United Nations A/CN.4/761

General Assembly

Distr.: General
13 February 2023

Original: English

International Law Commission
Seventy-fourth session
Geneva, 24 April–2 June and 3 July–4 August 2023

Sea-level rise in relation to international law

Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral,* Co-Chairs of the Study Group on sea-level rise in relation to international law

Contents

* The Co-Chair wishes to thank Zhifeng Jiang for his research assistance, and Beril Söğüt.

I. Introduction

A. Inclusion of the topic in the Commission's programme of work; consideration of the topic by the Commission

1. At its seventieth session (2018), the Commission decided to recommend the inclusion of the topic "Sea-level rise in relation to international law" in its long-term programme of work.[1] Subsequently, in its resolution 73/265 of 22 December 2018, the General Assembly noted the inclusion of the topic in the long-term programme of work of the Commission.

2. At its seventy-first session (2019), the Commission decided to include the topic in its programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria. At its 3480th meeting, on 15 July 2019, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[2]

3. At its seventy-second session (2021), the Commission reconstituted the Study Group, chaired by the two Co-Chairs on issues related to the law of the sea, namely Mr. Aurescu and Ms. Oral. The Commission considered the first issues paper on the topic, concerning issues related to the law of the sea,[3] prepared by Mr. Aurescu and Ms. Oral. The paper was issued together with a preliminary bibliography.[4] The Study Group held eight meetings, from 1 to 4 June and on 6, 7, 8 and 19 July 2021. At its 3550th meeting, on 27 July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group. Chapter IX of the 2021 annual report of the Commission contains a summary of the work of the Study Group during that session on the subtopic of issues related to the law of the sea.[5]

4. At its seventy-third session (2022), the Commission reconstituted the Study Group, chaired by the two Co-Chairs on issues related to statehood and to the protection of persons affected by sea-level rise, namely Ms. Galvão Teles and Mr. Ruda Santolaria. The Commission considered the second issues paper on the topic, concerning issues related to statehood and to the protection of persons affected by sea-level rise,[6] prepared by Ms. Galvão Teles and Mr. Ruda Santolaria. The paper was issued together with a selected bibliography.[7] The Study Group held nine meetings, from 20 to 31 May and on 6, 7 and 21 July 2022. At its 3612th meeting, on 5 August 2022, the Commission considered and adopted the report of the Study Group on its work at that session. Chapter IX of the 2022 annual report of the Commission contains a summary of the work of the Study Group during that session on the subtopics of issues related to statehood and to the protection of persons affected by sea-level rise.[8]

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[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 369.
[2] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 265–273.
[3] A/CN.4/740 and Corr.1.
[4] A/CN.4/740/Add.1.
[5] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 247–296.
[6] A/CN.4/752.
[7] A/CN.4/752/Add.1.
[8] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), paras. 153–237.

B. Purpose and structure of the additional paper to the first issues paper (2020)

5. The purpose of the present paper is to supplement and develop the content of the first issues paper (2020), on the basis of a number of suggestions by members of the Study Group that were proposed during the debate on that paper, which took place during the seventy-second session (2021). These suggestions were presented in the 2021 annual report of the Commission and referred to a wide range of issues.[9]

6. While all such suggestions are pertinent to the debates within the Study Group, owing to the inherent limited dimensions of the present paper, the Co-Chairs will address the main aspects highlighted by the Member States in their submissions to the Commission and in their statements presented in the Sixth Committee of the General Assembly after the first issues paper was issued and following the debate on it in the Commission in 2021.

7. From this perspective, the present paper focuses on the following areas and is structured accordingly: the meaning of "legal stability" in connection with the present topic, including the issue of ambulatory versus fixed baselines; the potential situation whereby, as a result of sea-level rise and a landward shift of the coastline, overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlap; the issue of the consequences of the situation whereby an agreed land boundary terminus ends up being located out at sea because of sea-level rise; the relevance of other international treaties and legal instruments than the United Nations Convention on the Law of the Sea;[10] the relevance for the topic of various principles; the issue of navigational charts in connection with the topic; and the possible loss or gain of benefits by third States in the case of fixed baselines..

8. The present paper is intended to serve as a basis for discussion in the Study Group and may be complemented by contribution papers prepared by members of the Study Group.

C. Debate in the Sixth Committee of the General Assembly; level of support from Member States; outreach efforts

9. Owing to the outbreak of the coronavirus disease (COVID-19) pandemic in 2020, and the ensuing postponement of the seventy-second session of the Commission, Member States had the opportunity to comment upon the first issues paper during the sessions of the Sixth Committee in both 2020 and 2021.[11] Some Member States also made reference in their statements in 2022 to the law of the sea aspects related to sea-level rise included in the first issues paper and in chapter IX of the 2021 annual report of the Commission.

[9] See *ibid.*, chap. IX.

[10] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[11] The plenary debate in the Sixth Committee as pertains to the subtopic is reflected in the summary records contained in the documents cited in the footnotes, which contain a summarized form of the statements made by delegations. The full texts the statements made by delegations participating in the plenary debate are available from the Sixth Committee's web page, at https://www.un.org/en/ga/sixth/.

10. The growing interest in and support for the topic as described in the first issues paper with respect to 2017, 2018 and 2019,[12] was confirmed as a trend during the debates in the Sixth Committee in 2020, 2021 and 2022.

11. In 2020, because of the pandemic and the consequent special circumstances in which the debate in the Sixth Committee took place, only 25 Member States presented statements on the Commission's work,[13] of which 15 referred to the topic: 11 of them expressed appreciation for the first issues paper,[14] and the remaining 4 made reference to the topic or to the first issues paper.[15]

12. In 2021, 67 delegations delivered 69 statements in the Sixth Committee that referred to the topic.[16] These statements not only refer to the first issues paper, but also react to the substantive debates in the Study Group and the Commission that took place during its seventy-second session (2021).

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[12] A/CN.4/740 and Corr.1, paras. 8–9 and 19.

[13] A/76/10, para. 255.

[14] Belize, on behalf of the Alliance of Small Island States (A/C.6/75/SR.13, paras. 24–28); Fiji, on behalf of the Pacific small island developing States (*ibid.*, paras. 50–51); Maldives (*ibid.*, paras. 55–58); Micronesia (Federated States of) (*ibid.*, paras. 52–55); New Zealand (*ibid.*, paras. 43–46); Papua New Guinea (*ibid.*, paras. 37–39); Portugal (*ibid.*, para. 65); Solomon Islands (*ibid.*, paras. 72– 74); Tonga (*ibid.*, para. 59); Türkiye (*ibid.*, paras. 60–61); and Tuvalu, on behalf of the Pacific Islands Forum (*ibid.*, paras. 21–23).

[15] India (*ibid.*, paras. 69–60); Republic of Korea (*ibid.*, paras. 66–68); Sierra Leone (*ibid.*, paras. 34–36); and United States of America (*ibid.*, paras. 30–32).

[16] Croatia (A/C.6/76/SR.17, para. 64); Samoa, on behalf of the Pacific small island developing States (A/C.6/76/SR.19, paras. 68–71); European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine) (*ibid.*, paras. 72–73); Fiji, on behalf of the Pacific Islands Forum (*ibid.*, paras. 74–76); Antigua and Barbuda, on behalf of the Alliance of Small Island States (*ibid.*, paras. 77–82); Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*, paras. 87–91); Singapore (A/C.6/76/SR.20, paras. 22–24); Sierra Leone (*ibid.*, paras. 27–29); Islamic Republic of Iran (*ibid.*, paras. 38–39); France (*ibid.*, paras. 45–47); Egypt (*ibid.*, paras. 58–59); Belarus (*ibid.*, paras. 63–65); El Salvador (*ibid.*, para. 70); Kingdom of the Netherlands (*ibid.*, para. 76); South Africa (ibid., paras. 77–78); Türkiye (*ibid.*, paras. 81–83); Italy (*ibid.*, paras. 87–88); China (*ibid.*, paras. 92–95); United States (*ibid.*, para. 96); Israel (*ibid.*, paras. 98–99); Liechtenstein (A/C.6/76/SR.21, paras. 2–4); Portugal (*ibid.*, paras. 8–10); Romania (*ibid.*, paras. 20–23); Brazil (*ibid.*, para. 26); Cuba (*ibid.*, paras. 31–33); Slovakia (*ibid.*, para. 38); Japan (*ibid.*, paras. 41–42); Mexico (*ibid.*, paras. 48–50); Chile (*ibid.*, paras. 51–58); Hungary (*ibid.*, paras. 67–68); Germany (*ibid.*, paras. 78–82); Viet Nam (*ibid.*, paras. 83–85); Czech Republic (ibid., para. 92); Slovenia (*ibid.*, paras. 96–97); New Zealand (*ibid.*, paras. 102–107); Sri Lanka (*ibid.*, paras. 111–112); Estonia (*ibid.*, paras. 118–122); Ireland (*ibid.*, paras. 131–135); Maldives (*ibid.*, paras. 137–141); United Kingdom of Great Britain and Northern Ireland (*ibid.*, para. 146); Federated States of Micronesia (*ibid.*, paras. 147–150); Malaysia (*ibid.*, paras. 153–154); Thailand (A/C.6/76/SR.22, paras. 3–5); Côte d'Ivoire (*ibid.*, paras. 6–7); Cameroon (*ibid.*, para. 26); Argentina (*ibid.*, paras. 31–34); Papua New Guinea (*ibid.*, paras. 35–38); Austria (*ibid.*, paras. 53–55); Republic of Korea (*ibid.*, para. 60); Australia (*ibid.*, paras. 62–63); Poland (*ibid.*, paras. 70–71); Latvia (*ibid.*, paras. 74–75); Solomon Islands (*ibid.*, paras. 76–81); Indonesia (*ibid.*, paras. 83–84); Russian Federation (*ibid.*, paras. 91–95); Algeria (*ibid.*, paras. 99–100); Cyprus (*ibid.*, paras. 101–106); Spain (*ibid.*, para. 115); Tonga (*ibid.*, paras. 117–120); Greece (*ibid.*, paras. 129–131); Lebanon (*ibid.*, paras. 133–134); Tuvalu (A/C.6/76/SR.23, paras. 2–5); India (*ibid.*, paras. 9–10); Costa Rica (*ibid.*, paras. 11–15); Philippines (*ibid.*, paras. 17–21); Colombia (*ibid.*, paras. 23–25); Holy See (Observer) (*ibid.*, paras. 28–29); and Jordan (A/C.6/76/SR.24, paras. 126–127). The topic was referred to in two statements by Japan (A/C.6/76/SR.17, para. 74; and A/C.6/76/SR.21, paras. 41–42) and by Sri Lanka (A/C.6/76/SR.18, para. 8; and A/C.6/76/SR.21, paras. 111–112). Of all the delegations that presented statements, only one (Austria) expressed doubts as to "the usefulness of discussing topics closely resembling those that have already been dealt with" by either the International Law Association or the Institute of International Law.

13. The following were the main issues highlighted in these statements:

(a) the meaning of legal stability, security, certainty and predictability;[17]

(b) support for the preliminary observation contained in the first issues paper that the United Nations Convention on the Law of the Sea does not exclude an approach based on the preservation of baselines and outer limits of maritime zones in the face of climate change-related sea-level rise once information about such maritime zones has been established and deposited with the Secretary-General,[18] or support for the solution of fixed baselines and/or outer limits of maritime zones;[19]

(c) support for the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders in August 2021, and references to regional State practice among the Pacific small island developing States or the Alliance of Small Island States;[20]

(d) support for the Declaration of the Heads of State and Government of the Alliance of Small Island States issued in September 2021;[21]

[17] The following States referred explicitly in their statements to legal stability, although implicit references were made in many other statements: Fiji, on behalf of the Pacific Islands Forum; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Sierra Leone; France; Kingdom of the Netherlands (which "is guided by the notions of legal certainty, stability and security, while remaining firmly grounded in the primacy of the [United Nations Convention on the Law of the Sea]"); Italy; Romania; Brazil; Chile ("'legal stability' meant the need to preserve the baselines and outer limits of maritime zones"); Viet Nam; Slovenia; New Zealand; Estonia; Maldives; Malaysia; Federated States of Micronesia ("legal stability, security, certainty, and predictability … mean[s] the need to maintain maritime zones without reduction, as well as the rights and entitlements that flow from them, regardless of climate change-related sea-level rise"); Papua New Guinea ("legal stability … means the need to preserve the baselines and outer limits of maritime zones"); Indonesia; Solomon Islands ("Solomon Islands holds the view that maritime boundaries and archipelagic baselines are fixed. Once national maritime zones are determined in accordance with [the United Nations Convention on the Law of the Sea] and deposited with the Secretary-General, our interpretation of international law is that they are not subject to change, despite sea-level rise. The foundational principles of certainty, predictability and stability in international law demand this result"); Cyprus; Spain; Greece; Tuvalu; Costa Rica; and Philippines.

[18] A/CN.4/740 and Corr.1, para. 104.

[19] Samoa, on behalf of the Pacific small island developing States; Fiji, on behalf of the Pacific Islands Forum; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Egypt; Cuba; Chile; Estonia; Maldives; Malaysia; Federated States of Micronesia; Argentina; Papua New Guinea; Australia ("[i]t is important that we protect our maritime zones, established in accordance with [the United Nations Convention on the Law of the Sea], in the face of sea-level rise"); Solomon Islands; Algeria; Cyprus; Tonga; Greece; Tuvalu; and Philippines (which "would caution against inference in favour of ambulatory baselines, absent a showing of State practice and *opinio juris* on the matter").

[20] Samoa, on behalf of the Pacific small island developing States; Fiji, on behalf of the Pacific Islands Forum; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Japan; New Zealand; Federated States of Micronesia; Papua New Guinea; Australia ("[w]hile preserving maritime zones to the greatest extent possible, the Declaration upholds the integrity of [the United Nations Convention on the Law of the Sea] and is supported by the legal principles underpinning it, including legal stability, security, certainty and predictability"); Latvia; Spain ("Spain understands and positively values the statement made by the Pacific Islands Forum"); Tonga; and Tuvalu.

[21] Fiji, on behalf of the Pacific Islands Forum; Antigua and Barbuda, on behalf of the Alliance of Small Island States; and New Zealand.

(e) the need to interpret the United Nations Convention on the Law of the Sea in the light of changing circumstances and/or taking into account the interests of States affected by sea-level rise;[22]

(f) the need to maintain the integrity of the Convention and/or the balance of rights and obligations under the Convention;[23]

(g) the need to take into account of equity,[24] the principle of *uti possidetis*,[25] the principle of good faith,[26] the principle that "the land dominates the sea", the principle of freedom of the seas, obligations for the peaceful settlement of disputes, protection of the rights of coastal and non-coastal States, and the principle of permanent sovereignty over natural resources;[27]

(h) the preservation of maritime boundary delimitation treaties and the decisions of international courts or tribunals;[28]

(i) the need to study navigational charts;[29]

(j) the issue of ambulatory versus fixed baselines;[30] and

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[22] Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden); Chile; Germany ("Germany commits to support the process and work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with [the United Nations Convention on the Law of the Sea], including through a contemporary reading and interpretation of its intents and purposes, rather than through the development of new customary rules"); Sri Lanka ("[p]erhaps it was time for the Commission to examine whether or not [the United Nations Convention on the Law of the Sea] could be modified by mutual consent or based on the subsequent practice of all States parties"); Estonia; Papua New Guinea; Russian Federation ("[a] practical solution was needed that was aligned with the United Nations Convention on the Law of the Sea, on the one hand, and reflected the concerns of States affected by sea-level rise, on the other"); Solomon Islands; Spain ("[i]t was imperative for the Commission to continue working on the topic in a manner that ensured respect for and integrity of the United Nations Convention on the Law of the Sea, and also allowed for the identification of special formulas that reflected the extraordinary circumstances that various States, especially small island developing States, endured as a consequence of sea-level rise due to climate change"); Tonga (the United Nations Convention on the Law of the Sea "must be interpreted and applied in a way that respects the rights and sovereignty of vulnerable small island States"); and Greece ("[w]ith respect to the topic of sea-level rise, the [United Nations Convention on the Law of the Sea] provides the answers to the questions raised, within their proper context").

[23] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); Fiji, on behalf of the Pacific Islands Forum; Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (which also referred to predictability and stability in connection with the integrity of the Convention); Singapore; Italy; China; United States (which emphasized "the universal and unified character of the [United Nations] Convention on the Law of the Sea"); Romania; Cuba; Japan; Chile; Germany; Viet Nam; Czech Republic (which also referred to legal stability, certainty and predictability in connection with the integrity of the Convention); Malaysia; Australia (for which the Convention "reflects our commitment to an international rules-based order, as the basis for international stability and prosperity"); Russian Federation; Cyprus; Spain; Greece; Costa Rica; Philippines; and Jordan.

[24] Singapore; Islamic Republic of Iran; Federated States of Micronesia; and Philippines ("[e]cological equity as a principle is key: no State should suffer disproportionately from effects of climate change affecting all").

[25] Egypt, El Salvador and Philippines.

[26] El Salvador and Federated States of Micronesia.

[27] Belarus and Federated States of Micronesia.

[28] Singapore; Italy ("the principle of fundamental change of circumstances [applies] neither to existing delimitation agreements nor to decisions rendered in arbitral or judicial decisions"); Chile; Estonia; Malaysia; Argentina; Poland; Indonesia; Algeria; Cyprus; Greece; and Philippines.

[29] South Africa.

[30] United States, Israel, Romania, Sri Lanka and Ireland.

(k) the importance of distinguishing between *lex lata*, *lex ferenda* and policy options in the future work on this topic.[31]

14. In 2022, 67 delegations delivered 68 statements by in the Sixth Committee that referred to the topic.[32] The majority of these statements referred to the second issues paper, dedicated to the subtopics of statehood and the protection of persons affected by sea-level rise, and to the debates that took place in the Study Group and the Commission at its seventy-third session (2022). However, 17 statements also referred to issues relating to the law of the sea in connection with sea-level rise,[33] mainly the following: support for the solution of fixed baselines;[34] support for legal stability;[35]

[31] South Africa, Germany, Ireland, Austria and Poland.

[32] Croatia; France; European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); Bahamas, on behalf of the Caribbean Community; Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden); Singapore; Poland; Slovenia; China; India; Italy; El Salvador; Belarus; Hungary; United States; Romania; Malaysia; Austria; Mexico; Sierra Leone; Germany; Islamic Republic of Iran; Brazil; Colombia; Slovakia; Estonia; Armenia; Australia; Cuba; Portugal; Philippines; Ireland; Kingdom of the Netherlands; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Israel; Samoa, on behalf of the Pacific small island developing States; Cameroon; Bangladesh; Maldives; Viet Nam; South Africa; United Kingdom; Russian Federation; Chile; Thailand; Egypt; Spain; Federated States of Micronesia; Czech Republic; Cyprus; Japan; Algeria; Indonesia; United Republic of Tanzania; Papua New Guinea; Jamaica; Liechtenstein; Côte d'Ivoire; Peru; Nicaragua; Türkiye; Republic of Korea; New Zealand; Argentina; Bulgaria; Holy See (Observer); and State of Palestine (Observer). El Salvador referred to the topic in two statements before the Sixth Committee (see https://www.un.org/en/ga/sixth/77/summaries.shtml, 21st and 26th plenary meetings).

[33] Croatia; European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); India; United States; Romania; Germany; Cuba; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Samoa, on behalf of the Pacific small island developing States; Thailand; Federated States of Micronesia; Cyprus; Indonesia; Papua New Guinea; Türkiye; New Zealand; and Bulgaria.

[34] Croatia ("Croatia holds the view that baselines are fixed and, once determined, national maritime zones are not subject to change, despite sea-level rise"); European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine) (which noted that "there is no express obligation on States under the United Nations Convention on the Law of the Sea to periodically review and update all the charts and coordinates [that] they have drawn (or agreed) and duly published in accordance with the relevant provisions of the Convention"); United States (which had "announced a new policy on sea-level rise and maritime zones. Under this policy, which recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise, the United States will work with other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits and will not challenge such baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change"); Romania (which noted that "preserving the baselines and outer limits of maritime zones is crucial to legal stability"); Cuba; Antigua and Barbuda, on behalf of the Alliance of Small Island States; Samoa, on behalf of the Pacific small island developing States; Cyprus; Papua New Guinea; New Zealand; and Bulgaria.

[35] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine) ("there are major legal and policy reasons to recognize the stability provided for by the maritime delimitations established either by treaty or by adjudication"); United States (see footnote 34 above); Romania (see footnote 34 above); Germany (which noted that, "[i]n our view, a contemporary reading of [the rules under the United Nations Convention on the Law of the Sea regarding the stability of baselines] gives the coastal State the right to update its baselines when the sea level rises or falls or the coastline moves, but it does not require the coastal State to do so"); Antigua and Barbuda, on the behalf of Alliance of Small Island States; Samoa, on behalf of the Pacific small island developing States; Thailand; Indonesia; and Bulgaria.

the principle that "the land dominates the sea";[36] the need to maintain the integrity of the United Nations Convention on the Law of the Sea;[37] the need to respect rights of third States;[38] the preservation of maritime boundary delimitation treaties and the decisions of international courts or tribunals;[39] the issue of customary international law in relation to the topic;[40] and the need to interpret the Convention in the light of changing circumstances and/or taking into account the interests of States affected by sea-level rise.[41]

15. The Co-Chairs of the Study Group have continued to undertake numerous outreach efforts to explain the progress of the Commission's work on the topic.

II. Issue of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones

16. At the seventy-second session of the Commission (2021), the debate in the Study Group and in the Commission on the first issues paper focused, *inter alia*, on the important issue of legal stability. Some members of the Study Group agreed on the need for stability, security, certainty and predictability, and the need to preserve the balance of rights and obligations between coastal States and other States, yet did not agree on whether the first issues paper's preliminary observations reflected those needs. Further, some members took the view that the statements by States in favour of stability, certainty and predictability could be open to different interpretations, and called into question the first issues paper's repeated reliance on "concerns expressed by Member States". It was noted that the terms "stability", "certainty" and "predictability" were referred to in the jurisprudence in relation to land boundary delimitation and not maritime delimitation, where the considerations were different. At the same time, it was noted that the statements delivered in the Sixth Committee by the delegations of States affected by sea-level rise seemed to indicate that, by "legal stability", they meant the need to preserve the baselines and outer limits of maritime zones. The Study Group welcomed the suggestion that the meaning of "legal stability" in connection with the present topic needed further clarification, including by addressing specific questions to the Member States.[42]

17. Another important part of the debate on legal stability focused on the relevance of the preliminary observation from the first issues paper regarding the possible use

[36] Croatia; and European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine).

[37] Croatia; European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); and Romania.

[38] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine).

[39] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); Thailand; and Cyprus.

[40] European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine); Federated States of Micronesia; and Papua New Guinea.

[41] Samoa, on behalf of the Pacific small island developing States; Federated States of Micronesia; Papua New Guinea; and New Zealand.

[42] A/76/10, para. 266.

of fixed baselines and outer limits of the maritime zones measured from the baselines as a response to the concerns of the States affected by sea-level rise. A substantive discussion regarding the interpretation of the provisions of the United Nations Convention on the Law of the Sea pertaining to the ambulatory or fixed character of baselines took place in the Study Group.[43]

18. Beyond the doctrinal perspective on the issue of legal stability, it is highly relevant to take into account the views expressed by Member States in their submissions to the Commission and in their statements delivered in the Sixth Committee after the first issues paper was released in 2020, and, especially, in reaction to the debate in the Study Group and in the Commission in 2021. Indeed, this methodological approach is confirmed by the references in the 2021 annual report of the Commission to the need to address specific questions to the Member States in further clarifying the meaning of "legal stability", and to the agreement among members of the Study Group on the importance of and need for assessing State practice on questions relating to the freezing of baselines.[44]

19. As evidenced below, the Member States, in their submissions and statements, attached concrete meaning to "legal stability", connected to the importance of fixing the baselines from which the maritime zones are measured and the outer limits of these zones, thus preserving their entitlements to these zones. The issue of legal stability in connection with delimitation agreements is not covered in the present chapter, but will be examined later, in chapters III and IV, in the context of analysis of the principles of *uti possidetis juris* and *rebus sic stantibus*. Member States were clear and unequivocal as to their support for the observations in paragraph 141 of the first issues paper in this respect, especially subparagraph (c).[45]

A. Views of Member States related to legal stability and the preservation of baselines and maritime zones

1. Submissions of Member States to the Commission

20. Antigua and Barbuda, in its submission to the Commission, in 2021,[46] makes a direct and concrete reference to the meaning that it attaches to legal stability, which is connected with the solution of fixed baselines: "The baselines may remain fixed despite sea-level rise to abide with the principles of certainty and stability … Antigua and Barbuda shares the concerns expressed in the [first issues paper] that ambulatory baselines 'affect legal stability, security, certainty and predictability'".[47] It states the following:

> Antigua and Barbuda's legal opinion, which is backed by its State practice …, is that maritime baselines established in accordance with [the United Nations Convention on the Law of the Sea] may remain fixed despite sea-level rise and, additionally, States have no obligation to revise maritime baselines because of sea-level rise. … [B]aselines may remain fixed despite sea-level rise to abide

[43] *Ibid.*, paras. 270–275.
[44] *Ibid.*, paras. 266 and 270.
[45] A/CN.4/740 and Corr.1, para. 141, especially 141 (c): "Sea-level rise cannot be invoked in accordance with article 62, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, as a fundamental change of circumstances for terminating or withdrawing from a treaty which established a maritime boundary, since maritime boundaries enjoy the same regime of stability as any other boundaries."
[46] Submission of Antigua and Barbuda. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[47] *Ibid.*, para. 17; and A/CN.4/740 and Corr.1, para. 77.

> with the principles of certainty and stability. Furthermore, ambulatory baselines are inequitable and unfair.[48]

Antigua and Barbuda again makes the direct connection between legal stability and fixed baselines: "Fixed baselines respect international law while ambulatory baselines may lead to the violation of international law principles … Interpreting baselines as fixed would be more consistent with the principles of certainty and stability of international law."[49] It goes further with this reasoning by arguing that the United Nations Convention on the Law of the Sea should be interpreted in the light of the current challenges prompted by sea-level rise. In this respect, it invokes article 7, paragraph 2, of the Convention, on deltas:

> [U]nder this provision, States can keep their baseline when the low-water line regresses but can still move them forward in the event the low-water line were to expand … [S]ea-level rise triggers article 7, [paragraph 2,] of [the Convention] and allows for the drawing of straight baselines "along the furthest seaward extent of the low-water line" that "shall remain effective until changed by the coastal State" "notwithstanding subsequent regression of the low-water line". Indeed, the "other natural conditions" and "regression of the low-water line" included in the article can reasonably be read to include sea-level rise. Thus, even with sea-level rise, which causes a coastline to be highly unstable, and notwithstanding subsequent regression of the low-water line, baselines can remain fixed.[50]

Antigua and Barbuda concludes by referring to its State practice: "Antigua and Bermuda deposited its maritime charts with the United Nations … In accordance with the practice of fixed maritime entitlements, Antigua and Barbuda has never updated its deposited charts as sea levels have risen. This practice is consistent with [paragraph 104 (f) of the first issues paper], that found that States do not have to update their baseline and can preserve their entitlements."[51] Moreover, its Maritime Areas Act 1982 "provides for no mandatory update of those charts or lists".[52]

21. Colombia, in its submission to the Commission, in 2022, does not refer directly to legal stability, but refers extensively to the issue of baselines. It recalls the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders in August 2021, "in which the member countries of the Forum state that … they do not intend to review the baselines or limits of their maritime zones as notified [at the relevant time] to the Secretary-General". While Colombia has not yet formally decided on a specific position regarding that intention, it notes the following:

> [It] will continue to review the issue, in particular because, owing to its geographical location and the configuration of its coastline and island territories, it is among the States that will be the worst affected by climate change and rising sea levels. … [B]aselines, although they are of a variable nature insofar as they change in accordance with changes in the coastline and variations in the low-water line, have to be set out on maps, and there is no express obligation to modify or update them. … [T]here would be no legal impediment to updating or revising registered and publicized maps or coordinates, but nor is there a positive obligation to do so.[53]

[48] Submission of Antigua and Barbuda (see footnote 46 above), paras. 10 and 13.
[49] *Ibid.*, at para. 12, and para. 20.
[50] *Ibid.*, paras. 19 and 22–23.
[51] *Ibid.*, para. 45.
[52] *Ibid.*, para. 44.
[53] Submission of Colombia, pp. 2–3. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

22. New Zealand, in its submission to the Commission, in 2022, refers to its State practice: "New Zealand has not updated [its] maritime zone submission since it was submitted [on 8 March 2006]. In the event that New Zealand experiences coastal regression as a result of climate change-related sea-level rise, New Zealand does not intend to update its notification of 8 March 2006."[54] This practice is presented as fully in accordance with Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders on 6 August 2021:

> The Declaration … makes clear our intention to maintain our zones, without reduction. The Declaration records the position of Members of the [Pacific Islands Forum] that maintaining maritime zones established in accordance with [the United Nations Convention on the Law of the Sea], and rights and entitlements that flow from them, notwithstanding climate change-related sea-level rise, is supported by both the Convention and the legal principles underpinning it.[55]

23. New Zealand also informs the Committee about the practice of the Cook Islands:

> The Cook Islands is a self-governing territory in free association with New Zealand, and a party to [the United Nations Convention on the Law of the Sea] in its own right. New Zealand notes that when the Cook Islands deposited its list of geographic coordinates to the Secretary-General on 12 August 2021 in accordance with [the Convention], it further transmitted … the following observation of relevance to this topic: 'The Cook Islands states its understanding that it is not obliged to keep under review the maritime zones reflected in the present official deposit of lists of geographical coordinates of points and accompanying illustrative maps, delineated in accordance with [the Convention, and that the Cook Islands intends to maintain these maritime zones in line with that understanding, notwithstanding climate change-induced sea-level rise.'[56]

24. The Pacific Islands Forum, in its submission to the Commission, in 2021, refers, *inter alia*, to the practice of Fiji: "Fiji's Climate Change Act 2021 is a most recent State practice that recognizes by law the permanence of Fiji's maritime boundaries and maritime zones notwithstanding the effects of climate change and sea-level rise, aligned to the [Pacific Islands Forum] position in the 2021 [Forum] Declaration."[57]

25. The Philippines, in its submission to the Commission, in 2022, notes the following regarding the stability of baselines in case of sea-level rise:

> We are … of the view that any adjustment of the baselines should result in expansion rather than diminution of our maritime zones. Erosion of coastlines and inundation of features as a result of sea-level rise, for example, should not affect the baselines that the State has established. … Further, in accordance with article 7 (2) of [the United Nations Convention on the Law of the Sea], there is no need to change the baselines if it would result in a reduction of maritime zone areas as a result of the regression of the coastline.[58]

26. Japan, in its submission to the Commission, in 2022, noted that the Leaders Declaration adopted at the Ninth Pacific Islands Leaders Meeting, on 2 July 2021,

[54] Submission of New Zealand, p. 1. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[55] *Ibid*.
[56] *Ibid.*, p. 2.
[57] Submission of the Pacific Islands Forum in 2021, para. 44. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[58] Submission of the Philippines. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

referred to the "importance of protecting maritime zones established in accordance with" the United Nations Convention on the Law of the Sea.[59]

27. France, in its submission to the Commission, in 2022, is in favour of interpreting the United Nations Convention on the Law of the Sea in order to find solutions for the impact of sea-level rise, even if it does not explicitly mention "legal stability":

> France considers that the Convention's framework and ambitions help us to understand this relatively new legal issue, without requiring a new multilateral framework. In this regard, it is … important to note that the Convention provisions grant coastal States room for manoeuvre when it comes to taking the initiative to modify or maintain declared data regarding baselines and limits of their maritime zones. The Convention leaves it to coastal States to decide whether to make modifications to this data, which means that so long as a coastal State does not decide to make such modifications, the initially declared data remain in force.[60]

France goes on to note that "some of the Convention's provisions could be applied to sea-level rise", with direct reference to article 7, paragraph 2, regarding deltas, which, according to France, can be interpreted "as being applicable to situations resulting from sea-level rise, independently [of] the presence of a delta". It takes that reasoning further, noting that article 7, paragraph 4, of the Convention could similarly "be applied in the context of sea-level rise, because it enables a coastal State to establish straight baselines from low-tide elevations".[61]

28. Germany, in its submission to the Commission, in 2022, goes in the same direction and is clear:

> [O]n the issue of the preservation of baselines and maritime zones … Germany commits to … work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with the [United Nations Convention on the Law of the Sea], including through a contemporary reading and interpretation of its intents and purposes, rather than through the development of new customary rules.[62]

Germany is explicitly in favour of interpreting the Convention in order to find solutions for the impact of sea-level rise:

> Through such contemporary reading and interpretation, Germany finds that [the Convention] allows for freezing of [baselines and outer limits of maritime zones] once duly established, published and deposited … in accordance with the Convention.
>
> [The Convention] does not contain any explicit obligations to update [either] normal baselines that have been marked … [or] straight baselines that have been marked, published and deposited …, as well as no further obligation to update a State's relevant charts and lists of geographical coordinates with regard to the [exclusive economic zone] … and the continental shelf ….

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[59] Submission of Japan. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms. See also para. 12 of the Leaders Declaration, available from https://www.mofa.go.jp/files/100207980.pdf.

[60] Submission of France, pp. 1–2. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms. France also notes that the Convention "does not provide for an obligation, for coastal States, to re-evaluate and update their baselines", that "States may update their baselines and their national maritime zone notifications, but they are not obliged to do so", and that the Convention "does not provide for an obligation to update the charts and lists of geographical coordinates, once published pursuant to its provisions" (*ibid.*, pp. 3–4).

[61] *Ibid*., p. 2.

[62] Submission of Germany, p. 1. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

> However, Germany concludes [that] the concept of fictitious baselines [is] already immanent within [the Convention], in particular when a coastline is highly unstable due to the presence of "a delta and other natural conditions" [in accordance with article 7, paragraph 2, of the Convention].
>
> Since this provision has been translated as "delta or other natural conditions" in several translations by [European Union member States], Germany suggests to examine if a contemporary understanding of the provision could broaden the scope of the exception pursuant to [article 7, paragraph 2, of the Convention] and provide further legal certainty with regard to States freezing their baselines and outer limits of maritime zones.[63]

Germany continues to present this interpretation in the following terms:

> Germany … considers that once the baselines and lines of delimitation mentioned in [article 16 of the Convention] have been drawn in accordance with the Convention and their charts and lists of geographical coordinates duly published and deposited with the [Secretary-General], these baselines and lines of delimitation, as well as the charts and geographical coordinates, remain stable until the coastal State decides to update them again.
>
> Germany also considers that once a coastal State has duly published the outer limit lines and the lines of delimitation of its [exclusive economic zone] and continental shelf in accordance with the Convention and duly published and deposited their relevant charts and lists of geographical coordinates with the [Secretary-General], … the Convention does not impose a further duty on the coastal State to keep these under review and/or update them regularly (but the coastal State remains entitled to do so).[64]

29. Ireland, in its submission to the Commission, in 2022, informs the Committee of the following:

> Ireland notes that its practice in this field to date has not been formulated expressly in contemplation of sea-level rise. In Ireland normal baselines are ambulatory and are determined by the low-water line along the coast as marked on the officially recognized large-scale charts. These charts are revised from time to time and accordingly the normal baselines may change over time depending on natural processes.

At the same time, Ireland "notes that in contrast to straight baselines, coastal States are not required by [the United Nations Convention on the Law of the Sea] to deposit details of normal baselines with the Secretary-General".[65]

30. The Kingdom of the Netherlands, in its submission to the Commission in 2022, provides interesting information regarding its efforts to ensure the stability of its coastline:

> In respect of the European part of the [Kingdom of the] Netherlands a so-called "basic coastline" has been established (for policy purposes). … An important tool to maintain and preserve the coastline is the "basic coastline", which is defined as an imaginary, indicative line along our coast, in between the low-water line along the coast at the bottom and the dune foot … at the top. … The basic coastline ("approach") is evaluated every six years in terms of location and efficiency. It is also periodically reviewed whether the effects of the rising sea level should be taken into account. … In respect of the European part of the

[63] *Ibid.*, p. 2.
[64] *Ibid.*, p. 3.
[65] Submission of Ireland. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

> [Kingdom of the] Netherlands, the current adaptation measures executed by the Dutch authorities in order to preserve the coastline take the form of sand nourishment …. The basic coastline remains basically the same.[66]

31. Poland, in its submission to the Commission, in 2022, notes that it "does not consider modifying of maritime boundary treaties due to sea-level rise for now".[67]

32. The United Kingdom of Great Britain and Northern Ireland, in its submission to the Commission, in 2022, refers to the frequency of updating of national legislation regarding baselines, and of national maritime zone notifications deposited with the Secretary-General: "There has been no change to this legislation, including to the specified coordinates, since it was originally made [in 2014]".[68]

2. Statements by Member States in the Sixth Committee of the General Assembly

33. The statements presented from 2020 to 2022 on behalf of the Pacific Islands Forum and by the member States of the Forum are clear as to the meaning attached to legal stability.

