EU ARCTIC AND OCEAN LAW AND POLICY

S. KIRCHNER

V. N. Karazin National University, Kharkiv

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EU ARCTIC AND OCEAN LAW AND POLICY – PART 1

CLIMATE CHANGE AND THE NEW ARCTIC

BASIC INFORMATION

OVERVIEW

- 3 sessions of 80 minutes each
  - Interactive format
  - Starting with a lecture but then – hopefully – evolving into a seminar-style discussion

TOPICS

- Climate change and the Arctic
- The Arctic Ocean and the Law of the Sea
- The EU's Integrated Maritime Policy
- The EU's Arctic Policy

A BRIEF HISTORY OF THE ARCTIC

- The Arctic is the home of many indigenous peoples since about the end of the last ice age.
- First contact with Northern European communities around 1000 years ago (Viking settlements in Greenland and North America).
- Expansion of European settler societies to the North into Sápmi and to the East into Siberia.
- Age of Exploration, especially by the British navy after the Napoleonic wars.
- Whale and seal hunting by British and Norwegians off the coast of Greenland in the 19th century.
- Scientific research in the Arctic since the 19th century.
- Military interest in the Arctic during the Cold War, increasing infrastructure, modern icebreakers.
- Satellite observations since the late 1970s.
- Increasing Arctic activities due to reduction of sea ice cover in the 2000s (oil drilling, shipping…).

DEFINING THE ARCTIC

- There are multiple definitions of the Arctic
  - North of the treeline
  - North of the Arctic Circle
  - North of the 10 °C isotherm (avg. Temperature in the warmest month < 10 °C)
  - Specific waters, combining different factors for definition
- The course is primarily concerned with the Arctic Ocean, rather than the land areas which are under the full sovereignty of nation states.
  - There are some attempts by non-Arctic actors to redefine the Arctic as a whole as ’common heritage of mankind’.
    - This approach is incompatible with internationational law, in particular with the sovereignty of the Arctic states.
  - Therefore no specific need to agree on a clear definition, but basically the waters of the Arctic Ocean plus adjacent areas (e.g. waters near Iceland, which is in the North Atlantic, or between Canada and Greenland).

SOURCES

The slides for this course are based on a number of publications (in the order used for the presentation):

- Peter Wadhams, A Farewell to Ice – A Report from the Arctic, 1st ed., Penguin, London (2017), chapters 1, 6-10.
- Stefan Kirchner, ” Climate Change Effects on Snow Conditions and the Human Rights of Reindeer Herders”, in: 33 Pace Environmental Law Review (2015), pp. 1-22.
- Stefan Kirchner, ”Greening Arctic Cruise Shipping Through Law and Technology: A Role for China”, in: Arctic Yearbook (2018).
- Stefan Kirchner, ”Arctic Cruise Shipping: Dreams, Development or Disaster?”, in: 4 Current Developments in Arctic Law (2016).
- Michael Byers, International Law and the Arctic, 1st ed., Cambridge University Press, Cambridge (2013).
- Michael Byers, ”Arctic Region”, in: Max Planck Encyclopedia of Public International Law (2010).
- Timo Koivurova, Stefan Kirchner and Pirjo Kleemola-Juntunen, ”Regional Agreements and Arrangements” (forthcoming, 2019).
- Y. Tanaka, International Law of the Sea.

SOURCES

- Karen N. Scott & David L. VanderZwaag, ”Chapter 32: Polar Oceans and the Law of the Sea”, in: Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott & Tim Stephens (eds.), The Oxford Handbook of the Law of the Sea, 1st ed., Oxford University Press, Oxford (2017), pp. 724-751.
- Timo Koivurova, Pirjo Kleemola-Juntunen and Stefan Kirchner, ”Are we ready to govern a a new ocean?” (forthcoming, 2019).
- Njord Wegge, ”The EU and the Arctic: European foreign policy in the making”, in: 3 Arctic Review on Law and Politics (2012), pp. 6-29.
- Adam Stepien & Andreas Raspotnik, ”The EU’s Arctic Future Following the Spring of Statements”, Arctic Yearbook (2016).
- Kristina Schönfeldt (ed.), The Arctic in International Law and Policy, 1st ed., Hart Publishing, Oxford and Portland (2017), pp. 364-446.
- EC/EU Commission documents (2007) 575, (2008) 395 and (2012) 491.
- Adam Stepien & Timo Koivurova, Arctic Europe: Bringing together the EU Arctic Policy and Nordic Cooperation, 1st ed., Office of the Prime Minister, Helsinki (2017).

CLIMATE CHANGE AND THE ARCTIC

CLIMATE CHANGE

- Greenhouse effect
  - Greenhouse gases (GHGs) such as CO_2, methane etc. enter the atmosphere and 'trap' heat radiated from Earth, leading to warming temperatures
- Not only warming but also changes in climate
  - Extreme weather events, e.g. drought and forest firest in 2018
  - Temperature changes in the Arctic are several times as significant as in other parts of the world
    - Alaska: 100 months of record temperatures in a row
    - Canada: heating up 3 times as fast as the rest of the planet
    - Northern Europe: forest fires in the summer and almost no snow at the Arctic circle in December 2018
    - Russia: thousands of reindeer die due to unusual weather patterns (refreezing snow)

FROM WHITE TO BLUE

- The Arctic Ocean is particularly affected by climate change.
- For practically all of human history, the Central Arctic Ocean (CAO) was unusuable for human activities.
  - Fishing / hunting by indigenous communities in Canada, Greenland and Russia but no permanent settlements in the extreme north, no practical access to the CAO

FROM WHITE TO BLUE

- This is changing. The ’permanent’ sea ice of the Arctic Ocean is no longer permanent. The Arctic Ocean is no longer white, it is becoming blue.
  - 40 % loss of ice thickness between the late 1976 and 2000, 60% of volume loss for summer sea ice between the 1970s and the 1990s.
  - In 1942-1944 the Royal Canadian Mounted Police ship St. Roch needed two summer seasons to cross the Northwest Passage. This was already faster, thanks to technical developments, than the Amundsen expedition which needed three years (1903-1906). By 2015, 238 had crossed the Northwest Passage. It is still a challenging trip but thanks to the lack of sea ice, it is a possible route.
  - In the late 1970s, the Arctic sea ice covered 8 million km^2. In 2012, it was 3.4 million km^2.
  - For up to date information see https://nsidc.org/arcticseaicenews/.

CHANGE IS HAPPENING NOW

- There is fluctuation between summer and winter months with regard to the surface area covered by ice and the thickness of the ice – but it is also the multiyear sea ice which is disappearing.
- This means that the Arctic Ocean is melting and will be largely (likely with a few small exceptions near NE Canada / NW Greenland) ice free during the summer months just a few years from now (current estimates: 2035-2040).
- For the first time in tens of thousands of years, the North Pole will no longer be frozen.
- The Arctic Ocean has been a barrier – for future generations it can become a connecting body of water, like the Mediterranean.
  - Of course, unlike in the Mediterranean, the climate is still harsh and there is a very low population density.
  - But the fundamental nature of the Arctic is changing.
- This change is happening now and it has a dramatic impact on people already today.

THE PACE OF CHANGE IS ACCELERATING

- The loss of the summer sea ice in the Arctic Ocean will have two main consequences:
  - More heat: Local albedo (the part of the incoming solar radiation which is reflected back into space and which therefore does not contribute to additional warming) increases from 0.6 to 0.1 due to the loss of the white surface.
    - Warming accelerates: The loss of albedo of 4 million km^2 lost sea ice will have a similar effect as 25 years of global CO_2 emissions.
  - Less cooling: The disappearance of the ice will lead to an increase in temperatures as the presence of sea ice in the summer keeps the air and water temperature in the Arctic low as well. This cooling effect is disappearing, too.
    - Surface water in the Arctic Ocean is already at least 7 °C higher than a generation ago.

A VICIOUS CIRCLE

- Climate change leads to more climate change: higher overall temperatures in the Arctic lead to the thawing of Greenland ice sheet and the permafrost in Russia.
  - The loss of Greenlandic ice increases sea levels and impacts the climate.
  - The thawing of the permafrost leads to the release of large amounts of methane, which is currently stored in the frozen soil. Methan is a highly potent greenhouse gas and its release is further accelerating climate change.

A VICIOUS CIRCLE

- This is an accelerating process and according to the 2018 report of the International Panel on Climate Change (IPCC), we are quickly approaching a ”point of no return” even if we were to implement the Paris climate change agreement immediately and completely.
  - Climate change affects the entire planet and it will affect especially those who do not have the capacity to take protective measures, such as moving to other countries.
  - The effects of climate change on the Arctic are just the beginning.

FEEDBACK LOOPS

- Ice-albedo feedback
- Snowline retreat feedback
- Water vapour feedback
- Ice sheet melt feedback
- Arctic river feedback
- Black carbon feedback
- Ocean acidification feedback

DATA VISUALIZATIONS

- The so called ”death spiral” of Arctic sea ice
  - https://www.youtube.com/watch?v=6sbBxECIKxs
- NASA sea ice coverage
  - https://www.youtube.com/watch?v=pyIdwDbtcGs
- Sea ice decrease visualizations by Zachary Labe, University of California - Irvine
  - https://sites.uci.edu/zlabe/arctic-sea-ice-figures/

BEYOND THE TIPPING POINT

- Multiyear sea-ice is diminishing every year
- Once the ice cover is gone completely – just once – all the ice in the following winter will be thin first year ice, which will melt again in the next summer.
- We are quickly approaching a point of no return for Arctic sea ice.
- There is no precedent for this, no prior human experience which will prepare us for this event, which is likely to happen before the middle of this century, according to some estimates even already in the next few years.

A NEW CHAPTER IN ARCTIC HISTORY

- Climate change means that the Arctic Ocean is becoming more available for navigation.
  - Arctic sea routes provide shortcuts (= financial savings).
  - Currently, marine traffic in the Arctic is still primarily near-coastal.

- In the long run, also the Central Arctic Ocean will likely be accessible for shipping for the first time in human history.
  - How can the marine environment of the Arctic Ocean be protected?
  - How can human health be protected against negative effects from increased shipping in the Arctic?
  - Are current rules sufficient or do we need new rules?

EU ARCTIC AND OCEAN LAW AND POLICY – PART 2

THE ARCTIC OCEAN AND THE LAW OF THE SEA

DEVELOPMENT OF THE LAW OF THE SEA

- International Law of the Sea is one of the oldest branches of Public International Law (PIL)
  - Therefore it must be examined from the perspective of the development of PIL in general
- Originally: customary international law
  - Notable exceptions in antiquity:
    - Rhodian Sea Law
      - See W. Ashburner, The Rhodian Sea-Law (1909), available online at https://archive.org/stream/nomosrhodinnauti00rhoduoft#page/n3/mode/2up
      - But see also R. D. Benedict, The Historical Position of the Rhodian Law, in: 18 Yale Law Journal (1909), pp. 223-242, available online at http://www.jstor.org/stable/785136
    - Incorporated into Roman Law (Corpus Iuris Civilis, Digesta, 533 A.D.)
  - Not yet PIL in the modern sense of the term

DEVELOPMENT OF THE LAW OF THE SEA

- Progressive codification
  - In particular in the second half of the 20th century
    - United Nations Conferences on the Law of the Sea
    - Third United Nations Conference on the Law of the Sea adopted the Law of the Sea Convention (LOSC) in 1982
      - LOSC = key international treaty regulating the International Law of the Sea
        - Absolute must-read text for this course!
      - Contains old rules of customary law, some LOSC rules meanwhile have become customary law of their own
- Constant development
  - In particular through the International Maritime Organization (IMO)

WHY DO THE OCEANS MATTER?

- Oceans and seas have been and continue to be of fundamental importance to human life
  - Fishing
  - Navigation (transport of goods)
  - Natural resources (e.g. oil)
- Increased use of the oceans leads to a need for more and more regulation
- By its very nature, this regulation has to be international
- Highly dynamic development of the uses and the law

FUNCTIONS OF THE LAW OF THE SEA

- Dual role in international relations
  - Spatial distribution of jurisdiction of States
    - International Law of the Sea divides the oceans into different zones in which different rules apply
      - Internal Waters
      - Territorial Seas (TS)
      - Contiguous Zone (CZ)
      - Exclusive Economic Zone (EEZ)
      - Archipelagic Waters
      - Continental Shelf (CS)
      - High Seas (HS)
      - the Area (Deep Sea Bed, DSB)
    - The Law of the Sea regulates rights and obligations of coastal States and other States with regard to these different jurisdictional areas.
      - Law of the Sea aims at balancing competing interests
      - Zonal management approach, mirroring the division of Earth into different States

FUNCTIONS OF THE LAW OF THE SEA

- Dual role in international relations
  - Ocean Management
    - Proper ocean management requires international coordination
    - Effective conservation of marine living resources requires international cooperation.
      - The spatial scope does not always correspond to the existing ecosystems
        - Highly migratory species often cross artificial delimitation lines
        - Divergence between law and nature
        - Zonal approach is not always the best for solving issues related to the Oceans
      - Pollution does not stop at borders.
      - Also: unilateral action could lead to competitive disadvantages.
    - The highly complex nature of the oceans requires international cooperation in marine scientific research.

FUNCTIONS OF THE LAW OF THE SEA

- International cooperation in marine affairs is essential.
- These two basic functions (zonal approach / holistic approach) are not mutually exclusive but coexist in the Law of the Sea. Reconciliation between these two approaches is essential for the International Law of the Sea.
  - See also Y. Tanaka, A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea (2008), pp. 21-25.
- The Law of the Sea provides a legal framework for ensuring international cooperation, thereby safeguarding the common interests of the international community as a whole.
  - On common interests see Y. Tanaka, Protection of Community Interests in International Law: The Case of the Law of the Sea, in: 15 Max Planck Yearbook of United Nations Law (2011), pp. 329-375.

MARINE SPACES IN THE LAW OF THE SEA

- The Ocean as the object of the Law of the Sea is one unit, the totality of marine waters. Each marine space is connected to the rest of the World Ocean.
  - Therefore, the Law of the Sea is not a law of lakes. The Caspian Sea is not covered by the Law of the Sea because the Caspian Sea is not connected to the Ocean.
  - Lakes and rivers are subjected to other legal regimes, often treaty based in case of rivers which flow through several countries.

TYPOLOGY OF MARINE SPACES

- Marine spaces under the national jurisdiction of the coastal State
  - Internal waters
  - Territorial seas
  - International Straits
  - Archipelagic waters
  - Contiguous Zone
  - Exclusive Economic Zone
  - Continental Shelf
- Marine spaces beyond national jurisdictions
  - High Seas
  - Area
    - Sea-bed and ocean floor and subsoil thereof as far as beyond national jurisdiction

TYPOLOGY OF MARINE SPACES

- Marine spaces under the national jurisdiction of the coastal State – further division possible:
  - Marine spaces governed by territorial sovereignty v. Marine spaces beyond territorial sovereignty but under the national jurisdiction of the coastal State
    - Marine spaces governed by territorial sovereignty
      - Territorial sovereignty is characterized by completeness and exclusiveness
        - Complete jurisdiction = comprehensive jurisdiction over territory
          - Both legislative and enforcement jurisdiction
          - No limits *ratione materiae*, nor *ratione personae*
        - Exclusive jurisdiction: No other State may exercise jurisdiction over this territory or persons in this territory (unless allowed by the coastal State)
      - Includes: internal waters, territorial seas, International Straits, Archipelagic waters

TYPOLOGY OF MARINE SPACES

- Marine spaces beyond territorial sovereignty
  - Includes:
    - Contiguous Zone

      (CZ is either part of EEZ or HS, more later)
    - Exclusive Economic Zone (Art. 56 (1) LOSC)
    - Continental Shelf (Art. 77 (1) LOSC)
  - Coastal State jurisdiction over EEZ and CS (sovereign rights) is limited to matters defined by international law (limitation *ratione materiae*)
    - Not as far-reaching as territorial sovereignty (territorial sovereignty is in principle unlimited unless international law provides otherwise)

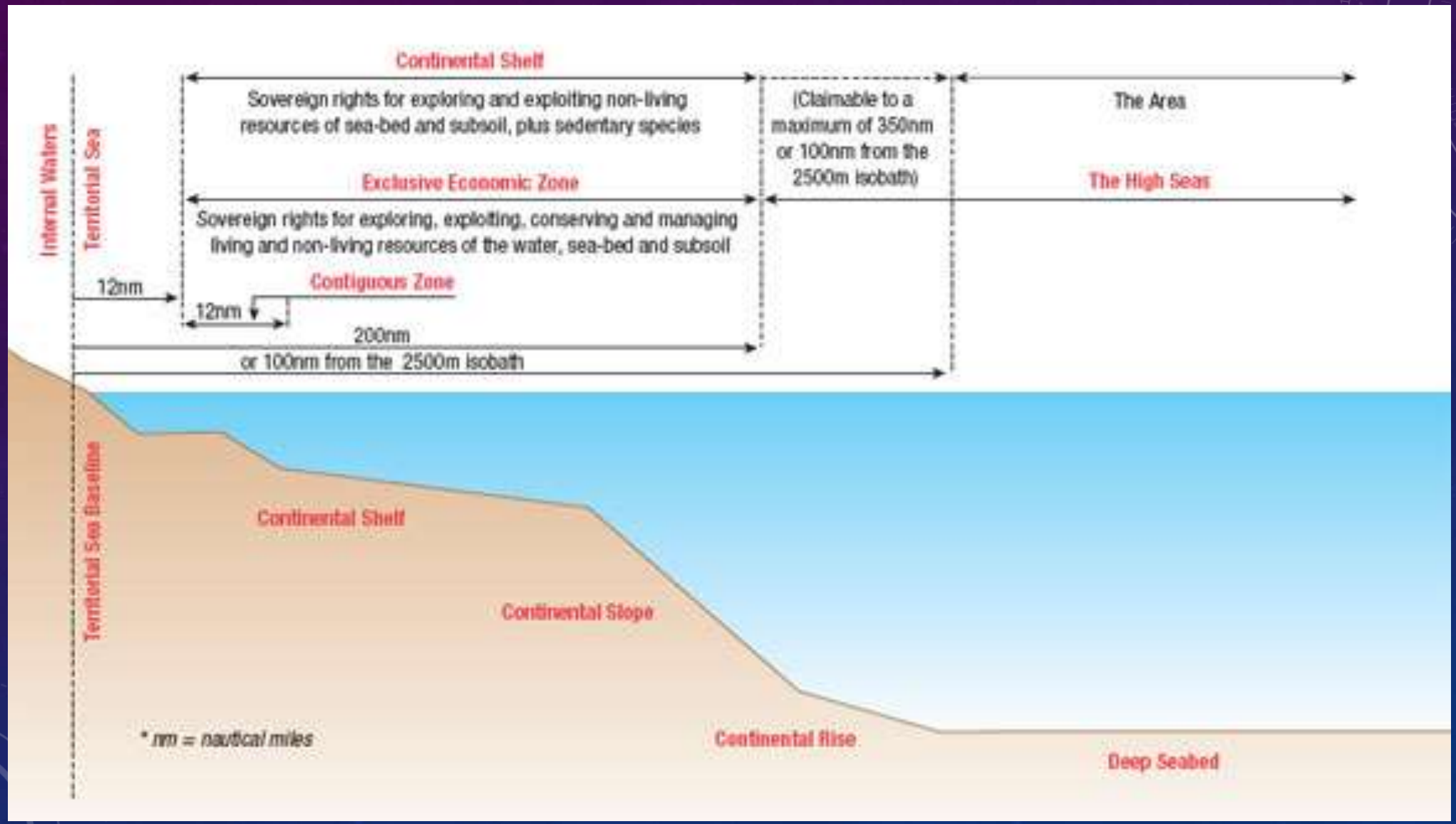
TYPOLOGY OF MARINE SPACES

- But some commonalities between sovereign rights and territorial sovereignty exist
  - Sovereign rights are spatial in nature because they concern a certain space (e.g. the EEZ) – and only that space
  - Concerning matters defined by law, the coastal State may exercise legislative and enforcement jurisdiction in the EEZ and the Continental Shelf
  - Within the certain space in question, the coastal State exercises its jurisdiction over all people regardless of their nationality = no limit *ratione personae*
    - Distinction from personal jurisdiction (e.g. the jurisdiction of the flag State over persons aboard a ship on the High Sea) necessary
  - Sovereign rights are exclusive in the sense that no one may undertake the exploration and exploitation of natural resources without the express consent of the coastal State.
- Essentially, sovereign rights are a form of *limited* spatial jurisdiction (while full sovereignty includes *complete* spatial jurisdiction).
- Coastal State jurisdiction is spatial by nature.

TYPOLOGY OF MARINE SPACES

- Summary: Marine spaces can be categorized as follows:
  - Marine spaces under national jurisdiction
    - Marine spaces under territorial sovereignty (or complete spatial jurisdiction)
      - Internal waters
      - Territorial Sea
      - International Straits
      - Archipelagic waters
    - Marine spaces under sovereign rights (or limited spatial jurisdiction)
      - Contiguous Zone (if there is an EEZ)
      - EEZ
      - Continental Shelf
  - Marine spaces beyond national jurisdiction
    - High Seas
    - Area

MARINE ZONES



Source: http://www.dfo-mpo.gc.ca/oceans/canadasoceans-oceansducanada/marinezones-zonesmarines-eng.htm

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Formal sources: Article 38 (1) Statute of the International Court of Justice:
  - International convention, whether general or particular, establishing rules expressly recognized by the States in question (= international treaties)
  - International custom, as evidence of a general practice accepted as law (= international customary law = state practice and *opinio juris*, International Court of Justice, *Libya / Malta* Case, ICJ Reports 1985, p. 29, para. 27)
  - General principles of law
- Focus on treaties and customary law

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Customary law
  - General customary law
    - Binding upon **all** States (International Court of Justice, *North Sea Continental Shelf* cases, ICJ Reports 1969, pp. 38 et seq., para. 63)
    - Because there is no treaty on the Law of the Sea which is ratified by all coastal States, let alone all States, customary law continues to play and important role
  - Special or regional customary law
    - Only applicable among a limited number of States
      - Example: The right to grant diplomatic asylum is recognized under regional customary law in Latin America – but not universally
      - Can also exist between only two States (International Court of Justice, *Right of Passage over Indian Territory*, ICJ Reports 1960, p. 39)

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Customary law = State practice + *opinio juris*
  - State practice (objective element)
    - What is State practice?
      - Not only physical acts, also publications (national legislation, national judicial decisions, diplomatic correspondence, policy statements, press releases, comments on draft treaties etc.) by States
      - Also: omissions
    - How uniform does the practice have to be?
      - In principle, international law remains very much State-centered and based on consensus: usually, international law rules exists because States consent to them – but that is not all:
      - Universality is not required to establish a new rule of customary international law
        - In order to deduce the existence of customary law rules, it is sufficient that the conduct of States is in general consistent with such rules (International Court of Justice, *Nicaragua* Case (Merits), ICJ Reports 1986, p. 98, para. 186)
          - Historically, great maritime nations, e.g. Britain, played an important role
          - In the second half of the 20th century, this dominance was critizised by the newly independent former colonies - this is reflected in part in the LOSC

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- How much time needs to pass for the emergence of a new rule of customary international law?
  - No long time necessary (International Court of Justice, *North Sea Continental Shelf* cases, ICJ Reports 1969, p. 43, para. 74) (that does not necessarily allow for instant custom (see International Court of Justice, *Nicaragua* Case (Merits), ICJ Reports 1986, p. 97, para. 184) – but the latter might not be completely impossibly, see International Space Law)

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Customary law = State practice + *opinio juris*
  - *opinio juris* (subjective element)
    - The paradox inherent in creating customary law: ”The well-known paradox of *opinio juris* is that States cannot trust in the existence of a rule of customary law requiring them to act or refrain from acting, before a customary rule is established. At the initial stage of the formation of a rule of customary law, it is illogical to consider that States feel a conviction to comply with a rule of law since there is as yet no legal obligation. In response to this question, it would be sufficient to consider that, at the initial stage, the States concerned regard the practice as conforming to a rule which is a useful and desirable rule and one that should exist.[…] Considering that the formation of customary law is a gradual process, it may be argued that a legal conviction matures gradually.” (Y. Tanaka, The International Law of the Sea (2012), Part I, 1, 3.1. (a))

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- How to find evidence for *opinio juris*?
  - Evidence for *opinio juris* can be difficult to find – but opinio juris remains a necessarily element in the formation of customary international law
  - But *opinio juris* is necessary to distinguish mere custom as fact from legally relevant custom
  - Difficulties in finding evidence for *opinio juris* do not mean that this requirement were less important
  - International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, pp. 254-255, para. 70: UN General Assembly resolutions can indicate the emergence of customary law

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- No strict or coherent standard used by the International Court of Justice for identifying customary international law
  - *North Sea Continental Shelf* Cases: ICJ applied the two-part test (state practice and *opinio juris*) to the equidistance method (more on that later), finding no customary law, but not to the issue of equitable principles (which it ended up applying in the delimitation of the CS in the North Sea)
  - Practical application may vary on a case-by-case basis (see also P.-M. Dupuy, Le juge et la règle générale, in: 93 Revue Générale de Droit International Public (1989), pp. 569 *et seq.*)

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Persistent objector
  - ”According to the doctrine of the persistent objector, a State which objects consistently to the application of a rule of law while it is still in the process of becoming such a rule may be able to ’opt out’ of the application of the rule after it has acquired the status of a rule of general customary law.” (Y. Tanaka, The International Law of the Sea (2012), Part I, 1, 3.1. (a))
  - Origin of the doctrine: International Court of Justice, *Norwegian Fisheries* Case, ICJ Reports 1951, p. 131
    - The United Kingdom disputed the legality of the Norwegian baselines (more on baselines in a moment) because they were thought to be inconsistent with a rule of customary law which existed at the time (the so called ’ten mile rule’, the contents of which are not important for us at the moment). The ICJ held the ten mile rule to be inapplicable to Norway because Norway had always opposed attempts by other States with regard to the applicability of this rule to the Norwegian coastline.
    - Other example from the law of the sea: 3 nautical miles (nm, 1 nm = 1.852 km) and 12 nm territorial sea. Today the breadth of the TS under customary law is 12 nm, a few decades ago it was still 3 nm. While the 12 nm rule was already emerging during the Cold War, West Germany was always a persistent objector to the 12 nm and only claimed a 3 nm TS. The idea behind this was that if there is no 12 nm rule, West German military / border guard vessels could get as close as 3 nm to the coast of East Germany (on traveling through an other state’s TS later more) and pick up East German refugees who tried to escape East Germany via the Baltic Sea.

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Treaties
  - Very important principal source of the Law of the Sea
    - In fact, most of this course will be devoted to one single treaty, the Law of the Sea Convention.
  - Large number of treaties on the global and regional level, including
    - Law of the Sea Convention (LOSC)
    - International Convention for the Safety of Life at Sea (SOLAS)
    - International Convention for the Prevention of Pollution From Ships (MARPOL)
    - Standards of Training, Certification and Watchkeeping for Seafarers (STCW)
    - Maritime Labour Convention (MLC)
  - Rules regarding treaties are covered by the Vienna Convention on the Law of Treaties (VCLT), many rules of which are already part of customary law.

