considered completely unacceptable by the developed world in general and the USA in particular (Schmidt, 1989).

Even at the time of its adoption, it was clear that the convention text would need to be modified in some way in order to accommodate the interests of the major industrialized powers whose support would be necessary for the regime to become a practical reality. Some concessions were made in Resolutions I and II which were appended to the Final Act of the Conference. These granted certain privileges to 'pioneer investors', States and companies registered in States which had already made a significant investment in seabed mining. This, however, proved to be too little too late. The breakthrough came in the early 1990s when the likelihood of the convention's entry into force, coupled with the demise of communism and changing economic and geo-political factors, produced a climate in which it was possible to revisit the convention text, sweep away some of the more bureaucratic and arcane layers of regulation and strike a new balance between the interests of those States and those companies which were already practically engaged in activities relating to mining the deep seabed and the more general interests of the international community as a whole. Far reaching changes were made in the 1994 Implementation Agreement which paved the way for widespread ratification of the convention and which has been considered in Section I, above. Underlying this change of approach was the realization that the financial rewards were likely to be considerably less than originally thought—if, indeed, there were likely to be any at all.[48]

Under the current arrangements, resource exploration and exploitation of the seabed and subsoil beyond the limits of national jurisdiction, known as the 'Area', is administered by the International Seabed Authority (ISA) to which applicants must submit 'plans of work'. These must identify two areas of roughly equal mining potential, one of which is to be mined by the applicant whilst the other will be 'reserved' for exploitation by the international community. In the original convention scheme, exploitation of the 'reserved' site would be undertaken by the 'Enterprise', an independent commercial mining arm of the ISA but under the 1994 Agreement the 'Enterprise' was given a considerably reduced role and, at least initially, might only engage in joint ventures. If the Enterprise does not undertake the mining of a reserved site within 15 years, the original applicant may do so. Moreover, if it does seek to mine the site, the original applicant is to be offered the chance to participate in the joint venture. The reality of the situation is that the Enterprise does not yet exist as an entity, and the ISA is currently fulfilling its functions. It will only be established should seabed mining becomes commercially feasible, and it may be that it never will be. In the meanwhile, the Authority has since 2001 entered into a number of 15-year contracts with a range of governments, government entities and commercial consortia whose activities are largely focused on exploration and research at present, in the Clarion-Clipperton Zone in the Pacific Ocean and the Central Indian Ocean Basin.

The details of the regime, and the manner in which it balances the interests of various interest groups—including consumer States, investing States, producing States, developing States, landlocked States, and others—is such as to defy easy and succinct description

[48] Indeed, commercial interest was already switching away from polymetallic nodules, primarily located beyond national jurisdiction in the Area, and becoming more focused on polymetallic sulphides which are more usually found within areas of national jurisdiction within the continental shelf and EEZ, further lessening the significance of the Deep Seabed regime.

and may be pursued elsewhere.[49] For current purposes what is significant is the manner in which the international community—after a number of false starts—was able to agree to extract the resource potential of the seabed and subsoil from of the high seas regime and create a further regime of resource jurisdiction whilst preserving the integrity of the general jurisdictional framework applicable to the law of the sea.

VI. DELIMITATION OF MARITIME ZONES BETWEEN OPPOSITE OR ADJACENT STATES

It will often be impossible for States to extend their jurisdiction as far seawards as international law permits because of the claims of other States. The resulting problem of delimiting maritime zones between opposite or adjacent coastal States whose claims overlap is extremely difficult and has given rise to more cases before the ICJ than any other single subject, as well as having generated a considerable number of ad hoc arbitrations.

A. EQUIDISTANCE OR EQUITABLE PRINCIPLES?

LOSC Article 15 provides that, in the absence of agreement to the contrary, States may not extend their territorial seas beyond the median, or equidistance line, unless there are historic or other 'special' circumstances that dictate otherwise. This 'equidistance/special circumstances' rule has been accepted by the ICJ as customary international law[50] and it is clear that only in exceptional cases will the equidistance line not form the basis of the boundary between overlapping territorial seas, although recent practice has in fact produced rather more exceptions than might have been thought probable.[51]

Article 6 of the 1958 CSC adopted the same approach to the delimitation of overlapping continental shelves but its application in this context has had a more chequered history (see generally Evans, 1989; Weil, 1989; Antunes, 2003; Tanaka, 2006). In the *North Sea* cases Denmark and the Netherlands argued that Article 6 represented customary law and so bound Germany, a non-State party. Applying this rule mechanically to the concave Germany coastline sandwiched between Denmark and Norway restricted Germany

[49] For details see the information available on the International Sea Bed Authority website: http://www.isa.org.jm. For a helpful overview of its work see Nandan, 2006.

