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Dispute Settlement in the UN Convention on the Law of the Sea

Natalie Klein

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is fishing in the EEZ. States clearly preferred that in dealing with the new regime in the Convention, traditional consent-based methods of dispute settlement would be more appropriate. Bilateral and regional approaches are more likely to ensure the effective operation of this regime due to the differing circumstances of various fisheries as well as differing circumstances relevant to coastal States themselves. Equally, the substantive provisions of the Convention may be sufficient in themselves to ensure the balance of interests appropriate for a particular issue and mandatory jurisdiction does not have a vital role to play in this regard. As a politically realistic instrument, compulsory dispute settlement is far from "comprehensive" in its application to the substantive rules of the Convention and clearly does not need to be so.

4 Optional Exceptions to Applicability of Compulsory Procedures Entailing Binding Decisions

Introduction

Article 298 of the Convention allows for States parties to exclude certain categories of disputes from compulsory procedures entailing binding decisions. States may declare when signing, ratifying, or acceding to the Convention, or at any time thereafter, that they do not accept the procedures available under Section 2 for those disputes specified in Article 298.[1] The declaration is without prejudice to the consent-based procedures set out in Section 1 of Part XV.[2] While a State is entitled to withdraw its declaration, a State may not submit a dispute subject to a declaration to any procedure under the Convention without the consent of the other State.[3]

Declarations permitted under Article 298 relate, first, to maritime delimitation disputes in relation to the territorial sea, EEZ, or continental shelf of States with opposite or adjacent coasts, as well as disputes involving historic bays or title. Second, States may opt to exclude disputes relating to military activities, as well as law enforcement activities relating to marine scientific research and fishing in the EEZ. Finally, disputes in respect of which the Security Council is exercising its functions under the UN Charter may also be excluded from compulsory procedures entailing binding decisions at the election of States. This chapter explores these categories of disputes and the role that dispute settlement is expected to play and what justifications can be posited for the possible exclusion of these disputes. While mandatory jurisdiction is either not

[1] UNCLOS, art. 298(1). Declarations and notices of withdrawals of declarations are to be deposited with the UN Secretary-General. *Ibid.*, art. 298(6).
[2] *Ibid.*, art. 298(1).
[3] *Ibid.*, art. 298(3). A State may agree to submit an otherwise excluded dispute to any procedure specified in the Convention. *Ibid.*, art. 298(2).

necessary in some cases, or not politically viable in others, it is notable that a small proportion of States parties has as yet availed themselves of these exceptions.[4] Such reticence, while a surprising deviation, may increase the likelihood of States using adjudication or arbitration for the future resolution of disputes on these issues, rather than just relying on consent-based modes of dispute settlement.

Maritime Delimitation and Historic Title Disputes

Maritime delimitation involves a determination of the outer boundary of a maritime zone as measured from a State's basepoints and baselines.[5] The delimitation may mark the point that the high seas begins or, in areas where there is insufficient water area for States to have their full entitlement to maritime zones, attributes zones of jurisdiction, sovereign rights, or sovereignty between States with opposite or adjacent coasts. When sufficient space exists for States to have their full entitlement then the question of delimitation is largely a unilateral act. However, as the claim of the coastal State in this instance involves allocation of areas that would otherwise be *res communis*, an international aspect to the claim remains.[6] When States have either adjacent or opposite coasts that create an overlapping entitlement, the area must be divided to determine the reach of each State's competence. Great efforts have been undertaken to devise international standards for this task but too many variables (geographic configurations, traditional patterns of usage, and social factors as well as economic and strategic considerations) come into play. These considerations have been amplified with the allocation of larger maritime zones through the creation of the EEZ and the legal recognition of the continental shelf. The formulation of legal rules for maritime delimitation has had to cater for all of these variations.

Delimitations of overlapping maritime zones have typically been left to negotiations between the relevant States. Problems may arise if States fail to reach an agreement and conflicts ensue over which State is entitled to exercise jurisdiction over particular activities. The problem may

[4] See United Nations, *Multilateral Treaties Deposited with the Secretary-General*, UN Doc. ST/LEG/SER.E/15, available at www.un.org/Depts/los/los_decl.htm (updated November 13, 2003).

[5] Baselines are lines drawn along a State's continental or insular coast from which maritime zones are measured. Basepoints are any point on the baseline.

[6] See Fisheries Case (*United Kingdom* v. *Norway*), 1951 ICJ 116, 132 (December 18).

become acute when companies wish to enter certain areas for the exploration and exploitation of hydrocarbons. Various avenues may be pursued in this situation – *de facto* or provisional arrangements could be developed or a joint project could be undertaken. This alternative may allow certain activities to proceed without prejudice to the fixing of a final boundary. If States are unable to agree on the boundary then it remains possible that no agreement could be reached on even a provisional or joint arrangement. Oil companies are less likely to invest in areas of questionable title and States thus have an incentive to resolve the question of the boundary. The matter could then be referred to third-party dispute settlement to resolve any impasse to agreement. The use of adjudication or arbitration is not unusual for maritime boundary disputes.[7]

The need to reach agreement and the variety of circumstances influencing States in the allocation of maritime areas have influenced the formulation of legal rules for maritime delimitation as well as the procedures available for differences arising over the interpretation or application of these rules. The first half of this section describes the principles and procedures dealing with the delimitation of maritime zones when there are overlapping entitlements, as well as with historic title, both prior to UNCLOS and in UNCLOS itself. The second half then analyzes the modes of dispute settlement available under the Convention for disputes relating to maritime delimitation. The Convention permits States to exclude at their election disputes relating to historic bays or title and maritime delimitation of the territorial sea, EEZ, and continental shelf. This optional exclusion potentially denies a range of advantages otherwise accruing to States in dispute but is a realistic reflection of State preferences for political, rather than third-party, settlement when dealing with an important matter such as title. Additional disputes arising with respect to maritime delimitation addressed in this section concern the application of straight baselines and the regime of islands

[7] See, e.g., North Sea Continental Shelf; Icelandic Fisheries; Tunisia/Libya; Gulf of Maine; Continental Shelf (*Libya/Malta*), 1985 ICJ 13 (June 3); Land, Island and Maritime Frontier Dispute (*El Salvador/Honduros; Nicaragua* Intervening), 1992 ICJ 351 (September 11); Report and Recommendations of the Conciliation Committee on the Continental Shelf Area between Iceland and Jan Mayen, 20 ILM 797 (1981); Beagle Channel Arbitral Award (*Argentina/Chile*), 52 ILR 93 (1979); Delimitation of the Continental Shelf (*United Kingdom/France*), 18 ILM 397 (1979); Arbitral Award of 19 October 1981 (*Emirates of Dubai/Sharjah*), 91 ILR 543 (1981); Maritime Boundary (*Guinea-Bissau/Senegal Maritime Delimitation Case*), 83 ILR 1 (1989); Delimitation of the Maritime Areas between Canada and France (St Pierre and Miquelon) (*France/Canada*), 95 ILR 645 (1992).

under UNCLOS. While these disputes will often be inherently linked to delimitation disputes between neighboring States, international review may well be necessary – and should be available – to protect inclusive interests.

Maritime Delimitation Prior to UNCLOS

Maritime delimitation prior to World War II mostly focused on the limits of coastal States' maritime zones as an indication of where the high seas began. This issue encompassed the question of the breadth of the territorial sea, drawing closing lines across the mouths of rivers, bays, ports, and other coastal features as well as the method for measuring the outer limit of the territorial sea. These questions were of considerable significance in light of the two contrasting legal regimes that applied in the territorial sea and on the high seas respectively. The question was one of where areas of sovereignty ended and areas of *res communis* began.

Methods of delimitation have long been grounded in notions of equality and proportionality.[8] When the limits of the territorial sea were quite narrow, there were few instances where the water areas between States with opposite coasts overlapped. In these cases, the typical approach was to apply a median line to allow for equal sharing; less often, the thalweg of a narrow strait would be used to preserve equal rights of navigation.[9] Delimitation of coastal waters between adjacent States initially varied between several approaches: utilizing a line of latitude, drawing a line perpendicular to the coast, or again employing a median line.[10] An early decision of the Permanent Court of Arbitration, *Grisbadarna*, devised a maritime boundary between Norway and Sweden that ran "perpendicularly to the general direction of the coast."[11] Some adjustment of this line was made in light of the Swedish tradition of lobster fishing in the area and various executive acts performed by Sweden.[12] The value of historic use was recognized in the statement that, "a state of things which actually exists and has existed for a long time should

[8] Sang-Myon Rhee, "Sea Boundary Delimitation Between States before World War II," 76 *Am. J. Int'l L.* 555, 556 (1982) (citing Pufendorf as the first to propose principles of sea boundaries in the middle of the seventeenth century).

[9] *Ibid.*, at 559–64. [10] *Ibid.*, at 564–65.

[11] "Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden," 4 *Am. J. Int'l L.* 226, 232 (1910).

[12] *Ibid.*, at 233.

be changed as little as possible."[13] This decision thus utilized a variation on a median line, one that was modified for equitable considerations.[14]

At the 1930 Codification Conference, one of the Bases for Discussion concerned the delimitation of a strait that was less than twelve miles wide. The Preparatory Committee to this Conference had proposed the use of the median line "in principle."[15] However, during the debates at the Codification Conference, States did not want a specific rule set out but preferred to rely on special agreements between the relevant straits States. No uniform principle of delimitation for straits could be agreed upon at that time. States subsequently employed the median line in delimitations, but no uniform method of demarcation was actually formulated.[16] An approach to drawing the median line was devised in 1936 by S. Whittemore Boggs, who proposed a line "every point of which is equidistant from the nearest point or points on opposite shores."[17] This formula could be used for both adjacent and opposite coasts and was to prove influential in codification efforts after World War II. The debates prior to and at the First Conference remain of interest to the extent that they foreshadowed the views of States on dispute settlement procedures in relation to maritime delimitation in drafting UNCLOS. Well before UNCLOS was adopted, a potential role for compulsory dispute settlement was contemplated for maritime delimitation, but was ultimately resisted in favor of an optional procedure.

Delimitation of the Territorial Sea

The question of what method should be used to delimit the territorial sea between States with opposite or adjacent coasts was initially

[13] *Ibid.*

[14] Weil has noted that the *Grisbadarna* decision to apply a rule and then make exceptions to it was indicative of the trend in the method of maritime delimitations generally. See Prosper Weil, *The Law of Maritime Delimitation – Reflections* (1989), pp. 136–37.

[15] Bases of Discussion for the Conference drawn up by the Preparatory Committee, in 2 *Codification Conference*, at 227.

[16] Rhee, at 577–80.

[17] S. Whittemore Boggs, "Problems of Water-Boundary Definition: Median Line and International Boundaries Through Territorial Waters," 27 *Geographical Rev.* 445, 447 (1937). Boggs had earlier advocated the use of arcs of circles as the most practical method for drawing the outer limit of the territorial sea. See S. Whittemore Boggs, "Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law," 24 *Am. J. Int'l L.* 541, 544 (1930). The arcs of circles method is used to determine the equidistant points from baselines.

considered separately to the delimitation of the continental shelf within the International Law Commission prior to the First Conference.[18] Due to the technical nature of the question and the inability of the Commission to agree on one method, the Commission decided to refer the question of a delimitation method to experts.[19] The Committee of Experts formulated a detailed rule that provided for the application of an equidistance line with certain exceptions for the presence of islands as well as fishing and navigation interests.[20] In adopting a simplified version of this formula,[21] the Commission first considered that some provision for arbitration was needed.[22] However, no such dispute settlement clause was included in the texts submitted to the First Conference because of a general preference in the Commission to provide for compulsory dispute settlement only where extremely technical matters were involved and where it was expected that the majority of States would not accept certain obligations without the guarantee of compulsory adjudication or arbitration.[23] Presumably, the Commission did not consider these conditions were met for the delimitation of the territorial sea.

States at the First Conference accepted the use of an equidistant line for territorial sea delimitation and were primarily concerned with the

[18] The members of the International Law Commission canvassed alternative methods of delimitation between adjacent States in early drafts of the delimitation of the territorial sea. Régime of the Territorial Sea – Rapport par J. P. A. François, rapporteur spécial, UN Doc. A/CN.4/53, at 38, art. 13, reprinted in *Documents of the Fourth Session including the Report of the Commission to the General Assembly*, [1952] 2 Y.B. Int'l L. Comm'n 25, UN Doc. A/CN.4/SER.A/1952/Add.1, UN Sales No. 58.V.5, vol. II (1958). see also *Summary Records of the Fourth Session*, [1952] 1 Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/Ser.A/1952, UN Sales No. 58.V.5, vol. I (1958) at 182, ¶ 13 (Yepes) (proposing the drawing of a line perpendicular and at right angles from the coast).

[19] *ILC Yearbook*, (1952), vol. I, at 185.

[20] Additif au deuxième rapport de M. J.P.A. François, rapporteur spécial, UN Doc. A/CN.4/61/Add.1, at 75, 77, reprinted in *Documents of the Fifth Session including the Report of the Commission to the General Assembly*, [1953] 2 Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/Ser.A/1953/Add.1, UN Sales No. 59.V.4, vol. II (1959) at 57 (incorporating in its Annex the report of the Committee of Experts).

[21] *Report of the International Law Commission to the General Assembly*, UN GAOR, at 157, UN Doc. A/2693 (1954), reprinted in *Documents of the Sixth Session including the Report of the Commission to the General Assembly*, [1954] 2 Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/Ser.A/1954/Add.1, UN Sales No. 59.V.7, vol. II (1960) at 140. The substance of this article was not subsequently altered before its submission to the First Conference.

[22] *Ibid.*, at 157–158.

[23] *First Conference*, 1st Comm., at 69–70, ¶¶ 16–17 (Statement by Mr. François, Expert to the Secretariat of the Conference).

exceptions, if any, to this rule.[24] States were willing to consider the possibility of historic usage as a reason for altering a boundary based on the median line as such circumstances had been considered in earlier delimitations.[25] However, the absence of a provision on arbitration or judicial settlement was used to reinforce arguments for the deletion of a reference to other special circumstances.[26] States supporting this view clearly considered that third-party dispute settlement was essential so that the maritime delimitation process was not rendered too indeterminate. The question was ultimately subsumed by the discussion on dispute settlement for all of the conventions being drafted at the First Conference and the adoption of the Optional Protocol. Even with optional jurisdiction, the reference to historic use and other special circumstances in the delimitation formula was retained. Article 12 of the Territorial Sea Convention sets forth the rule that the median line, which is equidistant from points on the respective coasts, is to be used for the delimitation of the territorial sea between opposite or adjacent States unless historic use or other special circumstances exist.[27]

Delimitation of the Continental Shelf

With the recognition of the continental shelf as a legal institution, States turned to consider the limits of this new maritime zone. The early discussions within the Commission focused on the need for States to reach agreement and what would happen in cases where no such agreement could be reached, rather than the actual method of delimitation. The Special Rapporteur to the International Law Commission had canvassed various delimitation methods and opted for calling on the relevant States to reach agreement and, in the absence of agreement, to

[24] Yugoslavia, for example, argued: "The granting of a right to establish an unspecified boundary line other than the median line would cause confusion and encourage States to claim special circumstances for reasons of self-interest." *Ibid.*, at 187, ¶ 8 (Yugoslavia). But see *ibid.*, at 189, 1136 (United Kingdom) (advocating the inclusion of a reference to special circumstances "for reasons of equity or because of the configuration of a particular coast," or to account for the presence of a navigation channel or small islands).

[25] Two earlier cases, *Grisbadarna* and *Anglo-Norwegian Fisheries*, had referred to historic use in deciding martime boundaries.

[26] *First Conference*, 1st Comm., at 192, ¶ 35 (Greece). See also *ibid.*, at 192, ¶ 22 (Netherlands).

[27] The final formulation largely followed the Commission's text with a slight change to take account of the fact that the specific breadth of the territorial sea had not been ascertained.

use a line extending the territorial boundary for cases of adjacency and a median line for opposite States.[28] Scelle suggested that exploitation could not begin until a settlement was reached but States would either have to maintain the *status quo* or be under an obligation to refer the dispute to the ICJ.[29] The compulsory nature of dispute settlement was viewed as somewhat inevitable on the basis that States would otherwise be unable to explore the seabed.[30] The issue of procedure became less pressing once the Commission settled on the use of equidistance-special circumstances for continental shelf delimitation following the report of the Committee of Experts. However, if the parties could not agree on a line then the matter was to be submitted to arbitration.[31]

At the First Conference, States accepted that priority had to be given to boundaries being delimited by agreement. Yet it was proposed that the matter could not simply be left to negotiations in a legal vacuum,[32] as this approach could too easily lead to disputes between States.[33] Instead,

[28] Deuxième rapport sur la haute mer par J. P. A. François, Rapporteur Spécial, Régime of the High Seas, UN Doc. A/CN.4/42, at 102, ¶ 162, reprinted in *Documents of the Third Session including the Report of the Commission to the General Assembly*, [1951] 2 Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/Ser.A/1951/Add.1, UN Sales No. 1957.V.6, vol. II (1957) at 75.

[29] *Summary Records of the Third Session*, [1951] 1 Y.B. Int'l L. Comm'n 288, ¶ 5 (Scelle), UN Doc. A/CN.4/SER.A/1951, UN Sales No. 1957.V.6, vol. I (1957). See also *ibid.*, at 289, ¶ 16 (Scelle) ("Merely to exhort States to reach agreement was to leave the strong free to exert pressure on the weak.").

[30] *Ibid.*, at 291, ¶ 46 (Hsu). Cf. *ibid.*, at 289, ¶ 13 (Cordova). The members of the Commission agreed in 1951 that the draft text should provide for recourse to arbitration in the event of the interested States not reaching agreement. *Ibid.*, at 291 (by ten votes to two). It was further agreed that arbitration should be compulsory. *Ibid.*, at 292 (by eight votes to two, with two abstentions). Nonetheless, the draft article as a whole was rejected. *Ibid.*, at 293 (six votes in favor, six votes against). It was commented that:

> the votes cast against the inclusion of the word "compulsory" had not resulted from any dislike of the concept itself, but had been due to the fact that the members concerned had considered that it might offend the dignity of States. Nevertheless, a State refusing to reach an agreement had to be put under the obligation of submitting to arbitration.

Ibid., at 297, ¶ 22 (El Khoury). The Commission then adopted a proposal (by ten votes to two) reading: "Failing agreement, the parties are under the obligation to have boundaries fixed by arbitration". *Ibid.*, at 297, ¶ 23 (Spiropoulos).

[31] *Summary Records of the Fifth Session*, [1953] 1 Y.B. Int'l L. Comm'n 106, UN Doc. A/CN.4/SER.A/1953, UN Sales No. 59.V.4, vol. I (1959) (citing his report in UN Doc. A/CN.4/60). See also art. 73 of Articles 67 to 73 of the Draft of the International Law Commission, UN Doc. A/3159UN, reprinted in *First Conference*, 4th Comm., at 125.

[32] Venezuela: proposal, UN Doc. A/CONF.13/C.4/L.42, reprinted in *First Conference*, 4th Comm., at 138.

[33] *Ibid.*, at 94, ¶ 11 (Colombia).

States recognized that some sort of rule was required. The debates on continental shelf delimitation largely mirrored those on the delimitation of the territorial sea. Emphasis on the use of the median line was again apparent.[34] There was also more support for inclusion of the exception of special circumstances, as the rigid application of the median line would lead to inequitable results and considerable technical difficulties.[35] The final text of Article 6 of the Continental Shelf Convention required States with opposite or adjacent coasts to determine their boundary by agreement. It further provided, "In the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

Mandatory jurisdiction was not discussed as an elemental feature of the legal regime for delimitation of overlapping continental shelf entitlements specifically but was debated in relation to the legal regime of the continental shelf in its entirety. Some delegations strongly favored the inclusion of a mandatory dispute settlement mechanism,[36] particularly because of some of the vague expressions used in the articles relating to the continental shelf.[37] Other States doubted whether the ICJ, as proposed by the International Law Commission, was the preferable forum for dispute settlement in relation to the continental shelf. The very newness of the articles on the continental shelf suggested that compulsory adjudication was inappropriate since they had not "been put to the test of experience."[38] Moreover, in light of the technical character of the disputes that could be envisaged, an arbitral body similar to the one established for the conservation of living resources was suggested as

[34] *Ibid.*, at 92, ¶ 15 (United Kingdom) ("the median line would always provide the basis for delimitation").

[35] *Ibid.*, at 93, ¶ 5 (Italy). See also *ibid.*, at 92, ¶ 19 (Venezuela) (explaining that "failure to make due provision for special circumstances such as were frequently imposed by geography could not result in a solution which would be fair to all States").

[36] *Ibid.*, at 7, ¶ 18 (Netherlands); *ibid.*, at 7, ¶ 22 (Spain); *ibid.*, at 10, ¶ 13 (Colombia); *ibid.*, at 12, ¶ 9 (India) (provided it was subject to a declaration under Article 36 of the Court's Statute); *ibid.*, at 20, ¶ 14 (USA); *ibid.*, at 30, ¶ 31 (Canada) (acknowledging, however, that difficulties might arise for technical disputes); *ibid.*, at 101, ¶ 27 (Federal Republic of Germany); *ibid.*, at 100, ¶ 15 (Sweden); *ibid.*, at 101, ¶ 30 (Uruguay); *ibid.*, at 6, ¶ 8 (Greece) (stating that one of the conditions for its acceptance of the creation of the institution of the continental shelf was the inclusion of a provision on dispute settlement).

[37] *Ibid.*, at 9, ¶ 4 (Dominican Republic).

[38] *Ibid.*, at 99, ¶ 7 (USSR).

more appropriate.[39] Other delegations opposed the inclusion of a provision for mandatory jurisdiction in favor of dispute settlement according to Article 33 of the UN Charter.[40]

After the International Law Commission draft on dispute settlement was adopted narrowly,[41] the development of the Optional Protocol for dispute settlement rendered the article redundant.[42] States at the First Conference were satisfied with the inclusion of the equidistance-special circumstances formula for the delimitation of the continental shelf without any separate need to insist on the availability of compulsory dispute settlement in the event of failure to agree on a boundary. No cases concerning maritime delimitation were submitted to the processes of the Optional Protocol, but the formula adopted in the Continental Shelf Convention was discussed by the ICJ in the *North Sea Continental Shelf* cases and before an ad hoc tribunal in the *Channel Islands* case, which were both submitted on a consensual basis by the parties concerned.

North Sea Continental Shelf Cases

The Federal Republic of Germany, Denmark, and the Netherlands submitted cases by Special Agreement to the ICJ in 1967, asking the Court to state the principles and rules of international law that applied to the delimitation of the continental shelf appertaining to each of them. The Court was not asked to undertake the delimitation itself. Denmark and the Netherlands argued that the equidistance principle as defined in Article 6 of the Continental Shelf Convention was applicable to the delimitation of the North Sea. Although a signatory, Germany had not ratified the Continental Shelf Convention and was thus not a party. Denmark and the Netherlands submitted that this regime bound Germany either because it had assumed the obligations of the Continental Shelf Convention by virtue of public statements and proclamations, or because the equidistance-special circumstances rule was binding as a matter of general or customary international law. Germany resisted the application of the equidistance-special circumstances formula because its use on Germany's concave coast with respect to both Denmark and the Netherlands would have had the effect of cutting off Germany's entitlement to continental shelf area a short distance from its coast.

[39] *Ibid.*, at 3, ¶ 9 (South Africa).
[40] *Ibid.*, at 19, ¶ 8 (Pakistan) (arguing that "it was common knowledge that certain States did not accept the compulsory jurisdiction" and that Article 33 thus provided an acceptable alternative). See also *ibid.*, at 16, ¶ 16 (Chile); *ibid.*, at 21, ¶30 (Venezuela).
[41] *Ibid.*, at 106. [42] *First Conference*, Plenary Meetings, at 55, ¶ 70 (India).

The Court determined that Germany was not bound by the terms of the Continental Shelf Convention by virtue of its conduct because only a very definite and consistent course of conduct could warrant a finding that a State had become bound by a treaty in the absence of its ratification.[43] Furthermore, the Court decided that equidistance-special circumstances was not binding on Germany as a matter of general or customary law. In discussing whether the formula amounted to a rule of law or just a method of delimitation, the Court noted that the method had practical convenience and certainty of application. These factors were not enough, however, to convert the method into a principle of law.[44] The equidistance-special circumstances formula had only been adopted as a matter of practical convenience and cartography rather than as a matter of legal theory. Equidistance-special circumstances was not of a "norm-creating character" – it was subject to reservations in the Continental Shelf Convention, it was a secondary obligation after the primary obligation of delimitation by agreement and there were controversies as to the exact meaning and scope of the notion of special circumstances.