34. For instance, Tuvalu, in its statement on behalf of the Pacific Islands Forum in 2020, refers directly to legal stability:

> As mentioned by the [first issues paper] and highlighted by many Member States, there is an overarching concern for preserving legal stability, security, certainty and predictability at the very centre of this topic. This would also be in line with the general purpose of the [United Nations Convention on the Law of the Sea], as reflected in its preamble. … The practice of our region, as well as the practice of other regions, demonstrates the interest of many Member States in preserving the legal stability and security of their baselines and of outer limits of maritime zones measured from the baselines. … In this context, we note with appreciation the preliminary conclusions set out in [paragraph] 104 of the first issues paper and particularly draw attention to the points in [subparagraphs] (e) and (f) that the Convention does not exclude an approach based on the preservation of baselines and outer limits once notifications have been deposited.[69]

35. Fiji, in its statement on behalf of the Pacific Islands Forum in 2021, explicitly clarifies the meaning of legal stability:

> In the interest of absolute clarity, particularly in light of the discussion in the Commission this year on this point, we stress that when we refer to the need for legal stability, security, certainty and predictability in relation to the subtopic of the law of the sea, we mean that this is achieved through the preservation of maritime zones and the rights and entitlements that flow from them despite climate change-related sea-level rise.[70]

It also specifies the following:

> The Pacific Islands Forum's approach to this issue … preserves maritime zones in the face of climate change-related sea-level rise. … We also recognize that

[66] Submission of the Kingdom of the Netherlands, pp. 2–3. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[67] Submission of Poland, p. 2. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[68] Submission of the United Kingdom, para. 6. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.
[69] Statement of Tuvalu, on behalf of the Pacific Islands Forum, in 2020. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.
[70] Statement of Fiji, on behalf of the Pacific Islands Forum, in 2021, para. 12. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#19mtg.

> other countries, including small island developing States and low-lying States outside of our Pacific region, similarly require stability, security, certainty and predictability of their maritime zones.[71]

36. In the same statement, Fiji refers to the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders on 6 August 2021, as "a formal statement of Forum Members' view on how the [United Nations Convention on the Law of the Sea] rules on maritime zones apply in the situation of climate change-related sea-level rise" and "a good-faith interpretation of [the Convention] and a description of the current and intended future practice of our members in [the] light of this interpretation".[72]

37. Similar references to the importance of the Declaration in connection with legal stability can be found in many statements by Forum member States in 2021 and 2022. For example, Papua New Guinea, in its statement in 2021, noted the following:

> Through this Declaration, Pacific Island Forum Members intend to promote stability, security, certainty and predictability of maritime zones by clarifying our good-faith interpretation of [the Convention] as it applies to the relationship between climate change-related sea-level rise and maritime zones.
>
> The Declaration proclaims that the Pacific Islands Forum Members' maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with [the Convention], and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.
>
> … [T]his proclamation, and the current and intended future State practice in our region, is supported by [the Convention] and its underpinning legal principles, including those of stability, security, certainty and predictability. Furthermore, preserving maritime zones in the manner set out in the Declaration contributes to a just international response to climate change-related sea-level rise.[73]

Papua New Guinea also notes in its statement in 2022 that this approach of the Declaration "is in accord with the observations in paragraphs 104 (e) and 104 (f) of the first issues paper. We are pleased at the positive responses to the [Forum] Declaration that have been expressed to us by many members of the international community across different regions".[74] Similarly, New Zealand, in its statement in 2021, notes that the Declaration "promotes the principles of legal stability and certainty over maritime zones",[75] and, in its statement in 2022, refers again to "the approach set out" in the Declaration.[76] Similar references are made by Samoa, in its statement on behalf of the Pacific small island developing States in 2021;[77] by the Federated States of Micronesia in its statement in 2021;[78] and by Australia in its

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[71] Statement of Fiji, on behalf of the Pacific Islands Forum, in 2021 (see footnote 70 above), paras. 8 and 11.

[72] *Ibid.*, paras. 10 and 13.

[73] Statement of Papua New Guinea in 2021, p. 3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[74] Statement of Papua New Guinea in 2022, p. 2. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (29th plenary meeting).

[75] Statement of New Zealand in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[76] Statement of New Zealand in 2022, p. 2. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (29th plenary meeting).

[77] Statement of Samoa, on behalf of the Pacific small island developing States, in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#19mtg.

[78] Statement of the Federated States of Micronesia in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

statement in 2021 ("While preserving maritime zones to the greatest extent possible, the Declaration … is supported by the legal principles underpinning it, including legal stability, security, certainty and predictability").[79]

38. In its statement on behalf of the Pacific small island developing States in 2020, Fiji refers to efforts to ensure that "maritime zones could not be challenged or reduced as a result of sea-level rise and climate change", and calls on other member States to "recognize the need [to retain] maritime zones and the entitlements that flow from such maritime zones once delineated in accordance with [the United Nations Convention on the Law of the Sea]".[80] Samoa, in its statement on behalf of the Pacific small island developing States in 2021, goes into further detail on the need to maintain the stability of maritime zones and of the entitlements and rights of coastal States affected by sea-level rise:

> Currently, the mean low-water lines along coasts around the world as marked on large-scale charts officially recognized by the relevant coastal States are used as normal baselines for measuring maritime zones under [the Convention]. These physical points will likely change in the future due to climate change-related sea-level rise, but [the Convention does not explicitly state what this means for maritime zones and the rights and entitlements that flow from them. It is important that [the Convention] is applied in such a way that respects the rights and obligations in the Convention, including the rights and entitlements of island States flowing from their maritime zones. We note with appreciation the preliminary observations set out in [paragraph 104 of the first issues paper] and particularly draw attention to the points in [subparagraphs] (e) and (f) that [the Convention] does not exclude an approach based on the preservation of baselines and outer limits of maritime zones in the face of climate change-related sea-level rise once information about such maritime zones has been established and deposited with the … Secretary-General.
>
> … Many [Pacific small island developing States] have built on regional State practice by adopting domestic legislation purporting to maintain their maritime limits for perpetuity, including the description of maritime boundary lines by reference to geographic coordinates and defining the outer limits of our continental shelves beyond 200 nautical miles and reference to neutral decision-making processes under [the Convention]. … This practice grounds the observations of the Co-Chairs that, in order to preserve maritime zones and the rights and entitlements that flow from them, States parties [to the Convention] are not obligated to update their maritime zone coordinates or charts once deposited with the … Secretary-General.[81]

In its statement on behalf of the Pacific small island developing States in 2022, Samoa notes that "[Pacific Islands] Forum Leaders consider that maritime zones, once established and notified to the Secretary-General … in accordance with [the Convention], and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise".[82]

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[79] Statement of Australia in 2021, p. 2. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[80] Statement of Fiji, on behalf of the Pacific small island developing States, in 2020, p. 2. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

[81] Statement of Samoa, on behalf of the Pacific small island developing States, in 2021 (see footnote 77 above).

[82] Statement of Samoa, on behalf of the Pacific small island developing States, in 2022, p. 2. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).

39. Papua New Guinea, a Pacific Islands Forum member, refers to legal stability in its statement in 2020:

> For Papua New Guinea, as an archipelagic States, the need to preserve the legal stability, security, certainty and predictability of our maritime zones is of very high priority, including as regards our archipelagic waters. We therefore welcome and agree with the emphasis in the [Study Group Co-Chairs'] first issues paper on the need to preserve legal stability, security, certainty and predictability.[83]

In its statement in 2021, it is even more direct as to the meaning of legal stability:

> [W]e recognize the need for legal stability, security, certainty and predictability, to maintain peace and security and orderly relations between States, and to avoid conflict …. By "legal stability", we mean the need to preserve the baselines and outer limits of maritime zones. … [T]here are no provisions in [the Convention] that require States to keep under review and update their baselines and outer limits of maritime zones, once the relevant information has been deposited with the Secretary-General of the United Nations in accordance with [the Convention].[84]

It makes similar references in its statement in 2022.[85]

40. In its statement in 2020, the Federated States of Micronesia, another Pacific Islands Forum member, refers explicitly to legal stability:

> We agree with the [first issues paper]'s observations that the 1982 United Nations Convention on the Law of the Sea … does not contemplate the phenomenon of sea-level rise, does not prohibit States parties from preserving for perpetuity their maritime zones and the entitlements that flow from them once those zones are delineated in accordance with the Convention, and should be interpreted and applied in a manner that fosters legal stability, security, certainty and predictability.[86]

It continues by providing information about its State practice in this regard:

> [E]arlier this year, [the Federated States of] Micronesia officially deposited its lists of geographical coordinates of points and accompanying illustrative maps of our maritime zones with the Secretary-General …. In that process, [the Federated States of] Micronesia formally included with its deposit a set of written observations which, among other things, underscored that [the Federated States of] Micronesia is a specially-affected State with respect to sea-level rise and climate change; stated [the Federated States of] Micronesia's understanding that it is not obliged to keep under review the maritime zones reflected in its official deposit of lists of geographical coordinates of points and accompanying illustrative maps, as delineated in accordance with the Convention; and announced that [the Federated States of] Micronesia intends to maintain these maritime zones in line with that understanding, notwithstanding climate change-induced sea-level rise. These observations have been included in the formal maritime zone notification circulated earlier this year by the Secretary-General as depositary of the Convention.[87]

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[83] Statement of Papua New Guinea in 2020, p. 3. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

[84] Statement of Papua New Guinea in 2021 (see footnote 73 above), pp. 2–3.

[85] Statement of Papua New Guinea in 2022 (see footnote 74 above).

[86] Statement of the Federated States of Micronesia in 2020, p. 1. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg

[87] *Ibid.*, p. 2.

It is even more explicit in its statement in 2021:

> [The Federated States of] Micronesia stresses that when we speak of the importance of legal stability, security, certainty and predictability in connection with the law of the sea elements of the sea-level rise topic, we mean the need to maintain maritime zones without reduction, as well as the rights and entitlements that flow from them, regardless of climate change-related sea-level rise. … [T]he rights and entitlements that flow from maritime zones that are originally established by a coastal State must never be reduced solely on the basis of climate change-related sea-level rise. … [T]he preservation of maritime zones and the rights and entitlements that flow from them is the most suitable and equitable approach in order to achieve that goal.[88]

41. In its statement in 2020, Tonga, also a Pacific Islands Forum member, takes the same line:

> Tonga maintains that the baselines which determine our territorial boundaries, once established under the United Nations Convention on the Law of the Sea, should remain unchanged despite the effects of sea-level rise and any climate change modification that might ensue. Our sovereignty must not be compromised to that effect.[89]

It is more explicit in its statement in 2021:

> The catastrophic impacts of rising sea levels cannot be emphasized enough.
>
> This unprecedented reality was not contemplated 40 years ago when the legal regime for ocean governance under the 1982 United Nations Convention on the Law of the Sea … was being negotiated. The current deliberations of the Commission are key to filling this gap and strengthening the [Convention] framework to address the modern realities of sea-level rise.
>
> It is for the aforementioned [reasons] that our Pacific Islands Forum leaders are committed to ensuring [that] maritime zones of Pacific Member States are delineated in accordance with [the Convention] which should not be challenged or reduced due to climate change-induced sea-level rise. We maintain the importance of preserving baselines and outer limits of maritime zones measured therefrom and their entitlements, despite climate change-induced sea-level rise. [The Convention must be interpreted and applied in a way that respects the rights and sovereignty of vulnerable small island States. …
>
> We welcome the Commission's … preliminary conclusion in [paragraph 104 of the first issues paper] that preserving maritime zones once notifications have been deposited can be consistent with the Convention.[90]

42. In its statement in 2020, Solomon Islands, another Pacific Islands Forum member, also refers to fixed baselines in the context of stability:

> [The United Nations Convention on the Law of the Sea] does not adequately consider rapidly rising sea levels. This ambiguity was underscored in the Study Group's issues paper. …
>
> My delegation would like to reaffirm its opinion that maritime boundaries and archipelagic baselines are fixed. Once national maritime zones are determined in accordance with [the Convention] and deposited with the Secretary-General,

[88] Statement of the Federated States of Micronesia in 2021 (see footnote 78 above).
[89] Statement of Tonga in 2020. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.
[90] Statement of Tonga in 2021, pp. 1–2. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

> our interpretation of international law is that they are not subject to change, despite sea-level rise. Fixed baselines contribute to the certainty, predictability, and stability of maritime boundaries in international law. Fixed baselines ensure fair and equitable results, by preserving existing maritime entitlements which [small island developing States] and so many other States rely on.
>
> This stability is of great importance to Solomon Islands …. Consistent with international law and regional practice, Solomon Islands has deposited geographic coordinates for nearly all of its maritime zones with [the Division for Ocean Affairs and the Law of the Sea]. These zones are fixed and are not to be altered, despite sea-level rise.[91]

Solomon Islands repeats the same position in its statement in 2021:

> Once national maritime zones are determined in accordance with [the Convention] and deposited with the Secretary-General, our interpretation of international law is that they are not subject to change, despite sea-level rise. The foundational principles of certainty, predictability and stability in international law demand this result.[92]

43. In its statement in 2021, Tuvalu, another Pacific Islands Forum member, also refers explicitly to legal stability: "As mentioned in the [first issues paper] and highlighted by many Member States, there is an overarching concern for *preserving legal stability, security, certainty and predictability* at the very centre of this topic. This would also be in line with the general purpose of [the United Nations Convention on the Law of the Sea], as reflected in its preamble."[93]

44. In its statement in 2021, Australia, also a Pacific Islands Forum member, refers to the issue of stability in the following terms:

> It is important that we protect our maritime zones, established in accordance with [the United Nations Convention on the Law of the Sea], in the face of sea-level rise.
>
> … [T]he Declaration [on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise] adopted by Pacific Islands Forum Leaders on 6 August 2021 … is supported by the legal principles underpinning it, including legal stability, security, certainty and predictability.
>
> Australia is committed to working together with all States to preserve maritime zones and the rights and entitlements that flow from them … in a manner that is consistent with international law, particularly [the Convention].[94]

45. In its statement in 2020, New Zealand, another Pacific Islands Forum member, directly refers to legal stability: "New Zealand agrees that the principle of stability and certainty underlies [the United Nations Convention on the Law of the Sea], along with justice and equity, good faith, reciprocity and the duty of States to cooperate. … [T]hese principles are all relevant to the issue of sea-level rise and international law."[95] It goes further in its statement in 2021:

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[91] Statement of Solomon Islands in 2020, pp. 2–3. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

[92] Statement of Solomon Islands in 2021, p. 1. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[93] Statement of Tuvalu in 2021, p. 2. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#23mtg.

[94] Statement of Australia in 2021 (see footnote 79 above), p. 2.

[95] Statement of New Zealand in 2020, p. 3. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

> We recall that [the Convention] was adopted as an integral package containing a delicate balance of rights and obligations, which are integral to many States' development pathways. It is in the interests of the international community to preserve this balance and to ensure [that] there is certainty, security, stability and predictability over maritime zones. New Zealand is committed to working constructively with other States to this end.[96]

It also refers to the "urgency" of the "securing maritime zones for future generations", to the Pacific Islands Forum Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders on 6 August 2021, and to the Declaration of the Heads of State and Government of the Alliance of Small Island States, issued in September 2021.[97]

46. Belize, in its statement on behalf of the Alliance of Small Island States in 2020, points in the same direction:

> [W]e agree with the observation of the first issues paper that nothing prevents Member States from depositing geographic coordinates or large-scale charts concerning the baselines and outer limits of maritime zones measured from baselines, in accordance with [the United Nations Convention on the Law of the Sea], and then not updating those coordinates or charts, in order to preserve their entitlements. … [A]s indicated in the first issues paper, an approach responding adequately to the need to preserve legal stability, security, certainty and predictability is one based on the preservation of baselines and outer limits of maritime zones measured therefrom and their entitlements.
>
> … [T]here is a body of State practice under development regarding the preservation of maritime zones and the entitlements that flow from them. Many small island and low-lying States have taken political and legislative measures to preserve their baselines and the existing extent of their maritime zones, through domestic legislation, maritime boundary agreements, and deposit of charts or coordinates and declarations attached thereto.
>
> … This State practice grounds the observations of the Co-Chairs that, in order to preserve maritime zones and the entitlements that flow from them, State Parties are not obligated to update their coordinates or charts once deposited.
>
> … Nevertheless, the absence of a general customary rule does not have an effect on the interpretation of the Convention, based on subsequent practice of its States parties.[98]

Antigua and Barbuda, in its statement on behalf of the Alliance of Small Island States, in 2021, reinforces the meaning attached to legal stability as expressed in 2020: "For small island developing States, legal stability, security, certainty and predictability in relation to our maritime zones are of paramount importance. As we stated last year, this is achieved through the preservation of baselines and outer limits of maritime zones measured therefrom and their entitlements".[99] Referring to the Declaration of the Heads of State and Government of the Alliance of Small Island States, it noted the following:

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[96] Statement of New Zealand in 2021 (see footnote 75 above), pp. 4–5. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[97] *Ibid.*, p. 4..

[98] Statement of Belize, on behalf of the Alliance of Small Island States, in 2020, pp. 2–3. Available from https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

[99] Statement of Antigua and Barbuda, on behalf of the Alliance of Small Island States, in 2021, p. 2. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#19mtg.

> "This statement reflects [the Alliance's] interpretation of a lack of an obligation under [the Convention] to review or update baselines and outer limits once deposited with the Secretary-General, and of the practice of many [small island developing States] on this issue. This echoes the statement by the Heads of State and Government of the Pacific Islands Forum in August, and the preliminary observations in the first issues paper.[100]

Antigua and Barbuda goes on to reiterate the observations made by Belize on behalf of the Alliance, in 2020, regarding the development of State practice regarding the preservation of baselines and the existing extent of their maritime zones.[101] In its statement on behalf of the Alliance of Small Island States in 2022, Antigua and Barbuda refers again to the Declaration of the Heads of State and Government of the Alliance of Small Island States of September 2021:

> In that negotiated declaration, our [Alliance] Leaders affirmed that there is no obligation under [the Convention] to keep baselines and outer limits of maritime zones under review [or] to update charts or lists of geographical coordinates once deposited with the Secretary-General …, and that such maritime zones and the rights and entitlements that flow from them shall continue to apply without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise. We are heartened to see that other States, including some of the largest coastal States, have adopted a similar understanding of international law, recognizing the need to ensure legal stability, security, certainty and predictability.[102]

47. Asian States include similar references to legal stability in their statements.

48. For instance, Maldives, in its statement in 2020, refers to the interpretation of the United Nations Convention on the Law of the Sea in the context of legal stability:

> [O]ur interpretation of [the Convention] is that once a State deposits the appropriate charts and/or geographic coordinates with the Secretary-General, these entitlements are fixed and will not be altered by any subsequent physical changes to a State's geography as a result of sea-level rise. Baselines and maritime entitlements remain consistent. Stability, certainty, equity and fairness all require it.
>
> … States are not prohibited under [the Convention] from maintaining previously established baselines, and other limits of maritime zones measured from those baselines, in order to preserve their maritime entitlements.
>
> … Maldives also agrees with the observation of the first issues paper that there is … State practice [of] freezing baselines and outer limits of maritime zones and increasing *opinio juris* on these maritime entitlements.[103]

Maldives repeats this reasoning in its statement in 2021:

> [W]e do not interpret [the Convention] to require regular updates to those submissions. Once a State has deposited the relevant charts and maritime zones, baselines and maritime entitlements are fixed and cannot be altered by any subsequent physical changes to a State's physical geography as a consequence of sea-level rise. This interpretation is necessary to support the goals of stability,

[100] *Ibid.*, p. 2.
[101] *Ibid.*, pp. 2–3.
[102] Statement of Antigua and Barbuda, on behalf of the Alliance of Small Island States, in 2022, para. 4. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).
[103] Statement of Maldives in 2020, pp. 4–6. Available at https://www.un.org/en/ga/sixth/75/summaries.shtml#13mtg.

> security, certainty and predictability as outlined in the first issues paper and discussed in the report [of the Commission on its seventy-second session].[104]

49. Viet Nam, in its statement in 2021, refers explicitly to the issue of legal stability, and implicitly to the way in which to interpret the United Nations Convention on the Law of the Sea in order to ensure such stability: "The approach to address the implications of sea-level rise should ensure the stability and security in international relations, including the legal stability, security, certainty and predictability, without involving the question of amending and/or supplementing [the Convention]."[105]

50. Sri Lanka, in its statement in 2021, refers to the way the United Nations Convention on the Law of the Sea can be interpreted to respond to the effects of sea-level rise:

> A fixed baseline approach to the establishment of the outer limits of maritime zones meant that the maritime boundaries of States were permanent and their baselines would remain unchanged even if coastal areas were inundated as a result of sea-level rise. The United Nations Convention on the Law of the Sea did not exclude the possibility of resorting to either ambulatory or fixed baselines. Perhaps it was time for the Commission to examine whether or not the Convention could be modified by mutual consent or based on the subsequent practice of all States parties.[106]

51. Malaysia, in its statement in 2021, is also clear: "Malaysia shares the view [of] the majority of States that maritime baselines, limits and boundaries should be fixed in perpetuity regardless of sea-level rise".[107] Similarly, Thailand, in its statement in 2021, notes the following: "Thailand believes that in order to maintain peace, stability and friendly relations among States, their rights in relation to maritime zones and boundaries as guaranteed by [the United Nations Convention on the Law of the Sea] must be protected."[108] Thailand repeats this assertion in its statement in 2022.[109]

52. Indonesia, in its statement in 2021, also refers to legal stability:

> [W]e concur that the principles of certainty, security and predictability and the preservation of the balance of rights and obligations should be maintained.
>
> … [C]harts or lists of geographical coordinates of baselines that have been deposited with the Secretary-General pursuant to articles 16 (2) and 47 (9) of [the United Nations Convention on the Law of the Sea] shall continue to be relevant.
>
> We believe that … maintaining existing maritime baselines and limits corresponding to the principles of certainty, security and predictability … also reflects the interests of many States in connection with the effects of sea-level rise.[110]

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[104] Statement of Maldives in 2021, p. 3. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[105] Statement of Viet Nam in 2021. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[106] Statement of Sri Lanka in 2021. See A/C.6/76/SR.21, para. 111.

[107] Statement of Malaysia in 2021, p. 3. Available at https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[108] Statement of Thailand in 2021, para. 5. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[109] Statement of Thailand in 2022, para. 7. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).

[110] Statement of Indonesia in 2021, p. 2. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

In its statement in 2022, Indonesia refers, *inter alia*, to "the need for stability and security in the law of the sea".[111]

53. The Philippines, in its statement in 2021, notes the following:

> The Philippines would caution against inference in favour of ambulatory baselines, absent a showing of State practice and *opinio juris* on the matter. … [P]roceeding on the basis of legal stability, security, certainty and predictability in international law is a welcome approach. … [T]he principle of immutability of borders …, in accordance with the principle of *uti possidetis juris*, has value in this regard. An analogous principle could be considered in favour of permanent baselines.[112]

54. Jordan, in its statement in 2021, considers that "any outcome … should take into account legal certainty, equity and stability, and balance the legitimate interests of all relevant States and the international community as a whole".[113]

55. African States also include references to legal stability in their statements.

56. Sierra Leone, in its statement in 2021, includes the following reference to legal stability: "We ... note with interest that the Study Group welcomed the suggestion that the meaning of 'legal stability' … seems to suggest 'the need to preserve the baselines and outer limits of maritime zones', in the views expressed by Member States".[114] Egypt, in its statement in 2021, asserted that "maritime limits should be fixed rather than ambulatory".[115] Algeria, in its statement in 2021, "welcomed the fact that the Study Group on the topic had examined the practice of African States regarding maritime delimitation and confirmed that the principles of international law supported fixed baselines".[116]

57. Latin American States also include references to legal stability in their statements.

58. For instance, Cuba, in its statement in 2021, notes the following:

> Cuba is aware that the United Nations Convention on the Law of the Sea does not offer answers to the questions raised by the topic, because of the moment in history when it was adopted. Nevertheless, it is essential to ensure unconditional compliance with the provisions of the Convention concerning maritime limits and boundaries, even when the latter undergo physical changes owing to sea-level rise.[117]

In its statement in 2022, Cuba repeats these assertions and adds that, if baselines or maritime boundaries were subject to change due to sea-level rise, "[t]his would imply

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[111] Statement of Indonesia in 2022, para. 17. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (29th plenary meeting).

[112] Statement of the Philippines in 2021, pp. 2–3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#23mtg.

[113] Statement of Jordan in 2021, p. 6. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#24mtg.

[114] Statement of Sierra Leone in 2021, para. 13. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.

[115] Statement of Egypt in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg (Arabic only). See also A/C.6/76/SR.20, para. 58.

[116] Statement of Algeria in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg (Arabic only). See also A/C.6/76/SR.22, para. 99.

[117] Statement of Cuba in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg (Spanish only). See also A/C.6/76/SR.21, para. 31.

an additional expense that would be very difficult for small island States to assume, in addition to the legal insecurity generated owing to the loss of natural resources necessary for the economy of these States".[118]

59. Chile, in its statement in 2021, explicitly refers to the meaning of legal stability:

> Chile agrees that the principles of stability, security, certainty and predictability must be applied in the analysis of the issues contained in the mandate [of the Study Group], it being understood that, as expressed by the delegations of States affected by sea-level rise, "legal stability" means the need to preserve the baselines and outer limits of maritime zones.
>
> … The concept of ambulatory baselines, if established, would be of particular concern, and the immediate effect would be a loss of sovereignty and jurisdictional rights for coastal and island States and a corresponding reduction in their maritime zones.
>
> … [I]f the baselines and the outer limits of maritime zones of a coastal or archipelagic State have been duly determined in accordance with the United Nations Convention on the Law of the Sea, there should be no requirement that those baselines and outer limits be recalculated in the event of sea-level changes that affect the geographical reality of the coastline.[119]

60. Argentina, in its statement in 2021, is similarly direct:

> … [W]ith respect to the effects of sea-level rise on the boundaries of maritime spaces, in terms of legal certainty it seems appropriate to consider that, if the baselines and the outer limits of maritime spaces of a coastal or archipelagic State have been duly determined in accordance with the requirements of the United Nations Convention on the Law of the Sea, which also reflects customary international law, there should be no requirement to readjust these baselines and limits in the event of sea-level changes that affect the geographical reality of the coastline.[120]

61. Costa Rica, in its statement in 2021, notes the following:

> Costa Rica would like to highlight … the need to apply the principles of stability, security, certainty and predictability in order to preserve the balance of rights and obligations between coastal States and other States.
>
> … Costa Rica welcomes the consideration [by the Study Group] of the judgment of the [International Court of Justice] that served to establish the maritime boundaries between Costa Rica and Nicaragua, using a moving delimitation line in a segment that connects the coast with the fixed point of the start of the maritime boundary. As this case shows, in some situations where the coastal geomorphology is variable, a solution such as the one determined by the Court in that specific case is an ideal alternative for providing security and stability to the parties despite frequent variations in the land boundary terminus.[121]

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[118] Statement of Cuba in 2022, p. 4. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (27th plenary meeting; Spanish only).

[119] Statement of Chile in 2021, pp. 5–6. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg (Spanish only). See also A/C.6/76/SR.21, paras. 55–56.

[120] Statement of Argentina in 2021, p. 3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg (Spanish only). See also A/C.6/76/SR.22, para. 32.

[121] Statement of Costa Rica in 2021, pp. 2–3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#23mtg (Spanish only).See also A/C.6/76/SR.23, paras. 13–14.

62. European Member States also include references to legal stability in their statements.

63. For instance, Iceland, in its statement on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) in 2021, refers to stability, but in more general terms:

> [The United Nations Convention on the Law of the Sea] provides predictability and stability, and its universal and unified character should be safeguarded and strengthened. Like any other legal instrument, the Convention should be interpreted in [the] light of changing circumstances. That said, it seems premature at this juncture for the Nordic countries to pronounce on the precise legal implications of sea-level rise in the context of [the Convention].[122]

64. The Kingdom of the Netherlands, in its statement in 2021, also refers to legal stability:

> The [Kingdom of the] Netherlands is guided by the notions of legal certainty, stability and security while remaining firmly grounded in the primacy of the [United Nations Convention on the Law of the Sea]. … [S]ome potential solutions deserve more consideration. In particular, we would like to note that the option of merely securing the outer limits of established maritime zones to prevent States from losing maritime zones has not received much attention in the [first issues paper].[123]

65. Italy, in its statement in 2021, directly refers to legal stability:

> Italy would like to stress the importance of stability, security and legal certainty with regard to baselines and maritime delimitation. … It is also important to underline that any principle of permanency of baselines, which have been established and deposited in accordance with international law, must refer solely to sea-level rise induced by climate change and not to other circumstances, including land accretion.[124]

66. Romania, in its statement in 2021, notes that "[t]he increasing challenges that sea-level rise pose are beyond doubt, including from the perspective of ensuring security and stability around the world". It refers to the debate in the Study Group regarding ambulatory versus fixed baselines: "our legislation could be interpreted as favouring an ambulatory system of baselines, though a connection with the specific case of sea-level rise is difficult to make, given the particular character of the Black Sea as a semi-enclosed sea and less exposed to this phenomenon".[125] It is more explicit in its statement in 2022, stressing "that preserving the baselines and outer limits of maritime zones is crucial to legal stability".[126]

67. Germany, in its statement in 2022, refers to its 2022 submission,[127] in which "we explain how we interpret the [rules under United Nations Convention on the Law of the Sea] regarding the stability of baselines. In our view, a contemporary reading of these [Convention] rules gives the coastal State the right to update its baselines when

[122] Statement of Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), in 2021, p. 5. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#19mtg.

[123] Statement of the Kingdom of the Netherlands in 2021, pp. 5–6. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.

[124] Statement of Italy in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.

[125] Statement of Romania in 2021, pp. 4–5. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[126] Statement of Romania in 2022, p. 3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (27th plenary meeting).

[127] See footnote 62 above.

the sea level rises or falls or the coastline moves but it does not require the coastal State to do so".[128]

68. The Czech Republic, in its statement in 2021, refers to legal stability in more general terms: "In order to contribute to legal stability, certainty and predictability in dealing with these challenges, it is of paramount importance that the work of the Commission and its Study Group on this topic proceed in strict adherence to the existing legal regime of the law of the sea, in particular the 1982 [United Nations] Convention on the Law of the Sea".[129] Slovenia also refers to the issue in its statement in 2021: "The immense challenge of sea-level rise, relating to possible effects of sea-level rise on baselines [and] maritime zones …, as well as on the exercise of sovereign rights and jurisdiction, underline the demand for a multifaceted, in-depth approach and new solutions where legal certainty and predictability should remain one of the primary considerations."[130]

69. Estonia, in its statement in 2021, includes clear references to legal stability in connection with the solution of fixed baselines and outer limits, which can be based on interpretation of the United Nations Convention on the Law of the Sea:

> [W]e welcome the conclusion in the first issues paper that the aim of the Study Group should be to find solutions to the challenges connected to sea-level rise in the [Convention]. The need to preserve legal stability, security, certainty and predictability in international relations has to be kept in mind. We are satisfied that the Study Group has found possibilities to interpret the [Convention] in [a] way that it corresponds to the need for the stability in inter-State relations.
>
> We support the idea to stop updating notifications, in accordance with the [Convention], regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea-level rise occur, in order to preserve … States' entitlements.[131]

70. The Russian Federation, in its statement in 2021, notes that "one of the key issues in this respect is the question of baselines … [I]t is important to find a practical solution that is aligned with [the United Nations Convention on the Law of the Sea], on one hand, and reflects the concerns of States affected by sea-level rise, on the other".[132]

71. Cyprus, in its statement in 2021, notes the following:

> [A]ffected coastal States should be entitled to designate permanent baselines pursuant to article 16 of [the United Nations Convention on the Law of the Sea], which would withstand any subsequent regression of the low-water line. This view is in conformity with [the Convention] and aims at safeguarding coastal States' legal entitlements in [the] light of the ongoing, worrisome developments generated by climate change.

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[128] Statement of Germany in 2022, p. 4. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (27th plenary meeting).

[129] Statement of the Czech Republic in 2021, pp. 3–4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[130] Statement of Slovenia in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[131] Statement of Estonia in 2021, p. 4. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg.

[132] Statement of the Russian Federation in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg (Russian only). See also A/C.6/76/SR.22, para. 93.

> Moreover, baselines must be permanent and not ambulatory so as to achieve greater predictability ….
>
> … [I]t is evident that the obligation under article 16 of [the Convention] for the coastal State to show the baselines for measuring the breadth of the territorial sea, or the limits "derived therefrom", on charts or a list of geographical coordinates of points is meant to establish legal security. No indication is provided for that these charts are to be periodically revised.[133]

Cyprus uses similar wording in its statement in 2022.[134]

72. According to Greece, in its statement in 2021:

> [P]redictability, stability and certainty, which are inherent to the [United Nations Convention on the Law of the Sea] and guide its application, require the preservation of baselines and of the outer limits of maritime zones, as well as of maritime entitlements deriving therefrom, in accordance with the [Convention]. … As rightly observed, the Convention imposes no obligation of reviewing or recalculating baselines or the outer limits of maritime zones established in accordance with its provisions."[135]

73. Croatia, in its statement in 2022, clearly states that it "holds the view that baselines are fixed and once determined national maritime zones are not subject to change, despite sea-level rise".[136]

74. Bulgaria, in its statement in 2022, also refers to legal stability in connection with the stability of baselines:

> [The United Nations Convention on the Law of the Sea] does not contain a legal obligation for States parties to regularly review and update their baselines and the borders of their maritime zones, established in accordance with the applicable rules of [the Convention]. Conclusions that suggest that a periodic review should be carried out by States could potentially have a negative impact on … relations between coastal States and may affect … stability in different regions of the world.[137]

75. The European Union, in its statement in 2022, notes, *inter alia*, that "there is no express obligation on States under the United Nations Convention on the Law of the Sea to periodically review and update all the charts and coordinates [that] they have drawn (or agreed) and duly published in accordance with the relevant provisions of the Convention".[138]

76. Furthermore, the United States of America, in its statement in 2022, notes the following:

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[133] Statement of Cyprus in 2021, pp. 2–3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[134] Statement of Cyprus in 2022, pp. 1–3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).

[135] Statement of Greece in 2021, pp. 4–5. Available from https://www.un.org/en/ga/sixth/76/ilc.shtml (statement II).

[136] Statement of Croatia in 2022, p. 3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (25th plenary meeting).

[137] Statement of Bulgaria in 2022, p. 3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (29th plenary meeting).

[138] Statement of the European Union (in its capacity as observer; also on behalf of the candidate countries Albania, Montenegro, North Macedonia and Serbia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia, the Republic of Moldova and Ukraine) in 2022, para. 8. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (26th plenary meeting).

> [T]he United States … has announced a new policy on sea-level rise and maritime zones. Under this policy, which recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise, the United States will work with other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits and will not challenge such baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change.[139]

3. Collective declarations by regional bodies

77. After the issuance of the first issues paper in 2020 and the debate on it in the Commission in 2021, the most notable collective action by States was the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the 18 Pacific Islands Forum Leaders on 6 August 2021.[140] The Declaration contains important references to legal stability in relation to the United Nations Convention on the Law of the Sea and sea-level rise. For example, the preamble includes the following text:

> *Recalling* … that the Convention was adopted as an integral package containing a delicate balance of rights and obligations, and was prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea, and establishes, with due regard for the sovereignty of all States, an enduring legal order for the seas and oceans,
>
> *Recognizing* the principles of legal stability, security, certainty and predictability that underpin the Convention and the relevance of these principles to the interpretation and application of the Convention in the context of sea-level rise and climate change,
>
> …
>
> *Acknowledging* that the relationship between climate change-related sea-level rise and maritime zones was not contemplated by the drafters of the Convention at the time of its negotiation, and that the Convention was premised on the basis that, in the determination of maritime zones, coastlines and maritime features were generally considered to be stable.