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Many LOSC rules reflect older customary law or have since become customary law.
- Relationship between treaty law and customary law:
  - 3 possible effects of a treaty in relation to customary law
    - Codification of already existing rules of customary law (declaratory effect)
      - e.g. Preamble of the Geneva Convention on the High Seas (1958) codified existing rules of customary international law
    - A treaty can reflect existing state practice which does not yet amount to customary law, thus elevating rules from *lex ferenda* (the law as it ought to be) to *lex lata* (the law as it is)
      - e.g. Articles 1 – 3 Geneva Convention on the Continental Shelf (1958)
    - Creation of a new rule of customary law: a treaty can contain a new rule and States which are not parties to the treaty might accept this rule as well, which can lead to the emergence of a new rule of customary law which is identical to the treaty rule (generating effect)

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Relationship between different treaties
  - Growing number of treaties
  - Requires more coordination between different legal regimes
    - This concerns the interpretation level
    - e.g.: LOSC frequently refers to ”generally accepted international rules and standards”
      - These rules and standards are spelled out in more detail in other treaties
      - Therefore other documents must be taken into account when interpreting the LOSC
    - LOSC also has to be read together with the subsequent 1994 Implementation Agreement and the 1995 Fish Stocks Agreement

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Material sources
  - Treaties and customary law = formal sources
  - Material sources (secondary sources) provide evidence of the existence of rules which (if their existence has been proven), have the status of legally binding rules of general application
  - Article 38 (1) (d) Statute of the International Court of Justice:
    - ”judicial decisions and the teaching of the most highly qualified publicists of various nations” are ”subsidiary means for the determination of the rules of law”

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Judicial decisions are particularly important in the context of the law of the sea
  - Much potential for conflicting interests > increased importance of judicial decisions
- Some key writers' publications remain influential
  - In particular due to a lack of supreme legislative and judicial authorities with universal mandates in international law

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Non-binding instruments
  - Resolutions, declarations, guidelines by the UN, IMO etc.
    - Can be precursors to later treaties
      - e.g. the 1970 Declaration of Principles Governing the Deep Sea Bed later became the basis for Part XI of the LOSC
    - Can provide guidance regarding the interpretation of treaty rules
      - e.g. the 1995 Food and Agricultural Organisation's Code of Conduct for Responsible Fisheries amplifies relevant provisions of the LOSC and the 1995 Fish Stocks Agreement
    - Where a non-binding instrument forms 'generally accepted standards established through the relevant international organisation', e.g. the IMO, the non-binding instrument must be read together with the relevant provisions of the LOSC by rule of reference.

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Can confirm existing customary international law
  - e.g. UN General Assembly Resolution on Permanent Sovereignty over Natural Resources (1803 (XVII), see Arbitral Tribunal, Texas Overseas Petroleum Company / California Asiatic Oil Company v. Libyan Arab Republic, in: 17 International Legal Materials (1978), p. 30, para. 87.
- Can aid in the emergence of new rules of customary international law
  - e.g. 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Unilateral acts
  - In principle, unilateral acts cannot results in international rights and obligations
    - International Court of Justice, Burkina Faso v. Mali (Frontier Dispute Case), ICJ Reports 1986, p. 574, para. 39
    - on obligations, however, keep in mind the principle *non venire contra factum proprium* or *venire contra factum proprium non valet*
    - Limited effect not impossible
      - International Court of Justice, *Australia v. France* (Nuclear Test Case), ICJ Reports 1974, p. 267, para. 43
        - But not necessarily a general rule to the effect that unilateral acts could have effects
    - Unilateral declarations can start legal developments
      - e.g. 1945 Truman Declaration on the Continental Shelf

SOURCES OF THE INTERNATIONAL LAW OF THE SEA

- Considerations of humanity
  - ”elementary considerations of humanity” play a role in international law as ”general and well-recognized principles”
    - International Court of Justice, *United Kingdom v. Albania* (Corfu Channel Case), ICJ Reports 1949, p. 22.
  - ”apply in the law of the sea, as they do in other areas of international law”
    - ITLOS, *M/V Saiga (No. 2)*, 38 International Legal Materials (1999), p. 1355, para. 155
  - Are included in relevant treaties
    - 1979 International Convention on Marine Search and Rescue (SAR)
    - SOLAS
    - Also reflected in Articles 18 (2), 24 (2), 44 and 98 LOSC

PRINCIPLES OF THE INTERNATIONAL LAW OF THE SEA

- Modern International Law of the Sea consists of three major principles:
  - Freedom
  - Sovereignty
  - Common heritage of mankind

PRINCIPLES OF THE INTERNATIONAL LAW OF THE SEA

- Traditional principles
  - Freedom
  - Sovereignty
- Also: traditional area of conflict
- Modern addition
  - Common heritage of mankind

PRINCIPLES OF THE INTERNATIONAL LAW OF THE SEA

”The sea has always been lashed by two major contrary winds: the wind from the high seas to the land is the wind of freedom; the wind from the land toward the high seas is the bearer of sovereignties. The law of the sea has always been in the middle between these conflicting forces.”

R.-J. Dupuy, The Sea under National Competence,

in: R.-J. Dupuy / D. Vignes, A Handbook on the

New Law of the Sea, Vol. 1 (1991), p. 247.

PRINCIPLES OF THE INTERNATIONAL LAW OF THE SEA

- Historical background to the freedom of the sea:
  - Early 17th century: rivalry between the Netherlands (United East India Company) and Portugal concerning trade access to the Far East
  - 1609: Dutch lawyer Hugo Grotius published *Mare liberum*, arguing for freedom of navigation for the purpose of trade
  - Initially met with some resistance, the argument by Grotius has since become a key rule of international law

PRINCIPLES OF THE INTERNATIONAL LAW OF THE SEA

- Principle of sovereignty
  - Seeks to safeguard the interests of coastal States
  - Promotes the extension of sovereignty beyond the coast
  - Emer de Vattel, Le droit des gens (1758): States can have sovereignty over some parts of the sea but not over the high seas, ships from other States must be allowed to pass through the parts of the sea over which a State has sovereignty in order go to or come from the high seas
  - Distinction between these different areas confirmed in the *Bering Sea Fur-Seals* Arbitration Case between the United Kingdom and the United States (1893)
    - Already then: 3 nm limit
  - Essentially, this principle remains valid today.
    - Division of the sea in areas under national jurisdiction and areas not under national jurisdiction
    - After World War II: balance shifts towards more sovereignty

PRINCIPLES OF THE INTERNATIONAL LAW OF THE SEA

- Principle of the common heritage of mankind
  - Antithesis to the principles of sovereignty and freedom
    - Sovereignty and freedom are about State interests
    - The principle of the common heritage of mankind seeks to promote the common interest of mankind as a whole
    - ’Mankind’ is a transspatial and transtemporal concept
      - Everywhere
      - Everyone, including future generations
  - Included in Part XI of LOSC
    - ’Mankind’ is not just an abstract entity but has been given a voice in the form of the International Seabed Authority, which is acting on behalf of mankind as a whole
  - Entirely new perspective on the Law of the Sea

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Originally: only customary international law
- 1930: Hague Conference for the Codification of International Law
  - Recognition of
    - the sovereignty of the coastal State over a belt of sea along the coast
    - the right of other States to innocent passage (more on this concept later)

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- How far should the coastal State's sovereignty reach?
  - Cannon shot rule (= as far as a cannon on the coast can shoot)
    - France, Netherlands, Mediterranean
    - Downside: flexible, depending on technological developments
  - Fixed distance from the coast
    - Scandinavia (around 1750 Denmark and Sweden agreed on 4 nm)
    - 1793: United States suggests 3 nm
    - 1805: 3 nm recognized by United Kingdom (*Anna* Case)
  - No universal rule
  - 3 nm rule was opposed at the 1930 conference
    - Coastal States wanted more, maritime powers wanted only 3 nm
  - No solution found in 1930

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- 28 September 1945: U.S. President Truman issues Proclamations on the Continental Shelf and on Fisheries
  - = starting point for new development
- 1947: UN establishes International Law Commission (ILC) to promote the progressive development of international law and its codification
- 1956: ILC report ’Articles Concerning the Law of the Sea’, basis for the work of the First UN Conference on the Law of the Sea (UNCLOS I)

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- 1958: UNCLOS I
  - Four Conventions and one Optional Protocol adopted
    - Convention on the Territorial Sea and the Contiguous Zone
    - Convention on the High Seas
    - Convention on Fishing and Conservation of the Living Resources of the High Seas
    - Convention on the Continental Shelf
    - Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes
  - Nine resolutions regarding
    - Nuclear tests on the high seas
    - Pollution of the high seas by radioactive materials
    - Fishery conservation
    - Cooperation in conservation measures
    - Human killing of marine life
    - Coastal fisheries
    - Historic waters
    - Convening of a Second UN Conference on the Law of the Sea
    - Tribute to the ILC

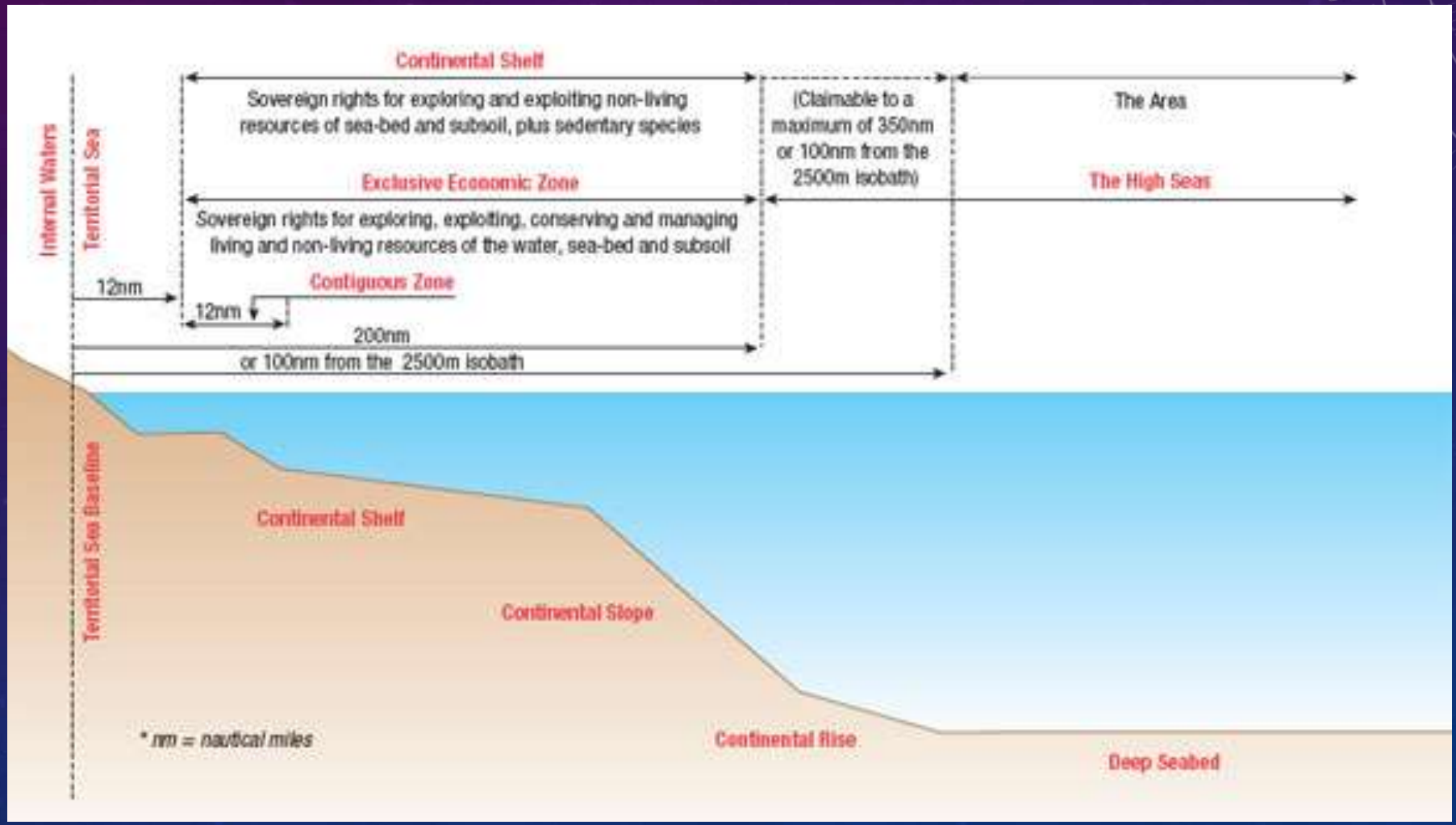
CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Dualism codified:
  - ”The term ’high seas’ means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.” (Article 1 of the Convention on the High Seas, HS)
- Clear division: internal waters, territorial sea, high seas
  - ”The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.” (Article 1 of the Convention on the Territorial Sea and the Contiguous Zone, TSC)
- Freedom of the high sea expressly guaranteed in Article 2 (2) HS

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Continental Shelf defined as ”the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas” (Article 1 (1) Continental Shelf Convention, CSC)
- Rights of coastal States over the Continental Shelf (CS) do not affect the legal status of the superjacent waters as High Seas (HS)
- TSC also allows for a Contiguous Zone (CZ)
- CZ is already part of the High Seas (Article 24 (1) TSC)

MARITIME ZONES TODAY



Source: http://www.dfo-mpo.gc.ca/oceans/canadasoceans-

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Note that at the UNCLOS I conference in 1958 the Exclusive Economic Zone, Deep Sea Bed etc. did not yet play a role – all that was to come much later
- UNCLOS I left some open questions
  - How far should the territorial sea reach? 12 nm ? 3 nm ?
    - No solution
    - But: Article 24 (2) TSC already ruled that the CZ must not extend more than 12 nm from the baseline from which the breadth of the TS is measured
      - Hence the TS could not be more than 12 nm wide
  - How to settle disputes peacefully?
    - Only Optional Protocol for compulsory dispute settlement

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Second UN Conference on the Law of the Sea, UNCLOS II (1960)
  - Issues: outer limit of the TS and the Fishery Zone
  - Suggestion by U.S. and Canada, incl. 6 nm TS plus 6 nm Exclusive Fishery Zone – not adopted by UNCLOS II
  - No result at UNCLOS II

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Third UN Conference on the Law of the Sea, UNCLOS III (1973-1982)
  - Growing demand for natural resources led States to extend their jurisdiction seaward
    - Approx. 20 States had claimed exclusive fisheries jurisdiction beyond 12 nm
    - Deep seabed mining seemed to become possible

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

Deep Seabed Mining: Manganese nodule, recovered by the German Research Vessel *Sonne* in the Pacific

Source: http://www.bgr.bund.de/EN/Themen/MarineRohstoffforschung/Bilder/Pol_Mn-Knolle_g_en.html;jses

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Marine environmental protection had been neglected at UNCLOS I and UNCLOS II
  - Demands for regulation

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Marine environmental protection had been neglected at UNCLOS I and UNCLOS II
  - Demands for regulation after the 1967 *Torrey Canyon* incident off the British coast

Source: http://www.zeesleepvaart.com/torreycanyon.eng.htm

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Important political change between UNCLOS II and UNCLOS III: decolonialization
  - Suddenly many new States
    - Different interests than traditional maritime powers
    - Existing rules were seen as benefiting primarily developed countries
      - Calls for reassessment of the International Law of the Sea as a whole

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- 1967: Malta's Permanent Representative to the UN, *Arvid Pardo* (key figure in the development of the Law of the Sea in the 20th century) proposed a declaration governing the seabed and its natural resources beyond the limits of national jurisdiction
  - UN General Assembly Resolution 2340 (XXII), 18 December 1967: Ad Hoc Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction
  - UN General Assembly Resolution 2467A (XXIII), 21 December 1968: replaced by permanent Committee
  - Soon it became clear that there were more open questions
  - UN General Assembly Resolution 2750C (XXV), 17 December 1970: convene UNCLOS III for 1973

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- UNCLOS III: eleven sessions between 1973 and 1982
- Unlike at UNCLOS I and II: no preparatory work by the ILC
  - Politically sensitive matters
  - Developing States felt underrepresented at ILC
  - Instead: work in three committees
    - First Committee: deep seabed
    - Second Committee: TS, CZ, EEZ, CS, international straits, archipelagic waters, high seas, land-locked and geographically disadvantaged States
    - Third Committee: marine environment and scientific research, transfer of technology
    - Plenary: peaceful uses of ocean space, preamble, final clauses, dispute settlement, general provisions, Final Act

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Principal features of UNCLOS III
  - Universality of participants,
    - not just UN member States, also non-member States
    - Many observers, incl. international organizations and NGOs
    - Universality led to legitimacy
      - Also: efforts to reach consensus on issues
  - Long duration of the conference (1973-1982), preparatory work since 1967
  - Large quantity of issues
    - UN General Assembly: ”the mandate of the Conference shall be to adopt a convention dealing with all matters relating to the law of the sea” (Resolution 3067 (XXVIII), 16 November 1973)
- LOSC was adopted on 30 April 1982 by 130 in favor, 4 against, 18 abstentions, 18 not recorded
- LOSC was opened for signature on 10 December 1982 and entered into force after 60 ratifications on 16 November 1994

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Equally authentic languages of the LOSC
  - Arabic, Chinese, English, French, Russian, Spanish
- Key features of LOSC
  - 320 Articles and 9 Annexes
  - 17 Parts (not incl. Annexes)
    - The first eleven parts deal with different marine spaces
    - Parts XII to XV deal with specific issues
    - Parts XVI and XVII deal with general and final provisions

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Important questions were answered by the LOSC
  - The territorial sea is no more than 12 nm wide
  - Dispute settlement procedures have been created
- New institutions were created
  - International Tribunal for the Law of the Sea (ITLOS)
  - International Seabed Authority (ISA)
  - Commission on the Limits of the Continental Shelf (CLCS)
- In principle, no reservations or exceptions allowed (Art. 309 LOSC)

CODIFICATION OF THE INTERNATIONAL LAW OF THE SEA

- Developments after UNCLOS III
  - Two Implementation Agreements
    - 1994 Implementation Agreement
    - 1995 Fish Stocks Agreement
  - *De facto* amendment of LOSC through Meetings of States Parties (SPLOS)
  - Development of the Law of the Sea through international organizations
    - IMO (shipping)
    - FAO (fisheries)
  - UN General Assembly
  - UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (ICP) since 1999
  - 2012: UN Oceans Compact Initiative by the UN Secretary General

BASELINES AND RELATED ISSUES

- Primary task of the Law of the Sea: determine the spatial extent of the coastal State jurisdiction over the oceans
- Seaward limits of each jurisdictional zone is measured from the coast
  - In order to make it easier, baselines are used
  - Rules concerning baselines are very important in the Law of the Sea
  - Important issues
    - Straight baselines
    - Bays
    - Islands
    - Low-tide elevations
  - Important, because the existence of such features influences the seaward limits of said zones significantly

BASELINES AND RELATED ISSUES

- Issues to look at:
  - Which are the rules governing baselines?
  - What are the problems associated with straight baselines?
  - What are the rules governing juridical bays in international law?
  - What is a historic bay and what are the elements of title to such a bay?
  - What is the definition of islands?
  - What are the differences between islands, rocks and low-tide elevations?

BASELINES AND RELATED ISSUES

- Articles 3, 33, 57, 76 (1) LOSC: The extent of maritime zones (with the exceptions of internal and archipelagic waters) is measured from the coast.
- The line from which this measurement is taken is the so called **baseline**.
- Distinction important because the legal regime for internal waters differs from the legal regime for the territorial sea.
- Problem: law is general in nature, coastlines can be very diverse
  - Tension between general rules and exceptions

BASELINES AND RELATED ISSUES

- Different types of baselines:
  - Normal baselines
  - Straight baselines
  - Closing lines across river mouths and bays
  - Archipelagic baselines

Now: focus on the first three.

BASELINES AND RELATED ISSUES

- Normal baseline = low-water line drawn along the coast
  - Article 5 LOSC: ”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.”
  - This definition is beneficial to the coastal State and clearly shows the relation between the land and the territorial sea, International Court of Justice, *Anglo-Norwegian Fisheries* Case, ICJ Reports 1951, p. 128.
  - ILC: ”no uniform standard by which States in practice determine this line”
  - DOALOS: large-scale chart can be anywhere between 1:50,000 and 1:200,000
  - LOSC contains no rule concerning normal baselines along polar coasts which are permanently covered by ice shelves, no customary law so far

BASELINES AND RELATED ISSUES

- Straight baselines
  - Low-water line = general rule
  - Sometimes impractical due to a highly complicated coastal configuration
  - Article 7 (1) LOSC allows for straight baselines
  - Straight baselines = a system of straight lines joining specified or discrete points on the low-water line, usually known as straight baselines turning points, which may be used only 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 (DOALOS)
  - Turning points should normally lie on the low-water line (follows from Article 7 (2) LOSC)
  - Difference between normal and straight baselines: straight baselines are drawn across water, normal baselines are drawn along the coast

BASELINES AND RELATED ISSUES

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Source: https://eosweb.larc.nasa.gov/sites/default/files/project/misr/gallery/norway_coast.jpg

See also B. G. Harsson / G. Preiss, Norwegian Baselines, Maritime Boundaries and the UN Convention on the Law of the Sea, in: 3 Arctic Review on Law and Politics (2012), pp. 108–129.

BASELINES AND RELATED ISSUES

Source: http://www.pentaxforums.com/forums/10-pentax-slr-lens-discussion/187253-lenses-visit-fjords.html

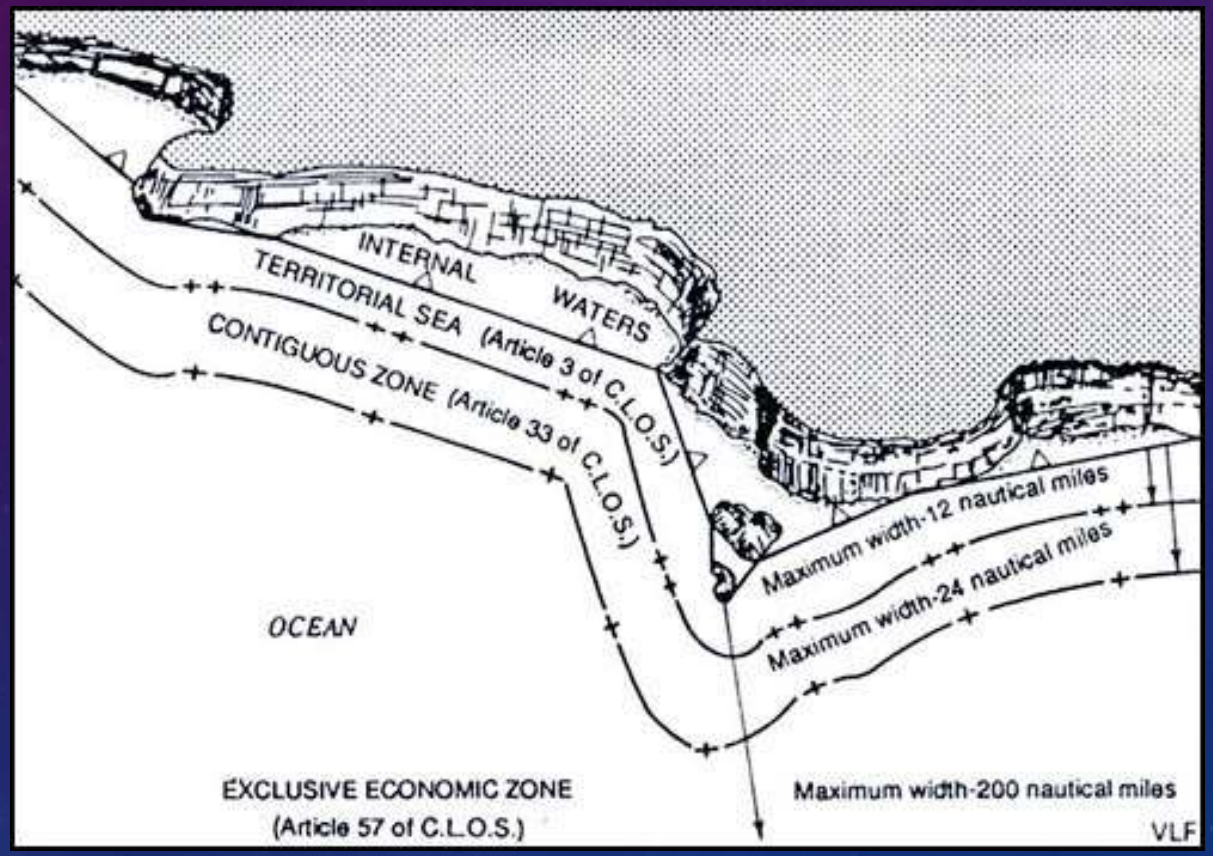
BASELINES AND RELATED ISSUES

- *Anglo-Norwegian Fisheries* Case (1951)
  - Norwegian coast includes mainland and the *skjaergaard* (120,000 islands plus islets, rocks, reefs)
  - 1935: Norway drew straight baselines connecting 48 points on the mainland and islands in order to determine the outer limits of the exclusive fisheries zone claimed by Norway
  - A number of UK fishing trawlers operating in the area claimed by Norway were arrested, the UK considered the Norwegian approach to be invalid and instituted proceedings at the ICJ in 1949

BASELINES AND RELATED ISSUES

- *Anglo-Norwegian Fisheries* Case (1951)
  - ICJ ruled in favor of Norway:
    - ”Where a coast is deeply indented and cut into […] the baseline becomes independent of the low-water mark, and can only be determined by means of a geometrical construction.”
    - The ICJ held that in such cases it is permissible to draw straight baselines between points on the low water-mark
    - In addition to ruling on the ”if” of baselines, the ICJ set up three requirements regarding ”how” to draw straight baselines:
      - Baselines must follow the general direction of the coastline
      - Certain sea areas which are located between the baseline and the coast must be sufficiently closely linked to the land domain to be treated as internal waters (the same as rivers or lakes inland)
      - Certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage, should be taken into consideration. (ICJ Reports 1951, p. 133)
  - This formula was later included in Article 4 of the Territorial Sea Convention and can now be found in Article 7 LOSC.

BASELINES AND RELATED ISSUES



Straight baselines: simple example

Source: http://bldgblog.blogspot.fi/2010/02/glacier-island-storm.html

BASELINES AND RELATED ISSUES

- Article 7 LOSC:

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.

BASELINES AND RELATED ISSUES

- Interrelationship between Article 7 (1) and (5) LOSC
  - Wording of Article 7 LOSC:

"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.

[…]

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."

- Article 7 (5) LOSC is only applicable if the conditions of Article 7 (1) LOSC are already met.

BASELINES AND RELATED ISSUES

- When are the conditions of Article 7 (1) LOSC fulfilled?
  - “where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity”
  - ”deeply indented” = ?
    - No objective test
  - ”fringe of islands” = ?
    - More than one island – but how many?
  - ”immediate vicinity” = ?
- Elsewhere, LOSC provides clearer definitions
  - Bays: Article 10 (5) LOSC
  - Archipelagic baselines: Article 47 (2) LOSC

BASELINES AND RELATED ISSUES

- The length of a baseline is considered to be an indicator of its validity
  - Baselines must not be excessively long, examples for questionable baselines:
    - Myanmar: 222.3 nm long baseline along the Gulf of Martaban (enclosing an area just a bit smaller than Estonia)
    - Vietnam: 161.3 nm from Bay Canh Islet to Hon Hai Islet and 161.8 nm from Hon Hai Islet to Hon Doi Islet
  - If a baseline is in violation of Article 7 LOSC, it will be invalid at least in relation to the States that object to it.
  - International Court of Justice, *Qatar / Bahrain* Case (Merits), ICJ Reports 2001, p. 103, para. 212: restrictive use of baselines.

BASELINES AND RELATED ISSUES

- Baselines must not be drawn from low-tide elevations, unless
  - permanent installations are located there or
    - Lighthouses increase safety of navigation
  - where the drawing of baselines to such elevations has received general international recognition
    - covers one specific Norwegian case beyond Art. 4 (3) TSC
  - See already G. Marston, Low-Tide Elevations and Straight Baselines, in: 46 British Yearbook of International Law (1972-1973), pp. 405 et seq.
- Baselines may not be used to cut off the Territorial Sea of an other State from the High Seas or an Exclusive Economic Zone, Article 7 (6) LOSC
  - Freedom of navigation is to be guaranteed
  - Protects States in particular situations, e.g. Monaco in relation to France or Turkey in relation to the Greek islands off the West coast of Turkey, Bosnia-Herzegovina in relation to Croatia etc.