The Court filled the vacuum left by this decision with "certain basic legal notions" that "delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles."[45] The Court referred to the standard that had been included in the Truman Proclamation – namely, that any dispute over maritime boundaries between adjacent or opposite States should be settled by mutual agreement and in accordance with equitable principles. No single method of delimitation was to be considered as obligatory in all cases. Instead, delimitation was to be effected by agreement in accordance with equitable principles and taking account of all relevant circumstances. "There is no legal limit to the considerations which States may take into account for the purpose of making sure that they apply equitable procedures."[46] In the present case, the Court considered that the factors to be taken into account were the general configuration of the coasts (including any special or unusual features), proportionality, the unity of the natural resources of the continental shelf, and any other continental shelf delimitations in the same region. The Court's decision was important for its impact on the legal regime of the continental shelf and the rights of States in relation thereto. However, in deciding on a different approach to maritime

[43] North Sea Continental Shelf, paras. 21–36.
[44] *See Ibid.*, para. 23. [45] *Ibid.*, para. 85. [46] *Ibid.*, para. 93.

delimitation to that laid down in the Continental Shelf Convention, further uncertainty was introduced to the applicable substantive law and thus accorded States with additional discretion in determining their maritime boundaries.

Channel Islands Case

The second case to consider the possible application of Article 6 of the Continental Shelf Convention was the *Channel Islands* case, which was an arbitration between France and the United Kingdom over the delimitation of the Channel in the region around the Channel Islands. The Channel Islands archipelago is located within a rectangular gulf formed by the coasts of Normandy and Brittany. One of these islands lies within seven miles of the French coast. The task of the arbitral tribunal was to delimit the continental shelf of the Channel, which included the area lying to the north and to the west of the Channel Islands. With respect to this area, France argued that a median line should be drawn down the middle of the Channel with an enclave around the Islands.[47] France advanced this solution on the basis that the Channel Islands are situated close to the French coast, intrinsically linked with its continental land mass, and "on the wrong side of the median line."[48] France objected to the strict application of equidistance because it would grant to the United Kingdom a disproportionate area of the continental shelf in the Channel, impinge on French navigational interests, and negatively impact on the vital security and defense interests of France in separating the Channel into two zones.[49] The United Kingdom emphasized the proposition that every island is entitled to its own continental shelf and that the Channel Islands could not be viewed as "very small islands for the purpose of considering their effect on the delimitation of a median line between 'opposite' States."[50] The legal framework of the case was thus "that of two opposite States one of which possesses island territories close to the coast of the other State."[51]

Both France and the United Kingdom were parties to the Continental Shelf Convention but France had entered reservations to Article 6 to prevent its application in this area.[52] Although the United Kingdom

[47] Channel Islands, para. 156. [48] *Ibid.*, paras. 157–59.
[49] *Ibid.*, paras. 161–62. [50] *Ibid.*, para. 170. [51] *Ibid.*, para. 187.
[52] France had declared that it would not accept a boundary by application of the equidistance principle where "special circumstances" existed and designated the Bay of Biscay, the Bay of Granville and the sea areas of the Straits of Dover and of the North Sea off the French coast as such.

had objected to this reservation, the Tribunal found that Article 6 was inapplicable as between the two parties to the extent of the reservations.[53] In applying customary international law, the Tribunal determined that the equidistance-special circumstances rule was indistinguishable from the general international law rule, which gave no special preference to equidistance.[54] The role of special circumstances was to ensure an equitable delimitation.[55] Article 6 of the Continental Shelf Convention produced no practical difference to the customary law in this case since the application of the equidistance-special circumstances method depended on geographical and other relevant circumstances.[56] Equidistance-special circumstances and the rules of customary law were said to have the same object of delimitation of a maritime boundary in accordance with equitable principles.[57]

The effect of this decision was to "subject the equidistance method to the primary goal of securing an equitable solution in delimitation agreements."[58] As such, this decision was significant for its timing during the UNCLOS negotiations. At the point that States were divided between reference to the equidistance-special circumstances or to equitable principles, the decision that the rule in the Continental Shelf Convention was the same as the customary law rule was hoped to have a moderating effect.[59]

Conclusion

Two legal formulae thus developed for the delimitation of both the territorial sea and the continental shelf prior to the negotiations and conclusion of UNCLOS. A more technical rule, equidistance-special circumstances, was adopted at the First Conference for both maritime areas. At the same time, States resisted the inclusion of a predetermined dispute settlement mechanism, or at least considered the availability of a mandatory jurisdiction as unnecessary in the formulation of this method. Subsequent to the adoption of the Territorial Sea Convention and the Continental Shelf Convention, two cases considered what method and legal principles applied to maritime delimitation. These

[53] Channel Islands, para. 61.
[54] *Ibid.*, paras. 65–69. See also Jan Mayen, paras. 65–69. See further Malcolm D. Evans, "Maritime Delimitation and Expanding Categories of Relevant Circumstances," 40 *Int'l & Comp. L.Q.* 1, 4 (1990).
[55] Channel Islands, para. 70. [56] *Ibid.*, para. 97. [57] *Ibid.*, para. 68.
[58] Attard, p. 232. [59] Oxman, "1977 New York Session," at 79.

decisions set the tone for the future resolution of maritime delimitation disputes by establishing a far more flexible (but indefinite) standard.

Maritime Delimitation and Historic Title under UNCLOS

It was against this background that States came to negotiate the delimitation clauses for the territorial sea and the extended maritime zones (the continental shelf and the EEZ) at the Third Conference. The delimitation of the territorial sea was far less controversial at the Third Conference as larger stakes had emerged in allocating maritime zones that extended even further from the coast. On this occasion, States not only had to take into account the delimitation of the continental shelf, but also that of the EEZ. Both the continental shelf and the EEZ may extend to a distance of 200 miles from a State's baselines.[60] With these greater distances, the likelihood of States' maritime entitlements overlapping is considerably increased. This part examines Articles 15, 74, and 83 of UNCLOS, which deal with the delimitation of the territorial sea, the EEZ, and the continental shelf respectively, as well as historic title. The application of some of these principles was considered in maritime delimitation awards rendered subsequent to the adoption of UNCLOS but prior to its entry into force.[61] *Eritrea/Yemen*,[62] which was decided in 1999, was the first case to use UNCLOS as the governing law for a maritime delimitation.[63] The discussion immediately below considers normative standards that may be applicable in the delimitation of the territorial sea, the EEZ,

[60] UNCLOS, art. 57 (setting the limit of the EEZ at 200 miles) and *ibid.*, art. 76 (allocating each State at least a 200-mile zone designated as continental shelf and allowing for extensions of up to 350 miles in certain circumstances). As the EEZ covers the seabed and subsoil, the two zones have thereby been linked, but the extent of this linkage has been the subject of debate among commentators. See, e.g., Kwiatkowska, *Exclusive Economic Zone*, pp. 6–18; Attard, pp. 136–45. In *Libya/Malta*, the Court stated: "This does not mean that the concept of the continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts." Libya/Malta, para. 33.

[61] For example, an arbitral award between Dubai and Sharjah considered the 1980 draft of the Convention, which still included reference to equidistance-special circumstances where suitable, and considered this clause as well as customary law in determining the applicable law. Dubai/Sharjah, at 249–56.

[62] In the Matter of an Arbitration Pursuant to an Agreement to Arbitrate dated 3 October 1996 between the Government of the State of Eritrea and the Government of the Republic of Yemen (*Eritrea/Yemen*) (Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), December 17, 1999), available at http://pca-cpa.org/RPC/#Eritrea.

[63] This arbitration was not instituted under Part XV of UNCLOS but was conducted at the request of the parties under the auspices of the Permanent Court of Arbitration.

and the continental shelf as well as for historic title and the next part analyzes the interrelationship of this law with the dispute settlement mechanism in UNCLOS.

Delimitation of the Territorial Sea under UNCLOS

Article 15 of UNCLOS largely reproduces the text of the Territorial Sea Convention for territorial sea delimitation.[64] The use of an equidistance line unless another boundary was warranted by special circumstances had been accepted and applied in State practice.[65] Although various proposals were made to refer to equitable principles, there was widespread support for the retention of the provision, with only minor drafting amendments, during the UNCLOS negotiations.[66] Neither the substance of the provisions on territorial sea delimitation nor related questions of dispute resolution occupied a prominent position during deliberations at the Third Conference.[67] The equidistance-special circumstances formula was thus still considered acceptable for the narrower distances at stake in a territorial sea delimitation.

The Tribunal in the *Eritrea/Yemen* arbitration considered the application of Article 15 in the southern reaches of the Red Sea.[68] This arbitration involved two phases, where the first phase decided the sovereignty of some islands located roughly in the middle of the Red Sea and the second phase delimited the maritime boundary between the opposite coasts of the States. In the first phase, the Tribunal determined that Yemen

In the Agreement to Arbitrate, the parties agreed that UNCLOS would apply for the second stage of the proceedings for the purposes of the arbitration even though Eritrea was not a party to the Convention. See Arbitration Agreement, October 3, 1996, Eritrea-Yemen, available at http://www.pca-cpa.org/RPC/arbagreeER-YE.htm, art. 2(3).

[64] Article 15 reads:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way that is at variance therewith.

UNCLOS, art. 15.

[65] S. P. Jagota, *Maritime Boundary* (1985), pp. 56–57.

[66] Oxman, "Seventh Session," at 22. The suggestion to bring Article 15 into line with the articles on the delimitation of the EEZ and the continental shelf was not adopted. 2 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 141.

[67] 2 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 140.

[68] Territorial sea delimitations had previously been undertaken in the *Grisbardana* and *Beagle Channel* arbitrations.

had acquired title to the main mid-sea islands based on evidence from the decade prior to the arbitration. The Tribunal recognized Eritrea's sovereignty over some smaller islands extending from its coast to within ten miles of the mid-sea islands. In awarding sovereignty over the mid-sea islands to Yemen, the Tribunal considered that this title entailed the perpetuation of the traditional fishing regime in the region, including free access, for the fishermen of both Eritrea and Yemen.[69] This decision in the first phase of the arbitration then had to be taken into account in the second phase of the case. Article 15 was relevant because of the small distances between the Yemeni mid-sea islands and the Eritrean coastal islands. The Tribunal applied Article 15 in determining the international boundary in this area and took the view that there were no reasons of historic title or other special circumstances to vary the equidistant median line.[70] Neither the size, habitability, nor historic usage of the area from the western mainland altered the placement of the median line.[71] Instead, the importance of the shipping lane and the practicality of not enclaving these islands mediated in favor of its use.[72]

Another third-party decision to consider the application of Article 15 was *Qatar* v. *Bahrain*.[73] There, the ICJ noted that the parties had agreed that Article 15 of UNCLOS was part of customary law, and thus adopted the approach of drawing an equidistance line on a provisional basis and then considering whether that line should be adjusted in the light of the existence of special circumstances.[74] The presence of a tiny island mid-way between the island of Bahrain and the Qatar peninsula constituted a special circumstance to prevent a disproportionate effect being accorded to an insignificant maritime feature.[75] While the use of the equidistant line for the territorial sea was given preeminence in UNCLOS, and customary international law, territorial sea delimitation does not involve

[69] In the Matter of an Arbitration Pursuance to an Agreement to Arbitrate dated 3 October 1996 between the Government of the State of Eritrea and the Government of the Republic of Yemen (*Eritrea/Yemen*) (Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), October 9, 1998), available at http://pca-cpa.org/RPC/#Eritrea, para. 527 (vi).

[70] Eritrea/Yemen, Maritime Delimitation, para. 158. [71] See *ibid.*

[72] *Ibid.*, para. 155. The arbitral tribunal in the *Beagle Channel* arbitration had previously taken issues of navigability into account in delimiting territorial sea areas. Beagle Channel, para. 110.

[73] Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (*Qatar* v. *Bahrain*), 2001 ICJ (March 16), available at http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm.

[74] *Ibid.*, para. 176. [75] *Ibid.*, para. 219.

much less flexibility than is inherent in the delimitation of the EEZ and the continental shelf.

Delimitation of the EEZ and the Continental Shelf under UNCLOS

Far more controversial than territorial sea delimitation has been the question of delimitation for overlapping entitlements to EEZ and the continental shelf. It was generally recognized at the Third Conference that the elements that had to be included in the delimitation provisions were delimitation by agreement; relevant or special circumstances; equity or equitable principles; and the median or equidistance line.[76] However, coastal States were, of course, aware of the impact that any particular method could have on their own maritime areas and therefore took different views on the respective weight to be attributed to these elements in the text because of their particular geographic situations vis-à-vis neighboring States.

Effected by Agreement on the Basis of International Law in Order to Achieve an Equitable Solution

The negotiating positions at the Third Conference were divided between those in favor of equidistance-special circumstances and those in favor of equitable principles. States did not consider that they were bound to retain the use of equidistance-special circumstances as set out in the Continental Shelf Convention, particularly as they were also considering the delimitation of the EEZ.[77] Moreover, as noted above, the ICJ had not accepted this rule as customary international law in the *North Sea Continental Shelf* cases and the arbitral tribunal in the *Channel Islands* case subsequently considered that equitable principles and relevant circumstances were equivalent to the method set out in Article 6 of the Continental Shelf Convention. Yet, the application of equitable principles was not considered as advancing the chances of a solution any further in light of their indeterminacy and the theoretically unlimited categories of relevant circumstances.[78] "Any precise formula will tend to divide the Conference, since for each coastal state that supports a particular

[76] Oxman, "Seventh Session," at 23. See also Jagota, p. 236.

[77] A Chamber of the ICJ noted the limitation of Article 6 was only applicable to the continental shelf and thus could not be used for the determination of a single maritime boundary. Gulf of Maine, paras. 115–21.

[78] Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law," 88 *Am. J. Int'l L.* 227 (1994).

rule . . . another naturally reacts in fear that it will lose some area."[79] With a definite rule of delimitation, States would have a clearer idea of what factors could be used in delimitation agreements. "The purpose of including a substantive provision in the convention is to describe, and thereby to narrow, the range of choices available."[80] Otherwise, States would be free to choose any equitable principle and accord any weight to that principle based on the vagaries of geography.[81]

As no compromise could be reached on the use of the equidistance-special circumstances formulation or a reference to equitable principles, Articles 74 and 83 of the Convention provide that the delimitation of the EEZ and the continental shelf, respectively, shall be effected by agreement in accordance with international law in order to achieve an equitable solution. This position reaffirms the principle that the validity of a maritime boundary, even when unilaterally declared, is determined by international law.[82] Agreement is to be reached "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice."[83] The text was included at the final stages of the Third Conference despite significant criticism and hesitation.[84] It was disliked because it did not provide any "specific designation of which principles and rules from out of the entire panoply of customary, general, positive,

[79] John R. Stevenson and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session," 69 *Am. J. Int'l L.* 1, 17 (1975). "The realization is growing that the Conference could become hopelessly bogged down if it tries to deal definitely with essentially bilateral delimitation problems." *Ibid.*

[80] Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)," 74 *Am. J. Int'l L.* 1, 31 (1980).

[81] L. D. M Nelson, "The Roles of Equity in the Delimitation of Maritime Boundaries," 84 *Am. J. Int'l L.* 837, 852 (1990).

[82] Anglo-Norwegian Fisheries, at 132. "The establishment of an international maritime boundary regardless of the legal position of other States is contrary to the recognized principles of international law." Attard, p. 223.

[83] UNCLOS, arts. 74(1) and 83(1).

[84] Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea, The Tenth Session," 76 Am. J. Int'l L. 1, 13 (1982). Oxman cites the comments of the American representative as follows:

> If "the main purpose of a Convention on the Law of the Sea is to reduce the possibility of disputes and conflict between States, and to help resolve differences that do arise by narrowing and reformulating them in generally acceptable legal terms," the U.S. representative observed, then this is not the time for the conference "to give up and move forward with an anodyne text that cannot achieve these purposes and that may indeed have the opposite effect of adding confusion to the law . . . a text that delegations on both sides privately look upon with embarrassment."

Ibid., at 15 (citing statement of Ambassador Malone in the plenary meeting of August 28, 1981).

and conventional law are of particular significance."[85] In this respect, neither States in favor of equidistance-special circumstances nor those that supported equitable principles received any satisfaction.

States are thus provided with minimal guidance from the Convention on what approach must be used in the delimitation of their extended maritime zones.[86] Articles 74 and 83 leave both negotiators and third-party decision-makers alike with considerable discretion in deciding on maritime boundaries. There is certainly room to doubt whether there is any legal rule at all. Oda has stated:

> The words "in order to achieve an equitable solution" cannot be interpreted as indicating anything more than a goal and a frame of mind, and are not expressive of a rule of law . . . The deciding factors in such diplomatic negotiations are mainly the negotiating powers and the skills of each State's negotiator. In other words, there is *no* legal constraint, hence there is *no* legal rule, which guides negotiations on delimitation, even though the negotiations should be directed "to achiev[ing] an equitable solution."[87]

Sir Robert Jennings has questioned how the UNCLOS formula is different from a decision *ex aequo et bono*.[88] As it is the equitable solution that must predominate, principles could acquire an equitable quality if they lead to an equitable result.[89] The ICJ reached this conclusion in *Tunisia/Libya* when discussing the provisions in the 1981 draft of the Convention:

> Any indication of a specific criterion which could give guidance to the interested parties in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of the continental shelf areas are those which are appropriate to bring about an equitable result . . .[90]

[85] Tunisia/Libya, at 246 (Dissenting Opinion of Judge Oda). Cf. Oxman,"Eighth Session," at 31 (arguing that by referring to delimitation in accordance with international law there is some restraint on the claims available in a delimitation).

[86] As Charney notes, "If international law is supposed to be normative, this formulation fell far short of the ideal." Charney, "Progress," at 227.

[87] Oda, "Dispute Settlement Prospects," at 869 (emphasis in original).

[88] Robert Y. Jennings, "The Principles Governing Marine Boundaries," in *Staat und Völkerrechtsordnung: Festschrift für Karl Doehring* (Kay Hailbronner *et al.* eds., 1989), pp. 397, 408. ("Yet the obvious question, even if it be somewhat embarrassing, must in honesty be posed: how, then, does this differ from a decision *ex aequo et bono*, except indeed that this is not what the parties asked for nor sanctioned?")

[89] See Tunisia/Libya, para. 70. The Court subsequently clarified this approach to say that the matter was not one of abstract justice but justice according to the rule of law. Libya/Malta, para. 45. See also Charney, "Progress," at 227.

[90] Tunisia/Libya, para. 50.

The method to be followed for achieving the goal of an equitable solution is not specified. Instead, the Convention "restricts itself to setting a standard, and it is left to States themselves, or to the courts, to endow this standard with specific content."[91]

Courts and tribunals resolving maritime boundary conflicts since the adoption of the Convention have sought to attain an equitable result and have utilized a range of principles,[92] and relied on a diversity of factors in reaching such a result.[93] In assessing the application of Articles 74 and 83 in case law, one commentator has concluded:

> The pronouncements of the International Court of Justice and the Court of Arbitration in the Guinea/Guinea Bissau arbitration indicate that Articles 74 and 83 are considered to be identical to the rules of customary international law on the matter. Application of either set of rules to the same case would result in the same outcome.[94]

Such a conclusion is possible in light of the very broad formulations in the Convention – so much flexibility is accorded to decision-makers, it is unlikely that the reasoning for and designation of a maritime boundary

[91] Libya/Malta, para. 28. See also Gulf of Maine, para. 95 ("Although the text is singularly concise it serves to open the door to continuation of the development effected in this field by international case law"); Guinea/Guinea-Bissau, para. 88 ("in each particular case, its application requires recourse to factors and the application of methods which the Tribunal is empowered to select").

[92] For example, in *Libya/Malta*, the Court states:

> The normative character of equitable principles applied as part of general international law is important because these principles govern not only delimitation by adjudication or arbitration, but also, and indeed primarily, the duty of Parties to seek an equitable result. That equitable principles are expressed in terms of general application, is immediately apparent from a glance at some well-known examples: the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances the principle that although State are equal before the law and are entitled to equal treatment, "equity does not necessarily mean equality."

Libya/Malta, para. 46.

[93] Malcolm Evans has analyzed in detail the different circumstances utilized in the course of maritime delimitation arbitrations and adjudications. Malcolm D. Evans, *Relevant Circumstances and Maritime Delimitation* (1989).

[94] Alex G. Oude Elferink, "The Impact of the Law of the Sea Convention on the Delimitation of Maritime Boundaries," in *Order for the Oceans at the Turn of the Century* (Davor Vidas and Willy Østreng eds., 1999), pp. 457, 462.

would not be justified under Articles 74 and 83. When States are negotiating a boundary, there is no limit to the factors that may be taken into account,[95] and, consequently, more factors may be considered in the course of negotiations than in a decision process undertaken by a third-party tribunal. So long as the agreement is in accordance with international law and effects an equitable result, UNCLOS places no further constrictions on this practice.

In *Eritrea/Yemen*, the delimitation of the northern reaches of the maritime area was governed by Articles 74 and 83 of the Convention. The Tribunal decided that the "generally accepted view" was that the equidistance line normally provided an equitable boundary in delimitations between States with opposite coasts.[96] Considerations relating to the position of "barren and inhospitable" islands,[97] as well as the history of oil concessions in the area did not disturb the use of a median line (the latter consideration actually reinforced the use of the median line).[98] This decision was "in accord with practice and precedent in like situations,"[99] as little guidance could otherwise be drawn from the Convention for what specific method should be applied. The Tribunal noted as much: "there has to be room for differences of opinion about the interpretation of articles which, in a last minute endeavour at the Third United Nations Conference on the Law of the Sea to get agreement on a very controversial matter, were consciously designed to decide as little as possible."[100]

In sum, the latitude created under UNCLOS leaves States and third parties granted responsibility to devise a maritime boundary a wide scope for considering a range of sources for ascertaining what would be an equitable solution in the circumstances of each case. It is not possible to determine any uniform standard that must be applied in all maritime delimitations as what constitutes an equitable result varies in light of the geography of each of the relevant areas. At best, the cases may indicate what factors can be considered in a delimitation but no

[95] See UN Division for Ocean Affairs and the Law of the Sea, *Handbook on the Delimitation of Maritime Boundaries*, at 25, UN Sales No. E.01.V.2 (2000). The volumes edited by Charney and Alexander further illustrate the range of circumstances accorded weight by States in their agreements. See generally Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries* (1996).

[96] Eritrea/Yemen, Maritime Delimitation, para. 131.

[97] *Ibid.*, para. 147. [98] *Ibid.*, para. 132. [99] *Ibid.*, para. 132.

[100] *Ibid.*, para. 117. See also Oxman, "Eighth Session," at 30 (noting that judges or arbitrators were not likely to be influenced greatly by an inevitably flexible formulation).

guidance is provided on how factors relevant to a delimitation are to be balanced or weighed.[101] Consequently, the failure of States to arrive at an agreement on maritime delimitation is not usually because of a difference in interpretation over the rules of international law but a difference of opinion on what constitutes an equitable solution.[102]

Provisional Delimitations

Pending an agreement, "the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement."[103] States resisted any reference to a median line pending agreement even though State practice had favored such a boundary as an interim measure.[104] The Chairman of the committee negotiating this question decided that reference to the median line as an interim arrangement should not be included without a compulsory dispute settlement procedure being available since the availability of the median line might not encourage agreements.[105] If States could employ the median line as the interim arrangement and this line was preferred by a State for the final boundary, there would be no incentive for that State to refer the matter to any further negotiations, or to third-party settlement.

Provisional arrangements are without prejudice to any final delimitation.[106] A claim based upon the conduct of one State alone reflects only what that State might consider equitable, not what might be an equitable solution for both.[107] The policy of allowing such arrangements rests in the promotion of stability in the relations between States:

> Such arrangements enable states to make use of the disputed areas and to conduct normal relations there. In the absence of such arrangements, states may feel compelled at some cost, to forcefully challenge each other's actions in the area to maintain their legal rights.[108]

[101] See Evans, "Expanding Categories," at 27–28.
[102] Oda, "Dispute Settlement Prospects," at 870.
[103] UNCLOS, arts. 74(3) and 83(3). [104] Attard, p. 227.
[105] See Oxman, "1976 Session," at 267 (citing the comments of the chairman).
[106] UNCLOS, arts. 74(3) and 83(3). See also Bernard H. Oxman, "International Maritime Boundaries: Political, Strategic, and Historical Considerations," 26 *U. Miami Inter-Am. L. Rev.* 243, 290 (1994–95). ("Fears that a *modus vivendi* may, for political or juridical reasons, evolve into a permanent boundary or boundary regime may limit the ability of the parties to find means to control the scope and intensity of their dispute.")
[107] Evans, "Expanding Categories," at 25. [108] Charney, "Progress," at 227.