78. In the operative part of the Declaration, the Pacific Islands Forum Leaders:

> *Affirm* that the Convention imposes no affirmative obligation to keep baselines and outer limits of maritime zones under review nor to update charts or lists of

[139] Statement of the United States in 2022, p. 2. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (27th plenary meeting). See also United States, White House, "Roadmap for a 21st-century US-Pacific island partnership", fact sheet, 29 September 2022: "Sea-level rise: The United States is adopting a new policy on sea-level rise and maritime zones. This policy recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise, is mindful of the Pacific Island Forum's Declaration Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, commits to working with Pacific island States and other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits, and encourages other countries to do the same."

[140] See https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/. The Pacific Islands Forum is a regional organization comprising 18 members: Australia, Cook Islands, Fiji, French Polynesia, Kiribati, Marshall Islands, Micronesia (Federated States of), Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

geographical coordinates once deposited with the Secretary-General of the United Nations,

Record the position of Members of the Pacific Islands Forum that maintaining maritime zones established in accordance with the Convention, and rights and entitlements that flow from them, notwithstanding climate change-related sea-level rise, is supported by both the Convention and the legal principles underpinning it,

Declare that once having, in accordance with the Convention, established and notified our maritime zones to the Secretary-General of the United Nations, we intend to maintain these zones without reduction, notwithstanding climate change-related sea-level rise,

Further declare that we do not intend to review and update the baselines and outer limits of our maritime zones as a consequence of climate change-related sea-level rise, and

Proclaim that our maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the Convention, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.

79. That Declaration was preceded, *inter alia*, by the Leaders Declaration adopted at the Ninth Pacific Islands Leaders Meeting, on 2 July 2021. In paragraph 12 of this Declaration, the Pacific Islands Leaders "jointly noted the importance of protecting maritime zones established in accordance with [the United Nations Convention on the Law of the Sea], and concurred to further discuss the issue of preserving maritime zones, properly delineated in accordance with [the Convention, in the face of climate change-related sea-level rise including at the multilateral level".[141]

80. Following the adoption of the Declaration by the Pacific Islands Forum Leaders, the Declaration of the Heads of State and Government of the Alliance of Small Island States was adopted, on 22 September 2021.[142] In paragraph 41 of the Declaration, the leaders of the Alliance of Small Island States:

Affirm that there is no obligation under the United Nations Convention on the Law of the Sea to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations, and that such maritime zones and the rights and entitlements that flow from them shall continue to apply without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.

According to Antigua and Barbuda, in its statement on behalf of the Alliance of Small Island States in 2021:

[141] See footnote 59 above.

[142] See https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/. The Alliance of Small Island States is a regional organization comprising 39 members, from the Caribbean, the Pacific, Africa, the Indian Ocean and South-East Asia: Antigua and Barbuda, Bahamas, Barbados, Belize, Cabo Verde, Comoros, Cook Islands, Cuba, Dominica, Dominican Republic, Fiji, Grenada, Guinea-Bissau, Guyana, Haiti, Jamaica, Kiribati, Maldives, Marshall Islands, Mauritius, Micronesia (Federated States of), Nauru, Niue, Palau, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Seychelles, Singapore, Solomon Islands, Suriname, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu and Vanuatu.

> [The Declaration] reflects [the Alliance's] interpretation of a lack of an obligation under [the Convention] to review or update baselines and outer limits once deposited with the Secretary-General, and of the practice of many [small island developing States] on this issue. This echoes the statement by the Heads of State and Government of the Pacific Islands Forum in August, and the preliminary observations in the first issues paper .[143]

81. The Declaration by the Pacific Islands Forum Leaders was endorsed by further two organizations: the Climate Vulnerable Forum[144] and the Organization of African, Caribbean and Pacific States.[145] The Dhaka-Glasgow Declaration of the Climate Vulnerable Forum, of 2 November 2021, provides the following: "We, Heads of State and Government, and high representatives, of the Climate Vulnerable Forum … call on all States to support the principles outlined in the Pacific Islands Forum [Leaders'] 2021 Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise".[146] The Declaration of the Seventh Meeting of the Organization of African, Caribbean and Pacific States Ministers in Charge of Fisheries and Aquaculture, of 8 April 2022, provides the following: "We, the Ministers in charge of fisheries and aquaculture from the Member States of the Organization … [*s*]*upport* the 2021 Pacific Islands Forum [Leaders'] Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise".[147]

B. Preliminary observations

82. In the light of the above comprehensive presentation of Member States' submissions to the Commission, statements presented in the Sixth Committee and collective positions as expressed in various international and regional declarations, a number of preliminary observations can be made.

83. First, it is clear that, in these many submissions and statements, references to the issue of legal stability, whether explicit or implicit – including to the solution of fixed baselines and/or outer limits of maritime zones measured from them, as examined in the first issues paper – are the most numerous. The next most numerous are references to the need to interpret the United Nations Convention on the Law of the Sea in such a manner as to respond to the effects of sea-level rise, mostly in the sense that the Convention does not forbid the freezing of baselines.[148] It is obvious that Member States consider these issues to be the most relevant to the aspects of the

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[143] See footnote 99 above.

[144] Comprising 58 members: 27 members from Africa and the Middle East, 20 members from Asia and the Pacific and 11 members from Latin America and the Caribbean. For further information, see https://thecvf.org/members/.

[145] Comprising 79 members from Africa, the Caribbean and the Pacific. For further information, see https://www.oacps.org/.

[146] See https://thecvf.org/our-voice/statements/dhaka-glasgow-declaration-of-the-cvf/.

[147] See https://www.oacps.org/wp-content/uploads/2022/05/Declaration_-7thMMFA_EN.pdf, p. 8.

[148] As evidenced above, out of 69 statements delivered by 67 delegations in 2021 in the Sixth Committee that referred to the topic, 25 referred to legal stability, 20 to the solution of fixed baselines, 11 to the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise (which touches upon the previous topics), and 11 to the need to interpret the United Nations Convention on the Law of the Sea to favour fixed baselines. In 2022, out of the 17 statements referring to the aspects of the law of the sea related to sea-level rise, 11 referred to the solution of fixed baselines and 9 referred to legal stability. The vast majority of submissions also included such references.

law of the sea related to sea-level rise. This interesting evolution of the focus of Member States on these aspects has also been noted by legal scholars.[149]

84. Second, the significance that Member States attach to legal stability – and certainty, security and predictability – is concrete and pragmatic. With the exception of a limited number of Member States, which refer in their statements to legal stability as more general notion connected to the overall regime embodied in the United Nations Convention on the Law of the Sea,[150] the rest of the Member States that refer to this issue in their submissions, statements and collective declarations made following the issuance of the first issues paper consider legal stability as dedicated to, and inherently linked to, the preservation of maritime zones as they were before the effects of the sea-level rise, and the decision of the Member States affected by sea-level rise not to update their notifications of coordinates and charts, thus fixing their baselines even if the physical coast moves landward because of sea-level rise. No States, even those that have national legislation providing for ambulatory baselines, have contested the option of fixed baselines.

85. Third, it is interesting to note the progressive and remarkable extension of awareness among States from various regions of the world of the need to find solutions in the context of the law of the sea to the negative impact of sea-level rise on coasts and maritime zones, especially the view of legal stability in connection with the preservation of baselines and the outer limits of maritime zones measured from those baselines. The Pacific States have consolidated their approach and State practice, as evidenced by their submissions to the Commission, their statements in the Sixth Committee and the adoption by the Pacific Islands Forum Leaders of the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise in August 2021. The approach of these States was cross-regionally confirmed by the views of the members of the Alliance of Small Island States, as expressed in their submissions and statements, but also in the Declaration of the Heads of State and Government of the Alliance of Small Island States, adopted in September 2021. This is because the Alliance's 39 members include not only those from the Pacific (14 out of the 18 members of Pacific Islands Forum), but also those from other regions: Africa (3), Indian Ocean (4), Caribbean (16) and South-East Asia (1). Together, the Pacific Islands Forum and the Alliance of Small Island States represent 43 members, of which 41 are parties to the United Nations Convention on the Law of the Sea, comprising approximately 25 per cent of all parties to the Convention.[151] Furthermore, it is important to note the positions expressed by States from other regions in favour of the preservation of baselines and the outer limits of maritime zones measured from those baselines and the solution of fixed baselines. These positions have been expressed with various nuances, both explicitly and implicitly – stressing the absence of an obligation set forth by the United Nations Convention on the Law of the Sea to update the baselines – by States from Asia (Indonesia, Japan, Malaysia and Philippines), Latin America (Argentina, Chile, Colombia and Costa Rica), Africa (Algeria, Egypt and Sierra Leone), Europe

[149] See, for instance, Davor Vidas and David Freestone, "Legal certainty and stability in the face of sea level rise: trends in the development of State practice and international law scholarship on maritime limits and Boundaries", in *International Journal of Marine and Coastal Law*, vol. 37, 2022, pp. 673–725; and Frances Anggadi, "What States say and do about legal stability and maritime zones, and why it matters", in *International and Comparative Law Quarterly*, vol. 71, No. 4 (October 2022), pp. 767–798.

[150] Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), in 2021 (see footnote 122 above); Kingdom of the Netherlands, in 2021 (see footnote 123 above); Czech Republic, in 2021 (see footnote 129 above); and Jordan, in 2021 (see footnote 113 above).

[151] See Vidas and Freestone, "Legal certainty and stability in the face of sea level rise" (see footnote 149 above), pp. 714–715.

(Bulgaria, Croatia, Cyprus, France, Germany, Greece, Ireland, Netherlands (Kingdom of the) and Romania) and North America (United States).

86. An explicit connection has been drawn by several States from various regions of the world between the meaning of legal stability and the solution of preserving maritime zones and fixing the baselines and the outer limits of maritime zones: Fiji, in its statement, on behalf of Pacific Islands Forum, to the Sixth Committee, in 2021;[152] Papua New Guinea (Pacific), in its statement in 2020;[153] Federated States of Micronesia (Pacific), in its statement in 2020;[154] Antigua and Barbuda (Caribbean), in its submission, in 2021;[155] Romania (Europe), in its statement in 2021;[156] Chile (Latin America), in its statement in 2021;[157] and Argentina (Latin America), in its statement in 2021.[158]

87. This was the approach taken in the first issues paper. The observations made in paragraph 104, subparagraphs (d),[159] (e)[160] and (f)[161], of that paper were confirmed by the positions of Member States, as discussed above.

88. At the same time, the fact that sea-level rise and its effects were not perceived as an issue that needed to be addressed in the United Nations Convention on the Law of the Sea at the time of its negotiation[162] is also reflected in the statements of Member States,[163] as is the need to interpret the Convention in such a manner as to respond to the effects of sea-level rise, mostly in the sense that the Convention does not the

[152] See footnote 70 above.
[153] See footnote 83 above.
[154] See footnote 86 above.
[155] See footnote 46 above.
[156] See footnote 125 above.
[157] See footnote 119 above.
[158] See footnote 120 above.
[159] A/CN.4/740 and Corr.1, para. 104 (d): “The ambulatory theory/method regarding baselines and the limits of maritime zones measured from them does not respond to the concerns expressed by Member States that are prompted by the effects of sea-level rise, especially as regards the rights of the coastal State in the various maritime zones, and the consequent need to preserve legal stability, security, certainty and predictability”.
[160] *Ibid*., para. 104 (e): “An approach responding adequately to these concerns is one based on the preservation of baselines and outer limits of the maritime zones measured therefrom, as well as of the entitlements of the coastal State; the [United Nations Convention on the Law of the Sea] does not prohibit *expressis verbis* such preservation …. In any case, the obligation provided by article 16 [of the Convention] to give due publicity to and deposit copies of charts and lists of coordinates about baselines only refers to straight baselines (which are less affected by sea-level rise) and not to normal baselines. Even in the case of straight baselines, the Convention does not indicate an obligation to draw and notify new baselines when coastal conditions change (or, as a consequence, new outer limits of maritime zones measured from the baselines)”.
[161] *Ibid*., para. 104 (f): “Consequently, nothing prevents Member States from depositing notifications, in accordance with the Convention, regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea-level rise occur, to stop updating these notifications in order to preserve their entitlements”.
[162] As concluded in the first issues paper (A/CN.4/740 and Corr.1, para. 104 (a)).
[163] For instance, Tonga in 2021 (see footnote 90 above); Samoa, on behalf of the Pacific small island developing States, in 2021 (see footnote 77 above); Antigua and Barbuda, on behalf of the Alliance of Small Island States, in 2021 (see footnote 99 above); China in 2021 (available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg. Chinese only. See also A/C.6/76/SR.20, para. 93); Cuba in 2021 (see footnote 117 above); Solomon Islands in 2021 (see footnote 92 above); India in 2021 (available from https://www.un.org/en/ga/sixth/76/summaries.shtml#23mtg) and 2022 (available from https://www.un.org/en/ga/sixth/77/summaries.shtml, 26th plenary meeting); Indonesia in 2022 (see footnote 111 above); and Federated States of Micronesia in 2020 (see footnote 86 above). The preamble of the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders on 6 August 2021, includes a similar reference.

forbid freezing the baselines. The first issues paper addressed the question as to whether the provisions of the Convention could be interpreted and applied so as to address the effects of sea-level rise on the baselines, outer limits of maritime zones and entitlements in these zones.[164] That analysis, which led to the above-mentioned observations in paragraph 104, subparagraphs (d), (e) and (f), of the first issues paper, was largely validated by the views of the Member States on the interpretation of the Convention, as shown in the following paragraphs.

89. Although a large part of the doctrine has interpreted the United Nations Convention on the Law of the Sea to the effect that the outer limits of the territorial sea, contiguous zone and exclusive economic zone are ambulatory [165] – an interpretation that was also mentioned during the debate in the Study Group in 2021 [166] – the views of many States favour a rather different, more pragmatic approach, in an attempt to respond to the concerns prompted by the negative effects of sea-level rise.

90. France, in its submission to the Commission, in 2022, [167] points out the following:

> [The provisions of the United Nations Convention on the Law of the Sea] grant coastal States room for manoeuvre when it comes to taking the initiative to modify, or maintain declared data regarding baselines and limits of their

[164] A/CN.4/740 and Corr.1, paras. 78–80:

> 78. … Nevertheless, it is quite important to underline that the Convention does not indicate *expressis verbis* that new baselines must be drawn, recognized (in accordance with article 5) or notified (in accordance with article 16) by the coastal State when coastal conditions change; the same observation is valid also with regard to the new outer limits of maritime zones (which move when baselines move). Also, it should be noted that the obligation under article 16 for the coastal State to show the baselines for measuring the breadth of the territorial sea or the limits "derived therefrom" on charts (or a list of geographical coordinates of points, specifying the geodetic datum), and to "give due publicity to such charts or lists of geographical coordinates" and to deposit copies of them with the Secretary-General of the United Nations, applies only in the case of straight baselines (art. 7), mouths of rivers (art. 9) and bays (art. 10). So, normal baselines are exempted from this obligation.
>
> 79. The interpretation of the Convention to the effect that baselines (and, consequently, the outer limits of maritime zones) have, generally, an ambulatory character does not respond to the concerns of the Member States prompted by the effects of sea-level rise and the consequent need to preserve the legal stability, security, certainty and predictability. The only express exception in the Convention to this ambulatory character – other than the permanency of the continental shelf following the deposit with the Secretary-General of the United Nations of charts and relevant information, including geodetic data, describing its outer limits – is article 7, paragraph 2: "[w]here because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention." Although there were notable attempts by scholars to argue in favour of the use of this provision to respond to sea-level rise concerns in general, the overall view is that this text is only applicable to situations where deltas are involved.
>
> 80. Another possible option suggested by scholars for using the existing provisions of the Convention to address the effects of sea-level rise on the baselines is the interpretation of the rules of article 7 referring to straight baselines. … In addition, the argument is made that it is possible to use to this purpose article 7, paragraph 4, … and article 7, paragraph 5 …. But the same authors concede that such solutions based on using the provisions of the Convention on straight baselines are not efficient when the sea-level rise is significant.

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

[166] A/76/10, paras. 270–277.

[167] See footnote 60 above.

> maritime zones. The Convention leaves it to coastal States to decide whether to make modifications to this data, which means that so long as a coastal State does not decide to make such modifications, the initially declared data remains in force.
>
> That is the case for normal baselines, under article 5 of the Convention, but also for straight baselines, under article 16. Likewise, regarding maritime areas, when reading articles 75 and 84 of the Convention, regarding the exclusive economic zone and the continental shelf respectively we can make the same observation.

At the same time, France advocates an interpretation of article 7, paragraph 2, as being "applicable to situations resulting from sea-level rise, independently [of] the presence of a delta", thus proposing an even more ambitious approach than the first issues paper.

91. Germany, in its submission, in 2022,[168] goes in the same direction:

> Germany commits … to work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with the [United Nations Convention on the Law of the Sea], including through a contemporary reading and interpretation of its intents and purposes…
>
> Through such contemporary reading and interpretation, Germany finds that [the Convention] allows for freezing of [baselines and outer limits of maritime zones] once duly established, published and deposited … in accordance with the Convention.
>
> [The Convention] does not contain any explicit obligations to update [either] normal baselines that have been marked (article 5 [of the Convention]) [or] straight baselines that have been marked, published and deposited (article 16 …), as well as no further obligation to update a State's relevant charts and lists of geographical coordinates with regard to the [exclusive economic zone] (article 75 …) and the continental shelf (article 84 …).
>
> However, Germany concludes [that] the concept of fictitious baselines [is] already immanent within [the Convention], in particular when a coastline is highly unstable due to the presence of "a delta and other natural conditions" [in accordance with article 7, paragraph 2, of the Convention].
>
> Since this provision has been translated as "delta or other natural conditions" in several translations by [European Union member States], Germany suggests to examine if a contemporary understanding of the provision could broaden the scope of the exception pursuant to [article 7, paragraph 2, of the Convention] and provide further legal certainty with regard to States freezing their baselines and outer limits of maritime zones.
>
> Germany commits to close multilateral coordination and cooperation at many levels in order to arrive at such a contemporary interpretation, possibly by working towards a "common understanding of the correct interpretation of the relevant [Convention] provisions", which could possibly be expressed and endorsed by the States parties to [the Convention] in a [resolution of the Meeting of States Parties] or by [United Nations] Member States in [a General Assembly] resolution. We also support further discussions in the Sixth Committee of the [General Assembly] with this aim.

[168] See footnote 62 above.

92. States take a similar line in their statements in the Sixth Committee. See, for example, the statements of the following:

(a) Tuvalu, on behalf of the Pacific Islands Forum, in 2020;[169]

(b) Fiji, on behalf of the Pacific Islands Forum, in 2021, referring to the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by the Pacific Islands Forum Leaders in August 2021, as "a good-faith interpretation" of the United Nations Convention on the Law of the Sea.[170] Similar statements on the Pacific Islands Forum Declaration have been made by the following: Papua New Guinea, in 2021 and 2022, referring to the Declaration as "a formal statement of Forum members' view on how [the Convention] rules on maritime zones apply in the situation of climate change-related sea-level rise";[171] New Zealand, in 2021 and 2022;[172] and Samoa, on behalf of Pacific small island developing States, in 2022, noting the following:

> As the Declaration makes clear, this approach is supported by [the Convention] and its underlying principles. … [T]he Declaration does not formally represent an extra-legal circumvention of [the Convention] or the establishment of new international law. Because it is grounded on an interpretation of the existing law of the sea as reflected in [the Convention], States from outside the Pacific Islands Forum membership are welcome to endorse and apply the approach of the Declaration, including those that are not States parties to [the Convention];[173]

(c) Belize, on behalf of the Alliance of Small Island States, in 2020, recalling that "the Vienna Convention on the Law of Treaties states that subsequent practice [in] applying the treaty, which evinces parties' agreement on the treaty interpretation, shall be taken into account. This is particularly useful where the treaty is silent on an issue, as the Convention is with the requirement to update coordinates or charts";[174]

(d) Antigua and Barbuda, on behalf of the Alliance of Small Island States, in 2021, referring to the Alliance's "interpretation of a lack of an obligation under [the Convention] to review or update baselines and outer limits once deposited with the Secretary-General";[175]

(e) Samoa, on behalf of Pacific small island developing States, in 2021, noting that "[i]t is important that [the Convention] is applied in such a way that respects the rights and obligations in the Convention, including the rights and entitlements of island States flowing from their maritime zones";[176]

(f) Maldives, in 2021, noting that "we do not interpret [the Convention] to require regular updates to those submissions. … This interpretation is necessary to support the goals of stability, security, certainty and predictability";[177]

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[169] See footnote 69 above.
[170] See footnote 70 above.
[171] See footnotes 73 and 74 above.
[172] See footnotes 75 and 76 above.
[173] See footnote 82 above.
[174] See footnote 98 above. Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 443 (see article 31, paragraph 3 (*b*)).
[175] See footnote 99 above.
[176] See footnote 77 above.
[177] See footnote 104 above.

(g) Federated States of Micronesia, in 2020, affirming that "the Convention … should be interpreted and applied in a manner that fosters legal stability, security, certainty and predictability";[178]

(h) Tonga, in 2021, noting that the Convention "must be interpreted and applied in a way that respects the rights and sovereignty of vulnerable small island States";[179]

(i) Iceland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), in 2021, noting that "the Convention should be interpreted in [the] light of changing circumstances";[180]

(j) Germany, in 2021, adopting the same approach as in its submission to the Commission, in 2022;[181]

(k) Chile, in 2021, asserting that "the best approach for interpreting [the Convention] is to give priority to the principles of international stability and the peaceful coexistence of States";[182]

(l) Sri Lanka, in 2021, noting that "[p]erhaps it was time for the Commission to examine whether or not the Convention could be modified by mutual consent or based on the subsequent practice of all States parties";[183]

(m) Estonia, in 2021, noting that "[w]e are satisfied that the Study Group has found possibilities to interpret the [Convention] in [a] way that it corresponds to the need for the stability in inter-State relations";[184]

(n) Russian Federation, in 2021, stating that "it is important to find a practical solution that is aligned with [the Convention], on one hand, and reflects the concerns of States affected by sea-level rise, on the other";[185]

(o) Solomon Islands, in 2021;[186]

(p) Spain, in 2021, noting that "it is essential to continue the work of the Commission on this topic in a way that guarantees respect for and [the] integrity of [the Convention] … and that, at the same time, allows us to identify special formulas that take into consideration the extraordinary circumstances that several States, especially … small island developing States, are suffering as a result of the process of sea-level rise caused by climate change";[187] and

(q) Greece in 2021, asserting that, "[w]ith respect to the topic of sea-level rise, the [Convention] provides the answers to the questions raised, within their proper context".[188]

93. It is noteworthy that there was no objection from any State, in their submissions to the Commission or statements in the Sixth Committee, to the above-mentioned interpretation of the United Nations Convention on the Law of the Sea.

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[178] See footnote 86 above.
[179] See footnote 90 above.
[180] See footnote 122 above.
[181] Statement of Germany in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#21mtg. See also footnote 62 above.
[182] See footnote 119 above.
[183] See footnote 106 above.
[184] See footnote 131 above.
[185] See footnote 132 above.
[186] See footnote 92 above.
[187] Statement of Spain in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.
[188] See footnote 135 above.

94. This pragmatic interpretation by States, which supports the approach proposed in the first issues paper,[189] in some cases goes even further than the first issues paper by suggesting that article 7, paragraph 2, of the United Nations Convention on the Law of the Sea is applicable to situations resulting from sea-level rise, independently of the presence of a delta. Such an approach is welcome.

95. At the same time, the views of States, as expressed in their submissions and statements following the issuance of the first issues paper, include only very few references to the issue of the formation of customary law on the freezing of baselines and outer limits of maritime zones. That issue was analysed in the first issues paper, with the observation that "it is early to draw, at this stage, a definitive conclusion on the emergence of a particular or regional customary rule (or even of a general customary rule) of international law regarding the preservation of baselines and of outer limits of maritime zones measured from the baselines"; although, at the time of drafting of the first issues paper, the Co-Chairs were able to identify elements of regional State practice, the existence of the *opinio juris* was not yet evident.[190]

96. Indeed, in their submissions and statements over the period 2020–2022, States focus rather on interpretation of the United Nations Convention on the Law of the Sea and on presentation of State practice. Views referring to the issue of the formation of customary law are limited and quite cautious. For instance, Germany, in its submission, in 2022, notes that it "commits to … work together with others to preserve their maritime zones and the rights and entitlements that flow from them in a manner consistent with the Convention, including through a contemporary reading and interpretation of its intents and purposes, rather than through the development of new customary rules".[191] The European Union, in its statement in 2022, notes the following:

> [T]he European Union and its Member States would suggest caution regarding the consideration of regional State practices together with the respective *opinio juris* in this context, because universally applicable provisions and principles such as the [Convention] need to be applied in a uniform way in all regions of the world …. [C]ertain possible emerging regional State practices regarding sea-level rise should not lead to the recognition of a regional customary law of the sea rule, and the European Union and its Member States would encourage the Study Group to build on the State practice and consider the *opinio juris* accepted by all the regions of the world before inferring the existence (or not) of an established State practice or *opinio juris*.[192]

The Federated States of Micronesia, in its statement in 2022, notes the following:

> [The Federated States of Micronesia] stresses that the Declaration [by the Pacific Islands Forum Leaders in 2021] announces the Pacific Islands Forum membership's understanding and application of existing international law of the sea. … [T]he Declaration is not formally meant to establish or announce new regional customary international law. … For [the Federated States of] Micronesia, even if we assume that the Declaration represents the formation or announcement of new regional customary international law, the views of States from outside the Pacific Islands Forum region have no bearing on whether such new law can be developed for the region. As the Commission itself has pointed out in its draft conclusions on the identification of customary international law, such regional customary international law applies only to those States that

[189] A/CN.4/740 and Corr.1, para. 104 (f).
[190] *Ibid.*, para. 104 (i).
[191] See footnote 62 above.
[192] See footnote 138 above.

accept it and would not be opposable to States outside the region that do not accept or apply such regional customary international law.[193]

Similarly Papua New Guinea, in its statement in 2022, notes that the Declaration "is not a formal statement on regional customary law and should not be misunderstood or misconstrued as such".[194] Antigua and Barbuda, in its statement on behalf of the Alliance of Small Island States in 2021, notes that, "while we recognize that there may not yet be sufficient State practice and *opinio juris* to make a conclusion that there is a general customary rule concerning preservation of maritime zones, we think that the trend is in that direction".[195] China, in its statement in 2021, is more cautious: "Many countries believe that consistent State practice on sea-level rise has not been formed and that overemphasizing regional practice may exacerbate the fragmentation of legal rules."[196] Similar caution is expressed by Israel in its statement in 2021: "Israel believes that given the limited State practice in this field – as acknowledged by the Study Group itself – it is doubtful whether any conclusion regarding evidence of existing binding rules of international law on the subject of sea-level rise could be drawn at this juncture."[197] The Russian Federation, in its statement in 2021, expresses the following view: "At this stage, there is no applicable rule of customary international law, because of both the lack of recognition of the relevant practice as legal obligation (*opinio juris*) and the insufficiency of the practice itself."[198] Sri Lanka, in its statement in 2021, expresses the view that "the Commission might be able to develop the rules of customary international law in such a way as to lead to the modification of the Convention with respect to the preferred approach for the delimitation of maritime boundaries".[199] The Co-Chairs wish to restate their commitment to fully observing the mandate established when the topic was introduced on the agenda of the Commission: work on the present topic will not lead to proposals for modification of the Convention.

97. State practice regarding the preservation of maritime zones and/or the fixing of baselines has become increasingly evident over the period 2020–2022 in the submissions to the Commission and statements to the Sixth Committee of States from various regions of the world. See, for example, the following: Federated States of Micronesia, in its statement in 2020;[200] Belize, in its statement on behalf of the Alliance of Small Island States in 2020;[201] Antigua and Barbuda, in its statement on behalf of the Alliance of Small Island States in2021;[202] Fiji, in the submission of the Pacific Islands Forum in 2021;[203] New Zealand, in its submission in 2022 (in which it also refers to the practice of the Cook Islands);[204] the United Kingdom, in its submission in 2022;[205] and the Kingdom of the Netherlands, in its submission in 2022 (in which it refers to the establishment of a "basic coastline", which is preserved through sand nourishment).[206] The Co-Chairs wish to thank Commission member

[193] Statement of the Federated States of Micronesia in 2022, p. 3. Available from https://www.un.org/en/ga/sixth/77/summaries.shtml (28th plenary meeting).
[194] See footnote 74 above.
[195] See footnote 99 above.
[196] See footnote 163 above.
[197] Statement of Israel in 2021, pp. 2–3. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.
[198] See footnote 132 above.
[199] A/C.6/76/SR.21, para. 112 (see footnote 106 above).
[200] See footnote 86 above.
[201] See footnote 98 above.
[202] See footnote 99 above.
[203] See footnote 57 above.
[204] See footnote 54 above.
[205] See footnote 68 above.
[206] See footnote 66 above.

Mr. Bimal N. Patel for providing a paper on State practice in India, which was very informative.

98. In conclusion, the following observations of a preliminary nature can be made:

(a) legal stability (and security, certainty and predictability) is viewed among Member States as having a very concrete meaning, and has been linked to the preservation of maritime zones through the fixing of baselines (and outer limits of maritime zones measured from those baselines): in other words, States affected by sea-level rise are not required to update their notifications of coordinates and charts, resulting in their baselines being fixed even if the physical coast moves landward because of sea-level rise. No States – not even those with national legislation providing for ambulatory baselines – have expressed positions contesting the option of fixed baselines;

(b) Member States point to the fact that when the United Nations Convention on the Law of the Sea was being negotiated, sea-level rise and its effects were not perceived as an issue that needed to be addressed by the Convention, and to the need to interpret the Convention in order to respond to the effects of sea-level rise. Most States take the view that this interpretation should be in the sense that the Convention does not forbid the freezing of baselines. This approach is a pragmatic one, which proposes a reading or interpretation of the Convention that allows for the freezing of baselines once duly established, published and deposited. According to this interpretation, the Convention contains no explicit obligation to update either normal baselines or straight baselines that have been published and deposited, and no further obligation to update a State's relevant charts and lists of geographical coordinates with regard to the exclusive economic zone and the continental shelf. This interpretation of the Convention goes even further than the one proposed in the first issues paper, since article 7, paragraph 2, of the Convention is considered to be applicable to situations resulting from sea-level rise, independently of the presence of a delta. There were no objections from any States, in their submissions to the Commission or in their statements to the Sixth Committee, to this interpretation of the Convention;

(c) the observations in paragraph 104 of the first issues paper were largely upheld by Member States, with the nuances presented above.

III. Immutability and intangibility of boundaries

A. Boundaries and the principle of immutability

99. Oppenheim defined State boundaries as "the imaginary lines on the surface of the earth which separate the territory of one [S]tate from that of another, or from unappropriated territory, or from the open sea".[207] In the *Frontier Dispute (Benin/Niger)* case, the International Court of Justice stated that "a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air".[208] According to the International Court of Justice in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, "[t]o 'define' a territory is to define its frontiers".[209] Nesi writes that "[i]n contemporary international relations, the term 'boundary' means a line that

[207] Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law*,, 9th ed., vol. 1, *Peace* (Harlow, Longman, 1992), para. 226, at p. 661.

[208] *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 90, at p. 142, para. 124.

[209] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at p. 26, para. 52.

determines the extension of a [S]tate's territorial sovereignty. A general definition of the notion, which is applicable to both land and maritime delimitations, would refer to boundaries as the 'extreme limits of spatial validity of the legal norms of a State'".[210] Nesi further observes that "[b]oundaries are fundamental in international law because they define the limits of national jurisdiction and the important legal consequences deriving from this fact", [211] and that the "principle of the intangibility of boundaries refers to the obligation that all [S]tates have to respect existing delimitations in any circumstances, without implying their immutability".[212]

100. The principle of the stability and finality of boundaries is well established in international law.[213] As underscored by International Court of Justice in the *Temple of Preah Vihear (Cambodia* v. *Thailand)* case, "[i]n general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question … Such a frontier, so far from being stable, would be completely precarious". [214] Likewise, in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the Court underscored the principle of the stability of boundaries, stating that "[o]nce agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court".[215] The Court reaffirmed this principle in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*) case.[216]

B. *Uti possidetis juris* and the intangibility of boundaries

101. The principle of the intangibility of frontiers,[217] deriving from the principle of *uti possidetis juris*, is considered by many to be a well-established principle.[218] Its origins can be traced back to Roman law, but later it was adopted and developed within the context of establishing boundaries during the decolonization period in

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[210] Giuseppe Nesi, "Boundaries", in *Research Handbook on Territorial Disputes in International Law*, Marcelo G. Kohen and Mamadou Hébié, eds. (Cheltenham, United Kingdom, and Northampton, Massachusetts, Edward Elgar, 2018), pp. 193–233, at p. 197.

[211] *Ibid*., p. 201. See also Malcolm N. Shaw, "The heritage of States: the principle of *uti possidetis juris* today", *British Year Book of International Law*, vol. 67 *(1996)*, pp. 75–154, at p. 77.

[212] Nesi, "Boundaries" (see footnote 210 above), p. 229.

[213] See *Ibid*., p. 227.

[214] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962,* p. 6, at p. 34.

[215] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see footnote 209 above), p. 37, para. 72; and Nesi, "Boundaries" (see footnote 210 above), p. 229.

[216] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832, at p. 861, para. 89.

[217] Dirdeiry M. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging* Uti Possidetis (Cambridge, United Kingdom, Cambridge University Press, 2015), pp. 47–74.

[218] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 20; *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 44, at. p. 73, para. 63. See *also* A/76/10, para. 261. Ahmed takes the position that, based on the "clean slate" principle, there is no general rule of international law for newly independent States "to respect pre-existing international frontiers in the event of a State succession". Ahmed, *Boundaries and Secession* (see footnote 217 above), p. 52. It should be noted that there is a robust scholarly debate on whether *uti possidetis* is a rule of customary international law and whether it has actually served to preserve stability and avoid conflict. Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of* Uti Possidetis (Montreal and Kingston, McGill-Queen's University Press, 2002); Mohammad Shahabuddin, "Postcolonial boundaries, international law, and the making of the Rohingya crisis in Myanmar", *Asian Journal of International Law*, vol. 9, No. 2 (July 2019), pp. 334–358; and Ahmed, *Boundaries and Secession* (see footnote 217 above).

Latin America in the nineteenth century and in Africa in the twentieth century. Former colonial administrative boundaries or divisions were turned into international frontiers or boundaries.[219] The three core purposes of the *uti possidetis* principle are to prevent the situation of *res nullius*,[220] to prevent conflict[221] and to preserve stability.[222]

102. In addition to the decolonization process, the *uti possidetis* principle was applied by the Commission of Rapporteurs in the case of the Åland Islands, between Finland and Sweden, and adopted by the League of Nations Council in recommending that the islands be awarded to Finland.[223] In the context of State succession, following the dissolution of the former Socialist Federal Republic of Yugoslavia, the Badinter Arbitration Committee, in its third opinion, recognized *uti possidetis* – respect for frontiers existing at the moment of independence – as a general principle applicable beyond the decolonization context, where internal borders of federated states serve as international borders.[224] While much of the scholarship and focus on *uti possidetis* has been on Latin America and Africa, recent scholarship has criticized the absence of discussion of *uti possidetis* in relation to postcolonial South Asia.[225]

103. The principle of *uti possidetis* has been invoked in arbitration cases[226] and before the International Court of Justice.[227] No doubt the most influential case is the decision by the Chamber of the International Court of Justice in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, in which the parties had agreed that the settlement of the dispute must be "based in particular on respect for the principle of the intangibility of frontiers inherited from colonization".[228] The Court went on to declare that the principle of *uti possidetis* was not limited to the process of decolonization, but was a general principle that "has kept its place among the most

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[219] *Frontier Dispute (Benin/Niger)* (see footnote 208 above), p. 120, paras. 45–46. See also Giuseppe Nesi, "Uti possidetis doctrine", in Rüdiger Wulfrum, ed., *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2018).

[220] *Affaire des frontières Colombo-vénézuéliennes (Colombie contre Vénézuela)*, Award of 24 March *1922*, *Reports of International Arbitral Awards, vol. I, pp.* 223–298, at p. 228 (cited in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351, at pp. 387, para. 42).

[221] See also the separate opinion of Judge *ad hoc* G. Abi-Saab in *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above), in which he describes the dual purpose of the principle of *uti possidetis*; and the separate opinion of Judge Yusuf in *Frontier Dispute (Burkina Faso/Niger)* (see footnote 218 above).

[222] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218), p. 565, para. 20.

[223] *Aaland Islands Question*, report of the Commission of Rapporteurs, League of Nations Council Doc B.7 21/68/106, 16 April 1921.