BASELINES AND RELATED ISSUES

- Article 7 (2) LOSC allows States to take changing coastlines in deltas into account: such baselines shall remain valid even if the factual coastline has moved:

”Where, because of the presence of a delta or 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 [landward] regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with [the LOSC].”

  - Baseline turning point can end up in the sea
  - Definitions unclear:
    - ”delta”
    - ”highly unstable”
  - Baselines must fulfill the requirements of Article 7 (1) LOSC in order to qualify for the exception under Article 7 (2) LOSC.
  - In case global warming will lead to significantly rising sea levels: could Article 7 (2) LOSC provide the point of departure for a new rule of customary international law to the effect that current baselines can remain in place even if water levels rise?

BASELINES AND RELATED ISSUES

- Baselines have to be published
  - Follows indirectly from Articles 5 and 16 LOSC
  - Everybody who operates in the area must know if one is in the Territorial Sea or in internal waters
  - Usually, the coordinates of the baseline turning points are also published

BASELINES AND RELATED ISSUES

- Juridical bays
  - Bays are important because they usually have a much closer connection to the surrounding land than other parts of the sea:

”the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line.”

(Arbitral Tribunal, *North Atlantic Coast Fisheries* Case (United Kingdom v. United States), 7 September 1910, in: 11 Records of International Arbitral Awards, p. 196)

BASELINES AND RELATED ISSUES

- If the low water line would apply to bays, it would be possible that the center of the bay would consist of High Seas, surrounded by Territorial Sea, which would be inconvenient for marine activities. Therefore customary law has allowed States to draw a closing line along the entrance of a bay, turning the bay into internal waters.
  - The legal concept of the bay (juridical bay) is therefore an exception to the general rules on baselines.
  - The closing line of the bay becomes the baseline.
  - This is important for shipping States because in internal waters (unlike in the Territorial Sea), there is no right to innocent passage (more on that later).
  - What are the limits to drawing such closing lines?
    - 1910: Arbitral Tribunal, *North Atlantic Coast Fisheries* Case: closing line must not be longer than 10 nm
    - 1951: ICJ, *Anglo-Norwegian Fisheries* Case: 10 nm rule not customary law

BASELINES AND RELATED ISSUES

- Article 10 LOSC
  - Only bays that belong to one State
  - Not including historic bays (special regime, more later)
  - Not applicable to bays for which straight baselines are used
    - Legally speaking, although they look the same on a map, closing lines are different from straight baselines

BASELINES AND RELATED ISSUES

- Article 10 (2) LOSC defines what a bay is
  - ”well-marked indentation [measures from the low-water mark, Article 10 (3) LOSC] whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and
  - constitute more than a mere curvature of the coast”
  - ”An indentation shall not […] be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.”
  - Article 10 (3) LOSC: ”Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.”

BASELINES AND RELATED ISSUES

- Article 10 (4) and (5) LOSC: closing line must not be longer than **24 nm** (twice the maximum of the breadth of the Territorial Sea)
  - 24 nm rule is now customary international law (International Court of Justice, *Land, Island and Maritime Frontier Dispute* Case (El Salvador / Honduras), ICJ Reports 1992, p. 588, para. 383)

BASELINES AND RELATED ISSUES

- Historic bays
  - Exception to general rules on bays
  - Not defined in LOSC or TSC
  - Historic bays are part of the concept of historic waters
    - ”waters which are treated as internal waters but which would not have that character were it not for the existence of [a] historic title” on the part of the coastal State

      (International Court of Justice, Anglo-Norwegian Fisheries Case, ICJ Reports 1951, p. 130)
    - How does a State get title to such a bay? Three cumulative criteria:
      - Exercise of authority over the area
      - Continuity of the exercise of authority
      - Acquiescence of foreign States
        - Counterexamples: protests against
          - Russia’s claim re Peter the Great Gulf in Far East Russia
          - Libya’s claim re Gulf of Sidra
  - No general rules, only acceptance of individual cases
  - Under Article 298 (1) (a) (i) LOSC, disputes involving historic bays or titles may be exempted from the compulsory procedure of peaceful settlement of international disputes under Part XV LOSC

BASELINES AND RELATED ISSUES

- Bays bordering more than one State
  - Assuming it is not a historic bay, two potential solutions:
    - Bordering States may draw a closing line by agreement and divide the internal waters
      - 1988: Tanzania and Mozambique Agreement re Ruvuma Bay
    - Or: normal rules on baselines apply
      - Because such bays are neither historic bays nor covered by Article 10 LOSC
      - And because LOSC does not foresee the possibility of multi-State bays in which the internal waters of one State immediately border on the internal waters of an other State (International Court of Justice, *Gulf of* Fonseca Judgment, Dissenting opinion by Judge *Oda*, ICJ Reports 1992, p. 746, para. 24)
        - Multi-State bays may not be dogmatically sound but LOSC is often concerned with fairness: would it be unfair to limit States in this way?
        - Remember the need for a special relationship between the waters of the bay and the surrounding land. Can such a relationship exist in the case of a shared bay?

BASELINES AND RELATED ISSUES

- River mouths
  - Article 9 LOSC: ”If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks.”
    - Directly = without forming an estuary (follows more clearly from the French version of the norm) - may be difficult to distinguish in practice
    - Where should the base points be located from which to draw the line across the mouth of the river? Can be difficult if there is a large tidal range – what is the low-water point? Article 9 LOSC does not provide an answer.
    - Article 9 LOSC does not specify the maximum length of the line.
    - What in case the river forms the border between two States?
      - Situation similar to shared bays?
      - But the act of drawing baselines is a unilateral act.
      - Argentina and Uruguay agreed on a line to close the mouth of the Rio de la Plata – followed by a protest by the U.S.

BASELINES AND RELATED ISSUES

- Ports
  - Outermost parts of the harbour are included in the coastline (Article 11 LOSC, already: 1981 *Dubai / Sharjah* Border Arbitration)
  - Includes ”installations which allow ships to be harboured, maintained or repaired and which permit or facilitate the embarkation and disembarkation of passengers and the loading or unloading of goods” (International Court of Justice, *Romania / Ukraine*, ICJ Reports 2009, p.106, para. 133)
    - Mere roadsteads will usually not fulfill these criteria

BASELINES AND RELATED ISSUES

- Islands
  - naturally formed area of land
    - Not icebergs, artificial installations etc.
    - No minimum size (International Court of Justice, *Qatar / Bahrain* Case, ICJ Reports 2001, p. 97, para. 185)
  - surrounded by water
    - Not connected to land at any time, by causeways, low tide elevations etc.
  - above water at high tide
    - more than just a low tide elevation (a building on a low tide elevation does not turn the low tide elevation into an island, even if the building is partially above water at high tide)

BASELINES AND RELATED ISSUES

- Islands are land territory and thus generate maritime zones (Article 121 (2) LOSC)
  - Often very large maritime zones (200 nm EEZ, Continental Shelf etc.)
  - Should even tiny islands have such an effect? After all, this diminishes the space of the High Seas and the Area
  - Art. 121 (3) LOSC: ”Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” (but Territorial Sea and Contiguous Zone)
    - Does not apply to rocks which are part of the baseline
    - UK had claimed a 200 nm EEZ around Rockall but gave up this claim after protests by Ireland, Denmark and Iceland
    - Still disputed: legal nature of Okinotorishima (Japan), considered to be only a rock by China, S. Korea, Taiwan
    - No permanent human habitation required
    - ”human habitation or economic life”: is one of both sufficient? Or is that one single concept?
    - Economic life does not necessarily have to be commercial in nature, ICJ, *Greenland / Jan Mayen* Case, 1999
    - Economic life which is introduced artificially is insufficient under Art. 121 (3) LOSC, external supplies are allowed

BASELINES AND RELATED ISSUES

- Reefs
  - Article 6 LOSC: ”In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.”
  - ”islands situated on atolls” requires terra firma, not just an atoll or coral reef alone (see L. L. Herman, The Modern Concept of the Off-Lying Archipelago in International Law, in: 23 Canadian Yearbook of International Law (1985), p. 191).
  - Does not apply to permanently submerged reef features, Arbitral Tribunal, *Eritrea / Yemen* Arbitration (Second Phase), in: 40 International Legal Materials (2001), p. 1007, paras. 143 et seq.
  - ”fringing reef” is not defined, could include barrier reefs which are separated from the low water line by a deeper channel or lagoon

BASELINES AND RELATED ISSUES

- Low-tide elevations (LTEs)
  - Article 13 (1) LOSC: ”A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.”
  - LTEs which are totally or in part within the Territorial Sea from the mainland or from an island can have a Territorial Sea of their own, measured from the low water line of the LTE
  - LTEs which are located outside the Territorial Sea of the mainland or an island do not have a Territorial Sea of their own, this also refers to LTEs which are located within the Territorial Sea of an LTE which qualifies for one
  - Still some open questions regarding what is an LTE, what is an island etc.

INTRODUCTION TO TERRITORIAL SOVEREIGNTY OVER MARINE SPACES

- Internal waters, territorial seas, international straits and archipelagic waters are marine spaces under the territorial sovereignty of the coastal State
- The use of the marine environment for sea communication necessitates the freedom of navigation through those spaces. Consequently, marine spaces under territorial sovereignty are part of the territory of the coastal State and the highway for sea communication at the same time.
- How it is possible to reconcile the territorial sovereignty of the coastal State and the freedom of navigation?

INTRODUCTION TO TERRITORIAL SOVEREIGNTY OVER MARINE SPACES

- Key questions:
  - What is the coastal State's jurisdiction over foreign vessels in internal waters?
  - How is it possible to reconcile the need to provide refuge for ships in distress and the protection of the offshore environment of the coastal State?
  - What is the right of innocent passage?
  - Do foreign warships enjoy the right of innocent passage through the territorial sea?
  - What is the legal regime of international straits?
  - What is the legal regime of archipelagic waters?
  - What are the differences between the right of innocent passage, the right of transit passage and the right of archipelagic sea lane passage?

INTRODUCTION TO TERRITORIAL SOVEREIGNTY OVER MARINE SPACES

- Need for reconciliation of competing interests
  - reconciliation between the territorial sovereignty of the coastal State and the freedom of navigation
  - tension between the strategic interest of naval powers and the security interest of coastal States
    - ensuring the freedom of navigation of warships through marine spaces under national jurisdiction is of paramount importance for naval powers
    - foreign warships through offshore areas may be a source of threat to the security of coastal States
  - reconciliation between the navigational interest of user States and the shipping industry on the one hand and the marine environmental protection of coastal States on the other hand
    - size of vessels is ever increasing, and the contents of cargoes may be highly dangerous
    - balance the freedom of navigation and the protection of the offshore environment of coastal States

MARINE SPACES UNDER THE NATIONAL JURISDICTION OF THE COASTAL STATE

- Internal waters
- Territorial Sea
- International Straits
- Archipelagic waters
- Contiguous Zone
- Exclusive Economic Zone
- Continental Shelf

INTERNAL WATERS

- Internal waters are ‘those waters which lie landward of the baseline from which the territorial sea is measured’.
  - parts of the sea along the coast down to the low-water mark
  - ports and harbours
  - Estuaries
  - landward waters from the closing line of bays
  - waters enclosed by straight baseline
- internal waters in the law of the sea do not include waters within the land territory and land-locked waters or lakes
- seaward limit of internal waters is determined by a baseline from which the territorial sea is measured
- internal waters are bound by the territorial sea of the coastal State
  - Exception: archipelagic States (Archipelagic States may draw lines limiting their internal waters across the mouths of rivers, bays and ports only within their archipelagic waters. In this case, the internal waters are bound by the archipelagic waters, not by the territorial seas.)

INTERNAL WATERS

- Legal status of internal waters
  - Article 2(1) LOSC
  - The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
  - Unlike the territorial sea, the right of innocent passage does not apply to internal waters.
    - Exception: internal waters have been newly enclosed by a straight baseline

INTERNAL WATERS

- Jurisdiction in internal waters, Article 8 LOSC
  - Private law: Normally the jurisdiction of the coastal State is not exercised in connection with disputes of a private nature arising between members of the crew.
  - Criminal Law
    - Classical views
      - Anglo-American view
        - coastal State has complete jurisdiction over foreign vessels in its ports
        - as a matter of comity, the coastal State may refrain from exercising its jurisdiction over those vessels, U.S. Supreme Court, *Wildenhus* case (1887)

INTERNAL WATERS

- French view
  - the coastal State has in law no jurisdiction over purely internal affairs on foreign vessels in its ports, opinion of the French Conseil d'Etat in the *Sally* and *Newton* cases (1806)
    - members of the crews of two U.S. ships assaulted another
    - local jurisdiction did not apply to matters of internal discipline or offenses by members of a crew, unless the peace and good order of the port were affected, or the local authorities were asked for assistance
    - did not completely deny the territorial jurisdiction of the coastal State over offenses committed on board foreign ships in French ports
    - coastal State would not exercise its jurisdiction in certain cases
  - 1859 *Tempest* Case: homicide of a fellow crew member compromised the peace of the port, and therefore brought the ship under local jurisdiction
- Minimal practical differences

INTERNAL WATERS

- Modern practice concerning coastal State criminal law
  - In modern practice, the scope of criminal jurisdiction of the coastal State over foreign merchant ships is provided by specific consular conventions.
  - Consistent practice by States:
    - Foreign ships entering a port are subject to the sovereignty of the coastal State and that State has criminal jurisdiction over them. However, the coastal State does not exercise criminal jurisdiction over matters involving solely the internal discipline of the ship.

INTERNAL WATERS

- The coastal State will exercise criminal jurisdiction in the following cases:
  - when an offence caused on board the ship affects or is likely to affect the peace and order or the tranquillity of the port or on land, or its interests are engaged,
  - when its intervention is requested by the captain, or the consul of the flag State of the vessel,
  - when a non-crew member is involved,
  - when an offence caused on board the ship is of a serious character, usually punishable by a sentence of imprisonment for more than a few years,
  - when matters which do not concern solely the 'internal economy' of a foreign ship, such as pollution and pilotage, are involved.
- It is solely the coastal State which may determine the existence of a situation as described above.
- Unlike merchant ships, warships and other government ships operated for non-commercial purposes enjoy sovereign immunity. Members of the crew ashore on duty or official mission are immune from the local jurisdiction, when committing breaches of local law.
  - exceptions: crimes against humanity etc.

INTERNAL WATERS

- Asylum
  - Political asylum on board foreign ships in internal waters?
    - Unclear
- Slavery
  - Prohibited by *jus cogens*
  - Currently 27-30 million slaves
  - “Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.“ (Art. 99 LOSC, Article 13 of the Geneva Convention on the High Seas)
    - = obligation of flag States to protect against slavery

INTERNAL WATERS

- Access to ports
  - As ports are under the territorial sovereignty of the coastal State, that State may regulate foreign vessels' entry to its ports
  - No general right to entry into ports of foreign States in customary international law (*Nicaragua* Case)
    - 1958 *Aramco* award, which upheld the right of ships to access to ports under customary international law, does not seem to be entirely in conformity with State practice
  - Dangerous cargo
    - it is not uncommon that nuclear-powered ships and ships carrying nuclear or other noxious substances can enter a port only with the permission of the coastal State
      - Fire aboard ships with nuclear cargo in Hamburg, 2013
    - establish particular requirements for the entry of foreign vessels into their ports in order to prevent pollution from vessels
    - Article 211(3) of the LOSC: In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject (Article 25(2))

INTERNAL WATERS

- In practice, sea communication would be much disturbed without access to ports. Thus, many bilateral treaties of ‘Friendship, Commerce and Navigation’ confer rights of entry to ports for foreign merchant ships
- Normally, ports are open for trade unless declared otherwise

INTERNAL WATERS

- Access to ports by ships in distress
  - In light of imminent danger, particular rules apply to a ship in distress.
  - 1809 *Eleanor* case, four requirements:
    - distress must be urgent and something of grave necessity.
    - there must be at least a moral necessity
    - it must not be a distress which he has created himself
    - the distress must be proved by the claimant in a clear and satisfactory manner
      - Burden of proof rests with the ship in question
  - 1979 International Convention on Maritime Search and Rescue defines a 'distress phase' as: 'A situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance'.
  - For humanitarian and safety reasons, it is generally recognized that any foreign vessel in distress has a right of entry to any foreign port under customary international law.
  - A ship in distress entering a port or a place of refuge enjoys immunity from local laws. The immunity applies to arrest of the vessel, to local health, criminal and tax laws, as well as to public charges levied for entry into port.

INTERNAL WATERS

MSC Flaminia (2012)
Cargo: *i.a.* Calcium hypochlorite Ca(ClO)2
-self-heating
-explosive
-poisonous gases

3 dead
No port of refuge

Source: http://www.havariekommando.de/presse/gallery.php.html?file=bildergalerie/2012_08_20/DSC_0044.JPG&oid=6576&tsize=1

Environmental hazards arising from ships in distress

INTERNAL WATERS

- Environmental hazards arising from ships in distress
  - Refuge denied for some ships, e.g. *MSC Flaminia* (2012), *Erika (1999), Castor* (2001), *Prestige* (2002)
  - Ireland, 1995 *M/V Toledo* Case, Judge *Barr*, Irish High Court of Admiralty: "In summary, therefore, I am satisfied that the right of a foreign vessel in serious distress to the benefit of a safe haven in the waters of an adjacent state is primarily humanitarian rather than economic. It is not an absolute right. If safety of life is not a factor, then there is a widely recognized practice among maritime states to have proper regard to their own interests and those of their citizens in deciding whether or not to accede to any such request."
  - Guidelines on Places of Refuge for Ships in Need of Assistance adopted on 5 December 2003 by the International Maritime Organization (IMO). Paragraph 3.12: Where permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weight all the factors and risks in a balanced manner and give shelter whenever reasonably possible.

INTERNAL WATERS

- Customary law: the right of entry into foreign ports by vessels in distress is a long-established rule of customary international law. It is debatable whether there is widespread and uniform State practice, along with *opinio juris*, which may change the rule at this stage.
- Treaty law: Article 195 LOSC explicitly forbids States 'to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another'.

- Article 20 of Directive 2002/59/EC requires the EU Member States to draw up plans to accommodate ships in distress in the waters under their jurisdiction.
  - Did not (yet) work in the case of the *MSC Flaminia*.
- Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea of 2002 also imposes upon the Contracting Parties a duty to define strategies concerning reception in places of refuge, including ports, of ships in distress presenting a threat to the marine environment.

TERRITORIAL SEA

- Legal status of the Territorial Sea
  - The territorial sea is a marine space under the territorial sovereignty of the coastal State up to a limit not exceeding twelve nautical miles measured from baselines.
    - Includes: water, seabed and subsoil and airspace
  - Court of Arbitration, 1909 *Grisbadarna* (note: typing error in the Textbook by *Tanaka*) case between Norway and Sweden, stated that ‘the maritime territory is an essential appurtenance of land territory’, and ‘an inseparable appurtenance of this land territory’.

TERRITORIAL SEA

- Judge McNair: ‘the possession of this territory [territorial waters] is not optional, not dependent upon the will of the State, but compulsory’. There is no doubt that the territorial sea is under the territorial sovereignty of the coastal State. As explained earlier, territorial sovereignty in international law is characterised by completeness and exclusiveness. Accordingly, the coastal State can exercise complete legislative and enforcement jurisdiction over all matters and all people in an exclusive manner unless international law provides otherwise.
- Article 2(3) LOSC: sovereignty over the territorial sea is subject to the Convention and to other rules of international law
  - e.g. coastal States’ sovereignty over the territorial sea is restricted by the right of innocent passage for foreign vessels

TERRITORIAL SEA

- Breadth of the Territorial Sea
  - 137 States Parties to the LOSC have established a 12 nm territorial sea
    - approximately 10 States have claimed, wholly or partly, a territorial sea of less than 12 nm
    - 24 States that formerly claimed a territorial sea more than 12 nm in breadth have pulled back its breadth to 12 nm
  - Only 9 States, including 4 parties to the LOSC, claim a greater breadth than 12 nm
    - But protests from other States!
    - 200 nm TS = contrary to international law
  - 12 nm TS = customary law
- Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea.

TERRITORIAL SEA

- Innocent Passage
  - The right of innocent passage of foreign ships through the coastal State's Territorial Sea
    - based on the freedom of navigation as an essential means to accomplish freedom of trade.
    - 1758: Vattel had already accepted the existence of such a right
    - 1801: *Twee Gebroeders* Case, Lord Stowell: "permission is not usually required"
    - Around 1850: innocent passage = customary law
    - 1930 Hague Conference: "generally recognized" right
    - Codified in Article 14(1) TSC, Article 17 LOSC "Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

TERRITORIAL SEA

- Right of innocent passage does not include the freedom of overflight
- Under Article 18(1) of the LOSC, innocent passage comprises lateral passage and vertical passage.
  - Lateral passage is the passage traversing the territorial sea without entering internal waters or calling at a roadstead or port facility outside internal waters.
  - Vertical or inward/outward-bound passage concerns the passage proceeding to or from internal waters or a call at such roadstead or port facility.
  - the direction of the passage is at issue in relation to the criminal jurisdiction of coastal States over vessels of foreign States in the territorial sea
- Passage shall be continuous and expeditious
  - normal movement is permitted, incl. Temporary stops, but no hovering

TERRITORIAL SEA

- Can a breach of the requirement to navigate on the surface negate the right of innocent passage?
  - Example: submerged submarine
  - Whilst it seems that a submerged submarine in the territorial sea is not considered as innocent passage, submergence in the territorial sea will not instantly justify the use of force against the submarine. Above all, every measure should be taken short of armed force to require the submarine to leave.
  - Using armed force would be an armed reprisal, which would be illegal under international law. The use of armed force is severely limited under international law, mainly to cases of self-defense / defense of an ally and under Chapter VII of the UN Charter (peacekeeping / peace enforcement).

TERRITORIAL SEA

- Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea in accordance with Article 21(4).
  - The most important regulations are probably those in the 1972 Convention on the International Regulations for Preventing Collisions at Sea.

TERRITORIAL SEA

- Article 19(1) LOSC: Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
- Article 19(2) contains a catalogue of prejudicial activities:
  - any threat or use of force,
  - any exercise with weapons of any kind,
  - spying,
  - any act of propaganda,
  - the launching, landing or taking on board of any aircraft,
  - the launching, landing or taking on board of any military device,
  - the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws of the coastal State,
  - any act of willful and serious pollution,
  - fishing activities,
  - research or survey activities,
  - interference with coastal communications or any other facilities,
  - And any other activity not having a direct bearing on passage.
- The last item in the list, seems to imply that the above list is non-exhaustive.
- The term ‘activities’ under Article 19(2) seems to suggest that the prejudicial nature of innocent passage is judged on the basis of the manner in which the passage is carried out, not the type of ship. This approach seemed to be echoed by the ICJ in the 1949 *Corfu Channel* case.

TERRITORIAL SEA

- Some clauses of Article 19(2) are so widely drafted that disputes may arise with respect to their interpretation
  - Paragraph 4 of the 1989 Uniform Interpretation between the United States and the USSR stated that "A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocent passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time." This is not necessarily a rule of customary international law but so much common sense that it might reflect a common practice.
- Whether paragraph 2 of Article 19 is meant to be an illustrative list of paragraph 1 of the same provision, or whether the coastal State may evaluate innocence solely on the basis of paragraph 1, independent from paragraph 2. If paragraph 2 is an illustrative list of paragraph 1, paragraph 1 would seem to be superfluous.

TERRITORIAL SEA

- Unlike the second paragraph, the first paragraph makes no explicit reference to ‘activities’. Hence there appears to be scope to argue that the criterion for judging innocence under Article 19(1) is not limited to the manner of the passage of ships. At least, there is no clear evidence that the criteria for evaluating innocence of the passage of foreign warships in paragraphs 1 and 2 of Article 19 must be the same.
  - If this is the case, it seems that the coastal State can regard the particular passage of a ship as non-innocent on the basis of Article 19(1), even if the passage concerned does not directly fall within the list of Article 19(2).
  - Following this interpretation, for instance, the Japanese government takes the view that the passage of foreign warships carrying nuclear weapons through its territorial sea is not innocent, whilst Japan generally admits the right of innocent passage of foreign warships.

TERRITORIAL SEA

- Would a violation of a coastal State's law *ipso facto* deprive a passage of its innocent character?
  - Opinion of the members of the ILC was divided on this particular issue
  - Literal interpretation of Article 14(4) of the TSC appears to suggest that the violation of the coastal State's law does not ipso facto deprive a passage of its innocent character, unless such violation is prejudicial to the coastal State's interests.
    - The only exception involves Article 14(5), which provides that: Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.
    - This provision was inserted in order to introduce an additional criterion of innocence. It seems to imply that apart from the violation of fishing law, the breach of the law of the coastal State does not ipso facto deprive a passage of its innocence.
    - This is not that surprising because coastal States have a strong interest in their fisheries, an interest which is only growing as fish stocks become more and more depleted.
  - There appears to be scope to argue that, under the LOSC, the violation of the law of the coastal State does not ipso facto deprive a passage of its innocent character, unless such violation falls within the scope of Article 19.

TERRITORIAL SEA

- The right of innocent passage of warships
  - The right of innocent passage of warships is of paramount importance for major naval powers in order to secure global naval mobility. However, the passage of foreign warships through the territorial sea may be a threat to the security of the coastal State.
  - 1949 *Corfu Channel* case: While the ICJ accepted the right of innocent passage of foreign warships in straits used for international navigation, it did not directly address the question whether foreign warships have the same right of innocent passage in the territorial sea. Overall it may have to be accepted that customary international law is obscure on this subject.

TERRITORIAL SEA

- Treaty Law:
  - Article 14(1) of the TSC stipulates that: Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea. It must be noted that this provision is under the rubric 'Rules Applicable to All Ships'. Further, Article 14(2) sets out that submarines are required to navigate on the surface, when in the territorial sea, and to show their flag. It can be presumed that this provision relates specifically, if not totally, to military submarines. Moreover, Article 23 provides that if a warship fails to comply with the regulations of the coastal State concerning passage through the territorial sea, the coastal State may require the warship to leave the territorial sea. Noting these points, some argue that warships have a right of innocent passage under the TSC.
  - LOSC contains no *explicit* provision with respect to the right of innocent passage of foreign warships in the territorial sea.
    - Article 17 of the LOSC, which provides the right of innocent passage, is under the rubric 'Rules Applicable to All Ships'. It can be presumed, therefore, that Article 17 is applicable to all ships, including warships.
    - Article 20 of the LOSC requires submarines and other underwater vehicles to navigate on the surface and to show their flag in the territorial sea.
    - Article 19(2) sets out a catalogue of activities which render passage non-innocent. Some of these activities, such as any exercise or practice with weapons, the take-off or landing of aircraft, and the launching or receiving of any military device, relate specifically, if not totally, to warships.
    - Article 30 stipulates that if any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately. This provision would be pointless if foreign warships had no right of innocent passage in the territorial sea.
    - Those provisions seem to hint at the right of innocent passage of foreign warships under LOSC.