Nonetheless, reference to provisional measures "of a practical nature" has been criticized as "so vague that it can be of little practical assistance in establishing interim measures."[109] States are again left with considerable discretion in reaching agreement on what temporary measures should be taken and are under no obligation to make interim arrangements. It is when States are unable to reach agreement within a reasonable period of time that the States concerned are to resort to the procedures in Part XV, and the compulsory procedures may enable a State to seek an interim arrangement as a provisional measure if circumstances so require.[110]

Historic Title

Historic title is recognized in various contexts in UNCLOS – in relation to maritime delimitation, the status of bays as well as the rights of States in respect of archipelagic waters. The rationale for recognizing historic rights is clearly grounded in notions of stability. One commentator has stated that:

> Longstanding practice evidenced by a strong historic presence should not be disturbed. Judicial bodies are ill-advised to disregard a situation that has been peacefully accepted over a long period of time. To justify a division based on historic presence over the area, coupled with affirmative action toward that end, should be apparent.[111]

Claims of historic title effectively seek to restrict the rights of the international community in those waters.[112] Historic waters have been defined as, "waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States."[113] While historic waters are typically internal waters, the exact status could depend on

[109] Attard, p. 228.
[110] See further pp. 59–85. But see Aegean Sea Continental Shelf Case, Request for Indication of Interim Measures of Protection (*Greece* v. *Turkey*), 1976 ICJ Rep. 3 (September 11) (declining to issue an order that Turkey refrain from all exploration activity as the seismic tests undertaken were of a transitory nature and so there was no risk of irreparable prejudice to the rights in question).
[111] Marvin A. Fentress, "Maritime Boundary Dispute Settlement: The Nonemergence of Guiding Principles," 15 *Ga. J. Int'l & Comp. L.* 591, 622–623 (1985).
[112] Roach, at 777.
[113] L. J. Bouchez, *The Regime of Bays in International Law* (1964), p. 281. See also Andrea Gioia, "Tunisia's Claims over Adjacent Seas and the Doctrine of 'Historic Rights,'" 11 *Syracuse J. Int'l L. & Com.* 327, 328–29 (1984).

whether the right of innocent passage has been allowed through the area in question.[114]

The presence of historic title may affect the drawing of a maritime boundary. The delimitation of the territorial sea specifically requires an adjustment of the median line where it is necessary to take account of "historic title or other special circumstances." Historic rights were recognized in the determination of maritime boundaries by third parties in *Grisbadarna* and *Anglo-Norwegian Fisheries*. In the delimitation between Sweden and Norway, the Permanent Court of Arbitration decided that the Grisbadarna area should be assigned to Sweden. One of the reasons for this delimitation was the "circumstance that lobster fishing in the shoals of Grisbadarna has been carried on for a much longer time, to a much larger extent, and by much larger number of fishers by the subjects of Sweden than by the subjects of Norway."[115] The Court was willing to take this factor into account on the basis that, "it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible."[116]

In *Anglo-Norwegian Fisheries*, which was decided in 1951, the United Kingdom accepted that Norway was allowed to claim certain maritime waters as internal waters or territorial seas on historic grounds. In the opinion of the United Kingdom, these claims constituted a derogation from general international law:

> on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possesio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force.[117]

The Court defined historic waters as "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title."[118] The majority of the Court accepted the

[114] Donat Pharand, *Canada's Arctic Waters in International Law* (1988), p. 93.
[115] Grisbadarna, at 233. [116] *Ibid.*, at 233.
[117] Anglo-Norwegian Fisheries, at 130.
[118] *Ibid.* In a dissenting opinion, Sir Arnold McNair considered that for a claim of historic bay evidence is required of a long and consistent assertion of dominion over the bay and of the right to exclude foreign vessels except on permission of the relevant State. *Ibid.*, at 164 (Dissenting Opinion of Sir Arnold McNair). Judge Read, in his dissent, stated that the burden was upon Norway to prove the following facts: that the Norwegian system came into being as a part of the law of Norway; that it was made known to the world in such a manner that other nations, including that Britain knew about it or must be assumed to have had knowledge; and that there has been acquiescence by the international community, including by the United Kingdom. *Ibid.*, at 194 (Dissenting Opinion of Judge Read).

argument that historic title should be taken into account in maritime delimitations: "Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable."[119] Although claims of historic rights have been raised in other maritime delimitation cases resolved by third parties, these claims have not prevailed to alter the course of the boundary.[120]

The Convention further envisages claims of historic title being asserted with respect to bays. Article 10, paragraph 6 provides that the rules for drawing closing lines across the mouths of bays do not apply for "so-called 'historic' bays." At the First Conference, a proposal was submitted for a request to the General Assembly to study the regime of historic bays.[121] Although a study was prepared on the juridical regime of historic waters, including historic bays,[122] the issue was not addressed at any length at the Third Conference and Article 10 replicates the relevant provision of the Territorial Sea Convention. The classification of certain areas as historic bays has been controversial because of the potential to close off bodies of water and thereby push exclusive maritime zones further into high seas areas. A notable example of this situation has been

[119] *Ibid.*, at 142. According to Judge Alvarez, in his Separate Opinion, for prescription to have effect the rights claimed to be based thereon should be well established; have been uninterruptedly enjoyed; not infringe rights acquired by other States; not harm general interests; and not constitute an *abus de droit*. *Ibid.*, at 152 (Separate Opinion of Judge Alvarez).
[120] In *Tunisia/Libya*, Tunisia claimed that a maritime boundary would have to take into account its historic rights in relation to the exploitation of the shallow inshore banks for fixed fisheries and the deeper banks for the collection of sponges. Tunisia/Libya, para. 98. The Court, however, was able to reach a decision on the position of the boundary without having to pass judgment on the validity of this claim. *Ibid.*, para. 105. Similarly, in *Eritrea/Yemen*, although the Tribunal had confirmed the perpetuation of the traditional fishing regime around the mid-sea islands, the boundary drawn did not specifically designate the location of these traditional fisheries.
[121] India and Panama submitted this proposal, which was adopted as Resolution VII, at the First Conference. See Resolutions Adopted by the Conference, UN Doc. A/CONF.13/L.56 (1958), reprinted in *First Conference*, Plenary Meetings, at 145. The General Assembly referred this request to the International Law Commission. GA Res. 1453, UN GAOR, 14th Sess., Supp. 16, at 57, UN Doc. A/4354 (1959). The UN Secretariat undertook the study instead.
[122] Juridical Regime of Historic Waters, including Historic Bays, UN Doc. A/CN.4/143, reprinted in [1962] 2 Y.B. Int'l L. Comm'n 1, UN Doc. A/CN.4/Ser.A/1962/Add.1, UN Sales No. 62.V.5 (1962).

the United States' military challenges to Libya's assertion that the Gulf of Sidra constitutes a historic bay and should be closed off as internal waters.[123]

Reliance on historic criteria is also permitted when considering whether a group of islands constitutes an archipelago for the purposes of the Convention,[124] and in the drawing of archipelagic baselines.[125] With respect to the latter:

> If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighboring State, existing rights and 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.[126]

Traditional fishing rights and other legitimate activities of States that are immediate neighbors to archipelagic States are to be recognized.[127] The existence of other rights relating to archipelagoes will depend on the neighboring State establishing that it had traditionally exercised the rights or interests claimed. Historic rights of this kind permit States to exercise a limited authority over certain areas not usually subject to coastal State sovereignty; the sovereignty is limited to the activity in question and does not amount to full sovereignty over high seas areas.[128] For historic fishing rights, a tribunal would have to examine the validity, scope and opposability of those rights to the other party.[129]

One of the important reasons for asserting historic rights was to protect long-held economic interests in particular areas in the face of the *res communis* philosophy.[130] As such, it is arguable that historic rights should

[123] Libya's position has been strongly criticized by commentators. See, e.g., John M. Spinnato, "Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra," 13 *Ocean Dev. & Int'l L.* 65 (1983); Roger Cooling Haerr, "The Gulf of Sidra," 24 *San Diego L. Rev.* 751 (1987); Yehuda Z. Blum, "The Gulf of Sidra Incident," 80 *Am. J. Int'l L.* 668 (1986).

[124] UNCLOS, art. 46(b). A commentary on Article 46 notes:

> The expression "which historically have been regarded as such" was not elucidated at the Conference. This alternative historical method of qualification may not be very important in practice, because before an archipelagic State may draw archipelagic baselines it must satisfy the objective criteria prescribed in article 47 as well as the requirement that it consist of one or more archipelagos. Furthermore, it is improbable that an entity without geographic, economic and political unity would attempt to be considered an archipelagic State.

2 *United Nations Convention on the Law of the Sea 1982: A Commentary*, pp. 414–15.

[125] UNCLOS, art. 47(6). [126] *Ibid.*, art. 47(6). [127] *Ibid.*, art. 51(1).

[128] Gioia, at 329. [129] Attard, p. 267. [130] Roach, at 777.

be admitted in a more restricted fashion now that coastal States have much broader entitlements to maritime jurisdiction.[131] States might be inclined to challenge declarations of historic title in certain areas if such a declaration impinges on inclusive uses of that region. Alternatively, a challenge may arise in a bilateral delimitation where the historic claim has the effect of enlarging the entitlement of States with an adjacent or opposite coast. Competing claims over the existence and opposability of historic title cannot easily be resolved under the terms of the Convention in light of the scant elaboration of principles on this matter. Specificity on the standard to be applied in determining claims to historic title was avoided in the Convention for similar reasons as maritime delimitation: the circumstances of individual cases varied too extensively to permit the formulation of a uniform standard.

Dispute Settlement Procedures for Maritime Delimitation and Historic Title

Compulsory dispute settlement under Section 2 of Part XV is available to States for disputes relating to the delimitation of the territorial sea, continental shelf, and EEZ, and to historic title unless States have opted to exclude these disputes by virtue of Article 298(1)(a). Articles 74 and 83 expressly stipulate that States shall resort to Part XV procedures in the event that no agreement is reached within a reasonable period of time.[132] There was support for some form of dispute settlement entailing a binding decision because "boundary disputes were likely to be more frequent when the zones under the jurisdiction of the coastal states were more extensive, and . . . those zones would create a danger to peace if they were not definitely settled by a binding decision."[133]

[131] See *ibid.* [132] UNCLOS, arts. 74(2) and 83(2).

[133] 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 117. Jacovides writes:

> The fact is that sea boundary delimitation, because of the high stakes involved due to the increase of the zones of maritime jurisdiction under the present Convention (as compared to the 1958 situation), because of the contentious potential since it touches sensitive nerves of national sovereignty and because of the vagueness of the substantive rules adopted in other parts of the convention – particularly in the case of Articles 74 and 83 on the delimitation of the exclusive economic zone and the continental shelf between states with opposite or adjacent coasts – especially lends itself to third party compulsory settlement if solutions are to be found peacefully and actual or potential disputes are not to escalate into confrontations, including in many instances even armed conflict.

Jacovides, at 167–68.

Further impetus to resort to adjudication or arbitration for determination of maritime boundaries may be derived from the highly flexible legal formulae prescribed under the Convention. UNCLOS provides no clear rule for States to apply in maritime delimitation of the EEZ and continental shelf beyond the exhortation that any agreement be based on international law. Similarly, no criteria are stated for establishing historic title in relation to territorial sea delimitation, bays, and fishing in archipelagic waters. The indeterminate nature of the substantive principles set out with respect to delimitation of the continental shelf and the EEZ, as well as the large degree of discretion accorded to States in asserting historic title, meant that mandatory jurisdiction would provide States with a procedure to facilitate agreement. Certainly, western States strongly favored the inclusion of a procedure entailing binding jurisdiction if the substantive rules were insufficiently determinative.[134] Moreover, the delimitation of maritime zones has been subject to third-party dispute settlement in the past despite the highly discretionary nature of the applicable legal principles.[135] It is nonetheless noticeable that the arbitral and adjudicative procedures that have been undertaken for the determination of maritime boundaries have lacked the zero sum result that is characteristic of litigated dispute resolution. The typical tactic is for States to submit maximalist claims to courts and tribunals and these bodies are left the task of devising a compromise position between these claims to achieve an "equitable result." This history could indicate that the subject of the dispute would be conducive to settlement under the compulsory procedures in Part XV of the Convention. It may well be another contributory factor as to why governments negotiating at the Third Conference did not insist on the complete exclusion of maritime delimitation and historic title disputes from the compulsory dispute settlement regime.

[134] Eero J. Manner, "Settlement of Sea-Boundary Delimitation Disputes According to the Provisions of the 1982 Law of the Sea Convention," in *Essays in International Law in Honour of Judge Manfred Lachs* (Jerzy Makarczyk ed., 1984), p. 625, at pp. 636–37. See also Brown, "Dispute settlement," at 24 (1997). ("The objective observer might well argue that the degree of need for compulsory settlement machinery is in inverse proportion to the degree of precision and certainty of the criteria of delimitation: the more imprecise and uncertain the criteria, the greater the need for some form of compulsory settlement.")

[135] "In spite of this indeterminacy, if not because of it, coastal states have found that third-party dispute settlement procedures can effectively resolve maritime boundary delimitation disputes." Charney, "Progress," at 227.

States also have an economic incentive to resolve maritime disputes in order to provide companies interested in exploring for hydrocarbons with certainty and exclusivity of title. Equally, States could only grant fishing licenses over certain areas, and undertake the necessary conservation and management enforcement measures, when it could be clearly ascertained which State was responsible for, and entitled to, a particular maritime area. The importance of international marketability illustrates why compulsory dispute settlement is an essential complement to maritime delimitation.[136] Dispute settlement procedures provide States with the chance to quiet their title to certain maritime areas, particularly in situations of overlapping entitlements. To the extent that resources in maritime areas cannot be harvested and sold without recognized legal title, there is an incentive to submit to third-party dispute resolution. Such a procedure is necessary in order to show investors and the international market that a State has good title to the resources in a particular maritime area. Without a legal resolution, a State may lose all capacity to harvest and market resources – or at best the questionable title will significantly diminish the value of the concession – and this is because it can no longer market exclusive rights to private fishing fleets or oil companies. Moreover, States are much more likely to comply with a third-party decision on the allocation of maritime areas. Due to the centrality of marketable title, there is little value in continuing to claim maritime areas when a tribunal has declared that a particular State is not the owner of a certain area. Third-party opinion carries substantial weight because a State will not be able to market resources profitably after an adverse ruling.

The economic motivations, indeterminate legal standards and history of adjudicated or arbitrated delimitations may have militated in favor of compulsory dispute settlement but the significant practice of settlement through agreement and the important interests at stake also impacted on the decision to include mandatory jurisdiction over these disputes. Coastal States may wish to negotiate boundary agreements rather than refer matters to third parties, as the States concerned are able to take into account human and resource conditions that have been ignored in boundaries settled through adjudication or arbitration.[137]

[136] See Brilmayer and Klein, at 732–36.

[137] See Charney, "Progress," at 227 (noting that such consideration was taken in *Jan Mayen* but criticizing the step as "unfortunate and likely to encourage greater conflict and uncertainty"). Oxman has similarly commented:

The fundamental importance of maritime delimitation has meant that conflicts relating to overlapping entitlements are "the most dangerous" disputes,[138] as they lie "at the very heart of sovereignty."[139] The significance of the national interests involved in allocation of maritime zones deterred States from transferring unconditionally this important decision to an international process. The socialist States indicated that, "they would not accept any formula – nor indeed the whole Convention – if it contained provisions on compulsory procedures entailing binding decisions relating to delimitation disputes."[140] This problem became particularly acute when the decision was reached that no reservations could be made to the Convention.[141] States were concerned as to whether the dispute settlement procedures would grant the parties autonomy to determine the contents of the reference for settlement or whether they would be compelled to submit the determination of the boundary itself.[142] The compromise reached was that maritime delimitation and historic title disputes would be included within the compulsory dispute settlement framework but States could optionally exclude these disputes, subject to an obligation to refer the matter to conciliation if certain conditions were met.[143]

> Provided they agree, the parties are largely free to divide as they wish control over areas and activities subject to their jurisdiction under international law. They may be guided principally, in some measure, or not at all by legal principles and legally relevant factors a court might examine, and by a host of other factors a tribunal might well ignore such as relative power and wealth, the state of their relations, security and foreign policy objectives, convenience, and concessions unrelated to the boundary or even to maritime jurisdiction as such.
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> Oxman, "Political, Strategic, and Historical Considerations," at 256.

138 Stevenson and Oxman, "1975 Session," at 781.

139 Gamble, "Dispute Settlement in Perspective," at 331.

140 Manner, at 636–37. See also Jagota, p. 238 (noting that some delegations expressly reserved their position on the need for compulsory dispute settlement in their proposals).

141 UNCLOS, art. 309. States were well aware of the connection between the exclusions to compulsory dispute settlement entailing binding decisions and the use of reservations. An earlier draft of the article on reservations was provisional on an agreement being reached on the rules relating to delimitation of the extended maritime zones and the dispute settlement procedures available for delimitation disputes. See Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)," 75 *Am. J. Int'l L* 211, 232 (1981).

142 Jagota, p. 237.

143 Earlier drafts of Article 298(1)(a) provided that declarations excluding maritime delimitation disputes from the Convention regime had instead to specify a regional or other third-party procedure entailing a binding decision. See 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, pp. 109–13.

The use of conciliation as an alternative to adjudication or arbitration allows States to consider a wide range of factors in their efforts to reach agreement. Conciliation may produce a more acceptable political and economic result than adjudication or arbitration because it is a highly flexible process that permits a comprehensive range of interests to be taken into account.[144] Compulsory conciliation was also considered as providing more protection for weaker parties compared with a free choice of procedure where, in practice, dispute settlement may remain in the realm of negotiations where bargaining positions would be unequal.[145] Although not a binding determination, the findings of the conciliation commission could carry weight as an impartial judgment.[146] The utility of conciliation reports lies in the elaboration of principles that could be applied by the parties in future negotiations. Such a method is not without precedent – the ICJ was charged with this responsibility in the *North Sea Continental Shelf* cases, rather than being asked to define the actual location of the boundary.[147] In this respect, the conciliation commission may take into account interests that have typically been excluded in third-party maritime delimitations. The ultimate weight that the conciliation report will have on the final agreement of the States may be limited because of its non-binding nature. The worth of the conciliation process will depend on the type of recommendations, the States involved in the delimitation process, and the overall political context.

Under Article 298(1)(a)(i), either party to a dispute excluded from mandatory adjudication or arbitration can submit the matter to conciliation provided certain conditions have been met. The first condition is that the dispute must be one that has arisen subsequent to the entry

144 Brus, n. 19 (comparing the outcome of the conciliation procedures between Iceland and Norway concerning the delimitation in the Jan Mayen area and the International Court of Justice's delimitation in the dispute between Denmark and Norway in a neighboring area).

145 *Ibid.*, p. 123. Cf. Jacovides, at 167–68. ("Such a situation – the relative vagueness of the substantive rules on the one hand and the absence of compulsory third party dispute settlement procedures of a binding nature on the other – is bound to create problems and to work an injustice at the expense of smaller and militarily weaker states because larger and stronger states may be tempted to claim the lion's share and are not obliged to accept third party adjudication.")

146 Günther Jaenicke, "Dispute Settlement under the Convention on the Law of the Sea," 43 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1983), pp. 813, 827.

147 North Sea Continental Shelf, para. 2. Norway advocated this approach in *Jan Mayen*, but the Court decided against Norway on this point. Jan Mayen, at 77–78. The argument was also made, and rejected, in *Tunisia/Libya*. Tunisia/Libya, at 38–40.

into force of UNCLOS between the parties to the dispute. The inclusion of this condition is a natural consequence of paragraph 4 of Articles 74 and 83, which states: "Where there is an agreement in force between the States concerned, questions relating to the delimitation of the [EEZ or continental shelf, respectively] shall be determined in accordance with the provisions of that agreement." This condition significantly reduces the number of delimitations that could be subject to the Convention's regime.[148] It excludes disputes that arise prior to the entry into force of the Convention for the particular States in dispute, not just disputes that arise after the entry into force of the Convention in general. This condition is grounded in the presumption against retroactivity in the law of treaties and prevents any longstanding disputes being made subject to Part XV of UNCLOS.[149] Furthermore, only addressing disputes that arise subsequent to the entry into force of the Convention prevents States from attempting to reopen disputes that had previously been settled in the hope that a more favorable outcome (a more "equitable result") would be achieved.

A point of contention here could well be deciding at what point in time the dispute arose. The Third Conference had considered three different formulae for this exception – one that excepted disputes; another that excepted disputes that related to situations or facts existing prior to the entry into force of the Convention; and a composite of these two.[150] Reference to existing facts and situations created a highly subjective test that would be dependent on the circumstances of each individual case.[151] Otherwise, the dispute can be deemed to arise at the time that opposing views of the States concerned take definite shape.[152] While Singh argues that the "crystallization of disagreement between the dispute States" model would add certainty to the operation of the

[148] Manner, p. 642. ("Accordingly, these provisions will not cover important old and pending delimitation disputes.")

[149] The presumption against retroactivity will not operate to bar the exercise of jurisdiction where there is a continuing violation of international law, however. See Joost Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems," 66 *Brit. Y.B. Int'l L.* 415, 435 (1995). ("The general rule is that in these cases the international tribunal will be allowed to exercise jurisdiction over the alleged breach for the period which continues to elapse after the critical date, even though the breach came into existence before that date.")

[150] Singh, p. 144. [151] *Ibid.*, p. 145.

[152] This test was used in the *Mavrommatis Palestine Concessions* case (*Greece* v. *Britain*) (Jurisdiction), 1924 PCIJ, Series A, No. 2, p. 28; 2 AD 27 *et al.* and the *Interhandl* case. *Ibid.*, p. 145.

conciliation procedure,[153] this test does not advance a more objective formula. The question will clearly depend on the facts of any case in order to determine when the dispute concerning the location of the boundary or the challenge to the existence of historic title first occurred.

The second condition precedent is that no agreement has been reached in negotiations between the parties after a reasonable period of time. This condition reinforces the importance the Convention places on the peaceful settlement of disputes as a precursor to settlement under the compulsory UNCLOS regime. It further reaffirms the obligation to reach agreement found in Articles 15, 74, and 83. A question, of course, arises as to what constitutes a "reasonable period of time" and whether a State could challenge the competence of the conciliation commission on the basis that efforts at negotiations have not been exhausted or that a "reasonable" time for negotiations has not lapsed. The ICJ has considered that for maritime delimitations, States "are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation."[154] A decision on whether efforts at negotiation constitute more than a "formal process" will depend on the facts of each case. Undoubtedly, a reasonable period of time lapses if one party refuses to negotiate.[155] Another question is whether a disputant State would have to wait a "reasonable" period of time when it considers as soon as the dispute arises that negotiations would be unlikely to yield a result or it would be forced to accept a particular result through economic or political pressure that would have less impact in conciliation proceedings. In the provisional measures stage of *Southern Bluefin Tuna*, ITLOS considered that requirements to take efforts to resolve a dispute were met at the decision of one of the States that the possibilities for settlement were exhausted.[156] This decision referred to the conditions under Section 1 of Part XV. If a unilateral decision is sufficient for determining when negotiations are exhausted in relation to maritime delimitation, then this condition is unlikely to pose a significant hurdle.

[153] *Ibid.*, p. 146.

[154] North Sea Continental Shelf, para. 85. See also Railway Traffic between Lithuania and Poland (*Lithuania* v. *Poland*) 1931 PCIJ (ser. A/B) No. 42, at 116 (stating that the obligation was not just to enter into negotiations, but to pursue them as far as possible with a view to concluding agreements).

[155] See United States Diplomatic and Consular Staff in Tehran (*United States* v. *Iran*) 1980 ICJ 3, paras. 49 and 52 (May 24).

[156] Southern Bluefin Tuna, Provisional Measures, paras. 60 and 61.