[224] Alain Pellet, "The opinions of the Badinter Arbitration Committee: a second breath for the self-determination of peoples", *European Journal of International Law*, vol. 3, No. 1 (1992), pp. 178–185, at p. 180; Shahabuddin, "Postcolonial boundaries" (see footnote 218 above); and Peter Radan, *The Break-Up of Yugoslavia and International Law* (London and New York, Routledge, 2002) (in which the author is critical of the reliance by the Badinter Commission's on the application of the principle of *uti possidetis* in *Frontier Dispute (Burkina Faso v. Mali)*).

[225] Vanshaj Ravi Jain, "Broken boundaries: border and identity formation in postcolonial Punjab", *Asian Journal of International Law*, vol. 10, No. 2 (July 2020), pp. 261–292; Radan, *The Break-Up of Yugoslavia and International Law* (see footnote 224 above), pp. 118–134; and Shaw, "The heritage of States" (see footnote 211 above), p. 105.

[226] See *Affaire des frontières Colombo-vénézuéliennes (Colombie contre Vénézuela)*, Award of 24 March 1922 (see footnote 220 above).

[227] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above); *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999)*, p. 1045; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303; *Frontier Dispute (Benin/Niger)* (see footnote 208 above); and *Frontier Dispute (Burkina Faso/Niger)* (see footnote 218 above).

[228] *Frontier Dispute* (*Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 564, para. 19.

important legal principles" regarding territorial title and boundary delimitation at the moment of decolonization.[229]

104. The Chamber also stressed that "[t]he essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved".[230] The notion of the freezing of the boundaries is vividly depicted when the Chamber explains that "the principle of *uti possidetis* … applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands".[231] Stressing the interests of "stability", the Chamber resolved the apparent contradiction of *uti possidetis* with the right of peoples in African States to self-determination by citing the "essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields".[232]

105. The principle of respect for existing boundaries is reflected in a resolution of the Organization of African Unity (OAU) adopted in 1964.[233] In that resolution, member States reaffirm their strict respect for the principles laid down in article 3 (3) of the OAU Charter,[234] and "pledge themselves to respect the frontiers existing on their achievement of national independence". This text has been interpreted as a recognition of the principle of *uti possidetis juris*.[235] In the *Tunisia/Libyan Arab Jamahiriya* case, the International Court of Justice noted that the fact that the land boundary between the Libyan Arab Jamahiriya and Tunisia dated from 1910 and had survived two world wars exemplified the principle of respect for boundaries declared in the 1964 OAU resolution.[236]

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[229] *Ibid*., p. 567, para. 26 (cited in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 706, para. 151).

[230] *Frontier Dispute* (*Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 566, para. 23. See also Shaw, "The heritage of States" (see footnote 211 above), p. 128.

[231] *Frontier Dispute* (*Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 568, para. 30.

[232] *Ibid.*, p. 567, para. 25.

[233] Resolution AHG/Res. 16(I), adopted by the First Ordinary Session of the Assembly of Heads of State and Government of OAU, held in Cairo from 17 to 21 July 1964, entitled "Border disputes among African States", which includes the following in the preamble: "*Considering further* that the borders of African States, on the day of their independence, constitute a tangible reality".

[234] Charter of the Organizations of African Unity (Addis Ababa, 25 May 1963), United Nations, *Treaty Series*, vol. 479, No. 6947, p. 39. Under article 3 (3), the member States solemnly affirm and declare their adherence to the principles of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence".

[235] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 565–566, paras. 22–23. However, see the separate opinion of Judge Yusuf in *Frontier Dispute (Burkina Faso/Niger)* (see footnote 218 above), in which he details the differences between the principle of *uti possidetis juris* and the African principle of respect for boundaries as found in the OAU resolution. See also Suzanne Lalonde, "The role of the *uti possidetis* principle in the resolution of maritime boundary disputes", in *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*, Christine Chinkin and Freya Baetens, eds. (Cambridge, United Kingdom, Cambridge University Press, 2002), pp. 248–272, at p. 256; and Pierre-Emmanuel Dupont, "Practice and prospects of boundary delimitation in Africa: the ICJ judgment in the *Burkina Faso/Niger Frontier Dispute* case", *Law and Practice of International Courts and Tribunals*, vol. 13, No. 1 (April 2014), pp. 103–116.

[236] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 65–66, para. 83–84. See also Shaw, "The heritage of States" (see footnote 211 above), p. 114; and Dupont, "Practice and prospects of boundary delimitation in Africa" (see footnote 235 above).

C. Application of the principle of *uti possidetis* to maritime boundaries

106. Distinctions have been made between land and maritime boundaries, in particular as to their respective foundation or creation.[237] Nesi observes that a general definition of the notion of a boundary, "which is applicable to both land and maritime delimitations, would refer to boundaries as the 'extreme limits of spatial validity of the legal norms of a State'".[238] In the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, the Chamber of the International Court of Justice stated that "the effect of any judicial decision rendered either in a dispute as to attribution of territory or in a delimitation dispute, is necessarily to establish a frontier"; the same reasoning would seem to apply to maritime delimitation, where the objective is to establish a frontier or boundary.[239]

107. The principle of *uti possidetis*, however, has had limited application in relation to maritime boundaries.[240] The issue was raised in the *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*.[241] While both parties recognized the principle of *uti possidetis* in general, their views diverged on its application to maritime boundaries. Guinea-Bissau argued against the application of *uti possidetis* to maritime boundaries, as this was an area of recent development, whereas Senegal was of the view that it did apply.[242] The question was not directly addressed by the Tribunal's determination that the convention in question did not create a maritime boundary.[243] However, as highlighted by Shaw, "[t]he Tribunal also emphasized that the Arbitration Agreement signed between Guinea-Bissau and Guinea in 1983 in order to settle that particular dispute incorporated an express reference to the 1964 OAU resolution accepting colonial boundaries. Since that dispute was a maritime dispute, the Tribunal concluded that both parties had

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[237] Lalonde, "The role of the *uti possidetis* principle", in Chinkin Baetens, eds., *Sovereignty, Statehood and State Responsibility* (see footnote 235 above); Nesi, "Boundaries" (see footnote 210 above), p. 196; Marcelo Kohen, "Conclusions", in *Droit des frontières internationales – The Law of International Boundaries*, Société française pour le droit international (Paris, Editions A. Pedone, 2016), pp. 311–319, at pp. 317–318; and Alberto Alvarez-Jimenez, "Boundary agreements in the International Court of Justice's case law, 2000–2010", *European Journal of International Law*, vol. 23, No. 2 (2012), pp. 495–515.

[238] Nesi, "Boundaries" (see footnote 210 above), p. 197.

[239] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above), p. 563, para. 17. However, Snjólaug Árnadóttir expresses the view that there is "an inherent difference between boundaries delimiting land territory and those delimiting maritime zones". Snjólaug Árnadóttir, "Termination of maritime boundaries due to a fundamental change of circumstances" *Utrecht Journal of International and European Law*, vol. 32, No. 83 (September 2016), pp. 94–111, at pp. 104–105. See also Lucius Caflisch, "The delimitation of marine spaces between States with opposite or adjacent coasts", in *A Handbook on the New Law of the Sea*, René-Jean Dupuy and Daniel Vignes, eds. (Dordrecht, Boston and Lancaster, Martinus Nijhoff, 1991), pp. 425–499, at. p. 426.

[240] *Dispute between Argentina and Chile concerning the Beagle Channel,* Decision of 18 February 1977, *Reports of International Arbitral Awards,* vol. XXI, pp. 53–264 (the Tribunal rejected Argentina's invocation of the principle of *uti possidetis* on the grounds that the principle had been replaced by the Boundary Treaty of 1881); *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, *Reports of International Arbitral Awards,* vol. XX, pp. 119–213; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above); and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* (see footnote 227 above).

[241] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 240 above), pp. 144–145, para. 64.

[242] Guinea-Bissau further challenged the automatic rule of State succession, arguing instead for the principle of *tabula rasa*.

[243] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 240 above), p. 148, para. 75.

accepted that the principle of respect for colonial boundaries applied also to maritime boundaries".[244]

108. In the same case, Judge Bedjaoui penned his well-known dissent,[245] which included his response to the view of Senegal that maritime boundaries did not constitute frontiers. He made clear his view that maritime boundaries were real boundaries:

> *Sur ce point, j'estime que les délimitations maritimes donnent lieu à l'existence de "frontières" véritables. L'étendue des compétences de l'Etat est sans doute différente pour les limites maritimes par rapport aux frontières terrestres. Mais cette différence est de degré non de nature, même si certaines limites maritimes ne "produisent" pas une exclusivité et une plénitude de compétence étatique*.[246]

109. In *Land and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, because of the colonial history of the Gulf of Fonseca, the Chamber examined the legal situation of the waters of the Gulf in 1821 at the time of succession from Spain. However, it found that no evidence had been presented by the parties of the application of the principle of *uti possidetis* by analogy with the case of the land.[247] The only part where the Chamber found an implicit application of *uti possidetis* to the Gulf waters was in relation to the part of the Gulf between Honduras and Nicaragua that had been delimited in 1900. The Chamber was of the view that the Mixed Commission responsible for that delimitation "simply took it as axiomatic that 'there belonged to each State that part of the Gulf or Bay of Fonseca adjacent to its coasts' … A joint succession of the three States to the maritime area seems in these circumstances to be the logical outcome of the principle of *uti possidetis juris* itself".[248] According to Shaw, "[i]n other words, the doctrine applied to what were in effect maritime boundaries, but in the special circumstances of that bay did so not in the form of a division of waters but rather by way of joint sovereignty over them by the three coastal States".[249]

110. In the *Nicaragua* v. *Honduras* case, Honduras had argued that the principle of *uti possidetis juris* applied to both land and maritime areas in the case.[250] The International Court of Justice found that Honduras had failed to make a persuasive case overall for the application of the *uti possidetis* principle.[251] Nonetheless, the Court did not preclude its application in maritime delimitation, stating that "the *uti possidetis juris* principle might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation".[252] The Court further observed that "Nicaragua and Honduras as new independent States were entitled by virtue of the *uti possidetis juris* principle to such mainland and insular

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[244] Shaw, "The heritage of States" (see footnote 211 above), p. 127.

[245] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 240 above), dissenting opinion of Judge Bedjaoui, p. 154.

[246] *Ibid*., pp. 162–163, para. 22.

[247] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), p. 589, para. 386.

[248] *Ibid*., pp. 601–602, para. 405.

[249] Shaw, "The heritage of States" (see footnote 211 above), p. 128.

[250] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras)* (see footnote 229 above). In the *Cameroon* v. *Nigeria* land and maritime delimitation case, Cameroon had also argued for the application of *uti possidetis*. The Court did not address the arguments advanced by Cameroon in finding that the Anglo-German Agreement of 11 March 1913 was applicable. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (see footnote 227 above), p. 412, para. 217.

[251] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above), p. 728, para. 232.

[252] *Ibid*., p. 728, para. 232.

territories and territorial seas which constituted their provinces at independence".[253] However, there was no evidence the Spanish Crown had divided its maritime jurisdiction between the colonial provinces of Nicaragua and Honduras even within the limits of the territorial sea.[254] The Court did not address the claim by Honduras in relation to the continental shelf.

D. Preliminary observations

111. In conclusion, the following observations of a preliminary nature can be made:

(a) the function of boundaries is to demarcate the extent of the State's sovereignty and jurisdiction, which extends beyond its land territory and includes the maritime space. The principle of stability of and respect for existing boundaries – that is, their immutability – is a rule of customary international law. The same principle of stability of and respect for existing boundaries would apply to maritime boundaries, which share the same function of demarcating the extent of the sovereignty and the sovereign rights of a State. Concerns regarding preservation of the stability of boundaries would equally apply to maritime boundaries, which, if questioned, could create conflictual situations among States over maritime territory that had been settled by treaty or otherwise;

(b) the principle of the intangibility of boundaries, as developed under the principle of *uti possidetis*, is considered a general principle of law beyond application to the traditional decolonization process and is a rule of customary international law. For the purposes of the present paper, it is relevant, first, because its overriding purpose is to preserve stability and avoid conflict should boundaries be questioned. Second, *uti possidetis* provides an example under international law of the "freezing" of pre-existing boundaries in the interests of preserving stability and preventing conflict. The same approach could be applied to baselines or the outer limits of maritime zones, also in the interests of preserving stability and preventing conflict;

(c) in relation to sea-level rise and maritime boundaries, the main preliminary observation is not so much the application of *uti possidetis* to existing maritime boundaries because of the impact of sea-level rise impact, but rather the importance accorded to ensuring continuity of pre-existing boundaries in the interests of stability and preventing conflict.

IV. Fundamental change of circumstances (*rebus sic stantibus*)

A. Submissions of Member States to the Commission and statements by Member States in the Sixth Committee of the General Assembly

112. The issue whether sea-level rise represents a fundamental change of circumstances, in the context of article 62, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties, that might be invoked as a ground to terminate maritime boundary agreements was examined in the first issues paper.[255] While some members of the Study Group noted that maritime treaties and adjudicated boundaries should be final, other members commented that additional study was necessary. A summary of the general exchange of views of the Study Group on this issue is to be found in the annual report of the Commission.[256] In the first issues paper, reference

[253] *Ibid*., p. 729, para. 234.
[254] *Ibid*.
[255] A/CN.4/740 and Corr.1, paras. 114–140.
[256] A/76/10, para. 281.

is made to the numerous statements made by Member States in the Sixth Committee, and their submissions to the Commission, in which they assert that sea-level rise should not affect maritime boundaries fixed by treaty or that there is a need to maintain the stability of existing maritime boundary agreements.[257]

113. Austria, in its statement in 2021, notes that it "would welcome further study in regard to the applicability of article 62 [of the Vienna Convention on the Law of Treaties] to the phenomenon of sea-level rise".[258] Israel notes that it "continues to study and consider this important discussion on the interministerial level, as it is of great relevance to the entire topic of sea-level rise, and we look forward to weighing in on this debate at a future date".[259] A number of States also have expressed the view that a fundamental change of circumstances would not apply to treaties establishing maritime boundaries: Antigua and Barbuda,[260] Columbia,[261] Cyprus,[262] France,[263] Greece,[264] Ireland,[265] Maldives,[266] Philippines,[267] Poland,[268] Singapore,[269] Thailand[270] and United States.[271]

114. To date, no State has expressed the view that the rule of fundamental change of circumstances, as codified in article 62, paragraph 1, of the Vienna Convention on the Law of Treaties, would apply to maritime boundaries as a result of sea-level rise. It should be noted also, that, in general, there are very few examples of State practice whereby article 62 has been invoked to unilaterally terminate a treaty,[272] and virtually

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[257] Submission of Maldives, p. 9 (available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms; see A/CN.4/740 and Corr.1, para. 122); submission of the Pacific Islands Forum in 2019, p. 3 (available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms; see A/CN.4/740 and Corr.1, para. 123); submission of the United States in 2020, p. 1 (available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms; see A/CN.4/740 and Corr.1, para. 125); statements of Greece in 2018 and 2019 (A/C.6/73/SR.21, para. 68, and A/C.6/74/SR.28, paras. 56–57; see A/CN.4/740 and Corr.1, para. 128); statement of New Zealand (A/C.6/73/SR.22, para. 5; see A/CN.4/740 and Corr.1, para. 130); and statement of Israel (A/C.6/74/SR.24, para. 27; see A/CN.4/740 and Corr.1, para. 131).

[258] Statement of Austria in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#22mtg.

[259] Statement of Israel in 2021 (see footnote 197 above).

[260] Submission of Antigua and Barbuda (see footnote 46 above).

[261] Submission of Columbia (see footnote 53 above).

[262] Submission of Cyprus (see footnote 133 above).

[263] Submission of France (see footnote 60 above).

[264] Statement of Greece in 2021 (see footnote 135 above).

[265] Submission of Ireland (see footnote 65 above).

[266] Submission of Maldives (see footnote 257 above).

[267] Statement of the Philippines in 2021 (see footnote 112 above).

[268] Submission of Poland (see footnote 67 above), in which it states that it "does not consider modifying of maritime boundary treaties due to sea-level rise for now".

[269] Statement of Singapore in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg. In that statement, Singapore expresses the view that, "in general, maritime boundary delimitation treaties and the decisions of international courts or tribunals should not be easily reopened", while acknowledging that "each treaty needs to be interpreted in accordance with its terms in their context and in the light of its object and purpose and surrounding circumstances".

[270] Statement of Thailand in 2021 (see footnote 108 above).

[271] Submission of the United States in 2022. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[272] Examples of States invoking the rule of *rebus sic stantibus* to terminate or withdraw from treaties that predate the Vienna Convention on the Law of Treaties are examined in Snjólaug Árnadóttir, *Climate Change and Maritime Boundaries: Legal Consequences of Sea Level Rise* (Cambridge, United Kingdom, Cambridge University Press, 2021), pp 171–172.

none where international courts or tribunals have applied it.[273] Indeed, the situation does not seem to have changed much since Lauterpacht wrote that the "practice of States shows few examples of actual recourse to the doctrine *rebus sic stantibus*, and probably no examples of its recognition by States against whose treaty rights it has been invoked".[274]

B. Development of the rule of fundamental change of circumstances

115. Fundamental change of circumstances (*rebus sic stantibus*) is a general rule of international law that has been codified in article 62 of the Vienna Convention on the Law of Treaties. Article 62, paragraph 1, provides the following:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (*b*) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

116. The threshold is high, as States may invoke a fundamental change of circumstance only if the circumstances that existed at the time that the treaty was made formed an "essential" basis of the consent of the parties and the change in circumstances has the effect of "radically" transforming the obligations to be performed by the parties. However, even should there be a fundamental change of circumstances in accordance with article 62, paragraph 1, under paragraph 2, that change may not be invoked by a party "as a ground for terminating or withdrawing from a treaty … if the treaty establishes a boundary".

117. During its eighteenth session, the Commission adopted draft article 59 on fundamental change of circumstances.[275] The adopted draft article included paragraph 2 (a), excluding the invocation of fundamental change of circumstances as a ground for terminating or withdrawing from a treaty establishing a boundary. The draft articles were later adopted, in 1969, as the Vienna Convention on the Law of Treaties.

118. As reflected in the commentaries, the Commission agreed to exclude treaties establishing a boundary in order to prevent situations of conflict, "because otherwise the rule [of fundamental change of circumstances], instead of being an instrument of

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[273] See Julia Lisztwan, "Stability of maritime boundary agreements", *Yale Journal of International Law*, vol. 37, No. 1 (Winter 2012), pp. 153–200, at pp. 181 and 185; *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7. However, the European Court of Justice did find that the political and economic changes in former Yugoslav republics created a fundamental change in circumstances. European Court of Justice, *A. Racke GmbH & Co.* v. *Hauptzollamt Mainz*, Case No. C-162/96, Judgment, 16 June 1998, para. 55.

[274] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon, 1933) p. 270. Lauterpacht also discusses the case of *Bremen (Free Hansa City of) v. Prussia*, German *Staatsgerichtshof*, 29 June 1925, in which the court recognized the principle of *rebus sic stantibus* but did not deem it applicable to the case. *Ibid.*, pp. 277–279; and *Annual Digest of Public International Law Cases*, vol. 3 (Cambridge, United Kingdom, Cambridge University Press, 1929), pp. 352–354.

[275] "*Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 177, para. 38, at p. 184.

peaceful change, might become a source of dangerous frictions",[276] and to safeguard the stability of boundaries in order to promote peace and security in the international community.[277]

119. Moreover, the same concerns were expressed by States during the negotiations of the Vienna Convention on the Law of Treaties. For example, specifically on the exclusion of boundary treaties, Poland stated the following:

> "[T]he Polish delegation considered that the present formulation of article 59 reconciled two conflicting elements, the dynamics of international life and the stability that was essential in every legal order. While it might be argued that stability was not an end in itself, it was nevertheless the most important factor in the case of treaties establishing boundaries. The problem of boundaries was closely connected with the most fundamental rights of States. It was for that reason that the Polish delegation maintained that no treaty establishing a boundary could be open to unilateral action on the ground of a fundamental change of circumstances.[278]

120. It can be concluded that the fundamental interest of ensuring stability of boundaries with a view to preserving peaceful relations was an object and purpose of article 62, paragraph 2, of the Vienna Convention on the Law of Treaties. The same interest would apply to ensuring the stability of maritime boundaries and preserving peaceful relations among States. There are still many disputed maritime boundaries, and the prospect of adding new ones from boundaries that were settled would seem to undermine the interest of ensuring stability under the Convention.

C. Case law and application of the rule of fundamental change of circumstances to maritime boundaries

121. Past cases have also demonstrated that courts and tribunals are reluctant to apply fundamental change of circumstances to terminate a treaty. For example, the International Court of Justice did not accept a claim by Iceland of fundamental change of circumstances based on changes in fishing techniques and law as grounds to terminate the compromissory clause between it and the United Kingdom.[279] Likewise, the Court did not accept the argument by Hungary for the application of article 62 of the Vienna Convention on the Law of Treaties as grounds for termination of its treaty with Czechoslovakia. The Court underscored the concerns of stability under the Convention, observing that "[t]he negative and conditional wording of [a]rticle 62 of

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[276] *Ibid.*, p. 259, paragraph (11) of the commentary to draft article 59. See also submission of Maldives (see footnote 257 above).

[277] Árnadóttir, "Termination of maritime boundaries" (see footnote 239 above), pp. 101–102. In support of excluding boundaries, the Commission referred to Permanent Court of International Justice, *Case of the Free Zones of Upper Savoy and the District of , Order*, 19 August 1929, *P.C.I.J. Series A*, No. 22 (Árnadóttir, *ibid.*, pp. 103–104). See also submission of Maldives (see footnote 257 above), pp. 20–21, citing *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 259, paragraph (11) of the commentary to draft article 59.

[278] *Official Records of the United Nations Conference on the Law of Treaties, Second Session, 9 April–22 May 1969, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), 22nd plenary meeting, p. 117, para. 14. States also expressed concern that the exclusion of treaties establishing boundaries would constitute endorsement of a number of colonial and unequal treaties concluded in the past, and runs counter to the right of self-determination. See, for example, the statement of Afghanistan, *ibid.*, p. 118, para. 19.

[279] Iceland did not appear in the jurisdictional proceedings. Iceland had raised the principle of fundamental change of circumstance in a letter dated 29 May 1972 from the Minister for Foreign Affaires of Iceland to the Registrar of the Court. *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court* (see footnote 273 above).

the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases".[280]

122. The question as to whether article 62, paragraph 2, applies to maritime boundaries, was examined in two cases, already addressed in the first issues paper: the 1978 judgment of the International Court of Justice in the *Aegean Sea Continental Shelf (Greece v. Turkey)* case,[281] and the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*.[282] Most recently, in *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, the Court observed "that boundaries between States, including maritime boundaries, are aimed at providing permanency and stability".[283] Moreover, the dominant view of writers does not support the application of fundamental change of circumstances (*rebus sic stantibus*) to maritime boundary treaties.[284] Thus, in reality the issue is more theoretical than likely to occur.

123. It is evident the objective and purpose article 62, paragraph 2 (a), is to prevent conflict and preserve the stability of boundaries. To recognize sea-level rise as a fundamental change of circumstance within the meaning of article 62 would produce the contrary outcome. By allowing States to unilaterally terminate or withdraw from existing treaties for maritime boundaries would instigate new disputes where they had been resolved peaceably by agreement of the parties. Given the widespread impact of sea-level rise, this would also threaten the stability of international relations in many parts of the world.

124. Moreover, given the very high threshold for invoking article 62, the question can also be raised as to whether sea-level rise would fulfil these cumulative conditions to allow a party to unliterally terminate an otherwise valid boundary agreement. Article 62 requires that "the facts, knowledge, or legal regime, the change of which is invoked as grounds for termination, existed at the time the treaty was concluded; the parties did not foresee a change in those circumstances".[285] As one author remarks, "the [S]tate would need to demonstrate both that the coastal geography at the time the agreement was concluded was a basis for its consent and that the [S]tate could not reasonably have anticipated changes in that coastal geography".[286]

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[280] *Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia)* (see footnote 273 above), p. 65, para. 104.

[281] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at pp. 35–36, para. 85. See also A/CN.4/740 and Corr.1, para. 118.

[282] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Case No. 2010-16, Permanent Court of Arbitration, Award, 7 July 2014, p. 63, paras. 216–217. Available from www.pca-cpa.org/en/cases/18. See also A/CN.4/740 and Corr.1, para. 120.

[283] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021*, p. 206, at p. 263, para. 158.

[284] Lisztwan, "Stability of maritime boundary agreements" (see footnote 273 above), pp. 184–199. The author refers to the statement of the United States delegation at the negotiations of the then draft article 59 on the fundamental change of circumstances, in which it quoted Oppenheim's definition of boundaries, noting that, "[b]y inference, the United States delegation also viewed boundaries as encompassing land and maritime delimitations". *Ibid*., p. 188. See also Kate Purcell, *Geographical Change and the Law of the Sea* (Oxford, Oxford University Press, 2019), pp. 253–254; and Jenny Grote Stoutenburg, "Implementing a new regime of stable maritime zones to ensure the (economic) survival of small island States threatened by sea-level rise", *International Journal of Marine and Coastal Law*, vol 26, No. 2 (January 2011), pp. 263–311, at p. 280. However, Árnadóttir is of the view that maritime boundaries are not excluded from article 62, paragraph 2. Árnadóttir, *Climate Change and Maritime Boundaries* (see footnote 272 above), pp. 209–219.

[285] Lisztwan, "Stability of maritime boundary agreements" (see footnote 273 above), citing Oliver J. Lissitzyn, "Treaties and changed circumstances (*rebus sic stantibus*)", American Journal of International Law, vol. 61, No. 4 (October 1967), pp. 895–922, at p. 912, para. 5 ("A change in circumstances may be invoked even if it was not 'unforeseen' in the absolute sense").

[286] Lisztwan, "Stability of maritime boundary agreements" (see footnote 273 above), p. 184.

D. Preliminary observations

125. In conclusion, the following observations of a preliminary nature can be made:

(a) many States in the Sixth Committee have expressed the clear position that sea-level rise should affect neither maritime boundaries fixed by treaty nor the need to maintain the stability of existing maritime boundary agreements. This view was reiterated by several States in their submissions to the Commission. To date, no State has expressed the view that the principle of fundamental change of circumstances, as codified in article 62, paragraph 1, of the Vienna Convention on the Law of Treaties, would apply to maritime boundaries as a result of sea-level rise;

(b) the history of article 62, paragraph 2 (a), of the Vienna Convention on the Law of Treaties, under which treaties establishing boundaries are excluded from application of the principle of fundamental change of circumstances to terminate or suspend a treaty, shows that its objective and purpose was the maintenance of the stability of boundaries in the interests of peaceful relations. The same objective, of maintaining stability in the interests of peaceful relations and avoiding conflict, would clearly apply to maritime boundaries. The possibility of a State unilaterally invoking sea-level rise as a fundamental change of circumstances to terminate an existing treaty would create a risk of conflict and disturbance of international relations. The widespread impact of sea-level rise could create many new disputes among States over settled maritime boundaries. Such a scenario would not be in the interests of preserving stability and peaceful relations;

(c) in practice, there are few examples of treaties being terminated or suspended as a result of a fundamental change of circumstances, whether before or after the adoption of the Vienna Convention on the Law of Treaties. Likewise, the International Court of Justice has not applied the principle when requested by States, on the basis of concerns of ensuring stability under the Convention. There is no clear evidence that maritime boundaries were intended to be excluded from article 62, paragraph 2 (a). On the contrary, in three cases that have raised this issue, the Court has consistently concluded that article 62, paragraph 2 (a), does apply to maritime boundaries, in the interests of the stability of boundaries;

(d) the objective of preserving the stability of boundaries and peaceful relations under article 62 would equally apply to maritime boundaries, as underlined by the Court and arbitral tribunal in three cases addressing this issue.

V. Effects of the potential situation whereby overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlap, and the issue of objective regimes;[287] effects of the situation whereby an agreed land boundary terminus ends up being located out at sea; judgment of the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case

126. According to the 2021 annual report of the Commission:

> Some members suggested that the Study Group take into account the possible situation where, as a result of sea-level rise and a landward shift of the coastline,

[287] The Co-Chairs wishes to thank Professor Ion Galea, Faculty of Law, University of Bucharest, for his contribution to this part of the present chapter.

> the bilaterally-agreed delimitation of overlapping areas of exclusive economic zones of opposite coastal States no longer overlapped, as such a situation would result in States being trapped in an unreasonable legal fiction. Support was expressed for the examination of this hypothesis, including from the angle of concepts from the law of treaties, like obsolescence or the supervening impossibility of performance of a treaty.[288]
>
> …
>
> It was noted that the matter [as to whether maritime agreements establishing boundaries and fixing limits were binding upon all States] needed to be further examined, including from the perspective of objective regimes in international law. It was also suggested that the Study Group examine the issue of the consequences for a maritime boundary if an agreed land boundary terminus ended up being located out at sea because of sea-level rise.[289]

Furthermore, "it was also deemed important to consider the judgment rendered by the International Court of Justice in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case in which the Court used a moving delimitation line for maritime delimitation".[290]

127. These issues were not covered by Member States in their submissions to the Commission or statements to the Sixth Committee over the period 2020–2022.

128. According to the doctrine, "[w]hen the coastal State has a maritime delimitation agreement with an opposite or adjacent State, … [i]f the total area exceeds 400 nautical miles after the coast retreats, a new area of high seas is created".[291]

129. The scenario under consideration presupposes that the delimitation was effected through a treaty between States with opposite coasts (hereinafter referred to as the "delimitation treaty"). In any case, the considerations below may apply only to the notion of the exclusive economic zone. In the case of the continental shelf, nothing prevents States from extending their continental shelf to limits beyond 200 nautical miles, in accordance with article 76 of the United Nations Convention on the Law of the Sea and the procedure for which it provides; at the same time, the maximum limit of 350 nautical miles must not be exceeded.

130. A first question to be answered is whether the delimitation treaty can be affected by the "supervening impossibility of performance", under article 61 of the Vienna Convention on the Law of Treaties. According to that article, "[a] party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty". This article reflects customary international law.[292]

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[288] A/76/10, para. 277.

[289] *Ibid.*, para. 281.

[290] *Ibid.*, para. 272. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139.

[291] Sarra Sefrioui, "Adapting to sea-level rise: a law of the sea perspective", in *The Future of the Law of the Sea*, Gemma Andreone, ed.) (Cham, Springer International, 2017), pp. 3–22, at p. 10), citing Lisztwan, "Stability of maritime boundary agreements" (see footnote 273 above), p. 176.

[292] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (see footnote 273 above), p. 38, para. 46. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16,; and *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court* (see footnote 273 above), p. 18, para. 36.

131. The Commission, in its commentary to the draft articles on the law of treaties, explained the following: “State practice furnishes few examples of the termination of a treaty on this ground. But the type of cases envisaged by the article is the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty.”[293] The Special Rapporteur on the topic, Sir Humphrey Waldock, also provided similar examples, including the destruction of a railway by an earthquake, and the destruction of a plant, installations, a canal or a lighthouse.[294]

132. According to the doctrine, only a “material” impossibility (not a “legal” impossibility) triggers the application of article 61.[295] Nevertheless, the International Court of Justice left the issue open in the *Gabčíkovo-Nagymaros Project* case. Hungary contended that the essential object of a 1997 treaty establishing a hydropower plant on the River Danube was “an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly” and that it had permanently disappeared. The Court held that “[i]t is not necessary for the Court to determine whether the term ‘object’ in [a]rticle 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it would have to conclude that in this instance that régime had not definitively ceased to exist”.[296]

133. Thus, if, in the case of a delimitation treaty, the overlapping entitlements over maritime areas were to be interpreted as a physical object (the “contact” between the entitlements of the two States), it may be argued that the parties could invoke article 61 if their entitlements in the respective areas disappear because of sea-level rise (a situation which is comparable to the submergence of an island). If the delimitation treaty is interpreted as establishing a legal regime, then it may be argued that article 61 does not apply, since this article is applicable only when “a physical object” indispensable for the execution of the treaty disappears. However, as noted by the International Court of Justice (see previous paragraph), even if so, the legal regime provided by that treaty continues to exist, since a maritime delimitation is a legal act.

134. In any case, both the Commission and the Special Rapporteur emphasize that the application of article 61 is not “automatic”: the parties have a “right to invoke” the supervening impossibility of performance as a ground for terminating the treaty,[297] which means that following that invocation the parties still have to agree on the termination of the treaty.

135. A second question to be answered is whether a treaty can be affected by the “desuetude” or “obsolescence”. The exclusion of desuetude and obsolescence as grounds for terminating treaties in the Vienna Convention on the Law of Treaties was intentional on the part of the Commission: “while ‘desuetude’ or ‘obsolescence’ may be a factual cause of the termination of a treaty, the legal basis of such termination,

[293] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 256, paragraph (2) of the commentary to draft article 58.

[294] *Yearbook … 1963*, vol. II, documents A/CN.4/156 and Add.1–3, p. 79, paragraph (5) of the commentary to draft article 21.

[295] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston, Martinus Nijhoff, 2009), p. 755, para. 4.

[296] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (see footnote 273 above), pp. 63–64, para. 103.

[297] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 256, paragraph (5) of the commentary to draft article 58; and *Yearbook … 1963*, vol. II, documents A/CN.4/156 and Add.1–3, p. 78, paragraph (2) of the commentary to draft article 21.

when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty".[298]

136. Desuetude is understood by the Special Rapporteur, Sir Gerald Fitzmaurice, to be "failure by both or all the parties over a long period to apply or invoke a treaty, or other conduct evidencing a lack of interest in it", which "may amount to tacit agreement to by the parties to disregard the treaty, or to treat it as terminated".[299] Obsolescence refers to the "impossibility of applying a treaty due to the disappearance of a legal situation which constituted one of its essential conditions".[300] Thus, obsolescence deals with the legal impossibility of applying a treaty. Examples offered in the doctrine include the references to "enemy state" in the Charter of the United Nations.[301] In practice, Austria, in 1990, notified the other States parties to the State Treaty of 15 May 1955 (France, Union of Soviet Socialist Republics, United Kingdom and United States) that military and aviation clauses in the treaty had became obsolete, and the other parties replied by consenting to this notification.[302] Thus, it may also be argued that the partial termination of the treaty took place by the consent of the parties.

137. It therefore appears that obsolescence could occur in the case of a delimitation treaty, as a "legal impossibility" to perform, if the following conditions were met: (a) a change in the legal framework that rendered the treaty inapplicable (this would imply that the rights and entitlements of States over the maritime areas that overlapped would disappear); and (b) the parties agreed on such inapplicability (or at least one party invoked obsolescence and the others did not object). However, this would require the entire United Nations Convention on the Law of the Sea to become obsolete, which seems highly improbable. The change of baselines of some States, or even many, does not render that entire Convention obsolete.

138. A third question to be answered is whether the delimitation treaty can affect the rights of third States. It could be argued that a delimitation treaty represents an "objective regime", a "territorial treaty", which is opposable to third States and has *erga omnes* effects.

139. The Vienna Convention on the Law of Treaties does not deal with treaties establishing objective regimes. However, in 1960, the Special Rapporteur Sir Gerald Fitzmaurice, recognized the following:

> [T]he instruments governing the use of such international rivers as the Rhine, Danube, and Oder, and such seaways as the Suez and Panama Canals, the sounds and belts, and the Dardanelles and Bosphorus, to take some of the more prominent cases, have all come to be accepted or regarded as effective *erga omnes*, and this of course is still more so as regards the question whether they confer universally available rights of passage.[303]

140. At the same time, the Special Rapporteur argued that, in the case of objective regimes, all States have a duty to recognize and respect situations of law or of fact

[298] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 237; and Marcelo G. Kohen, "Desuetude and obsolescence of treaties", in *The Law of Treaties Beyond the Vienna Convention*, Enzo Cannizzaro, ed. (Oxford, Oxford University Press, 2011), pp. 350–359, at p. 351.

[299] *Yearbook … 1957*, vol. II, document A/CN.4/107, p. 28, paragraph 3 of draft article 15.

[300] Kohen, "Desuetude and obsolescence of treaties" (see footnote 298 above), p. 358.

[301] *Ibid.*

[302] State Treaty for the Re-establishment of an Independent and Democratic Austria (Vienna, 15 May 1955), *Federal Gazette*, vol. 39 (1955), No. 152, p. 725 (English text at p. 762).