[50] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain), Merits, Judgment, ICJ Reports 2001*, p 40, paras 175–176. Cf Separate Opinion of Judge Oda, paras 13–21, who challenged the Court's views of customary law. The Court reaffirmed its view in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v *Honduras*), Judgment of 8 October 2007, nyr, paras 268 and 281.

[51] In the *Territorial and Maritime Boundary Dispute between Nicaragua and Honduras in the Caribbean* the ICJ, whilst emphasizing that equidistance remained the general rule, took the view that both the configuration and unstable nature of the relevant coastal area made it impossible to identify basepoints and construct a provisional equidistance line at all. This amounted to a 'special circumstance' justifying the use of an alternative method, the use of a line which bisected two lines drawn along the coastal fronts of the two States. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v *Honduras*), Judgment of 8 October 2007, nyr, paras 268–281. Also in that year the Annex VII Arbitration Award in the case concerning *Guyana/Suriname*, 17 September 2007, paras 323–325 concluded that historical and navigational issues were considered to amount to special circumstances justifying a departure from the use of the equidistance line for the territorial sea.

to a modest triangle of continental shelf, to the substantial benefit of its neighbours. Rather than ameliorate this outcome by arguing that the concave nature of the coast was a 'special circumstance' justifying another line, the ICJ decided that Article 6 did not reflect customary law, and that customary law required continental shelf delimitation to be conducted on the basis of equitable principles and taking account of relevant circumstances.[52]

This ushered in a period in which supporters of the more formulaic 'equidistance/special circumstances' approach vied with supporters of the relatively more flexible 'equitable principles/relevant circumstances' approach—though it is doubtful whether there was ever much to choose between them.[53] At UNCLOS III groups of States championed the approach they considered best suited their interests and, as no consensus could be found, an anodyne formula, applicable to both continental shelf and EEZ delimitation, was adopted in the dying days of the conference. This provides that such delimitations are to be 'effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution'. This avoids mentioning equidistance, equitable principles, special or relevant circumstances—and is virtually devoid of substantive content.

Around this time the ICJ delivered a trilogy of judgments, all of which emphasized the role of equity at the expense of equidistance, though in varying degrees.[54] Perhaps these cases were too close in time to UNCLOS III to shake off the ideological hostility to equidistance. By 1993, however, the Court was prepared to declare in the *Jan Mayen* case that 'Prima facie, a median line delimitation between opposite coasts results in general in an equitable solution'[55] (Evans, 1999). Although the position regarding the use of equidistance as the starting point for delimitation between adjacent coasts remained less certain, the judgment of the ICJ in the *Qatar* v *Bahrain* case[56] strongly suggested that equidistance would provide the starting point and this was confirmed in the *Cameroon* v *Nigeria* case[57] where it said that:

The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdiction is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'.

[52] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 101(c)(1).

[53] Thus the 1977 *Anglo-French Arbitration*, Cmnd 7438, 18 ILM 397, generally considered to lean towards the equitable principles school of thought, proceeded on the basis that although CSC Article 6 and custom were different the practical result of their application would be the same.

[54] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982*, p 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports 1984*, p 246; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, p 13.

[55] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, ICJ Reports 1993*, p 316, para 64, a position affirmed in the *Eritrea-Yemen Arbitration, Second Phase, Award of 17 December 1999*, para 131.

[56] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v *Bahrain), Merits, Judgment, ICJ Reports 2001*, p 40, para 230.

[57] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria: Equatorial Guinea Intervening), Merits, Judgment, ICJ Reports 2002*, p 303, para 288. See also *Barbados/Trinidad and Tobago*, Award of 11 April 2006, paras 242–244 and 306.