A dispute submitted for conciliation cannot involve "concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory."[157] This clause limits the scope of a dispute, rather than serving as a condition precedent to the submission of the matter to conciliation.[158] If two States seeking to delimit their maritime boundary also dispute sovereignty over particular territory, the boundary could still be drawn to the extent that the delimitation would not be influenced by the disputed territory.[159] For example, a maritime boundary could be drawn up to the point that the maritime zone of a disputed island would begin to influence the line. This approach would be consistent with maritime boundary cases that have had to account for third-party interests becoming impacted in the delimitation of a bilateral boundary.[160]

If a State submits the matter to conciliation in accordance with Annex V, Section 2 of the Convention, the other party to the dispute is obliged to submit to such proceedings.[161] The function of the conciliation commission is to "hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement."[162] The parties are then required to negotiate an agreement on the basis of the commission's report.[163] Article 298(1)(a)(ii) provides that "if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in Section 2, unless the parties otherwise agree." This provision is quite peculiar as it imposes a mandatory obligation ("shall") to submit the dispute to procedures in Section 2 but this referral is to be through "mutual consent," which would indicate that the use of Section 2 is not so mandatory. In addition, it purports to require the use of the procedures entailing a binding decision under Section 2 even though the whole purpose of the optional exception and the use of conciliation was to exclude resort to these sorts of mechanisms. This provision has been described as "one of the most bizarre passages in the entire Convention."[164] Gamble further writes:

[157] UNCLOS, art. 298(1)(a)(i).
[158] But see UN Handbook, p. 99 (considering this issue as a third condition precedent).
[159] See Oxman, Political, Strategic, and Historical Considerations, at 268.
[160] See, e.g., Libya/Malta, para. 78 (accounting for the maritime zones of Italy), and Eritrea/Yemen, Maritime Delimitation, para. 164 (accounting for the maritime zones of Saudi Arabia and Djibouti).
[161] UNCLOS, Annex V, art. 11. [162] *Ibid.*, Annex V, art. 6. [163] *Ibid.*, art. 298(1)(a)(ii).
[164] Gamble, "Binding Dispute Settlement?," at 51.

It is difficult to ascertain if anything is gained by this provision or others like it. The passage declares that the disputants "shall negotiate an agreement" but then immediately provides an alternative if no agreement can be reached. By mutual consent, the parties can submit the question to one of the procedures from section 2. The quintessence of the Montego Bay Convention's dispute settlement regime is the right of disputants to settle any dispute, at any time, by any mutually acceptable legal mode. Thus, the above provision would seem to contribute absolutely nothing.[165]

Perhaps one could have reference here to the decision of the ICJ in delimiting the maritime boundary between Greenland and the Norwegian island of Jan Mayen. Denmark had submitted the case to the Court on the basis of the optional clause whereby Norway and Denmark had agreed in advance to the compulsory jurisdiction of the Court.[166] Norway argued that the Court should not delimit the actual boundary but merely indicate the principles on which the delimitation should be based.[167] Such an approach had to be adopted by the Court, Norway argued, since States are only required to settle their maritime boundary disputes by agreement and not according to any specific rule or principle.[168] However, the Court decided to delimit the boundary.[169] Charney has stated: "Thus, the obligation to establish the maritime boundary by agreement was construed as merely a preliminary obligation; once efforts to negotiate a settlement were exhausted, the substantive international maritime boundary law became applicable and provided the rules pursuant to which the boundary must be delimited."[170] The question could then be posed as to whether the UNCLOS procedure should be approached in a similar way. Once the conciliation procedure has run its course, the States can thus consider their efforts to reach agreement exhausted and the compulsory procedures are then available to allow the matter to be settled through a third party. Such an argument is unlikely to succeed, however. The wording was intended to reinforce the paramountcy of State discretion in deciding how to settle maritime boundary disputes as well as the importance of a consensual resolution. Accounts of the negotiations at the Third Conference affirm this perspective: "The reference to 'mutual consent' was considered an essential additional element of compromise because it excluded

[165] *Ibid.* [166] ICJ Statute, art. 36. [167] See Jan Mayen, paras 88–89.
[168] Oral Presentation by Mr. Highet, Agent for Norway, Maritime Delimitation in the Area between Greenland and Jan Mayen (*Denmark* v. *Norway*), ICJ Verbatim Record, at 58–78 (January 21, 1993), cited in Charney, "Progress," at 227.
[169] Jan Mayen, para. 89. [170] Charney, "Progress," at 227.

the interpretation that the parties had to accept a third-party decision in the event that the conciliation did not result in an agreement."[171] On this basis, it would seem more likely that the awkward phrasing of "shall, by mutual, consent," was intended to reinforce the idea that compulsory third-party arbitration or adjudication was not available for maritime boundary or historic title disputes if excluded at the option of the States parties. Thus, if States so elect, maritime delimitation and historic title disputes can be excluded from compulsory procedures entailing a binding decision and reliance is thereby placed on diplomatic methods and other consent-based forms of dispute settlement.

In sum, maritime delimitation and historic title disputes may be subject to compulsory dispute settlement procedures. While this decision may have been desirable for economic reasons and to provide a means to give the substantive principles of delimitation some content, the interests at stake were too great to surrender these matters entirely to international arbitration or adjudication. The variety of political, strategic, social, and economic factors involved in allocation of maritime areas and the resultant malleable legal principles have lent support for resolution through political channels rather than third-party decision. States have more typically delimited their maritime boundaries through agreement and have been able to take into account a wide range of factors that are peculiar to the geography of the area as well as the political relations between the relevant States. It is ultimately this tradition of negotiated agreement that is reinforced in UNCLOS.

Disputes relating to Articles 15, 74, and 83 between States with opposite or adjacent coasts, as well as historic title, may be excluded if a State chooses to make a declaration to that effect. When this declaration is made, a State will only be obliged to submit to conciliation proceedings if the dispute arose after the entry into force of the Convention for the parties and no agreement has been reached within a reasonable period of time. Furthermore, any conciliation process is to be limited to the extent that the dispute necessarily involves consideration of disputes over land territory. Once the commission has presented its report, States are to resort to negotiations again and cannot refer the matter to compulsory procedures entailing a binding decision unless they so agree. Article 298 also repeats limitations on dispute settlement under the Convention that are found in Section 1 of Part XV as well as in the

[171] Manner, p. 638.

articles on maritime delimitation themselves.[172] The end result is that if States cannot reach agreement and one State has opted to exclude compulsory jurisdiction, there is no mandatory mechanism for decision and the dispute can be left unresolved. While the availability of compulsory dispute settlement may be essential to the delimitation of maritime zones in accordance with the Convention, political realities have prevented the compulsory use of third-party decision-making.

Other Disputes Relating to Maritime Delimitation and Historic Title

The disputes concerning maritime delimitation that may be expressly excluded from compulsory dispute settlement involve States with adjacent or opposite coasts. The question arises as to whether maritime delimitation disputes between States that do not have opposite or adjacent coasts could be settled under Section 2 of Part XV regardless of any declaration under Article 298. Disputes may well arise in situations where a coastal State makes an excessive maritime claim thereby appropriating areas that would otherwise constitute high seas. These claims have been viewed as potentially impinging on the freedoms of navigation and overflight and could subsequently threaten the security interests of other users.[173] To counter excessive maritime claims, the United States has continuously protested and operated in contested areas under the Freedom of Navigation Program, which emphasizes the use of naval exercises to protect freedom of navigation and to discourage State claims inconsistent with customary international law.[174] Dispute resolution under UNCLOS may be preferable in view of the increasing political, economic, and military costs of the Program.[175] These sorts of disputes are most likely to arise in the context of how coastal States have

[172] Article 298(1)(a)(iii) reads: "This subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties." UNCLOS, art. 298(1)(a)(iii).

[173] John H. McNeill, "The Strategic Significance of the Law of the Sea Convention," 7 *Geo. Int'l Envtl. L. Rev.* 703, 705 (1995).

[174] United States Department of State, Pub. No. 112, *Limits in the Seas: United States Responses to Excessive Maritime Claims* (1992), pp. 2–4. McNeill cites the example of the United States continuing to operate in the Persian Gulf despite the 1993 Iranian Maritime Areas law that attempts to inhibit uses of the area. McNeill, at 705–06.

[175] See George Galdorisi, "The United Nations Convention on the Law of the Sea: A National Security Perspective," 89 *Am. J. Int'l L.* 208, 210–212 (1995) (highlighting the challenges facing the Freedom of Navigation Program because of the large number of excessive maritime claims).

drawn their baselines or in a State's use of certain terrestrial features as islands to justify extending maritime zones as far as possible.

Straight Baselines

Baselines and closing lines have a fundamental importance in determining areas of maritime jurisdiction for they fix the points from which maritime areas are measured. Closing lines may be drawn across certain areas of water, such as bays and the mouths of rivers, and the enclosed waters have the status of internal waters, as opposed to territorial sea or high seas. Internal waters are identified where there is a "more or less close relationship existing between certain sea areas and the land formations which divide or surround them."[176] These waters must be "sufficiently closely linked to the land domain to be subject to the regime of internal waters."[177] Internal waters are juridically indistinguishable from a State's land territory (except for the requirement of allowing access to international ports) and are not typically subject to the regime of innocent passage.

In addition to closing lines, the Convention establishes two types of baselines from which the various maritime zones are to be measured. First, there is the normal baseline, which is the low-water line along the coast.[178] Second, the Convention includes the concept of the straight baseline in Article 7.[179] The straight baselines system was developed by the ICJ in the *Anglo-Norwegian Fisheries* case. In this case, the United Kingdom challenged the baselines used in a Norwegian decree that delimited a zone in which the fisheries were reserved to its own nationals. The Court determined that the drawing of straight baselines was not

[176] Anglo-Norwegian Fisheries, at 133. [177] *Ibid.*

[178] The Second Sub-Committee at the 1930 Conference had agreed that the baseline from which the territorial sea would normally be measured was a line of low-water mark along the entire coast. Report of the Second Sub-Committee, Report Adopted by the Committee on April 10, 1930, Appendix, reprinted in 4 *Codification Conference*, at 1419. The use of the low-water line was also adopted in Article 3 of the Territorial Sea Convention and Article 5 of UNCLOS.

[179] In addition to the matter of normal baselines, the Preparatory Committee to the 1930 Conference asked States to consider if baselines were drawn following the sinuosities of the coast or whether islands, islets, or rocks could be considered as points for drawing lines. Point IV, Bases of Discussion, reprinted in 2 *Codification Conference*, at 253. The latter resembles an early formulation of straight baselines but the concept was not included as a possible basis for discussion at this time on the grounds that it "would necessitate detailed information as regards the choice of the salient points and the distance determining tha [sic] base line between these points." *Ibid.*, at 256.

unlawful if certain geographic – and possibly economic – conditions were met. The Territorial Sea Convention codified the conditions set out in *Anglo-Norwegian Fisheries* in order for straight baselines to be lawfully drawn.[180]

Article 7 of UNCLOS now allows for straight baselines to be used 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."[181] Where straight baselines are used, they "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."[182] Under the Convention, the drawing of straight baselines must therefore take into account geographical features.[183] In determining whether the lawful situation for straight baselines exists, consideration may further be given to particular economic interests in the relevant region, provided that the reality and importance of these interests are clearly evidenced by a long usage.[184] Economic interests only can be used in drawing straight baselines once it is clear that such lines are permissible on geographic

[180] The main divergence between the text adopted and the rule espoused in *Anglo-Norwegian Fisheries* is that the Territorial Sea Convention does not permit straight baselines to be drawn to and from low-tide elevations unless there are lighthouses or other installations on them that are permanently above sea level. See Territorial Sea Convention, art. 4(3). The Court had permitted Norway to draw baselines between low-tide elevations. Anglo-Norwegian Fisheries, at 133 and 144.

[181] UNCLOS, art. 7(1). Questions were raised during the debates at the First Conference about the use of the term "immediate vicinity." The delegation from the Philippines considered the definition of that phrase "should be left to the courts to decide." *First Conference*, 1st Comm., at 160, ¶ 66 (Philippines). The United States has proposed criteria for determining whether a coast is deeply indented or whether islands constitute a "fringe." To be "deeply indented" the coast must have three or more indentations in close proximity to one another and the depth of each indentation must be greater than one-half the length of its proposed baseline. For a "fringe," the islands must mask 50 percent of the coastline in the given location, lie within twenty-four miles of the coast and each baseline must not exceed twenty-four miles in length. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Developing Standard Guidelines for Evaluating Straight Baselines* (Limits in the Sea, No. 106) (1987), cited in John Astley III and Michael N. Schmitt, "The Law of the Sea and Naval Operations," 42 *Air Force L. Rev.* 119, 123 (1997).

[182] UNCLOS, art. 7(3).

[183] The geographical conditions necessary to warrant the drawing of straight baselines was one of the major controversies of the First Conference because of their effect of decreasing high seas areas. Dean, "Geneva Conference," at 617.

[184] UNCLOS, art. 7(5).

grounds.[185] When straight baselines are used "they should be drawn conservatively to reflect the one rationale for their use that is consistent with the Convention, namely the simplification and rationalization of the measurements of the territorial sea and other maritime zones off highly irregular coasts."[186]

Straight baselines may also be used to enclose the outermost islands of archipelagic States. The method for drawing these straight baselines is specified in Article 47, which sets out criteria for the length of the baselines and what basepoints may be used. The drawing of these baselines has the effect of transforming the waters within those lines into archipelagic waters and consequently further reduces the amount of high seas available to other users. In view of this appropriation, States that have used these waters will be concerned with the size of the area that will be subject to the sovereignty of archipelagic States.

The recognition of the straight baselines system had considerable repercussions for international navigation and overflight as the waters thereby enclosed became subject to the regime of internal waters. The Special Rapporteur to the International Law Commission had recognized prior to the First Conference, "the system was primarily aimed at increasing the zone of internal waters wherein navigation might be restricted by the coastal State."[187] The compromise solution adopted by the Commission, and endorsed in both the Territorial Sea Convention and in UNCLOS, was to allow for the right of innocent passage in areas used for international navigation and newly closed off by the application of straight baselines.[188]

Systems of straight baselines also have the effect of extending all other areas subject to coastal State sovereignty or jurisdiction significantly seaward. The accrual of exclusive interests for the coastal State may provide an incentive for States to use straight baselines in a manner that is not

[185] Dean, "Geneva Conference," at 618 (highlighting this wording as a success of the United States since the Soviet Union wished the economic and geographic factors to be alternatives rather than cumulative conditions). See also Fitzmaurice, at 77.

[186] Roach, at 780.

[187] *Summary Records of the Seventh Session*, [1955] 1 Y.B. Int'l L. Comm'n, at 196–97, ¶ 25 (François), UN Doc. A/CN.4/SER.A/1955, UN Sales No. 60.V.3, vol. I (1960).

[188] Report of the International Law Commission to the General Assembly, UN GAOR at 267, UN Doc. A/3159 (1956), reprinted in *ILC Yearbook*, (1956), vol. II, at 253. (dealing with para. 3 of the article and commentary). See also Territorial Sea Convention, art. 5 and UNCLOS, art. 8(2). A special regime was created in the Convention for passage through archipelagic waters. See notes 361–76 below and accompanying text.

entirely consistent with the terms of the Convention.[189] The Convention itself grants coastal States a large degree of discretion with respect to this issue. The possible abuse that may arise with the use of straight baselines was anticipated during the initial codification efforts. Prior to the First Conference, the International Law Commission considered whether there would be a maximum length imposed on a straight baseline as a possible way to control the use of straight baselines. Such a limitation had been recommended by the Committee of Experts, and adopted by the Special Rapporteur.[190] Scelle considered a maximum length acceptable if the principle of compulsory arbitration was accepted for the purpose of determining the baseline of the territorial sea.[191] Lauterpacht also wondered if the ICJ would have jurisdiction over exceptions to the low-water line,[192] and went so far as to propose an amendment to the draft article on straight baselines whereby the ICJ would be given the power to maintain, modify, or annul the lines drawn.[193] These comments indicate that when a subjective decision is left to the coastal State,

[189] Reisman and Westerman have identified two categories of claims that are not in entire conformity with the formula for determining straight baselines as set out in Article 7 of the Convention. W. Michael Reisman and Gayl S. Westerman, *Straight Baselines in Maritime Boundary Delimitation* (1992), p. 118. The first category of disputable claims is where straight baselines have been drawn along coasts that are neither deeply indented and cut into nor fringed with islands in the immediate vicinity and the second category is where a State does have this type of coast but the basepoints selected for drawing the baseline are inappropriate. *Ibid.*, p. 118. Controversy may also arise over what constitutes a bay or island or low-tide elevation for the purpose of drawing a baseline. See Astley and Schmitt, at 122 (noting that baselines constitute a "critical point of departure" and are thus the focus of many law of the sea disputes).

[190] Additif au deuxième rapport de M. J. P. A. François, Rapporteur Spécial, UN Doc. A/CN.4/61/ Add.1, at 77, reprinted in *ILC Yearbook*, (1953), vol. II, at 75. The Special Rapporteur voiced the fears left by discretion (without suggesting dispute settlement was the answer):

> The matter of the territorial sea concerned not merely the interests of one State; it was a possible source of abuse and the Commission should endeavour to secure acceptance of a rule applicable to all countries. If the Commission wished to codify international law, or establish its rules by means of conventions, it could not leave unlimited discretion to Governments in all matters.

Summary Records of the Sixth Session, [1954] 1 Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/SER.A/1954, UN Sales No. 59.V.7, vol. I (1959), at 70, ¶ 26 (François).

[191] *ILC Yearbook*, (1954), vol. I, at 69, ¶ 20 (Scelle).

[192] *Ibid.*, at 68, ¶ 4 (Lauterpacht).

[193] *Ibid.*, at 75, ¶ 27 (Lauterpacht). Scelle considered this "extremely valuable," as the ICJ had the power "to rule *ex aequo et bono* and hence the freedom to evolve new law on the particular subject." *Ibid.*, at 75, ¶¶ 35–36 (Scelle). This proposal was criticized by several members of the Commission and ultimately withdrawn. See *ibid.*, at 83–85. A later proposal was to refer the matter to the same international organ that would have considered claims to different breadths of territorial sea. Amendements

then third-party dispute settlement might be necessary to balance the discretion granted.[194]

The delimitation of the territorial sea or the extended maritime zones by a coastal State can therefore be a controversial issue if straight baselines are drawn in such a way as to increase the size of the coastal State's internal waters and thereby restrict the rights and freedoms of other users.[195] As with other aspects of maritime delimitation, the exercise of a State's discretion in fixing its baselines may be subject to international scrutiny and the validity of the delimitation will depend on international law.[196] It is most typical that a challenge to baselines will ensue in the context of a delimitation between States with opposite or adjacent coasts.[197]

The question of straight baselines arose in the *Eritrea/Yemen* arbitration when the Tribunal delimited the northern reaches of the maritime area in dispute. Each country had relied on different basepoints in drawing straight baselines around the Dahlak islands, a fringe of islands off the Eritrean mainland coast. Although the Tribunal noted that it was not called upon to decide the reality, validity, or definition of the straight baseline system that had been established under Ethiopian legislation,[198]

proposés par M. J. P. A. François, Spécial Rapporteur, sur la base des observations des gouvernements au projet d'articles provisoires adopté par la Commission à sa sixième session, UN Doc. A/CN.4/93, reprinted in *Documents of the Seventh Session including the Report of the Commission to the General Assembly*, [1955] 2 Y.B. Int'l L. Comm'n 5, UN Doc. A/CN.4/SER.A/1955/Add.1, UN Sales No. 60.V.3, vol. II (1960).

194 The only proposal for a dispute settlement mechanism relating to baselines at the First Conference came from the Japanese delegation, which proposed, without success, a new article for the Territorial Sea Convention that would have required disputes arising out of Article 5 (straight baselines) and Article 7 (bays) be submitted to the ICJ unless the parties agreed on another method of dispute settlement. Japan: Proposal, UN Doc. A/CONF.13/C.1/L.130, reprinted in *First Conference*, 1st Comm., at 246.

195 Roach gives the example of Myanmar's 222-mile straight baseline across the Gulf of Martaban that effectively claims 14,300 square miles (an area the size of Denmark) as internal waters. Roach, at 780.

196 Anglo-Norwegian Fisheries, at 132.

197 Reisman has noted that courts or tribunals deciding maritime boundaries have been more inclined to ignore exorbitant straight baseline systems rather than criticize them. W. Michael Reisman, "Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)," 94 *Am. J. Int'l L.* 721, 732 (2000). The approach taken has been to fix the maritime boundary without taking into account the basepoints or baselines utilized by the parties. See Tunisia/Libya, at 76, para. 104; Gulf of Maine, at 332, para. 210; Libya/Malta, at 48, para. 64; Channel Islands, para. 19; Guinea/Guinea-Bissau, para. 96.

198 Legislation that had been adopted by Ethiopia during the period of Ethiopia's annexation of Eritrea continued in force after Eritrea's formal independence in 1993.

it still had responsibility for deciding on the basepoints that would control the course of the international boundary.[199] In this context, the Tribunal rejected the use of a particular feature, called Negileh Rock, as a basepoint on the basis that a British Admiralty Chart had shown the feature to be an underwater reef. Although rejecting Eritrea's submission in this regard, the Tribunal did not use the Eritrean islands suggested by Yemen as basepoints but determined itself what basepoints to use.[200] When considering the basepoints on the Yemeni coast, the Tribunal again considered the possible application of a straight baseline system. As Yemen had argued that the mid-sea islands should be used as basepoints, rather than its mainland coast, Yemen had not made any submissions on the application of a straight baseline system around the islands immediately adjacent to its coast. The Tribunal thus decided that the "intricate system of islands, islets and reefs which guard this part of the coast" constituted a "'fringe system' of the kind contemplated by Article 7 of the Convention, even though Yemen does not appear to have claimed it as such."[201] In making this decision, the Tribunal effectively assumed the power to assess the legitimacy of straight baselines in the context of a maritime delimitation dispute.

The decision in *Qatar* v. *Bahrain* may further signal a new trend in international courts and tribunals to assess the lawfulness of straight baselines. Bahrain alleged that the islands off the coast of the main islands could be assimilated to a fringe of islands that constituted a whole with the mainland.[202] While the ICJ considered that these features were part of the overall geographical configuration, the geographic conditions did not qualify as a fringe of islands along the coast for the purpose of applying the straight baselines method.[203] Instead, each maritime feature would have its own effect for the determination of baselines. The Court clearly stated in *Qatar* v. *Bahrain* that, as an exception to the normal rules for the determination of baselines, the straight baselines method had to be applied restrictively.[204]

To the extent that a dispute over baselines involves allocation of overlapping maritime zones between States with opposite or adjacent coasts or relates to historic title, the dispute could be excluded from compulsory procedures entailing a binding decision by virtue of Article 298. However, a third State may wish to challenge baselines if they are drawn

199 Eritrea/Yemen, Maritime Delimitation, para. 142.
200 *Ibid.*, para. 146.
201 *Ibid.*, para. 151.
202 *Qatar* v. *Bahrain*, para. 213.
203 *Ibid.*, para. 214.
204 *Ibid.*, para. 212.

in such a manner to allocate areas that would otherwise be part of the high seas. The *Anglo-Norwegian Fisheries* case involved such a challenge by the United Kingdom in respect of Norway's baselines.[205] On a textual analysis, the optional exception would not preclude States from instituting compulsory procedures under Section 2 of Part XV, if a State has filed an optional exclusion of jurisdiction on this question, as Article 298(1)(a)(i) refers explicitly to Articles 15, 74, and 83, and historic bays and titles. A dispute simply concerning the drawing of straight baselines in contravention of Article 7 falls outside the scope of the optional exception and could thus be resolved within the framework of Part XV.[206] Reisman and Westerman suggest that ITLOS could be used to "reinforce the intended purpose of straight baselines as mechanisms to rationalize ('smooth out') the ocean boundaries of irregular coastlines rather than as mechanisms to extend a nation's territorial waters."[207]

The situations where a dispute could be isolated in such a manner are limited, however. If a State is complaining that its high seas rights are being denied because of the coastal State's assertions of jurisdiction, sovereign rights, or sovereignty over a maritime area then it is likely that the dispute involves questions concerning resource exploitation (such as an assertion of enforcement jurisdiction over unlawful fishing) or allegations of unauthorized marine scientific research. A dispute could thus be characterized in such a manner that it would still fall within the limitations or exceptions to Section 2 of Part XV. If the drawing of baselines is the preliminary, or base, issue involved, a tribunal or court may be justified in proceeding to answer that question. To the extent that the question of baselines is subsumed or inherently linked to other substantive questions, the court or tribunal must decide what characterization is to take precedence in deciding on jurisdiction. If the dispute over the use of straight baselines arises because of interference with the freedoms of navigation or overflight then an important role for third-party dispute resolution remains in protecting these inclusive interests, and should warrant the exercise of jurisdiction.

[205] As noted above, the United Kingdom challenged the legality of Norwegian baselines that delimited a zone in which the fisheries were reserved to Norwegian nationals.

[206] See Roach, at 781.

[207] Reisman and Westerman, p. 219. But see Noyes, "ITLOS," at 155. ("One ought not assume that a 'binding' decision against a state's straight baseline claim by the ITLOS [or another court or tribunal] will automatically lead the political authorities of that state to reverse their position.")