[303] *Yearbook … 1960*, document A/CN.4/130, p. 92, para. 52.

established under lawful and valid international treaties embodying "international regimes or settlements".[304]

141. The question of "territorial" treaties appeared before the Commission on the occasion of the works related to the succession of States in respect of treaties. In its commentary to the draft articles on succession of states in respect of treaties, the Commission noted the following: "Both in the writings of jurists and in State practice frequent reference is made to certain categories of treaties, variously described as of a 'territorial', 'dispositive', 'real' or 'localized' character, as binding upon the territory affected notwithstanding any succession of States."[305] The Commission included in this category treaties establishing a boundary – which include delimitation treaties[306] – as well as "other territorial treaties", in what would become articles 11 and 12 of the 1978 Vienna Convention on the Succession of States in respect of Treaties.[307] The International Court of Justice confirmed the customary character of article 12 in the *GabčíkovoNagymaros Project* case.[308]

142. The interpretation of the word "boundary" to cover maritime boundaries was reinforced in the *Aegean Sea Continental Shelf* case.[309] In this case, the International Court of Justice interpreted the term "territorial status" to cover also the issues of delimitation of the continental shelf.[310] It can be noted, in this context, that States parties to the United Nations Convention on the Law of the Sea are obliged to give "due publicity" to charts or lists of geographical coordinates of the outer limit lines of the exclusive economic zone (art. 75, para. 2) and of the outer limit lines of the continental shelf and the lines of delimitation (art. 84, para. 2), and to deposit a copy of each such chart or list with the Secretary-General of the United Nations.

143. The hypothesis whereby an agreed land boundary terminus ends up being located out at sea has been flagged by the doctrine. For instance, Samuel Pyeatt Menefee refers to the situation whereby "land boundaries between two [S]tates … become flooded by rising sea levels. Do these remain the same, although submerged, or would the onslaught of the oceans trigger the necessity for a new boundary agreement?"[311] Referring to article 15 of the United Nations Convention on the Law of the Sea,[312] he goes on:

> The initial wording suggests problems in retaining an old land boundary if the [S]tates involved are not equally affected by the rise in sea level. At the same

[304] *Ibid.*, p. 97, paras. 68–70.

[305] *Yearbook … 1974*, vol I (Part One), document A/9610/Rev.1, p. 174, para. 85, at p. 196, paragraph (1) of the commentary to draft article 12.

[306] *Idem*, p. 199, paragraph (10) of the commentary to draft article 12.

[307] Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

[308] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (see footnote 273 above), p. 72, para. 123.

[309] *Aegean Sea Continental Shelf* (see footnote 281 above), pp 35–36. para. 85: "Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances."

[310] *Ibid.*, p. 32, para. 77.

[311] Samuel Pyeatt Menefee, "'Half seas over': the impact of sea-level rise on international law and policy", *UCLA Journal of Environmental Law and Policy*, vol. 9, No. 2 (1991), pp. 175–218, at p. 210.

[312] Article 15, on "Delimitation of the territorial sea between States with opposite or adjacent coasts", reads as follows: "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 which is at variance therewith."

> time, one could expect an argument based on 'historical title or other special circumstances' by any [S]tate gaining advantage by retaining the old land boundaries. A similar argument is that the doctrine of changed circumstances is not usually held to apply in boundary matters and the former (dry land) territorial agreement would therefore apply, constituting an "agreement between them to the contrary".[313]

144. Indeed, boundary treaties are explicitly excluded under article 62, paragraph 2, of the Vienna Convention on the Law of Treaties from termination as a result of a change of circumstances: "[a] fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty ... if the treaty establishes a boundary". The fact of an agreed land boundary terminus ending up being located out at sea or even of a segment of an agreed land boundary being inundated does not affect the validity of the treaty establishing that land boundary. A different approach would affect the legal stability of the boundary and of its regime.

145. In the *Nicaragua* v. *Honduras* case, Nicaragua, noting the highly unstable nature of the mouth of the River Coco at the Nicaragua-Honduras land boundary terminus, asserted that fixing base points on either bank of the river and using them to construct a provisional equidistance line would be "unduly problematic".[314] As noted by Sefrioui:

> In this case, if the [d]elta shifted landward, it would actually lead to the baseline more closely following the overall shape of the coastline. The [International Court of Justice] held that '[g]iven the close proximity of these base points to each other, any variation or error in situating them would become disproportionately magnified in the resulting equidistance line'.[315] The land boundary along the Rio Coco ends in a prominent delta – Cape Gracias a Dios – created by sediment transported down the river. The parties to the case agreed that the sediment transported by the River Coco has 'caused its delta, as well as the coastline to the north and south of the Cape, to exhibit a very active morpho-dynamism'.[316] The Court has underlined that 'continued accretion at the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future'.[317] Therefore, the Court could not determine any base point for the construction of the equidistance line and concluded that 'where … any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method'.[318]

In this way, the Court found a practicable legal solution to overcome the instability of the baseline and of the base points.

146. In the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* case,[319] the International Court of Justice used a moving delimitation line for maritime delimitation, thus making a further step after the

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[313] Menefee, "'Half seas over'" (see footnote 311 above), p. 210.

[314] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above), p. 741, para. 273. See also Sefrioui, "Adapting to sea level rise" (see footnote 291 above), p. 17.

[315] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above), p. 742, para. 277.

[316] *Ibid*.

[317] *Ibid*.

[318] *Ibid*., p. 746, para. 287. Sefrioui, "Adapting to sea level rise" (see footnote 291 above), pp. 10–11.

[319] *Maritime Delimitation in the Caribbean Sea and in the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)* (see footnote 290 above).

solution found in the above-mentioned *Nicaragua v. Honduras* case. In its statement before the Sixth Committee in 2021, Costa Rica refers to this judgment:

> Costa Rica would like to highlight the need to apply the principles of stability, security, certainty and predictability …. Costa Rica welcomes the consideration [by the Study Group] of the judgment of the Court that served to establish the maritime boundaries between Costa Rica and Nicaragua, using a moving delimitation line in a segment that connects the coast with the fixed point of the start of the maritime boundary. As this case shows, in some situations where the coastal geomorphology is variable, a solution such as the one determined by the Court in that specific case is an ideal alternative for providing security and stability to the parties despite frequent variations in the land boundary terminus.[320]

Indeed, according to the Court in its judgment:

> The Court observes that, "since the starting-point of the land boundary is currently located at the end of the sandspit bordering the San Juan River where the river reaches the Caribbean Sea …, the same point would normally be the starting-point of the maritime delimitation. However, the great instability of the coastline in the area of the mouth of the San Juan River, as indicated by the Court-appointed experts, prevents the identification on the sandspit of a fixed point that would be suitable as the starting-point of the maritime delimitation. It is preferable to select a fixed point at sea and connect it to the starting-point on the coast by a mobile line. Taking into account the fact that the prevailing phenomenon characterizing the coastline at the mouth of the San Juan River is recession through erosion from the sea, the Court deems it appropriate to place a fixed point at sea at a distance of 2 nautical miles from the coast on the median line.[321]

This is a concrete solution found by the Court to overcome the "great instability of the coastline", characterized by "recession through erosion from the sea", and thus the instability of the baseline and of the base points.

147. In conclusion, the following observations of a preliminary nature can be made:

(a) in the potential situation whereby the overlapping areas of the exclusive economic zone of opposite coastal States, delimited by bilateral agreement, no longer overlap, the "supervening impossibility of performance", under article 61 of the Vienna Convention on the Law of Treaties, can be invoked only if the contact between the overlapping entitlements of the two States is interpreted to be the physical object that disappeared. At the same time, the legal regime can continue, since the delimitation is a legal act and, at any rate, the application of article 61 is not automatic. As shown above, neither can desuetude or obsolescence be invoked to terminate the treaty. At the same time, it could be argued that a delimitation treaty represents an "objective regime", a "territorial treaty", which is opposable to third States.

(b) the fact of an agreed land boundary terminus ending up being located out at sea or even of a segment of an agreed land boundary being inundated does not affect the validity of the treaty establishing that land boundary. A different approach would affect the legal stability of the boundary and of its regime.

[320] Statement of Costa Rica in 2021 (see footnote 121 above).

[321] *Maritime Delimitation in the Caribbean Sea and in the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)* (see footnote 290 above), p. 173, para. 86.

(c) the International Court of Justice, in its recent jurisprudence (*Nicaragua* v. *Honduras* and *Costa Rica* v. *Nicaragua*), has found concrete and practicable legal solutions to overcome the instability of the baseline and of the base points: using a fixed point at sea for the start of the maritime boundary might be interpreted as similar to fixing the baseline for the purposes of ensuring the stability of the maritime zones measured from it.

VI. Principle that "the land dominates the sea"

A. Development of the principle that "the land dominates the sea"

148. The well-known principle of international law that "the land dominates the sea" is a judicial creation famously articulated by the International Court of Justice in its 1969 *North Sea Continental Shelf* case.[322] The Court applied this principle to the continental shelf on the grounds that "the land is the legal source of the power which a State may exercise over territorial extensions to seaward", especially in the case of stretches of submerged land.[323] It indicated that the starting point for determining any maritime entitlement is the coast.[324] The principle that "the land dominates the sea" has since been applied in a number of cases concerning the delimitation of the continental shelf,[325] the exclusive economic zone and islands.[326] The concept dates back to the 1909 arbitration in the *Grisbådarna case*, in which the arbitral tribunal referred to the fundamental principles of the law of nations, "*tant ancien que moderne*" ("both ancient and modern"), according to which "*le territoire maritime est une dépendance nécessaire d'un territoire terrestre"* ("maritime territory is an essential appurtenance of land territory").[327] The concept was later highlighted in the *Fisheries Case (United Kingdom* v. *Norway)*, in which the Court took into consideration "the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts".[328] Notably, the principle that "the land dominates the sea", despite its wide acceptance and application by the Court and tribunals, has not been codified. There is no mention

[322] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3.

[323] *Ibid*., p. 51, para. 96.

[324] *Ibid*. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 97, para. 185.

[325] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 312, para. 157; *Aegean Sea Continental Shelf* (see footnote 281 above), p. 36, para. 86; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 324 above), p. 97, para. 185; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (see footnote 229 above), pp. 696 and 699, paras. 113 and 126; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), I.C.J. Reports 2009*, p. 61, at p. 89, para. 77; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* (see footnote 282 above), p. 172, para. 279; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), p. 61, para. 73; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, at. p. 56, para. 185.

[326] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 324 above), p. 97, para. 185.

[327] *Affaire des Grisbådarna (Norvège, Suède)*, Award of 23 October 1909, *Reports of International Arbitral Awards, vol.* XI, pp. 155–162, at. p. 159. See also Bing Bing Jia, "The principle of the domination of the land over the sea: a historical perspective on the adaptability of the law of the sea to new challenges", *German Yearbook of International Law*, vol. 57, 2014, pp. 63–94, at p. 69.

[328] *Fisheries Case, Judgment of December 18th 1951: I.C.J. Reports 1951*, p. 116, at p. 133.

of the principle in the four 1958 Geneva Conventions[329] or in the 1982 the United Nations Convention on the Law of the Sea.

149. While the land is the source of maritime entitlements, the International Court of Justice has clarified that it is not the land mass itself that is the basis of entitlement to continental shelf rights: "The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast. The concept of adjacency measured by distance is based entirely on that of the coastline, and not on that of the landmass."[330] The Court reiterated this concept in the *Qatar and Bahrain* case, recalling that "[i]n previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as 'the land dominates the sea'".[331] In 2009, in the *Maritime Delimitation in the Black Sea* case, the Court stated the following: "The title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts."[332]

B. Principle of natural prolongation

150. Notably, in relation to the continental shelf, the doctrine of "natural prolongation" also emerged parallel to the principle that "the land dominates the sea", as articulated by the International Court of Justice in the *North Sea Continental Shelf* cases: "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources".[333]

151. In contrast to the principle that "the land dominates the sea", the principle of natural prolongation was codified, in article 76, paragraph 1, of the United Nations Convention on the Law of the Sea. However, the application of the principle of natural prolongation in the delimitation of the respective claims of coastal States over the continental shelf by courts and tribunals diminished, despite its broad acceptance by States, in favour of the distance criterion. In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, both parties had asserted that the principle of natural prolongation should be applied in the delimitation of their respective continental shelves. As the International Court of Justice observed, "for both [p]arties it is the concept of the natural prolongation of the land into and under the sea which is

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[329] Convention on the High Seas (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11; Convention on the Continental Shelf (Geneva, 29 April 1958), *ibid.*, vol. 499, No. 7302, p. 311; Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958), *ibid.*, vol. 516, No. 7477, p. 205; and Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 559, No. 8164, p. 285.

[330] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 41, para. 49.

[331] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 324 above), p. 97, para. 185. See also *Aegean Sea Continental Shelf* (see footnote 281 above), p. 36, para. 86.

[332] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above), p. 89, para. 77.

[333] *North Sea Continental Shelf* (see footnote 322 above), p. 22, para. 19. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above). Both parties invoked the concept in the following terms (*ibid.*, pp. 29–30): "The concept of the continental shelf as the natural prolongation of the land territory into and under the sea is fundamental to the juridical concept of the continental shelf and a State is entitled *ipso facto* and *ab initio* to the continental shelf which is the natural prolongation of its land territory into and under the sea."

commanding. Where they differ in this respect is … as to the meaning of the expression 'natural prolongation'".[334] The United Nations Convention on the Law of the Sea had not yet been adopted at the time of the judgment and neither State was party to the 1958 Convention on the Continental Shelf, meaning that the Court was to apply the rules and principles of international law. The Court decided not to apply the well-accepted principle of natural prolongation, as both the Libyan Arab Jamahiriya and Tunisia derived continental shelf title from a natural prolongation common to both territories, despite the parties presenting geological information otherwise. Instead, the Court found that "the ascertainment of the extent of the areas of shelf appertaining to each State must be governed by criteria of international law other than those taken from physical features".[335] While it had recognized in 1969 that natural prolongation was a concept of customary international law,[336] the Court relied on equitable principles: "the two considerations – the satisfying of equitable principles and the identification of the natural prolongation – are not to be placed on a plane of equality".[337] The Court essentially shifted the approach from one relying on geomorphology to ultimately apply the distance criterion under articles 76 and 83 of the then draft United Nations Convention on the Law of the Sea as "new accepted trends".[338]

152. In the *Libyan Arab Jamahiriya/Malta* case, the International Court of Justice, referring to the above-mentioned decision in the *Tunisia/Libyan Arab Jamahiriya* case, abandoned the application of the principle of natural prolongation in favour of the distance criterion, taking into account as a relevant circumstance the close link between rights of the coastal State over the continental shelf and the exclusive economic zone.[339] Some years later, the International Tribunal for the Law of the Sea rejected the argument of Bangladesh to apply natural prolongation as the primary criterion in establishing entitlement to the continental shelf beyond 200 nautical miles: "The Tribunal finds it difficult to accept that natural prolongation … constitutes a separate and independent criterion a coastal State must satisfy in order to be entitled to a continental shelf beyond 200 [nautical miles]."[340] Bing Bing Jia observed that "[t]he current regime of the continental shelf seemingly operates independently of the principle [that 'the land dominates sea']", the practice in that area having "[rid] itself of the element of natural prolongation".[341]

153. These are examples where the International Court of Justice has not applied well-established and recognized principles that had broad acceptance by States or were codified, such as the principle of natural prolongation, for reasons of pragmatism and equity. A similar approach could be considered in regard to the application of the principle that "the land dominates the sea" in relation to sea-level rise and solutions such as the preservation of baselines or outer limits. The principle that "the land

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[334] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), p. 44, para. 38.

[335] *Ibid.*, p. 58, para. 67.

[336] *Ibid.*, p. 46, para. 43.

[337] *Ibid*., p. 47, para. 44.

[338] *Ibid.*, pp. 48–49, paras. 47–48.

[339] *Continental Shelf (Libyan Arab Jamahiriya/Malta*) (see footnote 330 above), p. 33, para. 33, and pp. 46–47, paras. 61–62. See also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (see footnote 325 above), p. 114, para. 437. In the subsequent case against India, before the Permanent Court of Arbitration, Bangladesh withdrew its argument for the application of natural prolongation as a criterion for the continental shelf beyond 200 nautical miles. *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* (see footnote 282 above), p. 131, para. 439.

[340] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (see footnote 325 above), p. 113, para. 435.

[341] Bing Bing Jia, "The principle of the domination of the land over the sea" (see footnote 327 above), p. 76.

dominates the sea" is a purely judicial creation and has not been codified. Soons has dismissed the views of authors who see that principle as a possible barrier to the preservation of existing maritime zones, stating that he does not find such arguments convincing:

> I think these authors confuse the meaning of a legal maxim with the underlying legal rules themselves. They seem to argue: you cannot change the law, because it is the law. "The land dominates the sea" is a maxim, it is a summary of what some positive legal rules (on baselines and perhaps on the extent of maritime zones) currently provide. But circumstances can change, and so will the law; law is inherently adapting to the requirements of developments in society. So, if the rules on baselines change, perhaps the maxim will in the future be worded differently, but I am not even sure that is really needed.[342]

Likewise, Nguyen, while recognizing the role of the principle that "the land dominates the sea" as the basis for maritime entitlements, is of the view that it "does not go against the maintenance of maritime baseline and limits".[343]

C. Exception of "permanency" and the continental shelf

154. The finality and permanency of the limits of the continental shelf under article 76, paragraphs 8 and 9, of the United Nations Convention on the Law of the Sea is an example of where the principle that "the land dominates the sea" does not apply. It demonstrates a flexible application of the principle that "the land dominates the sea". The continental shelf is measured from the baselines from which the breadth of the territorial sea is measured, as is case for the other maritime zones. If the baseline moves landward, the boundaries of the continental shelf should therefore be affected. However, if the required conditions are met, as provided for under article 76, a landward shift of the baseline would have no impact on the boundaries of the continental shelf, which remain fixed or permanent. This shows that the principle that "the land dominates the sea" is not absolute and, under certain circumstances, is not always applied. Indeed, an underlying presumption of permanency of maritime zones in general can be inferred from the observation by the International Court of Justice in the *Jan Mayen* case that "the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline".[344]

D. Preliminary observations

155. In conclusion, the following observations of a preliminary nature can be made:

(a) the principle that "the land dominates the sea" is a judicial construction that was developed in relation to the continental shelf and the extension of the sovereign rights coastal State. As stated by the International Court of Justice, "the land is the legal source of the power which a State may exercise over territorial extensions to seaward".[345] It is a rule of customary international law, and has been codified in neither the 1958 Geneva Conventions nor the United Nations Convention

[342] Alfred Soons, "Remarks by Alfred Soons" (in Patrícia Galvão Teles, Nilüfer Oral *et al.*, remarks on "Addressing the law of the sea challenges of sea-level rise"), *American Society of International Law Proceedings*, vol. 114 (2020), pp. 389–392, at p. 392.

[343] Nguyen Hong Thao, "Sea-level rise and the law of the sea in the Western Pacific region", 13 *Journal of East Asia and International Law*, vol. 13, No. 1 (May 2020), pp. 121–142, at p. 139.

[344] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 74, para. 80.

[345] *North Sea Continental Shelf* (see footnote 322 above), p. 51, para. 96.

on the Law of the Sea. Maritime entitlements do not derive from the land mass *per se*, but from the sovereignty exercised by the State over the coastline. The determination of the extent of maritime boundaries is not a mathematical equation based on the size of the land territory. The Court has stated that the application of equitable principles is paramount, and has discarded the use of natural prolongation for this reason. The preservation of existing maritime boundaries and entitlements in the face of sea-level rise could be considered to be an equitable principle and could operate as an exception to the principle that "the land dominates the sea";

(b) while the principle that "the land dominates the sea" has had wide acceptance and application by courts and tribunals, as well as States, it is not an absolute rule, for two reasons:

(i) first, the principle of the natural prolongation of the continental shelf, which developed in parallel to the principle that "the land dominates the sea", is an example of an exception to existing principles of international law being made for pragmatic reasons and in order to achieve an equitable solution. An analogous approach could be applied in relation to sea-level rise and the preservation of existing baselines. The rigid application of the principle that "the land dominates the sea" would not provide a solution to the inequitable outcome of many States losing existing maritime entitlements because of sea-level rise. Instead, that principle should be assessed in the light of equity and other principles, such as the stability of boundaries, which is also a recognized rule of customary rule. This would be analogous to the Court's approach in replacing the codified and customary rule of natural prolongation with that of the emerging trend of the distance criterion under the United Nations Convention on the Law of the Sea;

(ii) second, if the necessary conditions are met, as provided for under the Convention, the permanent character of the outer limits of the continental shelf would mean that they would remain fixed in case of a landward shift of the baseline. This is an example of where the principle that "the land dominates the sea" does not apply, meaning, therefore, that it is not absolute. In other words, the freezing of baselines and the outer limits of the other maritime zones is not inconsistent with the principle that "the land dominates the sea". There are examples in international law to support a flexible interpretation of the principle that "the land dominates the sea" that would allow for the preservation of baselines or the outer limits of maritime zones.

VII. Historic waters, title and rights

A. Development of the principle of historic waters, title and rights

156. The origin of the concept of historic waters and rights lies in the development of the notion of historic bays and gulfs.[346] The subject of historic bays was addressed early on in the Conference for the Codification of International Law in 1930. In the

[346] The issue of the possible application of historic waters and historic title was raised by a member of the Study Group on sea-level rise in relation to international law at a meeting during the seventy-second session of the Commission, in 2021. The member stated that by taking into account the specific maritime areas of States affect by sea-level rise and considering their individual relationship with those maritime areas, historic titles could potentially be established, and that further exploration of historic titles to preserving maritime entitlements in the light of sea-level rise was warranted in any case. The history of the development of the principle of historic waters and title is detailed in the study, prepared by the Secretariat in 1962, into the juridical regime of historic waters, including historic bays (*Yearbook ... 1962*, vol. II, document A/CN.4/143, p. 1).

Commission's draft articles concerning the law of the sea, only a brief reference is made in the commentary explaining the exclusion of historic bays from draft article 7.[347] At the request of the General Assembly, the Secretariat, in 1962, prepared a study on the juridical regime of historic waters, including historic bays.[348] The Commission, at its fourteenth session, also in 1962, decided to include the topic of juridical regime of *historic waters*, including *historic* bays, in its programme of work, following a request from the General Assembly.[349] However, the Commission ultimately decided not to place the topic on its active work programme.[350]

157. There is limited reference to historic waters or title in the 1958 Convention on the Territorial Sea and the Contiguous Zone and in the 1982 the United Nations Convention on the Law of the Sea. Neither Convention provides any definition of historic waters or title. Moreover, no express reference is made to historic rights. In sum, there is limited codification of the regime of historic waters and title. The lack of a definition or regime for historic waters or historic titles was noted by the International Court of Justice in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case,[351] and reiterated in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, noting that they were regulated by general rules of international law.[352]

158. The study prepared by the Secretariat remains the most comprehensive, and it is relied upon by courts and tribunals.[353] According to the study, the term "historic rights" goes beyond "historic bays":

> Historic rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water. There is a growing tendency to describe these areas as "historic waters", not as "historic bays".[354]

159. The Secretariat highlighted three factors that must be taken into consideration in determining whether a State has acquired an historic title to a maritime area:

> First, the State must exercise authority over the area in question in order to acquire [an] historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that

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[347] *Yearbook … 1956*, vol II, document A/3159, p. 269.

[348] *Yearbook … 1962*, vol. II, document A/CN.4/143, p. 1. See *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958,* vol. II, *Plenary Meetings*, document A/CONF.13/L.56 resolution VII, p. 145. The initial proposal for a study on the regime of historical bays and waters was made by India and Panama. See also Myron H. Nordquist *et al.*, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (Dordrecht, Martinus Nijhoff, 1993), p. 118, para. 10.5 (e).

[349] See *Yearbook … 1967*, vol. II, document A/CN.4/L.119, p. 341, para. 14; and General Assembly resolution 1686 (XVI) of 18 December 1961.

[350] *Yearbook … 1977*, vol. II, p. 129, para. 109.

[351] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), pp. 73–74, para. 100.

[352] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), pp. 588–589, para. 384.

[353] *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958,* vol. I, *Preparatory Documents*, document A/CONF.13/1.

[354] *Yearbook … 1962*, vol. II, document A/CN.4/143, p. 5, para. 29 (citing *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958*, vol. I, *Preparatory Documents*, document A/CONF.13/1, p. 2, para. 8).

acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient.[355]

B. Case law and application of the principle of historic waters, title and rights

160. Historic waters, title and rights have been addressed in several international cases related to maritime delimitation. In the 1910 *North Atlantic Coast Fisheries* Arbitration between the United Kingdom and the United States, the Tribunal of the Permanent Court of Arbitration recognized the existence of "historic bays", although rejected the claim by the United States in the case.[356] In 1917, the Central American Court of Justice declared the Gulf of Fonseca to be an historic bay.[357] The International Court of Justice, in the 1951 *Fisheries Case (United Kingdom* v. *Norway)* case, 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".[358] In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, the Chamber recalled that definition with reference to the Gulf of Fonseca, noting that– "historic waters" were generally understood to mean "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title".[359] On the basis of the 1917 judgement of the Central American Court of Justice, the Chamber determined the following:

> [T]he Gulf waters, other than the 3-mile maritime belts, are historic waters and subject to a joint sovereignty of the three coastal States. … The reasons for this conclusion, apart from the reasons and effect of the 1917 decision of the Central American Court of Justice, are the following: as to the historic character of the Gulf waters, the consistent claims of the three coastal States, and the absence of protest from other States. As to the character of rights in the waters of the Gulf: those waters were waters of a single-State bay during the greater part of their known history.[360]

161. In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the International Court of Justice recognized that "[h]istoric titles must enjoy respect and be preserved as they have always been by long usage".[361] However, the Court did not recognize as historic rights activities that did not lead to "the recognition of an exclusive quasi-territorial right".[362] In the *Eritrea/Yemen* arbitration, Eritrea and

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[355] *Yearbook … 1962*, vol. II, document A/CN.4/143, p. 13, para. 80. For comprehensive explanation of the three elements of historic title, see *ibid.*, pp. 13–19, paras. 80–132.

[356] *The North Atlantic Coast Fisheries Case (Great Britain/United States of America), Award of 7 September 1910,* Case No. 1909-01, Permanent Court of Arbitration, United Nations, *Reports of International Arbitral Awards,* vol. XI, p. 167 (see also https://pca-cpa.org/en/cases/74).

[357] Central American Court of Justice, *El Salvador v. Nicaragua*, Judgment of 9 March 1917, *American Journal of International Law*, vol, 11, No. 3 (July 1917), pp. 674–730.

[358] *Fisheries Case* (see footnote 328 above), pp. 130. See also the dissenting opinion of Sir Arnold McNair, *ibid*., pp. 158–185, at p. 184; the dissenting opinion of Judge J. E. Read, *ibid*., pp. 186–206, at pp. 194–195; and Clive R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Leiden and Boston, Martinus Nijhoff, 2008).

[359] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), p. 588, para. 384.

[360] *Ibid.*, p. 601, paras. 404–405.

[361] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above),pp. 73–74, para. 100. See also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), pp. 588–589, para. 384.

[362] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 324 above), p. 112, para. 236. Bahrain had claimed its pearling or fishing activities as historic rights.

Yemen requested the arbitral tribunal to decide questions of territorial sovereignty over disputed islands in the Red Sea in accordance with applicable international law principles, rules and practices including historic titles. The arbitral tribunal concluded that "[i]n the end neither [p]arty has been able to persuade the Tribunal that the history of the matter reveals the juridical existence of an historic title, or of historic titles, of such long-established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal's decision".[363]

162. A number of cases also assessed historic rights as a relevant circumstance or equitable criterion. In the *Gulf of Maine* case, the Chamber of the International Court of Justice found that the scale of historic fishing activities did not constitute a relevant circumstance or equitable criterion in determining the course of the third segment of the delimitation line.[364] Likewise, the arbitral tribunal in *Barbados/Trinidad and Tobago* did not accept that the claim of Barbados to historic fishing activities in the waters off Trinidad and Tobago warranted the adjustment of the maritime boundary, with the following caveat: "This does not, however, mean that the argument based upon fishing activities is either without factual foundation or without legal consequences."[365]

163. More recently, the arbitral tribunal in the *South China Sea* case noted the following:

> The term "historic rights" is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty.[366]

Citing the 1962 study by the Secretariat, the arbitral tribunal observed the following:

> [T]he process for the formation of historic rights in international law … requires the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States. Although the [study by the Secretariat] discussed the formation of rights to sovereignty over historic waters, … historic waters are merely one form of historic right and the process is the same for claims to rights short of sovereignty.[367]

164. The *South China Sea* tribunal also held that historic rights that were at variance with the maritime zones stipulated under the United Nations Convention on the Law of the Sea were superseded by that Convention,[368] and that the formation of historic rights after the Convention's entry into force would the same three elements with

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[363] *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Award of 9 October 1998, *Reports of International Arbitral Awards,* vol. XXII, pp. 209–332, at p. 311, para. 449.

[364] *Delimitation of the Maritime Boundary in the Gulf of Maine* (see footnote 325 above), p. 342, para. 237.

[365] *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Case No. 2004-02, Permanent Court of Arbitration, Award, 11 April 2006, p. 84, para. 272. Available from https://pca-cpa.org/en/cases/104. However, the arbitral tribunal found that it did not have jurisdiction to make an award establishing a right of access for Barbadian fishers to flying fish within the exclusive economic zone of Trinidad and Tobago, by virtue of article 297, paragraph 3 (a), of the United Nations Convention on the Law of the Sea (*ibid.*, p. 87, para. 283).

[366] *South China Sea Arbitration between the Philippines and the Peoples' Republic of China*, Case No. 2013-19, Permanent Court of Arbitration, Award, 12 July 2016, p. 96, para. 225. Available from https://pca-cpa.org/en/cases/7.

[367] *Ibid.*, p. 113, para. 265.

[368] *Ibid.*, p. 103, para. 246.

respect to historic rights would apply. A number of scholars have written on the issue of historic rights in the *South China Sea* case and the decision of the tribunal.[369]

C. State practice

165. In terms of State practice regarding claims to historic rights and historic waters, Zou and the Chinese Society of International Law cite the following: an agreement between India and Sri Lanka on the boundary in historic waters between the two countries, on 26 June 1974;[370] Territorial Waters and Maritime Zones Act, 1976, of Pakistan;[371] Maritime Zones Law, 1976, of Sri Lanka, providing for the declaration of the territorial sea and other maritime zones of Sri Lanka and all other matters connected therewith or incidental thereto; [372] a presidential proclamation of 15 January 1977, of Sri Lanka, claiming that "the historic waters in the Palk Bay and Palk Strait shall form part of the internal waters of Sri Lanka", and "the historic waters in the Gulf of Mannar shall form part of the territorial sea of Sri Lanka";[373] the Law on the State Boundary of the former Union of Soviet Socialist Republics, which entered into force on 1 March 1983, providing that the waters of bays, inlets, coves, and estuaries, sea and straits, historically belonging to the Union, were relegated to internal waters of the Union;[374] and Oceans Act of 1996 in Canada.[375]

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[369] Robert Beckman, "UNCLOS Part XV and the South China Sea", in *The South China Sea Disputes and Law of the Sea*, S. Jayakumar, Tommy Koh and Robert Beckman, eds. (Cheltenham, Edward Elgar, 2014), pp. 229–264, at pp. 260–261; Stefan Talmon, "The South China Sea arbitration: is there a case to answer?", in *The South China Sea Arbitration: A Chinese Perspective*, Stefan Talmon and Bing Bing Jia, eds. (Oxford, Hart Publishing, 2014), pp. 15–79, at. p. 51; Keyuan Zou, "Historic rights in the South China Sea" in *UN Convention on the Law of the Sea and the South China Sea*, Shicun Wu, Mark Valencia, and Nong Hong, eds. (London, Routledge, 2015), pp. 239–250; Clive R. Symmons, "Historic waters and historic rights in the South China Sea: a critical appraisal" in *ibid.*, pp. 191–238, at pp. 195–196 (see also Clive R. Symmons, "First reactions to the *Philippines v China* arbitration award concerning the supposed historic claims of China in the South China Sea", *Asia-Pacific Journal of Ocean Law and Policy*, vol. 1, 2016, pp. 260–267); Sreenivasa Rao Pemmaraju, "The South China Sea arbitration (*The Philippines v. China*): assessment of the award on jurisdiction and admissibility", *Chinese Journal of International Law*, vol 14, No. 2 (June 2016), pp. 265–307, at pp. 293–294, para. 54; Sophia Kopela, "Historic titles and historic rights in the law of the sea in the light of the South China Sea arbitration", *Ocean Development and International Law*, vol. 48, No. 2 (2017), pp. 188–207; Yoshifumi Tanaka, "Reflections on historic rights in the *South China Sea* arbitration (merits)", *International Journal of Marine and Coastal Law*, vol 32, 2017, pp. 458–483, at pp. 474–475; Andrea Gioia, "Historic titles", in Wulfrum, ed., *Max Planck Encyclopedia of Public International Law* (see footnote 219 above), para. 21; Chinese Society of International Law, "The South China Sea arbitration awards: a critical study", *Chinese Journal of International Law*, vol. 17, No. 2 (June 2018) , pp. 207–748; and Clive R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal*, 2nd ed. (Leiden, Brill Nijhoff, 2019), pp. 1–3.

[370] Zou, "Historic rights in the South China Sea" (see footnote 369 above), p. 242.

[371] Chinese Society of International Law, "The South China Sea arbitration awards": a critical study" (see footnote 369 above), p. 443, para. 488.

[372] Zou, "Historic rights in the South China Sea" (see footnote 369 above), p. 242.

[373] Chinese Society of International Law, "The South China Sea arbitration awards" (see footnote 369 above), pp. 443–444, para. 488.

[374] Zou, "Historic rights in the South China Sea" (see footnote 369 above), p. 242.

[375] Chinese Society of International Law, "The South China Sea arbitration awards" (see footnote 369 above), pp. 443–444, para. 488.

D. Application to sea-level rise

166. A number of scholars have delved into the potential application of historic rights and historic waters to sea-level rise.[376] For example, Caron suggested that historic rights could be one way in which States freeze their maritime boundaries. However, he also acknowledges that the assertion of historic rights is more easily contested than the location of a baseline.[377] Soons examines claims of historic rights as a means of maintaining maritime entitlements:

> A coastal State could maintain the outer limits of its territorial sea and of its [exclusive economic zone] where they were originally located before significant sea level rise occurred. As a consequence, the breadth of its territorial sea would gradually become more than 12 [nautical miles] (or a territorial sea enclave would exist where a former island had disappeared), and the outer limit of its [exclusive economic zone] would be located ever further than 200 [nautical miles] from the baseline (or, in an extreme case of a submerged island, the [exclusive economic zone] could become an enclave in the high seas).[378]

Soons cautions the following, however:

> Such claims must be distinguished from claims to historic waters. … Historic waters can be defined as waters over which the coastal State, in deviation of the general rules of international law, has been exercising sovereignty, clearly and effectively, without interruption and during a considerable period of time, with the acquiescence of the community of States. Such areas are governed by the regime of maritime internal waters.[379]

167. Although Soons accepts the theoretical possibility of using historic rights regime as a way to preserve existing maritime entitlements, he argues that such a solution would result in varying outcomes for different States as it "would involve assessing each individual claim by a coastal State in the light of the particular circumstances and conduct of that State, and the reactions of other interested States over a period of

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[376] David D. Caron, "When law makes climate change worse: rethinking the law of baselines in light of a rising sea level", *Ecology Law Quarterly*, vol. 17, No. 4, 1990, pp. 621–653, at pp. 650–651; Frances Anggadi, "Establishment, notification, and maintenance: the package of State practice at the heart of the Pacific Islands Forum Declaration on Preserving Maritime Zones", *Ocean Development and International Law*, vol. 53, No. 1, 2022, pp. 19–36, at p. 22; Karen Scott, "Rising seas and Pacific maritime boundaries", Australian Institute of International Affairs, 3 September 2018; Vladyslav Lanovoy and Sally O'Donnell, "Climate change and sea-level rise: is the United Nations Convention on the Law of the Sea up to the task?", *International Community Law Review*, vol. 23, No. 2–3 (June 2021), pp. 133–157, pp. 137 and 139; and Egdardo Sobenes Obregon, "Historic waters regime: a potential legal solution to sea-level rise", *International Journal of Maritime Affairs and Fisheries*, vol. 7, No. 1 (June 2015), pp. 17–32.

[377] Caron, "When law makes climate change worse" (see footnote 376 above), pp. 650–651.

