may be drawn around archipelagos is, as we shall see in a moment, much more clearly and strictly formulated. The effect is to deprive some archipelagic States altogether of the possibility of drawing archipelagic baselines.

Article 47 of UNCLOS explains more on archipelagic baselines:

“1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an

area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

7. For the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.

8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.

9. The archipelagic 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.”

Article 47 contains nine paragraphs which deal with the rule on drawing archipelagic baselines. The first three

paragraphs set out five criteria that a State must satisfy in order to draw archipelagic baselines which are as follow:

- i. Include the main islands
- ii. Enclose an area of the sea at least as large as the area of enclosed land but not more than nine times that land area
- iii. No segment of baseline may exceed 125 nautical miles¹² in length
- iv. Not more than 3% of baseline segments may exceed 100 nautical miles in length
- v. The baselines must not depart to any appreciable extent from the general configuration of the archipelago

2. The Review of Maritime Zones

a. Definition of Maritime Zones

A maritime zone is a conceptual division of the Earth's water surface areas using physiographic or geopolitical criteria. As such, it usually includes areas of exclusive national rights over mineral and biological resources, encompassing maritime features, limits and zones.¹³ Generally, maritime zones are delineated through a particular measure from a jurisdiction's coastline.

¹² Nautical miles are often referred as 'nm'. 1 nautical mile = 1,852 meters

¹³ <http://www.ga.gov.au/marine/jurisdiction/definitions.jsp> , accessed on 29 October 2015

Although in some countries the term “maritime zone” represents borders of a maritime nation¹⁴ and are recognized by the United Nations Convention on Law of the Sea, they usually serve to identify international waters.

b. Maritime Zones under UNCLOS

The rights of coastal States to claim and enforce maritime zones derive from the law of the sea. The law of the sea is the branch of international law that is concerned with all uses and resources of the sea. International law is the body of law that regulates the rights and duties of States and other actors, such as international organisations, recognised by international law. The cornerstone of the law of the sea is the United Nations Convention on the Law of the Sea.

The United Nations Convention on Law of The Sea which was adopted on 10 December 1982 was recognized as universal legal document on the seas. Part of the balance that UNCLOS seeks to achieve is accomplished by the division of the seas and oceans into maritime zones. The Convention contains provisions recognizing the sovereignty, sovereign rights, freedoms, rights, jurisdiction and obligations of States within several maritime zones namely internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, and high seas which shall be

¹⁴ <http://www.State.gov/g/oes/ocns/opa/convention/c28187.htm> , accessed on 29 October 2015

established by coastal States. The Convention also States the rights and obligations of the States on managing and governing their activities including protection and preservation natural resources in the zones. Furthermore, the States enjoy their rights in the Area¹⁵ and high sea which are beyond their national jurisdiction, for the purpose of exploitation and exploration.¹⁶

c. Types of Maritime Zones

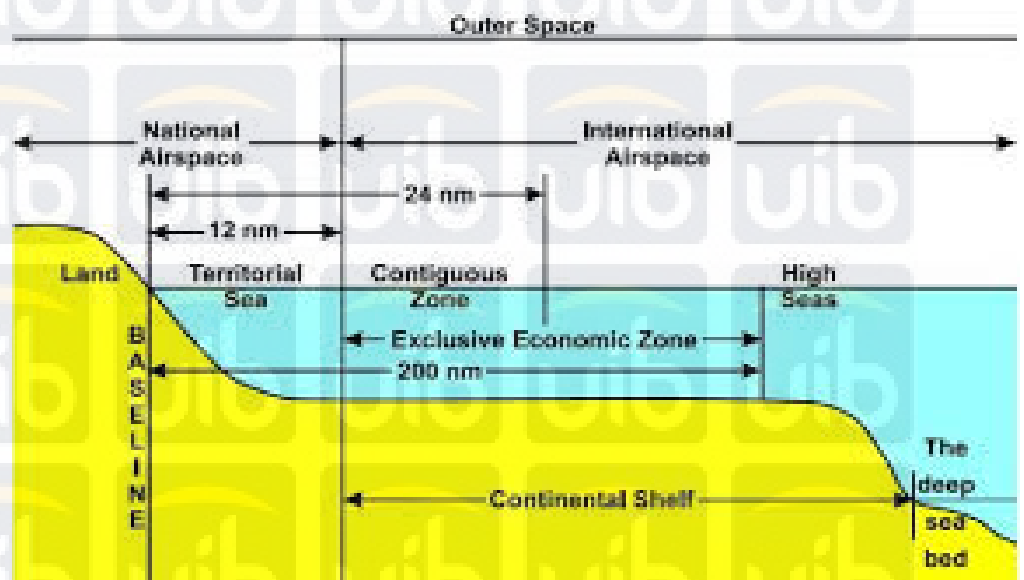


Figure 2.1 Types of Maritime Zones¹⁷

Note: The figure does not show internal waters landward of baselines

1) Internal Waters

Article 8 of 1982 UNCLOS provides that Internal

Waters are waters on the landward side of normal baseline,

¹⁵ Area means the sea bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction or to put it simply, sea bed beneath the high seas

¹⁶ MOM Ravin, "Law of the Sea, Maritime Boundaries and Dispute Settlement Mechanisms", (Germany: United Nations-The Nippon Foundation Fellow, 2005), pg.5

¹⁷<http://www.safety4sea.com/maritime-zones-in-the-mediterranean-sea-16801>, downloaded on 30 October 2015

straight baseline and archipelagic baseline from which the territorial sea is measured. Based on the foregoing provision, the Internal Waters are as follow:

- i. waters on the landward side of the normal baseline which is low water line along the coast as mark on large scale charts officially recognized by the coastal State¹⁸
- ii. waters on the landward side of straight baselines accepted to calculate the breadth of the territorial sea¹⁹
- iii. waters of bays to which the breadth of the entry does not exceed 24 miles²⁰
- iv. waters considered to be historic gulfs, bays, inlets, and strait even if the breadth of entry exceed 24 miles²¹
- v. waters of ports limited by a line passing through the most extended port installations seaward²²
- vi. waters of the deeply indented and enclosed by the territory of single State²³

¹⁸ UNCLOS, *Op.Cit.*, Art.5

¹⁹ UNCLOS, *Op.Cit.*, Art.7 (3)

²⁰ UNCLOS, *Op.Cit.*, Art.10(4)

²¹ UNCLOS, *Op.Cit.*, Art.10(6)

²² UNCLOS, *Op.Cit.*, Art.11

²³ UNCLOS, *Op.Cit.*, Art.7(1)

- vii. waters in the case of islands situated on atolls or of islands having fringing reefs²⁴
- viii. mouth of river²⁵
- ix. waters of which is considered highly unstable²⁶
- x. archipelagic waters which is closed by closing line²⁷

The said provisions of the Convention and the geographical nature of the coastline allow the coastal States to establish their internal water according to the circumstances of their own coastline.

UNCLOS recognizes a coastal State's sovereignty within its internal waters within which the coastal State's authority is in principle absolute, unless restricted by international law. Such authority encompasses complete access to, and control of, all resources as well as full jurisdiction over all activities by both nationals and foreigners, and for all purposes (e.g. safety and environmental protection). However, the development of economic requires the coastal State to establish the best conditions port and also to adopt laws and regulations aimed at facilitating the procedure involved in the entry and stay of foreign merchant vessels. Foreign merchant

²⁴ UNCLOS, *Op.Cit.*, Art.6

²⁵ UNCLOS, *Op.Cit.*, Art.9

²⁶ UNCLOS, *Op.Cit.*, Art.13

²⁷ UNCLOS, *Op.Cit.*, Art.50

vessels and all its crewmembers are fully subject to the criminal, civil and administrative jurisdiction of the coastal State.