After 35 years of hesitation, the ICJ finally accepted what it had rejected in the *North Sea* cases, that the equidistance/special circumstances approach reflects customary international law (Evans, 2006). It has subsequently confirmed that this is the case both for the delimitation of the territorial sea[58] and for the delimitation of the continental shelf, EEZ, or when drawing a single delimitation line.[59]

B. FACTORS AFFECTING DELIMITATION

Even if equidistance provides the starting point, this does not mean it will be the finishing line. All formulations of the rule accept that it can be modified to take account of other factors. Although the categories of potentially relevant factors are never closed, the potential relevance—and irrelevance—of some factors is well established (Brownlie, 2008, pp 217–218). Close attention is usually paid to ensuring that areas appertaining to each State are not disproportionate to the ratio between the lengths of their 'relevant coasts' adjoining the area (though this is clearly open to gerrymandering). Likewise, the presence of islands capable of generating claims to a continental shelf or EEZ is a complicating factor and their impact upon an equidistance line can be reduced or discounted in numerous ways (Jayawardene, 1990). On the other hand, geological factors are not considered relevant where the distance between the coasts is less than 400 n. miles[60] and economic factors are generally considered irrelevant by courts and tribunals, although they probably play a significant role in negotiated boundary agreements.

It is difficult to go beyond this with certainty, and it is certainly not possible to predict how the various factors will be taken into account. Courts and tribunals increasingly refrain from indicating how—or why—the factors considered relevant combine with the chosen methodology to produce the final line. This had led some to observe that some judgments do little more than 'split the difference' between competing claims (Churchill and Lowe, 1999, p 191). However, in the *Cameroon* v *Nigeria* case the ICJ dismissed the relevance of all the various factors put forward by the parties and used an equidistance line in an unmodified fashion, despite the presence of a number of factors that might have been thought to have some claim to consideration.[61] The subsequent Arbitral Award in the *Guyana/Suriname* case and the judgment of the ICJ in the *Romania* v *Ukraine* case also dismissed the relevance of all factors put forward by the parties.[62] Whilst it would be a mistake to conclude from this that using an equidistance line alone might itself become seen an producing an equitable outcome, there appears to be an increasing need for caution and clear reasoning when presenting claims which call for a departure from the equidistance

[58] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v *Honduras)*, Judgment of 8 October 2007, nyr, paras 262–298.

[59] *Guyana/Suriname*, Award of 17 September 2007, paras 376–392; *Maritime Delimitation in the Black Sea (Romania* v *Ukraine)*, Judgment of 2 February 2009, para 116.

[60] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, p 13, para 39.

[61] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria: Equatorial Guinea Intervening), Merits, Judgment, ICJ Reports 2002*, p 303, paras 293–306.

[62] *Maritime Delimitation in the Black Sea (Romania* v *Ukraine)*, Judgment of 2 February 2009, paras 185–218.

line, and such departures normally should be firmly grounded in factors flowing from coastal geography (see Tanaka, 2004; Evans, 2006).[63] Overall, one must still conclude that despite the greater certainly concerning the law to be applied, the application of the law pertaining to maritime delimitation remains as unpredictable and as mysterious as ever.

VII. FISHERIES

A. THE BASIC SCHEME OF REGULATION

Given its significance, it is perhaps surprising that the LOSC does not address fisheries as a discrete topic. However, the manner in which the seas are divided for jurisdictional purposes means that one has to look at how fisheries are regulated in each particular maritime zone. The basic scheme seems simple enough; the coastal State exercises sovereignty over the territorial seas and sovereign right to explore, exploit, conserve, and manage fishing in any EEZ or EFZ that it might claim. In the high seas the freedom of fishing remains and fish stocks are open to all, but the activities of fishing vessels are subject to the jurisdiction and control of their flag State. The problems are, however, enormous. Overfishing has endangered many fish stocks and there is a pressing need to agree upon and implement effective strategies for conservation and management in the increased threat from 'Illegal, Unreported and Unregulated' (IUU) fishing. At the same time, the economic and nutritional needs of communities must be borne in mind. The result is that the piecemeal approach to regulation is under increasing pressure and a more holistic approach, built around the idea of sustainable development may be in the process of emerging (see Edeson, 1999; Orrego-Vicuna, 1999). However, any system that is ultimately dependent upon flag State enforcement will be vulnerable to abuse.