The existence of a means to challenge the drawing of straight baselines through the Convention's dispute settlement mechanism may discourage States from making excessive claims in the future as well as encourage States to revise existing claims to ensure that they are in accord with the criteria in UNCLOS.[208] The question of the international legality of straight baselines may well be resolved through processes other than mandatory dispute settlement. For example, as coastal States are required to deposit copies of charts marking geographical coordinates of baselines with the UN Secretary General,[209] the resulting publicity may cause States to reassess their drawings of baselines. As Reisman notes, "[g]iven the discretionary and somewhat subjective character of straight baselines, this requirement would appear to have been designed as a necessary component of their validity and opposability to third states."[210] The Division of Ocean Affairs and the Law of the Sea in the UN Secretariat has established the necessary facilities to receive and disseminate this information.[211] In addition, the Division has a Geographic Information System that "helps . . . to identify any inconsistencies in the information submitted."[212]

Another possible way to rectify unlawful baselines may be through the Commission on the Limits of the Continental Shelf.[213] The Commission is the body created under the Convention to make recommendations to coastal States that want to claim extended continental shelf jurisdiction.

[208] "In discharging this obligation, states may either re-examine the outer limit lines previously defined in their national legislation or have to establish these lines, if they have not yet done so. The publicity resulting from these coastal state actions may provoke reactions from interested states". Oude Elferink, p. 458.

[209] UNCLOS, art. 16. The General Assembly requested the Secretary-General to establish the appropriate facilities for the deposit by States of maps, charts and geographic coordinates concerning national maritime zones and establishing a system for their recording and publicity. GA Res. 28, UN GAOR, 49th Sess. (1994), available at http://www.un.org/documents/ga/res/49/a49r028.htm, para. 15(f).

[210] Reisman, "Eritrea-Yemen," at 732. See also *ibid.*, at 733 ("But how can international users, availing themselves of the freedom of navigation, know of unpublished straight baselines and their consequent projection of different legal regimes *vers le large*?"); Oude Elferink, p. 459 ("non-compliance with the obligation to give due publicity to the limits of maritime zones may make these unopposable against other states if a conflict over their location arises").

[211] UN Handbook, p. 11.

[212] *Ibid.*

[213] This Commission was established on March 14, 1997 in accordance with Article 76, which addresses the limits of the continental shelf. Under Article 77, the coastal State exercises sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources to a distance of 200 miles from its baselines. Provided certain technical criteria are met, coastal States may claim up to 350 miles of jurisdiction over areas where the actual shelf extends beyond 200 miles.

Its functions are to consider the data and other material submitted by coastal States concerning the outer limit of the continental shelf in areas where those limits extend beyond 200 miles and to provide scientific and technical advice, if requested, during the preparation of such data.[214] The Commission makes recommendations to establish the limit of the continental shelf and any recommendation could take account of the baselines drawn by the States wishing to extend their continental shelf and whether those baselines are in accordance with the terms of the Convention. It could be argued that experts in the field of geology, geophysics, or hydrography are not qualified to address such an issue, or it is outside the scope of the Commission's jurisdiction. However, the Commission is responsible for assisting States in the lawful extension of their continental shelf and without considering the position of the baselines, the Commission could well be perpetuating a violation of the Convention. The instances where the Commission may be able to function in this way are undoubtedly limited, however.

Although mechanisms besides compulsory dispute settlement exist within the Convention as a means of regulating the lawful drawing of straight baselines, these alternative processes are limited in their lack of authoritative control and restricted availability. Compulsory dispute settlement entailing binding decisions is available under the Convention and may serve the role of modifying State discretion to ensure conformity with international legal standards. An additional procedure may fill a gap in a viable normative regime for the drawing of lawful straight baselines. Lacunae still remain, though. Questions may arise as to whether a dispute over baselines relates to delimitation disputes under Articles 15, 74, and 83 or to historic bays and titles. If so, the optional exception may exclude the dispute from the Section 2 process. Even when a third State is challenging straight baselines because of the impact on inclusive uses of ocean space, the matter may be linked to disputes that would otherwise be excluded from mandatory jurisdiction by virtue of Article 297. In the latter situation, where the drawing of straight baselines is somehow inherently linked to issues that would otherwise be outside the scope of mandatory jurisdiction, the question for the tribunal or court is how to characterize the dispute. The issue of straight baselines may be the predominant or preliminary question and may warrant the intervention of an international court or tribunal. Respect for the exercise of coastal State discretion would have to be

[214] UNCLOS, Annex II, art. 3(1).

balanced against the need to affirm the criteria set out for the lawful drawing of straight baselines, and to protect the inclusive interests of other users. If coastal States have not been prepared to register their baselines in accordance with Article 16, the responsibility for maintaining the international standards under the Convention falls to international courts and tribunals. Courts and tribunals constituted under Part XV should not hesitate to exercise jurisdiction to enforce the standards for straight baselines set out in the Convention and thereby reaffirm and uphold the normative content of these rules.

Islands

Disputes may arise over islands in different contexts. Issues may concern the definition of an island and whether a particular feature may be so defined. This question is relevant for the use of islands in drawing baselines to determine the extent of coastal State jurisdiction or sovereignty as well as the impact an island may have in drawing maritime boundaries between opposite and adjacent States. The legal definition of an island is also relevant where a State may wish to claim rights to maritime space by virtue of the presence of a tiny, isolated, barren island in the middle of the high seas.[215] An island is defined in Article 121 of the Convention as "a naturally formed area of land, surrounded by water, which is above water at high tide."[216] These three criteria must be met for a State to claim the territorial sea, contiguous zone, EEZ, and continental shelf surrounding the land formation.[217] Article 121 applies to natural land formations and individual islands, rather than groups of islands, which are covered by the provisions on archipelagoes in Article 46.

[215] Barbara Kwiatkowska and Alfred H. A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own," 21 *Neth. Y.B. Int'l L.* 139, 145–46 (1990) (describing islands that are so located).

[216] UNCLOS, art. 121 (1). Islands are also mentioned in the Convention in reference to the drawing of baselines (*ibid.*, arts. 6, 7(1), and 10(3)), navigation through straits (*ibid.*, art. 38(1)), archipelagic states (*ibid.*, art. 46 and Part IV generally), and artificial islands (*ibid.*, arts. 11, 60, 80, and 147(2)(e)).

[217] *Ibid.*, art. 121(2). This definition was first formulated at the 1930 Codification Conference where the Sub-Committee's Report refers to an island being an area of land, surrounded by water, which is permanently above the high-water mark. This definition was subsequently followed by the International Law Commission and adopted in Article 10 of the Territorial Sea Convention. The definition of an island, and particularly the meaning of "above water at high tide," was considered in *United States* v. *Alaska*, 117 S. Ct. 1888 (1997).

Islands are entitled to the same maritime areas as continental land unless they constitute "rocks," as defined under the Convention. Rocks do not generate continental shelf or EEZ rights if they "cannot sustain human habitation or economic life of their own."[218] The exact meaning of this qualification has been rightly queried.[219] No further explanation could be agreed upon during the Third Conference and so the definition was deliberately left ambiguous.[220] Charney has rightly noted that the two conditions are directly linked to human activities and development and that they may well vary over time as technology and resource use change.[221] He further considers that permanent habitation or year-long economic use are not necessary but there must just be proof that the rock has "some capacity" for human habitation or economic value.[222] The words "cannot sustain" reinforce that the question is one of capacity rather than a factual situation of sustaining human habitation or economic life or not.[223] This assessment may involve consideration of the history of the maritime feature to determine whether it qualifies as an island or a rock.[224] In addition, Attard has argued that the words "of their own" ensure that no State can artificially create conditions for human habitation or economic life.[225] These considerations should all be relevant in applying the definition in Article 121. Any decision on whether a particular landform is an island or a rock will have more significance if the question arises in the context of a maritime delimitation

[218] UNCLOS, art. 121(3). As an interesting forerunner to this qualification, several States responded to questions prepared for the Codification Conference regarding the definition of islands that islands should be defined by reference to whether they were capable of effective use and occupation. See, e.g., South Africa, Germany, Australia, Great Britain, India, New Zealand, Point VI, Bases of Discussion, reprinted in 2 *Codification Conference*, at 270–71. This criterion was not included as part of the bases of discussion, however, and was thus not ultimately considered at the 1930 Conference. Point VI, Bases of Discussion, reprinted in *ibid.*, at 272.

[219] See, e.g., Jonathan I. "Charney, Rocks that Cannot Sustain Human Habitation," 93 *Am. J. Int'l L.* 863 (1999); Kwiatkowska and Soons; Jonathan L. Hafetz, "Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention," 15 *Am. U. Int'l L. Rev.* 584 (2000).

[220] Jon M. Van Dyke and Robert A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources," 12 *Ocean Dev. & Int'l L.* 265, 282 (1983).

[221] Charney, "Rocks," at 867–68.

[222] *Ibid.*, at 868. This opinion is consistent with the decision of the Jan Mayen Conciliation Commission, which took the view that the maintenance of an economic life of its own would not necessarily exclude external support for a population that was not always permanent. See Report and Recommendations of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, 20 ILM 797, 803–04 (1981). See also Kwiatkowska and Soons, at 168–69.

[223] Kwiatkowska and Soons, at 160. [224] *Ibid.*, at 161. [225] Attard, pp. 259–60.

between States with adjacent or opposite coasts or whether the question is one of the legality of baselines and exertion of coastal State jurisdiction or sovereignty over maritime areas.

Islands and rocks have been discussed in third-party decisions delimiting boundaries between opposite or adjacent States. These features typically constitute "special" or "relevant" circumstances and have differing impact on the drawing of the maritime boundary depending on their geographic location and their importance as well as the overall geography of the maritime area being delimited.[226] There has not been any consideration of whether a particular feature was a "rock" under the terms of UNCLOS and thereby reduced the entitlement of a State to extended maritime zones.[227] In *Eritrea/Yemen*, the Tribunal had to delimit the southern areas between the small Eritrean islands and the Yemeni mid-sea islands. Due to the narrow distances involved,[228] the Tribunal did not need to consider whether the particular features were rocks or islands under Article 121.[229] By negative implication, rocks are entitled to a territorial sea and contiguous zone.[230] The other implication to be drawn here is that a rock must still be a "naturally formed area of land, surrounded by water, which is above water at high tide," because it would otherwise constitute a low-tide elevation, which is not accorded territorial sea if it is situated outside the territorial sea of a coastal State.[231] The question may have arisen in the northern Red Sea area given

[226] "It may thus be necessary, in the delimitation of a boundary, to abate the effect of an island which forms an incidental special feature." Dubai/Sharjah, at 676. See also Tunisia/Libya, at 89, para. 129 ("a number of examples are to be found in state practice of delimitations in which only partial effect has been given to islands situated close to the coast; the method adopted has varied in response to the varying geographical and other circumstances of the particular case"); Channel Islands, paras. 183–84 and 187 (considering the geographic situation of two opposite States with islands of one State close to the coast of the other State, the islands' political relationship with the mainland, their economy, and population as well as each State's territorial sea limits and coastal fisheries).

[227] In *Jan Mayen*, Denmark argued that Jan Mayen was not capable of sustaining human habitation or economic life but did not go so far as to assert that the island had no entitlement to continental shelf or fishing zones. Jan Mayen, para. 80.

[228] The combined territorial seas of each State in this area were no more than five miles wide.

[229] If wider distances had been at stake, then the question would probably have arisen given the descriptions of the different southern islands as "rocky islets which amount to little more than navigational hazards" and "uniformly unattractive, waterless, and habitable only with great difficulty." Eritrea/Yemen, Territorial Sovereignty, paras. 467, 93 (respectively).

[230] UNCLOS, art. 121(3). See also Charney, "Rocks," at 864.

[231] UNCLOS, art. 13. See also Kwiatkowska and Soons, at 150.

the greater distances involved and the barren and inhospitable nature of the mid-sea islands there located. However, the Tribunal elected to ignore these features in delimiting the boundary line between Eritrea and Yemen without casting the question in terms of entitlement of rocks or islands.[232]

To the extent that the status of islands is part of the overall settlement of territorial sea, EEZ and/or continental shelf boundaries, disputes over the qualification of certain landforms as islands will be subjected to the same procedures as specified in Article 298(1)(a). A State may try to raise the specific question of whether a particular feature is a rock or an island under Article 121 without asking a tribunal or court to be involved in the actual maritime delimitation. Such a decision could then be used by a State in influencing negotiations over the boundary. Article 298 does not *prima facie* exclude disputes over the interpretation or application of Article 121 from compulsory procedures entailing a binding decision if a State has otherwise so elected. There may be an advantage in referring a question of interpretation of "human habitation or economic life of their own" to an international body as a means of developing and clarifying the law on this issue. However, a challenge to the jurisdiction of the tribunal or court would certainly be warranted on the basis that the question is inherently related to maritime delimitation and should be excluded due to the optional exception of one (or both) of the disputant States. A consistently recognized principle of maritime delimitation has been effecting a boundary by agreement between the parties concerned. This principle has been affirmed in the Convention in the articles dealing with the substantive law of delimitation as well as the dispute settlement procedures.[233] To isolate one particular question pertaining to the maritime delimitation for mandatory adjudication or arbitration deprives States from reaching agreement on their own accord. A decision by a court or tribunal on this specific issue denies States the full benefit of a right granted under the Convention.

The other context in which disputes over the definition of islands may arise is in the designation of basepoints for the determination of the outer limit of maritime zones. The position of islands may provide another means for littoral States to designate basepoints beyond the

[232] Eritrea/Yemen, Maritime Delimitation, para. 147.

[233] See UNCLOS, arts. 15, 74, 83, 298, and Part XV, Section 1 generally. This principle was also reaffirmed in the *North Sea Continental Shelf* cases. See discussion at notes 43–46 and accompanying text.

mainland coast. The ownership of islands is also important when a State with sovereignty over a small island in the middle of the high seas or a long distance from its coast but still within its extended maritime zone uses the existence of that island to claim an even greater entitlement to maritime areas. The claim to maritime space may be controversial if third States consider that the "island" causing the maritime boundary to be extended is actually a "rock." A confrontation could further result between a State with a long-distant fishing fleet fishing outside the territorial sea of a "rock" and a State seeking to exclude those fishing vessels from the area that it alleged was the EEZ of its "island." The potential for such a dispute has already been raised before ITLOS. In a decision relating to the prompt release of a vessel that was seized in the EEZ of Kerguelen Islands, Judge Vukas in a separate declaration doubted whether the establishment of an EEZ for those "uninhabitable and uninhabited" islands was in accordance with UNCLOS.[234] This statement in a prompt release proceeding was an unusual moment of judicial activism.[235] At the least, it indicates the potential for a dispute over the interpretation and application of Article 121 being raised in proceedings instituted under Article 286.

It would thus seem that in situations where a dispute arises over the definition of an island under Article 121 between the State with sovereignty and third States then these conflicts are subject to the compulsory procedures in Section 2, once the requirements of Section 1 are fulfilled. However, the fact that the dispute may arise in the context of the exercise of enforcement jurisdiction by the coastal State in its EEZ in respect of fishing activities may bring into play other limitations to compulsory jurisdiction. The question is then similar to that posed with respect to straight baselines. Any court or tribunal would have to decide whether the dispute concerning Article 121 was preliminary to a determination on the exercise of jurisdiction on other aspects of the dispute. A segregation of the dispute in this manner may be sufficient to resolve the conflict in question. However, the division of the dispute may not be possible or viable if the court or tribunal considers the question of the entitlement of the landform to extended maritime zones as integral to a decision on a State's exercise of enforcement jurisdiction. As with straight baselines, it may be preferable for an international standard to

[234] Monte Confurco, Declaration of Judge Vukas.

[235] Judge Anderson noted his surprise at Judge Vukas' Declaration as, *inter alia*, the Tribunal is only meant to deal with questions of release in considering applications under Article 292 of the Convention. *Ibid.*, Dissenting Opinion of Judge Anderson, n. 1.

be further elaborated through international processes to provide greater clarity in the law and to protect the inclusive uses of the oceans.

Conclusion

The law of maritime delimitation and historic title as set out in the Convention brings to the fore the importance of State decision-making power. So much is evident by States' discretion to determine what areas are subject to the regime of historic rights, what features constitute islands, what coastlines qualify for the drawing of straight baselines. However, these acts have an international dimension because of their impact on the entitlement of other States – either to their own maritime areas or to the freedoms of the high seas. The delimitation of overlapping entitlements to maritime areas also permits a large degree of discretion between the States concerned. For the delimitation of the territorial sea, States with opposite or adjacent coasts may reach their own agreement. Failing agreement between them, they are entitled to extend their territorial sea to an equidistant line. This boundary will not apply, however, if another boundary is justified by historic title or other special circumstances. What will constitute special circumstances will depend on the conditions pertaining to each area. For the delimitation of the EEZ and the continental shelf between States with opposite or adjacent coasts, delimitation is to be effected by agreement. No precise rule is applied to delimitation efforts but States may rely on the panoply of international law articulated in treaties, customary, and general international law, and as recognized in arbitral and judicial decisions, as a means of achieving an equitable solution. No interim boundary is specified before final agreement is reached but States must attempt to enter into provisional arrangements of a practical nature.

What becomes rapidly evident is that UNCLOS does not dictate how maritime boundaries are to be drawn in cases of overlapping entitlement. Beyond what could best be described as guiding principles (to effect an agreement on the basis of international law and to achieve an equitable solution), States are entitled to devise their own boundaries as appropriate for their individual circumstances. Given the scant normative criteria set out in the Convention for maritime delimitation and for historic bays and titles, an external international process could have conceivably formed a vital element in the application of the law. Moreover, the economic incentives and the earlier case law may have rendered mandatory jurisdiction as requisite for the functioning

of the maritime delimitation provisions in the Convention. However, the normative framework is designed to leave the matter largely within the control of the relevant States. The high stakes involved in maritime territory rendered complete acquiescence in compulsory procedures entailing binding decisions as unacceptable to some States. A desire to avoid compulsory procedures entailing binding decisions is obvious. Even the convoluted conciliation process in Article 298(1)(a) returns States to negotiation. The inclusion of an optional exception for disputes relating to Articles 15, 74, 83, and historic bays and titles thus retains the emphasis on State decision-making and agreement.

By contrast, the legal regimes for straight baselines and for islands do require compulsory dispute settlement. Article 7, which draws on earlier case law and the Territorial Seas Convention, sets out the criteria for drawing straight baselines. While some external review is possible under Article 16 in the process of registering and publicizing baselines used for maritime delimitation (or perhaps through the work of the Continental Shelf Commission), States could well interpret the language of the Convention somewhat loosely in order to augment their exclusive maritime space. Where this action impacts on areas that would otherwise constitute high seas, all States have an interest in ensuring that the legal standards are maintained and upheld. Mandatory jurisdiction plays an essential role in this regard. Similarly, Article 121 creates standards that impact on States' entitlement to maritime areas. Unlike Article 7, Article 121 is an innovation in the Convention in that it expressly excludes rocks as generating rights to an EEZ and continental shelf. The standard for what constitutes a rock remains to be elucidated in the practice of States and in third-party decisions. Compulsory dispute settlement provides a check on the power of States through the interpretation and application of Article 121, paragraph 3 and thereby prevents the unlawful extension of exclusive rights into the high seas. The necessity of this role should color the characterization of a dispute that may otherwise be excluded from mandatory jurisdiction by means of another exception or limitation.

Use of Force, Military Activities, and Law Enforcement

Naval power has long been one of the pillars of States' military policies. States with significant naval fleets have relied on the traditional freedoms of the high seas to undertake a range of missions to promote

national policies.[236] In addition to naval warfare, maritime military activities encompass naval exercises; weapons tests; naval presence missions; installation of military structures and devices; and declaring security zones. While specific legal regimes were developed to govern the conduct of naval warfare, many other military activities, which do not amount to armed conflict, remain to be regulated under the law of the sea.

UNCLOS provides little detail on what military conduct is allowed in different maritime zones or how that conduct, if allowed, is to be regulated. The desire to exclude this activity from the scope of international regulation and review in UNCLOS is further evident in Part XV of the Convention. The Convention permits States to exclude from mandatory adjudication or arbitration disputes relating to the military activities of warships and government vessels and aircraft engaged in non-commercial service,[237] as well as disputes relating to certain law enforcement activities in accordance with Article 298(1)(b). States may further choose to exclude disputes in respect of which the Security

[236] Hedley Bull outlined the importance of naval power in 1976 when writing for the International Institute of Strategic Studies:

> The first of these advantages is its flexibility: a naval force can be sent and withdrawn, and its size and activities varied, with a higher expectation that it will remain subject to control than is possible when ground forces are committed. The second is its visibility: by being seen on the high seas or in foreign ports a navy can convey threats, provide reassurance, or earn prestige in a way that troops or aircraft in their home bases cannot do. The third is universality or pervasiveness: the fact that the seas, by contrast with the land and the air, are an international medium allows naval vessels to reach distant countries independently of nearby bases and makes a state possessed of sea power the neighbor of every other country that is accessible by sea.

Hedley Bull, "Sea Power and Political Influence," in *Power at Sea I: The New Environment*, Adelphi Paper No. 122, Spring 1976, p. 6, cited in Richardson, "Power," at 907. The primary missions for the United States Navy are strategic deterrence, sea control, projection of power ashore, naval presence, and scientific research. See Mark W. Janis, "Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception," 4 *Ocean Dev. & Int'l L.* 51, 57 (1977).

[237] Article 29 defines a warship as, "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline." UNCLOS, art. 29. For the purposes of this discussion, warships and government vessels engaged in non-commercial service shall be referred to as "military and government vessels" unless comments are specifically related to either warships or government vessels engaged in non-commercial service.

Council is exercising the functions assigned to it by the UN Charter.[238] The exact contours of the exclusions are not immediately evident from the text of Article 298 but they potentially allow for the exclusion of a wide range of disputes.

This half of Chapter 4 examines the variety of disputes that are excepted from mandatory jurisdiction at the option of States under Article 298(1)(b) and (c), and considers what the absence of compulsory dispute settlement may mean for the international rules governing these activities. The first section analyzes the possible application of UNCLOS during times of armed conflict as well as military activities that do not amount to armed conflict. Both the military activities and the Security Council exceptions may be relevant here in addition to certain questions of admissibility. The second section discusses the various rights of passage accorded to military and government vessels in areas subject to coastal State sovereignty and the role of dispute settlement for these legal regimes. The third section turns to the question of law enforcement and addresses the particular law enforcement disputes specifically envisaged under Article 298 as well as other law enforcement activities under the Convention. With respect to the latter, difficulties may arise in determining where a line should be drawn between what constitutes law enforcement that is subject to mandatory jurisdiction and what constitutes military activities for the purposes of the optional exceptions.

Resolution of Disputes Relating to Armed Conflict at Sea

The role of Part XV in relation to armed conflict at sea depends on the general applicability of UNCLOS, in part or in its entirety, during times of armed conflict. Traditionally, the international rules governing the conduct of naval warfare have been derived from a series of conventions adopted in The Hague in 1907.[239] The conditions by which States may lawfully resort to force have altered significantly since the adoption

[238] *Ibid.*, art. 298(1)(c).

[239] Convention [No. VI] Relating to the Statue of Enemy Merchant Ships at the Outbreak of Hostilities, October 18, 1907, 100 *Brit. & Foreign St. Papers* 365 (1906–07), *reprinted in The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 96 (N. Ronzitti ed., 1988); Convention [No. VII] Relating to the Conversion of Merchant Ships to Warships, October 18, 1907, 100 *Brit. & Foreign St. Papers* 377 (1906–07), reprinted in *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 114 (N. Ronzitti ed., 1988); Convention [No. VIII] Relative to the Laying of Automatic Submarine Contact Mines, October 18, 1907, 36 Stat. 2332, 1 Bevans 669; Convention [No. IX] Concerning Bombardment by Naval Forces in Time of War, October 18, 1907, 36 Stat. 2351, 1 Bevans 681; Convention [No. XI] Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War,

of these conventions. In particular, the UN Charter now prohibits the use or threat of force unless in the exercise of self-defense,[240] or unless authorized by the Security Council under Chapter VII of the UN Charter.[241] The change in the justifications for the resort to force raises the question of whether the laws governing the means and methods of warfare, as developed from the 1907 conventions, remain equally applicable. The exact interplay between the principles in the UN Charter and the laws of war is far from evident.[242] Churchill and Lowe suggest that the principles of the laws of war and neutrality, if not their specific details, continue to apply to international armed conflicts.[243]

The question then arises as to what extent UNCLOS may be applicable during times of armed conflict. A spectrum of views on this issue can be identified. It has been suggested that UNCLOS now replaces many of the rights and responsibilities drawn from the laws of naval warfare and that those laws are generally no longer valid due to the prohibition on the use of force in the UN Charter.[244] Alternatively, Astley and Schmitt consider that the law of the sea is mostly consistent with the laws of war, particularly those rules relating to neutrality.[245] Finally, it has been argued that UNCLOS was envisaged, like the 1958 Conventions before it, as a treaty for times of peace and is thus not applicable at all during armed conflict.[246] If UNCLOS were intended to govern the conduct of naval warfare, it would remain applicable between the warring parties.[247] However, some rights enshrined in UNCLOS, particularly

October 18, 1907, 36 Stat. 2396, 1 Bevans 711; Convention [No. XIII] Concerning the Rights and Duties of Neutral Powers in Naval War, October 18, 1907, 36 Stat. 2415, 1 Bevans 723.