One example of a restriction on a coastal State's authority within its internal waters is contained in Article 8(2) of UNCLOS, which provides:

“Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.”

2) Territorial Sea

The sovereignty of a coastal State extends beyond its land territory and internal waters to an adjacent belt of sea described as the territorial sea.²⁸ The maximum breadth of the territorial sea is 12 nautical miles measured from the baselines.²⁹ Within the territorial sea, the authority of the coastal State is in principle absolute except as restricted by UNCLOS and other rules of international law. The most important restriction included in UNCLOS is the right of ‘innocent passage’ through the territorial sea. This right is enjoyed by ships of all States, whether coastal or land-

²⁸ UNCLOS, *Op.Cit.*, Art.2(1)

²⁹ UNCLOS, *Op.Cit.*, Art.3

locked.³⁰ Articles 18 and 19 of UNCLOS focus on the modalities and innocence of passage. ‘Passage’ means navigation through the territorial sea for the purpose of:

- i. Traversing that sea without entering internal waters or calling at a roadstead or port facility outside the internal waters; or
- ii. Proceeding to or from internal waters or calling at such roadstead or port facility.

With limited exceptions such passage must in principle be continuous and expeditious unless in times of *force majeure*³¹ or distress.³² Passage remains ‘innocent’ as long as it is not prejudicial to the peace, good order and security of the coastal State.³³ Paragraph (2) of Article 19 contains a non-exhaustive list of activities that would render passage non-innocent including “any act of wilful and serious pollution contrary to this Convention”. The broad jurisdiction of coastal States in their territorial sea is reflected in the non-exhaustive list of regulatory purposes incorporated in Article 21(1).

³⁰ UNCLOS, *Op.Cit.*, Art.17

³¹ Force majeure is unforeseeable circumstances that prevent someone from fulfilling its duty or role

³² UNCLOS, *Op.Cit.*, Art.18(2)

³³ UNCLOS, *Op.Cit.*, Art.19(1)

Ships exercising the right of innocent passage must comply with the laws and regulations made applicable to the territorial sea by the coastal State in accordance with UNCLOS.

As a safeguard to flag States, Article 24(1) provides the provision on the duties of coastal State may not hamper the innocent passage of foreign ships through its territorial sea except in accordance with the provisions of UNCLOS. It goes on to provide that in the application of UNCLOS or any laws or regulations adopted in conformity therewith, the coastal State shall not:

- i. Impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
- ii. Discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.³⁴

UNCLOS stipulates that no charges may be levied on foreign ships by reason only of their passage through territorial sea.³⁵ Article 26(2) provides that such charges may be levied in a non-discriminatory manner 'as payment only for specific services rendered to the ship'.

³⁴ UNCLOS, *Op.Cit.*, Art.24(1)

³⁵ UNCLOS, *Op.Cit.*, Art.26(1)

UNCLOS contains a separate regime to ensure that straits used for international navigation are not subject to the same regime of innocent passage that applies in the territorial sea, even though they would be included in the territorial sea due to the expansion of their breadth to 12 nm. This regime is laid down in UNCLOS's Part III entitled 'Straits Used for International Navigation'.

In comparison with the regime of innocent passage, the regime of transit passage considerably constrains the legislative and enforcement jurisdiction of coastal States and considerably relaxes passages for foreign vessels and the stringency of the standards that are to be complied with. Among other things, Part III does not contain a provision comparable to Article 25(1), which confirms the coastal State's power "to prevent passage which is not innocent", or a list of activities comparable to the list in Article 19(2), which render passage non-innocent.

Thus, a coastal State clearly has the exclusive right to undertake monitoring and surveillance activities within its territorial sea. Mandatory port entry reporting requirements are an obvious example.

3) Contiguous Zone

UNCLOS provides that within a zone contiguous to its territorial sea, described as the 'contiguous zone'. Within its

Contiguous Zone, if one has been claimed, a coastal State enjoys no particular additional surveillance powers. It may, however, exercise the control necessary to:

- i. Prevent infringements of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and
- ii. Punish violations of the laws and regulations committed within the territorial sea and areas landward.³⁶

The maximum outer limit of the contiguous zone may not exceed 24 nm from the baselines.³⁷ Contiguous zone jurisdiction is specifically related to the outward and inward bound movement of ships.

4) Exclusive Economic Zones (EEZ)

The concept of the Exclusive Economic Zone is the most important pillars of the United Nations Convention on the Law of the Sea. The Convention contains the articles on legal regime of the Exclusive Economic Zone; the limitation of the Zone, the sovereign rights of the coastal state to manage the zone in good faith; the regard for the economic interests of the third states; regulations of the certain activities in the zone,

³⁶ UNCLOS, *Op.Cit.*, Art.33(1)

³⁷ UNCLOS, *Op.Cit.*, Art.33(2)

such as marine scientific research, protection and preservation of the marine environment, and the establishment and use of artificial islands; freedom of navigation and over flight; the freedom to lay submarine cables and pipelines; military and strategic use of zone; and the means of settlement of disputes.

Definition of Exclusive Economic Zones is regulated in UNCLOS:

“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.”³⁸

One of the primary purposes behind establishing the EEZ was to clarify the rights of individual nations to control the fish harvests off their shores. In accordance with the article 57 of 1982 UNCLOS, the Exclusive Economic Zone is an area adjacent to the territorial sea and it shall not extend beyond 200 nautical miles from baseline where the territorial sea is measured. The 200 nautical miles limit established by UNCLOS is not an arbitrary number. It is derived from the fact that the most lucrative fishing grounds lie within 200 nautical miles from the coast as this is where the richest phytoplankton (the basic food of fish) pastures lie.

³⁸ UNCLOS, *Op.Cit.*, Art.55

The creation of the EEZ gave coastal nations jurisdiction of approximately 38 million square nautical miles of ocean space. The world's EEZs are estimated to contain about 87% of all of the known and estimated hydrocarbon reserves as well as almost all offshore mineral resources. In addition, the EEZs contain almost 99% of the world's fisheries, which allows nations to work to conserve the oceans vital and limited living resources.³⁹

Coastal nations have primary control over the fish stocks in their EEZ. As part of this primary control, the coastal nation is required to maintain the existing stock and protect it from over-exploitation. As a part of that responsibility, coastal nation get to determine the maximum allowable catch for a given species.⁴⁰ While coastal nation are required to monitor and maintain fish stocks within their EEZ, they are also required to provide for the maximum exploitation possible that will not threaten the population in question.⁴¹ To that end, coastal nation are required to determine not only how much of a specific species can be caught, but how much the nation itself has the capacity to catch. In instances where the nation cannot

³⁹United Nations, “Convention Historical Perspective”, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm, accessed on 01 November 2015

⁴⁰ UNCLOS, *Op.Cit.*, Art.61

⁴¹ UNCLOS, *Op.Cit.*, Art.62(1)

catch the full maximum allowable catch, the coastal nation is obliged to give other nations access to the surplus.⁴²

This does not mean that the coastal State cannot restrict access to the living resources in the EEZ for its own or foreign nationals. This is evidenced by Article 62(4), which provides that:

“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... (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;...”

Since UNCLOS provides that the coastal State can regulate areas of fishing, the coastal State can also regulate areas of “non-fishing”, in other words areas in which fishing is restricted or forbidden where this is necessary for conservation and management purposes.