[378] Alfred H.A. Soons, "The effects of sea-level rise on baselines and outer limits of maritime zones", in *New Knowledge and Changing Circumstances in the Law of the Sea*, Thomas Heidar, ed. (Leiden and Boston, Brill Nijhoff, 2020), pp. 358–381, at p. 372.

[379] *Ibid.*, pp. 372–373.. See also Eric Bird and Victor Prescott, "Rising global sea levels and national maritime claims", *Marine Policy Reports*, vo. 1, No. 3, 1989; and David Freestone and John Pethick, "Sea-level rise and maritime boundaries: international implications of impacts and responses", in *World Boundaries*, vol. 5, *Maritime Boundaries*, Gerald Blake, ed. (London and New York, Routledge, 1994), pp. 73–90.

time", and would result in unequal outcomes in response to the problem of sea-level rise, which requires a general solution capable of protecting the rights of all States.[380]

E. Preliminary observations

168. Historic waters, title and rights are acquired by a State through long usage and through recognition by other States. They are waters, title or rights to which a State would not otherwise be legally entitled. In other words, it is a principle that preserves long-standing rights exercised by a State over a maritime area. It has also been considered as a relevant circumstance for maritime delimitation. There is doctrinal support that an analogous principle or rule could be applied to preserve existing maritime zones and entitlements that may disappear as a result of sea-level rise.

169. In conclusion, the following observation of a preliminary nature can be made: the principle of historic waters, title or rights provides an example of the preservation of existing rights in maritime areas that would otherwise not be in accordance with international law.

VIII. Equity

A. Statements by Member States in the Sixth Committee of the General Assembly

170. The issue of equity has been raised by a number of States in relation to sea-level rise in their comments in the Sixth Committee and in their submissions in response to the request by the Commission. Antigua and Barbuda, in its submission to the Commission, highlights the importance of equity in relation to determining rights on maritime areas and boundaries decided by international adjudication, recalling the statement by the arbitral tribunal in the *Barbados/Trinidad and Tobago* that "[c]ertainty, equity and stability are thus integral parts of the process of delimitation",[381] and observes that challenging existing maritime boundaries would be inequitable. [382]

171. Maldives, in its submission to the Commission, includes several references to equity. For example, it observes that "considerations of equity and fairness require that [small island developing States'] maritime entitlements are protected, especially given the particular vulnerability of [those States] to climate change". [383] Maldives also expresses the following view:

> [C]onsiderations of fairness and equity mean that it is critically important that international law operates to maintain [small island developing States'] existing maritime entitlements, as established under [the United Nations Convention on

[380] Soons, "The effects of sea-level rise" (see footnote 378 above), p. 373. See also Alfred H.A. Soons, "The effects of a rising sea level on maritime limits and boundaries", *Netherlands International Law Review*, vol. 37, No. 2 (August 1990), pp. 207–232, at pp. 223–226. The following articles raise potential matters that would need to be addressed if the proposal of freezing maritime spaces were to be adopted (although these articles do not specifically mention historic titles or rights): Vincent P. Cogliati-Bantz, "Sea-level rise and coastal States' maritime entitlements", *Journal of Territorial and Maritime Studies*, vol. 7, No. 1 (Winter/Spring 2020), pp. 86–110, at pp. 95–96; Clive Schofield, "A new frontier in the law of the sea? Responding to the implications of sea-level rise for baselines, limits and boundaries", in *Frontiers in International Environmental Law: Oceans and Climate Challenges – Essays in Honour of David Freestone*, Richard Barnes and Ronán Long, eds. (Leiden, Brill Nijhoff, 2021), pp. 171–193, at pp. 188–191.

[381] *Arbitration between Barbados and Trinidad and Tobago* (see footnote 365 above), p. 74, para. 244.

[382] Submission of Antigua and Barbuda (see footnote 46 above).

[383] Submission of Maldives (see footnote 257 above).

> the Law of the Sea]. A failure to do so would result in inequitable and unfair treatment of [small island developing States] such as Maldives, who would be disproportionately affected by any change to their maritime entitlements, notwithstanding that they have contributed virtually nothing to the climate crisis.[384]

172. The Islamic Republic of Iran, in its statement in the Sixth Committee in 2021, in relation to sea-level rise and possible changes to baselines and outer limits of maritime zones, expresses the view "that any change in lines shall be based on principles of equity and fairness".[385] The Philippines observes that "[e]cological equity as a principle is key: no State should suffer disproportionately from effects of climate change affecting all".[386] According to Singapore, "the principle of equity could be particularly relevant when considering the impact of climate change-induced sea-level rise on the development needs of small island developing States", and that such considerations may operate differently depending on "the extent to which the interests of third States and the freedom of navigation are engaged".[387] The Federated States of Micronesia emphasizes the following:

> [T]he core notion under existing relevant international law that the rights and entitlements that flow from maritime zones that are originally established by a coastal State must never be reduced solely on the basis of climate change-related sea-level rise. In our view, the preservation of maritime zones and the rights and entitlements that flow from them is the most suitable and equitable approach in order to achieve that goal.[388]

B. Equity in general

173. Cottier notes that equity "has been a companion of the law ever since rule-based legal systems emerged. It offers a bridge to justice where the law itself is not able to adequately respond. Equity essentially remedies legal failings and shortcomings".[389] The well-known trio of functions of equity are equity *infra legem*, equity *praeter legem* and equity *contra legem*.[390] Equity *infra legem* is a method of interpreting and adapting the applicable law to the specific circumstances of the case using elements

[384] *Ibid.*

[385] Statement of the Islamic Republic of Iran in 2021. Available from https://www.un.org/en/ga/sixth/76/summaries.shtml#20mtg.

[386] Statement of the Philippines in 2021 (see footnote 112 above).

[387] Statement of Singapore in 2021 (see footnote 269 above).

[388] Statement of the Federated States of Micronesia in 2021 (see footnote 78 above).

[389] Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge, United Kingdom, Cambridge University Press, 2015), p. 8. See also Francesco Francioni, "Equity in international law", in Wulfrum, ed., *Max Planck Encyclopedia of Public International Law* (see footnote 219 above), updated November 2020.

[390] Michael Akehurst, "Equity and general principles of law", *International and Comparative Law Quarterly*, vol. 25, No. 4 (October 1976), pp. 801–825.

of reasonableness, flexibility, fairness, judgment and individualized justice.[391] It allows a judge a certain amount of discretion to apply the law to individual cases with different circumstances.[392]As the International Court of Justice stated in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case, citing the *North Sea Continental Shelf* cases, "[i]t is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law".[393] According to Francioni, the Court's decision in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case was the "high-water mark in the development of a concept of equity *praeter legem* endowed with its autonomous normativity".[394] Equity *contra legem* enables departure from strict positive law.[395]

174. Equity is considered to be included generally as part of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, and included specifically under Article 38, paragraph 2, under which the Court may decide a case *ex aequo et bono* if the parties agree thereto.[396] As examples of equity, Cottier cites "the principle of proportionality, of good faith, and the protection of legitimate

[391] *Frontier Dispute (Burkina Faso/Republic of Mali)* (see footnote 218 above), pp. 567–568, para. 28; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Reparations, 9 February 2022, General List No. 116. In the latter case, in a separate opinion, Judge Robinson observed the following: "When the Court applies the principle of equitable considerations, it is applying equity *intra legem*, equity within the law … the elements of the principle of equitable considerations are reasonableness, flexibility, judgment, approximation and fairness. Consequently, the Court's finding that it may form an appreciation of the extent of damage is nothing but an illustration of the principle of equitable considerations, which allows for reasonableness and judgment … and flexibility" (para. 31). See also Catharine Titi, *The Function of Equity in International Law* (Oxford, Oxford University Press, 2021), p. 73 ("Equity as a corrective and as individualised justice aims to adjust the law to the particular factual situation not in order to reject the general law but in order to avert an injustice"); Francioni, "Equity in international law" (see footnote 389 above), para. 7; and Akehurst, "Equity and general principles of law" (see footnote 390 above), p. 801.

[392] Werner Scholtz, "Equity" in *The Oxford Handbook of International Environmental Law*, 2nd ed., Lavanya Rajamani and Jacqueline Peel, eds. (Oxford, Oxford University Press, 2021), pp. 335–350.

[393] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 33, para. 78. See also *North Sea Continental Shelf* (see footnote 322 above), p. 46, para. 85.

[394] Francioni, "Equity in international law" (see footnote 389 above), para. 15.

[395] For example, in *Cameroon* v. *Nigeria*: "The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited long before the work of the [Lake Chad Basin Commission] began, it necessarily follows that any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*." *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening*) (see footnote 227 above), p. 351, para. 64; and Robert Kolb, *International Court of Justice* (Oxford, Hart Publishing, 2013), p. 365.

[396] Francioni, "*Equity in international law"* (see footnote 389 above).

expectations and more particularly of estoppel and acquiescence, the doctrine of abuse of rights".[397]

175. In the *North Sea Continental Shelf* cases, the International Court of Justice stated that the rule of equity means that its judicial decisions "must by definition be just, and therefore in that sense equitable".[398] In the *Tunisia/Libyan Arab Jamahiriya* case, the Court stated that "[e]quity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it".[399] The Court also stated that the "result of the application of equitable principles must be equitable".[400]

176. The principle of equity has also developed in other disciplines of law, such as the law of the sea, environmental law, human rights law and investment law. However, for the purpose of the present report, the focus will be on equity as relevant to sea-level rise, in the context of the law of the sea, in relation to maritime boundaries and entitlements.

C. Equity and the law of the sea

177. There are numerous references to equity in the United Nations Convention on the Law of the Sea. For example, "the equitable and efficient utilization of their resources" and "the realization of a just and equitable international economic order";[401] the resolution "on the basis of equity" of conflicts between the interests of the coastal State and any other State when the Convention does not attribute rights or jurisdiction to either;[402] the enjoyment by landlocked States[403] and by geographically disadvantaged States of their rights "on an equitable basis"[404] the delimitation of the maritime boundaries of the exclusive economic zone[405] and the continental shelf[406] by means of "an equitable solution"; the "equitable sharing of financial and other economic benefits derived from activities in the Area";[407] and the transfer of marine

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[397] Cottier, *Equitable Principles of Maritime Boundary Delimitations* (see footnote 426 above), p. 14. See, for example, Cayuga Indian Claims, Great Britain v United States, Award, (1955), *Reports of International Arbitral Awards* VI 173, (1926) 20 *Asian Journal of International Law* 574, 22nd January 1926, Arbitral Tribunal (Great Britain-United States 1910); *Case Relating to the Diversion of the Water From the Meuse*; Russian Claim for Interest on Indemnities (Damages Claimed by Russia for Delay in Payment of Compensation Owed to Russians Injured During the War of 1877-1878), Russia v Turkey, Award, (1961) *Reports of International Arbitral Awards* XI 421, ICGJ 399 (PCA 1912), (1912) 1 HCR 547, 11th November 1912, Permanent Court of Arbitration [PCA]; Orinoco Steamship Company Case, United States v Venezuela, Award, (1961) *Reports of International Arbitral Awards* XI 227, (1961) *Reports of International Arbitral Awards* XI 237, ICGJ 402 (PCA 1910), (1910) 1 HCR 228, 25th October 1910, Permanent Court of Arbitration [PCA]; *Norwegian Shipowners' Claims, Norway v United States*, Award, (1948) *Reports of International Arbitral Awards* I 307, ICGJ 393 (PCA 1922), (1932) 1 I.L.R. 189, (1919-1922) ADIL 189, (1932) 2 Hague Rep 69, 13th October 1922, Permanent Court of Arbitration [PCA]; Eastern Extension, Australasia and China Telegraph Company Limited (Great Britain) v United States, (1955) *Reports of International Arbitral Awards* VI.

[398] *North Sea Continental Shelf* (see footnote 322 above), p. 48, para. 88.

[399] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), p. 60, para. 71.

[400] *Ibid.*, p.59, para. 70.

[401] United Nations Convention on the Law of the Sea, preamble.

[402] *Ibid.*, article 59.

[403] *Ibid.*, article 69.

[404] *Ibid.*, article 70.

[405] *Ibid.*, article 74, paragraph 1.

[406] *Ibid.*, article 83, paragraph 1.

[407] *Ibid.*, article 140.

technology.[408] However, it is in the field of maritime delimitation where equity and equitable principles have flourished.[409]

178. The arbitral tribunal in *Barbados/Trinidad and Tobago* observed that, "[s]ince the very outset, courts and tribunals have taken into consideration elements of equity in reaching a determination of a boundary line over maritime areas".[410] The role of equity in relation to maritime delimitation was core to the landmark decision by the International Court of Justice in the 1969 *North Sea Continental Shelf* cases, in which the Court decided that "delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances".[411] Equity has since been applied to all cases concerning maritime delimitation.[412] Jennings wrote that "the process of delimitation involves both law and equity", and that "law and equity working together should serve the ends of justice by introducing flexibility, adaptability, and even limitations upon the application and meaning of legal rules".[413]

179. The International Court of Justice and tribunals have consistently rejected recognizing any single method of delimitation, preferring instead equity, as was first articulated by the Court in the *North Sea Continental Shelf* cases, in which it declared that "delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances",[414] despite the codification of the equidistance method in the 1958 Convention on the Territorial Sea and the Contiguous Zone. The equity method was subsequently codified in the United Nations Convention on the Law of the Sea, in article 83, paragraph 1, for the continental shelf and article 74, paragraph 1, for the exclusive economic zone, each providing that the objective of maritime delimitation is to achieve an equitable solution. In the *Tunisia/Libyan Arab Jamahiriya* case, the Court articulated an "outcome" approach, whereby it was not the strict application of specific equitable principles but the equitable outcome that mattered:

> It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result.[415]

A similar view was expressed by the International Tribunal for the Law of the Sea in the 2012 *Bangladesh/Myanmar* case, in which it stated that "[t]he goal of achieving

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[408] *Ibid.*, article 266, paragraph 3.

[409] Cottier, *Equitable Principles of Maritime Boundary Delimitations* (see footnote 389 above), p. 4.

[410] *Arbitration between Barbados and Trinidad and Tobago* (see footnote 365 above), p. 70, para. 229.

[411] *North Sea Continental Shelf* (see footnote 322 above), p. 53, para. 101.

[412] See, for example, *Continental Shelf (Libyan Arab Jamahiriya/Malta*) (see footnote 330 above), pp. 51–52, para. 70.

[413] Robert Y. Jennings, "Equity and equitable principles", *Annuaire Suisse de Droit International*, vol. XLII (1986), pp. 27–38, at p. 36; and Robert Y. Jennings, "The principles governing marine boundaries", in *Staat und Völkerrechtsordnung*, Kay Hailbronner, Georg Ress and Torsten Stein, eds. (Berlin, Springer, 1989), pp. 397–408, at p. 400. See also Barbara Kwiatkowska, "Equitable maritime boundary delimitation, as exemplified in the work of the International Court of Justice during the presidency of Sir Robert Yewdall Jennings and beyond", Ocean Development and International Law, vol 28, No. 2 (1997), pp. 91–145, at p. 101.

[414] *North Sea Continental Shelf* (see footnote 322 above), p. 53, para. 101.

[415] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), p. 59, para. 70.

an equitable result must be the paramount consideration guiding the action of the Tribunal in this connection". [416]

180. The process of achieving the equitable result has been crystallized in the three-step method of delimitation recognized by the International Court of Justice in the *Maritime Delimitation in the Black Sea* case.[417] It begins with the identification of the relevant coastal area to be delimited and the drawing of a provisional equidistance line.[418] Equitable considerations are applied to determine whether the provisional equidistance line needs to be adjusted to achieve an equitable solution. Relevant circumstances could be geographic and non-geographic. Geographic factors include the general configuration of the coasts of the States, the presence of any unusual or special features, reasonable proportionality of the coastal line and any "cut-off" effect.[419] Other considerations raised have been the general geographical context in which the delimitation is to be effected,[420] such as the enclosed nature of the sea[421] or the concavity of a gulf.[422] In practice, geographic circumstances have played a dominant part in cases in which the court or tribunal has made adjustments to the provisional equidistance line.

181. Among the non-geographic and socioeconomic relevant circumstances considered by the International Court of Justice are past conduct of the parties, such as hydrocarbon licensing practice,[423] historic fishing rights,[424] fishing activities,[425] oil and gas concessions,[426] possible third-State claims,[427] existing delimitations already effected in the region,[428] security and defence concerns,[429] naval patrols,[430] and economic disparity.[431] However, in practice, these circumstances have not been applied. Indeed, the Chamber in the *Gulf of Maine* case set a high threshold for non-geographic factors such as fisheries activities, navigation, defence, petroleum exploration and exploitation, stating the scale of such activities "cannot be taken into account as a relevant circumstance or … equitable criterion to be applied in determining the delimitation line" unless the result should be revealed as "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned""[432] This high threshold of having catastrophic

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[416] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar*) (see footnote 325 above), p. 67, para. 235.

[417] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above), pp. 101–103, paras. 115–122.

[418] *Ibid.*

[419] See *North Sea Continental Shelf* (see footnote 322 above).

[420] See *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 330 above).

[421] See *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above).

[422] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* (see footnote 227 above). However, the Court did not find it to be relevant: *ibid.*, pp. 445–446, para. 297.

[423] See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above).

[424] *Ibid.*, pp. 76–77, para. 105.

[425] See *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above).

[426] *Ibid*. In *Cameroon* v. *Nigeria*, the Court did not consider the oil practice of the parties to be a relevant circumstance. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* (see footnote 227 above), pp.447–448, para. 304.

[427] See *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 330 above).

[428] See *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (see footnote 325 above).

[429] *Ibid.*

[430] *Ibid*.

[431] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above); and *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 330 above), p. 41, para. 50.

[432] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (see footnote 325 above), p. 342, para. 237.

consequences would clearly apply to sea-level rise for many States should their maritime boundaries be reduced or changed as a result.

182. In the third and final step of the maritime delimitation process, the court or tribunal verifies whether there is a marked disproportion between the ratio of the respective coast lengths and the relevant maritime areas of the coastal States in relation to the provisional delimitation line drawn.[433] In practice, the court or tribunal has rarely adjusted the provisional equidistance line.

D. Preliminary observations

183. In conclusion, the following observations of a preliminary nature can be made:

(a) equity plays different functions in law. However, the notion of justice is core: as stated by the International Court of Justice, equity is "a direct emanation of the idea of justice". Equity provides for methods of interpretation and allows for flexibility to ensure justice where strict application of rules may produce inequitable results. Indeed, this is also at the foundation of the preference of the Court and of tribunals for the application of equitable principles in lieu of established methods of delimitation such as equidistance. For the purposes of maritime delimitation, the overarching objective is to achieve an equitable solution through the application of equitable principles or relevant circumstances. As addressed in chapter VI, achieving an equitable result had priority over the principle of natural prolongation in the *Tunisia/Libyan Arab Jamahiriya* case;[434]

(b) the United Nations Convention on the Law of the Sea includes many references to equity, and equity is integral to the interpretation and application of the Convention. Considerations of the inequitable impact of sea-level rise on particularly vulnerable countries, such as small island developing States and low-lying coastal developing States, should also be considered when assessing the legal impact of sea-level rise on maritime zones and associated entitlements of these States and when considering potential solutions, especially as the loss of maritime entitlements will result in catastrophic consequences for many of these States;

(c) the potential significant loss of maritime entitlements due to sea-level rise if the baseline shifts landward, or if islands are rendered unable to sustain human habitation or an economic life of their own, would constitute an inequitable outcome and would not fulfil the notions of justice under international law. The preservation of existing maritime entitlements, on the other hand, would prevent potentially catastrophic consequences and provide for an equitable outcome, as mandated under the United Nations Convention on the Law of the Sea and international law;

(d) equity, as a method under international law for achieving justice, should be applied in favour of the preservation of existing maritime entitlements, the loss of which would result in catastrophic consequences for the most vulnerable States.

[433] Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford, Oxford University Press, 2016), p. 93.

[434] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 236 above), pp. 46–47, para. 44.

IX. Permanent sovereignty over natural resources

A. Development of the principle of permanent sovereignty over natural resources

184. The assertion by Antigua and Barbuda, in its submission to the Commission in 2021, that "[a]mbulatory baselines would violate State sovereignty and the principle of permanent sovereignty of people and States over their natural wealth and resources"[435] underscores the important relationship between sovereignty and the preservation of existing rights of coastal States over their marine natural resources lawfully established. Permanent sovereignty over natural resources emerged as a fundamental principle of decolonization together with the principle of self-determination. It served as a foundation stone for economic development, especially for developing countries.[436] Economic independence, self-determination and development were key issues for the developing world, and an integral component was the principle of permanent sovereignty over natural resources.[437]

185. There have been a plethora of General Assembly resolutions invoking the right of permanent sovereignty over natural resources. The essence of those adopted in the period between the 1950s and 1970s was to secure economic rights for and the development of developing countries.[438] Schrijver, in his extensive study of the principle of permanent sovereignty of natural resources, observes two roots for the principle: first, permanent sovereignty as a part of the movement to strengthen the political and economic sovereignty of the newly independent States and, second, a part of the development of the principle of self-determination.[439]

186. During the 1950s, the General Assembly adopted a series of resolutions concerning permanent sovereignty over natural resources.[440] In 1958, the General

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[435] Submission of Antigua and Barbuda (see footnote 46 above).

[436] Nico Schrijver, "Fifty years permanent sovereignty over natural resources: the 1962 UN Declaration as the *opinio iuris communis*" in Marc Bungenberg and Stephan Hobe (eds.), *Permanent Sovereignty over Natural Resources* (Springer, 2015), p. 16; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge, United Kingdom, Cambridge University Press, 1997).

[437] For a detailed history of the development of the principle of permanent sovereignty over national resources see, Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*.

[438] Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties,* pp. 82-118.

[439] Schrijver, "Fifty years permanent sovereignty over natural resources …", p. 16. See also Stephan Hobe, "Evolution of the principle on permanent sovereignty over natural resources from soft law to a customary law principle?" in Bungenberg and Hobe, *Permanent Sovereignty over Natural Resources*, p. 3. See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Mauritius (1 March 2018), p. 220; See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the African Union, para. 242; See also separate opinion of Judge Cançado Trindade; Portugal also invoked the right to self-determination and permanent sovereignty over natural resources in *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90. See also the dissenting opinion of Judge Weeramantry, stating "I would reaffirm the importance of the right of the people of East Timor to self-determination and to permanent sovereignty over natural resources …" p. 204.

[440] General Assembly resolution 523 (VI) of 12 January 1952 on "Integrated economic development and commercial agreements", followed by resolution 626 (VII) of 21 December 1952, which in paragraph 3 of its preamble declared "the right of peoples freely to use and exploit their natural wealth and resources *is inherent in their sovereignty* and is in accordance with the Purposes and Principles of the Charter of the United Nations". This was followed by General Assembly resolutions 837 (IX) of 14 December 1954 "Recommendations concerning international respect for the right of peoples and nations to self-determination" (request to the Commission on Human Rights to complete its work on self-determination); 1314 (XIII) of 12 December 1958, "Recommendations concerning international respect for the right of peoples and nations to self-determination", which in its preamble stated "Noting that the right of peoples and nations to self-determination as affirmed in the two draft Covenants completed by the Commission on Human Rights includes 'permanent sovereignty over their natural wealth and resources'".

Assembly established the Commission on Permanent Sovereignty over Natural Resources, which was followed by the adoption by the General Assembly of the Declaration on Permanent Sovereignty over Natural Resources.[441] The preamble included the "recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States". Article I, paragraph 1, declared, "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned." Some decades later, the International Court of Justice recognized the principle of permanent sovereignty over natural resources, as enshrined in General Assembly resolution 1803 (XVII), as a principle of customary international law.[442]

187. The integral link between economic development and the right to exercise permanent sovereignty over natural resources developed over the next series of General Assembly resolutions.[443] In 1964, the first meeting of the United Nations Conference on Trade and Development (UNCTAD) adopted a set of principles to guide trade relations,[444] of which principle 3 provided: "Every country has the sovereign right freely to trade with other countries, and freely to dispose of its natural resources in the interest of the economic development and well-being of its own people."[445] Notably, in its resolution 2158 (XXI), adopted on 25 November 1966 by a vote of 104 for, 0 against, with 6 abstentions, the General Assembly reaffirmed the "inalienable right of all countries to exercise permanent sovereignty over their natural

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[441] General Assembly resolution 1803 (XVII) of 14 December 1962.

[442] However, the Court denied the claim of Uganda that the Democratic Republic of the Congo had violated its right to permanent sovereignty over its natural resources, as the resolution did not contain anything to suggest it would apply to looting, pillage and exploitation of natural resources by the military of another State. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (see footnote 424 above), para 244. Judge Koroma, in his separate declaration, disagreed with this view stating "in my view, the exploitation of the natural resources of a State by the forces of occupation contravenes the principle of permanent sovereignty over natural resources, as well as the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949" as well as noting that both were parties to the African Charter on Human and Peoples' Rights of 1981 that provided "In no case shall a people be deprived" of their right "to freely dispose of their wealth and natural resources" (Separate declaration of Judge Koroma, *ibid*., pp. 289-290); See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the African Union (1 March 2018), paras. 102 and 242.

[443] General Assembly resolution 1515 (XV) of 15 December 1960 on "Concerted action for economic development of economically less developed countries", which in paragraph 5 reads: "Recommends further that the sovereign right of every State to dispose of its wealth and its natural resources should be respected in conformity with the rights and duties of States under international law"; General Assembly resolution 1803 (XVII) of 14 December 1962 on "Permanent sovereignty over natural resources", paragraph 1, which stated: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned"; General Assembly resolution 2158 (XXI) of 25 November 1966 on "Permanent sovereignty over natural resources", which in paragraph 1 reads: "Reaffirms the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development."

[444] General and Special Principles to govern international trade relations and trade policies conducive to development, *Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 March–16 June 1964*, vol. I, *Final Act and Report* (E/CONF.46/141, Vol. I; United Nations publication, Sales No.: 64.II.B.11), annex A.I.1.

[445] As Schrijver describes the adopted text was initially contested by developed countries represented in the B group [Group B: Western Europe a by ninety-four votes to four (Australia, Canada, the UK and the USA), with eighteen abstentions (Group B countries plus Cameroon, Nicaragua, Peru and South Africa) and other industrialized countries with a market economy] who did, however, agree to the text, which was adopted. Schijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, p. 84.

resources in the interests of their national development". There was no opposition to such right being "inalienable".[446]

188. The principle of permanent sovereignty over natural resources was also adopted in the International Covenant on Civil and Political Rights,[447] the Vienna Convention on Succession of States in Respect of Treaties,[448] the African Charter of Human and Peoples' Rights (1986)[449] and Protocol to the Pact on Security, Stability and Development in the Great Lakes Region against the Illegal Exploitation of Natural Resources.[450] It is also reflected in instruments related to conservation of natural resources such as Principle 21 of Declaration of the United Nations Conference on the Human Environment,[451] Principle 2 of the Rio Declaration on the Environment and Development,[452] African Convention on the Conservation of Nature and Natural Resources,[453] 1982 World Charter for Nature,[454] 2002 Johannesburg World Summit on Sustainable Development,[455] and the 2012 Rio+20 Conference on Sustainable Development.[456] The first issues paper also outlined the economic importance to the livelihoods of developing States, especially the small island developing States.[457]

B. Definition of permanent sovereignty

189. According to Brownlie, "Loosely speaking, permanent sovereignty is the assertion of the acquired rights of the host State which are not defeasible by contract

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[446] General Assembly resolution 3171 of 17 December 1973 also referred to the "inalienable right of each State to the full exercise of national sovereignty over its natural resources" and that this had been "repeatedly recognized by the international community in numerous resolutions of various organs of the United Nations." (see Zhifeng comments on the opposition to "inalienable"); General Assembly resolution 41/128 on "Declaration on the Right to Development" of 4 December 1986, which stated the "right to development is an inalienable right" and such right to development "implies the full realization of the right of people's to self-determination which includes … the exercise of their *inalienable* right to full sovereignty overall their natural wealth and resources" (emphasis added).

[447] Article 1, paragraph 2, which also states that, "In no case may a people be deprived of its own means of subsistence". International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[448] Article 13 provides the following: "Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources."

[449] African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 9.

[450] Protocol to the Pact on Security, Stability and Development in the Great Lakes Region against the Illegal Exploitation of Natural Resources, 30 November 2006.

[451] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972 (A/CONF.48/14 and Corr.1).

[452] 4 June 1992, in *Report of the United Nations Conference on Environment and Development* (A/CONF.151/26/Rev.1(Vol.I)), Annex I.

[453] African Convention on the Conservation of Nature and Natural Resources (with annexed list of protected species), United Nations, *Treaty Series*, vol. 1001, 1968, p. 3.

[454] General Assembly resolution 37/7, the preamble of which solemnly invited Member States, in the exercise of their permanent sovereignty over their natural resources, to conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations.

[455] A/CONF.199/20, in which States declare "We strongly reaffirm our commitment to the Rio principles", *Report of the World Summit on Sustainable Development*, p. 8.

[456] A/CONF.216/L.1, Reaffirming the principles of the Rio Declaration on Environment and Development, para 15.

[457] First issues paper, para. 181.

or, perhaps, even by international agreement."[458] Hossain writes that "At the core of the concept of permanent sovereignty is the inherent and overriding right of a state to control and dispose of the natural wealth and resources in its territory for the benefit of its own people." [459] According to Cullinan, "[t]he doctrine of permanent sovereignty over natural resources … recognizes that all states have the inalienable right to dispose of their natural wealth and resources in accordance with their national interests and is one of the most fundamental doctrines in international environmental law."[460] Sanita van Wyk writes "terms such as 'permanent', 'full' or 'inalienable' are often used when referring to the state's sovereignty over natural resources. … the right to permanent sovereignty over natural resources does not need to be secured by a treaty or a contract."[461] And "the term 'inalienable' is understood to denote exactly the same characteristics as the term 'permanent' or 'full' when used in conjunction with the phrase 'the principle of sovereignty over natural resources'. In other words, the "rights that are awarded to a state in terms of [permanent sovereignty over natural resources] can never be taken from that state."[462]

C. Permanent sovereignty over marine resources

190. An early act of claiming permanent sovereignty over marine natural resources is the 1945 Truman Proclamation on the Continental Shelf, in which the United States extended its sovereign rights of over the natural resources of its continental shelf.[463] This was followed with the 1952 Declaration of Santiago on the Maritime Zone by Chile, Ecuador and Peru.[464] Since then the right of permanent sovereignty over natural resources in the marine environment has been recognized in a number of General Assembly resolutions. These include General Assembly resolution 2692 (XXV) of 1970, which recognized "the necessity for all countries to exercise fully their rights so as to secure the optimal utilization of their natural resources, *both land and marine*" (emphasis added); General Assembly resolution 3016 (XXVII) of 18 December 1973 on the "Permanent sovereignty over natural resources of developing countries", which emphasized "the great importance for the economic progress of all countries, especially the developing countries, of their fully exercising their rights so as to secure the maximum yield from their natural resources, both on land and in their coastal waters". It also reaffirmed "the right of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those found in the seabed and subsoil thereof within their national jurisdiction and in the superjacent waters". General Assembly resolution 3171 (XXVIII) of 17 December 1973, which strongly reaffirmed "the inalienable rights of States to permanent

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[458] Ian Brownlie, "Legal status of natural resources in international law", *Collected Courses of the Hague Academy of International Law*, vol. 162 (1979), pp. 255–271, at pp. 270–271.

[459] Kamal Hossain, "Introduction" in Kamal Hossain and Subrata Roy Chowdhury (eds.), *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (London, Pinter, 1984), p. xiii.

[460] Cormac Cullinan, "Earth jurisprudence" in Lavanya Rajamani and Jacqueline Peel (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2021), p. 246.

[461] Sanita van Wyk, *The Impact of Climate Change Law on the Principle of State Sovereignty Over Natural Resources* (Baden Baden, Nomos Verlag, 2017), pp. 73-74. See also Subrata Roy Chowdhury, "Permanent sovereignty over natural resources: substratum of the Seoul Declaration" in Paul de Waart, Paul Peters and Erik Denters (eds.), *International Law and Development* (1988).

[462] Van Wyk, *The Impact of Climate Change Law on the Principle of State Sovereignty Over Natural Resources* (see previous footnote), pp. 75-76.

[463] Executive Order 9633 of September 28, 1945, 10 Fed. Reg. 12,305 (1945).

[464] Chile, Ecuador and Peru Declaration on the Maritime Zone, signed at Santiago on 18 August 1952, United Nations, *Treaty Series*, vol. 325, No. 1006.

sovereignty over all their natural resources, on land within their international boundaries as well as those in the seabed and the subsoil thereof within their national jurisdiction and in the superjacent waters".[465] The principle of permanent sovereignty over natural resources also featured prominently in the Declaration on the Establishment of a New International Economic Order adopted by the General Assembly in 1974,[466] which described it as an "inalienable right".[467]

191. In relation to the law of the sea, Schrijver observes how developing countries in becoming independent "have broadened the scope of [permanent sovereignty over natural resources] by claiming exclusive rights over the natural resources of the sea in waters adjacent to their coast. To a considerable extent these claims have been accepted and recognized in the modern law of the sea."[468] Permanency is also an integral aspect of the regime of the continental shelf under article 76 of the United Nations Convention on the Law of the Sea if all the conditions are met. Moreover, it is well accepted that the coastal State rights over the continental shelf exist *ipso facto* and *ab initio*. Moreover, if the outer limits of the continental shelf are permanent, this would logically mean that the coastal State has permanent sovereign rights over its resources. Permanent sovereignty over the natural resources would equally apply to the exclusive economic zone and territorial sea in the situation of where States risk losing such rights outside their own volition. Such loss, as a result of imposing a legal requirement to move the baseline landward under the United Nations Convention on the Law of the Sea because of sea-level rise, would arguably result in a violation of the inalienable or permanent character of the principle.

D. Preliminary observations

192. The principle of permanent sovereignty over natural resources is a principle of customary international law as recognized by the International Court of Justice and expressed in multiple General Assembly resolutions, as well as recognized in binding international instruments. It was critical to the decolonization process and the achievement of self-determination. The permanent sovereignty over natural resources is inherent to the sovereignty of the State (see General Assembly resolution 626 (VII) of 21 December 1952) and is inalienable, meaning that States cannot be deprived of it against their volition. Moreover, it is integral to the social and economic rights of developing States. The principle of permanent sovereignty over natural resources applies equally to marine resources, as reflected in numerous General Assembly resolutions. It applies *ipso facto* and *ab initio* over the coastal State's continental shelf.

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[465] Emphasis added. See also *Proceedings of the United Nations Conference on Trade and Development, Third session*, Principle XI of Res. 46 (III), 18 May 1972, which states. "Coastal States have the right to dispose of marine resources within the limits of their national jurisdiction, which must take duly into account the development and welfare needs of their peoples." (p. 60). Emphasis added.

[466] General Assembly resolution S-6/3201, Declaration on the Establishment of a New International Economic Order, adopted 1 May 1974 in paragraph 4 (e) provides "Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."

[467] General Assembly resolution 3281 (XXIX), "Charter of Economic Rights and Duties of States", of 12 December 1974, stating the right of every State to freely exercise full permanent sovereignty over its natural resources.

[468] Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, p. 214.

193. Many of the States that are or will be adversely impacted by sea-level rise are developing States whose livelihoods and economies rely heavily on marine natural resources. The landward shift of baselines or the possible loss, through loss of islands, of their capacity to sustain human habitation or an economic life of their own risks the loss of valuable marine natural resources critical to their economies and economic development as outlined in the first issues paper (paras. 179–183). If these States were to lose these entitlements outside of their own volition, this could be a violation of their "inalienable rights" inherent their sovereignty, as recognized by States. The principle of permanent sovereignty over natural is also consistent with the solution of legal preservation of maritime zones and the natural resources as way to prevent the loss of existing entitlements.

194. In conclusion, the following observations of a preliminary nature can be made:

(a) the principle of permanent sovereignty over natural resource is a rule of customary international law according to which a State cannot be deprived of its inherent and inalienable sovereign right over its natural resources, including marine resources;

(b) the loss of marine natural resources important for the economic development of States as a result of sea-level rise would be contrary to the principle of the permanent sovereignty over natural resources. Whereas, the legal and practical solution of the preservation of existing maritime entitlements would also be in line with this principle.

X. Possible loss or gain by third States

195. The first issues paper included an examination in some detail of the possible consequences on the rights and obligations of States in maritime zones in the case of a landward shift of the baseline resulting in a landward shift of the maritime zones.[469] It concluded the following: "Overall, third States stand to benefit from these changes, but at the expense of the coastal State."[470] However, while no State raised this issue, the present chapter contains an examination in greater detail, at the request of the Study Group at the seventy-second session of the Commission, of the possible benefits and losses to third States resulting from any landward shift of a new baseline in the case of an ambulatory baseline that is adjusted.