240 See UN Charter, arts. 2(4) and 51.

241 See UN Charter, arts. 39–42.

242 George P. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (1998), p. 7 (describing three views on the interrelationship of these bodies of law).

243 R. R. Churchill and A. V. Lowe, *The Law of the Sea* (3rd ed., 1999), p. 423.

244 See A. V. Lowe, "The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea," in 64 *International Law Studies: The Law of Naval Operations* (Horace B. Robertson ed., 1991), pp. 111, 130–133. See *ibid.*, at 141. ("The very idea that the Laws of War, in particular the eighty-year old Hague Conventions, remain binding is one which is open to serious doubt.")

245 Astley and Schmitt, at 138 ("the maritime rights and duties States enjoy in peacetime continue to exist, with minor exceptions, during armed conflict").

246 Rauch, at 233. ("To be sure, the new Convention constitutes part of the law of peace and is not intended to regulate the law of naval warfare.")

247 There is no clear line on what treaties remain applicable during times of armed conflict and what treaties are suspended as between the warring parties. See Michael K. Prescott, "How War Affects Treaties between Belligerents: A Case Study of the Gulf

those related to passage, are unlikely to apply between the warring States during an armed conflict.[248]

It seems most likely that the minimal regulation of military activities in the Convention indicates that it was not intended to replace the customary laws regulating the use of naval force under the UN Charter during times of armed conflict. Certainly, the Preamble to UNCLOS affirms that matters not regulated by the Convention continue to be governed by the rules and principles of general international law.[249] Instead, the Convention simply reiterates in Article 301 the proscriptions of the UN Charter on the use of force. Article 301 requires:

> 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 embodied in the Charter of the United Nations.

Although suggested during the debates at the Third Conference that there should be a complete prohibition of all military activities in the oceans, most States accepted that some broader, more general understanding would be the most likely compromise position.[250] When Article 301 is considered in light of the UN Charter, the Definition of Aggression,[251] and the Declaration on Friendly Relations,[252] the only military acts prohibited at sea are those that are either directed against the sovereignty, territorial integrity, or political independence of another State or constitute a blockade or an attack on the sea forces or the

War," 7 *Emory Int'l L. Rev.* 192 (1993); Christine M. Chinkin, "Crisis and the Performance of International Agreements," 7 *Yale J. World Pub. Ord.* 177 (1981); Harvard Research in International Law, "Law of Treaties," 29 *Am. J. Int'l L. Supp.* 653 (1935); "The Effects of Armed Conflicts on Treaties," 61-II *Y.B. Inst. Int'l L.* 199 (1986).

248 See Chinkin, at 196.

249 Regard can also be had in this respect to Article 311, paragraph 2 which reads: "This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment of other States Parties of their rights or the performance of their obligations under this Convention." UNCLOS, art. 311(2).

250 See Boleslaw A. Bozcek, "Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea," 20 *Ocean Dev. & Int'l L.* 359, 369 (1989). See also Rauch, at 239–40.

251 Definition of Aggression, GA Res. 3314, UN GAOR, 29th Sess., Supp. No. 31, at 142, UN Doc. A/9631 (1975).

252 Declaration of Principles on International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/2890 (1970).

marine fleets of another State.[253] In line with this view, "the high seas may legally be used for a whole panoply of military purposes as long as none of them are aggressive."[254] If the requirements to reserve the oceans for peaceful purposes mean that States must abide by the UN Charter obligations regarding the threat or use of force, then these articles add little substance to obligations already binding States.[255] No further regulation of naval warfare is provided in the Convention.[256] On this basis, UNCLOS cannot be viewed as creating any new substantive obligations with respect to the use of force at sea. What is significant here is the new procedural aspect whereby compulsory arbitration or adjudication is available, subject to the optional exceptions, for disputes concerning any threat or use of force during the exercise of rights or performance of duties under the Convention.[257]

For situations of armed conflict, the optional exclusion under Article 298(1)(c) may take effect if the Security Council is seized with the matter and measures are being prescribed in relation to the conflict as part of the Council's exercise of its functions. This provision avoids a conflict between any procedures of dispute resolution started under the Convention and any action that the Security Council may be taking with respect to the same matter to maintain or restore international peace and security.[258] If the Security Council decides to remove the matter from its agenda or calls upon the parties to settle the dispute by the procedure in the Convention, then the compulsory dispute settlement

[253] Rüdiger Wolfrum, "Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being?," 24 *German Y.B. Int'l L.* 200, 217 (1981).

[254] Rex J. Zedalis, "Military Uses of the Ocean Space and the Developing International Law of the Sea: An Analysis in the Context of Peacetime ASW," 16 *San Diego L. Rev.* 575, 613 (1979).

[255] Bozcek, at 370–71. See also Oxman, "The Regime of Warships," at 814 and 831. Wolfrum argues that the legislative history of this article indicates that it was not an essential part of the Convention and should not be over-emphasized nor used to limit military activities at sea that are recognized under customary international law. Wolfrum, at 213.

[256] Politakis writes, UNCLOS "can offer dim guidance at best as to the normative substance of modern rules governing armed conflict at sea." Politakis, at 7.

[257] See Oxman, "Regime of Warships," at 815.

[258] 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 138. There was some resistance to this exclusion because it would be unclear as to when the Security Council was exercising its functions. However, as the wording reflects Article 12 of the UN Charter, which prevents the General Assembly from making recommendations in respect of any dispute or situation when the Security Council is exercising the functions assigned to it, this formulation was considered sufficiently specific. *Ibid.*, at 138–40.

mechanism can be used.[259] While the Convention anticipates a possible overlap in jurisdiction between courts and tribunals constituted under the Convention and the Security Council, no such allowance is made when a matter is before a different political body. A question of admissibility as to the proper forum may be raised in this context if one of the warring parties attempted to bring a matter that constituted one aspect of a wider conflict under the UNCLOS system as part of its overall political campaign. Such a tactic may be viewed as an abuse of process. Also in this situation, the relevant court or tribunal could properly determine under the circumstances that the dispute did not actually relate to the interpretation or application of the Convention and it thus lacked jurisdiction to resolve the dispute.

If any of the States involved in the armed conflict had opted for the military activities exception, it is clear that a dispute arising out of the context of an armed conflict will fall under this exception. Such a characterization would only be avoided if, for example, States pointed to failures to cooperate in respect of fishing conservation, denying passage, or unlawfully suspending marine scientific research as violations of the Convention without citing the conflict as possible reason for this alleged transgression. Again, a court or tribunal would have to decide if the dispute was truly one relating to the interpretation or application of the Convention. Furthermore, a question of admissibility might be raised in this instance to challenge the political character of the dispute. The political nature of the dispute could well be reaffirmed if the entirety of the conflict was being addressed by a regional organization or in another political forum. A court or tribunal may reason that it is dealing with the legal dimensions of the dispute and that its holding might contribute to the overall resolution of the conflict. The political question may not create too much pause, particularly in light of the tendency of the ICJ to exercise jurisdiction in these cases.[260] The risk is that the misuse of the compulsory dispute settlement mechanism in this manner could undermine the authority of the tribunal or court and diminish the likelihood of compliance with the decision.

Military Activities on the High Seas and in the EEZ

A range of military activities can be undertaken on the high seas or in EEZ areas that do not amount to armed conflict. As O'Connell notes:

[259] UNCLOS, art. 298(1)(c).

[260] See, e.g., Military and Paramilitary Activities (*Nicaragua* v. *United States*), 1984 ICJ 392, 434–35 (November 26); Teheran Hostages, at 19.

the occasion for navies to be employed to influence events will be multiplied because the increasing complexities of the law of the sea, with its proliferation of claims and texts and regimes covering resources, pollution, security and navigation, are multiplying the opportunities for disputes and the circumstances for the resolution of disputes by the exertion of naval power.[261]

In these cases, the laws of war would not govern an "exertion of naval power" and so the focus then becomes how UNCLOS might govern these sorts of uses of the oceans. Naval activities on the high seas and in the EEZ are generally not regulated specifically under the terms of the Convention. States deliberately minimized debate on military uses to avoid controversy and to incorporate sufficient ambiguity within the Convention to allow for differing interpretations.[262] The tactical reason for this approach was to retain considerable flexibility in the military uses of the oceans and thereby allow States to pursue their assorted strategic objectives.

States with considerable naval fleets were particularly anxious to preserve their rights on the high seas. The freedoms of the high seas listed under Article 87 are not exclusive and may be interpreted as including implicitly a variety of military activities. The inclusive listing of categories (signaled by the phrase "*inter alia*") was also used in the High Seas Convention.[263] In neither convention is any express reference made to military activities, although the freedom of navigation has traditionally encompassed the free movement of warships across the high seas.[264]

[261] D. P. O'Connell, *The Influence of Law on Sea Power* (1975), p. 10. See also Scott C. Truver, The Law of the Sea and the Military Use of the Oceans in 2010," 45 *La. L. Rev.* 1221 (1985). ("Sea power will be a fundamental tool of coercive and supportive diplomacy employed by coastal and maritime states alike to safeguard all their interests in the oceans, particularly in light of the potential for international tension and crisis to arise over ocean rights and obligations.")

[262] Majula R. Shyam, "The UN Convention on the Law of the Sea and Military Interests in the Indian Ocean," 15 *Ocean Dev. & Int'l L.* 147, 149 (1985). Booth considers that the drafters of the Convention deliberately followed the tactic of silence, and that a number of rights for navies are hidden within that silence. Booth, at 340. See also Rauch, at 231 (noting that all substantive discussion of questions with security policy or military implications was off the record and that assorted euphemisms are used to refer to military uses).

[263] High Seas Convention, art. 2.

[264] O'Connell writes:

> So, battle fleets in past ages steamed in formations, conducted manoeuvres, and engaged in gunnery practice extending over hundreds of square miles. Provided that the rules of the road were observed and the range was kept clear, this was a lawful use of the high seas because other ships in the area continued to navigate without being diverted.

One of the few requirements in UNCLOS that may impact on the conduct of high seas military maneuvers is that the freedoms of the high seas are to be exercised with due regard for the interests of other States in their exercise of high seas freedoms.[265] How this obligation of due regard is likely to influence State conduct on the high seas is unclear. A due regard requirement had not been included in the High Seas Convention. Instead, Article 2 of that treaty had set out a test of reasonableness whereby the freedoms of the high seas were to be exercised "with reasonable regard to the interests of other states."[266] Therefore, in the past, the high seas have been used by naval powers for extended military exercises as well as weapons tests and these States have claimed these acts to be lawful uses of the oceans as they meet a standard of reasonableness.[267] This previous standard could arguably be read into a standard of "due regard" under UNCLOS. However, the change in terminology and the use of the due regard standard in respect of activities in the EEZ indicate that a balancing test of subjective interests may be undertaken in the event of a dispute, rather than an objective assessment of reasonableness *writ large*. The shift in emphasis should not be over-emphasized, however.

A further limitation on military activities on the high seas could be Article 88 of the Convention, which reserves the high seas for peaceful purposes. Larson, however, considers that the reservation of the high seas for peaceful purposes is virtually redundant. He argues:

> Exactly what this means in practice is rather difficult to define, since the superpowers in particular use the [high seas] to deploy sub-surface submarines and surface vessels and use the air space above for naval and other military purposes. As a result, the practical effect of reserving the [high seas] for peaceful purposes is almost non-existent.[268]

From this perspective, it would seem that little clarity on the authorization of military activities is provided through the reference to peaceful

O'Connell, 2 *International Law of the Sea*, p. 809. See also P. Sreenivasa Rao, "Legal Regulation of Maritime Military Uses," 13 *Indian J. Int'l L.* 425, 435 (1973).

[265] UNCLOS, art. 87(2).

[266] High Seas Convention, art. 2.

[267] At the time of the First Conference, States were unable to agree on legal rules for these military activities, beyond a reasonable regard test.

[268] David L Larson, "Security Issues and the Law of the Sea: A General Framework," 15 *Ocean Dev. & Int'l L.* 99, 116 (1985). See also Truver, at 1242 (stating that Article 88 "seems to have very little substance"); Booth, at 341 (describing Article 88 as, "a familiar piece of pious rhetoric, calculated to degrade respect for the document rather than legitimize new patterns of behavior").

purposes. The reservation of areas for "peaceful purposes" has been used in other multilateral treaties to refer to complete demilitarization or to excluding certain types of military activities – either as conventional obligations or as goals for States parties.[269] In the UNCLOS context, the proscription is limited to threats or use of force as set forth in the UN Charter.[270] No further curtailment can be drawn from the peaceful purposes provisions of the Convention.[271] As noted above, the States with the superior military strength will presumably conduct military exercises or weapons tests and rely on their rights under the freedoms of the high seas for such acts. These States would expect to protect these rights by excluding the possibility of review by international courts or tribunals.

The lack of normative guidelines on military activities on the high seas then carries over to the EEZ. Through the cross-reference in Article 58, paragraph 2, the reservation of the high seas for peaceful purposes is extended to the EEZ, to the extent that this obligation is not incompatible with the provisions of the Convention governing the EEZ. As with the high seas, a due regard requirement is incorporated into Article 58 whereby:

> States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with this Part [dealing with the EEZ].

The rights and duties of the coastal State are those set out in Article 56 and relate to issues such as the conservation and management of the natural resources, artificial islands, marine scientific research, and the marine environment. The Convention does not specifically authorize coastal States to control conduct relating to military activities in the EEZ.

269 See Bozcek, "Peaceful Purposes Provisions," at 361–63 (discussing the use of "peaceful purposes" provisions for the regimes governing Antarctica, the moon and other celestial bodies and the seabed). See also James C. F. Wang, *Handbook on Ocean Politics and Law* (1992), pp. 367–88; Wolfrum, at 201–02.

270 UNCLOS, art. 301.

271 The Convention designates both maritime zones and activities as subject to the peaceful purposes requirement. See *ibid.*, art. 88 (reservation of high seas for peaceful purposes); *ibid.*, art. 141 (Area is only to be used for peaceful purpose); *ibid.*, art. 143 (marine scientific research in the Area is only to be for peaceful purposes); *ibid.*, art. 147 (installations in the Area only for peaceful purposes); *ibid.*, art. 240 (marine scientific research is to be conducted for peaceful purposes). These activities must similarly fall short of threats or use of force under the UN Charter to be for "peaceful purposes" under the Convention.

The fulfillment of the requirement of due regard will ultimately depend on what activities are being undertaken by the respective States. A number of commentators have taken the view that Article 58 was intended to ensure for third States that the rights enjoyed in the EEZ were quantitatively and qualitatively the same as the traditional freedoms of the high seas.[272] Rauch has argued that the freedom of navigation associated with the "operation of ships" allows for a range of internationally lawful military activities, including maneuvers, deployment of forces, exercises, weapons tests, intelligence gathering, and surveillance.[273] Some governments argue, however, that various military activities, such as weapons exercises and testing, may not be conducted without coastal State consent.[274] This view is based on an interpretation of Article 58 that focuses on the listing of the specific freedoms and that not all military activities are related to the specified freedoms.[275] Furthermore, it is quite likely that a naval presence mission or military exercises in the EEZ of another State could well interfere with coastal State economic rights.[276] An attempt to introduce a requirement of coastal State consent for naval operations other than navigation in the EEZ during the drafting of the Convention did not succeed.[277] Francioni instead remarks, "[f]rom the text and legislative history of article 58, it seems difficult to infer that the establishment of the EEZ has involved a limitation on military operations of foreign navies other than pure navigation

272 Richardson, "Navigation and National Security," at 573. See also Walter F. Doran, "An Operational Commander's Perspective on the 1982 LOS Convention," 10 *Int'l J. Marine & Coastal L.* 335 (1995) ("The Convention does not permit the coastal state to limit traditional non-resources related high seas activities in this EEZ, such as task force manoeuvring, flight operations, military exercises, telecommunications and space activities, intelligence and surveillance activities, military marine data collection, and weapons' testing and firing."); Oxman, "Regime of Warships," at 838 ("It is essentially a futile exercise to engage in speculation as to whether naval maneuvers and exercises within the economic zone are permissible. In principle, they are."); Francesco Francioni, "Peacetime Use of Force, Military Activities, and the New Law of the Sea," 18 *Cornell Int'l L.J.* 203, 214 (1985) (noting that the majority of authors believe that military uses of the seas remain unaffected by the establishment of the EEZ).

273 Rauch, at 252.

274 Brazil, Cape Verde, and Uruguay have taken this view. United Nations, Office of the Special Representative of the Secretary-General for the Law of the Sea, *Law of the Sea Bulletin*, No. 5 (1985), at 6–7, 8, 24. Singh has argued that military activities in the EEZ are subject to the national jurisdiction of the relevant coastal States. See Singh, p. 148. However, this interpretation cannot be correct because it would attribute to coastal States jurisdiction over non-economic activities.

275 See Lowe, "Commander's Handbook," at 113.

276 See Mark Janis, *Sea Power and the Law of the Sea* (1976), p. 84.

277 Francioni, at 215.

and communication."[278] Sufficient ambiguity in the text means that interpretations can be made both in favor of and against the right of warships to conduct military maneuvers in a foreign EEZ.[279] A similar vagueness is evident with regard to the legality of military installations and devices.[280] In light of the deliberate ambiguity in relation to this issue and the specific grant of sovereign rights and jurisdiction in the EEZ, the better interpretation does seem to be in favor of the legality of military activities in the EEZ, subject to due regard requirements only.

The want of precision as to what military activities are permissible on the high seas and in the EEZ may constitute good reason to allow for third-party dispute resolution. A court or tribunal could set out the appropriate legal standards based on UNCLOS provisions and specify what conduct is or is not acceptable under the Convention. In addition, the inclusion of military activities within the scope of mandatory jurisdiction is also necessary as a consequence of the doctrine of sovereign immunity of warships.[281] Articles 95 and 96 provide for the complete immunity of warships as well as ships owned or operated by a State and used only on government non-commercial service on the high seas. Immunity is also accorded to these vessels in the territorial sea of a State, subject to certain rules relating to innocent passage.[282] Any claims brought before the national courts of States, other than the relevant flag State, can be excluded from national jurisdiction on the basis of sovereign immunity. Reference to sovereign immunity was not

[278] *Ibid.*, at 216.

[279] Bozcek, "Peaceful Purposes Provisions," at 372. Robertson argues that the right to conduct naval manoeuvres is seemingly incompatible with coastal State interests in the EEZ. He believes the only possible restriction is found in Article 88, which is applicable to the EEZ by virtue of Article 58(2), providing that the high seas are reserved for peaceful purposes. However, if these maneuvres are restricted in the zone, then it would also follow that such maneuvres are similarly restricted on the high seas and this latter interpretation is contrary to the established position permitting such naval activities on the high seas. See Robertson, at 885–87. By contrast, Shyam has noted that none of the littoral States on the Indian Ocean have enacted legislation prohibiting naval exercises by other States. Shyam, Military Interests, at 164. The negative implication to be drawn from this practice is that naval exercises are not viewed as activities that can be regulated under the EEZ regime.

[280] Bozcek, "Peaceful Purposes Provisions," at 373.

[281] See Janis, at 56.

[282] See UNCLOS, art. 32. See also notes 296–334 and accompanying text. Moore argues that warships transiting straits are also subject to immunity through a reading of Articles 31, 32, 42(4) and (5), 233, and 236. John Norton Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," 74 *Am. J. Int'l L.* 77, 99 (1980) ("coastal states shall not interfere with or take enforcement action against warships or other vessels entitled to sovereign immunity"). See also *ibid.*, at 106.

included in Article 298, as it was considered inappropriate – and would be anomalous – for international courts and tribunals that hear disputes between sovereign States.[283] The continued exemption of military vessels or aircraft from national jurisdiction was a strong reason not to exclude their activities entirely from the scope of international jurisdiction.[284]

However, the highly political nature of naval activities on the high seas has typically meant that the role of courts and tribunals has been marginal in the legal regulation of military uses of the oceans.[285] The minimal substantive regulations along with an optional exclusion covering military activities on the high seas and in the EEZ are indicative of a preference on the part of States not to use compulsory third-party procedures for resolving disputes about military activities. The optional exclusion is beneficial to naval powers not wishing to have their military activities questioned through an international process. The exclusion satisfies "the preoccupation of the naval advisors . . . that activities by naval vessels should not be subject to judicial proceedings in which some military secrets might have to be disclosed."[286] An optional exclusion is also beneficial to coastal States that could use the exception to prevent review of any of their interference with naval exercises in their EEZ. The deliberate obfuscation of rights and duties in different maritime areas provides States with considerable leeway in deciding what actions to take and how certain disputes should be resolved. The intention of the States parties is respected through Article 298 in this regard. Permitting "military activities" to be excluded from compulsory dispute settlement reinforces the versatility allowed for this issue: "It is obvious that states can define military matters as broadly as they wish."[287] Such

[283] "Doubts were raised . . . as to whether any vessels are entitled to sovereign immunity in a case brought before an international tribunal, as that doctrine applies only to domestic courts which are not allowed to bring before them a foreign sovereign, and as the very purpose of international tribunals is to deal with disputes between sovereign States." 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 135. The question should be raised, however, as to whether the same considerations should automatically apply to disputes involving non-State entities before international tribunals.

[284] Singh, p. 168, n. 21; and 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 136 (referring to the views of the New Zealand delegate).

[285] The constrained judgments in the *Nuclear Tests* cases are exemplary in this regard. See Nuclear Tests (*Australia* v. *France*; *New Zealand* v. *France*), 1974 ICJ 253, 457 (December 20).

[286] 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, at 135. See also Noyes, "Compulsory Adjudication," at 685 (noting that an exception was required for military activities because naval advisers were concerned about exposing military secrets in the course of judicial proceedings).

[287] Gamble, "Dispute Settlement in Perspective," at 331.

choices can be made in accordance with strategic policies and protects States from formal international review through legal processes if they so elect.

Passage through Territorial Seas, Straits, and Archipelagic Waters

The military activities exception could encompass the acts of military and government vessels as they traverse maritime areas subject to coastal State sovereignty. Unlike military activities on the high seas, the Convention contains detailed provision for the passage of different types of foreign ships through territorial seas, straits, and archipelagic waters. The law of the sea has addressed the question of rights and duties relating to the passage of foreign vessels through territorial seas because of the rights of the coastal State over this body of water as well as third States' interests in ensuring the passage of all vessels through the safest and most expeditious route. In addition, navigation through territorial seas and straits has always had considerable military importance.[288] Straits, particularly narrow bodies of water between coasts, are essential for passage between larger bodies of water and are typically high-traffic areas for commercial, military, and government vessels alike.[289] These coastal States then have interests in protecting their security as well as their economic and environmental interests in the areas directly adjacent to their land. Such interests have been balanced through the recognition of a right of innocent passage through waters subject to coastal State sovereignty.

A threat to the mobility of vessels, especially military vessels, arose when coastal States advocated for a territorial sea wider than the traditionally accepted three-mile limit. The States with large naval fleets particularly faced this challenge during the First and Second Conferences. An increase in breadth would have reduced the high seas area available for the exercise of the freedom of navigation. A broader territorial sea

[288] Naval vessels need to be able to traverse all areas of the oceans in order to fulfill their strategic objectives. As Richardson writes: "To fulfill their deterrent and protective missions these forces must have the manifest capacity either to maintain a continuing presence in farflung areas of the globe or to bring such a presence to bear rapidly. An essential component of this capacity is true global mobility – mobility that is genuinely credible and impossible to contain." Richardson, "Power," at 907.