The land locked states and geographically disadvantaged states are given the rights to participate, on an equitable basis, in the exploration of an appropriate part of surplus of the living resources in conformity with the regulations and management laws designed by the coastal state. They also have the rights to overflight, lay submarines

⁴² UNCLOS, *Op.Cit.*, Art.62(2)

cables and pipelines and other internationally lawful uses of the seas on the zone.⁴³

A coastal State has full prescriptive and enforcement jurisdiction. As mentioned above, the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁴⁴ The exception to this rule occurs when EEZs would overlap; that is, State coastal baselines are less than 400 nautical miles apart.

When an overlap occurs, it is up to the States to delineate the actual maritime boundary.⁴⁵ Generally, any point within an overlapping area defaults to the nearest State.

A State's Exclusive Economic Zone (EEZ) stretches out to 200 nautical miles from the baseline. It stretches much further than territorial sea which only extends outward 12 nautical miles from the baseline. Thus, the EEZ includes territorial sea and contiguous zone as well.

In contrast to the territorial sea, in respect of which a coastal State has sovereignty, a more limited set of "sovereign rights" are conferred by UNCLOS on coastal States in respect of EEZs claimed.

⁴³ UNCLOS, *Op.Cit.*, Art.58

⁴⁴ UNCLOS, *Op.Cit.*, Art.57

⁴⁵ William R. Slomanson, "Fundamental Perspectives on International Law, 5th Edition", (Belmont: Thomson-Wadsworth, 2006), pg.294.

More specifically, within its EEZ a coastal State has sovereign rights relating to living and non-living resources and with regard to other activities for the economic exploitation and exploration of its EEZ, such as the production of energy.

Article 56 (1) States that:

“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;”

A coastal State also has the necessary jurisdiction related to these sovereign rights as well as jurisdiction for the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment.⁴⁶

Article 56 (2) implies that the coastal State does not enjoy its sovereignty in its fullest because it has to regard the rights and duties of other States and shall act in a manner compatible with the provisions of UNCLOS.

In other words, coastal State regulatory competence in the EEZ is confined to the matters expressly indicated in UNCLOS in respect of which sovereign rights or jurisdictional

⁴⁶ UNCLOS, *Op.Cit.*, Art.56(1)(b)

powers are granted to a coastal State. Moreover UNCLOS subjects the exercise of this competence to various conditions and obligations, such as the right of any State to lay submarine pipelines and cables, and the freedom of navigation of other States' vessels.⁴⁷

The construction of artificial islands, installations and structures in the EEZ is subject to the specific provisions contained in Article 60 of UNCLOS. This article provides:

“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.”

Article 60 of UNCLOS goes on to authorize the coastal State to take precautionary measures as regards the safety of navigation.

“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.

⁴⁷ Freedom of navigation in the EEZ is not absolute, but a balance exercise between the coastal State and the flag State (UNCLOS Art.58(3))

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.”⁴⁸

Based on Article 73 Stated above, coastal States may board, inspect, arrest and judicial proceedings of the ship and crews who do not comply the laws and regulations adopted by it in conformity with UNCLOS. Nevertheless, in cases of arrest or detention, coastal State must immediately notify flag State through appropriate channels and if the flag State posts reasonable bond or other security, the arrested vessels and its crews must be released immediately.

Whether military exercises by non-coastal States are allowed within the EEZ of the coastal State still remains an open question. Some States consider that the carrying out of military exercises, or the deployment of military installations in the EEZ is subject to the permission of the coastal State. However a majority of States consider that those activities are included within the exercise of the freedom of navigation or “other internationally lawful uses” of the sea.

⁴⁸ UNCLOS, *Op.Cit.*, Art.73

Generally, the rules regarding the High Seas, set forth in Articles 88 to 115, apply to the EEZ.⁴⁹ The decision whether or not to claim an EEZ is the sovereign right of a coastal State.

5) High Seas

The high seas lie beyond the zones described above. Beyond the outer limit of the EEZ (or of the territorial sea if no EEZ has been declared) the regime of the high seas applies.⁵⁰

Rather than offering a definition for the term 'high seas', UNCLOS defines the spatial scope in Article 86, as follows:

“The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”

All States enjoy the freedom of the high seas. The waters and airspace of this area are open to use by all countries, except for those activities prohibited by international law. Article 87 defines the scope of this freedom, stipulating that:

“1. It comprises, inter alia, both for coastal and land-locked States:

- (a) Freedom of navigation;
- (b) Freedom of overflight;

⁴⁹ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.58

⁵⁰ In the case of a coastal State that has not claimed a contiguous zone, or an EEZ, the regime of the high seas begins beyond the outer limit of the territorial sea. If a coastal State has claimed one of these zones, the regime of the high seas in those zones will be subject to the rights of the coastal State within such zones

(c) Freedom to lay submarine cables and pipelines, subject to Part VI;

(d) Freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

(e) Freedom of fishing, subject to the conditions laid down in section 2;

(f) Freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”

Within the high seas, all States are entitled to exercise the freedoms that also exist in the EEZ and, in addition, the freedoms of fishing, marine scientific research and to construct artificial islands and other installations. These freedoms are all subject to conditions and obligations.⁵¹

The limits to this freedom are laid down in Article 89 of UNCLOS, which States that ‘No State may validly purport to subject any part of the high seas to its sovereignty’. In other words States are not entitled to exercise jurisdiction in a coastal State capacity with respect to the high seas, which is for that reason also referred to as an ‘area beyond national jurisdiction’ or an ‘international commons’.

The bed of the high seas is known as the International Seabed Area (also known as “the Area”), for which the UNCLOS established a separate and detailed legal regime. The

⁵¹ *UNCLOS, Op.Cit., Art.87(2)*

minerals on the ocean floor beneath the high seas are deemed “the common heritage of mankind,” and their exploitation is administered by the International Seabed Authority (ISA). Any commercial exploration or mining of the seabed is carried out by private or State concerns regulated and licensed by the ISA, though so far only exploration has been carried out.

According to Article 92 of UNCLOS which describes:

“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”

Article 88 of 1982 Convention states that the high seas shall be reserved for peaceful purposes only. However, when a ship is involved in certain criminal acts, such as piracy⁵² any nation can exercise jurisdiction under the doctrine of universal jurisdiction. Universal jurisdiction allows States or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the nationality, country of residence, or any other relation with the accused. Crimes prosecuted under universal jurisdiction are considered crimes against all, too serious to tolerate jurisdiction. In order to deliver the right punishment to the right person or State, the ships need to be registered to a country to show proof of

⁵² UNCLOS, *Op.Cit.*, Art.105

ownership.⁵³ Freedom of the seas allows a ship to move freely on the ocean as long as it follows the international law.

On the high seas⁵⁴ all States have the implied right to undertake surveillance but not to the extent of interfering with the exercise of the freedoms of the high seas by ships flying a foreign flag. As a general principle, enforcement measures on the high seas, including those relating to illegal activities such as smuggling, are based around the competence and consent of the flag State. However, by way of exception to this general principle, pursuant to Article 110 of UNCLOS⁵⁵ a warship may, in certain circumstances, board a foreign ship in cases where there is reasonable ground for suspecting that that ship is:

- i. Engaged in piracy
- ii. Engaged in the slave trade
- iii. Engaged in unauthorized broadcasting⁵⁶
- iv. Without nationality

⁵³ New Zealand Maritime Government, “A Guide to Ship Registration”, <http://www.maritimenz.govt.nz/Publications-and-forms/Commercial-operations/Ship-registration/A-guide-to-Ship-Registration.pdf>, downloaded on 02 November 2015

⁵⁴ Areas beyond any national jurisdiction

⁵⁵ Article 110 of 1982 UNCLOS regulates on the right of visit

⁵⁶ Provided the flag State of the warship has jurisdiction under Article 109 of 1982 UNCLOS

v. In reality of the same nationality as the warship although flying a foreign flag or refusing to show its flag.