196. As stated in the first issues paper, "if the baselines and the outer limits of the various maritime spaces move landward, this means that the legal status and legal regime of the maritime zones change: for example, part of the internal waters becomes territorial sea, part of the territorial sea becomes contiguous zone and/or exclusive economic zone, and part of the exclusive economic zone becomes high seas, with implications for the specific rights of the coastal State and third States, and their nationals (innocent passage, freedom of navigation, fishing rights, etc.). Sea-level rise also poses a risk to an archipelagic State's baselines".[471] Each of these scenarios is examined below.

A. Part of the internal waters becomes territorial sea

197. Internal waters are those that lie on the landward side of the baselines from which the territorial sea and other maritime zones are measured, as codified in

[469] A/CN.4/740 and Corr.1, paras. 172–190.
[470] *Ibid.*, para. 190 (g).
[471] *Ibid.*, para. 76.

article 5 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and article 8 of the 1982 the United Nations Convention on the Law of the Sea, with the exception of archipelagic waters.[472] However, neither instrument provides for the rights and obligations of States in internal waters, an area that is firmly under the sovereignty of the coastal State, in which it has full prescriptive and enforcement jurisdiction, civil and criminal, over foreign-flagged vessels and all other activities, notwithstanding the debate over rights of access to ports.[473]

198. The landward shift of the baseline where part of the internal waters of the coastal State becomes part of the territorial sea would result in foreign-flagged vessels gaining the right, under customary international law, of innocent passage in the territorial sea. The one exception is in the case provided for under article 8, paragraph 2, of the United Nations Convention on the Law of the Sea, whereby the establishment by the coastal State of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such. In this case, foreign vessels have the right of innocent passage.

199. The right of innocent passage, as defined in articles 19 and 45 of the United Nations Convention on the Law of the Sea, apply to both merchant and military vessels and, in certain straits used for international navigation, may not be suspended.[474] In short, if part of the internal waters were to become part of the territorial sea, foreign-flagged vessels would benefit from broader unimpeded navigational rights and the coastal State would, in contrast, lose some of its prescriptive and enforcement rights as provided for under the Convention and under the rules of international law. Nonetheless, foreign-flagged vessels engaged in innocent passage would still have to comply with the rules and regulations of the coastal State on the safety of navigation and protection of the marine environment, such as those on the use of sea lanes, traffic separation schemes[475] and requirements for foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to carry documents.[476]

B. Part of the territorial sea becomes part of the contiguous zone

200. The contiguous zone, as provided for in article 33 of the United Nations Convention on the Law of the Sea, which may be established by a coastal State, is a belt of waters extending up to 24 nautical miles from the baselines from which the breadth territorial sea is measured. In the contiguous zone, the coastal State may exercise not sovereign rights, but the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, and to punish infringements of such laws and regulations committed within its territory or territorial sea. Article 33 of the Convention is considered to

[472] Article 49 of the United Nations Convention on the Law of the Sea provides that archipelagic waters are those "waters enclosed by the archipelagic baseline drawn in accordance with article 47".

[473] See Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Berlin, Heidelberg and New York; Springer; 2006), pp. 45–114. The author provides an overview of the debate, noting the decisions of the International Court of Justice in which the Court recognized that the coastal State, by virtue of its sovereignty, could regulate access to its ports (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, at pp. 21–22, para. 21; and *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 220 above), pp. 382–383, para. 35). See also the United Nations Convention on the Law of the Sea, article 211, paragraph 3.

[474] See *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4.

[475] United Nations Convention on the Law of the Sea, article 22.

[476] *Ibid.*, article 23.

codify customary international law.[477] According to the International Court of Justice in its judgment in the *Alleged Violations (Nicaragua* v. *Columbia)* case, the contiguous zone of one coastal State may overlap with the exclusive economic zone of another State, given the different nature of the respective zones.[478] Consequently, the landward movement of the contiguous zone of one State that overlaps with the exclusive economic zone of another State would benefit both States where the overlap disappears.

C. Part of the territorial sea becomes part of the exclusive economic zone

201. The coastal State enjoys sovereign rights over the exclusive economic zone, which is a zone beyond and adjacent to the territorial sea that, cannot extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[479] Specifically, the coastal State has sovereign rights in the exclusive economic zone for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[480]Among the other rights and duties that the coastal State has in the exclusive economic zone, as provided for in the United Nations Convention on the Law of the Sea, it has jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.[481] In addition, the coastal State has the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures, although due notice must be given of the construction of such islands, installations and structures.[482]

202. Third States have an important entitlement in the exclusive economic zone that does not apply in the territorial sea. The coastal State must give other States access to the surplus of the allowable catch in its exclusive economic zone that it does not have the capacity to harvest, subject to the conditions enumerated in the United Nations Convention on the Law of the Sea.[483] Consequently, the shifting of the territorial sea to the exclusive economic zone would potentially create a right of access for third-party States to living natural resources where no such entitlement existed previously.

203. In addition, while coastal States have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf, the requirement for them to grant consent for such research applies “in normal circumstances” only.[484] Such a qualification does not exist in the case of the territorial sea. For purposes of the present paper, without engaging in a detailed analysis as to what “normal circumstances” entail, it can be asserted that there is a slight benefit to third States when part of the territorial sea becomes part of the exclusive economic

[477] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Judgment, 21 April 2022, General List No. 55, para. 164.
[478] *Ibid*., paras. 160–161.
[479] United Nations Convention on the Law of the Sea, article 57,
[480] *Ibid.*, article 56, paragraph 1 (a).
[481] *Ibid.*, article 56, paragraph 1 (b) and (c).
[482] *Ibid.*, article 60, paragraphs 1–3.
[483] *Ibid.*, article 62.
[484] *Ibid.*, article 246.

zone, as they cannot be denied consent to conduct marine scientific research absent "abnormal" circumstances.

204. The greatest benefit to third States in the case of part of the territorial sea becoming part of the exclusive economic zone concerns the acquisition of the freedom of navigation and overflight in the area, and the right to lay submarine cables and pipelines.[485] The gains would be significant, as third States would have the freedom of overflight for aircraft in an area in which even the right of innocent passage was not recognized. Ships would enjoy most aspects of freedom of navigation as on the high seas, but not all. In both the exclusive economic zone and the high seas, however, the exercise of freedom of navigation is subject to the obligation to show due regard for the interests of other States.[486]

205. However, the rights of foreign-flagged vessels to freedom of navigation in the exclusive economic zone of another State are not identical to their rights to freedom of navigation in the high seas. For example, in the *M/V "Virginia G"* prompt release case, the International Tribunal for the Law of the Sea decided that regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures that the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the United Nations Convention on the Law of the Sea, and that such bunkering is not part of the freedom of navigation of the foreign-flagged vessel.[487] Consequently, the coastal State retains both prescriptive and enforcement jurisdiction over bunkering activities if its law has expressly subjected such activities to its regulations on the conservation of fisheries. It remains to be seen whether the same would apply to coastal State law regulating the protection of the marine environment in general, such as in the case of marine protected areas.

206. Under article 73 of the United Nations Convention on the Law of the Sea, the coastal State has relatively broad enforcement competence: "The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."[488]

207. In contrast to the broad and exclusive enforcement competence of coastal States under article 73 of the United Nations Convention on the Law of the Sea, their enforcement competence in relation to violations committed by foreign-flagged vessels in the exclusive economic zone is limited. First, the coastal State may request information from the foreign-flagged vessel only where there are clear grounds for believing that, while navigating in the exclusive economic zone, the vessel committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels, or of laws and regulations adopted by the coastal State in accordance with and giving effect to such international rules and standards. Second, the coastal State may undertake physical inspection of the

[485] *Ibid.*, article 58. See also *ibid.*, para. 87.

[486] See Rolf Einar Fife, "Obligations of 'due regard' in the exclusive economic zone: their context, purpose and State practice", *International Journal of Marine and Coastal Law*, vol. 34, No. 1 (February 2019), pp. 43–55.

[487] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 69, para. 217. See also Bernard H. Oxman and Vincent P. Cogliati-Bantz, "The *M/V "Virginia G" (Panama/Guinea-Bissau*)", *American Journal of International Law*, vol. 108, No. 4 (October 2014), pp. 769–775.

[488] See *M/V "SAIGA" (Saint Vincent and the Grenadines* v. *Guinea), Prompt release, Judgment, ITLOS Reports 1997*, p. 16, in which the application of article 73 to the arrest and detention of a bunkering vessel is addressed.

vessel only if the violation results in a substantial discharge causing or threatening significant pollution of the marine environment, and only if the foreign-flagged vessel has refused to give information, or the information supplied by the vessel is manifestly at variance with the evident factual situation, and the circumstances of the case justify such inspection. In other words, the coastal State has significantly limited competence to exercise its enforcement powers for violations of its laws and regulations when committed in its exclusive economic zone.[489]

D. Part of the exclusive economic zone becomes part of the high seas

208. In the high seas, all vessels enjoy the long-standing customary right of freedom of the high seas, which comprises freedom of navigation, freedom of overflight, marine scientific research, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations permitted under international law, freedom of fishing and freedom of scientific research.[490] In the high seas, the flag State has exclusive jurisdiction over ships under its flag. Absent consent, no other State may board, inspect, detain or otherwise interfere with its freedom of navigation. However, warships on the high seas may board a vessel without the consent of the flag State if there are reasonable grounds for suspecting that the vessel is engaged in piracy, the slave trade or (if the warship has jurisdiction under article 109) unauthorized broadcasting, or that the ship is without nationality or, though flying a foreign flag or refusing to show its flag, the ship is, in reality, the same nationality as the warship.[491] The right of hot pursuit also operates as an exception to the exclusive jurisdiction of the flag State on the high seas if the necessary conditions are fulfilled.[492]

209. In the case of part of the exclusive economic zone becoming part of the high seas, third States would gain significant rights of freedom of the high seas at the expense of the coastal State. An area that was once under the exclusive jurisdiction of the coastal State regarding the adoption of rules and legislation for the protection of the marine environment and the conservation of living resources would become an area subject only to the exclusive jurisdiction of the flag State.

210. The high seas are also considered to be a global commons in which all States have an interest and obligations *erga omnes* apply.[493] So the question should also be posed as to the benefit or loss that would accrue to the international community if an area that was once under the prescriptive and enforcement competence of the coastal State is fragmented into the multiplicity of flag States with significant differences in relation to navigational safety, protection of the marine environment and conservation of marine living resources. Indeed, this very concern of fragmentation and the governance gap in the high seas are reasons why States are in the process of negotiating an internationally legally binding instrument for the conservation and sustainable use of biological diversity in areas beyond national jurisdiction.[494]

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[489] *Ibid.*, article 220, paragraph 2.

[490] *Ibid.*, article 87.

[491] *Ibid.*, article 110. In general, see Efthymios Papastavridis, *The Interception of Vessels on the High Seas, Contemporary Challenges to the Legal Order of the Oceans* (Oxford, Hart, 2013); and Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge, United Kingdom, Cambridge University Press, 2009).

[492] United Nations Convention on the Law of the Sea, article 111.

[493] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 59, para. 180.

[494] See General Assembly resolution 72/249 of 24 December 2017.

E. Loss of the archipelagic baseline

211. As discussed in the first issues paper, sea-level rise could affect the right of an archipelagic State to maintain its archipelagic straight baseline in case of submergence of the outermost islands or drying reefs that constitute the basis of its baseline, meaning that it would no longer meet the requirements of article 47 of the United Nations Convention on the Law of the Sea. This vulnerability is not theoretical, but is a genuine risk that several of the 22 archipelagic States are facing.[495] For example, in Indonesia, the National Research and Innovation Agency has projected that at least 115 of the State's islands will be under water by 2100.[496]

212. The sovereignty of an archipelagic State over its archipelagic waters extends to its airspace and to the seabed and subsoil, similar to the territorial sea of a coastal State. Foreign-flagged vessels have innocent passage rights, except where the archipelagic State designates sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of the foreign ships and aircraft through or over its archipelagic waters.[497]

213. Each island that makes up the archipelagic State, if entitled under article 121 of the United Nations Convention on the Law of the Sea, may be in a situation to establish new baselines for measuring individual territorial seas, exclusive economic zones and continental shelves. Depending on the archipelago, this could result in the emergence of areas of high seas in what were archipelagic waters over which the archipelagic State once exercised sovereignty or sovereign rights. In all cases, the archipelagic State would stand to lose more rights than third States would gain.[498]

F. Preliminary observations

214. In conclusion, the following observations of a preliminary nature can be made:

(a) in cases where the baseline or outer limits of the baseline move landward, third States stand to gain additional rights overall to those to which they would otherwise be entitled. These include gaining innocent passage rights in waters that were previously internal waters and now formed part of the territorial sea of the coastal State. In the case of the contiguous zone, a landward shift that reduces any overlap between those of two opposite coastal States would be beneficial to both. In cases where the territorial sea becomes part of the exclusive economic zone, third States will possibly gain access to any surplus of the allowable catch of the coastal State that the latter does not have the capacity to harvest. A slight benefit may also accrue to third States since, in the exclusive economic zone, the coastal State is required "under normal circumstances" to grant authorization for marine scientific research to third States. A much broader right of unimpeded navigation is the greatest gain for third States if part of the territorial sea becomes part of the exclusive economic zone, which is akin to freedom of navigation in the high seas, but with some limitations. Likewise, third States would gain additional rights especially if the exclusive economic zone becomes part of the high seas in cases where archipelagic States lose their archipelagic baselines as a result of the inundation of outermost

[495] See David Freestone and Clive Schofield, "Sea-level rise and archipelagic States: a preliminary risk assessment", *Ocean Yearbook Online*, vol. *35,* No. 1 (July 2021), pp. 340–387. The authors point to examples such as Bahamas, Comoros, Fiji, Grenada, Indonesia, Jamaica, Kiribati, Maldives, Marshall Islands, Mauritius (Chagos archipelago), Papua New Guinea, Philippines, Sao Tome and Principe, Seychelles, Solomon Islands and Tuvalu.

[496] Dita Liliansa, "Sea-level rise may threaten Indonesia's status as an archipelagic country" The Conversation, 19 January 2023.

[497] United Nations Convention on the Law of the Sea, article 53.

[498] See Freestone and Schofield, "Sea-level rise and archipelagic States" (see footnote 495 above).

islands or drying reefs, thus no longer fulfilling the requirements of article 47 of the United Nations Convention on the Law of the Sea;

(b) however, as observed in the first issues paper, these gains are at the considerable expense of the coastal State. These aspects are outlined in detail in the first issues paper. Consideration should also be given to equity where one party stands to gain significantly more than another for circumstances that are not caused by the coastal State. Such changes in maritime entitlements do bring the risk of creating uncertainty, instability and the possibility of disputes. The preservation of existing rights and obligations – in other words, maintaining the *status quo* of maritime entitlements established in accordance with international law and the Convention – would not result in any loss to either party.

XI. Nautical charts and their relationship to baselines, maritime boundaries and the safety of navigation

215. During the discussions of the Study Group at the seventy-second session of the Commission, in 2021, the issue of navigational charts was raised. A view was expressed that updating them was important in the interests of navigational safety, while another view maintained that the potential dangers to navigation might be rather exceptional given that the coast receded landward in case of sea-level rise and that satellite technology was more accessible than ever. Support was expressed for the proposal made by the Co-Chairs that the issue of navigational charts could be subject to additional study. For example, such study could examine the different functions of navigational charts as required under the rules of the International Hydrographic Organization and of the charts that are deposited with the Secretary-General of the United Nations for purposes of registration of maritime zones.[499]

A. Submissions of Member States to the Commission

216. The Kingdom of the Netherlands, in its submission to the Commission in 2022, provides information on its practice:

> The Netherlands Hydrographic Office (part of the Ministry of Defence), which is responsible for the publication of accurate and up-to-date nautical charts, has a risk-based resurvey plan. This plan divides the Dutch part of the North Sea in pieces with a resurvey frequency between 2 and 25 years. The part of the North Sea near the coastline falls under the responsibility of the Ministry of Infrastructure and Water Management and is monitored even more frequently for coastal defence purposes. The results of the surveys of both Ministries are combined and published in the official charts, issued by the Netherlands Hydrographic Office. … On average, the maritime limits of the [Kingdom of the] Netherlands change 1–2 times per year. These changes are not deposited with the Secretary-General of the United Nations on a regular basis.[500]

217. Colombia, in its submission to the Commission, notes that "[i]t might be considered that the coastal State in question should take into account the need to update the relevant information (nautical charts) to reflect current conditions in order to ensure, in particular, the safety of navigation for the exercise of the right of innocent passage and for access to inland waters and ports".[501] Estonia expressed support for "the idea to stop updating notifications, in accordance with the [United

[499] A/76/10, para. 276.
[500] See footnote 66 above.
[501] See footnote 53 above.

Nations Convention on the Law of the Sea], regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea-level rise occur, in order to preserve … States' entitlements".[502]

218. France, in its submission in response to the request of the Study Group, notes that the United Nations Convention on the Law of the Sea "does not provide for an obligation to update the charts and lists of geographical coordinates, once published pursuant to its provisions. The navigational charts are prepared and published, as necessary, by the French Naval Hydrographic and Oceanographic Service, under guidelines set by the International Hydrographic Organization."[503]

219. Germany, in its submission, expresses its view as follows:

> [The United Nations Convention on the Law of the Sea] does not contain any explicit obligations to update [either] normal baselines that have been marked ([a]rticle 5 …) [or] straight baselines that have been marked, published and deposited ([a]rticle 16 …), as well as no further obligation to update a State's relevant charts and lists of geographical coordinates with regards to the [exclusive economic zone] ([a]rticle 75 …) and the continental shelf ([a]rticle 84 …)." [504]

Moreover, in direct response to the request from the Commission on practice, Germany replies as follows: "The maritime boundary charts still reflect the proclamations of 1994. New editions of the latest nautical charts, particularly the detailed large-scale charts, are published regularly. However, changes in the maritime boundaries in these charts only affect the normal baselines (0-metre depth contour) in the areas for which no straight baselines have been defined."[505]

220. Ireland, in its submission to the Commission, states the following:

> [C]oastal States are not required by the [United Nations Convention on the Law of the Sea] to deposit details of normal baselines with the Secretary-General as the low water line along the coast may be established from the relevant official large-scale charts, being nautical charts produced to the relevant international standard, suitable and reliable for navigation. Ireland understands that the rationale for the obligations under the Convention to deposit details of straight baselines with the Secretary-General and otherwise to give them due publicity is that these baselines may not be marked on the relevant nautical charts, in which case they could not be ascertained.[506]

221. Morocco, in its submission to the Commission in 2022, indicates the following:

> The navigational charts used to determine the baselines and outer limits of the exclusive economic zone and the continental shelf are updated periodically, in keeping with the standards of the International Hydrographic Organization. … [A]s part of the project to extend its continental shelf (preliminary dossier), Morocco had updated base points and baselines along its entire Atlantic seaboard, in 2015–2016, on the basis of new reference nautical charts published by the French Naval Hydrographic and Oceanographic Service … and the United Kingdom Hydrographic Office.[507]

222. New Zealand, in its submission, responds as follows:

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[502] See footnote 131 above.
[503] See footnote 60 above.
[504] See footnote 62 above.
[505] *Ibid*.
[506] See footnote 65 above.
[507] Submission of Morocco. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms

> On 8 March 2006 … New Zealand deposited with the United Nations Secretary-General [10] nautical charts showing the baselines from which the breadth of the territorial sea is measured, together with the outer limits of its territorial sea and its exclusive economic zone ….
>
> New Zealand has not updated this maritime zone submission since it was submitted. In the event that New Zealand experiences coastal regression as a result of climate change-related sea-level rise, New Zealand does not intend to update its notification of 8 March 2006.
>
> The charts that New Zealand deposited with the Secretary-General in 2006 are not used by mariners for navigation purposes. New Zealand's government agency Land Information New Zealand produces official nautical charts for safe navigation in New Zealand's [exclusive economic zone]. These charts are updated regularly based on the latest topographic and hydrographic data obtained by [Land Information New Zealand] and are freely available to all mariners on [its] website. [508]

223. The Philippines, in its submission, notes the following:

> The updating of charts due to coastal changes is done as soon as possible for purposes of navigational safety and coastal zone management. The updating and publication of baselines for areas under the Regime of Islands can also be done as part of the mapping and charting mandates of the national mapping agency, which in the Philippines is the National Mapping and Resource Information Authority …, and pursuant to relevant provisions of RA 9522 and [a]rticles 5, 6 and 7 of [the United Nations Convention on the Law of the Sea]. However, absent clear legal guidance on the matter, [the Authority] would seek the concurrence of relevant authorities before publishing such changes.[509]

224. Poland, in its submission, informs the Commission that, "[a]s regards the charts, the Hydrographic Office of the Polish Navy, responsible, *inter alia*, for preparing and publishing of nautical charts, has not found it necessary to amend relevant nautical charts due to sea-level rise for now." [510]

225. The United Kingdom, in its submission in 2022, advises the following:

> The [United Kingdom Hydrographic Office] publishes Admiralty Standard Nautical Charts and Electronic Navigational Charts, on various scales and levels of detail, of areas around the world. Updates are published weekly.
>
> In relation to [the United Kingdom] in particular, the frequency of surveys and of updates to these charts is likely to depend to some extent on the nature of the coast. For example, charts of areas with shifting sandbanks, extensively used for navigation, may be updated as often as weekly. Charts of hard, rocky coastlines may not need to be update[d] for years. Not all changes to charts will necessarily be relevant to the location of baselines. [United Kingdom] [t]erritorial [s]ea, [c]ontinental [s]helf and exclusive economic zone limits are shown on these charts.[511]

226. The United States, in its submission in 2022, explains the following:

> The United States agency responsible for charts depicting the limits of its maritime zones is the National Oceanic and Atmospheric Administration …. [The Administration] updates its suite of nautical chart products based upon new

[508] See footnote 54 above.
[509] See footnote 58 above.
[510] See footnote 67 above.
[511] See footnote 68 above.

> source as it is received. The prioritization of chart updates is based upon the criticality of the new source and resources available to action this new source. The [United States] [b]aseline and [m]aritime [l]imits are updated on [the Administration's] charts as changes are noted from incoming source[s] and when those changes are reviewed by the [United States] Baseline Committee.[512]

227. Samoa, in its statement in the Sixth Committee on behalf of the Pacific small island developing States in 2021, notes the following:

> The … Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise [issued by the Pacific Islands Forum Leaders on 6 August 2021] affirms that once Pacific islands have established and notified their maritime zones to the Secretary-General … such maritime zones and the rights and entitlements that flow from them shall not be reduced irrespective of the physical effects of climate change-related sea-level rise …. States [p]arties of [the United Nations Convention on the Law of the Sea] are not obligated to update their maritime zone coordinates or charts once deposited with the … Secretary-General.[513]

Antigua and Barbuda, in its statement in the Sixth Committee on behalf of Alliance of Small Island States in 2021, reiterates that position.[514]

228. In addition, in its statement in the Sixth Committee in 2021, Cyprus expresses the view that the obligation under article 16 of the United Nations Convention on the Law of the Sea for the coastal State to show the baselines for measuring the breadth of the territorial sea, or the limits "derived therefrom", on charts or a list of geographical coordinates of points is meant to establish legal security, and that no indication is provided for that these charts are to be periodically revised.[515]

B. Purpose of nautical charts under international law

229. For purposes of determining the limits of the territorial seas, articles 5 and 6 of the United Nations Convention on the Law of the Sea reflect a limited function for nautical charts "officially recognized by the coastal State", which is for the purpose of measuring the breath of the territorial sea. No other function for the baseline is mentioned. The *Virginia Commentaries* explain that the term "officially recognized by the coastal State" "implies that the charts in question do not have to be produced by the coastal State", which may adopt charts produced by foreign hydrographic services.[516] This is indeed the practice of many States. It is also an indication that the use of nautical charts for the purposes of drawing baselines does not mean that the coastal State has an obligation to update those charts for the purposes of safety of navigation. This means that the two functions of nautical charts are distinct, as discussed in greater detail below.

230. Under the International Convention for the Safety of Life at Sea,[517] a "nautical chart" (or "nautical publication") is defined as "a special-purpose map or book, or a specially compiled database from which such a map or book is derived, that is issued officially by or on the authority of a Government, authorized Hydrographic Office or

[512] See footnote 271 above.
[513] See footnote 77 above.
[514] See footnote 99 above.
[515] See footnote 133 above.
[516] Nordquist *et al.*, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (see footnote 348 above), p. 90, para. 5.4 (d).
[517] International Convention for the Safety of Life at Sea, 1974 (London, 1 November 1974), United Nations, *Treaty Series*, vol 1184, No. 18961, p. 2.

other relevant government institution and is designed to meet the requirements of marine navigation". [518] The principal function of nautical charts is for safety of navigation.[519] Since 2000, IMO has been promoting the use of electronic chart display and information systems, with official electronic navigational charts. The International Convention for the Safety of Life at Sea, which is the principal global instrument for the safety of navigation, provides for a set of obligations concerning nautical charts and the safety of navigation. According to regulation V/9 of the Convention, contracting Governments are required to ensure that hydrographic surveying is carried out, as far as possible, adequate to the requirements of safe navigation; to prepare and issue nautical charts, sailing directions, lists of lights, tide tables and other nautical publications, where applicable, satisfying the needs of safe navigation; to promulgate notices to mariners in order that nautical charts and publications are kept, as far as possible, up to date; and to provide data management arrangements to support these services. [520] There is no mention of updating of baselines as part of the obligation to update charts for the purposes of ensuring the safety of navigation.

231. The different functions of nautical charts are illustrated by the practice of the United States. The National Oceanic and Atmospheric Administration, which is the officially recognized charting agency of the United States, depicts on its nautical charts not the actual baseline, but the official limits of national jurisdiction.[521] The baseline is determined not by that Administration, but by the United States Baseline Committee, which is chaired by the United States Department of State.[522] Westington and Slagel note the following: "Since the nautical chart is a document compiled from many sources of information and is designed for safe and efficient navigation, supplemental information, such as a hydrographic or topographic survey, is critical to precisely determine the baseline from which the [United States] maritime limits are measured."[523]

232. This separation of function of nautical charts is also supported by the Division for Ocean Affairs and the Law of the Sea, of the Office of Legal Affairs, which is the substantive unit of the United Nations Secretariat responsible for the custody of charts and lists of geographical coordinates deposited in accordance with the United Nations Convention on the Law of the Sea.[524] In its *Handbook on the Delimitation of Maritime Boundaries*, and in relation to the low-water line, the Division states as follows: "The low-water line along the coast is a fact irrespective of its representation on charts. The maritime zones claimed by the coastal State exist even if no particular low-water line has been selected or if no charts have been officially recognized."[525] There is no mention of the use of the baseline for the purposes of navigational safety. The

[518] *Ibid*., annex, chapter V, regulation 2, paragraph 2 (as amended in IMO, resolution MSC.99(73) of 5 December 2000, para. 7, at p. 117).

[519] Meredith A. Westington and Matthew J. Slagel, "U.S. maritime zones and the determination of the national baseline", National Oceanic and Atmospheric Administration (2007), p. 4. The authors explain as follows: "The nautical chart is constructed to support safe navigation; its general purpose is to inform the mariner of hazards and aids to navigation as well as the limits of certain regulatory areas."

[520] International Convention for the Safety of Life at Sea, annex, chapter V, regulation 9 (as amended in IMO, resolution MSC.99(73) of 5 December 2000, para. 7, at pp. 121–122). See also the submission by IMO to the Commission; available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

[521] Westington and Slagel, "U.S. maritime zones" (see footnote 519 above), p. 1.

[522] *Ibid*., p. 2.

[523] *Ibid*., p. 13.

[524] *Handbook on the Delimitation of Maritime Boundaries* (United Nations publication, 2000), p. 11, para. 65..

[525] *Ibid*., p. 4, para. 19.

independence of the low-water line (which is to be used for the baseline) from the chart would indicate this.

233. An important element that must be considered in assessing the obligations of States is that not all Governments have the capacity to produce their own nautical charts. This element is reflected in the use of the term "officially recognized by the coastal State" and is explained in the authoritative *Virginia Commentaries*.[526] In practice, those States that do not have their own capability to develop nautical charts will use the nautical charts prepared by hydrographic offices of other States. This means that the updating of charts will depend upon the capacity of those Governments to provide data to the Governments preparing such nautical charts. This was recognized by the IMO Assembly, which in 2004 adopted a resolution in which it invited member Governments to cooperate in the collection and dissemination of hydrographic data with other Governments having little or no hydrographic capability.[527] As noted in its submission to the Commission, IMO "has continuously encouraged Governments, in particular coastal States, to develop or improve their hydrographic capabilities and consider becoming members of the [International Hydrographic Organization], and provided technical assistance to its [m]ember States, as and when requested in cooperation with [that Organization]."[528]

234. If not all Governments are able to provide the hydrographic services necessary to produce and update charts, it would be unreasonable to impose an obligation to resurvey their baselines and update nautical charts. The use of the qualified language "as far as possible" in regulation V/9 of the International Convention for the Safety of Life at Sea constitutes recognition of the differing capabilities of its contracting Governments.

C. Information provided by the International Hydrographic Organization and the International Maritime Organization

235. In response to the request from the Commission, in 2022, the International Hydrographic Organization and IMO kindly provided information. According to the submission of the former:

> The International Hydrographic Organization … is the intergovernmental international organization whose principal aim is to ensure that all the world's oceans, seas and navigable waters are properly surveyed and charted. The work is done by bringing together the national agencies responsible for the conduct of hydrographic surveys, the production of nautical charts and related publications, and the distribution of [m]aritime [s]afety [i]nformation … in accordance with the requirement set out in the International Convention for the Safety of Life at Sea … and other international regulations.[529]

236. IMO, in its submission, lays out the obligations of contracting Governments under regulation V/9 of the International Convention for the Safety of Life at Sea to maintain hydrographic services and products. In particular, contracting Governments are required to cooperate in carrying out, as far as possible, a range of nautical and hydrographic services, in the manner most suitable for the purpose of aiding navigation. These services include ensuring that hydrographic surveying is carried

[526] Nordquist *et al.*, eds, *United Nations Convention on the Law of the Sea 1982: A Commentary* (see footnote 348 above), p. 90, para. 5.4 (d).

[527] Submission of IMO to the Commission (see footnote 520 above), para. 1.

[528] *Ibid*.

[529] Submission of the International Hydrographic Organization to the Commission, p. 1. Available from https://legal.un.org/ilc/guide/8_9.shtml#govcoms.

out, as far as possible, adequate to the requirements of safe navigation; promulgating notices to mariners in order that nautical charts and publications are kept, as far as possible, up to date; and preparing and issuing nautical charts, sailing directions, lists of lights, tide tables and other nautical publications, where applicable, satisfying the needs of safe navigation.[530] In addition, at its twenty-third session, in 2004, the IMO Assembly invited Governments, in addition to their existing obligations under regulation V/9: to promote the use of electronic chart display and information systems; to cooperate, as appropriate, in the collection and dissemination of hydrographic data with other Governments having little or no hydrographic capability; to promote support for Governments that might require technical assistance; and establish hydrographic offices where they did not exist, in consultation with the International Hydrographic Organization.[531]

237. The International Hydrographic Organization is a consultative and technical organization. Its current membership stands at 98 member States and 55 non-member States.[532] The latter States do not have national hydrographic offices. Consequently, these States do not have the capacity or capability to conduct their own hydrographic surveys.[533] This is why an important objective of the Organization is to provide technical assistance and capacity-building to Governments. The object of the Organization includes the promotion of the use of hydrography for the safety of navigation and for all other marine purposes.[534] These include supplementary purposes, as the Organization explains in its submission:

> Although safety of navigation remains a major driver for the [Organization], hydrographic products and services support all activities associated with the oceans, seas, and navigable waters. As accurate depth data (bathymetry) and sea-level data is essential to the generation of nautical charts and publications and the substantiation of the … claims [under the United Nations Convention on the Law of the Sea] of coastal States to maritime territory and resources, hydrography is essential in helping coastal states protect their maritime zones and populations in the face of sea-level rise. All coastal States should be encouraged to ensure that their seas and coastal areas are properly surveyed and charted. This will directly allow them to protect their maritime rights, [and] mitigate and adapt to the impacts of climate change and displaced persons.[535]

238. The International Hydrographic Organization notes the various adverse consequences of sea-level rise on countries, including "altering access to food, increasing the impact of storms and storm surges [and] displacing populations". It observes that data on physical features of the ocean can used in efforts to mitigate and adapt to the negative impact of sea-level rise.[536] The Organization explains that, recognizing the importance of such hydrographic information, its member States agreed in 2020 to include a goal in its Strategic Plan "targeting the increased use of hydrographic data beyond the traditional charts".[537]

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[530] Submission of IMO (see footnote 520 above), p. 1.

[531] *Ibid.*

[532] International Hydrographic Organization, *Yearbook: 9 March 2023* (Monaco, 2023), pp. 5–9.

[533] This point was highlighted by authors who wrote that Poland had "limited technical capabilities" and did not have an up-to-date set of geographic data on the Baltic Sea that established the maritime boundary of the State. Cezary Specht and others, "A new method for determining the territorial sea baseline using an unmanned hydrographic surface vessel", *Journal of Coastal Research*, vol. 35, No. 4 (July 2019), pp. 925–936, at p. 926.

[534] International Hydrographic Organization, "Strategic Plan for 2021–2026)", November 2020, p. 1.

[535] Submission of the International Hydrographic Organization (see footnote 529 above), para. 2.

[536] *Ibid*., para. 15.

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

239. There are two key points to be deduced from the information provided by the International Hydrographic Organization. The first point is that nautical charts and hydrographic services support the claims of coastal States to maritime territory and resources and help to protect these zones and their population. The second point, as demonstrated by the use of the verb "encourage", is that there is no obligation for all coastal States to survey and chart their seas and coastal areas. Such an obligation would be difficult to impose, given that many coastal States lack such capacity. Moreover, while the Organization includes as one of its objectives to assist with mitigation of and adaptation to the negative impact of sea-level rise, there is no mention of any objective to ensure the resurveying and updating of bathymetry for baselines used for maritime boundaries in relation to the safety of navigation.

240. The International Hydrographic Organization is also actively engaged in providing digital navigation support in the context of the requirements under the International Convention for the Safety of Life at Sea to enhance the safety of navigation, and the implementation of "e-navigation", led by IMO. Since easy access to standardized high-quality digital geospatial information is required, the International Hydrographic Organization has continued to work on products including one called "S-121", on maritime limits and boundaries, whose purpose is to provide support to the Division for Ocean Affairs and the Law of the Sea regarding deposit requirements. In addition, the product is to provide the clarity necessary for good governance by: (a) providing coordinate-based spatial representations of maritime limits and boundaries that are accurate, reliable and easy to interpret; (b) facilitating States parties' obligation under the United Nations Convention on the Law of the Sea to deposit their outer limits of maritime zones, together with the lines of delimitations (marine boundaries) with the Secretary-General of the United Nations through the Division of Ocean Affairs and the Law of the Sea. Thus, "S-121 supports ocean governance in the context of sea-level rise by supporting legal procedures through the provision of output that is legally readable, targeted to the issues and provides historical information and source validation."[538] There is no mention of baselines in the Organization's submission, only a reference to the "outer limits of maritime zones".

241. Moreover, IMO and the International Hydrographic Organization have, in collaboration, undertaken 11 capacity-building activities to improve hydrographic services and the production of nautical charts between 2012 and 2018. They were mostly regional activities in the Pacific, Asia, Latin America and Eastern Europe, with some national activities focusing on the Sudan and Kenya in the Africa region.[539] Three activities were delivered under the United Nations "Delivering as one" initiative, whereby common technical cooperation activities were identified and delivered as part of a joint initiative on capacity-building matters by the International Hydrographic Organization, IMO, the Intergovernmental Oceanographic Commission, the World Meteorological Organization, the International Association of Marine Aids to Navigation and Lighthouse Authorities, the International Atomic Energy Agency and the International Federation of Surveyors.[540]

[538] *Ibid*., paras. 9–10.
[539] Submission of IMO (see footnote 520 above), p. 2.
[540] *Ibid.*

D. Survey by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, of charts or lists of geographical coordinates deposited with the Secretary-General

242. In response to the request of the Commission,[541] the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs conducted a survey of charts or lists of geographical coordinates deposited with the Secretary-General of the United Nations that had been modified or updated during the period from 1990 to the present, and any additional explanatory information. The Division notes that the United Nations Convention on the Law of the Sea does not explicitly address the "modification or updating" of deposits made. The Division reports that the first deposit with the Secretary-General under the Convention was made in March 1995, and that, in September 2022, a total of 86 coastal States had made a total of 157 deposits to the Secretary-General. Of the 86 depositing States, 17 made subsequent deposits (that is, later deposits for the same region and under the same articles of the Convention).[542] Of these, 16 States conveyed their intention to supersede an earlier deposit, in part or fully, indicating whether an earlier deposit should be considered superseded.