TERRITORIAL SEA

- Customary Law:
  - State practice is not uniform on this subject. In ratifying the LOSC, some States – for example, Germany and the Netherlands – explicitly declared that the Convention permits innocent passage in the territorial sea for all ships, including foreign warships. Thailand has also taken the position that all foreign ships, including warships, can exercise the right of innocent passage in the territorial sea.
  - 1989 Uniform Interpretation of Norms of International Law Governing Innocent Passage between the USA and the USSR, Paragraph 2: All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.
  - However, nearly forty States, mainly developing States, require prior notification or prior authorization of the passage of warships through their territorial sea.
    - In ratifying the LOSC, however, some States – Germany, Italy, the Netherlands and the United Kingdom – expressed the view that claims to prior authorization and prior notification were at variance with the LOSC. The USA has also protested against most of the claims to both prior authorization and prior notification.61 A question thus arises whether prior notification or prior authorization is compatible with the LOSC.
  - A distinction must be drawn between the requirement of prior notification and that of prior authorization.
    - There appears to be scope to argue that the requirement of prior notification could fall within the scope of Article 21(1)(a) of the LOSC. If this is the case, the right of innocent passage of foreign warships and the requirement of prior notification of the coastal State could be compatible. However, it appears that the legality of prior *authorization* remains a matter for discussion.

TERRITORIAL SEA

- Coastal State action against foreign warships is qualified by the sovereign immunity afforded to warships. However, the coastal State may require any warship to leave its territorial sea if the warship does not comply with the laws and regulations of the coastal State pursuant to Article 30 of the LOSC.
- Under Article 31, the flag State is also obliged to bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other governmental ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of the LOSC or other rules of international law.

TERRITORIAL SEA

- A further question is whether a foreign warship has a right to enter into the territorial sea of another State to render assistance to persons in distress, without prior notification to the coastal State. Article 98 of the LOSC, which applies to the high seas and the EEZ, places an explicit obligation upon every State to render assistance to any person found at sea in danger of being lost. Whilst the LOSC contains no duty to render assistance to any persons in distress in the territorial sea, the offer of such assistance would be consistent with the requirement of the consideration of humanity. Indeed, a temporary entrance of a foreign warship into the territorial sea for the purpose of rendering assistance to persons in distress would pose no threat to the coastal State.

TERRITORIAL SEA

- The right of innocent passage of foreign nuclear-powered ships and ships carrying inherently dangerous or noxious substances
  - Article 23 of the LOSC provides as follows:
    - Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.
    - Examples of international agreements regulating the passage of nuclear-powered ships or ships carrying hazardous substances include the 1962 Convention on the Liability of Operators of Nuclear Ships, the 1973 International Convention for the Prevention of Pollution from Ships as modified by the 1978 Protocol (MARPOL), and the 1974 International Convention for the Safety of Life at Sea (SOLAS).

TERRITORIAL SEA

- Foreign nuclear-powered ships and ships carrying hazardous cargoes enjoy the right of innocent passage through the territorial sea, Article 23 LOSC: ‘when exercising the right of innocent passage’.
  - It is also to be noted that this provision is under the rubric ‘Rules Applicable to All Ships’.
  - Article 22(2) allows the coastal State to require nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to confine their passage to such sea lanes as it may designate or prescribe for the regulation of the passage of ships.

TERRITORIAL SEA

- In practice, some States require prior notification or prior authorization
  - Some opposition to this requirement. Same legal problem as before.
  - A requirement of prior notification is consistent with the LOSC, Art. 22 (1) and (2) LOSC. If the coastal State were not entitled to know the passage of those ships, arguably that State cannot exercise its right set out in these provisions.
  - Requirement of prior authorization compatible with LOSC?
  - amounts to denial of the right of innocent passage
  - UN General Assembly: States should maintain dialogue and consultation, in particular under the auspices of the International Atomic Energy Agency and the IMO, with the aim of improved mutual understanding, confidence-building and enhanced communication in relation to the safe maritime transport of radioactive materials

TERRITORIAL SEA

- The rights and obligations of the coastal State concerning innocent passage
  - Articles 21, 22 and 25 of the LOSC provide rights of the coastal State with respect to innocent passage
  - Article 21(1) LOSC: the coastal State possesses the legislative jurisdiction relating to innocent passage through the territorial sea, with respect to all or any of the following:
    - (a) the safety of navigation and the regulation of maritime traffic;
    - (b) the protection of navigational aids and facilities and other facilities or installations;
    - (c) the protection of cables and pipelines;
    - (d) the conservation of the living resources of the sea;
    - (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
    - (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
    - (g) marine scientific research and hydrographic surveys;
    - (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State
  - Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards pursuant to Article 21(2).
  - The coastal State is entitled to require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes – must be published.

TERRITORIAL SEA

- The coastal State is entitled to take the necessary steps in its territorial sea to *prevent* passage which is not innocent in conformity with Article 25(1) LOSC.
  - stop certain conduct
  - requesting a ship to leave the territorial sea
  - intervention of State authorities to board and exclude the ship from its territorial sea.
  - Article 220(2) LOSC provides that where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has violated laws and regulations of that State during its passage therein, the coastal State may undertake physical inspection of the vessel relating to the violation, and may, where the evidence so warrants, institute proceedings, including detention of the vessel.
  - In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject by virtue of Article 25(2) LOSC.

TERRITORIAL SEA

- The coastal State is entitled to take the necessary steps in its territorial sea to *suspend* the right to innocent passage under Article 25 (3) LOSC.
- Conditions:
  - (i) suspension must be essential for the protection of its security
  - (ii) suspension must be temporal
  - (iii) suspension must be limited to specific areas of its territorial sea
  - (iv) suspension must be without discrimination
  - (v) suspension shall take effect only after having been duly published

TERRITORIAL SEA

- The coastal State has sovereignty over the Territorial Sea. Does that mean that the coastal State enforce national criminal law rules there?
- Article 27(1) LOSC provides that the criminal jurisdiction of the coastal State '*should not*' be exercised on board a foreign ship passing through the territorial sea, save only in the following cases:
  - (a) if the consequences of the crime extend to the coastal State;
  - (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
  - (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
  - (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

TERRITORIAL SEA

- The phrase ‘should not’ seems to suggest that the exercise of criminal jurisdiction is not strictly prohibited in other cases. It would seem to follow that the coastal State has a discretion with regard to the exercise of criminal jurisdiction.
- The restriction of criminal jurisdiction under Article 27(1) does *not* apply to the case of inward/outward-bound navigation by virtue of Article 27(2).
- Where a crime has been committed before the ship entered the territorial sea and the ship is *only passing through* the territorial sea without entering internal waters, however, the coastal State may not exercise criminal jurisdiction over the ship under Article 27(5). This is a mandatory prohibition on the exercise of the criminal jurisdiction of the coastal State in the territorial sea.
  - Exception: crimes which are jus cogens violations

TERRITORIAL SEA

- Can the coastal State exercise civil jurisdiction in the Territorial Sea?
  - Article 28 LOSC limits the exercise of civil jurisdiction of the coastal State in certain cases:
  - 'the coastal State *should not* stop or divert a foreign ship *passing through* the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship'.
  - The term 'should not' seems to suggest that the restriction of the civil jurisdiction is a matter of comity.
  - Under Article 28(2) LOSC, the coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.
  - Article 28(2) is not applicable to inward/outward-bound navigation by virtue of Article 28(3).

TERRITORIAL SEA

- Obligations of the coastal State concerning innocent passage
  - In light of the importance of sea communication for all States, the LOSC places certain obligations upon the coastal State to ensure the interests of navigation in its territorial sea.
    - The coastal State is obliged not to hamper the innocent passage of foreign ships pursuant to Article 24(1) of the LOSC.
    - The coastal State is under the obligation to give appropriate publicity to any danger to navigation under Article 24(2). This obligation follows from the dictum in the *Corfu Channel* judgment.
    - No charge may be levied upon foreign ships by reason only of their passage through the territorial sea pursuant to Article 26 LOSC.
      - Case Study: Russia Northeast Passage obligatory icebreakers and fee

INTERNATIONAL STRAITS

- International Straits = straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State
  - Geographical criterion: connecting ‘one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone’
  - functional criterion: ‘straits used for international navigation’
    - A strait must actually be being used for international navigation as a useful route for international maritime traffic in order to meet the functional criterion.
    - Mere potential utility would be insufficient.
  - Concerning the relationship between the two criteria, the ICJ, in the Corfu Channel case, seemed to consider that the geographical criterion provided the primary criterion.

INTERNATIONAL STRAITS

- Right to innocent passage
  - Differences to the right to innocent passage through the Territorial Sea (IP_{TS}):
    - Less than IP_{TS}:
      - Does not include the right to overflight
      - submarines and other underwater vehicles are required to navigate on the surface and to show their flag in the exercise of the right of non-suspendable innocent passage
    - More than IP_{TS}:
      - May not be suspended
      - Foreign warships also possess the right of non-suspendable innocent passage set out in Article 16(4) LOSC
    - Unlike the right to innocent passage through the Territorial Sea, the right to innocent passage through International Straits is *not* yet part of customary international law.

INTERNATIONAL STRAITS

- 52 international straits less than 6 nautical miles in width
- 153 international straits between 6 and 24 nautical miles in width
- 60 international straits more than 24 nautical miles in width
- By establishing the twelve-mile territorial sea, many straits which include a strip of high seas fall within the territorial sea of the coastal States.
  - The ‘territorialisation’ of international straits would compromise the freedom of overflight of (military) aircraft and navigation of foreign warships, including submerged submarines.
  - Thus maritime States urged the introduction of a new regime relating to the right of ‘transit passage’, which was finally embodied in Part III of the LOSC.
  - It is important to note that the agreement on the twelve-mile territorial sea was closely linked to ensuring the freedom of navigation and overflight through international straits.

INTERNATIONAL STRAITS

- Different types of International Straits
  - Straits where Part III is applied (Straits as Territorial Sea)
    - Straits where transit passage is applied: High seas/EEZ ↔ high seas/EEZ (Art. 37 LOSC)
      - Classical example: Dover Strait
    - Straits where innocent passage is applied.
      - High seas/EEZ↔High seas/EEZ with islands (Art. 38 (1), 45 (1) (a) LOSC)
      - High seas/EEZ↔Territorial sea (Art. 45(1)(b) LOSC)
  - Straits where Part III is not applied (Straits which are not part of a Territorial Sea)
    - High seas routes or routes through EEZ through straits used for international navigation (Art. 36 LOSC)
    - Straits in which passage is regulated in whole or in part by long-standing international conventions (Art. 35(c) LOSC)
    - Straits within archipelagic waters (more on archipelagic waters later)
- Note that the often cited *Corfu Channel* Case only refers to straits between two parts of the high seas. Art. 16 (4) LOSC goes beyond the *Corfu Channel* precedent and beyond the existing customary law.

INTERNATIONAL STRAITS

- Part III LOSC does not affect any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in Article 7 LOSC has the effect of enclosing as internal waters areas which had not previously been considered as such (Article 35(a) LOSC).
  - It would seem to follow that basically Part III applies to international straits as the territorial sea.

INTERNATIONAL STRAITS

- Question, whether or not a strait can be considered as a ‘transit passage’ strait
  - Canadian Northwest Passage through Canada’s Arctic archipelago:
    - In 1985, Canada drew straight baselines around its Arctic archipelago and, consequently, the Northwest Passage fell within Canada’s internal waters. Canada thus rejected ‘any suggestion that the Northwest Passage is such an international strait’.
    - The United States has taken the position that the Passage is a strait used for international navigation subject to the transit passage regime.
      - The disagreement was circumscribed by 1988 Agreement on Arctic Cooperation between Canada and the United States. In this Agreement, the United States and Canada agreed to ‘undertake to facilitate navigation by their icebreakers in their respective Arctic waters and to develop cooperative procedures for this purpose’.

INTERNATIONAL STRAITS

- Straits of Malacca and Singapore
  - Traffic transiting the Straits of Malacca and Singapore is heavy because they form one of the world's major choke points for international trade and commerce.
  - The Joint Statement of the Governments of Indonesia, Malaysia and Singapore of 16 November 1971 stated that 'the Straits of Malacca and Singapore are not international straits while fully recognizing their use for international shipping in accordance with the principle of innocent passage'.
  - Later, however, these three States became parties to the LOSC.
    - As a consequence, one can say that transit passage presently applies to the Straits of Malacca and Singapore in accordance with relevant provisions of the Convention

INTERNATIONAL STRAITS

- Straits which are excluded from Article 38(1) LOSC are straits formed by an island of a State bordering the strait and its mainland, and there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics.
  - Messina Strait
- ‘straits between a part of the high seas or an EEZ and the territorial sea of a foreign State’
  - Tiran Strait
  - Gulf of Aqaba

INTERNATIONAL STRAITS

- International straits outside the scope of Part III of the LOSC
  - Overview:
    - High seas routes or routes through EEZ through straits used for international navigation (Art. 36 LOSC)
    - Straits in which passage is regulated in whole or in part by long-standing international conventions (Art. 35(c) LOSC)
    - Straits within archipelagic waters (more on archipelagic waters later)

INTERNATIONAL STRAITS

- In more detail:
  - First, under Article 36 of the LOSC, Part III does not apply to straits used for international navigation which contain a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. If a route through the high seas or through an EEZ in the international strait is not convenient with respect to navigational and hydrographic characteristics, Part III will apply to the territorial sea within the strait.
    - In relation to this, it is interesting to note that Japan has limited its territorial sea claim in five international straits, namely the Soya Strait, the Tsugaru Strait, the Tsushima Eastern Channel, the Tsushima Western Channel and the Osumi Strait, creating a corridor of the EEZ in the middle of these straits. As a result, these five straits pertain to a strait 'which contains a route through an EEZ of similar convenience' under Article 36 of the LOSC.

INTERNATIONAL STRAITS

- Second, Part III does not apply to straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits pursuant to Article 35(c) LOSC.
  - The Turkish Straits
    - These straits include the Dardanelles, the Sea of Marmara, and the Bosphorus, which connect the Black Sea and the Aegean Sea.
    - The Turkish Straits are governed by the 1936 Convention Regarding the Régime of the Straits (Montreux Convention). This Convention contains a set of special rules for, inter alia, the free passage of warships, merchant vessels and authorization for civil aviation.
  - The Danish Belts and the Sound
    - These straits comprise the Little Belt between Jutland and the island of Funen, the Great Belt between Funen and the island of Zealand, and the Öresund Sound between Zealand and Sweden.
    - These straits are regulated by the Treaty for the Redemption of the Sound Dues between Denmark and European States of 14 March 1857 (the Treaty of Copenhagen).

INTERNATIONAL STRAITS

- The Strait of Magellan
  - The Strait between Argentina and Chile connects the Pacific and the Atlantic Oceans.
  - Article 5 of the 1881 Treaty between Argentina and Chile confirmed the neutralization of the Strait of Magellan and free navigation to the flags of all nations.This was confirmed by Article 10 of the 1984 Treaty of Peace and Friendship between Argentina and Chile.
- The Strait of Gibraltar
  - This strait joints the Mediterranean Sea and the Atlantic Ocean. The free passage of the Strait of Gibraltar was declared in the 1904 Anglo-French Declaration (Article 7), and was confirmed by Article 6 of the 1912 Treaty between France and Spain regarding Morocco.

INTERNATIONAL STRAITS

- The Åland Strait
  - Upon signing the LOSC, Finland and Sweden declared that Article 35(c) LOSC is applicable to the strait between Finland (the Åland Islands) and Sweden. The applicable treaties are the 1921 Convention on the Non-Fortification and Neutrality of the Åland Islands and the 1940 Agreement between Finland and the Soviet Union concerning the Åland Islands, which obliged Finland to demilitarize the Åland Islands and not to fortify them.
- The third category of straits to which Part III does not apply involves international straits within archipelagic waters.

INTERNATIONAL STRAITS

- The right of transit passage
  - Article 38(2) LOSC defines transit passage as: the exercise
    - in accordance with Part III LOSC
    - of the freedom of navigation and overflight
    - solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or the EEZ
    - This provision continues that: ‘the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State’.
      - Thus the transit passage includes lateral and vertical passage.

INTERNATIONAL STRAITS

- The right of transit passage in international straits differs from the right of innocent passage in the territorial sea in four respects.
  - First, Article 38(1) makes it clear that all ships and aircraft enjoy the right of transit passage. It is clear, therefore that warships enjoy the right of transit passage.
  - Second, the right of transit passage includes overflight by all aircraft, including military aircraft.
  - Third, concerning submarines, the LOSC provides no explicit obligation to navigate on the surface and to show their flag.
    - Article 39(1)(c) provides that ships and aircraft, while exercising the right of transit passage, shall 'refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress'. Arguably, the normal mode for submarines to transit is submerged navigation.
    - Furthermore, Article 38(2) stipulates that transit passage means the exercise 'in accordance with this Part [III]' of the freedom of navigation and overflight. It would follow that the transit passage is to be subject only to provisions in Part III. There is no cross-reference to the specific provision on innocent passage which requires on-surface navigation. It appears that this interpretation is also consistent with the travaux préparatoires for UNCLOS III. In conclusion, there is room for the view that submarines and other underwater vehicles in transit passage are not required to navigate on the surface and to show their flag.
  - Fourth, unlike the right of innocent passage through the territorial sea in general, there shall be no suspension of transit passage by virtue of Article 44 LOSC.

INTERNATIONAL STRAITS

- Duties of Ships in transit passage
  - Article 39(1) of the LOSC:
    - proceed without delay through or over the strait;
    - refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
    - refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
    - comply with other relevant provisions of this Part.

INTERNATIONAL STRAITS

- Ships in transit passage are under duties to
  - comply with generally accepted international regulations, procedures, and practice for safety at sea, including the International Regulations for Preventing Collisions at Sea (Article 39(2)(a))
  - comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships (Article 39(2)(b))
  - refrain from carrying out any research or survey activities without the prior authorization of the States bordering straits (Article 40)
  - respect applicable sea lanes and traffic separation schemes (Article 41 (7)
  - comply with law and regulations adopted by States bordering a strait under Article 42(1) of the LOSC (Article 42(4))

INTERNATIONAL STRAITS

- Article 39(3)(a)LOSC and (b) provides that *aircraft* in transit passage shall:
  - observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft;
    - state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
  - at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency
- Concerning Article 39(3)(a), a question arises whether or not States bordering straits have a right to issue and apply their own air regulations in the airspace of the straits used for international navigation.
  - Upon signature and ratification of the LOSC, the Spanish government claimed such a right. However, the United States objected to the Spanish interpretation.
  - Whilst opinions of writers are divided, the Secretariat of International Civil Aviation Organisation (ICAO) took the view that the Rules of the Air as adopted by the Council of ICAO would have mandatory application over the straits and the States bordering the strait cannot file an alteration to Rules of the Air under Article 38 of the Chicago Convention with respect to the airspace over the straits.

INTERNATIONAL STRAITS

- Legislative jurisdiction of the coastal State in International Straits
  - The coastal State has a right to adopt laws and regulations relating to transit passage through straits. Under Article 42(1) LOSC, those laws and regulations involve:
    - the safety of navigation and the regulation of maritime traffic, as provided in Article 41 LOSC,
    - the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait,
    - with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear, and
    - the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.
  - The legislative jurisdiction of the coastal State is qualified by paragraph 2 of Article 42 in two respects. The first limitation is that the laws and regulations of the coastal State bordering international straits 'shall not discriminate in form or in fact among foreign ships'. The second limitation is that the application of the laws and regulations shall not 'have the practical effect of denying, hampering or impairing the right of transit passage'.

INTERNATIONAL STRAITS

- Enforcement jurisdiction: can the coastal State terminate the right of transit passage unilaterally?
  - The language of Article 42(2) seems to suggest that States bordering straits are not allowed to directly deny the right of transit passage merely on grounds of breach of their municipal law. In the case of a violation of the laws and regulations referred to in Article 42(1)(a) and (b), however, Article 233 of the LOSC explicitly allows the State bordering a strait to exercise its enforcement jurisdiction.

INTERNATIONAL STRAITS

- Coastal States‘ duties
  - Article 44 LOSC
    - Not hamper transit passage
    - Give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge
    - Not suspend transit passage.
  - Article 43 LOSC requires user States and States bordering a strait to cooperate
    - in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
    - for the prevention, reduction and control of pollution from ships’.
      - Japan has been promoting international cooperation in the Straits of Malacca and Singapore through the Malacca Strait Council in such fields as hydrographic survey, maintenance of aids to navigation, making nautical charts, transfer of technology and clearance of sunken ships.

INTERNATIONAL STRAITS

- Environmental protection in international straits
  - As international straits are often narrow, the risk of marine casualties is higher than in other marine spaces. Thus the health of waterways is a matter of serious concern for States bordering international straits. In this regard, the question arises as to whether, under Part III of the LOSC, the coastal State has a right to introduce a compulsory pilotage system in an international strait.

INTERNATIONAL STRAITS

- Case Study: Australia

In 2006, Australia established a compulsory pilotage system for certain vessels in the Torres Strait and Great North East Channel in order to protect sensitive marine habitats. The Torres Strait is a strait used for international navigation to which the regime of transit passage applies. The depths of the Torres Strait are shallow and navigation in that strait is highly difficult. As the Torres Strait contains a highly sensitive marine habitat, it became a Particularly Sensitive Sea Area (PSSA) in 2005. Australian authorities will not suspend or deny transit passage and will not stop, arrest, or board ships that do not take on a pilot while transiting the Strait. However, the owner, master, and/or operator of the ship may be prosecuted on the next entry into an Australian port, for both ships on voyages to Australian ports and ships transiting the Torres Strait en route to other destinations. Australia's compulsory pilotage system was protested by the United States and Singapore.

- The controversy relating to the compulsory pilotage system in the Torres Strait seems to signal a growing tension between the navigational interest of the user States and the environmental interest of States bordering an international strait. In this respect, Article 43 LOSC merits particular attention with a view to reconciling such contrasting interests through international cooperation.

INTERNATIONAL STRAITS

- Bridges in International Straits
  - Planned in the Bab el Mandeb Strait (Red Sea) (originally planned to be finished by 2020, delayed since 2010, no construction so far, no framework agreement between Yemen and Djiboiuti yet)
  - 1991 Great Belt case between Finland and Denmark before the ICJ, no judgment
    - Great Belt East Channel Bridge closes the Baltic Sea for deep draught vessels over 65 metres in height. Since the early 1970s mobile offshore drilling units (MODUs) built in Finland had used the Great Belt. Some of the Finnish MODUs reached a height of close to 150 metres. Since the fixed link was created across the Great Belt, these MODUs are no longer be able to pass through the Great Belt, damaging Finnish commercial activity. Thus a dispute arose between Finland and Denmark with regard to the Danish project.
    - Denmark and Finland agreed to settle the dispute. Denmark agreed to pay a sum of 90 million Danish kroner (around 15 million US dollars), and Finland agreed to withdraw its application.
    - As a consequence, the ICJ did not have occasion to pronounce its view on this dispute, and the questions remain open.

ARCHIPELAGIC WATERS

- The key concept of archipelagic waters is that a group of islands in mid-ocean, i.e. ‘mid-ocean archipelagos’, should be considered as forming a unit; and that the waters enclosed by baselines joining the outermost points of the archipelago should be under territorial sovereignty.
- Article 46(a) of the LOSC defines an ‘archipelagic State’ as
  - ‘a State constituted wholly by one or more archipelagos and may include other islands’.
  - It follows that States possessing territory in a continent, i.e. mainland States, are not archipelagic States.
    - For example, Greece is not an archipelagic State under the LOSC.
- Article 46(b) defines ‘archipelago’ as follows:
  - ‘Archipelago’ means 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.
  - no criterion with regard to the minimum number of islands. It appears that ‘an economic and political entity’ does not always coincide with ‘a geographical entity’.

ARCHIPELAGIC WATERS

Source: http://wordsmith.org/words/images/archipelago_map_large.jpg

This is **not** an archipelago within the meaning of the LOSC.

ARCHIPELAGIC WATERS

This **is** an archipelago within the meaning of the LOSC.

Source: http://www.vidiani.com/?p=4205

ARCHIPELAGIC WATERS

- Currently twenty-two States have formally claimed archipelagic status (Antigua and Barbuda, Bahamas, Cape Verde, Comoros, Dominican Republic, Fiji, Grenada, Indonesia, Jamaica, Kiribati, Maldives, Marshall Islands, Mauritius, Papua New Guinea, Philippines, Saint Vincent and the Grenadines, São Tomé e Principe, Seychelles, Solomon Islands, Trinidad and Tobago, Tuvalu and Vanuatu). All these States are parties to the LOSC.
- 'Archipelagic waters' mean the waters enclosed by the archipelagic baselines drawn in accordance with Article 47 regardless of their depth or distance from the coast (Article 49(1) LOSC).
  - The breadth of the territorial sea, the contiguous zone, the EEZ and the continental shelf is to be measured from archipelagic baselines (Article 48 LOSC).
  - Thus archipelagic waters must be distinguished from the territorial sea.
  - Further, Article 50 stipulates that within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters in accordance with Articles 9, 10, and 11 (Article 50).
  - The landward areas of these closing lines become internal waters of an archipelagic State. Archipelagic waters do **not** constitute internal waters.
    - On ratifying the LOSC in 1984, however, the Philippines declared that the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines. Some States – Australia, Belarus, Bulgaria, Czechoslovakia, Ukraine, the USA and the USSR – protested the Philippine Declaration. It appears that the declaration is at variance with the concept of archipelagic waters in the LOSC.

ARCHIPELAGIC WATERS

- Archipelagic baselines
  - An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago
  - A State which does not meet the legal definition of an archipelagic State is not entitled to draw archipelagic baselines
  - Article 47 LOSC sets out conditions for drawing these baselines in some detail
    - The archipelagic waters must include main islands, and 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 pursuant to Article 47(1).
      - The lower ratio was designed to exclude those archipelagos which are dominated by one or two large islands or islands that are connected only by comparatively small sea areas. This requirement will not allow, for instance, Australia, Cuba, Iceland, Madagascar, New Zealand and the United Kingdom to draw archipelagic baselines. The upper ratio was intended to exclude those archipelagos which are widely dispersed, such as Tuvalu and Kiribati.
    - The length of such baselines shall not exceed 100 nautical miles. But 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 pursuant to Article 47(2).
    - no restriction on the number of baseline segments
  - The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago (Article 47(3)).

ARCHIPELAGIC WATERS

- Archipelagic 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 (Article 47(4)).
  - On the other hand, Article 47(1) provides that 'an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost island and drying reefs'. At UNCLOS III, it was understood that 'drying reefs' were above water at low tide but submerged at high tide. It would follow that 'drying reefs' are low-tide elevations. If this is the case, paragraph 1 of Article 47 may seem to contradict paragraph 4 of the same provision which prohibits drawing archipelagic baselines to and from low-tide elevations. In response to this question, a possible interpretation may be to apply the condition set up in Article 47(4), 'unless lighthouses or similar installations', to Article 47(1).
    - According to this interpretation, an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost drying reefs, provided that 'lighthouses or similar installations which are permanently above sea level have been built on them or where drying reefs are situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island'.

ARCHIPELAGIC WATERS

- The system of archipelagic baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the EEZ the territorial sea of another State under Article 47(5) LOSC.
  - Keep in mind that equity plays an important role in the Law of the Sea.

ARCHIPELAGIC WATERS

- Jurisdiction of archipelagic States over archipelagic waters
  - Article 49(1) and (2) LOSC: archipelagic waters are under the territorial sovereignty of the archipelagic State
  - On the other hand, Article 49(3) provides that this sovereignty is exercised subject to Part IV of the LOSC. Under Part IV of the LOSC, the territorial sovereignty of the archipelagic State is qualified by rights of third States in four respects.
    - respect the traditional fishing rights of third States pursuant to Article 51(1) of the LOSC
    - under Article 51(2), the archipelagic State is under the obligation to respect existing submarine cables.
      - This provision applies only to existing cables, and no mention is made of pipelines. It would seem to follow that the laying of new cables and pipelines depends on the consent of archipelagic States.