6) Continental Shelf

“The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”⁵⁷

It can be extracted that some coastal States may be entitled to an outer continental shelf that extends beyond the maximum outer limit of their EEZs. In other words, beyond 200 nautical miles from the baseline even if it has chosen not to claim an EEZ zone.

The coastal State exercises sovereign rights for the purpose of exploring it and exploiting its natural resources. In other words, as with the rights of a coastal State over its EEZ, a more limited set of “sovereign rights” are conferred by UNCLOS.⁵⁸

Article 77 (2) goes on to clarify that the rights of the coastal State are exclusive in that if it does not explore its continental shelf or exploit its natural resources no one else

⁵⁷ UNCLOS, *Op.Cit.*, Art.76

⁵⁸ UNCLOS, *Op.Cit.*, Art.77(1)

may undertake such activities without the express consent of the coastal State. Unlike the EEZ, the coastal State gains its continental shelf by operation of law, without the need to claim it.⁵⁹

The sovereign rights of the coastal State regarding the continental shelf include the exploitation of living organisms belonging to sedentary species⁶⁰, the use of artificial islands, installations, and structures⁶¹, drilling⁶² and tunnelling⁶³. It follows that coastal States may also take the appropriate planning measures to regulate these activities.

Article 78(1) states that ‘The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.’

Thus in the absence of an EEZ claim, the coastal State has no rights with regard to the waters over the seabed and airspace above those waters, which naturally have the status of high seas. Except to the extent necessary to make use of its rights on the continental shelf, a coastal State must avoid

⁵⁹ *UNCLOS, Op.Cit., Art.77(3)*

⁶⁰ 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 sea bed or the subsoil (UNCLOS Art. 77(4))

⁶¹ *UNCLOS, Op.Cit., Art.80*

⁶² *UNCLOS, Op.Cit., Art.81*

⁶³ *UNCLOS, Op.Cit., Art.85*

interference with navigation and other rights and freedoms of other States as laid down in the regime of the high seas.

As regards artificial islands, installations and structures on the continental shelf, Article 80 of UNCLOS States that article 60 applies *mutatis mutandis*. In other words the coastal State is authorized to take precautionary measures as regards the safety of navigation.

Where the territorial waters, EEZs, or continental shelves of neighbouring countries overlap, a boundary line must be drawn by agreement to achieve an equitable solution. Many such boundaries have been agreed upon, but in some cases when the countries have been unable to reach agreement the boundary has been determined by the International Court of Justice (ICJ; e.g., the boundary between Bahrain and Qatar) or by an arbitration tribunal (e.g., the boundary between France and the United Kingdom). The most common form of boundary is an equidistance line (sometimes modified to take account of special circumstances) between the coasts concerned.⁶⁴

3. Freedom of Navigation

a. Historical Development

⁶⁴ Robin R. Churchill, "Law of the Sea", <http://www.britannica.com/topic/Law-of-the-Sea#ref913546> , accessed on 02 November 2015

The notion of freedom of navigation is historically part of the more general concept of freedom of the high seas. As a result of this lack of sovereignty, all States enjoy certain rights on the high seas, including navigation, fishing, overflight and the laying of submarine cables.⁶⁵

Freedom of the high seas and in particular freedom of navigation is one of the oldest and most widely recognized principles of international law. In ancient times and in the first half of the Middle Ages, everybody enjoyed freedom of navigation on the high seas. But since the end of the 12th century C.E., claims to sovereignty over certain parts of the oceans have been made at different times by a number of States, e.g. Venice, Denmark and Sweden, Spain, Portugal and later England. During the 17th century, there is a long political and legal struggle between the adherents of the principle of freedom of the high seas (i.e., free concurrent use by all States) versus those who regarded the appropriation of vast area of the oceans by one State as lawful. This struggle also took the form of armed conflicts as well as diplomatic negotiations and clashes.

Among the writers who took part in this controversy, the two most famous were Grotius, and John Selden. The central core of Grotius' book, *Mare Liberum* (1609), is freedom of commerce

⁶⁵ UNCLLOS, *Op.Cit.*, Art.87

and freedom of the seas. He maintained that the sea could not be appropriated because it could neither be seized nor enclosed and because its usage by one State did not preclude its use by others.

John Selden, on the other hand, in his *Mare Clausum* (1635) maintained that the sea could physically be appropriated and that it was not inexhaustible; therefore, it could come under the sovereignty of a State.⁶⁶

By the end of the 17th century, the principle of *mare liberum* was widely accepted. Of all the arguments which have been used to justify this principle, the most convincing one places the source of the obligatory force of the freedom of the seas upon the needs of international trade and communication. In Grotius' opinion, the importance of the principle derives from the fact that it serves a general and universal need of all States.

b. Geographical Scope of Application

Since it is generally recognized that freedom of navigation applies on the high seas, it seems necessary to determine what areas belong to this category of sea spaces. Unfortunately, the term 'high seas' has no precise positive definition, as UNCLOS defines it as:

“The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”⁶⁷

⁶⁶ Yale, “Treaty of Tordesillas Overview”, http://avalon.law.yale.edu/15th_century/mod001.asp, accessed on 03 November 2015

⁶⁷ UNCLOS, *Op.Cit.*, Art.86

Therefore, in order to understand the definition, the parts of the sea which are included from the open sea must be determined.

1) Territorial Sea

UNCLOS grants foreign vessels the right of innocent passage in the territorial sea. It is generally recognized that the territorial sea is under the full and exclusive jurisdiction of the coastal State, with one important exception: vessels of all flags have a right to innocent passage in the territorial waters of any State, without prior authorization or notification. The said passage implies the right to navigate through the territorial sea, either in order to traverse it without entering the internal waters, or in order to enter or leave these waters. The expression "innocent passage" refers to a passage without stopping or anchoring: a ship that passes through the territorial sea of a foreign State may not stop or anchor therein unless this is incidental to ordinary navigation or rendered necessary by *force majeure* or distress.⁶⁸ In addition, the traversing ship has to comply with laws and regulations enacted by the coastal State, mainly in matters of transport and navigation, provided that these enactments conform to international law.

⁶⁸ UNCLOS, *Op.Cit.*, Art.18(2)

The question was raised as to what criteria determine the "innocence" of the passage: Is it only the behaviour of the vessel during the passage or may other facts also be taken into account, such as the ship's nationality, its destination and its cargo? It seems that the language of the above cited article refers that a passage should be considered as innocent or not according to the behaviour of the ship at the time of passage.

But the right to innocent passage in the territorial sea is not an absolute one:

"The coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security"⁶⁹

2) International Straits

To what extent does freedom of navigation apply to straits? As we all had known that the straits function itself as the main interchanges of the high seas. Freedom of passage through international straits is of the utmost importance for the international community because it is a fundamental precondition to the exercise of freedom of navigation on the high seas.

⁶⁹ *UNCLOS, Op.Cit., Art.25(3)*

UNCLOS describes the legal status of the straits used for international navigation as:

“The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.”⁷⁰

On the other hand, since navigation near its shores may be the source of danger to the coastal State, so they strive to reserve to themselves a right of supervision and regulation of traffic in straits in their vicinity. No wonder then that the history of important straits reveals a constant struggle between the users of the waterway and the coastal States who sometimes wish to put their strategic geographical position to their own political and economy advantages.

Generally, no problem would arise when the straits are broad enough to contain a strip of high seas in their middle, in which the rules of freedom of navigation on the high seas would apply. But, when the strait is not wider than the territorial seas of the coastal States or when the strip of high seas within the strait is not navigable, the conflict of interests between the users and the coastal States does arise.