[289] Straits of strategic importance for United States' commercial and military interests include Gibraltar, Dover, Malacca (in the Indonesian archipelago), Hormuz (the gateway to the Persian Gulf), Bab al Mamdab (in the south of the Red Sea), and Bonifacio (between Corsica and Sardinia). Mark E. Rosen, "Military Mobility and the 1982 UN Law of the Sea Convention," 7 *Geo. Int'l Env. L. Rev.* 717, 720 (1995).

belt meant greater coastal State control over the passage of naval vessels and thus affected the strategic policies of some of the major maritime States. An extension of the breadth of the territorial sea also had the effect of turning over a hundred international straits into territorial seas.[290] One of the reasons coastal States agitated for the wider belt of territorial sea was to frustrate the military objectives of the maritime States. This security aspect arose with respect to the threat of force that could be used against a State as a means of applying pressure on that State, rather than just protection from a full-scale war.[291] States were therefore keen to prevent naval ships from posing a threatening presence just off their coast.[292]

When both the First and Second Conferences failed to reach agreement on the breadth of the territorial sea for inclusion in a convention, the matter was left unresolved for a number of years. The United States and the Soviet Union both wished to have the question resolved and began sounding out various governments on their views on holding

[290] Carl M. Franklin, "The Law of the Sea: Some Recent Developments (With Particular Reference to the United Nations Conference of 1958)," 53 *Int'l L. Studies* 1, 90 (1959–60).

[291] See D. W. Bowett, "The Second United Nations Conference on the Law of the Sea," 9 *Int'l & Comp. L.Q.* 415, 417 (1960). This concern was certainly valid for a time when weaponry was less powerful. Latvia, for example, had expressed the view in 1930 that a sixty mile territorial sea was necessary "to prevent, for at least at that distance, attempts upon its national security." Acts of the Conference for the Codification of International Law, Meetings of the Committee, vol. III, Minutes of the Second Committee, Territorial Waters, reprinted in 4 *Codification Conference*, at 1335. In 1958, States argued that extensions of the territorial sea would not assist defensive measures because of the vastly increased range of modern armaments. See, e.g., *First Conference*, 1st Comm., at 150, ¶ 11 (New Zealand). Canada, for instance, dismissed claims for extending the breadth of the territorial sea on this basis: "Carrier task forces, rocket-firing submarines, heavy bombers and long-range nuclear weapons had long since moved such matters on to another plane." *Ibid.*, at 167, ¶ 3 (Canada).

[292] Franklin, at 122–23 (estimating that "the deterrent effect and stabilizing influence of a display of naval force in a trouble-area of the world where a three-mile territorial sea exists would be reduced by at least 50% if the limit were extended to six miles; it would be reduced to nil with a 12-mile territorial sea"). At the Second Conference, Albania stated: "In Albania's case the limit that would best safeguard the security of the State was that of twelve miles; it had often happened that maritime powers had carried out demonstrations of force off the shores of a weaker country, in order to intimidate it." *Second Conference*, at 101, ¶ 14 (Albania). See also *ibid.*, at 105, ¶ 32 (Byelorussian Soviet Socialist Republic); *ibid.*, at 125, ¶¶ 6 and 7 (Romania); *ibid.*, at 77, ¶ 24 (India); *ibid.*, at 39, ¶ 4 (Soviet Union) (the latter arguing that a flexible breadth of territorial sea had "an important bearing on the security of coastal States, some of which were at present vulnerable to intimidation by demonstrations of force in their coastal waters, even in time of peace").

another conference.[293] "[P]rotecting the mobility and use of warships was a central motivating force in organizing the Third United Nations Conference on the Law of the Sea."[294] At the Third Conference, there was little controversy about the breadth of the territorial sea being extended to twelve miles. The focus of discussions in relation to territorial seas and straits was what passage would be permissible for both commercial and different military vessels.[295] Two separate regimes were established depending on the body of water. Innocent passage would apply for the territorial sea and for certain types of straits while a new form of passage, transit passage, would apply in all other international straits. A third form of passage also had to be contemplated with the agreement that archipelagic States would be able to close off the waters inside their outer most islands. The system of passage existing within archipelagic waters incorporates both innocent and transit passage. These three forms of passage are discussed immediately below, with particular reference to the effect on warships and other government vessels operated for non-commercial service, and to the role of dispute settlement.

Territorial Sea and Innocent Passage

The territorial sea is a belt of water adjacent to a coastal State over which that State exercises sovereignty. The sovereignty of the coastal State extends to the bed, subsoil, and the airspace over the territorial sea.[296] The sovereignty of the littoral State is subject to the right of ships of all States to enjoy innocent passage.[297] The right of innocent passage also applies to straits where the right of transit passage is not accorded,

[293] Rauch, at 233. See also Oxman, "Tenth Session," at 4 (noting that the Soviet Union and the United States circulated draft articles on the territorial sea and straits).

[294] Oxman, "Regime of Warships," at 810.

[295] Buzan writes:

> During UNCLOS, a strong contingent of coastal states tried various ways of restricting the activity of foreign warships in their coastal waters . . . part of a general attempt to extend sovereignty and jurisdiction into oceans, but in this sector they met extremely determined opposition from the maritime powers. While the maritime powers were prepared to concede very large areas of control over resources and associated activities, they refused to yield almost anything on the rights of warships.

Barry Buzan, "Naval Power, the Law of the Sea, and the Indian Ocean as a Zone of Peace," 5 *Marine Pol'y* 194 (1981).

[296] UNCLOS, art. 2.

[297] *Ibid.*, art. 17. "As a general principle, the right of innocent passage requires no supporting argument or citation of authority, it is firmly established in international law . . ." Phillip Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 120.

or where a strait is used for international navigation between a part of the high seas or an EEZ and the territorial sea of a foreign State.[298] The right of innocent passage applies to both merchant and military vessels. Some particular restrictions are imposed on nuclear-powered vessels and submarines. The coastal State is entitled to designate sea lanes within its territorial sea and may restrict nuclear-powered vessels, or vessels carrying nuclear material, to these lanes.[299] Submarines are required to navigate on the surface and show their flag while in the territorial sea.[300] Warships, though not required to comply with traffic separation schemes, must still operate with "due regard" to other vessels.[301] The coastal State is further permitted to adopt laws and regulations that may indirectly impinge on the passage of military vessels.[302] If a warship fails to comply with these laws and regulations during passage, then the coastal State may require it to leave the territorial sea immediately,[303] and the flag State is responsible for any damage caused by the warship.[304]

Coastal States have attempted to subject military vessels to further regulation by requiring either prior authorization or prior notification before the exercise of their right of innocent passage. State practice has varied on whether prior notice or authorization is required for a warship to traverse a coastal State's territorial sea in exercise of the right of innocent passage.[305] In 1930, the Legal Sub-Committee at the Codification Conference had decided that as a general rule, a coastal State could not forbid the passage of foreign warships in its territorial sea nor could it require previous authorization or notification.[306] The International Court of Justice subsequently adopted this approach in the *Corfu Channel* case.[307] Prior to the First Conference, the International Law Commission noted during its debates that, "while it was obligatory in international

[298] UNCLOS, art. 45.

[299] *Ibid.*, art. 22. These vessels must carry documents and observe special precautionary measures established for such ships by international agreements. *Ibid.*, art. 23.

[300] *Ibid.*, art. 20. [301] Astley and Schmitt, at 134.

[302] See UNCLOS, art. 21 (permitting coastal States to adopt laws and regulations relating to, *inter alia*, the safety of navigation).

[303] *Ibid.*, art. 30. [304] *Ibid.*, art. 31.

[305] See Astley and Schmitt, at 132 (noting that over twenty-five States require prior permission, thirteen require prior notification and five States place special restrictions on nuclear-powered submarines).

[306] Report Adopted by the Committee on April 10, 1930, Appendix 1, reprinted in 4 *Codification Conference*, at 1418.

[307] The Court there decided:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts

law to grant the right of passage without authorization, notification had always been the practice except in urgent cases of vessels in distress."[308] At the First Conference, objections were raised to any requirement that would make the passage of warships or government ships through the territorial sea liable to previous authorization.[309] In the final voting stage at the Plenary Meeting, the inclusion of a reference to "authorization" was deleted and, as a result, a provision requiring notification was deemed unnecessary.[310] It was ultimately decided that there should not be a special regime for the passage of warships and Article 23 of the Territorial Sea Convention simply provided that coastal States may require warships to leave if those ships do not comply with its regulations. Reservations were entered to this provision to the effect that a coastal State had the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters.[311]

Similar to the Territorial Sea Convention, UNCLOS also provides that coastal States may require warships to leave their territorial seas for non-compliance with coastal State regulations.[312] No express reference is made to a requirement of prior notice or authorization within the scope of the coastal State's competence to adopt laws and regulations.[313] Although amendments were proposed at UNCLOS that would have enabled a coastal State to require prior notice or authorization, these amendments were not pressed to a vote.[314] No clarification on the issue

of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

Corfu Channel (*United Kingdom* v. *Albania*), 1949 ICJ 28 (April 9).

308 *ILC Yearbook*, (1955), vol. I, at 143–44, ¶ 96 (Liang, Secretary to the Commission).

309 *First Conference*, 1st Comm., at 133–34, ¶¶ 22 and 32 (United Kingdom).

310 *First Conference*, Plenary, at 67.

311 See, e.g., reservations by Bulgaria, Byelorussian SSR, Romania, Ukrainian SSR UN, *Multilateral Treaties Deposited with the Secretary-General*, available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty1.asp (August 13, 2001). Some reservations stated this need specifically. See, e.g., reservations by Colombia, Czechoslovakia, Hungary. *Ibid.*

312 UNCLOS, art. 30. The flag State also bears responsibility for damage caused by military vessels. *Ibid.*, art. 31.

313 See *ibid.*, art. 21 (listing the subjects of laws and regulations that the coastal State may adopt).

314 See Karin M. Burke and Deborah A. DeLeo, "Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea," 9 *Yale J. World Pub. Ord.* 389, 398–99 (1983) (considering the requirement of notice or prior authorization and what support it received during the negotiations of UNCLOS).

was possible in UNCLOS. While contrary views still exist in practice,[315] the major naval powers have maintained that no such notice or authorization is required under international law. For example, in 1989 a Joint Statement issued by the USSR and the United States stipulated that neither prior notification nor authorization would be required for the passage of warships through territorial seas.[316]

If prior authorization or notification is not a requirement, the only other possible impediment to the passage of military vessels through the territorial sea comes from the characterization of innocent passage. Passage will be considered innocent if it is not prejudicial to the peace, good order, or security of the coastal State.[317] Article 19 of the Convention sets out a number of activities that could be considered as prejudicial to the peace, good order, or security of the State and its final clause sets a fairly low threshold for the entire range of activities by stipulating that any activity "not having a direct bearing on passage" could mean the passage is not innocent.[318] A number of these activities bear specifically on warships and other military vessels – including threats of the use of force in violation of the UN Charter, weapons exercises, launching and landing of aircraft and military devices as well as the collection of information or the dissemination of propaganda.[319] On this basis, the acts that are undertaken by the vessel inform the nature of the passage rather than simply the character or type of vessel.[320]

315 For example, Bangladesh, China, Croatia, Egypt, Iran, Malta, Oman, Serbia and Montenegro, and Yemen still maintain the need for prior notification or authorization according to declarations submitted at the time of signing or ratifying UNCLOS. See United Nations, *Multilateral Treaties Deposited with the Secretary-General*, UN Doc. ST/LEG/SER.E/15, available at www.un.org/Depts/los/los_decl.htm (Apr. 11, 2003).

316 Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, September 23, 1989, US-USSR, 28 ILM 1444. The President of the Third Conference is also reported as stating that there is no need for warships to acquire the prior consent or even notification from the coastal State. See Rauch, at 245. Germany, Italy, the Netherlands, and the United Kingdom also agreed with this interpretation in their declarations submitted at the time of signing or ratifying UNCLOS. United Nations, *Multilateral Treaties Deposited with the Secretary-General*, UN Doc. ST/LEG/SER.E/15, available at www.un.org/Depts/los/los_decl.htm (April 11, 2003).

317 UNCLOS, art. 19. The Territorial Sea Convention had not specified what acts would be prejudicial to the peace, good order or security of a State. See Territorial Sea Convention, art. 14. Moore has commented: "This 'Innocent Passage' section of the territorial sea chapter is rooted in the provisions of the 1958 Geneva Territorial Sea Convention but in important respects modernizes and improves it." Moore, at 116.

318 UNCLOS, art. 19(2)(l). 319 *See ibid.*, art. 19 (a)–(f).

320 But see Robert C. Reuland, "The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention," 33 *Va. J. Int'l L.* 557, 578

The ICJ took this approach in *Corfu Channel* when addressing issues related to damage caused to British warships by mines in Albanian waters. The primary issue in *Corfu Channel* was the right of States to pass through international waterways without the prior consent of the littoral State.[321] Nonetheless, the discussion on innocent passage through the North Corfu Channel is still pertinent to the regime of innocent passage through territorial waters as the Court addressed the manner in which passage should be conducted to constitute innocent passage.[322] The United Kingdom had sent its warships to test the resolve of Albania during a time of political tension between the countries, and to demonstrate the strength of the British naval power. Albania fired on these ships as they passed through the North Corfu Channel. In deciding whether the passage was innocent, the Court had regard to the manner in which the passage was carried out.[323] In so doing, the Court took into account the facts that the guns of the warships were trimmed fore and aft, not loaded, and that the flotilla did not proceed in combat formation.[324] The Court concluded that the United Kingdom had not violated Albania's sovereignty by reason of the British Navy's acts in Albania's territorial waters.[325]

The acts of the United Kingdom may now be viewed differently in light of the list set out in Article 19 of UNCLOS, but the *Corfu Channel* judgment remains indicative of the need to analyze the character of the passage and thereby prevents coastal States from discriminating against warships *per se* in their territorial seas. The determination as to whether passage is innocent or not is left to the discretion of the coastal State though,[326] as the coastal State is entitled to take any necessary steps

(1993) (stating that the very presence of a ship may prejudice the coastal State, without committing any particular act).

321 Corfu Channel, at 27–30.

322 Innocent passage would still be required under UNCLOS because the North Corfu Channel falls under Article 38, which provides that "if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply there if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics."

323 Corfu Channel, at 30. 324 *Ibid.*

325 *Ibid.*, at 32. From this decision, McDougal and Burke note that a "technical state of war" (involving a high expectation of violence and the passage of warships that were principal supporters of the strait State's opponents) was not a sufficient justification to deny access to foreign warships. Myres S. McDougal and William T. Burke, *Public Order of the Oceans* (1962), pp. 206–208.

326 A joint Soviet and United States statement provides that if a coastal State questioned whether passage was innocent, then the ship had to be given the opportunity to

to prevent passage that is not innocent.[327] The implications of this discretionary power to determine subjectively the innocence of passage and unilaterally prescribe limitations on such passage have rightly been described as far-reaching.[328] If the passage of a warship can be characterized as "non-innocent" and the coastal State requests it to leave its territorial sea,[329] the coastal State may use minimum force to compel its departure.[330] Coastal States are further permitted to suspend innocent passage temporarily if essential for the protection of security, including for weapons exercises.[331]

Potential exists for disputes to arise in respect of innocent passage when warships violate the laws and regulations of the coastal State (including issues of prior notice or authorization); when coastal States require a warship to leave its waters for violations of those laws and regulations; and in respect of the characterization of the passage. A court or tribunal would need to consider whether the military activities exception, if chosen by one of the disputant States, extends to all questions pertaining to the passage of military and government vessels. It seems likely that it would so apply. Many of the reasons that led to the inclusion of the optional exception in relation to military activities on the high seas and EEZ are equally applicable to the passage of military and government vessels through the territorial sea. States may wish to have their naval missions left outside the purview of legal processes and may prefer not to disclose information relating to national security in adjudication or arbitration. The military activities exception could work to the advantage of both coastal States and flag States to the extent that their actions are put beyond review by the international legal

clarify its intentions or to correct its conduct. Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, September 23, 1989, US-USSR, 28 ILM 1444.

327 UNCLOS, art. 25(1). Reisman considers that coastal States have been given too much latitude in this regard thereby posing a threat to national security. W. Michael Reisman, "The Regime of Straits and National Security: An Appraisal of International Lawmaking," 74 *Am. J. Int'l L.* 48, 60–65 (1980).

328 Charles E. Pirtle, "Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited," 5 *Ocean Dev. & Int'l L.* 477, 481 (1978).

329 UNCLOS, art. 30. "The power to require departure from its territory is of course the classic remedy for a State that lacks enforcement jurisdiction over the sovereign agent or instrumentality of a foreign State, be it a diplomat or a warship." Oxman, "Regime of Warships," at 817.

330 Astley and Schmitt, at 131 (rationalizing that although specific remedies are not included in the Convention, the right to employ the minimum necessary force is a reasonable derivation of State sovereignty over the territorial sea).

331 UNCLOS, art. 25(3).

system. A dispute relating to the characterization of innocent passage may involve a warship acting in a manner contrary to the peace, good order, and security, or it may involve an allegation of coastal State interference with the passage of warships in unjustified circumstances. The Convention has tilted the balance in favor of the coastal State, however. The broadness of interpretation permissible in characterizing passage as innocent or not rests within the "unfettered discretion" of the coastal State.[332] This discretion applies in favor of the coastal State for commercial as well as military vessels – yet it is the coastal State that may be able to exclude its actions from review if the enforcement of these rules involves acts by military vessels. Rights of navigation in the territorial sea are clearly subjected to the control of the coastal State, both substantively and procedurally.

Given the discretion vested in the coastal State in these circumstances, it could well be argued that the availability of compulsory dispute settlement is important to provide a check on the exercise of these powers. Access to external review may provide a valuable tool in the way that coastal States exercise their sovereignty over their territorial seas. These reasons may indicate why disputes concerning military activities as applied to passage through the territorial sea are optionally excluded, rather than entirely excluded. The availability of mandatory dispute settlement in respect of innocent passage through the territorial sea may not be imperative, however. In addressing the question of prior authorization or notification, Lowe considers the matter somewhat of a non-issue:

> few international incidents have occurred, largely because of the *practice* of giving low-level and informal notice of passage on the occasions when naval vessels are sent into the territorial seas of States requiring notification or authorization, which may be followed by a purported "authorization" not sought by the passing ships: such ambiguous procedures save honor on both sides. Important as the controversy is as an academic matter, in practice the world has lived more or less happily with the contradictory interpretation of the law now for many years . . .[333]

[332] "A recalcitrant state could thus couch its interference with, for example, the rights of innocent passage, in terms of military activities so as to fit within the escape provisions of article 298(1)(b). The [Convention] does not define what constitutes a military activity; thus, the claiming state would appear to have unfettered discretion when arguing its actions were military activities." Pierce, at 342. See also Reisman, "Regime of Straits," at 58–59.

[333] Lowe, "Commander's Handbook," at 119 (emphasis in original). See also D. P. O'Connell, *The Influence of Law on Sea Power* (1975), p. 140; Lawrence Wayne Kaye, "The Innocent Passage of Warships in Foreign Territorial Seas: A Threatened Freedom," 15 *San Diego L. Rev.* 573, 583 (1978).

Typically, the common interest in the freedom of navigation for all ships has worked without resulting in any significant abuses of the right of innocent passage.[334] This reciprocity may provide a satisfactory basis to regulate future exercise of the right of innocent passage without reliance on compulsory dispute settlement.

International Straits and Transit Passage

The naval powers' interests in maintaining freedom of passage through straits became more acute in the face of claims to increasing coastal State jurisdiction.[335] Prior to the extension of the territorial sea to twelve miles, an area of high seas was typically located in international straits allowing passage without coastal State control. This situation changed with the increase in the breadth of the territorial sea. For States with large military fleets, the naval interest was to maintain a right of passage through international straits for naval forces that could not be limited, especially in a time of crisis, by the littoral State.[336] During the drafting of UNCLOS, the interest of maintaining this freedom of movement had to be balanced with the concerns of States bordering straits relating to the proximity and density of traffic, along with the possible adverse effects of this traffic on their security and economic interests.[337] From the start of negotiations, the United States asserted that straits were quite distinct from other areas of territorial waters as a functional matter.[338] It was with this functional perspective in mind that an acceptable balance could be struck through the creation of the right of transit passage. The regime of transit passage only applies in respect of straits between one part of the high seas or an EEZ and another part of the high seas or an EEZ.[339]

[334] Rao, at 446. [335] Janis, at 57.

[336] *Ibid.*, at 58. See also Richard J. Grunawalt, "United States Policy on International Straits," 18 *Ocean Dev. & Int'l L.* 445, 447 (1987). ("The flexibility and mobility of naval forces are dependent upon their ability to transit choke points in sea lines of communication, and to do so as a matter of right rather than at the sufferance of the coastal or island nations concerned.") But see Pirtle, at 489 (arguing that unimpeded passage through straits was not a necessary requisite for United States' security).

[337] Burke and DeLeo, at 400–01. See also Rauch, at 246.

[338] Special Report of the UN Law of the Sea Conference, Off. of Media Services, Bureau of Pub. Aff., 70 DEPT. STATE BULL. 398 (1974), cited in Richardson, "Navigation and National Security," at 563.

[339] UNCLOS, art. 37.

As a new creation of UNCLOS, the question arises as to the extent of freedom of navigation that transit passage accords. Some commentators consider that transit passage is equivalent to the high seas freedom of navigation but applied to international straits.[340] The range of competences accorded to the coastal State with respect to transit passage tends to detract from any argument that the freedom of navigation, as exercised on the high seas, is equivalent to transit passage. Moreover, the new regime has been criticized as "a neologism; it lies somewhere between 'freedom of navigation' on the one hand, and 'innocent passage' on the other. It is a compromise, a concession or a second-best solution."[341] The compromise was inevitable, however, because of the irreversible trend towards the appropriation of larger maritime areas by coastal States. Furthermore, some limitation had to be imposed on the traditional freedom of navigation to prevent overt military exercises and weapons testing, surveillance and intelligence gathering, and refueling in international straits.[342]

Any analysis of transit passage must account for its character as a species of passage lying somewhere between innocent passage and the freedom of navigation. All ships and aircraft enjoy the right of unimpeded transit passage through straits that lie between one part of the high seas or an EEZ and another part of the high seas or an EEZ.[343] Transit passage requires ships and aircraft to proceed without delay through or over the strait.[344] Compared with innocent passage, transit passage allows for greater surface navigation rights. Transiting warships are permitted to perform activities that are incidental to passage through the strait and consistent with the security of the unit (such as, the use of radar, sonar, and air cover).[345] Ships and aircraft exercising the right of

[340] See, e.g., David A. Larson, "Innocent, Transit, and Archipelagic Sea Lanes Passage," 18 *Ocean Dev. & Int'l L.* 411, 414–15 (1987) (also suggesting that transit passage is a codification and development of the customary rule set out in *Corfu Channel*); Rauch, at 233 ("the right of transit passage is a specific formulation of the high seas freedoms of navigation and overflight"). But see Reisman, "Regime of Straits," at 70 (arguing that "transit passage" is more a species of innocent passage than a high seas freedom because of the coastal State's legal duties and consequent entitlement to assess the character of the passage).

[341] Reisman, "Regime of Straits," at 68. [342] *Ibid.*, at 72.

[343] UNCLOS, art. 38. Four categories of straits to which transit passage does not apply are also listed in the Convention as part of the necessary compromise to reach consensus on the overall concept of transit passage. See *ibid.*, arts. 35(c), 36, 37, and 45.

[344] *Ibid.*, art. 39(1)(a).

[345] Bruce A. Harlow, "UNCLOS III and Conflict Management in Straits," 15 *Ocean Dev. & Int'l L.* 197, 201 (1985). As with innocent passage, it is the manner of the passage that is relevant rather than the purpose of the passage. Lowe, "Commander's Handbook," at 126.

transit passage must refrain from any threat or use of force against the territorial integrity or political independence of the littoral State.[346] This prohibition, while still being broad, is much more flexible than the list of activities that may be prejudicial to the peace, good order, or security of a coastal State for innocent passage through the territorial sea.[347] Moreover, the right of transit passage cannot be suspended.[348] States bordering straits subject to transit passage are entitled to designate sea lanes and prescribe traffic separation schemes for navigation through the strait (provided they are established in conformity with generally accepted international regulations)[349] and may also adopt laws and regulations relating to navigation, pollution, fishing, and fiscal, immigration, and sanitary laws.[350] Research and survey activities must not be carried out by foreign ships during transit passage without the authorization of the States bordering the strait.[351]

A controversial issue regarding transit passage has been whether there is a right of submerged passage for submarines. The Convention specifically stipulates that submarines must navigate on the surface and show their flag while exercising the right of innocent passage,[352] but no express provision is made for transit passage. The absence of a prohibition on submerged passage in respect of passage through straits can be interpreted as permissive or proscriptive. The only guide on this matter is in Article 39, which provides that ships and aircraft must "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit."[353] As submarines "normal mode" of passage is submerged, then that passage is presumably permitted through straits.[354] The reference to "normal mode" may impact on other military vessels. The "normal mode" permitted for transit passage has been interpreted to include launching and recovering aircraft and helicopters and thus allows carrier task forces to put up combat air patrols as a defensive measure.[355]

[346] UNCLOS, art. 39(1)(b). See also Larson, "Security Issues," at 117 (noting that threats to the sovereignty, territorial integrity or political independence of the straits States is distinct from the peace, good order, and security of the coastal State).