ARCHIPELAGIC WATERS

- Article 47(6) provides that: 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.
- By establishing archipelagic waters, some important navigation channels, such as the Sunda and Lombok Straits, fall under the territorial sovereignty of the archipelagic State. If passage through archipelagic waters is not accepted, sea communication will be considerably disturbed. Hence there is a strong need to guarantee the freedom of navigation of foreign vessels in archipelagic waters. Part IV of the LOSC ensures the freedom of navigation through archipelagic waters by providing the right of innocent passage and that of archipelagic sea lanes passage.

ARCHIPELAGIC WATERS

- Passage through Archipelagic Waters
  - The right of innocent passage is applicable to archipelagic waters. Article 52(1) LOSC: Subject to article 53 [right of archipelagic sea lanes passage] and without prejudice to article 50 [delimitation of internal waters], ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3 [the right of innocent passage in the territorial sea].
  - The right of archipelagic sea lanes passage
    - In addition to the right of innocent passage, all ships and aircraft can enjoy the more extensive right of archipelagic sea lanes passage through archipelagic waters. Article 53(3) of the LOSC defines the right of archipelagic sea lanes passage as follows: Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

ARCHIPELAGIC WATERS

- The principal elements of the right of archipelagic sea lanes passage can be summarized as follows:
  - As with the right of transit passage, the right of archipelagic passage applies between one part of the high seas or an EEZ and another part of the high seas or an EEZ.
  - All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes under Article 53(2). The right of archipelagic sea lanes passage contains the rights of overflight by aircraft. In common with the right of transit passage, foreign warships and military aircraft have the right of archipelagic sea lanes passage.
  - Like the right of transit passage, archipelagic sea lanes passage must be the exercise of the rights of navigation and overflight solely for the purpose of continuous, expeditious and unobstructed transit.

ARCHIPELAGIC WATERS

- On the other hand, as Articles 39, 40, 42 and 44 of the LOSC apply *mutatis mutandis* to archipelagic sea lanes passage (Article 54), ships and aircraft during their passage are under the duties provided in those provisions. Furthermore, Article 53(5) requires that ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines, i.e. the centre line, during passage. At the same time, this provision holds that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane. There are two different interpretations with regard to this provision.
  - the formula set out in Article 53(5) means 10 per cent of the distance from the axis line to the nearest island. In this case, the narrowest channel, which allows ships and aircraft to deviate by 25 nautical miles from the axis of the sea lane, is 55.6 nautical miles wide. In 1996, Indonesia applied the 10 per cent rule in this way in designating its archipelagic sea lanes, and the Maritime Safety Committee of the IMO accepted the submission of Indonesia in 1998. Thus it would appear that this interpretation is supported by the IMO.130 The archipelagic State may designate archipelagic sea lanes and air routes under Article 53(1) of the LOSC.

ARCHIPELAGIC WATERS

- How to design archipelagic sea lanes
  - The sea lanes for the archipelagic passage and air routes shall traverse the archipelagic waters and the adjacent territorial sea, and shall include normal passage routes used as routes for international navigation or overflight through or over archipelagic waters, and, within such routes, so far as ships are concerned, all normal navigational channels in accordance with Article 53(4) LOSC.
  - Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points under Article 53(5). An archipelagic State may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes pursuant to Article 53(6). Such sea lanes and traffic separation schemes shall conform to generally accepted international regulation under Article 53(8).
  - In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic State is obliged to refer proposals to the competent international organisation with a view to their adoption pursuant to Article 53(9). This provision has a parallel in Article 41(4) of the LOSC. As with Article 41(4), the competent international organisation means the IMO. In 1998, an Indonesian partial proposal for archipelagic sea lanes was adopted at the 69th session of the Marine Safety Committee of the IMO.

ARCHIPELAGIC WATERS

- Article 53(10) places an obligation upon the archipelagic State to clearly indicate the axis of the sea lanes and the traffic separation schemes on charts. The provisions of the LOSC concerning the designation of archipelagic sea lanes were further elaborated by IMO General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes in 1998.
- If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation by virtue of Article 53(12). It would seem to follow that even if archipelagic sea lanes or air routes not have been designated by the archipelagic State, submarines will be able to transit the routes normally used for international navigation submerged. On the other hand, there is a concern that a dispute may be raised between user States and archipelagic States as to what 'the routes normally used for international navigation' are. Furthermore, non-designation of sea lanes or air routes may create confusion as to which right – the right of innocent passage or the right of archipelagic sea lanes passage – applies in the same archipelagic waters.

ARCHIPELAGIC WATERS

- Rights and obligations of an archipelagic State
  - Article 44 of the LOSC applies *mutatis mutandis* to archipelagic sea lanes passage. It follows that archipelagic States shall not hamper archipelagic sea lanes passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. In addition to this, there shall be no suspension of archipelagic sea lanes passage.
  - An archipelagic State may adopt laws and regulations relating to the prevention of marine pollution in archipelagic waters by virtue of Articles 42(1) and 54 of the LOSC.
  - Although Articles 220 and 233 of the LOSC give the coastal State additional enforcement jurisdiction regulating pollution from ships in the territorial sea and the straits, these provisions contain no reference to archipelagic waters.
    - However, Article 233 refers to Article 42 concerning laws and regulations of States bordering straits relating to transit passage; and Article 42 applies *mutatis mutandis* to archipelagic waters in accordance with Article 54. Therefore, it seems logical to argue that Article 233 is also applicable to archipelagic waters.

SOVEREIGN RIGHTS

SOVEREIGN RIGHTS

- Sovereign Rights are less than full sovereignty
- In this part we will look at
  - Contiguous Zone
  - Exclusive Economic Zone
  - Continental Shelf
- Key questions:
  - What is the coastal State jurisdiction over the contiguous zone?
  - What is the coastal State jurisdiction over the EEZ and the continental shelf?
  - What is the difference between territorial sovereignty and sovereign rights?
  - What are the freedoms that all States can enjoy in the EEZ?
  - What residual rights are there in the EEZ?
  - What are the criteria for determining the outer limits of the continental shelf?

SOVEREIGN RIGHTS

- The legal regimes governing the EEZ and the continental shelf are essentially a result of the aspiration of coastal States for their need to control offshore natural resources.
- The coastal State exercises sovereign rights over the EEZ and the continental shelf for the purpose of exploring and exploiting natural resources. Other States cannot explore and exploit these resources in the EEZ and the continental shelf without the consent of the coastal State.
- On the other hand, as the EEZ and the continental shelf are part of the ocean as a single unit, legitimate activities in these zones by third States, such as freedom of navigation, overflight and the laying of submarine cables and pipelines, must be secured.
- An essential question thus arises as to how it is possible to reconcile the sovereign rights of the coastal State and the freedom of the seas exercised by other States in the EEZ and the continental shelf.

CONTIGUOUS ZONE

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- An essential question thus arises as to how it is possible to reconcile the sovereign rights of the coastal State and the freedom of the seas exercised by other States in the EEZ and the continental shelf.

CONTIGUOUS ZONE

- The contiguous zone is a marine space contiguous to the territorial sea, in which the coastal State may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.
  - The development of the contiguous zone was a complicated process of concurrence of different claims by coastal States. Whilst it has been considered that the origin of the concept of the contiguous zone dates back to the Hovering Acts enacted by Great Britain in the eighteenth century, it was not until 1958 that rules governing the contiguous zone were eventually agreed. The rules governing the contiguous zone were enshrined in Article 24 of the TSC. Later, this provision was, with some modifications, reproduced in Article 33 of the LOSC.
- The landward limit of the contiguous zone is the seaward limit of the territorial sea. Under Article 33(2) of the LOSC, the maximum breadth of the contiguous zone is twenty-four nautical miles. Article 33 of the LOSC contains no duty corresponding to Article 16, which obliges the coastal State to give due publicity to charts.
  - It would seem to follow that there is no specific requirement concerning notice in the establishment of the contiguous zone.3 The contiguous zone is an area contiguous to the high seas under Article 24(1) of the TSC. Under the LOSC, the contiguous zone is part of the EEZ where the coastal State claims the zone. Where the coastal State does not claim its EEZ, the contiguous zone is part of the high seas.

CONTIGUOUS ZONE

- Coastal State jurisdiction over the Contiguous Zone
  - Article 33(1), which follows Article 24(1) of the TSC, provides that:
    - 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

CONTIGUOUS ZONE

- Article 33(1) contains no reference to internal waters. However, it would be inconceivable that the drafters of this provision had an intention to exclude the internal waters from the scope of this provision since these waters are under the territorial sovereignty of the coastal State. Thus it appears to be reasonable to consider that internal waters are also included in the scope of 'its territory or territorial sea'.
- Article 33(1) literally means that the coastal State may exercise only enforcement, not legislative, jurisdiction within its contiguous zone. It would follow that relevant laws and regulations of the coastal State are not extended to its contiguous zone; and that infringement of municipal laws of the coastal State within the zone is outside the scope of this provision. Considering that an incoming vessel cannot commit an offence until it crosses the limit of the territorial sea, it would appear that head (b) of Article 33(1) can apply only to an outgoing ship. By contrast, head (a) can apply only to incoming ships because prevention cannot arise with regard to an outgoing ship in the contiguous zone.

CONTIGUOUS ZONE

- Article 33(1) does not make the further specification with regard to ‘control necessary to punish infringement’ of municipal law of the coastal State in its contiguous zone. In this regard, Article 111(1) makes clear that the coastal State may undertake the hot pursuit of foreign ships within the contiguous zone.5 Article 111(6), (7) and (8) further provide the coastal State’s right to stop a ship, the right to arrest the ship, and the right to escort the ship to a port. One can say, therefore, that the coastal State jurisdiction to punish the infringement of its municipal laws in the contiguous zone includes these rights. On the other hand, Article 111(1) does not specify the place where the infringement of laws and regulations of the coastal State must have occurred. In view of maintaining consistency with Article 33(1), it appears reasonable to consider that the coastal State may commence the hot pursuit of a ship only where that ship has already breached the laws and regulation of that State within its territory or territorial sea.

CONTIGUOUS ZONE

- The legal nature of the coastal State jurisdiction over the contiguous zone is not free from controversy.
  - literal or restrictive view
    - the coastal State has only enforcement jurisdiction in its contiguous zone and, consequently, action of the coastal State may only be taken concerning offences committed within the territory or territorial sea of the coastal State, not in respect of anything done within the contiguous zone itself
    - the power over the contiguous zone is ‘essentially supervisory and preventative’.

CONTIGUOUS ZONE

- liberal view
  - the coastal State may regulate the violation of its municipal law within the contiguous zone for some limited purposes
  - the coastal State should be entitled to exercise its authority as exercisable in the territorial sea only for some limited purposes of customs or sanitary control
  - a strict reading of Article 33(1) does not allow coastal States to extend legislative jurisdiction to its contiguous zone
    - an exception: concerning the protection of objects of an archaeological and historical nature found at sea, Article 303(2) of the LOSC provides that: 2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
- As a matter of practice, it may not be unreasonable to extend the legislative jurisdiction of the coastal State over the contiguous zone for the limited purposes provided in Article 33 of the LOSC. In any case, it must be remembered that disputes with regard to the exercise by a coastal State of its jurisdiction over the contiguous zone fall within the scope of the compulsory settlement procedure in Part XV of the LOSC.

EXCLUSIVE ECONOMIC ZONE

- The EEZ is an area beyond and adjacent to the territorial sea, not extending beyond 200 nautical miles from the baseline of the territorial sea.
- The origin of the concept of the EEZ may go back to the practice of the Latin American States after World War II.
  - Originally the figure of 200 nautical miles appeared in 1947, when Chile, Peru and Ecuador claimed such an extent for the exercise of full sovereignty. The figure of 200 nautical miles relied on scientific facts: it would enable the Andean States to reach the Peruvian and the Humboldt Currents, which were particularly rich in living species. Furthermore, the guano birds, whose deposit is an important fertilizer, feed on anchovy. Scientific research has shown that anchovy larvae had also been located in up to a 187-mile width. The three Andean States thus inferred that a perfect unity and interdependence existed between the sea's living resources and the coastal populations. For the three countries of Latin America's Pacific coast, the claim for a 200 nautical mile zone was considered as a means to correct an inequity inflicted upon them by geography, namely the lack of a continental shelf.

EXCLUSIVE ECONOMIC ZONE

- Later on, the claim for a 200-mile zone spread to the majority of coastal developing States. As the Caracas session of UNCLOS III approached, however, it became apparent that the maritime powers would not accept such an extensive territorial sea which would deter economic and military interests.
- In 1971, Kenya proposed the concept of the EEZ in the Asian-African Legal Consultative Committee at Colombo in a spirit of compromise. In August 1972, with overwhelming support from the developing countries, Kenya formally submitted its proposal for a 200-mile EEZ to the UN Seabed Committee. According to this proposal, the natural resources of the zone would be placed under the jurisdiction of the coastal State, while freedom of navigation was to be guaranteed. Further to this, a variant of the concept of the EEZ, the notion of the 'patrimonial sea', was reflected in the Declaration of Santo Domingo, adopted by the Conference of Caribbean Countries on 7 June 1972.
- On 2 August 1973, Colombia, Mexico and Venezuela submitted its proposal for the 'patrimonial sea' to the Seabed Committee. The two concepts effectively merged at UNCLOS III. By 1975, the basic concept of the EEZ seemed to be well established.
- Thus the legal regime governing the EEZ was embodied in Part V of the LOSC.

EXCLUSIVE ECONOMIC ZONE

- Unlike the continental shelf, the coastal State must claim the zone in order to establish an EEZ.
- The vast majority of coastal States have claimed a 200-mile EEZ. In this regard, the ICJ, in the *Libya/Malta* case of 1985, stated that:
  - '[T]he 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'.
  - The 200-mile EEZ amounts to some 35–36 per cent of the oceans as a whole.
  - Seven leading beneficiaries of the EEZ are: the USA, France, Indonesia, New Zealand, Australia, Russia and Japan.
    - It is ironic that leading EEZ beneficiaries are essentially the developed States. Whilst most States which had previously claimed an exclusive fishing zone (EFZ) have replaced such a zone by an EEZ, several States still maintain an EFZ.
  - Considering that all States claiming an EFZ became parties to the LOSC, it may be argued that the relevant provisions of the EEZ respecting fisheries are applicable to the EFZ.

EXCLUSIVE ECONOMIC ZONE

- Limits of the EEZ
  - The landward limit of the EEZ is the seaward limit of the territorial sea.
  - The seaward limit of the EEZ is at a maximum of 200 nautical miles from the baseline of the territorial sea. Given that the maximum breadth of the territorial sea is 12 nautical miles, the usual breadth of the EEZ is 188 nm = approx. 370 km.
    - Sometimes one can read that the maximum breadth is 188 nm (also in the recommended book by Tanaka). This is not the case if the coastal State claims a TS of less than 12 nm. In the (hypothetical) case of a 3 nm TS, the EEZ could be 197 nm wide.
  - EEZ limits must be published by the coastal State

EXCLUSIVE ECONOMIC ZONE

- Legal status of the EEZ
  - The concept of the EEZ comprises the seabed and its subsoil, the waters superjacent to the seabed as well as the airspace above the waters:
    - Water = fishinig rights etc.
    - Seabed and subsoil
      - With respect to the seabed and its subsoil, Article 56(1) provides that 'in the exclusive economic zone' the coastal State has
        - 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil'.
        - It would follow that the concept of the EEZ includes the seabed and its subsoil. The rights of the coastal State with respect to the seabed and subsoil are to be exercised in accordance with provisions governing the continental shelf by virtue of Article 56(3).

EXCLUSIVE ECONOMIC ZONE

- Airspace
  - Article 58(1) stipulates that ‘in the exclusive economic zone’, all States, whether coastal or land-locked, enjoy ‘the freedoms referred to in Article 87 LOSC of navigation and overflight’.
  - Article 56(1) further provides that the coastal State has sovereign rights with respect to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.
  - One can say, therefore, that the concept of the EEZ also includes the airspace.

EXCLUSIVE ECONOMIC ZONE

- The territorial sea is not part of the EEZ.
  - The territorial sovereignty of the coastal State does not extend to the EEZ.
  - Article 86 of the LOSC provides that the provisions of Part VII governing the high seas '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'.
- Accordingly, the EEZ is not part of the high seas.
  - In fact, the freedoms apply to the EEZ in so far as they are not incompatible with Part V of the LOSC governing the EEZ in accordance with Article 58(2). In this sense, the quality of the freedom exercisable in the EEZ differs from that exercisable on the high seas.
- EEZ = *sui generis* zone, distinguished from the territorial sea and the high seas

EXCLUSIVE ECONOMIC ZONE

- Coastal State jurisdiction over the EEZ
  - The key provision concerning coastal State jurisdiction over the EEZ is Article 56 of the LOSC.
    - 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
  - It is important to note that the sovereign rights of the coastal State over the EEZ are essentially limited to economic exploration and exploitation (limitation *ratione materiae*).
  - In this respect, the concept of sovereign rights must be distinguished from territorial sovereignty, which is comprehensive unless international law provides otherwise.

EXCLUSIVE ECONOMIC ZONE

- Sovereign rights in the EEZ are essentially exclusive in the sense that no one may undertake these activities or make a claim to the EEZ, without the express consent of the coastal State.
  - Third States have the right of access to natural resources in the EEZ.
    - But considering that the exercise of the right is conditional upon agreement with the coastal State, this does not challenge the exclusive nature of the coastal State's jurisdiction over the EEZ.

EXCLUSIVE ECONOMIC ZONE

- Legislative *and* enforcement jurisdiction
  - Article 73(1) LOSC:
    - „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.“
  - While this provision provides enforcement jurisdiction for the coastal State, the reference to ‘the laws and regulations by it’ seems to suggest that the State also has legislative jurisdiction.

EXCLUSIVE ECONOMIC ZONE

- Power over foreign vessels
  - The measures provided under Article 73(1) can be applied to foreign vessels within the EEZ.
    - This is clear from Article 73(4), which provides that: 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.

EXCLUSIVE ECONOMIC ZONE

- Sovereign rights of the coastal State in its EEZ
  - The sovereign rights of the coastal State can be exercised solely within the EEZ. In this sense, such rights are spatial in nature.
  - The sovereign rights of the coastal State are limited to the matters defined by international law (limitation *ratione materiae*). On this point, sovereign rights must be distinguished from territorial sovereignty.
  - However, concerning matters defined by international law, the coastal State may exercise both legislative and enforcement jurisdiction.

EXCLUSIVE ECONOMIC ZONE

- The coastal State may exercise sovereign rights over all people regardless of their nationality within the EEZ. Thus the sovereign rights contain no limit *ratione personae*.
  - In this respect, sovereign rights over the EEZ differ from personal jurisdiction.
- The sovereign rights of the coastal State over the EEZ are exclusive in the sense that other States cannot engage upon activities in the EEZ without consent of the coastal State.

EXCLUSIVE ECONOMIC ZONE

- Summary:
  - Unlike territorial sovereignty, the sovereign rights of the coastal State over the EEZ lack comprehensiveness of material scope.
  - With respect to matters accepted by international law, however, the coastal State can exercise both legislative and enforcement jurisdiction over all people within the EEZ in an exclusive manner.
  - The rights of the coastal State over the EEZ are spatial in the sense that they can be exercised solely within the particular space in question regardless of the nationality of persons or vessels.

EXCLUSIVE ECONOMIC ZONE

- Limited spatial jurisdiction
  - Under Article 56(1)(b) of the LOSC, the coastal State possesses jurisdiction over matters other than the exploration and exploitation of marine natural resources, namely
    - the establishment and use of artificial islands, installations and structures,
    - marine scientific research, and
    - the protection and preservation of the marine environment.
  - The coastal State also has other rights and duties provided for in this Convention (Article 56(1)(c)).

EXCLUSIVE ECONOMIC ZONE

- Coastal State jurisdiction over artificial islands
  - Article 60 LOSC:
    - 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:
      - artificial islands;
      - installations and structures for the purposes provided for in Article 56 LOSC and other economic purposes;
      - installations and structures which may interfere with the exercise of the rights of the coastal State in the EEZ
    - 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.

EXCLUSIVE ECONOMIC ZONE

- At the same time, the rights of the coastal State on this matter are subject to certain obligations.
  - Under Article 60(3), due notice must be given of the construction of such artificial islands, installations and structures, and permanent means for giving warning of their presence must be maintained.
  - Any installations or structures which are abandoned or disused must be removed to ensure safety of navigation.
  - Under Article 60(7), the coastal State may not establish artificial islands, installations and structures and the safety zones around them ‘where interference may be caused to the use of recognised sea lanes essential to international navigation’.

EXCLUSIVE ECONOMIC ZONE

- Whether or not the coastal State also has the jurisdiction to authorise and to regulate the construction and use of installations and structures for non-economic purposes, such as military purposes, is unclear.
  - It appears that State practice is not uniform on this particular matter.
    - Brazil, Cape Verde and Uruguay: without exception
    - Germany, Italy, the Netherlands and the United Kingdom: only those installations and structures which have economic purposes

EXCLUSIVE ECONOMIC ZONE

- Marine scientific research in the EEZ
  - Article 56(1)(b)(ii) LOSC makes clear that the coastal State has jurisdiction with regard to marine scientific research in the EEZ.
    - In relation to this, Article 246(1) LOSC stipulates that Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.

EXCLUSIVE ECONOMIC ZONE

- The Protection of the Marine Environment in the EEZ
  - Article 56(1)(b)(iii) LOSC: the coastal State has legislative and enforcement jurisdiction with regard to the protection and preservation of the marine environment
  - Further to this, Articles 210(1) and 211(5) provide legislative jurisdiction of the coastal State concerning the regulation of dumping and vessel-source pollution.
  - Moreover, Articles 210(2) and 220 contain enforcement jurisdiction of the coastal State with regard to the regulation of dumping and ship-borne pollution.

EXCLUSIVE ECONOMIC ZONE

- Cultural heritage and archeology in the EEZ
  - The LOSC contains no provision with regard to the coastal State jurisdiction over archaeological and historical objects found within the EEZ beyond the contiguous zone.
    - Thus the protection of these objects would need to be assessed by the application of Article 59 LOSC.

EXCLUSIVE ECONOMIC ZONE

- On 2 November 2001 UNESCO adopted the Convention on the Protection of Underwater Cultural Heritage (hereafter the UNESCO Convention) in order to ensure the protection of such heritage.
  - Article 9 of the UNESCO Convention places an explicit obligation upon all States Parties to protect underwater cultural heritage in the EEZ and on the continental shelf in conformity with this Convention.
  - Under Article 10(2) of the Convention, a State Party in whose EEZ or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law, including the LOSC.
  - Article 10(4) allows the coastal State as 'Coordinating State' to take all practical measures to prevent any immediate danger to underwater cultural heritage. These provisions would seem to provide the coastal State with grounds for exercising its jurisdiction over such heritage within the EEZ. In this regard, it is interesting to note that under Article 10(6), the 'Coordinating State' shall act 'on behalf of the States Parties as a whole and not in its own interest'

EXCLUSIVE ECONOMIC ZONE

- Legitimate activities by other States in the EEZ
  - Article 58(1) LOSC:
    - 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 LOSC 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.
    - It follows that among the six freedoms enumerated in Article 87 of the LOSC, three freedoms of the seas
      - freedoms of navigation,
      - overflight and
      - the lying of submarine cables and pipelines

      apply to the EEZ.

EXCLUSIVE ECONOMIC ZONE

- Further, Articles 88 to 115 and other pertinent rules of international law relating to the high seas apply to the EEZ in so far as they are not incompatible with this rule under Article 58(2).
- Article 58(3) requires States to '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 [V]'. zone.
  - Whilst the freedom of laying submarine cables and pipelines applies to the EEZ, the delineation of the course of a pipeline in the seabed of the EEZ is subject to the consent of the coastal State in accordance with Article 79(3).
- To this extent, the freedoms enjoyed by foreign States in the EEZ are not exactly the same as those enjoyed on the high seas.

EXCLUSIVE ECONOMIC ZONE

- Residual rights
  - Whilst the LOSC provides rules involving most of the obvious uses of the EEZ, there are some uses of the zone where it remains unclear whether they fall within the rights of the coastal State or other States. Here residual rights in the EEZ are at issue.
  - Article 59 LOSC:
    - 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.

CONTINENTAL SHELF

- Area adjacent to a continent or around an island extending from the low-water line to the depth at which there is usually a marked increase of slope to greater depth.
- Extensive reserve of oil and gas

CONTINENTAL SHELF

- Historical development
  - 28 September 1945: Truman Proclamation
  - US claimed jurisdiction over the natural resources of the continental shelf
  - Chain reaction, and many States unilaterally extended
  - Latin American States – many of which have virtually no continental shelf in a geological sense – claimed their full sovereignty over all the seabed at whatever depth and over all the adjacent seas at whatever depth to a distance of 200 nautical miles.
  - Whilst State practice was not consistent until the early 1950s, the vast majority of States were prepared to agree to create a new zone relating to the exploitation of natural resources on the continental shelf with the passage of time.
- Today: rights of the coastal State over the continental shelf are well established in customary international law

CONTINENTAL SHELF

- Spatial scope of the CS
  - The landward limit of the continental shelf in the legal sense is the seaward limit of the territorial sea.
    - Article 1 of the Convention on the Continental Shelf stipulates that the continental shelf is the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea.
    - Article 76(1) LOSC: ‘the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea’.
    - It follows that the continental shelf in a legal sense does not include the seabed of the territorial sea.

CONTINENTAL SHELF

- The seaward limit of the continental shelf needs careful consideration.
  - Article 1(a) of the Geneva Convention on the Continental Shelf provides two criteria to locate the seaward limits of the continental shelf:
    - 200 metres isobath
    - exploitability test
      - However, the exploitability test gave rise to a considerable degree of uncertainty because legal interpretation of the test may change according to the development of technology. In fact, the technological development during the 1960s made it possible to exploit the seabed at depths in excess of 1000 metres. It could be reasonably presumed that this capacity would progress further. In this regard, some argue that the concept of exploitability may be interpreted in relation to the most advanced standards of technology.
        - If this is the case, according to an extreme interpretation, all the ocean floor of the world would eventually be divided among the coastal States.

CONTINENTAL SHELF

- Hence it was hardly surprising that the precise limits of the continental shelf became a significant issue at UNCLOS III.
  - Negotiations at the Conference resulted in Article 76 of the LOSC. Article 76(1) provides two alternative criteria determining the outer limits of the continental shelf beyond 200 nautical miles:
    - 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.
  - With the emergence of the concept of the EEZ, the continental shelf within 200 nautical miles from the baseline is currently established as customary law.
    - Hence the coastal State has the continental shelf in a legal sense up to 200 nautical miles regardless of the configuration of the seabed.
  - As a consequence, approximately 36 % of the total seabed is now under the national jurisdiction of coastal State.

CONTINENTAL SHELF

- Legal title over the Continental Shelf
  - Legal title = criteria on the basis of which a State is legally empowered to exercise rights and jurisdiction over the marine areas adjacent to its coasts
  - According to the Truman Proclamation, the continental shelf 'may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it'.
    - Noting on this phrase, the ICJ, in the *North Sea Continental Shelf* cases, highlighted the concept of natural prolongation as a legal title over the continental shelf.

CONTINENTAL SHELF

- On the other hand, the emergence of the concept of the 200-mile EEZ inevitably affected the legal title of the continental shelf. The EEZ is based on the distance criterion.
  - In this regard, the ICJ, in the *Libya/Malta* case, pronounced that:
    - Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.
    - It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone.