One particularly noteworthy trend is the establishment of Regional Fisheries Bodies (RFBs) and Regional Fisheries Management Organisations (RFMOs) which provide means through which States may work together in the conservation, management and development of fishing in particular areas or of particular stocks. Multilateral treaty practice is moving beyond merely encouraging States to participate in such regimes and is increasingly requiring them to do so in order to have access to them. However, such obligations only bind States which become a party to such agreements and many major fishing States simply choose not to do so and continue to claim the right to fish these stocks as an aspect of the freedom of the high seas. An alternative response is to extend coastal State jurisdiction still further seawards but this also runs into fierce opposition. Some years ago Canada adopted a slightly different approach, by asserting its right to enforce conservation and management measures adopted by the relevant regional body (NAFO) over non-flag State vessels fishing beyond its 200 n. mile EEZ. The subsequent arrest in 1995 of the Spanish registered *Estai* on the high seas prompted a serious incident between the EC and Canada[64] and illustrated the difficulty of pursuing the unilateral route. For the moment

[63] See also *Barbados/Trinidad and Tobago*, Award of 11 April 2006, paras 233–240. But cf n 51 above.

[64] See Davies, 1995. Spain subsequently brought a case against Canada before the ICJ which the Court was unable to consider because Canada had previously removed such disputes from the scope of its consent to the Court's jurisdiction. (See de LaFayette, 1999.)

then, we can merely chart the trends in this direction whilst outlining the major elements of the regimes applicable beyond the limits of the territorial seas.

B. MANAGING FISHERIES

1. EEZ

Some 80–90% of all fishing takes place within EEZs. The coastal State does not enjoy a completely unfettered right to exploit the fisheries resources of the EEZ under the LOSC (though this may not be the position in customary law). LOSC Article 61(1) requires the coastal State to 'determine the allowable catch' (known as the TAC) of living resources. A number of factors feed into this determination, including the need to 'ensure through proper conservation and management measures that the maintenance of the living resources... is not endangered by over-exploitation' (Article 61(2)). At the same time, these measures must themselves be designed 'to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield' (Article 61(3)). This, then, looks to conserving stocks, but Article 62(1) switches to the obligation to 'promote the objective of optimum utilization of the living resources of the EEZ' by requiring the coastal State 'to determine its capacity to harvest' them. Where the harvestable capacity falls short of the TAC, the coastal State is to give other States access to that surplus (Article 62(2)), with particular regard being given to the requirements of developing States in the area (Article 62(3)), as well as the interests of landlocked and geographically disadvantaged States (Articles 69 and 70; Vasciannie, 1990) in determining to whom access will be offered.[65] Despite these provisions, since coastal States have their hands on both levers—determining both the TAC and the harvestable capacity—their control over EEZ fisheries is hardly troubled by these provisions which have more symbolic than substantial significance. If it were otherwise, the attraction of declaring an EEZ rather than an EFZ (in which these provisions would not apply) would be significantly diminished.

The convention also provides special rules for particular categories of species, including anadromous stocks, such as salmon, which spend most of their time at sea but spawn in freshwater rivers (LOSC Article 66), catadromous stocks, such as eels, which spawn at sea but spend most of their lives in fresh water (LOSC Article 67) which again reflect the theme of reconciling the interests of the State of origin with the established interests of others, and for marine mammals (LOSC Article 65). The situation regarding 'straddling stocks' and 'highly migratory species' (LOSC Articles 63 and 64) will be considered below.

Although the coastal State in principle enjoys complete control over fishing within the EEZ, this has not prevented overfishing. Some States refuse to accept the need for conservation of fish stocks in the face of more pressing and immediate economic or political interests, whilst others are simply unable to control the fishing activities of foreign-flagged vessels within their EEZ, both licensed and illegal.

2. High seas

It is often forgotten that the freedom of fishing upon the high seas is not unfettered. The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas

[65] Such access can, of course, be subject to licensing and fees and is more generally regulated by LOSC Article 64.