The basic rule with regard to straits is the principle of freedom of passage. No wonder that the straits regime, and

⁷⁰ *UNCLOS, Op.Cit., Art.34(1)*

in particular the principle of freedom of passage, was primarily conceived to apply to this category of straits. Innocent passage in these waterways is recognized and subject to the laws and regulations of the coastal State provided these regulations conform to international law, as is the case with the territorial sea.

In summary, the basic principle concerning straits, namely freedom of passage, applies without restrictions to the high seas spaces which may be encompassed in the strait, whereas in the areas of territorial sea it applies within the limits of innocent passage.

3) Contiguous Zone and Exclusive Economic Zone

As it can be seen in Figure 2.1, the Exclusive Economic Zone includes Contiguous Zone as well. This is the reason why Contiguous Zone and Exclusive Economic Zone is being placed under the same discussion in this matter.

It is mentioned above that in the 1982 UNCLOS Article 87 states that the freedom of high seas includes freedom of navigation. While the UNCLOS makes it clear there is freedom of navigation on the high seas, the same freedom is extended to the EEZ by Article 58(1):

“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.”

The right of freedom of navigation on the contiguous zone and the EEZ is circumscribed by the notion of “due regard” for the rights of others.

The principle of freedom of navigation applies to all the different layers of the marine environment beyond the territorial sea, irrespective of their being considered part of the high seas: the surface, the sea-bed and the subsoil. In some of these areas, the continental shelf and its superjacent waters, freedom of navigation is subject to reasonable interference due to the exploitation of the natural resources.

If the international community agrees upon a coastal State resource jurisdiction area and upon a regime for the exploitation of deep ocean floor, certainly in these areas, too, freedom of navigation will be preserved subject to some reasonable technical interference which may be caused by the process of exploitation.

c. The Beneficiaries

Who is entitled to enjoy freedom of navigation? UNCLOS rules that every State, whether coastal or land-locked, has the right

to sail ships flying its flag on the high seas.⁷¹ Though the Convention has not expressly reserved freedom of navigation to vessels possessing a nationality, it is generally understood that only ships sailing under the flag of a State enjoy the right of it. Problems arise between the lack of sovereignty over the high seas on one hand and the extension of the State's jurisdiction over ships flying its flag in the open sea on the other hand.

Stateless ships cannot appeal to the freedom of the seas but it should be remembered that Statelessness is not unlawful and the ship should not be treated as a pirate or an outlaw.

Each State is empowered by international law to provide by its national laws the conditions to be fulfilled by those vessels which wish to sail under its flag, provided there exists a genuine link between the State and the ship⁷², and the State effectively controls the ship. A ship which sails under the flags of two or more States using them according to convenience may not claim any of the nationalities in question with respect to any other State and may be regarded as a ship without nationality.⁷³

UNCLOS recognizes freedom of navigation in general terms, without specifying what kinds of devices may enjoy the right. Since the other provisions of the Convention which deal with

⁷¹ *UNCLOS, Op.Cit., Art.90*

⁷² *UNCLOS, Op.Cit., Art.91*

⁷³ *UNCLOS, Op.Cit., Art.92(2)*

navigation are concerned with ships, we may assume that freedom of navigation is a right enjoyed with respect to ships. Hence, what is a ship? Unfortunately this term has not been defined in the Convention. But the right of navigation has been granted in broad terms, and therefore it would not seem justified to restrict the kinds of vehicles which enjoy freedom of navigation. Thus it appears that all sea vessels are entitled to free navigation, whether they sail just above the water, on the surface of the water, through the water column or on the sea-bed. Furthermore, navigation is free irrespective of the legal status of the vessel-whether it is a private vessel, a government ship or a warship.

d. Conditions under which the Right May be Exercised

The vessels which enjoy freedom of navigation are subject to several restrictions which are intended to prevent chaos at sea. Thus the convention provides that freedom of the high seas is exercised under the conditions laid down by the Convention and by other rules of international law.⁷⁴ Ships have to comply with the relevant rules of international law, such as the 1954 Convention for the Prevention of Pollution of the Sea by Oil, as amended; the 1960 Convention for Safety of Life at Sea, as amended; the 1960 International Regulations for Preventing Collisions at Sea, as amended; the 1969 Convention on Civil Liability for Oil Pollution

⁷⁴ *UNCLOS, Op.Cit., Art.91(1)*

Damage; the 1973 Convention for the Prevention of Pollution from Ships, etc.

The provision that “these rights shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas” further restricts the complete freedom of the high seas. Therefore it is not an absolute freedom but only a relative one. It has been maintained by Prof. L. J. Bouchez, that “activities on the high seas which by their very nature necessarily harmfully affect the marine environment and/or the other uses of the high seas are a violation of International Law”⁷⁵

Another important measure intended to avoid lawlessness is the submission of ships on the high seas to the law of the flag State, and the duty of that State effectively to exercise its jurisdiction and control over the ship in administrative, technical and social matters.⁷⁶ A few exceptions in international law leave to the discretion of the flag State the question as to the contents of the law applicable to ships. However, nothing would seem to prevent the international law from laying down more and more rules which apply to ships on the high seas. A preventive measure that prevents anarchy - every merchant ship is subject to the supervision of warships of its own nationality. Moreover, it may be boarded by

⁷⁵ L.J. Bouchez, "The Freedom of the High Seas: A Reappraisal", (1973), pg.73

⁷⁶ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.94(2)(b)

warships of foreign flags if there is reasonable ground for suspecting that the ship is engaged in piracy or in slave trade, that the ship is in reality of the same nationality as the warship, that underwater pipelines have been damaged, and in case of hot pursuit.

Thus it can be concluded that it is a long and well established rule of international law, based upon the needs of international commerce and sanctioned by custom and treaty, that all sea vessels rightfully flying the flag of a State, may navigate on, in and under the waters beyond the territorial sea, provided they comply with the relevant rules of international law as well as the flag State's national law, and provided they also take into account the right of other States to enjoy the freedom of the seas.

4. United Nations Convention on Law of the Sea (UNCLOS)

a. Historical Development

The oceans had long been subject to the freedom of the seas doctrine - a principle put forth in the seventeenth century essentially limiting national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline. The remainder of the seas was proclaimed to be free to all and belonging to none. While this situation prevailed into the twentieth century, by mid-century there was an impetus to extend national

claims over offshore resources. There was growing concern over the toll taken on coastal fish stocks by long-distance fishing fleets and over the threat of pollution and wastes from transport ships and oil tankers carrying noxious cargoes that plied sea routes across the globe. The hazard of pollution was ever present, threatening coastal resorts and all forms of ocean life. The navies of the maritime powers were competing to maintain a presence across the globe on the surface waters and even under the sea.

From oil to tin, diamonds to gravel, metals to fish, the resources of the sea are enormous. The reality of their exploitation grows day by day as technology opens new ways to tap those resources.

Offshore oil was the centre of attraction in the North Sea. Britain, Denmark, Russia and Germany were in conflict as to how to carve up the continental shelf, with its rich oil resources.

A tangle of claims, spreading pollution, competing demands for lucrative fish stocks in coastal waters and adjacent seas, growing tension between coastal nations' rights to these resources and those of distant-water fishermen, the prospects of a rich harvest of resources on the sea floor, the increased presence of maritime powers and the pressures of long-distance navigation and a seemingly outdated, if not inherently conflicting, freedom of the

seas doctrine - all these were threatening to transform the oceans into another arena for conflict and instability.