CONTINENTAL SHELF

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  - It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone.
  - In light of the decisions of the Court and Article 76 of the LOSC, it may be argued that currently the distance criterion is the legal title over the continental shelf up to 200 nautical miles and the natural prolongation offers legal title over the shelf beyond 200 nautical miles.
    - This is why Russia was able to bring a huge claim to the CLCS. Russia claims that the Lomonossov Ridge is a natural prolongation of the Russian mainland and that the Russian Federation therefore is able to claim a huge area of continental shelf.

CONTINENTAL SHELF

- Criteria for determining the outer limits of the continental shelf beyond 200 nautical miles
  - Article 76(4) LOSC: sedimentary thickness test
    - Irish formula or Gardiner formula, Article 76(4)(a)(i) LOSC
      - The outer edge of the continental margin is fixed by a line delineated by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 % of the shortest distance from such point to the foot of the continental slope.
    - Hedberg formula, Article 76(4)(a)(ii) LOSC
      - The outer edge of the continental margin is determined by a line delineated by reference to fixed points not more than 60 nm from the foot of the continental slope. In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base by conformity with Article 76(4)(b) LOSC.

CONTINENTAL SHELF

- Lines delineating the outer limits of the continental shelf must be straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude (Article 76(7) LOSC).
- The fixed points comprising the line of the outer limits of the continental shelf on the seabed shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500-metre isobaths (Article 76(5) LOSC).

CONTINENTAL SHELF

- Continental shelf beyond 200 nautical miles attracts many coastal States. Yet there is a concern that this regime reintroduces the inequalities between States which the uniform breadth of 200 nautical miles was supposed to remove. Further to this, the criteria set out in Article 76 give rise to a degree of uncertainty as to its practical application.
  - For instance, in the application of the Irish and the Hedberg formulae, the location of the foot of the continental slope is of primary importance. However, the identification of the foot of the continental slope is not free from difficulty in practice. It is also suggested that the observed sediment thickness can be in error by as much as 10 per cent. If this is the case, this will have a significant impact upon the location of the outer limits of the continental shelf.
  - The points of the 2,500-metre isobath may also be difficult to locate when isobaths are complex or repeated in multiples.
  - In light of the scientific uncertainties, the LOSC established a technical body which assesses data respecting the outer limits of the continental shelf, namely the Commission on the Limits of the Continental Shelf (CLCS).

CONTINENTAL SHELF

- Commission on the Limits of the Continental Shelf
- 21 members
- Experts in the field of geology, geophysics or hydrography
- Elected by States Parties to the LOSC from among their nationals, having due regard to the need to ensure equitable geographical representation, and they shall serve in their personal capacities in accordance with Article 2(1) of Annex II.
  - The members are to be elected for a term of five years and can be re-elected (Article 2(4) of Annex II).
  - Whilst the tasks of the Commission are not completely separated from the legal interpretation of relevant rules of the Convention, the Commission contains no jurists.
  - No representative of the International Seabed Authority (hereafter the Authority) is included in the membership of the Commission, while the Authority is directly affected by the recommendation of the Commission.

CONTINENTAL SHELF

- The Commission is conferred with two functions by Article 3(1) of Annex II.
  - First, the Commission is to consider the data and other material submitted by coastal States and to make recommendations to the coastal States in this matter in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by UNCLOS III.
  - Second, the Commission is to provide scientific and technical advice, if requested by the coastal State concerned.
    - It can be reasonably presumed that the extension of the continental shelf beyond 200 nautical miles will increase overlapping of continental shelves. However, delimitation of the continental shelf beyond 200 nautical miles is outside the scope of the jurisdiction of the Commission.

CONTINENTAL SHELF

- Article 9 of Annex II, along with Article 76(10), make clear that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.
  - Paragraph 2 of Annex I of the Rules of Procedure of the Commission, adopted on 11 April 2008, states that: In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States, or in other cases of unresolved land or maritime disputes, related to the submission, the Commission shall be:
    - Informed of such disputes by the coastal States making the submission; and
    - Assured by the coastal States making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States.

CONTINENTAL SHELF

- In order not to prejudice questions relating to the delimitation of boundaries between States, a State may make partial or joint submissions to the Commission.
  - For example, on 19 May 2006, France, Ireland, Spain and the United Kingdom made a joint submission to the Commission.
  - On 1 December 2008, the Republic of Mauritius and the Republic of Seychelles also made a joint submission to the Commission.
  - It appears that joint submissions may contribute to reduce the workload of the Commission and encourage cooperation between neighbouring coastal States to determine their outer limits of the continental shelf in an amicable manner.

CONTINENTAL SHELF

- The process of establishing the outer limits of the continental shelf beyond 200 nautical miles involves four steps:

CONTINENTAL SHELF

- Step 1: The coastal State is to initially delineate the outer limits of its continental shelf in conformity with criteria set out in Article 76 of the LOSC.

CONTINENTAL SHELF

- Step 2: The coastal State is to submit information on the limits to the CLCS within ten years of the entry into force of the LOSC for that State.
  - A submission by a coastal State is examined by a sub-commission which is composed of seven members of the Commission, and, next, the sub-commission submits its recommendation to the Commission.
    - The representatives of the coastal State which made a submission to the Commission may participate in the relevant proceedings without the right to vote pursuant to Article 5 of Annex II.

CONTINENTAL SHELF

- Approval by the Commission of the recommendations of the sub-commission is to be by a majority of two-thirds of Commission members present and voting pursuant to Article 6(2) of Annex II.
- The recommendations of the Commission are to be submitted in writing to the coastal State which made the submission and to the UN Secretary-General in accordance with Article 6(3) of Annex II.
  - The LOSC contains no rule concerning public access to the information submitted to the Commission. Nor is there any provision with regard to the public promulgation of the recommendations of the Commission. However, the executive summary of a submission to the Commission is public pursuant to Rule 50 of the Rules of Procedure, and third States have been allowed to make observations on submissions to the Commission.

CONTINENTAL SHELF

- Step 3: The coastal State is to establish the outer limits of its continental shelf on the basis of the recommendations of the Commission.
  - Where the coastal State disagrees with the recommendations of the Commission, the State is to make a revised or new submission to the Commission in accordance with Article 8 of Annex II of the LOSC. Under Article 76(8) of the LOSC, the limits of the continental shelf established by a coastal State on the basis of the recommendations of the Commission shall be final and binding.

CONTINENTAL SHELF

- What is final and binding is the outer limits established by a coastal State on the basis of the Commission's recommendations, not the recommendations themselves.
  - In the case of disagreement by the coastal State with the recommendations of the Commission, the coastal State is to make a revised or new submission to the Commission within a reasonable time pursuant to Article 8 of Annex II.
- Article 76(8), along with Article 7 of Annex II, appears to indicate that the coastal State cannot establish outer limits of the continental shelf on the basis of information that has not been considered by the Commission. Yet the Commission is not empowered to assess whether a coastal State has established the outer limits of the continental shelf on the basis of its recommendations. It seems that the outer limits of the continental shelf which have not been established on the basis of the recommendations of the Commission will not become binding on other States.

CONTINENTAL SHELF

- Step 4: Under Article 76(9), the coastal State is to deposit with the UN Secretary-General charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General is to give due publicity thereto.
  - Article 84(2) requires the coastal State to give due publicity to charts or lists of geographical coordinates and deposit a copy of each such chart or list with the UN Secretary-General and, in the case of those showing the outer limit lines of the continental shelf, the Secretary-General of the International Seabed Authority.

CONTINENTAL SHELF

- A state which is not a party to the LOSC cannot invoke the benefits of Article 76 LOSC.
- Article 4 of Annex II sets out a time limit for submissions of ten years after entry into force of the LOSC.
  - This provision would seem to exclude the possibility of submission by a non-Party to the Convention. It must also be noted that Article 76 is linked to Article 82 with regard to revenue sharing. The claim over the continental shelf beyond 200 nautical miles without the acceptance of the obligation with regard to revenue sharing should not be assumed.59 Further to this, it is apparent that non-States Parties to the LOSC cannot use the recommendations of the CLCS.

CONTINENTAL SHELF

- Peaceful settlement of disputes concerning the interpretation and application of Article 76 LOSC
  - Other States Parties may be considered to have a legal interest in the outer limits of the continental shelf beyond 200 nautical miles.
    - For instance, it may be argued that a State Party which undertakes the exploration and exploitation of resources in the Area has a legal interest in the outer limits of the continental shelf beyond 200 nautical miles.
    - It is possible that other States may challenge the validity of the outer limits of the continental shelf concerned.
      - There is no reference to such disputes under section 3 of Part XV which provides for limitations and exceptions to the compulsory procedures of dispute settlement.
      - Thus, disputes involving the outer limits of the continental shelf beyond 200 nautical miles can, if necessary, be settled by recourse to the compulsory procedures of Part XV

CONTINENTAL SHELF

- Payments concerning the exploitation of the Continental Shelf beyond 200 nm
  - Under Article 82 of the LOSC, the coastal State is obliged to make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles.
    - It is generally recognized that this provision represents a compromise between a group of States which advocated their claims over their continental shelves beyond 200 nautical miles and an opposing group which attempted to limit the continental shelves at 200 nautical miles.
    - The payments and contributions are to be made annually with respect to all production at a site after the first five years of production of that site. For the sixth year, the rate of payment or contribution is to be 1 per cent of the value or volume of production at the site. The rate is to increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter in conformity with Article 82(2).
      - However, a developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments in respect of that mineral resource by virtue of Article 82(3).
    - Under Article 82(4), the payments or contributions are to be made through the Authority (more on that later).
      - The Authority is to distribute them to States Parties to the LOSC on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.
  - It may be said that the principle of the common heritage of mankind counterbalances overexpansion of the exclusive interests of coastal States.

CONTINENTAL SHELF

- Sovereign rights over the Continental Shelf
  - The coastal State exercises sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources in accordance with Article 77(1) LOSC:
    - The sovereign rights of the coastal State over the continental shelf are inherent rights, and do not depend on occupation, effective or notional, or on any express proclamation. Thus a continental shelf exists ipso facto and ab initio.
    - The sovereign rights of the coastal State relate to the exploration and exploitation of natural resources on the continental shelf. Non-natural resources are not included in the ambit of sovereign rights of the coastal State even if they are found on the continental shelf. For instance, wrecks lying on the shelf do not fall within the ambit of the sovereign rights over the continental shelf. The sovereign rights are thus characterized by the lack of comprehensiveness of material scope. On this point, the sovereign rights must be distinguished from territorial sovereignty.

CONTINENTAL SHELF

- The natural resources basically consist of the mineral and other non-living resources of the seabed and subsoil. However, exceptionally, sedentary species are also included in natural resources on the continental shelf. Under Article 77(4), the sedentary species are 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. Examples include oysters, clams and abalone. Yet it is debatable whether crabs and lobster fall within the category of sedentary species. Where the coastal State established the EEZ, that State has the sovereign rights to explore and exploit all marine living resources on the seabed in the zone. (iv) Although there is no provision like Article 73(1), there seems to be a general sense that the sovereign rights include legislative and enforcement jurisdiction with a view to exploring and exploiting natural resources on the continental shelf.

CONTINENTAL SHELF

- Article 111(2) LOSC:
  - The right of hot pursuit shall apply *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.
    - This provision appears to suggest that the coastal State has legislative and enforcement jurisdiction with respect to the continental shelf.
- The sovereign rights of the coastal State are exercisable over all people or vessels regardless of their nationalities. Thus there is no limit concerning personal scope.
- The rights 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. At the same time, the exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in the LOSC (Article 78(2)).

CONTINENTAL SHELF

- Overall sovereign rights of the coastal State over the continental shelf are limited to certain matters provided by international law. With respect to matters provided by international law, however, the coastal State may exercise legislative and enforcement jurisdiction over all peoples regardless of their nationalities in an exclusive manner.
- Rights over the continental shelf are spatial in the sense that they can be exercised solely within the particular space in question regardless of the nationality of persons or vessels.
  - Limited spatial jurisdiction

CONTINENTAL SHELF

- Jurisdiction with regard to artificial islands, marine scientific research, dumping and other purposes
  - Under Article 80 of the LOSC, Article 60 concerning the coastal State's jurisdiction over artificial islands is applied *mutatis mutandis* to the continental shelf.
    - It follows that on the continental shelf, the coastal State has exclusive rights to construct and to authorize and regulate the construction, operation and use of
      - artificial islands,
      - installations and structures for the purposes provided for in Article 56 and other economic purposes, and
      - installations and structures which may interfere with the exercise of the rights of the coastal State
  - The coastal State also has exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

CONTINENTAL SHELF

- On the continental shelf, the coastal State has jurisdiction with regard to marine scientific research in accordance with Articles 56(1)(b)(ii) and 246(1) of the LOSC.
  - Article 246(2) makes clear that marine scientific research in the EEZ and on the continental shelf shall be conducted with the consent of the coastal State.
    - With regard to the continental shelf beyond 200 nautical miles, the discretion of the coastal State is limited by Article 246(6), the first sentence of which provides as follows:
      - Notwithstanding the provisions of paragraph 5, coastal States may not exercise their discretion to withhold consent under subparagraph (a) of that paragraph in respect of marine scientific research projects to be undertaken in accordance with the provisions of this Part on the continental shelf, beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, outside those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time.

CONTINENTAL SHELF

- Article 210(5) of the LOSC makes clear that the coastal State has the right to permit, regulate and control dumping on the continental shelf. At the same time, the coastal State has enforcement jurisdiction with respect to pollution by dumping on the continental shelf.
- Article 81 provides that: 'The coastal State shall have the exclusive rights to authorize and regulate drilling on the continental shelf for all purposes'.
- Article 79(1) stipulates that all States are entitled to lay submarine cables and pipelines on the continental shelf.
  - However, the delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State pursuant to Article 79(3).
- Under Article 79(2), the coastal State also has rights to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines.

CONTINENTAL SHELF

- Judicial nature of the superjacent waters above the Continental Shelf
  - Following Article 3 of the Convention on the Continental Shelf, Article 78(1) of the LOSC provides that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the airspace above those waters.
    - It follows that where the coastal State has not claimed an EEZ, the superjacent waters above the continental shelf are the high seas.
    - Where the coastal State has established an EEZ, the superjacent waters above the continental shelf beyond 200 nautical miles are always the high seas under the LOSC.
  - All States enjoy the freedoms of navigation and fishing in the superjacent waters of the continental shelf and the freedom of overflight in the airspace above those waters. However, it must be noted that freedoms of third States may be qualified by the coastal State in the superjacent water of the continental shelf beyond 200 nautical miles.
  - The coastal State has exclusive jurisdiction over the construction of artificial islands as well as installations and structures on the continental shelf beyond 200 nautical miles by virtue of Article 80 of the LOSC.

CONTINENTAL SHELF

- It would seem to follow that freedom to construct artificial islands may be qualified by the coastal State jurisdiction, even though literally the superjacent waters of the continental shelf beyond 200 nautical miles are the high seas.
- In practice, coastal States explore and exploit natural resources on the continental shelf from the superjacent waters above the continental shelf. Accordingly, it appears inescapable that the coastal State excises its jurisdiction in the superjacent waters above the continental shelf for the purpose of the exploration and exploitation of natural resources.
  - In fact, Article 111(2) of the LOSC provides the right of hot pursuit in respect of violations on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable to the continental shelf, including such safety zones. In practice, safety zones are established on the superjacent waters of the continental shelf. It would seem to follow that the coastal State jurisdiction relating to the exploration and exploitation of the continental shelf is to be exercised at least in safety zones on the superjacent waters of the shelf.

CONTINENTAL SHELF

- The coastal State has jurisdiction with regard to marine scientific research on the continental shelf under Articles 56(1)(b)(ii) and 246(1) of the LOSC, and such research on the continental shelf is to be conducted with the consent of the coastal State pursuant to Article 246(2).
  - On the other hand, Article 257 of the LOSC provides that all States have the right to conduct marine scientific research in the water column beyond the limits of the EEZ 'in conformity with this Convention'.
  - According to a literal interpretation, consent under Article 246(2) seems to be required only for research physically taking place on the sea floor. Considering that normally marine scientific research is carried out from the superjacent waters or airspace above the continental shelf, however, it appears to be naïve to consider that coastal States will not exercise their jurisdiction to regulate marine scientific research there.
    - But that would not be allowed. Research which is conducted in the water and with regard to the water is not „on" the continental shelf in either meaning of the word „on". It can be „on" the continental shelf if the research actually happens there and it can be with regard to the continental shelf if probes etc. are aimed at the ground. The latter case may be open for interpretation - merely conducting research in the water without any relation to the continental shelf, however, cannot be limited by the coastal state.

MARINE SPACES BEYOND NATIONAL JURISDICTION

MARINE SPACES BEYOND NATIONAL SOVEREIGNTY

- High Seas
  - The high seas are essentially characterized by the principle of freedom of the sea, and order in the high seas is ensured primarily by the flag State. Thus the principle of the exclusive jurisdiction of the flag State and its exceptions are key issues underlying international law governing the high seas.
  - However, freedom does not mean that there is no legal order on the high seas.
    - The order on the high seas is essentially ensured by the principle of the exclusive jurisdiction of the flag State. Thus this principle and its exceptions become principal issues in the international law governing the high seas.

MARINE SPACES BEYOND NATIONAL SOVEREIGNTY

- Area
  - Area = the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction
  - governed by the principle of the common heritage of mankind.
    - This principle is an important innovation in the law of the sea in the sense that it introduces the concept of ‘mankind’ as an emerging actor in international law. The principle of the common heritage of mankind will provide a touchstone to consider the question whether and to what extent international law in the twenty-first century is moving toward an international law for mankind, which is beyond the State-to-State system.

MARINE SPACES BEYOND NATIONAL SOVEREIGNTY

- Questions
  - What is the principle of freedom of the high seas?
  - What is the function of the principle of the exclusive jurisdiction of the high seas?
  - What are the problems associated with flags of convenience and how is it possible to address them?
  - What are the peace-time exceptions to the principle of the exclusive jurisdiction of the flag State on the high seas?
  - What is the raison d'être of the principle of the common heritage of mankind?
  - To what extent was the regime governing the Area in the LOSC changed by the 1994 Implementation Agreement?
  - Is the common heritage of mankind still a significant principle governing the Area?

THE HIGH SEAS

- The LOSC devotes Part VII to the high seas.
- Spatial scope of the high seas
  - In Article 86 LOSC, the high seas are defined as
    - ‘all parts of the sea which are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State’.
  - Where a coastal State has established its EEZ, the landward limit of the high seas is the seaward limit of the EEZ.
  - Where the coastal State has not claimed its EEZ, the landward limit of the high seas is the seaward limit of the territorial sea.
    - In this case, the seabed of the high seas is the continental shelf of the coastal State up to the limit fixed by the international law of the sea.
    - The seabed and subsoil beyond the outer limits of the continental shelf are the Area, the superjacent waters above the Area are always the high seas.
    - Where the continental shelf extends beyond the limit of 200 nautical miles, the superjacent waters and the airspace above those waters are the high seas under Article 78 of the LOSC.

THE HIGH SEAS

- Principle of the freedom of the high seas
  - Established in the early nineteenth century.
  - Freedom of the high seas means that the high seas are free from national jurisdiction.
    - Article 89 of the LOSC makes clear that: 'No State may validly purport to subject any part of the high seas to its sovereignty'.
  - Freedom of the high seas means the freedom of activities there.
    - This is a corollary of the fact that the high seas are free from the national jurisdiction of any State. Consequently, each and every State has an equal right to enjoy the freedom to use the high seas in conformity with international law.
    - Article 87(1) provides as follows: The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law.
- Includes, inter alia, both for coastal and land-locked States:
  - Freedom of navigation
  - Freedom of overflight
  - Freedom to lay submarine cables and pipelines, subject to Part VI LOSC
  - Freedom to construct artificial islands and other installations permitted under international law, subject to Part VI LOSC
  - Freedom of fishing, subject to the conditions laid down in section 2
  - Freedom of scientific research, subject to Parts VI and XIII LOSC

THE HIGH SEAS

- The term ‘inter alia’ suggests that the freedom of the high seas may comprise other freedoms which are not provided for in Article 87(1).
  - Yet it is unclear what activities may fall within the category of other freedoms of the high seas. In particular, a sensitive issue arises with regard to the legality of military activities on the high seas.
  - Article 88 of the LOSC provides that the high seas shall be reserved for peaceful purposes, it is generally considered that this provision does not prohibit naval manoeuvres and conventional weapons testing on the high seas.
  - Article 301 explicitly prohibits military activities which are contrary to the UN Charter, by providing that: In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law enshrined in the Charter of the United Nations.

THE HIGH SEAS

- Freedom to construct artificial islands and freedom of scientific research may be qualified by the coastal State jurisdiction in superjacent waters of the continental shelf beyond 200 nautical miles.
  - It would follow that the six freedoms fully apply only to the high seas as superjacent waters of the Area.
- Freedom of the high seas is not absolute.
  - As provided in Article 87(2), the freedom must be exercised ‘with due regard for the interest 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’.
  - It is also to be noted that the freedom of the high seas may be qualified by specific treaties respecting such things as conservation of marine living resources and marine environmental protection

THE HIGH SEAS

- Principle of the exclusive jurisdiction of the flag State
  - well established in customary international law
  - Article 92(1) LOSC:
    - 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.
  - Flag State jurisdiction comprises both legislative and enforcement jurisdiction over its ships on the high seas.
  - The flag State exercises enforcement jurisdiction over all peoples within its ships flying its flag regardless of their nationalities.
    - The ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.

THE HIGH SEAS

- The flag State is entitled to make claims against other States in case of damage to its ship or injury to the seamen manning it, regardless of their nationality. (see ITLOS Case No. 22, *Netherlands v. Russia*)
- Corollary of the freedom of the high seas and the requirement of the submission of the high seas to law,
- Considering that the high seas are not subject to any national jurisdiction and that there is no centralized authority governing the high seas, legal order on the high seas can be ensured primarily by the flag State.
- Dual role
  - This principle prevents any interference by other States with vessels flying its flag on the high seas. In so doing, the principle of the exclusive jurisdiction of the flag State ensures the freedom of activity of vessels on the high seas.
  - Under this principle, the flag State has responsibility to ensure compliance with national and international laws concerning activities of ships flying its flag on the high seas.
- The principle of the exclusive jurisdiction of the flag State does not mean that only States are entitled to fly their flags on their vessels, Article 93 LOSC
  - International Committee of the Red Cross (ICRC)
  - UN Emergency Force (UNEF) in Egypt between 1956 and 1957

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THE HIGH SEAS

- Obligations of Flag States, Article 94 LOSC:
  - Every State is under the duty to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
    - In particular, every State is obliged to maintain a register of ships containing the names and particulars of ships flying its flags and to assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters respecting the ship.
    - Under Article 94(3), every State is obliged to take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, i.a., to:
      - the construction, equipment and seaworthiness of ships
      - the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments
      - the use of signals, the maintenance of communications and the prevention of collisions.

THE HIGH SEAS

- In taking those measures called for in Article 94(3)(4), each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance (Article 94(5)).
  - 'Generally accepted international regulations, procedures and practices' include treaties adopted under the auspices of the IMO and the ILO as well as practices on the basis of those instruments, e.g.
    - Seaworthiness of Ships
      - 1974 International Convention for the Safety of Life at Sea (SOLAS)
      - 1966 International Convention on Load Lines
      - 1971 Agreement on Special Trade Passenger Ships and its Protocol of 1973
      - 1977 International Convention for the Safety of Fishing Vessels and the 1993 Torremolinos Protocol

THE HIGH SEAS

- Collisions at sea
  - 1972 Convention on the International Regulations for Preventing Collisions at Sea
- Crew
  - 1976 ILO Convention No. 147 concerning Minimum Standards in Merchant Ships
  - 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
  - 1995 International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F)
  - 2006 Maritime Labour Convention
- Under Article 94(6), a State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such report, the flag State is obliged to investigate the matter, and if appropriate, take any action necessary to remedy the situation.

THE HIGH SEAS

- Jurisdictions in conflict: The *Lotus* Case (1928)
  - One issue which has arisen involves the extent of flag State jurisdiction in the situation where vessels flying the flags of different States have collided on the high seas.
  - On 2 August 1926, the French mail steamer *Lotus* collided with a Turkish vessel *Boz-Kourt* on the high seas. As a result of the collision, the Turkish vessel sank and eight Turkish nationals on board lost their lives. Upon the arrival of the *Lotus* in Constantinople (since 1930: Istanbul), the Turkish authorities instituted criminal proceedings against, among others, Lieutenant Demons, a French officer of the watch on board the Lotus at the time of collision. On 15 September 1926, the Criminal Court sentenced Lieutenant Demons to eighty days' imprisonment and a fine of £22.
  - The action of the Turkish judicial authorities gave rise to a dispute between France and Turkey and, by a special agreement signed at Geneva on 12 October 1926, the two governments submitted the case to the Permanent Court of International Justice (PCIJ).

THE HIGH SEAS

- In this case, the PCIJ took the view that 'there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent'.
  - The Court thus held, by the President's casting vote, that the Turkey had not acted in conflict with the principle of international law, contrary to Article 15 of the Convention of Lausanne of 24 July 1923.
    - Nonetheless, the Lotus judgment was much criticized because penal proceedings before foreign courts in the event of collision on the high seas may constitute an intolerable interference with international navigation.
- As a consequence, the 1952 Brussels Convention for the Unification of Certain Rules relating to Penal Jurisdiction provided for the **exclusive jurisdiction of the flag State or of the State of nationality of an offender in the event of a collision or any other incident of navigation concerning a sea-going ship**.

- This rule was echoed in Article 11 of the Geneva Convention on the High Seas and Article 97 of the LOSC.
  - Furthermore, Article 98(1)(c) of the LOSC places a clear obligation upon every State to require the master of a ship flying its flag, after a collision, to render assistance to the other ship, its crew and its passengers.

THE HIGH SEAS

- Nationality of a ship
  - The flag State jurisdiction is exercised on the basis of the nationality of a ship. Thus, the nationality of a ship is of central importance in order to establish the juridical link between a State and a ship flying its flag.
  - Under international law, each State is entitled to determine conditions for the grant of its nationality to ships. In the *M/V Saiga (No. 2)* case, ITLOS ruled that
    - Determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State.
    - However, the right of States to grant their nationality to ships is not without limitation. It is generally recognized that a State may not grant its nationality to a ship which has already been granted the nationality of another State.
      - This requirement follows from customary international law and Article 92(1) of the LOSC which obliges ships to sail under the flag of one State only.
    - The right of the State to grant its nationality to vessels may also be qualified by specific treaties, such as the United Nations Convention on Conditions for Registration of Ships (hereafter the UN Registration Convention).

THE HIGH SEAS

- The validity of the nationality of a ship may be questioned in international adjudication.
  - In the 2001 *Grand Prince* case between Belize and France, for example, ITLOS examined the question of whether Belize could be considered as the flag State of the Grand Prince when the application was made. The Tribunal then concluded that Belize failed to establish that it was the flag State of *the Grand Prince*.
  - A related issue is whether the change of the ownership of a ship results in the change of the nationality of the ship. In this regard, ITLOS, in the 2007 *Tomimaru* case, took the view that ownership of a vessel and the nationality of a vessel are different issues and it cannot be assumed that a change in ownership automatically leads to the change or loss of its flag.
    - This judgment provides an important precedent on this subject. As noted, the juridical link between a State and a ship that is entitled to fly its flag is a prerequisite for securing effective exercise of the flag State jurisdiction.

THE HIGH SEAS

- Article 91(1) LOSC:
  - Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
- Article 94(1) LOSC:
  - Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
    - There is little doubt that the concept of a 'genuine link' arose from the *Nottebohm* judgment of 1955.