[347] See UNCLOS, art. 19. [348] *Ibid.*, art. 44. [349] *Ibid.*, art. 41.

[350] *Ibid.*, art. 42. [351] *Ibid.*, art. 40. [352] *Ibid.*, art. 20. [353] *Ibid.*, art. 39(1)(c).

[354] Burke and DeLeo, at 403–04. See also Lowe, "Commander's Handbook," at 122; International Maritime Organization, *Guidance for Ships Transiting Archipelagic Waters*, IMO SN/Circ.206, January 8, 1999.

[355] Astley and Schmitt, at 133. See also Grunawalt, at 453; Doran, at 340 (defining the term "normal modes" to include surface warships being permitted to launch and recover aircraft as well as formation steaming). But see Lowe, "Commander's Handbook," at 122 (arguing that the right of overflight does not seem sufficient to warrant the launching and recovery of aircraft in international straits).

Overall, the articles in UNCLOS on transit passage contain "sufficient vagueness, so that both the straits states and the major maritime powers can read into it what they want."[356] Transit passage was one way to satisfy the needs of the naval military powers but given the importance of guaranteeing this freedom of navigation, "[w]hy permit the straits states to interpret, if they care to, transit passage to mean something very close to innocent passage?"[357] Compulsory dispute settlement is a means to maintain the nature of the compromise formed at the time of the drafting of the Convention. A third-party process is preferable to establish international standards for transit passage, rather than allow straits States to establish and maintain their own unilateral standards.[358] This role for dispute settlement is most likely blocked by the military activities exception, however, as the most controversial questions regarding transit passage concern the rights of military and government vessels. If the exception is elected, these disputes are then left for resolution through traditional methods. In this respect, the legal regime governing access to straits could be less important than the political context in which transit occurs.[359] Straits could be closed to military transit where the political will exists regardless of a regime of unimpeded transit or innocent passage.[360] Nonetheless, in light of the fact that transit passage is a creation of UNCLOS and designed for the specific purpose of balancing the interests of States possessing large naval military fleets with the interests of the straits States, mandatory dispute settlement is a necessary element in this system. There is distinct potential to undermine the legal regime of transit passage if third-party involvement is not available to maintain the system created by the Convention. The use of the military activities exception to prevent the institution of proceedings where necessary will impair the viability of transit passage in the law of the sea.

Archipelagic Waters and Archipelagic Passage

UNCLOS affords a recognized legal status to archipelagic States. The Convention creates a regime for the recognition of archipelagic States

[356] Larson, "Passage," at 418. Richardson has taken this approach and thus argues: "The text [on transit passage] emphasizes the rights of transiting states, placing on them only reasonable obligations that do not impair, *inter alia*, the execution of military missions." Richardson, "Power," at 915.

[357] Janis, at 59. [358] *Ibid.*, at 60. [359] Pirtle, at 489.

[360] *Ibid.*, at 490. The reality of this political will is evident in the purchase of particular antiship missiles as well as offshore mines by various straits States after witnessing their success during the Falkland Islands conflict. David L. Larson, "Naval Weaponry and the Law of the Sea," 18 *Ocean Dev. & Int'l L.* 125, 144 (1987).

and their rights as well as those of third States within the waters of these States. Under UNCLOS, an archipelago means "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, water and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."[361] An archipelagic State is then a State that is constituted wholly by one or more archipelagos and may include other islands.[362] Archipelagic States may enclose their outermost islands with straight baselines. The drawing of these baselines has the effect of transforming the waters within those lines into archipelagic waters and consequently further reduces the amount of ocean space available to other users.

All States enjoy the right of innocent passage through archipelagic waters in line with the right of innocent passage through territorial seas.[363] On this basis, submarines must navigate on the surface and passage may only be suspended temporarily. In addition to the right of innocent passage, the Convention establishes archipelagic sea lanes passage, which means "the exercise in accordance with this Convention of the right 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 exclusive economic zone and another part of the high seas of an exclusive economic zone."[364] Passage in archipelagic sea lanes is thus at least as broad with respect to navigation and overflight as transit passage through straits. As with transit passage, the creation of archipelagic sea lanes passage is a compromise between the regime of innocent passage and freedom of navigation on the high seas.[365] Transit passage was an acceptable passage regime because archipelagic sea lanes are not necessarily close to land territory.[366]

Designation of archipelagic sea lanes rests with the archipelagic State. Although the Convention specifies how these lanes should be defined,[367] it is within the discretion of the archipelagic State to determine how many sea lanes will traverse its waters. As such, the archipelagic State has a large degree of control over the amount of traffic that may pass

[361] UNCLOS, art. 46. [362] *Ibid.*, art. 46. [363] *Ibid.*, art. 52. [364] *Ibid.*, art. 53(3).

[365] Noegroho Wisnomoerti, Indonesia and the Law of the Sea, in *The Law of the Sea: Problems from the East Asian Perspective* (Choon-ho Park and Jae Kyu Park eds., 1987), p. 392, at pp. 395–96.

[366] J. Peter A. Bernhardt, "The Right of Archipelagic Sea Lanes Passage: A Primer," 35 *Va. J. Int'l L.* 719, 727 (1995).

[367] UNCLOS, art. 53(5), which provides: "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."

through its waters. In balance to this control, if the archipelagic State fails to designate sea lanes through and air routes over its waters, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.[368] This provision has been described as supplying "the lowest common denominator or 'safety valve' which enabled the maritime states to accept the concept of archipelagic sea lanes passage."[369] Controversy could well arise as to what passage regime applies in certain areas of archipelagic waters unless sea lanes are clearly delimited. When they have designated sea lanes, archipelagic States may prescribe traffic separation schemes.[370] The archipelagic State's power to prescribe traffic separation schemes is more limited than straits States' power to do so because the archipelagic State may only prescribe these schemes "for the safe passage of ships through narrow channels in such sea lanes"[371] rather than for any sea lanes. The rights of archipelagic States are further limited in that, similarly to transit passage, they are not permitted to close archipelagic sea lanes.[372] An express closure of the normal passage routes used for international navigation through archipelagic waters as well as conduct that has the effect of denying navigation rights would constitute a violation of UNCLOS.[373] Archipelagic States may suspend innocent passage through archipelagic waters temporarily only if essential for protection of security.[374]

[368] *Ibid.*, art. 53(12). [369] Bernhardt, at 755.

[370] UNCLOS, art 53(6). This right is also granted to straits States "where necessary to promote the safe passage of ships." *Ibid.*, art. 41.

[371] *Ibid.*, art. 53(6).

[372] Article 54 provides that Article 44 applies *mutatis mutandis* to archipelagic sea lanes passage. *Ibid.*, art. 54. As such, archipelagic States must not hamper or suspend passage.

[373] In response to Indonesia's closure of the Straits of Lombok and Sunda for naval exercises, the US Department of State wrote:

> No nation may, consistent with international law, prohibit passage of foreign vessels or aircraft or act in a manner that interferes with straits transit or archipelagic sea lanes passage . . . While it is perfectly reasonable for an archipelagic state to conduct naval exercises in its straits, it may not carry out those exercises in a way that closes the straits, either expressly or constructively, that creates a threat to the safety of users of the straits, or that hampers the right of navigation and overflight through the straits or archipelagic sea lanes.

Marian Nash Leich, "U.S. Practice, Indonesia: Archipelagic Waters," 83 *Am. J. Int'l L.* 558, 560 (1989).

[374] UNCLOS, art. 52 (unlike the suspension rights in the territorial sea, no suspension of archipelagic passage is permitted for military exercises).

The archipelagic regime created in the Convention is clearly intended to balance the interests of archipelagic States with the continuing interests in international navigation through these maritime areas. The hybrid passage regime manifests this balance through the provision of transit passage in areas that are designated by the archipelagic State or in areas that are normally used for international navigation. The Convention anticipates that the selection of sea lanes, as well as traffic separation schemes, will entail the involvement and approval of the competent international organization (typically the International Maritime Organization).[375] The axis of sea lanes as well as traffic separation schemes must further be indicated on charts that are given due publicity.[376] These external processes may count for adequate review to ensure that archipelagic States conform to the rules set out in the Convention. Otherwise, compulsory dispute settlement could provide an accessible avenue to protect the rights and duties of both archipelagic and third States in respect of passage through archipelagic waters as balanced in UNCLOS. There is no doubt that to the extent that commercial navigation is affected, compulsory dispute settlement is available. With respect to the passage of military and government vessels, similar considerations apply as for transit passage. Compulsory dispute settlement is necessary in order to maintain the balance produced in the Convention and to provide a check on the exercise of States' powers. Third-party involvement, in the form of review by international organizations or dispute settlement proceedings, is necessary to maintain the system created by the Convention. The archipelagic regime could be less viable if the military activities exception prevents recourse to international proceedings.

Law Enforcement

Law enforcement activities were first considered in the context of an optional exception to mandatory jurisdiction as a way of describing the extent of the military activities exception.[377] The exclusion of "military activities" from compulsory dispute settlement was included in early drafts of the Convention on the understanding that law enforcement activities pursuant to the Convention would not be considered as military activities.[378] A State could exclude disputes "concerning military activities, including those by government vessels and aircraft engaged

[375] *Ibid.*, art. 53(9). [376] *Ibid.*, art. 53(10). [377] Singh, p. 148.

[378] See *ibid.* (referring to the Single Negotiating Text and the Revised Single Negotiating Text).

in non-commercial service, but law enforcement activities pursuant to this Convention shall not be considered military activities."[379] Objections were raised that this provision would allow for a situation where "in the exclusive economic zone of a State, the military activities of foreign States' would be excluded from third-party settlement, but the coastal State's law enforcement activities would be subject to compulsory international settlement."[380] As originally drafted, the optional exception would have favored the naval power States in excluding their actions in the zones of third States while subjecting the actions of coastal States to possible third-party review. Law enforcement activities related to the exercise of sovereign rights or jurisdiction provided for in the Convention were then included as a possible optional exclusion in the Informal Composite Negotiating Text.[381] The final text of the Convention narrowed the exclusion to law enforcement activities related to fishing and marine scientific research.

Law Enforcement Optionally Excluded from Compulsory Dispute Settlement

Article 298(1)(b) refers, in relevant part, to "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3." A direct link is thus made between Article 298 and Article 297. These paragraphs of Article 297 respectively relate to marine scientific research and fishing in the EEZ. As discussed in Chapter 3, disputes concerning marine scientific research are subject to the compulsory procedure in Section 2 of Part XV except for disputes relating to marine scientific research in the EEZ and on the continental shelf of a coastal State and for decisions by a coastal State to order suspension or cessation of a research project.[382] Along with these specified exclusions, a State may choose to exclude law enforcement activities with respect to marine scientific research as well.[383] Similarly, disputes concerning fisheries are subject to compulsory dispute settlement except for those disputes relating to the exercise of sovereign rights over living resources

[379] *Single Negotiating Text*, UN Doc. A/CONF. 62/WP. 9/Rev. 1, art. 18(2)(b), cited in Singh, p. 148.
[380] 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 136.
[381] Singh, p. 148 (referring to UN Doc. A/CONF.62/WP.10, 15 July 1977, art. 297(1)(b)).
[382] UNCLOS, art. 297(2)(a).
[383] There is no specific provision in UNCLOS addressing law enforcement activities with respect to marine scientific research.

in the EEZ. For those disputes that are still covered by Section 2, States may also choose to exclude law enforcement activities with respect to fisheries.

Article 73, paragraph 1 allows the coastal State to take various measures to ensure compliance with its laws and regulations relating to the exploration, exploitation, conservation, and management of the living resources in the EEZ. The Convention anticipates that coastal States may board, inspect, arrest, and institute judicial proceedings against vessels found in violation of fishing laws and regulations. Burke has considered a range of other measures that coastal States have taken, or may take, to enhance enforcement of their fishing laws and regulations including prescribing sea lanes for transiting fishing vessels; requiring report of entry and exit together with route used; and stowage of fishing gear during passage.[384] In addition, coastal States will often include enforcement procedures in access agreements so that the flag State of foreign fishing fleets given access to the EEZ is responsible for monitoring and policing of its own ships.[385] The penalties imposed by the coastal State may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any form of corporal punishment.[386] In cases of arrest or detention of foreign vessels, the coastal State must promptly notify the flag State through appropriate channels of the action taken and of any penalties subsequently imposed.[387]

Coastal States are required promptly to release arrested vessels and their crews upon the posting of a reasonable bond or other security.[388] Although this action is part of the enforcement powers vested in the coastal State and could thus seemingly be excluded from mandatory proceedings, Article 292 permits the institution of proceedings against the detaining State when it is alleged that the detaining State has not complied with the prompt release requirement of, *inter alia*, Article 73, paragraph 2.[389] The prompt release proceedings under Article 292 can only deal with the question of release and the posting of a reasonable bond or other financial security, and not inquire into obligations relating to coastal State penalties or notification.[390] Oda has argued that a

[384] Burke, *New International Law of Fisheries*, pp. 315–35. See also Attard, pp. 180–81 (describing the enforcement measures exercised by various States and the validity of those measures under customary international law).
[385] Picard, at 336 (1996). See also Burke, *New International Law of Fisheries*, pp. 315–35; and Kwaitkowska, *Exclusive Economic Zone*, pp. 87–88.
[386] UNCLOS, art. 73(3). [387] *Ibid.*, art. 73(4).
[388] *Ibid.*, art. 73(2). [389] See further pp. 85–119.
[390] See Camouco, para. 59; Monte Confurco, para. 63.

problem of overlapping issues may arise with respect to proceedings for the prompt release of vessels, commenting that it is "inevitably linked with the content of the rules and regulations of the coastal State concerning the fisheries in its exclusive economic zone, and the way in which these rules are enforced."[391] However, in light of the limited jurisdiction of ITLOS in prompt release proceedings, any challenge to the particular enforcement measures prescribed by the coastal State would have to be made pursuant to a challenge on the merits and would only then risk being excluded by virtue of Article 298. The creation of a special procedure specifically for the prompt release of vessels was justified on the basis of the potential for too much interference with rights of navigation through the EEZ. Consequently, the optional exception for law enforcement should not be considered as excluding the application of Article 292.[392]

A problem may arise when the law enforcement powers of the coastal State in the EEZ clash with the rights of navigation of third States. The coastal State may prescribe measures, such as the designation of sea lanes or applying territorial sea authority to fishing vessels, that could interfere with the freedom of navigation. Burke argues that the enforcement of fishing laws and regulations should be done in such a way to minimize the negative impact on navigation since the fishing industry is only of vital importance to the economies of a small number of States.[393] The difficulty for the operation of the dispute settlement system in Part XV is that Article 297 subjects allegations that a coastal State has acted in contravention of the freedom of navigation to the mandatory procedures in Section 2 while States have the option to exclude law enforcement disputes under Article 298. The interaction of these provisions is not explained in the text of UNCLOS so the question may well become one of characterization of the dispute. Riphagen considers that the question is really one of degree – a foreign fishing vessel should not be arrested merely because it is equipped for fishing, as opposed to actually fishing, because that would seriously impair the freedom of navigation.[394] He argues that, "[o]ne could hardly assume that 'law enforcement' of such a kind could be made immune from compulsory dispute settlement by a court or tribunal."[395] Since a limited range of law

[391] Oda, "Dispute Settlement Prospects," at 866. [392] Riphagen, pp. 293–94.
[393] Burke, *New International Law of Fisheries*, pp. 309–10.
[394] Riphagen, pp. 293–94. He takes the same view with respect to enforcement of laws and regulations relating to marine scientific research. *Ibid.*
[395] *Ibid.*, at 293–94.

enforcement activities are only excluded from mandatory jurisdiction at the option of the State whereas Article 297 expressly includes navigation disputes relating to the EEZ and the continental shelf, the balance in the Convention would appear to be in favor of resolving navigation disputes through compulsory procedures entailing binding decisions. The aim of accommodating the competing interests of coastal and third States in navigation can "best be attained, and disruptive confrontation avoided, if the navigational articles are interpreted in a manner to give continuing efficacy to that balance."[396] As compulsory dispute settlement is necessary for the operation of the navigation regime established in UNCLOS, these interests should be weighted accordingly.

Settlement of Other Law Enforcement Disputes

Other aspects of the Convention that relate to the powers of States parties to enforce various laws relating to the uses of the oceans are not excluded from compulsory procedures entailing binding decisions, unless some other exception applies. Articles 27 and 28 relate to the exercise of civil and criminal jurisdiction over vessels (and jurisdiction over persons on those vessels) passing through territorial seas. Enforcement activities may also be undertaken in the contiguous zone. According to Article 33, States may exercise the control necessary to prevent and punish the infringement of their customs, fiscal, immigration, or sanitary laws and regulations within their territory or territorial sea in a zone extending twenty-four miles from their baselines. Enforcement activities may also be undertaken on the high seas in respect of fishing, piracy, slave trading, and unauthorized broadcasting through the right of visit and the right of hot pursuit.

The right of visit is exclusively available to warships on the high seas,[397] and "exists as an exception to the general principle of the exclusive jurisdiction of the flag State over ships flying its flag, set out in article 92."[398] The right of hot pursuit has long been accepted as part of the law of the sea.[399] "The right of hot pursuit – an exception to the freedom of the high seas – is at the same time a right of the littoral State established for the effective protection of areas under its

[396] Grunawalt, at 456. [397] UNCLOS, art. 110(1).
[398] 3 *United Nations Convention on the Law of the Sea 1982: A Commentary*, pp. 238–39.
[399] See O'Connell, 2 *International Law of the Sea*, pp. 1078–79 (describing the entrenched position of the right and consequent lack of controversy over the right during the progressive codification of the law of the sea). See also Reuland, at 557.

sovereignty or jurisdiction."[400] Article 111 sets out the basic right and a number of qualifications on the way the right may be exercised.[401] The right of visit is only ascribed to warships whereas the right of hot pursuit may be undertaken by warships as well as ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. In this regard, it may be possible to discern some overlap between law enforcement activities and military activities. The distinction between law enforcement and military activities may become relevant since many enforcement activities are undertaken by military vessels. The question thus arises as to what extent the military activities exception may exclude disputes relating to law enforcement activities undertaken by military vessels.

The right of visit for the enforcement of various laws under the Convention must be distinguished from the right of visit and search that may be exercised by a belligerent State against all merchant ships during time of war.[402] "The right of visit and search is a war right; it can only be expressed in time of peace by virtue of an express stipulation in an international treaty, or in the course of maintaining the security of navigation by a generally recognised usage in the interests of all nations."[403] The right of visit granted under UNCLOS is expressly for the enforcement of designated prescriptions set out in the Convention with respect to vessels that are not accorded immunity. Unlike the right of visit, the Convention does not specify that the right of hot pursuit may not be exercised against foreign military and government vessels. McDougal and Burke take the view that in light of the immunity of these vessels, the enforcing ship should not be authorized to pursue and seize warships or other government vessels not engaged in commercial service.[404] The right of hot pursuit is necessary to ensure the effective application and enforcement of coastal regulations and "as such, is merely ancillary to the substantive measures intended to be applied."[405]

It is difficult to assert that the right of hot pursuit and the right of visit are not law enforcement activities rather than military activities as both acts involve the enforcement of specific laws. The mere fact that

[400] Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law* (1969), p. 39.
[401] O'Connell notes that these qualifications, which were included in the drafting of the High Seas Convention, were more detailed than customary doctrine but could be viewed as reasonable corollaries of it. O'Connell, 2 *International Law of the Sea*, p. 1079.
[402] See C. John Colombos, *The International Law of the Sea* (6th ed., revisd, 1967), pp. 753–54.
[403] *Ibid.*, p. 311. [404] McDougal and Burke, p. 895.
[405] *Ibid.*, p. 896. See also *ibid.*, pp. 894 and 902.

these rights are exercised by military and government vessels does not justify a characterization of "military activities" for the purposes of Article 298. Clearly, from the terms of Article 298(1)(b), only law enforcement activities pertaining to fishing or marine scientific research in the EEZ may be excluded as "law enforcement." Furthermore, the drafting history of this provision would indicate that all law enforcement activities besides those specified are subject to compulsory procedures entailing binding decisions.[406] The military activities exception is not intended, and not needed, to insulate from mandatory jurisdiction disputes that are more properly construed as law enforcement activities.

Conclusion

The use of force, military activities, and law enforcement are subject to minimal normative regulation under the Convention. The application of all provisions of UNCLOS in times of armed conflict is unclear (but unlikely) and deliberate vagueness was preferred with respect to a range of naval activities on the high seas and in the EEZ of coastal States. Part XV nonetheless anticipates that these disputes will arise in relation to the interpretation and application of the Convention as Article 298 permits States to exclude disputes relating to military activities as well as disputes that are threats to international peace and security and are thus subject to the functions of the Security Council. The implication from this procedural device is that international legal processes are not necessarily required as the means to resolve disputes relating to armed conflict and naval activities in maritime areas where the freedoms of the high seas are exercised. The military activities exception and the Security Council exception can work to the advantage of States with greater naval power if they wish to resolve these disputes through political avenues.[407] Coastal States can also take advantage of the military activities exception if they have the capability to interfere with naval operations of third States in their territorial sea and EEZ and do not wish to have their actions subject to adjudication or arbitration.[408]

[406] See notes 377–81 and accompanying text. Singh, p. 148 ("military activities" were initially excluded from compulsory dispute settlement on the understanding that law enforcement activities pursuant to the Convention would not be considered as military activities).
[407] "From a military point of view the new LOS Convention protects to the fullest extent the security interests of the naval powers." Rauch, at 230.
[408] Janis, at 56–57 (noting that this would not be detrimental for the naval power if it was in a position to exert its relative physical advantage).

Greater regulation is evident for maritime areas subject to coastal State sovereignty. The traditional regime of innocent passage has been subject to increasing codification, first in the Territorial Sea Convention and now in UNCLOS. However, as a mutually beneficial system, States have long resolved disputes relating to innocent passage through diplomatic channels without typically resorting to international arbitration or adjudication. This system of reciprocity was jeopardized when coastal States began to agitate for a wider breadth of territorial sea. States with considerable commercial and strategic interests espoused greater concern about the freedoms of navigation. To respond to these concerns in particular maritime areas, namely, certain straits used for international navigation as well as archipelagic waters, new regimes of passage were created in the Convention. As true of many provisions in UNCLOS, some ambiguity was left within the terms of the Convention in order to allow for a range of interpretations to accord with the different interests of States. The systems of passage created in the Convention are delicate balances and are susceptible to erosion if misused by either the coastal State or the States in passage. To maintain a control on the powers of States in this regard, compulsory dispute settlement plays a vital role. Referral of a dispute to international adjudication or arbitration (or at least the threat of so doing) guarantees the balance of the Convention. The systems of transit and archipelagic passage could well break down without recourse to dispute settlement being available. To this end, the military activities exception, if held applicable, could undermine the viability of these passage regimes. Perhaps the passage of military and government vessels should not even be considered as "military activities" in this regard. Such a characterization would be less plausible when a tribunal or court was dealing with a question of rights of passage being suspended or denied unlawfully. Special conditions attached to passage (such as a levy or inspection) should also be deemed outside the exception of "military activities." Only acts that are tantamount to a threat or use of force in the course of passage – by either the coastal State or the State passing through the strait or archipelagic waters – should be viewed as falling within the category of disputes that could be excluded from mandatory jurisdiction of an international court or tribunal. This interpretation would be in line with the exclusions appropriate for military actions on the high seas or in the EEZ.

Finally, the exclusion of law enforcement activities is limited to disputes that relate to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297,

paragraph 2 or 3. All other law enforcement activities will be subject to mandatory procedures entailing a binding decision, unless one of the other exceptions or limitations applies. There may be some overlap between law enforcement activities relating to fishing in the EEZ and the right of navigation of third States through the EEZ. If the dispute is characterized as one relating to law enforcement then it could be excluded from jurisdiction by virtue of Article 298. Equally, if the dispute is characterized as one relating to the rights of navigation then it is included for resolution under Section 2 of Part XV in accordance with Article 297. In determining how to characterize the dispute, any court or tribunal should heed the essential role accorded to international arbitration and adjudication in respect of the regime of navigation in the EEZ. The need judicially to resolve disputes relating to the interpretation and application of the provisions on navigation in the EEZ should be taken into account in determining what characterization best fulfills the purposes of the Convention. A potential overlap between law enforcement and military activities is less problematic. The right of visit and the right of hot pursuit, as well as the enforcement powers exercisable in the territorial sea and contiguous zone, are quintessentially law enforcement activities even if undertaken by military and government vessels. The military activities exception was not intended to cover law enforcement acts, except for those expressly included in Article 298.