In 28th September 1945, President Harry S Truman, responding in part to pressure from domestic oil interests, unilaterally extended United States jurisdiction over all natural resources on that nation's continental shelf - oil, gas, minerals, etc. This was the first major challenge to the freedom of the seas doctrine.⁷⁷ Other nations soon followed.

In 11th October 1946, Argentina claimed its shelf and the epicontinental sea above it.⁷⁸ Chile and Peru in 1947, and Ecuador in 1950, asserted sovereign rights over a 200-mile zone, hoping to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent seas.⁷⁹

Soon after the Second World War, Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European countries laid claim to a 12-mile territorial sea, thus clearly departing from the traditional three-mile limit.⁸⁰

In the late 1960s, oil exploration was moving further from land, deeper into the bedrock of continental margins. From a

⁷⁷ President Harry S. Truman, "Proclamation 2667 - Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", <http://www.presidency.ucsb.edu/ws/?pid=12332> , accessed on 04 November 2015

⁷⁸ Shigeru Oda, "Fifty Years of the Law of the Sea", (The Hague: Kluwer Law International, 2003), pg.50

⁷⁹ Ibid., pg.51

⁸⁰ Ibid., pg.53

modest beginning in 1947 in the Gulf of Mexico, offshore oil production, still less than a million tons in 1954, had grown to close to 400 million tons. Oil drilling equipment was already going as far as 4,000 meters below the ocean surface.⁸¹

The oceans were generating a multitude of claims, counterclaims and sovereignty disputes. The hope was for a more stable order, promoting greater use and better management of ocean resources and generating harmony and goodwill among States that would no longer have to eye each other suspiciously over conflicting claims.

The law of the sea developed from the struggle between coastal States, who sought to expand their control over marine areas adjacent to their coastlines. The maximum breadth of the territorial sea was generally considered to be three miles - the distance that a shore-based cannon could reach and that a coastal State could therefore control.

After the Second World War, the international community requested that the United Nations International Law Commission consider codifying the existing laws relating to the oceans. The commission began working towards this in 1949 and prepared four draft conventions, which were adopted at the first UN Conference on the Law of the Sea:

⁸¹ World Ocean Review, "Oil and Gas from the Sea", http://worldoceanreview.com/wp-content/downloads/wor3/WOR3_chapter_1.pdf, downloaded on 04 November 2015

1) The First United Nations Conference on the Law of the Sea
(UNCLOS I)

This conference was held from 24th February until 29th April 1958. UNCLOS I adopted the four conventions, which are commonly known as the 1958 Geneva Conventions:

- i. The Convention on the Territorial Sea and Contiguous Zone;
- ii. The Convention on the High Seas;
- iii. The Convention on Fishing and Conservation of the Living Resources of the High Seas; and
- iv. The Convention on the Continental Shelf.

While considered to be a step forward, the conventions did not establish a maximum breadth of the territorial sea.

2) The Second United Nations Conference on the Law of the Sea
(UNCLOS II)

This conference was held from 17th March until 26th April 1960. UNCLOS II did not result in any international agreements. The conference once again failed to fix a uniform breadth for the territorial or establish consensus on sovereign fishing rights.

3) The Third United Nations Conference on the Law of the Sea
(UNCLOS III)

This conference was held from 1973 to 1982. UNCLOS III addressed the issues brought up at the previous conferences. Over 160 nations participated in the 9-year convention, which finally came into force in accordance with its article 308 on 16 November 1994, 12 months after the date of deposit of the sixtieth instrument of ratification or accession.⁸² The first sixty ratifications were almost all developing states.

It consolidates and replaces a number of earlier conventions on aspects of the law of the sea including, as regards maritime zones, the 1958 Convention on the Territorial Sea and Contiguous Zone, the 1958 Convention on the High Seas, the 1958 Convention on Fishing and Conservation of the Living Marine Resources of the High Seas and the 1958 Convention on the Continental Shelf.

A major feature of the convention included the definition of maritime zones - the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, the high sea, the international seabed area and archipelagic waters.

The convention also made provision for the passage of ships, protection of the marine environment, freedom of scientific research, and exploitation of resources.

⁸² United Nations Convention on Law of the Sea, UNCLOS 1982, Art.308

b. Convention Frameworks

Comprising 320 articles, and nine additional annexes, UNCLOS remains one of the most comprehensive international law instruments of its time. As explained above, UNCLOS was the outcome of the Third United Nations Conference on the Law of the Sea (UNCLOS III), which lasted from 1973 until 1982. Today, it is the globally recognized regime dealing with all matters relating to the law of the sea.

UNCLOS's objective is to establish a universally accepted, just and equitable law and regulation for the oceans that lessens the risk of international conflict and enhances peace and stability in the international community.

As part of the legal order that it attempts to create, UNCLOS seeks to balance the rights and interests of States acting in different capacities such as flag States⁸³, coastal States⁸⁴, port States⁸⁵, geographically disadvantaged and land-locked States, as well as developed and developing States, against the interests of the international community as a whole. Such interests include

⁸³ The term 'flag State' is commonly defined as the State in which a vessel is registered and/or whose flag it flies

⁸⁴ There is no prefixed definition for the term 'coastal State'. For the purpose of this Study, however, the term 'coastal State' refers to a State exercising rights and jurisdiction, subject to conditions and obligations, within its maritime zones over a range of activities including the exploitation, exploration, conservation and management of natural resources, the protection and preservation of the marine environment and scientific research as well as foreign vessels.

⁸⁵ The term 'port State' refers to a State exercising jurisdiction, subject to conditions and obligations, over foreign vessels that are voluntarily in one of its ports.

international communication⁸⁶, the long-term sustainable use of marine living resources and the protection and preservation of the marine environment and marine biodiversity.

Some of the main points of the Convention are as follow:

1) Coastal States exercise sovereignty over their territorial sea

which they have the right to establish its breadth up to a limit not to exceed 12 nautical miles;⁸⁷ foreign vessels are allowed "innocent passage" through those waters;⁸⁸

2) Ships and aircraft of all countries are allowed "transit passage"

through straits used for international navigation;⁸⁹ States bordering the straits can regulate navigational and other aspects of passage;⁹⁰

3) Archipelagic States, made up of a group or groups of closely

related islands and interconnecting waters,⁹¹ have sovereignty over a sea area enclosed by straight lines drawn between the outermost points of the islands;⁹² the waters between the

islands are declared archipelagic waters where States may establish sea lanes and air routes in which all other States

⁸⁶ For example: navigation and broadcasting

⁸⁷ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.3

⁸⁸ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.17

⁸⁹ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.38

⁹⁰ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.41

⁹¹ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.46

⁹² United Nations Convention on Law of the Sea, UNCLOS 1982, Art.47

enjoy the right of archipelagic passage through such designated sea lanes;⁹³

4) Coastal States have sovereign rights in a 200 nautical miles exclusive economic zone (EEZ)⁹⁴ with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection.⁹⁵ All other States have freedom of navigation and overflight in the EEZ, as well as freedom to lay submarine cables and pipelines;⁹⁶

5) Land-locked and geographically disadvantaged States have the right to participate on an equitable basis in exploitation of an appropriate part of the surplus of the living resources of the EEZ's of coastal States of the same region or sub-region; highly migratory species of fish and marine mammals are accorded special protection;⁹⁷

6) Coastal States have sovereign rights over the continental shelf (the national area of the seabed) for exploring and exploiting it; the shelf can extend at least 200 nautical miles from the shore, and more under specified circumstances;⁹⁸

⁹³ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.49

⁹⁴ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.57

⁹⁵ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.56

⁹⁶ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.58

⁹⁷ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.69-70

⁹⁸ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.76

7) Coastal States share with the international community part of the revenue derived from exploiting resources from any part of their shelf beyond 200 miles;⁹⁹