THE HIGH SEAS

- In *Nottebohm*, the ICJ held that a State cannot claim that the municipal rules governing the grant of its own nationality are entitled to recognition by another State 'unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States'. According to ITLOS, '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'. Yet the Convention on the High Seas and the LOSC leave entirely unspecified the concept of a genuine link.
- How it is possible to ensure a 'genuine link' between the flag State and the ships flying its flag in practice? This question is particularly relevant to flags of convenience.

THE HIGH SEAS

- Flags of convenience
  - ‘flag of convenience’ or ‘open registry’ States = states that permit foreign shipowners, having very little or virtually no real connection with those States, to register their ships under the flags of those States
    - The flag of convenience States allow shipowners to evade national taxation and to avoid the qualifications required of the crews of their ships. In so doing, flag of convenience States give shipowners an opportunity to reduce crew costs by employing inexpensive labour, whilst these States receive a registry fee and an annual fee. As one of the few variables in shipping costs is crew costs, a highly competitive market within the international shipping industry prompts shipowners to resort to open registry States.

THE HIGH SEAS

- ‘Second’ or ‘international’ registries that allow for the use of the national flag, albeit under conditions which are different from those applicable for the first national registry.
  - Examples include the Norwegian International Ship Register (NIS), the Danish International Register of Shipping (DIS), and the French International Register (RIF). The NIS and the RIF cater to some foreign-controlled tonnage, whilst the DIS is almost only used by Danish-controlled ships.
  - The ten largest open and international registry States that cater almost exclusively to foreign-controlled ships are: Panama, Liberia, Bahamas, Marshall Islands, Malta, Cyprus, Isle of Man, Antigua and Barbuda, Bermuda, and Saint Vincent and the Grenadines.

THE HIGH SEAS

- Even though non-compliance with relevant rules is by no means peculiar to flags of convenience, there is rightly the concern that open registry States do not commit themselves to effectively enforce the observance of relevant rules and standards by vessels flying their flag with regard to, inter alia,
  - safety of navigation,
  - labour conditions of the crew,
  - the regulation of fisheries
  - and marine pollution,

  since strict law enforcement will have a negative effect on the economic policy of attracting ships to register.
  - Illegal fishing by the flags of convenience is also a matter of pressing concern.

THE HIGH SEAS

- In 1986, the UN Registration Convention was adopted under the auspices of the United Nations Conference on Trade and Development (UNCTAD) with a view to tightening a genuine link between the flag State and the ships flying its flag.
  - The UN Registration Convention elaborates several conditions with which the flag State shall comply. In particular, ownership of ships, manning of ships, and the management of ships and shipowning companies constitute key elements of the tightening of a genuine link between the flag State and the ships flying its flag. However, this Convention has not entered into force. Furthermore, it appears to be questionable whether the flag of convenience States will ratify this Convention.
  - The problem of flags of convenience seems, broadly, to derive from international competition in the shipping and fishing industry, in which case, it is debatable whether the tightening of the requirement of a genuine link would provide an effective solution.

THE HIGH SEAS

- A further issue involves legal consequences arising from the absence of a genuine link between the flag State and the ship concerned.
  - *Magda Maria* Case (1986)
    - On 1 August 1981, the *Magda Maria* flying the Panamanian flag was seized by the Dutch authorities on the high seas nine miles off the Dutch coast because of unauthorized broadcasting from the high seas. The *Magda Maria* was brought into port at Amsterdam harbor and broadcasting equipment on board was seized. Although the District Court of The Hague upheld the validity of the seizure by the Dutch authority, the Supreme Court quashed the decision of the District Court and remitted the case to the Court of Appeal of The Hague for retrial and decision. Before the Court of Appeal, the Procurator-General claimed that in view of the absence of a genuine link as referred to in Article 5 of the Convention on the High Seas, the *Magda Maria* had become stateless.
    - Nonetheless, the Court of Appeal dismissed this claim. According to the Court, the concept of the genuine link obliges Panama as the flag State only to exercise its jurisdiction effectively. However, '[i]t does not imply that the Dutch Government has the right to recognize or otherwise the right to fly the Panamanian flag which was granted to the ship by Panama'.
    - Thus, the Court of Appeal held that 'it cannot be said on the basis of the examination at the sitting that the *Magda Maria* was stateless on account of the absence of a genuine link'.

THE HIGH SEAS

- Advisory Opinion in the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation (IMCO) (1960)
  - In this case, the ICJ was asked to answer to the question with regard to the validity of the constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation (IMCO).
  - Under Article 28(a) of the Convention of the IMCO, the members of the Maritime Safety Committee consisted of fourteen members elected by the Assembly which included the world's eight largest ship-owning countries. Nonetheless, Liberia and Panama were not elected to the Committee, although they ranked third and eighth on the world tonnage scale at that time.
  - In the course of arguments, it was contended that the Assembly was entitled to take the concept of a genuine link into consideration in assessing the ship-owning size of each country. However, the ICJ ruled that the concept of the genuine link was irrelevant for the purpose of the Advisory Opinion; and that the determination of the largest ship-owning nations depends solely upon the tonnage registered in the countries in question.
  - Hence, the Court concluded, by nine votes to five, that the Maritime Safety Committee of the IMCO was not constituted in accordance with the Convention for the Establishment of the Organisation.

THE HIGH SEAS

- *M/V Saiga* (No. 2) (1999)
  - In this case, Guinea claimed that there was no genuine link between the Saiga and Saint Vincent and the Grenadines, and, consequently, it was not obliged to recognize the claims of Saint Vincent and the Grenadines in relation to the ship.
  - ITLOS noted the fact that, in the legislative process of Article 5(1) of the Geneva Convention on the High Seas, the proposal that the existence of a genuine link should be a basis for the recognition of nationality was not adopted. Article 91 of the LOSC followed the approach of the Convention on the High Seas. Hence ITLOS concluded that the purpose of Article 91 was 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. In light of the vagueness of the concept of a genuine link, unilateral discretion of States to deny the nationality of vessels because of the absence of a genuine link may endanger the freedom of the seas.
  - Hence there may be room for the view that a third State cannot refuse to recognize the nationality of a ship on the basis of the absence of a genuine link between a flag State and a ship. It appears that the judicial practice is also supportive of this view.

THE HIGH SEAS

- Exceptions to the exclusive jurisdiction of the flag State
  - The right of visit
    - The principle of the exclusive jurisdiction of the flag State applies to warships as well as ships used only on government non-commercial service without any exception. This is clear from Articles 95 and 96 of the LOSC.
    - On the other hand, private ships are subject to two types of exception.
      - The first exception involves the right of visit. The right of visit is exercised by a warship or a military aircraft pursuant to Article 110.
        - In essence, the right of visit seeks to reinforce an international order on the high seas.
      - The second exception concerns the right of hot pursuit. The hot pursuit of a foreign ship may be undertaken by the competent authorities of the coastal State by virtue of Article 111 LOSC.
        - The right of hot pursuit seeks to safeguard the interests of coastal States.

THE HIGH SEAS

- Exceptions to the exclusive jurisdiction of the flag State
  - The right of visit
    - Article 110(1) distinguishes two cases where the foreign warship or the military aircraft may exercise the right of visit.
      - The first is the case where acts of interference derive from powers conferred by specific treaties. In those cases, only the States Parties to relevant conventions are entitled to exercise the right of visit on vessels flying the flag of other States Parties. In fact, some fishery treaties allow a State Party to board and inspect vessels of other Parties on the high seas.
      - The second case involves the right of visit with respect to activities of foreign vessels enumerated in Article 110(1). In this case, the warship or military aircraft may send a boat under the command of an officer to the suspected ship in order to verify the ship's right to fly its flag. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship (Article 110(2)). If the suspicions prove to be unfounded, however, it shall be compensated for any loss or damage that may have been sustained pursuant to Article 110(3).

THE HIGH SEAS

- The right of visit is provided in Article 110(1) of the LOSC as follows:
  - 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
    - (a) the ship is engaged in piracy;
    - (b) the ship is engaged in the slave trade;
    - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
    - (d) the ship is without nationality; or
    - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

THE HIGH SEAS

- The right of hot pursuit
  - Hot pursuit is the legitimate chase of a foreign vessel on the high seas following a violation of the law of the pursuing State committed by the vessel within the marine spaces under the pursuing State's jurisdiction.
    - The right of hot pursuit seems to be, to a considerable extent, a product of Anglo-Saxon jurisprudence. The right was clearly recognized in the *North* case of 1906.
    - Presently the right of hot pursuit is enshrined in both Article 23 of the Geneva Convention on the High Seas and Article 111 of the LOSC.
  - The right of hot pursuit is subject to several requirements.
    - The hot pursuit must be undertaken by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect in accordance with Article 111(5).
    - The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State.
      - If the foreign ship is within a contiguous zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established, that is to say, customs, fiscal, immigration or sanitary laws (Article 111(1)).
        - A controversial issue is whether attempted offences give rise to a right of hot pursuit. In drafting Article 23 of the Geneva Convention on the High Seas, which is essentially equivalent to Article 111(1) of the LOSC, Brazil proposed to the ILC that the draft Article should refer to an offence which was about to be committed. In this regard, the ILC seemed to consider that the suggestion was already implied in the text. Hence it can be argued that the right of hot pursuit is exercisable with regard to attempted offences.

THE HIGH SEAS

- Since, in essence, hot pursuit is a temporary extension of the coastal State's jurisdiction onto the high seas, the pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State pursuant to Article 111(1).
  - The right of hot pursuit is to apply *mutatis mutandis* to violations of the laws and regulations of the coastal State in the EEZ or on the continental shelf, including safety zones around continental shelf installations (Article 111(2)).
  - The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship in conformity with Article 111(4). This requirement is a replica of Article 23(3) of the TSC. In this regard, the ILC took the view that the words 'visual or auditory signal' exclude signals given at a great distance and transmitted by wireless.
    - In this connection, the use of radio signals was at issue in the British *R. v Mills and Others* case of 1995. In light of the development of modern technology, Judge Devonshire at Croydon Crown Court ruled that the transmission of the radio signals complied with the preconditions of the Convention on the High Seas concerning the right of hot pursuit.

THE HIGH SEAS

- The pursuit must be hot and continuous. The aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship pursuant to Article 111(6)(b).
- It is also recognized that hot pursuit can be transferred between ships, although there is no explicit provision on this particular matter.

- The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State (Article 111(3)), since pursuit in the territorial sea of another State would violate the territorial sovereignty of that State.
  - It would follow that hot pursuit may continue in the EEZ of a third State.
- Where the hot pursuit was unjustified, compensation shall be paid for any loss or damage that may have been sustained thereby (Article 111(8)).

- The conditions for the exercise of the right of hot pursuit under this provision are cumulative and each of them has to be satisfied for the pursuit to be legitimate under the LOSC.

THE HIGH SEAS

- Validity of hot pursuit that involves ships in pursuit from two or more coastal States.
  - Examples of so-called ‘multilateral hot pursuit’ can be found in the Southern Ocean.
    - In 2001, the Togo-registered *South Tomi* was pursued from Australia’s EEZ by the Australian-flagged *Southern Supporter*. After a fourteen-day chase covering a distance of 3,300 nautical miles, the *South Tomi* was finally apprehended by Australian personnel with the aid of two South African vessels.
    - In 2003, after a twenty-day hot pursuit, covering 3,900 nautical miles, the Uruguayan-flagged fishing vessel *Viarsa 1* was apprehended by the Southern Supporter with the aid of South African- and United Kingdom-flagged vessels.
    - Considering that these pursuits satisfied the conditions of hot pursuit and officials of the coastal State that initiated the pursuit could formally apprehend the suspected vessels, one can say that the multilateral hot pursuits in the cases of the *South Tomi* and *Viarsa 1* were not at variance with Article 111 of the LOSC.
    - Later, in 2003, Australia and France concluded a bilateral treaty which is applicable in the Southern Ocean.73 Article 3(3) of this treaty allows each Party to request assistance from the other Party when engaged in a hot pursuit. Article 4 of the 2003 Treaty allows a vessel or other craft authorized by one of the Parties to continue hot pursuit through the territorial sea of the other Party under certain conditions.

THE HIGH SEAS

- Validity of the doctrine of constructive presence.
  - This doctrine allows the coastal State to arrest foreign ships which remain on the high seas but commit an offence within the territorial sea or the EEZ by using their boats. The doctrine of constructive presence may operate with the right of hot pursuit. In this regard, a classical case is the *Tenyu Maru* case of 1910. The Japanese schooner, the *Tenyu Maru*, laid off from shore about 11.5 miles off the Pribilof seal islands and sent her boats out hunting seals. On 9 July 1909, the US revenue cutter discovered two boats within about a mile and a half of the shores of Otter Island. The cutter captured a boat within the three-mile limit from shore and the other after crossing the three-mile line. The *Tenyu Maru*, together with her captain and crew, was conveyed by the cutter to Dutch Harbour, Alaska. In this case, District Judge Overfield considered that: 'The schooner was therefore just as much "engaged in" killing the seals, under the statutes, when the small boat was captured within the three-mile limit on July 9th as though she had been standing within the zone at the time, in the absence of any evidence showing extenuating circumstances.' Thus, the *Tenyu Maru* was forfeited to the United States.

THE HIGH SEAS

- The doctrine of constructive presence seems to be implicitly recognized in Article 23(3) of the Convention on the High Seas and Article 111(4) of the LOSC. However, it appears that the validity of extensive constructive presence needs further consideration. Whilst simple constructive presence involves the case where the ship's own boats are used to establish the nexus, extensive constructive presence concerns the case where other boats are used. The doctrine of extensive constructive presence was upheld in *R. v Mills and Others*.

THE HIGH SEAS

- The *Poseidon*, a ship registered in Saint Vincent and the Grenadines, transferred 3.25 tons of cannabis to a British-registered fishing trawler, the *Delvan*, on the high seas. The *Delvan* had set out from Cork in the Republic of Ireland for this purpose. The *Delvan* headed to the United Kingdom and, later, it arrived in the south-coast port of Littlehampton. The cargo was unloaded there but the shore party was arrested shortly thereafter. Next, the *Poseidon* was arrested by the British task force on the high seas. A question arose whether the relationship between the *Poseidon* and the *Delvan* was such as to satisfy the requirements set out in Article 23(3) of the Convention on the High Seas, namely team work and the existence of a mother ship relationship. On this issue, Judge Devonshire took the view that there was the existence of a mother ship relationship.

THE HIGH SEAS

- Use of force in the exercise of the right of hot pursuit
  - An often quoted case on this matter is the *I'm Alone* case. The *I'm Alone*, which was a British ship of Canadian registry, engaged in smuggling liquor into the United States. The vessel was sighted within one hour's sailing time from the United States by the coastguard cutter, the *Wolcott*. As the *I'm Alone* refused to stop, the *Wolcott* pursued the vessel onto the high seas. Still in hot pursuit, another revenue cutter, the *Dexter*, joined the pursuit and, on 22 March 1929, the *I'm Alone* was sunk on the high seas in the Gulf of Mexico by the revenue cutter. The Joint Interim Report of the Commissioners of 1933 stated that: [I]f sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose [of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel], the pursuing vessel might be entirely blameless.
  - The admittedly intentional sinking of the suspected vessel was not justified by anything in the 1924 Convention between the United States of America and Great Britain to Aid in the Prevention of the Smuggling of Intoxicating Liquors into the United States. Finally, in the Joint Final Report of 1935, the Commissioners found that the sinking of the vessel was not justified by the 1924 Convention or by any principle of international law.

THE HIGH SEAS

- More recently, the use of force in hot pursuit was in issue in the *M/V Saiga (No. 2)* case. In this case, ITLOS held that: The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. In this case, the Guinean officers fired at the *Saiga* with live ammunition indiscriminately. As a consequence, considerable damage was done to the ship and, more seriously, caused severe injuries to two of the persons on board.

THE HIGH SEAS

- Thus, the ITLOS ruled that Guinea used excessive force and endangered human life before and after boarding the *Saiga*, and thereby violated the rights of Saint Vincent and the Grenadines under international law. Those precedents suggest that the use of force is a last resort and must be necessary and reasonable. In this regard, Article 22(1)(f) of the 1995 Fish Stocks Agreement requires that the inspecting State shall ensure that its duly authorized inspectors avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances. Likewise, Article 9 of the 2005 SUA Convention provides that: 'Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstance.'

THE HIGH SEAS

- Exceptional measures
  - The principle of the exclusiveness of flag State jurisdiction on the high seas may be varied in two situations. First, it is possible to depart from the principle of the exclusiveness of flag State jurisdiction by specific treaties. A particular example is the regulation of illicit traffic in narcotic drugs or psychotropic substances by sea. Second, the issue arises as to whether or not the interference with foreign vessels on the high seas can be justified by self-defence. (a) The regulation of illicit traffic in narcotic drugs or psychotropic substances The use of private vessels for illicit traffic in narcotic drugs has long been a serious problem. Thus Article 27(1)(d) of the LOSC provides an exception with regard to the criminal jurisdiction of the coastal State. Furthermore, Article 108 of the Convention places an obligation upon all States to cooperate in the suppression of drug smuggling at sea.
    - At the bilateral level, the United States concluded a series of bilateral agreements with twenty-nine Latin American and Caribbean States in order to combat illicit drug and immigrant smuggling.
    - 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
    - Several bilateral treaties also provide prior authorization for the boarding of ships for the purpose of the suppression of illicit drug traffic at sea.

THE HIGH SEAS

- Self-defence on the high seas
  - There is no doubt that States have the inherent right of self-defence under international law, but can interference with foreign ships on the high seas be justified by the right of self-defence?
    - After World War II, States have sometimes justified interference with foreign vessels on the high seas on the basis of the right of self-defence.
      - During the Algerian Emergency between 1956 and 1962, for example, the French Navy undertook to visit and search a considerable number of foreign ships on the high seas with a view to stemming the flow of arms and munitions into Algeria. Nonetheless, most of the States whose ships were affected by the French naval operation protested, and, in some cases, gave rise to serious diplomatic difficulties particularly between France and the Federal Republic of Germany.
      - Another well-known incident concerns the Cuban Quarantine in the 1962 Cuban missile crisis. On 23 October 1962, the Organization of American States called for the withdrawal of missiles from Cuba, and recommended that the Member States take all measures under the Inter-American Treaty of Reciprocal Assistance. Pursuant to this resolution, US President Kennedy immediately ordered that the United States Navy interdict the delivery of offensive weapons to Cuba and, thus, any ship proceeding towards Cuba might be ordered to submit to visit and search on the high seas. In order to justify this operation, the myriad possible justifications, including the right of self-defence under Article 51 of the UN Charter, were submitted. Nonetheless, it appears debatable whether the US operation could be fully justified on the basis of self-defence.
  - The validity of the exercise of the right of self-defence on the high seas is to be judged on a case-by-case basis in accordance with the international law of self-defence, in particular Article 51 of the UN Charter.

ARCTIC SHIPPING

- The reduction of sea ice cover makes the Arctic Ocean attractive for shipping.
  - Shorter distance from East Asia to Europe (Nothern Sea Route) or the North American East Coast (Northwest Passage)
    - Significant cost reductions for shipping companies
  - Export of raw materials (gas, oil…) from Russia to China
  - Cruise tourism
- Increasing shipping in the Arctic leads to increasing risks for coastal communities in the Arctic
  - Oil spills
  - Air pollution

ARCTIC SHIPPING OPERATIONS AND INTERNATIONAL LAW

- International Law provides a number of legal tools dealing with Arctic shipping operations
  - UN Convention on the Law of the Sea (UNCLOS) 1982
  - International Convention for the Prevention of Pollution From Ships (MARPOL) 1973, 1978
  - International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1978, 1995, 2010
  - Maritime Labour Convention (MLC) 2006
  - International Convention for the Safety of Life at Sea (SOLAS) 1914
  - International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F) 1995
  - Polar Code 2017

IF PREVENTION DOES NOT WORK, LIABILITY CONVENTIONS CAN PLAY AN IMPORTANT ROLE

- Liability conventions for the shipping sector include obligatory insurance requirements
  - Flag states check if all required insurances are in place and issue certificates accordingly
  - Port states check the presence of such certificates
    - Lack of insurances / certificates lead to the detention of ships
      - This in turn means that shipping companies / ship owners lose money because they cannot fulfil their contractual obligations to their customers because the ship is not allowed to move
- Only a few specialized insurers provide the relevant insurance services

IF PREVENTION DOES NOT WORK, LIABILITY CONVENTIONS CAN PLAY AN IMPORTANT ROLE

- Insurers have an economic interest in reducing the likelihood of disasters and damages
- Therefore insurers impose technical standards on their clients
  - These technical standards make shipping saver
  - And can be updated more easily than domestic laws or an international treaty
  - The international legal basis does not have to be changed in order to reflect new technical developments
- Indirect regulation forces ship operators / ship owners to adopt good practices

LIABILITY CONVENTIONS: GENERAL CONCERNS

- Convention on Limitation of Liability for Maritime Claims (LLMC) 1976
- Peracomo Inc et al. v. v TELUS Communications Company et al., 2014 SCC 29 (Supreme Court of Canada, aka the Realice Case)

OIL AS CARGO

- International Convention on Civil Liability for Oil Pollution Damage (CLC)
  - Oil as Cargo
  - obligatory insurance requirement
  - LLMC does not apply
  - Oil spills in the Arctic as a technical problem
  - Exxon Valdez, Alaska,1989: long-term effects 25 years later
  - Selendang Ayu, Alaska, 2004 (Container vessel, not oil tanker): no clean-up efforts due to bad weather conditions

OIL AS FUEL

- International Convention on Civil Liability for Bunker Oil (BUNKER)
  - Bunker Oil (including non-fuel technical oils)
  - Cosco Busan, 2007
  - obligatory insurance requirement
  - every seagoing vessel over 1,000 gross tons

HIGHLY NOXIOUS SUBSTANCES

- Hazardous and Noxious Substances by Sea Convention (HNS) 1996/2010 Protocol
  - Similar liability / insurance scheme for highly noxious substances
  - e.g. chemicals, explosive substances etc.
  - HNS Convention has not yet entered into force due to a lack of ratifications

PASSENGER RIGHTS

- Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL)
  - important in case of diversification of incomes for fishers through tourism, offshore services…
  - Implemented in EU law as well (albeit with some changes)

RISKS POSED BY WRECKS AND LOST CARGO

- Nairobi Convention on the Removal of Wrecks (NCRW)
  - useful tool for coastal communities
  - entry into force: 14 April 2015
  - not yet ratified by Nordic/Arctic states except Denmark

POSSIBLE CONTRIBUTION OF LIABILITY CONVENTIONS

- Potential to make shipping a bit safer
- But ship operations in the Arctic remain inherently dangerous
- Limited tool

THE ARCTIC CRUISE BOOM: A DOUBLE-EDGED SWORD

- Cruise boom in recent years
  - also in relation to Arctic cruises
    - Hurtigruten, Canadian Arctic, Bay of Bothnia
  - tourism revenue is becoming an important source of income for remote coastal communities
  - but also significant problems:
    - waste
    - lack of infrastructure to deal with hundreds or thousands of passengers
    - ‘consumption’ of local culture
    - limited income for local communities (e.g. meals are taken on board)
    - health risks
      - air pollution

HEALTH EFFECTS OF AIR POLLUTION FROM SHIPS

- In Europe alone, 50,000-60,000 premature deaths per year can be traced back to ship emissions
- low quality fuel = more emissions
- ships need energy while in port (e.g. for electricity), more often than not, there are no facilities on land which would allow a vessel to ‘plug in’ (first offer of land-based energy in Europe: Hamburg, 2016)
- expensive infrastructure investments required, usually impossible for small communities
  - consequence: engines are running while in port = closer to populated areas = higher risks for human health
- under MARPOL, Emission Control Areas (ECAs) have been expanded
- including Sulphur Emission Control Areas (SECAs), where only ship diesel with reduced sulphur content may be used
  - e.g. Baltic Sea

CONSERVATION OF MARINE LIVING RESOURCES

CONSERVATION OF MARINE LIVING RESOURCES

- Introduction
  - Considering that marine living resources are of vital importance for mankind because these resources constitute an increasingly important source of protein, it could well be said that conservation of marine living resources can be considered as a common interest of the international community. In this regard, it is relevant to note that the LOSC, in its Preamble, explicitly recognizes its aim of promoting the conservation of marine living resources.
  - At the same time, marine living resources are important for the international trade and industry of many countries. It may be said that conservation of marine living resources deeply involves not only community interests but also national interests at the same time. Thus the rules of international law on this subject rest on the tension between the protection of community interests and the promotion of national interests.

CONSERVATION OF MARINE LIVING RESOURCES

- Whilst there is no universal definition of conservation, one can take as an example Article 2 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas (hereafter the High Seas Fishing Convention), which provides as follows:
  - As employed in this Convention, the expression 'conservation of the living resources of the high seas' means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. Conservation programs should be formulated with a view to securing in the first place a supply of food for human consumption.
- As shown in this provision, conservation does not directly mean a moratorium or prohibition of exploitation of marine living resources. In practice, the 'supply of food for human consumption' will be determined on the basis of economic and social needs. Hence conservation is not a purely scientific or biological concept, but is qualified by economic, political and social elements.

CONSERVATION OF MARINE LIVING RESOURCES

- Presently there are growing concerns that marine living resources are at serious risk due to overcapacity, overfishing, illegal, unregulated and unreported fishing (IUU fishing) and marine pollution.
- According to the Report of the UN Secretary-General, many scientists consider that if current levels of exploitation were maintained, not only would the commercial extinction of fish stocks soon become a reality, but the long-term biological sustainability of many fish stocks would also be threatened.
- Arguably, the failure of conservation of marine living resources is due to a lack of will on the part of States to take appropriate conservation measures.
- From a legal viewpoint, however, there is a need to examine the limitations of the traditional approaches to conservation of marine living resources in international law and explore new approaches which may enhance the efficiency of conservation of these resources.

CONSERVATION OF MARINE LIVING RESOURCES

- Conservation of Marine Living Resources Under the LOSC
  - The LOSC created a basic legal framework for conservation of marine living resources.
  - The framework relies on two basic approaches, namely, the zonal management approach and the species specific approach.
  - Zonal Management Approach
    - Under the zonal management approach, different rules apply to conservation of marine living resources according to each jurisdictional zone.
      - Internal waters, the territorial seas and the archipelagic waters are under territorial sovereignty.
        - As the territorial sovereignty is comprehensive and exclusive in its nature, the coastal State can exercise its exclusive jurisdiction over marine resources in these marine spaces.
        - There is little doubt that the coastal State has jurisdiction with regard to conservation of marine living resources in those spaces in accordance with international law. Yet the LOSC contains no explicit obligation to conserve marine living resources in these marine spaces.

CONSERVATION OF MARINE LIVING RESOURCES

- In the EEZ and the continental shelf, the coastal State has sovereign rights for the purpose of exploring and exploiting the natural resources pursuant to Articles 56(1) and 77(1) of the LOSC as well as customary international law.
  - The sovereign rights are essentially exclusive in the sense that no one may undertake activities involving the exploration and exploitation of natural resources or make a claim to the EEZ, without the express consent of the coastal State.
  - The LOSC places explicit obligations upon States to conserve marine living resources in the EEZ. Whilst the natural resources on the continental shelf include sedentary species by virtue of Article 77(4), the LOSC provides no specific obligation to conserve these species.
- On the high seas, all States enjoy the freedom of fishing. The freedom is not absolute, however. As will be seen, States are obliged to cooperate to conserve living resources on the high seas.
- Under Article 133(a), resources of the Area, which are the common heritage of mankind, involve only mineral resources, and they do not include marine living resources.