8) All States enjoy the traditional freedoms of navigation, overflight, scientific research and fishing on the high seas;¹⁰⁰ they are obliged to adopt, or cooperate with other States in adopting, measures to manage and conserve living resources;¹⁰¹

9) The limits of the territorial sea, the exclusive economic zone and continental shelf of islands are determined in accordance with rules applicable to land territory, but rocks which could not sustain human habitation or economic life of their own would have no economic zone or continental shelf;¹⁰²

10) States bordering enclosed or semi-enclosed seas are expected to cooperate in managing living resources, environmental and research policies and activities;¹⁰³

11) Land-locked States have the right of access to and from the sea and enjoy freedom of transit through the territory of transit States;¹⁰⁴

⁹⁹ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.82

¹⁰⁰ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.87

¹⁰¹ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.118

¹⁰² United Nations Convention on Law of the Sea, UNCLOS 1982, Art.121(3)

¹⁰³ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.123

¹⁰⁴ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.125(1)

12) All marine scientific research in the EEZ and on the continental shelf is subject to the consent of the coastal State, but in most cases they are obliged to grant consent to other States when the research is to be conducted for peaceful purposes and fulfils specified criteria;¹⁰⁵

13) States are bound to promote the development and transfer of marine technology "on fair and reasonable terms and conditions", with proper regard for all legitimate interests;¹⁰⁶

14) States Parties are obliged to settle by peaceful means their disputes concerning the interpretation or application of the Convention;¹⁰⁷

c. Settlement of Disputes

Article 287, Part XV, of the United Nations Convention on the Law of the Sea provides that:

“When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) The International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) The International Court of Justice;
- (c) An arbitral tribunal constituted in accordance with Annex VII;
- (d) A special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.”

¹⁰⁵ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.142-143

¹⁰⁶ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.144(2)

¹⁰⁷ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.279

A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation¹⁰⁸ and, in certain circumstances, submission to it would be compulsory. The Tribunal has exclusive jurisdiction over deep seabed mining disputes.¹⁰⁹

5. International Tribunal on Law of the Sea (ITLOS)

a. Establishment of ITLOS

The International Tribunal for the Law of the Sea is an independent judicial body established by the United Nations Convention on the Law of the Sea to adjudicate disputes arising out of the interpretation and application of the Convention. The Tribunal is composed of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.

Following is the timeline for the Establishment of ITLOS from the beginning up to this day:

3 December 1973, New York

Opening of the Third United Nations Conference on the Law of the Sea, during which the United Nations Convention on the Law of

¹⁰⁸ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.284

¹⁰⁹ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.287(2)

the Sea is drafted. The conference is held in New York, Geneva and Caracas.

27 August 1974, Caracas

The informal working group formed to discuss all matters pertaining to the settlement of disputes which could arise out the application or interpretation of the Convention proposes three distinct mechanisms, i.e. arbitration, the International Court of Justice and a tribunal for the law of the sea in what was known as the 'Document of Caracas'.

22-23 March 1975, Geneva

The proposals for a three-fold mechanism for the settlement of disputes become known as the 'Montreux Formula' after a meeting of the informal working group in Montreux.

May 1975, Geneva

After the third session, the President of the Conference submits to the delegations an informal single negotiating text on the settlement of disputes which contains a draft Statute of the Law of the Sea Tribunal, but also considers the creation of a tribunal to deal exclusively with activities in the Area, as an organ of the International Seabed Authority.

1976, New York

The issue of the settlement of disputes is debated for the first time in the plenary of the Conference. The 'Montreux Formula' is

adopted and the Conference opts for the creation of a single tribunal with a specialized chamber to deal with disputes relating to the Area.

15 July 1977, New York

The first consolidated text of the proposed Convention is presented, with the dispute settlement procedure accepted as an integral part of the Convention rather than an additional and optional protocol.

22 September 1980, New York

The name for the adjudicatory body created by the Convention is adopted: the International Tribunal for the Law of the Sea.

21 August 1981, New York

Hamburg is chosen as the seat of the Tribunal by the Conference.

10 December 1982, Montego Bay

The Convention opens for signature.

15 March 1983, Kingston

The first meeting of the Preparatory Committee to discuss all issues pertaining to the concrete establishment and operation of the Tribunal.

16 November 1993, New York

Guyana deposits the 60th ratification of the Convention with the Secretary-General of the United Nations, allowing the Convention to enter into force twelve months later.

14 October 1994, New York

The Federal Republic of Germany accedes to the Convention.

16 November 1994, New York

The Convention enters into force.

22 November 1994, New York

The first Meeting of the Parties to the Law of the Sea Convention.

The Parties agree to defer the first election of the members of the Tribunal to 1 August 1996.

1 August 1996, New York

The election of the first 21 Judges by the fifth Meeting of States Parties to the Convention.

5 October 1996, Hamburg

The Judges elect the first President of the Tribunal (Thomas A. Mensah of Ghana) and Vice-President (Rüdiger Wolfrum of Germany).

18 October 1996, Hamburg

The ceremonial inauguration of the Tribunal takes place in the presence of the Secretary-General of the United Nations, Dr Boutros Boutros-Ghali.

21 October 1996, Hamburg

The Tribunal appoints Gritakumar Chitty (Sri Lanka) as Registrar.

17 December 1996, New York

The Tribunal is granted observer status at the UN General Assembly.

3 March 1997, Hamburg

The Tribunal establishes the Seabed Disputes Chamber, the Chamber for Fisheries Disputes and the Chamber for Marine Environment Disputes.

23 May 1997

The Parties to the Law of the Sea Convention adopt the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea.

28 October 1997, Hamburg

The Tribunal adopts its Rules of Procedure.

13 November 1997, Hamburg

The first case is submitted to the Tribunal, “The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release.”

4 December 1997, Hamburg

The Tribunal delivers its first judgment.

18 December 1997, Hamburg

The United Nations and the International Tribunal for the Law of the Sea sign an Agreement on Cooperation and Relationship.

8 September 1998, Hamburg

Entry into force of the Relationship Agreement between the Tribunal and the United Nations.

3 July 2000, Hamburg

The official opening of the new headquarters of the Tribunal takes place in the presence of the Secretary-General of the United Nations, Mr Kofi Annan.

10 December 2003, Hamburg

Establishment of the International Foundation for the Law of the Sea (IFLOS).

14 December 2004, Berlin

Agreement signed between the International Tribunal for the Law of the Sea and the Federal Republic of Germany regarding the Headquarters of the Tribunal.

29 September 2006, Hamburg

The Tenth Anniversary of the Tribunal.

16 March 2007, Hamburg

The Tribunal creates a standing special chamber to deal with maritime delimitation disputes pursuant to article 15, paragraph 1, of the Tribunal's Statute.¹¹⁰

b. The Scope of ITLOS

1) Access to the Tribunal

I. States Parties to the United Nations Convention on the Law of the Sea

¹¹⁰ ITLOS, "The Tribunal History", <https://www.itlos.org/the-tribunal/history/>, accessed on 04 November 2015

The Tribunal is open to States Parties to the Convention¹¹¹. There are currently 166 States and other entities that are parties to the Convention.

II. Declarations under Article 287 of the Convention

The Convention provides for four alternative means for the settlement of disputes: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII to the Convention, and a special arbitral tribunal constituted in accordance with Annex VIII to the Convention. A State Party is free to choose one or more of these means by a written declaration to be made under Article 287 of the Convention and deposited with the Secretary-General of the United Nations.

III. Entities other than States Parties

The Tribunal is open to entities other than States Parties in any case expressly provided for in Part XI of the Convention or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case (Article 291 of the Convention; Article 20 of the Statute).

2) Jurisdiction of the Tribunal

¹¹¹ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.291(1); Statute of the Tribunal, Art.20(1)

I. Contentious Cases

i. Jurisdiction over any dispute concerning the interpretation or application of the Convention

The Tribunal has jurisdiction over any dispute which is submitted to it in accordance with Part XV of the Convention concerning the interpretation or application of the Convention¹¹² and the Agreement relating to the Implementation of Part XI of the Convention.

Limitations on and exceptions to applicability of the compulsory procedures entailing binding decisions¹¹³ are contained in Articles 297 and 298 of the Convention. Any dispute belonging to the categories referred to in articles 297 and 298 of the Convention may, nevertheless, be submitted to the Tribunal if the parties to the dispute so agree.

ii. Jurisdiction over any dispute concerning the interpretation or application of other agreements

The Tribunal has jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the

¹¹² United Nations Convention on Law of the Sea, UNCLOS 1982, Art.288(1); Statute of the Tribunal, Art.21

¹¹³ United Nations Convention on Law of the Sea, UNCLOS 1982, Part XV, Section 2

purposes of the Convention which is submitted to it in accordance with the agreement.¹¹⁴ The jurisdiction of the Tribunal includes all matters specifically provided for in any agreement, other than the Convention, which confers jurisdiction on the Tribunal.¹¹⁵

Ten multilateral agreements have been concluded which confer jurisdiction on the Tribunal.

Any disputes concerning the interpretation or application of a treaty or convention already in force and relating to the subject-matter covered by the Convention may, if all the Parties to such agreement agree, be submitted to the Tribunal in accordance with the agreement.¹¹⁶

iii. Jurisdiction of the Seabed Disputes Chamber

The Seabed Disputes Chamber has jurisdiction over disputes with respect to activities in the Area, as defined in Article 1 of the Convention, falling within the categories referred to in Article 187, subparagraphs (a) to (f), of the Convention. Parties to such disputes may be States

¹¹⁴ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.288(2)

¹¹⁵ Statute of the Tribunal, Art.21

¹¹⁶ Statute of the Tribunal, Art.22

Parties, the International Seabed Authority, the Enterprise, state enterprises and natural or juridical persons referred to in Article 153, paragraph 2(b), of the Convention.

Disputes between States Parties concerning the interpretation or application of Part XI of the Convention and the Annexes relating thereto may be submitted to a special chamber of the Tribunal at the request of the parties, or to an *ad hoc* chamber of the Seabed Disputes Chamber at the request of any party (Convention, article 188, paragraph 1). Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c) (i), of the Convention are required to be submitted, at the request of a party, to binding commercial arbitration, unless the parties otherwise agree.

However, a commercial arbitral tribunal has no jurisdiction to decide any question of interpretation of the Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, with respect to activities in the Area, that question shall be referred to the

Seabed Disputes Chamber for a ruling (Convention, article 188, paragraph 2).

The Seabed Disputes Chamber has no jurisdiction with regard to the exercise by the International Seabed Authority of its discretionary powers and it has no competence to pronounce itself on the question of whether any rules, regulations and procedures of the International

Seabed Authority are in conformity with the Convention or to declare them invalid.¹¹⁷

iv. The Tribunal itself decides any question as to its jurisdiction

In the event of a dispute as to whether the Tribunal has jurisdiction, the matter shall be settled by decision of the Tribunal.¹¹⁸

v. Provisional measures

If a dispute has been duly submitted to the Tribunal and if the Tribunal considers that *prima facie*¹¹⁹ it has jurisdiction under Part XV or Part

XI, section 5, of the Convention, the Tribunal may prescribe any provisional measures which it

¹¹⁷ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.189

¹¹⁸ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.288; Rules of the Tribunal, Art.58

¹¹⁹

considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.¹²⁰

The Tribunal may also prescribe provisional measures in the case covered by Article 290, paragraph 5, of the Convention. Under this provision, pending the constitution of an arbitral tribunal to which a dispute is being submitted and if, within two weeks from the date of a request for provisional measures, the parties do not agree to submit the request to another court or tribunal, the Tribunal may prescribe provisional measures if it considers that *prima facie* the arbitral tribunal to be constituted would have jurisdiction and that the urgency of the situation so requires.

vi. Prompt release of vessels and crews

The Tribunal has jurisdiction to entertain an application for the prompt release of a detained vessel or its crew in accordance with the provisions of Article 292 of the Convention. This article provides that where the authorities of a State Party

¹²⁰ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.290; Statute of the Tribunal, Art.25(1)

have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to the Tribunal if, within 10 days from the time of detention, the parties have not agreed to submit it to another court or tribunal.¹²¹ The application for release may be made only by or on behalf of the flag State of the vessel.

II. Advisory Opinions

i. Advisory opinions under the Convention

The Seabed Disputes Chamber is competent to give an advisory opinion on legal questions arising within the scope of the activities of the Assembly or the Council of the International Seabed Authority.¹²²

ii. Advisory opinions on the basis of other international agreements

¹²¹ United Nations Convention on Law of the Sea, UNCLOS 1982, Art.292(2)

¹²² United Nations Convention on Law of the Sea, UNCLOS 1982, Art.159(10), 191

The Tribunal may also give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.¹²³

6. State Sovereignty

International law is based on the concept of the state. In turn, the state is based upon the foundation of sovereignty, which is defined as “supreme power especially over a body politic; freedom from external control.”¹²⁴ However, the development of international law has slowly weakened the idea of state sovereignty, causing a tension between international law and state sovereignty. International law is meant to preserve the peace and state sovereignty, but international law itself has now become a threat to state sovereignty.

B. Theoretical Framework

1. Monism Theory

Monism theory holds international law and municipal law constitute single legal system.¹²⁵ Monists accept that the internal and international legal systems form a unity.

¹²³ Rules of the Tribunal, Art.138(1)

¹²⁴ “Sovereignty”, <http://www.learnersdictionary.net/dictionary/sovereignty>, accessed on 30 September 2015

¹²⁵ Sefriani, *Hukum Internasional Suatu Pengantar*, (Jakarta: Rajagrafindo Persada, 2010), pg.86

In a pure monist state, international law does not need to be translated into national law it is just incorporated and has effect automatically in national or domestic laws. The act of ratifying an international treaty immediately incorporates the law into national law; and customary international law is treated as part of national law as well. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. A judge can declare a national rule invalid if it contradicts international rules because, in some states, the latter have priority. In other states, treaties have the same effect as legislation, and by the principle of *lex posterior*, only take precedence over national legislation enacted prior to their ratification. In its most pure form, monism dictates that national law that contradicts international law is null and void, even if it predates international law, and even if it is the constitution.¹²⁶

2. Dualism Theory

According to the dualist theory international law and municipal law are two separate and independent legal systems, one national and the other international. The latter, being international law regulates relations between States based on customary law and treaty law, whereas the former, national law, attributes rights and duties to individuals and legal persons deriving its force from the national Constitution.¹²⁷

¹²⁶ Ibid., pg.87

¹²⁷ Ibid., pg.87

Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law.¹²⁸ International law has to be national law as well, or it is no law at all. If a state accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates national law.¹²⁹ But one cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to dualists, national judges never apply international law, only international law that has been translated into national law.¹³⁰

¹²⁸ Ibid., pg.88

¹²⁹ Antonio Cassese, *International Law in a Divided World*, (Oxford: Clarendon Press, 1992), pg.15

¹³⁰ M. Akehurst, *Modern Introduction to International Law*, (London: Harper Collins), pg.45