CONSERVATION OF MARINE LIVING RESOURCES

- Limits of the zonal management approach
  - An essential limitation associated with the zonal management approach involves the divergence of the law and nature.
  - In the law of the sea, the spatial ambit of coastal State jurisdiction over marine spaces is defined on the basis of distance from the coast, irrespective of the nature of the ocean and the natural resources within it. By using the distance criterion, the ecological interactions between marine species as well as the ecological conditions of the physical surroundings are to be ignored.

CONSERVATION OF MARINE LIVING RESOURCES

- As a consequence, the spatial scope of man-made jurisdictional zones does not always correspond to ‘ecologically defined space’ which comprises the area where marine ecosystems extend.
- Several species, such as straddling and highly migratory species, do not respect artificial boundaries.
- Hence a clear-cut distinction between marine spaces under the coastal State’s jurisdiction and marine spaces beyond such a jurisdiction is not always suitable for the conservation of those species.

CONSERVATION OF MARINE LIVING RESOURCES

- This question was already raised in the 1893 *Bering Sea Fur-Seals* arbitration between Great Britain and the United States. In this case, the United States extended its national jurisdiction beyond the ordinary three-mile limit in order to protect fur-seals frequenting the islands of the United States in the Bering Sea, whilst Great Britain advocated the strict application of the freedom of the high seas. The Arbitral Tribunal rejected the claim of the United States on this matter. At the same time, however, the Tribunal determined regulations applicable to both parties, including the prohibition of the hunting of fur-seals within a zone of sixty miles around the Pribilov Islands.
- In so doing, the Arbitral Tribunal attempted to reconcile the interest of the distant-water fishing States and the need for conservation of marine species.
- The Bering Sea Fur-Seals dispute seems to demonstrate the difficulty of the conservation of marine species migrating between marine spaces under and beyond national jurisdiction. Yet it appears that the situation is not improved very much in the LOSC.

CONSERVATION OF MARINE LIVING RESOURCES

- The Species Specific Approach
  - The LOSC specifies rules applicable to conservation of
    - shared fish stocks (Article 63(1)),
    - straddling fish stocks (Article 63(2)),
    - highly migratory species (Article 64),
    - marine mammals (Article 65),
    - anadromous stocks (breeds in fresh water, lives in salt water, e.g. salmon or sturgeon) (Article 66),
    - catadromous species (breeds in salt water, lives in fresh water, e.g. eel) (Article 67) and
    - sedentary species (Article 68).
  - According to the species specific approach, conservation measures are to be determined according to each category of marine species.

CONSERVATION OF MARINE LIVING RESOURCES

- Development after the LOSC
  - In response to the limits of the traditional approaches, more conservation-oriented approaches are being developed in post-LOSC treaties with regard to conservation of those resources. This part will focus on three principal elements, namely, the concept of sustainable development, the ecosystem approach and the precautionary approach. These elements are closely intertwined. Particular focus should be on the normativity of these elements as a rule of conduct and a rule for adjudication.
  - Sustainable development is a key concept in the use of natural resources, including marine living resources. The concept of sustainable development was given currency by the Report of the World Commission on Environment and Development, 'Our Common Future'. In its Report, the World Commission on Environment and Development (hereafter WCED) defined this concept as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.
  - The concept of sustainable development seeks in essence to reconcile the need for development with environmental protection. The basic idea is echoed by the ICJ in the *Gabíkovo-Nagymaros Project* case as well as the Arbitral Tribunal in the Arbitration regarding the *Iron Rhine Railway* case of 2005.

CONSERVATION OF MARINE LIVING RESOURCES

- Currently the concept of sustainable development or ‘sustainable use’ is being increasingly incorporated into treaties and non-binding documents relating to the conservation of marine living resources.
  - 1995 UN Fish Stocks Agreement
  - Chapter 17 of Agenda 21 of 1992
  - 1995 Code of Conduct for Responsible Fisheries
  - 1999 Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries
  - 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem.
- On the other hand, the concept of sustainable development raises uncertainties as to its normativity.

CONSERVATION OF MARINE LIVING RESOURCES

- The ecosystem approach
  - The ecosystem approach (or ecosystem-based approach) represents an important development of international law governing the conservation of marine living resources.
  - Whilst the definition of the ecosystem approach varies according to instruments, the Biodiversity Committee of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic defined this approach as the comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.
  - Unlike the traditional species specific approach, the ecosystem approach aims to conserve ecosystem structure and functioning within ecologically meaningful boundaries in an integrated manner.

CONSERVATION OF MARINE LIVING RESOURCES

- The precautionary approach
  - The precautionary approach is one of the key elements which characterizes a new dimension of international law with regard to the conservation of marine species.
  - Whilst the definition of the precautionary approach varies depending on the instruments, Principle 15 of the 1992 Rio Declaration on Environment and Development formulated this approach as follows:
    - In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. 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.

CONSERVATION OF MARINE LIVING RESOURCES

- Whilst, on the international plane, the precautionary approach was originally adopted in order to protect the marine environment, this approach is being increasingly incorporated into instruments respecting conservation of marine living resources,
  - e.g. Article 6(1) of the 1995 Fish Stocks Agreement places a clear obligation upon States to apply ‘the precautionary approach widely to conservation, management, and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment’

CONSERVATION OF MARINE LIVING RESOURCES

- Ensuring Compliance
  - The implementation of substantive rules cannot be ensured without effective compliance mechanisms.
    - Primary responsibility: flag State
      - Cooperation required

PROTECTING HUMAN HEALTH THROUGH PROTECTING THE ARCTIC MARINE ENVIRONMENT?

- Human Rights play a role in the International Law of the Sea.
- Existing legal tools can be utilized to reduce the risk of harm to passengers and coastal residents:
  - Designation of Particularly Sensitive Sea Areas (PSSAs) and creation of Associated Protective Measures (APMs), examples:
    - PSSA: Wadden Sea, APM: mandatory deep water route ➔ limits the risk of collisions, oil spills
    - PSSA: Baltic Sea, APMs: deep-water route, traffic separation schemes, mandatory ship reporting system, areas which are to be avoided, MARPOL special area, MARPOL SOx Emissions Control Area (SECA = only ship fuel with reduced sulphur content permitted) ➔ protection of human health
    - PSSA: Great Barrier Reef, APMs: IMO-recommended Australian system of pilotage, mandatory ship reporting system ➔ limits the risk of physical destruction, coral bleaching
- Wide range of measures, involvement of local states possible; measures can be targeted to the needs of the area's environment.

REQUIREMENTS FOR THE DESIGNATION OF A SEA AREA AS A PSSA

- International Maritime Organization, Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas,
- IMO Assembly Resolution A.928(24), 1 December 2005, IMO Doc. A14/Res.982:
  - At least one of the ecological, socio-economic, or scientific criteria must be met (IMO Guidelines, paras. 4.4.1 - 4.4.17):
    - Ecological criteria: e.g. uniqueness, rarity, fragility, naturalness, bio-geographic importance
    - Social, cultural and economic criteria, e.g. human dependency.
    - Scientific criteria, e.g. high scientific interest.
  - In addition, “the recognized [natural] attributes of the area should be at risk from international shipping activities” (IMO Guidelines, para. 5.1).

CAN THE CENTRAL ARCTIC OCEAN BE DECLARED A PSSA TODAY?

- Central Arctic Ocean meets multiple ecological, scientific etc. criteria.
  - But today there are no shipping activities in the Central Arctic Ocean which could pose a threat.
  - Hypothetical threats, no matter how realistic, are not covered by the guidelines. International law remains reactive.

- But the presence of some ice (as opposed to complete ice cover) might fall under para. 5.1.7 (“ice, and other factors which increase the risk of collision and grounding”).
  - Para. 5.1 of the IMO Guidelines only includes the term “should” and the guidelines can be changed by the IMO !
  - With one minor clarification (hypothetical threats), the existing PSSA framework could be utilized in order to enhance the protection of the Central Arctic Ocean.

A NEED FOR TECHNICAL SOLUTIONS

- Although there is considerable effort underway to protect the Arctic marine environemnt, a comprehensive regional seas programme is still an idea for the future rather than a practical reality today.
- This means that ships have to change.
- The shipping industry has been excluded from the Paris climate accord and – despite notable exceptions such as hydrogen-powered ferries in Norway, sails, Flettner rotors using the Magnus effect etc. – continues to rely on heavy, dirty oils for fuel.
- Technically, alternatives are already available.
- Legally, it needed a bit of a push from the international community.

STRICTER EMISSION STANDARDS FOR SHIPS

- MARPOL Annex VI, Regulation 14:

  ”1 The sulphur content of any fuel oil on board ships shall not exceed the following limits:

  .1 4.50% m/m prior to 2012; .2 3.50% m/m on and after 1 January 2012; and .3 0.50% m/m on and after 1 January 2020.

  2 The worldwide average sulphur content or residual fuel oil supplied for use on board ships shall be monitored taking into account guidelines developed by the [IMO].

  3 For the purposes of this regulation, emission control areas shall include:

  .1 the Baltic Sea […]; .2 the North American area […]; .

  3 the United States Carribean Sea area […]; .

  4 any other sea area, including any port area,

  designated by the Organization in accordance with the criteria and procedures set forth in appendix III to this Annex.

  4 While ships are operating within an [ECA], the sulphur content of fuel oil used on board ships shall not exceed the following limits: […] .3 0.10% m/m on and after 1 January 2015. […]”

COMPLIANCE OPTIONS

- Switch to low-sulphur content fuels
  - preferred solution due to no immediate costs
    - but will enough fuel be available in early 2020?
  - Install scrubbers
    - cost: US$ 2-4 M
    - scrubbers can be cleaned using seawater
      - ports increasingly ban the dumping of water used to clean scrubbers:
      - California, Lithuania, some fjords in Norway, some ports in China; legislation in place but not yet used by local port authorities in Finland, Sweden, Polandand the United Kingdom
- Switch to alternative fuels (solar, wind, (green) electric…)

PORT STATE CONTROL AND LAW ENFORCEMENT

- Port-state control is an essential element of enforcing standards in the shipping sector
  - Flag-state has sole jurisdiction when a ship in on the high seas
  - But port-states can control compliance with environmental standards
    - Regional cooperation schemes, established through memoranda of understanding (for Europe: Paris MoU)
    - Port-state authorities can detain vessels and arrest those responsible for violations
      - Detention of vessels is costly for ship owners / operators due to loss of profit
      - Already arrest of captain of a US cruise vessel in France in 2018 for using fuel with a sulphur-content of 0.65 % instead of the 0.5 % permitted in the port of Marseilles

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THE NEAR FUTURE

- 1 January 2020: MARPOL Annex VI, Regulation 14: 0.5 % m/m Sulphur limit globally
- Limits to greenhouse gas emissions?
  - Shipping industry is not covered by the Paris Agreement
- Heavy fuel oil (HFO) ban in the Arctic?
  - Significant momentum towards a ban at MEPC72 and MEPC73 in 2018
  - Likely to be adopted in 2021 and implemented starting in 2023
  - Definition of HFO might be similar to the definition of heavy grade oil (HGO) which is outlawed in Antarctica under MARPOL Annex VI, Regulation 23.2

SHIPPING IS BECOMING GREENER

- Shipping is a dirty industry
- Air pollution by ships has significant effects on human health and impacts the rights of coastal residents.
  - Human right to health
  - Human right to a healthy environment
- Change is already happening, albeit slowly
  - Political will is growing slowly.
  - Technical solutions are becoming more available.
  - The future of shipping is green.

DIFFERENT ZONES OF THE ARCTIC OCEAN

- UN Law of the Sea Convention (LOSC) follows a sectoral or zonal approach:
  - marine areas under national jurisdiction
  - internal waters
  - territorial sea
  - sovereign rights of coastal states in marine areas
  - exclusive economic zones
  - continental shelf
  - marine areas beyond national jurisdiction
  - high seas
  - deep sea bed

LEGAL COMPETENCES OF COASTAL STATES

- Different competences for environmental protection enjoyed by coastal states
  - internal waters:
    - full sovereignty, domestic environmental law applies
      - states decide in how far they apply domestic law to foreign ships in their ports

LEGAL COMPETENCES OF COASTAL STATES

- territorial sea (TS, max 12 nm from coast/baseline)
  - Sovereignty
    - prescriptive jurisdiction
    - but in practice limited enforcement of domestic rules e.g. regarding ships which just pass through
  - Right of foreign ships to innocent passage (Art. 17 LOSC)
    - Intentional pollution makes passage no longer ’innocent’ (Art. 19 (2) (h) LOSC)
  - important for near-coastal shipping routes: traffic separation schemes etc.

LEGAL COMPETENCES OF COASTAL STATES (CONT'D)

- Different competences for environmental protection enjoyed by coastal states
  - exclusive economic zones (EEZ, beyond TS, up to max 200 nm from coast)
    - No sovereignty but exclusive (sovereign) rights of coastal states to use natural resources (fishing, oil, gas etc.)
    - sovereign right to protect the natural environment as far as the coastal state right is concerned (e.g. protection of fish in the EEZ)
  - Usually specific rules for EEZs or explicit extension of other norms to the EEZ
  - Right to designate marine protected areas in EEZs
  - Significant chance for coastal states to contribute to protecting marine biodiversity

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  - sovereign right to protect the natural environment as far as the coastal state right is concerned (e.g. protection of fish in the EEZ)
- Usually specific rules for EEZs or explicit extension of other norms to the EEZ
- Right to designate marine protected areas in EEZs
  - Art. 234 LOSC (ice-covered areas)
- Significant chance for coastal states tocontribute to protecting marine biodiversity

LEGAL COMPETENCES OF COASTAL STATES (CONT'D)

- continental shelf (CS)
- CS can go beyond the outer limits of the EEZ, waters above the continental shelf are high seas (=freedom for all states to engage in fishing, navigation etc.)
  - oil and gas deposits, risk of pollution
- Law of the Sea Convention (1982) remains vague on the issue of environmental protection of the CS beyond 200 nm
- investigation of CS claims in the Arctic by the Commission on the Limits of the Continental Shelf (CLCS) is not yet finished
  - A future issue in the Arctic
    - many unanswered questions

LEGAL COMPETENCES BEYOND NATIONAL JURISDICTIONS

- high seas (states and international organizations)
  - Art. 117 LOSC: duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas
  - Art. 118 LOSC: Cooperation of States in the conservation and management of living resources
  - Art. 119 LOSC: Conservation of the living resources of the high seas
  - Art. 120 LOSC: right of states to regulate protection of marine mammals against own nationals / ships
  - International treaties, e.g. International Convention for the Prevention of Pollution from Ships (MARPOL)
  - other rules, e.g. Polar Code contains rules concerning pollution by ships

LEGAL COMPETENCES BEYOND NATIONAL JURISDICTIONS

- deep sea bed (International Sea Bed Authority)
  - Art. 145 LOSC: duty to prevent harm to the environment
  - too early too tell when this will become relevant for the Arctic

SHORTCOMINGS OF THE ZONAL APPROACH

• Zonal approach in the Law of the Sea Convention does not reflect the reality at sea, which requires an ecosystembased approach.

• The need for an ecosystem-based approach to marineenvironmental protection was recognized e.g.

- in the 1995 UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement) and
- in regional seas agreements (RSAs)
  - e.g. the Convention on the Protection of the Marine Environment of the Baltic Sea Area = Helsinki Convention, administered by Baltic Marine Environment Protection Commission – Helsinki Commission = HELCOM
    - specific norms for the protection of regional seas, taking into account specific needs
    - e.g. eutrophication in the Baltic Sea
- as of today, there is not yet a regional seas agreement for the Arctic Ocean

TOWARDS REGIONALIZATION

- The work of the Arctic Council contains the seeds of a future normative order which one day might

functionally resemble an Arctic RSA.

  - LOSC is based on the old zonal approach
    - Makes sense from the perspective of costal state sovereignty
      - Does not reflect the biodiversity at sea

- Move towards an ecosystem-based approach to protecting the marine environment required.

THE ARCTIC COUNCIL AND THE ECOSYSTEM APPROACH

- Ecosystem approach was adopted by the Arctic Council in 2004
  - Arctic Marine Strategic Plan (AMSP)
- Arctic Council Working Group on the Protection of the Arctic Marine Environment (PAME) (www.pame.is)
  - Methods
    - Identification of ecosystems
    - Description of ecosystems
    - Setting objectives for ecosystems
    - Assessments of ecosystems
    - Social, economic and cultural valuation of ecosystems
    - Manage human activities
  - Now in the implementation phase, regular reports (https://pame.is/index.php/projects/ecosystem-approach/eadocuments-and-workshop-reports)

THE CENTRAL ARCTIC OCEAN FISHERIES AGREEMENT

- 15 year ban on fishing in the high seas part of the Arctic Ocean
  - only scientific research allowed
- application of the precautionary principle
  - unusual (but welcome) approach
    - usually international law is reactive

THE CENTRAL ARCTIC OCEAN FISHERIES AGREEMENT

- agreed in 2017, signed 4 October 2018
  - Arctic 5 (U.S., Canada, Russia, Norway, Denmark (for Greenland))
  - big fishing nations (Japan, China, South Korea)
  - European Union
- not yet in force
  - applies to ships flying the flag of the states involved
  - does not prevent ships flying the flag of non-party states from fishing in the high seas of the Arctic Ocean
    - but strong indicator that a parallel norm of customary law might develop which would also prevent other states from fishing there

NATURAL RESSOURCES

- The Deep Sea Bed is the common heritage of mankind and subject to a special legal regime which is contained in the UN Convention on the Law of the Sea.
- Coastal states can exercise sovereign rights on the Continental Shelf.
  - The extent of the Continental Shelf is a question of natural sciences.
  - Coastal states make submissions to the Commission on the Limits of the Continental Shelf (CLCS), which does not draw borders between states but determines the seaward extent of the continental shelves.
  - A number of Arctic states, in particular Russia, have already made submissions to the CLCS which are currently being examined.
  - The core of the discussion in this regard it the Lomosov Ridge, which runs through the North Pole and which appears to be possibly connected to Russia, Canada and Greenland.
    - Large hydrocarbon (oil, gas) deposits are expected in the region.
      - At some point in the future, oil drilling will become possible even there.
    - There is no final decision of the CLCS regarding the Lomonosov Ridge yet.

OIL SPILLS

- An oil spill in the Arctic would be a major disaster.
- Deepwater Horizon oil spill had significant effects but would pale in comparison to an oil spill in the Arctic.
- Some oil from the 1989 Exxon Valdez oil spill is still in the water, visible in tidal pools. Neither the nature nor the local economy has returned to its pre-spill conditions.
- An oil spill from drilling would be much worse.

HOW AN ARCTIC OIL SPILL WILL LOOK LIKE

“The oil would rise from the seabed as part of an oil-gas plume and spray the underside of the sea ice with oil droplets which would gather into slicks. The ice underside is constantly moving, so if there is a blowout the oild ice moves away from the site, while clean ice moves in to be oiled in its turn. In winter, new ice would quickly grow under the oil slick, creating an ‘oil sandwich’ in which the oil is encased in ice for the rest of the winter. During that time the ice flow may travel 1,000 km or more, ending up in quite a different part of the Arctic from where it started. Then, as surface melt begins in springtime, the oil starts to rise to the top surface of the ice by moving up through brine drainage channels […], which partially melt and open up in spring, providing a pathway to the top of the ice. Suddenly, little patches of oil will sprout up everywhere at the tops of these channels, usually too small to be removed or burned. Later in the summer, when the whole floe melts, the oil will be deposited in the water and so become a very widespread pollutant of the open water summer Arctic. This is especially dangerous for the marine ecosystem and for millions of migratory seabirds.”

(P. Wadhams, A Farewell to Ice (2017), p. 99)

FUTURE CHALLENGES

- Increased shipping activities in the Arctic Ocean
  - gas and oil transport
  - already today: natural gas trasport from Sabetta (Siberia) to China
- Arctic cruise tourism boom
- reliance on low grade hydrocarbons as ship fuels
  - risk of oil spills
    - not only a problem with tankers like the Exxon Valdez
      - cf. sinking of the cruise ship MS Explorer off Antarctica in 2007 and the resulting oil spill

FUTURE CHALLENGES

- development of green alternatives is slow
  - lack of dockside electricity supplies in Arctic ports means that cruise vessels have to let their engines run in port (near coastal communities) to provide electricity on board
    - air pollution, e.g. SOx
  - 2020: global limits on sulphur emissions but slow implementation
  - insufficient capacity of many coastal communities to handle visitors' waste

FUTURE CHALLENGES

- In the long run, Illegal, Unreported and Unregulated (IUU) Fishing might become a problem.
  - But too early to tell. More research on the actual composition of the biosphere of the CAO is needed.
- Is the Arctic Ocean become an ocean like all others?
  - The RSA approach allows regional aspects to be taken into account and can also work for a future ice-free Arctic Ocean.
  - From a legal perspective, existing frameworks and mechanisms can be used to protect the Arctic marine environment.

EU ARCTIC AND OCEAN LAW AND POLICY – PART 3

THE EU'S ARCTIC AND MARITIME POLICIES

THE EU'S INTEGRATED MARITIME POLICY (IMP)

- Initiated in 2007
- Strong focus on the blue economy, i.e., maritime-related industries
- But also on the protection of the marine environment

THE BLUE ECONOMY

- Maritime transport
- Energy
- Shipbuilding
- Fisheries and aquaculture

COOPERATION ACROSS BORDERS AND ACROSS INDUSTRY SECTORS

- Goal: maximize sustainable use of resources for regional economic development
  - Maritime Spatial Plannung (MSP)
  - Integrated Coastal Zone Management (ICZM)
- Development of national strategies and of a common EU framework for both MSP and ICZM
- Connecting scientific research and business
  - Increasing technical and governance innovation
- Protection of EU residents against sea-related threats
- Job creation and professional mobility
- Regional development

PROTECTION OF THE MARINE ENVIRONMENT

- 2008 Marine Strategy Framework Directive = environmental dimension of the EU's Integrated Maritime Policy
- 2010 Decision on criteria for standards and methods to determine the Good Environmental Status (GES) of waters
- It is the aim of the 2008 Marine Strategy Framework Directive to achieve GES for all EU marine waters by 2020
    - A lot still needs to happen before this goal is achieved
        - Some progress but problems persist, e.g. eutrophication of the Baltic Sea
- Mitigation of climate change
- Adaptation of climate change
- Air pollution from ships

IMPROVING MARITIME GOVERNANCE

- EU is an active player in maritime governance issues
- Increasing focus on blue economy
- EU can contribute to improvements of maritime governance
- But there are also other forms of maritime cooperation which do not easily correspond to traditional notions of governance, e.g. inter-regional cooperation between different coastal regions in the EU

THE ARCTIC IN EU FOREIGN POLICY

ARCTIC AS A CONCERN OF INTERNAL EU POLICIES

- Parts of the territories of two EU member states, Finland and Sweden, are located north of the Arctic Circle.
  - Sápmi is the non-independent homeland of the Sámi people, the only indigenous people in Western Europe.
    - More indigenous peoples in Russia, six small indigenous peoples in French Guiana, which is part of metropolitan France and therefore part of the European Union.
- Special case of Greenland.
  - Greenland is part of the Kingdom of Denmark but not part of the European Union.
  - Greenland used to be part of the European Economic Community but decided to leave.
  - Currently, Greenland is taking over more competences from Denmark, paving the way for possible / eventual independence from Denmark.
- Remoteness and harsh environments provide specific challenges in the European High North.
  - But also clear differences e.g. when comparing Lapland with Svalbard.

THE EU HAS A STAKE IN THE ARCTIC

- EU is actively involved in maritime issues, e.g. at the International Maritime Organization.
- Due to the Common Fisheries Policy (CFP), it was the EU (rather than member states) which became a party to the Central Arctic Oceans Fisheries Agreement.
- 2016 EU Policy Document ”The integrated EU policy for the Arctic”

COOPERATION HAS A LONG HISTORY IN THE EUROPEAN ARCTIC

- The Nordic countries have a shared history and have cooperated very closely already for generations.
  - More modern form: Nordic Council of Ministers
- Borders between Finland, Sweden and Norway had been open long before the Schengen Agreement.
- Similar culture, shared history, similar languages (with the exceptions of Finnish and the Sámi languages) facilitate cooperation.
- Due to the often harsh conditions, low population density and limited infrastructure, cooperation in the European High North is not optional but essential.
- EU policy regarding the Arctic is still more land-focused than ocean-focused because this is where the bulk of our activities happens – also due to the absence of an EU Arctic Ocean coast.
- EU cooperates with non-EU fora and hosts Arctic-specific activities, such as the EU-Arctic stakeholder forum.

EUROPE'S ARCTIC POLICY IS NOT ONLY ABOUT THE ARCTIC

- The EU's Arctic policy is about the Arctic but also about Europe and Europeans, including, but not limited to, those living in the European High North.
- The Arctic can be a test-bed for innovative governance solutions and is becoming increasingly relevant in the context of climate change.
    - Connecting with the Arctic as an emerging economic region can be beneficial for the EU as a whole.

KEY CHARACTERISTICS OF THE EU'S ARCTIC POLICY (QUOTES FROM STEPIEN/KOIVUROVA)

- "The European Union's Arctic policy remains primarily a compilation of ongoing actions and of Arctic manifestations of general EU policies. However, the document gives hope for maintaining the EU's long-term interest in the region in times of multiple crises."
- "Compared to earlier documents, the 2016 Joint Communication has greater emphasis on issues specific to the European Arctic."
- "The EU will never become the main public actor shaping developments in Arctic Europe, but can play a role supportive to actions at national and regional level."
- "Investments in clean technologies, bioeconomy, and renewables are among most prospective areas for EU contribution. Extraction of non-renewable resources has received very limited attention."

KEY CHARACTERISTICS OF THE EU'S ARCTIC POLICY (QUOTES FROM STEPIEN/KOIVUROVA)

- "Entrepreneurship and innovation are key themes in EU policies. Facilitating the development and testing of technologies that could be exported across Europe and globally are suitable areas of EU action, including via research funding."
- "Investment financing via the EIB funds can become in the mid-term the central mode of EU support in the region, particularly for interventions enhancing accessibility and connectivity."
- "EU programmes have assumed a key role in supporting cross-border cooperation across the region."
- "The main output of the 2016 Joint Communication for Arctic Europe is the EU-Arctic Stakeholder Forum process aiming at formulating key investment and research priorities."

THE ROLE OF THE EU IN ARCTIC EUROPE

- Many different roles
- Regulation (EU / EEA)
- Financial funding
- Cooperation with non-members, e.g. Russia
- Combining Nordic cooperation with Arctic policies
  - Building on top of the experience of the Nordic EU member states and on the cooperation experience with Norway and Iceland
  - Use synergies
  - Take into account local stakeholders (Arctic Stakeholder Forum)
- The EU's Free Trade Agreeement with Canada (CETA) has the potential to benefit Arctic Europe
- Growing importance of the Arctic for the EU

SCOPE OF THE 2016 EU ARCTIC POLICY

- Very general document (like the 2008 and 2012 predecessor documents)
- Arctic is not a priority for the EU
- EU has a strategic interest to play a central role in the Arctic
- Earlier EU policy documents regarding the Arctic had a stronger maritime and foreign policy focus, since 2016 more recognition of the European Arctic as part of the EU

A FUTURE BASED ON COOPERATION

CONCLUDING REMARKS

- Even though the EU has only a small share in the Arctic, the Arctic matters for the EU – and vice versa.
- Cooperation across borders is a key element of both the Arctic and the EU.
- The European Arctic has the potential to become a trailblazer for new governance approaches both the the Arctic as a whole and for the EU / EEA as a whole.
- The Arctic is changing faster than ever before and Europe will have to remain engaged in order to have a seat at the table when decisions are made about this part of the world.
- This requires a willingness to cooperate and to learn from each other, taking into account in particular the people who live in the Arctic.

THANK YOU FOR YOUR ATTENTION

STEFAN.KIRCHNER@ULAPLAND.FI