243. The Division highlights that in discharging its mandate concerning deposits under the United Nations Convention on the Law of the Sea, the Secretariat carries out a review of the deposited charts or lists of geographical coordinates of points with a view to ascertaining whether they correspond to the stated intention of the depositing State and meet the requirements specified in the Convention. The Secretariat is not mandated, however, to make any determination as to the conformity of the deposited material with the relevant provisions of the Convention. The Secretariat is also not mandated to determine whether the new charts and lists of geographical coordinates of points amount to a "modification or update" of any charts and lists deposited earlier.

244. The Division clarifies as follows:

> Given the international nature of an act of deposit of charts and/or lists, it is expected that such an act would be effected in the form of a note verbale or a letter from a person who is considered a representative of the coastal State addressed to the Secretary-General. In virtue of their functions, such persons can be any of the following: a Head of State; a Head of Government; a minister for foreign affairs; or a permanent representative or a permanent observer to the United Nations.[543]

In other words, the deposit of charts and/or lists is not done by the technical offices of the coastal State, such as the hydrographic office, as it is a legal act, not a technical one.

[541] A/77/10, para. 27 (a).

[542] Belgium, Brazil, Chile, Cook Islands, Fiji, France, Iraq, Japan, Lebanon, Madagascar, Nicaragua, Norway, Samoa, Seychelles, Spain, Tuvalu and United Arab Emirates.

[543] SPLOS/30/12, para. 16.

E. Preliminary observations

245. A number of States provided information on their practice and views concerning nautical charts in relation to maritime boundaries. Few States reported that they update charts regularly or periodically and most States indicated their view and practice that there is no requirement to update nautical charts under the United Nations Convention on the Law of the Sea in relation to baselines. No statement was made by any State indicating the view that an obligation exists under the Convention or international law to survey their baselines periodically, update the nautical charts and deposit the updated charts with the Secretary-General.

246. As explained by IMO and the International Hydrographic Organization, nautical charts are used principally for the purposes of safety of navigation, as provided for under the International Convention for the Safety of Life at Sea. However, the International Hydrographic Organization explains that hydrographic services and products can fulfil supplementary functions, including providing support in substantiating maritime zones, helping States to protect their maritime zones and population and supporting adaptation to the impact of sea-level rise. The information provided by the International Hydrographic Organization does not indicate any practice or obligation under the International Convention for the Safety of Life at Sea to the effect that baselines are relevant to the safety of navigation and must be depicted or updated on nautical charts. In other words, there are two different uses for nautical charts: for the safety of navigation, and for supplementary functions, such as indicating maritime zones. For example, the practice of the United States is not to show the baseline on the nautical charts prepared by the National Oceanic and Atmospheric Administration. This is supported by the *Handbook on the Delimitation of Maritime Boundaries*, prepared by the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs, according to which the "low-water line along the coast is a fact irrespective of its representation on charts". There is no evidence of general practice among States of updating their baselines on their nautical charts for the purposes of the safety of navigation. In the survey conducted by the Division, States did not indicate their reasons for adjusting their baselines.

247. Nautical charts are developed by national hydrographic offices. However, both IMO and the International Hydrographic Organization recognize that not all Governments have the capacity to establish hydrographic offices or to undertake hydrographic surveys. Many States do not have hydrographic offices and do not produce their own nautical charts. This concept is reflected in articles 5 and 6 of the United Nations Convention on the Law of the Sea, in which reference is made to charts that are "officially recognized by the coastal State". It would thus seem unreasonable to impose an obligation on States to conduct hydrographic surveys and update nautical charts, and there is no support in the instruments or in practice to do so.

248. These preliminary observations support a plain reading of article 5 of the United Nations Convention on the Law of the Sea, whereby the normal baseline is used only for measuring the breadth of the territorial sea, and, as stated in the first issues paper, "the Convention does not indicate *expressis verbis* that new baselines must be drawn".[544] The updating of charts for the purposes of the safety navigation is separate from the updating of charts and lists of coordinates concerning baselines and maritime zones under the Convention and international law in relation to maritime zones.

[544] A/CN.4/740 and Corr.1, para. 78.

249. In conclusion, the following observations of a preliminary nature can be made:

(a) nautical charts are principally used for the purposes of the safety of navigation, and the depiction of baselines or maritime zones is a supplementary function;

(b) there is no evidence of general practice among States of updating their baselines on their nautical charts for the purposes of the safety of navigation under the United Nations Convention on the Law of the Sea or international law;

(c) there is no evidence of State practice in support of the view that an obligation exists under the Convention or other sources of international law to regularly revise charts for the purposes of updating baselines or maritime zones.

XII. Relevance of other sources of law

250. In the Commission's 2021 annual report,[545] it was suggested by the members of the Study Group that, beyond the United Nations Convention on the Law of the Sea and the 1958 Geneva Conventions:[546]

> [T]he Study Group would examine other sources of law – relevant multilateral, regional and bilateral treaties or other instruments relating, for example, to fisheries management or the high seas that define maritime zones, or the 1959 Antarctic Treaty and its 1991 Protocol on Environmental Protection, the IMO treaties defining pollution or search and rescue zones, or the 2001 Convention on the Protection of the Underwater Cultural Heritage, …, as well as the regulations of relevant international organizations such as the International Hydrographic Organization. The purpose of this examination would be to determine the *lex lata* in relation to baselines and maritime zones, without prejudice to the consideration of the *lex ferenda* or policy options. It would also aim at assessing whether these instruments permit or require (or not) the adjustment of baselines in certain circumstances, and whether a change of baselines would entail a change of maritime zones.

251. Member States did not refer specifically in their submissions and interventions to certain treaties that they consider of relevance to be further examined. It can be noted that the Alliance of Small Island States expressed in its 2021 statement certain reservations to the need to embark on such an analysis: "We are interested in understanding how the 1958 Geneva Conventions …, which were negotiated when many of the [small island developing States] were under colonial administration, are relevant to our interpretation of the law of the sea under the present circumstances". The United States, in its 2021 statement, was also very direct: "We query whether other sources of law identified by the Study Group could override or alter such universally accepted provisions reflected in [the United Nations Convention on the Law of the Sea]".

252. The Antarctic Treaty of 1959[547] does not contain references to baselines or maritime zones (with the exception of high seas). Article IV of the Treaty contains only references to rights of, claims to or bases of claims to "territorial sovereignty in

[545] A/77/10, para. 294 (a).

[546] In fact, already examined in the first issues paper.

[547] The Antarctic Treaty (Washington, 1 December 1959), United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71.

Antarctica".[548] Only on the remote possibility that, after a future hypothetical termination of the Treaty, some States would have territorial sovereignty over (parts of) Antarctica, could the issue of baselines and maritime zones and, consequently, of their relation to sea-level rise arise. Article VI, which establishes the area of application of the Treaty, sets forth that "nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area". Taking into account the current legal regime of Antarctica, it is quite clear that this provision has no effect on the present topic.

253. Neither the 1991 Protocol on Environmental Protection to the Antarctic Treaty,[549] nor the 1972 Convention for the Conservation of Antarctic Seals[550] include references to baselines or maritime zones. The 1980 Convention on the Conservation of Antarctic Marine Living Resources[551] does not contain any reference to baselines or maritime zones either. Article IV of that Convention contains a similar text to article IV of the Antarctic Treaty[552] and a reference to article VI thereof. The same conclusion can therefore be drawn as for the Antarctic Treaty. Furthermore, article XI of the Convention on the Conservation of Antarctic Marine Living Resources provides that:

> The Commission [for the Conservation of Antarctic Marine Living Resources, created by the Convention on the Conservation of Antarctic Marine Living Resources] shall seek to cooperate with Contracting Parties which may exercise jurisdiction in marine areas adjacent to the area to which this Convention applies in respect of the conservation of any stock or stocks of associated species which occur both within those areas and the area to which this Convention applies, with a view to harmonizing the conservation measures adopted in respect of such stocks.

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[548] Art. IV: "1. Nothing contained in the present Treaty shall be interpreted as: (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica; (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise; (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica. 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

[549] Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991), United Nations, *Treaty Series*, vol. 2941, annex A, No. 5778, p. 3.

[550] Convention for the Conservation of Antarctic Seals (London, 1 June 1972), *ibid.*, vol. 1080, No. 16529, p. 172.

[551] Convention on the Conservation of Antarctic Marine Living Resources (Canberra, 20 May 1980), *ibid.*, vol. 1329, No. 22301, p. 47.

[552] Article IV: "1. With respect to the Antarctic Treaty area, all Contracting Parties, whether or not they are Parties to the Antarctic Treaty, are bound by Articles IV and VI of the Antarctic Treaty in their relations with each other. 2. Nothing in this Convention and no acts or activities taking place while the present Convention is in force shall: (a) constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in the Antarctic Treaty area or create any rights of sovereignty in the Antarctic Treaty area; (b) be interpreted as a renunciation or diminution by any Contracting Party of, or as prejudicing, any right or claim or basis of claim to exercise coastal state jurisdiction under international law within the area to which this Convention applies; (c) be interpreted as prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any such right, claim or basis of claim; (d) affect the provision of Article IV, paragraph 2, of the Antarctic Treaty that no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the Antarctic Treaty is in force."

This text does not distinguish to which "marine areas adjacent to the area to which this Convention applies" it refers. Since the Antarctic Treaty excludes any territorial sovereignty over Antarctica, the continent does not have maritime zones. As to the maritime zones of the adjacent States, the stability (fixing) of baselines would not affect the implementation area of the Convention, nor would a landward adjustment of baselines and of outer limits of maritime zones because of sea-level rise, where the respective States applied the ambulatory rule.

254. Analysis of IMO treaties regarding pollution or search and rescue zones has given the following conclusions. The International Convention for the Prevention of Pollution from Ships of 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997,[553] does not include references to maritime zones. Article 3, paragraph 2, of the 1973 Convention mentions that, "[n]othing in the present Article shall be construed as derogating from or extending the sovereign rights of the Parties under international law over the sea-bed and subsoil thereof adjacent to their coasts for the purposes of exploration and exploitation of their natural resources", but this provision has no relevance as to the permission or requirement (or otherwise) to adjust the baselines, or to the situation where a change of baselines would entail a change of maritime zones.

255. Annex I, entitled, "Regulations for the prevention of the pollution by oil", to the 1973 Convention includes a reference to baselines:

> Regulation 1. Definitions
>
> …
>
> (9) 'Nearest land'. The term 'from the nearest land' means from the baseline from which the territorial sea of the territory in question is established in accordance with international law, except that, for the purposes of the present Convention 'from the nearest land' off the north eastern coast of Australia shall mean from a line drawn from a point on the coast of Australia [defined by certain coordinates specified in the text].

This definition is relevant to the rules set forth in that annex, by which any discharge into the sea of oil or oily mixtures from ships shall be prohibited except when a number of conditions are met, including the one that the oil "tanker is more than 50 nautical miles from the nearest land"[554] or the "400 tons gross tonnage and above other than an oil tanker" ship "is more than 12 nautical miles from the nearest land".[555] Similar references are included in regulation 10 in the annex ("[t]he discharge is made as far as practicable from the land, but in no case less than 12 nautical miles from the nearest land")[556] and regulation 15 ("within 50 miles from the nearest land").[557] Other such references can be found in annex II, entitled "Regulations for the control of pollution by noxious liquid substances in bulk": under those regulations, the discharge of such substances is prohibited, but it can be permitted when a number of conditions are met, including the one that the "discharge is made at a distance of not

[553] International Convention for the Prevention of Pollution from Ships, 1973 (London, 2 November 1973), United Nations, *Treaty Series*, vol. 1340, No. 22484, p. 184; Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (London, 17 February 1978), *ibid*., vol. 1340, No. 22484, p. 61; Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (London, 26 September 1997), United Nations, *Juridical Yearbook 1997* (Sales No. E.02.V.1), p. 300.

[554] Regulation 9, "Control of discharge of oil", para. 1 (a) (ii).

[555] *Ibid*., para. 1 (b) (ii).

[556] Regulation 10, "Methods for the prevention of oil pollution from ships while operating in special areas", para. 3 (a) (iii) (emphasis added).

[557] Regulation 15, "Retention of oil on board", para. 5.

less than 12 nautical miles from the nearest land and in a depth of water of not less than 25 metres".[558] Annex IV, entitled "Regulations for the prevention of pollution by sewage from ships", also includes the same definition as presented in annex I and used for the other annexes, as well as references to "nearest land" in regulation 8, entitled, "Discharge of sewage" ("a distance of more than four nautical miles from the nearest land", "a distance of more than 12 nautical miles from the nearest land").[559] Annex V, entitled "Regulations for the prevention of pollution by garbage from ships", repeats the definition of the "nearest land" and includes references thereto in regulation 3, "Disposal of garbage outside special areas" ("if the distance from the nearest land is less than: (i) 25 nautical miles …; (ii) 12 nautical miles …"; "as far as practicable from the nearest land but in any case is prohibited if the distance from the nearest land is less than 3 nautical miles"),[560] as well as in regulation 5, "Disposal of garbage within special areas" ("not less than 12 nautical miles from the nearest land").[561]

256. The "nearest land" is defined as the "baseline … established in accordance with international law".[562] The analysis of the provisions of International Convention for the Prevention of Pollution from Ships shows that this instrument does not require the adjustment of baselines in certain circumstances. At the same time, ambulatory baselines would not affect the implementation of this Convention (since the baseline is the mark for measuring the distances set forth in the Convention), while the option of fixed baselines, although not affecting the implementation of the Convention, would mean that the coastline (which recedes in case of sea-level rise) would be at a greater distance from the (frozen) baseline and consequently from the limit of the area beyond which the discharge of oil, noxious liquid substances, sewage and garbage is permitted in accordance with the strict conditions established by the Convention. Accordingly, from the perspective of the protection of coastal environment (and land territory of the coastal State) from pollution from ships, the option of fixed baselines produces a more favourable effect in terms of fulfilling (at least part of) the object and purpose of the Convention, as reflected in the preamble of the Convention: "the need to preserve the human environment in general and the marine environment in particular".

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[558] Regulation 5, "Discharge of noxious liquid substances", paras. 1 (c), 2 (e), 3 (e), 4 (c), 7 (c), 8 (e), and 9 (e). Paragraph 4 (c) alone does not include the reference to "the depth of water of not less than 25 metres".

[559] Regulation 8, "Discharge of sewage", para. 1 (a): "(1) Subject to the provisions of Regulation 9 of this Annex, the discharge of sewage into the sea is prohibited, except when: (a) The ship is discharging comminuted and disinfected sewage using a system approved by the Administration in accordance with Regulation 3 (l) (a) at a distance of more than four nautical miles from the nearest land, or sewage which is not comminuted or disinfected at a distance of more than 12 nautical miles from the nearest land …".

[560] Regulation 3, "Disposal of garbage outside special areas", para. 1 (b): "The disposal into the sea of the following garbage shall be made as far as practicable from the nearest land but in any case is prohibited if the distance from the nearest land is less than: (i) 25 nautical miles for dunnage, lining and packing materials which will float; (ii) 12 nautical miles for food wastes and all other garbage including paper products, rags, glass, metal, bottles, crockery and similar refuse"; and para. 1 (c): "Disposal into the sea of garbage specified in sub-paragraph (b)(ii) of this Regulation may be permitted when it has passed through a comminuter or grinder and made as far as practicable from the nearest land but in any case is prohibited if the distance from the nearest land is less than 3 nautical miles".

[561] Regulation 5, "Disposal of garbage within special areas", para. 2 (b): "Disposal into the sea of food wastes shall be made as far as practicable from land, but in any case not less than 12 nautical miles from the nearest land."

[562] Annex I, regulation 1, para. 2, and annex V, para. 2.

257. The 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties[563] – also an IMO instrument – includes references to the high seas. Its preamble includes references to "the need to protect the interests of their peoples against the grave consequences of a maritime casualty resulting in danger of oil pollution of sea and coastlines" and "measures of an exceptional character to protect such interests might be necessary on the high seas and that these measures do not affect the principle of freedom of the high seas". In addition, article 1, paragraph 1, provides that:

> Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

In the case of an ambulation of baselines, following sea-level rise, the maritime zones (territorial sea, exclusive economic zone) of the coastal States would remain the same, while the high seas would extend in surface. It is difficult to assess in exact terms to what extent an extension of the surface of the high seas would impact upon the obligations of the coastal State as provided for in the Convention, but, in principle, since the surface is larger, the efforts of the coastal State to intervene would be greater. In the case of fixed baselines, decided as a measure to respond to the effects of sea-level rise, there is no change in the position of (limits of) maritime zones and high seas (nor in the latter's surface), so there is no alteration to the regime set forth in the Convention, while coastlines will be physically at a greater distance from the place of pollution, a situation which produces a more favourable effect in terms of fulfilling of the object and purpose of the Convention.

258. The 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,[564] another IMO instrument, does not distinguish between various maritime zones, with few exceptions: according to article III, paragraph 3, sea means "all marine waters other than the internal waters of States"; article VII, paragraph 1 (b), includes a mention of "vessels and aircraft loading in its territory or territorial seas matter which is to be dumped". An ambulation of the baselines would have as effect the change in position of both internal waters and territorial sea of the coastal State, which would have an impact upon the location of the loading of the matter to be dumped: locations that used to be in the territorial sea may, after ambulation, be in the exclusive economic zone, with the consequence of diminishing the jurisdiction of the coastal State, which, according to the Convention, has to apply measures to vessels and aircraft loading in territorial sea. The option of fixed baselines does not change the position of maritime zones and consequently does not affect the implementation of the Convention.

259. The 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation[565] – also an IMO instrument – includes references to "coastline" (preamble and art. 2, para. 2), "coastal State" (e.g., art. 4), but no reference to baselines or maritime zones.

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[563] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, 29 November 1969), United Nations, *Treaty Series*, vol. 970, No. 14049, p. 211.

[564] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, 29 December 1972), United Nations, *Treaty Series*, vol. 1046, No. 15749, p. 120.

[565] International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (London, 30 November 1990), United Nations, *Treaty Series*, vol. 1891, No. 32194, p. 51.

260. The 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances,[566] another IMO instrument, refers to "marine environment" and "coastline", but it does not include any reference to baselines and maritime zones.

261. The 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships,[567] also an IMO instrument, refers to "marine environment" (preamble) and "sea-bed and subsoil thereof adjacent to the coast over which the coastal State exercises sovereign rights for the purposes of exploration and exploitation of their natural resources" (art. 2, para. 1), but makes no other reference to baselines or maritime zones.[568]

262. The 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments,[569] another IMO treaty, includes a reference to "exploration and exploitation of the sea-bed and subsoil thereof adjacent to the coast over which the coastal State exercises sovereign rights for the purposes of exploration and exploitation of its natural resources" (art. 1, para. 1), "waters under the jurisdiction of [a] Party" (e.g., art. 3, para. 2, and art. 6), but no other reference to baselines or maritime zones,[570] with the exception of a reference to high seas in paragraph 4 of regulation A-3, "Exceptions" (contained in the annex to the Convention). Regulation B-4, entitled "Ballast water exchange", includes references to the "nearest land" ("at least 200 nautical miles from the nearest land" and "at least 50 nautical miles from the nearest land" (paras. 1.1 and 1.2, respectively)). The reasoning set forth above (para. 228 above) in connection with the similar provisions of the International Convention for the Prevention of Pollution from Ships is thus also applicable here.

263. The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009,[571] also an IMO treaty, includes no references to baselines and maritime zones.

264. The 1979 International Convention on Maritime Search and Rescue,[572] a further IMO treaty, contains no reference to baselines. It includes, like other IMO treaties, a no prejudice provision[573] in relation to the (then future) the United Nations

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[566] Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances (London, 15 March 2000), IMO, *OPRC–HNS Protocol*, London, 2002.

[567] International Convention on the Control of Harmful Anti-fouling Systems on Ships (London, 5 October 2001), IMO document AFS/CONF/26, annex.

[568] Article 15 states that, "[n]othing in this Convention shall prejudice the rights and obligations of any State under customary international law as reflected in the United Nations Convention on the Law of the Sea."

[569] International Convention for the Control and Management of Ships' Ballast Water and Sediments (London, 13 February 2004), IMO document BWM/CONF/2004, annex.

[570] Article 16 states that, "[n]othing in this Convention shall prejudice the rights and obligations of any State under customary international law as reflected in the United Nations Convention on the Law of the Sea."

[571] Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 (Hong Kong, China, 15 May 2009), International Maritime Organization, document SR/CONF/45, annex.

[572] International Convention on Maritime Search and Rescue (Hamburg, 27 April 1979), United Nations, *Treaty Series*, vol. 1405, No. 23489, p. 97.

[573] Art. II: "(1) Nothing in the Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750 (XXV) of the General Assembly of the United Nations' nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.
(2) No provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments."

Convention on the Law of the Sea. The annex thereto refers to notions like "Search and rescue region", which is "an area of defined dimensions within which search and rescue services are provided" (para. 1.3.1), which "shall be established by agreement among Parties concerned" (para. 2.1.4); paragraph 2.1.7 specifies that "[t]he delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States". Chapter 3, entitled "Cooperation", of the annex includes a number of references to the permission to be granted by a party for rescue units of other parties to enter the former's territorial sea. Neither the ambulation of baselines, nor the option of fixed baselines affect the implementation of the Convention since the reference therein is to "territorial sea" and not to the coast (even if in the case of ambulation, the territorial sea "moves" landward, while the option of fixed baselines "maintains" the territorial sea within the same coordinates).

265. The 2001 Convention on the Protection of the Underwater Cultural Heritage[574] of the United Nations Educational, Scientific and Cultural Organization includes in article 1, paragraph 5, a reference to "area" as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction", while articles 11 and 12 set forth the obligation of States parties to report, notify and protect underwater cultural heritage in the Area. Article 3 includes a no prejudice provision[575] in relation to the United Nations Convention on the Law of the Sea. Articles 7 to 10 include references to maritime zones and the obligations of States parties under the Convention in relation to each such zone. Article 7 refers to internal waters, archipelagic waters and territorial sea; article 8 to the contiguous zone and articles 9 and 10 to reporting, notifying of and protecting underwater cultural heritage in the exclusive economic zone and on the continental shelf. Article 29, on "Limitations to geographical scope", regulates the possibility for States parties to make a declaration at the time of ratifying, accepting, approving or acceding to this Convention, "that this Convention shall not be applicable to specific parts of its territory, internal waters, archipelagic waters or territorial sea", and provides that such States parties shall "promote conditions under which this Convention will apply to the areas specified in its declaration". Since the legal regime applicable is different depending on the maritime zone where the location of a discovery of underwater cultural heritage is, an ambulatory system of baselines in case of sea-level rise could result in the change of the maritime zone of the mentioned location and, consequently, of the legal regime to be applied, while the option of fixed baselines has the advantage of ensuring the legal stability of the regime under the Convention.

266. As to the treaties relating to fisheries management, the instruments listed were examined.

267. The World Trade Organization 2022 Agreement on Fisheries Subsidies[576] includes a reference to the jurisdiction of a coastal member or a coastal non-member[577] and to the exclusive economic zone.[578] Article 11, paragraph 2 (b), refers

[574] Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001), United Nations, *Treaty Series*, vol. 2562 – Part I, No. 45694, p. 3.

[575] "Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea."

[576] Agreement on Fisheries Subsidies (Geneva, 17 June 2022), World Trade Organization document WT/MIN(22)/33–WT/L/1144, annex.

[577] Art. 5, para. 1: "No Member shall grant or maintain subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant [Regional Fisheries Management Organization or Arrangement]."

[578] Art. 8, para. 1 (b) (i), footnote 14: "The term 'shared stocks' refers to stocks that occur within the [exclusive economic zones] of two or more coastal Members, or both within the [exclusive economic zone] and in an area beyond and adjacent to it."

to "territorial claims or delimitation of maritime boundaries".[579] A landward ambulatory baseline because of sea-level rise could have as a consequence that a certain fish stock that used to be in the exclusive economic zone of a State could end up outside that maritime zone or that State's jurisdiction, while a fixed baseline has the advantage of preserving the maritime zones within the same coordinates, thus preserving the respective fish stocks and the legal stability of the regime under the Convention.

268. The 1966 International Convention for the Conservation of Atlantic Tunas[580] defines in article I the "area to which this Convention shall apply" as "all waters of the Atlantic Ocean, including the adjacent Seas", and includes a reference to territorial sea in article IX, by which the parties commit to setting up "a system of international enforcement to be applied to the Convention area except the territorial sea and other waters, if any, in which a State is entitled under international law to exercise jurisdiction over fisheries" (para. 3). A landward ambulatory baseline because of sea-level rise could have as a consequence that the area of water to which such a system of enforcement would apply expands to areas formerly within the territorial sea and "other waters, if any, in which a State is entitled under international law to exercise jurisdiction over fisheries". While from the perspective of the legal regime set forth by the Convention this situation may be seen as an advantage, it might not be the same from the perspective of the coastal State. In the case of fixed baselines, the maritime zones remain within the same coordinates, so the enforcement system mentioned continues to be implemented in the same area as before sea-level rise.

269. The 1978 Convention on Cooperation in the Northwest Atlantic Fisheries[581] refers to exclusive economic zones, to coastal State (defined in article I (c), as "a Contracting Party having an exclusive economic zone within the Convention Area", which is defined by geographic coordinates in article IV), to "conservation and management of fishery resources and their ecosystems within areas under the jurisdiction of that coastal State" (art. VII, para. 10 (b)). It also includes a no prejudice provision[582] in relation to the United Nations Convention on the Law of the Sea. A similar assessment, adapted to the specificity of this Convention, as to the International Convention for the Conservation of Atlantic Tunas, analysed above, is valid for this one as well.

270. The 1993 Agreement for the Establishment of the Indian Ocean Tuna Commission[583] has no explicit references to baselines and maritime zones, but includes, in its article XVI on "Coastal States' rights", a no prejudice provision: "This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and

[579] "A panel established pursuant to Article 10 of this Agreement shall make no findings with respect to any claim that would require it to base its findings on any asserted territorial claims or delimitation of maritime boundaries."

[580] International Convention for the Conservation of Atlantic Tunas (Rio de Janeiro, 14 May 1966), United Nations, *Treaty Series*, vol. 673, No. 9587, p. 63.

[581] Convention on Cooperation in the Northwest Atlantic Fisheries (Ottawa, 24 October 1978), *ibid*., vol. 1135, No. 17799, p. 369. For the consolidated version, see Northwest Atlantic Fisheries Organization, *Convention on Cooperation in the Northwest Atlantic Fisheries*, Halifax, Canada, 2020.

[582] Art. XXI, para. 2: "Nothing in this Convention shall prejudice the rights, jurisdiction and duties of Contracting Parties under the 1982 Convention or the 1995 Agreement [for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks]. This Convention shall be interpreted and applied in the context of and in a manner consistent with the 1982 Convention and the 1995 Agreement."

[583] Agreement for the Establishment of the Indian Ocean Tuna Commission (Rome, 25 November 1993), United Nations, *Treaty Series*, vol. 1927, No. 32888, p. 329.

exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction." That provision makes implicit reference to the baselines from which this distance is usually measured. In the case of a landward ambulatory baseline because of sea-level rise, the outer limit of this zone of 200 nautical miles would also move landward, thus possibly leaving species previously under the jurisdiction of the coastal State outside it. In the case of a fixed baseline, the respective zone remains within the same parameters and the regime provided by the Convention enjoys legal stability.

271. The 2003 Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica[584] includes in its preamble a reference to "the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in [the United Nations Convention on the Law of the Sea], and the right of all States for their nationals to engage in fishing on the high seas in accordance with [that Convention]". It also has a no prejudice provision in article V:

> 1. Nothing in this Convention shall prejudice or undermine the sovereignty or sovereign rights of coastal States related to the exploration and exploitation, conservation and management of the living marine resources within areas under their sovereignty or national jurisdiction as provided for in [the United Nations Convention on the Law of the Sea], or the right of all States for their nationals to engage in fishing on the high seas in accordance with [the United Nations Convention on the Law of the Sea].
>
> 2. The conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible, ….

Article XVII also mentions that, "[n]o provision of this Convention may be interpreted in such a way as to prejudice or undermine the sovereignty, sovereign rights, or jurisdiction exercised by any State in accordance with international law, as well as its position or views with regard to matters relating to the law of the sea." Article XX, paragraph 3, sets forth that, "each Party shall take such measures as may be necessary to ensure that vessels flying its flag do not fish in areas under the sovereignty or national jurisdiction of any other State in the Convention Area without the corresponding license, permit or authorization issued by the competent authorities of that State" Article XXIII, paragraph 1, refers to the support to be granted to developing States "to enhance their ability to develop fisheries under their respective national jurisdictions and to participate in high seas fisheries on a sustainable basis" There are no other references in this Convention to baselines and maritime zones. Based on the above, this Convention does not therefore require the adjustment of baselines in certain circumstances, but a change of baselines would entail a change of position of maritime zones ("areas under sovereignty or national jurisdiction"), which would result in a change to the regime applicable, while fixed baselines would ensure the legal stability of the implementation of the Convention.

272. A review of the 13 sustainable fisheries partnership agreements concluded by the European Commission on behalf of the European Union with non-European Union

[584] Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa-Rica (Washington, 14 November 2003), *Treaties and Other International Acts*, Series 16-325.1.

countries[585] (out of which 9 are tuna agreements[586] and 4 are mixed agreements)[587] revealed the conclusions below. (The analysis below is presented in a more detailed way for the first three agreements, selected as examples, while for the rest it is presented in a more concise manner, since their provisions are quite similar.)

273. The 2006 Fisheries Partnership Agreement with Cabo Verde[588] mentions that the latter "exercises its sovereign rights or jurisdiction over a zone extending up to 200 nautical miles from the baselines in accordance with the United Nations Convention on the Law of the Sea" (preamble), but the area where the Agreement applies is defined as "the territories in which the Treaty establishing the European Community applies, under the conditions laid down in that Treaty, and … to the territory of Cape Verde" (art. 10), which is quite imprecise. At the same time, article 2 (c) mentions that, "'Cape Verde waters' means the waters over which Cape Verde has sovereignty or jurisdiction" and chapter 2 of the annex to the implementing Protocol mentions that "Community vessels may carry out fishing activities … beyond 12 nautical miles from the baselines". This means that, in the case of a landward ambulatory baseline because of sea-level rise, the fishing area also moves landward, while in the case of fixed baselines the fishing area remains within the same coordinates, thus staying at a greater distance from the coast.

274. The 2007 Fisheries Partnership Agreement with Côte d'Ivoire has similar provisions.[589] For instance, article 2 (c) defines "Côte d'Ivoire's fishing zone" as "the waters over which, as regards fisheries, Côte d'Ivoire has sovereignty or jurisdiction", while the area to which the Agreement applies is defined in similar terms as in the Cabo Verde agreement cited above. Chapter 2 of the annex to the implementing Protocol contains an almost identical text: "Community vessels may carry out fishing activities in waters beyond 12 nautical miles from the base lines in the case of tuna seiners and surface longliners." The same reasoning as set forth above is thus valid.

275. Similar provisions are included in the 2016 Fisheries Partnership Agreement with the Cook Islands:[590] the recognition in the preamble of the fact that "Cook Islands exercises its sovereign rights or jurisdiction over a zone extending up to 200 nautical miles from the baseline in accordance with the United Nations Convention on the Law of the Sea", the definition of the Cook Islands "fishery waters" as "the waters over which the Cook Islands have sovereign rights or fisheries jurisdiction" (art. 1 (f)); and the same definition of the area of application by reference to the territory of European Union and the Cook Islands (art. 10). Chapter I, section 2, paragraph 1, of the annex to the implementing Protocol refers to the fishing areas: "Union vessels … shall be authorised to engage in fishing activities in the Cook Islands' fishing areas, meaning the Cook Islands' fishery waters except protected or prohibited areas. The coordinates of the Cook Islands' fishery waters and of protected

[585] See https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas_en.

[586] Concluded with Cabo Verde, the Cook Islands, Côte d'Ivoire, Gabon, the Gambia, Mauritius, Sao Tome and Principe, Senegal and Seychelles. These agreements allow European Union vessels to pursue migrating tuna stocks as they move along the shores of Africa and through the Indian Ocean.

[587] Concluded with Guinea-Bissau, Mauritania and Morocco, and Greenland. These agreements provide access for European Union vessels to a wide range of fish stocks in the partner country's exclusive economic zone.

[588] Fisheries Partnership Agreement between the European Community and the Republic of Cabo Verde (Brussels, 19 December 2006), *Official Journal of the European Union,* L 414, p. 3.

[589] Fisheries Partnership Agreement between the European Community and the Republic of Côte d'Ivoire on fishing in Côte d'Ivoire's fishing zones for the period from 1 July 2007 to 30 June 2013 (Brussels, 12 February 2008), *ibid*., L 48, p. 41.

[590] Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands (Brussels, 29 April 2016), *ibid*., L 131, p. 3.

areas or closed fishing areas shall be communicated by the Cooks Islands to the Union …". The same reasoning as laid out above is applicable.

276. Similar provisions can be found in the other Fisheries Partnership Agreements, with certain nuances. For instance, in the annex to the 2021 implementing Protocol of Fisheries Partnership Agreement concluded in 2007 with Gabon,[591] chapter 1, section 2, states that:

> 2.1. The coordinates of the Gabonese fishing zone covered by this Protocol are set out in Appendix 1. Before the start of the provisional application of this Protocol, Gabon shall inform the Union of the geographical coordinates of the baselines of the Gabonese fishing zone and of all zones which are closed to navigation and fishing.
>
> 2.2. Union vessels may not engage in fishing activities within a band of 12 nautical miles from the baselines.
>
> …

The same reasoning as set forth above is applicable. Another Agreement, concluded in 2021 with Greenland (and Denmark),[592] provides that the "Parties hereby undertake to secure continued sustainable fishing in the Greenlandic [exclusive economic zone] in line with [the United Nations Convention on the Law of the Sea] provisions" (art. 3, para. 1); in the annex to the Protocol implementing the Agreement,[593] chapter I, paragraph 3, regulates the fishing zone: the exclusive economic zone and the baselines are defined by reference to domestic legislation, while "the fishery shall take place at least 12 nautical miles off the baseline". Again, the same reasoning as noted above is applicable.

277. Similar provisions can be found in the Fisheries Partnership Agreements concluded in 2007 with Guinea-Bissau (implementing Protocol from 2019),[594] Mauritania (2021 Agreement and implementing Protocol),[595] Mauritius (2012 Agreement and 2017 Protocol),[596] Morocco (2019 Agreement and implementing

[591] Fisheries Partnership Agreement between the Gabonese Republic and the European Community (Luxembourg, 16 April 2007), *ibid*., L 109, p. 1, and Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community (2021–2026) (Brussels, 29 June 2021), *ibid*., L 242, p. 5.

[592] Sustainable Fisheries Partnership Agreement between the European Union, of the one part, and the Government of Greenland and the Government of Denmark, of the other part (Brussels, 22 April 2021), *ibid*., L 175, p. 3.

[593] Protocol Implementing the Sustainable Fisheries Partnership Agreement between the European Union, of the one part, and the Government of Greenland and the Government of Denmark, of the other part (Brussels, 18 May 2021), *ibid.*, p. 14.

[594] Fisheries Partnership Agreement between the European Community and the Republic of Guinea-Bissau for the period 16 June 2007 to 15 June 2011 (Brussels, 4 December 2007), *ibid*., L342, p. 5, and Protocol on the implementation of that Agreement (Brussels, 15 June 2019), *ibid*., L 173, p. 3. The annex to the Protocol provides in chapter I, paragraph 2, that "The baselines shall be defined by national legislation."

[595] Partnership Agreement on sustainable fisheries between the European Union and the Islamic Republic of Mauritania (Brussels, 15 November 2021), *ibid*., L 439, p. 3, and Protocol implementing that Agreement, *ibid*., p. 14. In accordance with appendix 1 to annex III of that Protocol, the Mauritanian fishing zone is defined by geographic coordinates, so the ambulation or fixing of baselines can have no effect on this fishing zone.

[596] Fisheries Partnership Agreement between the European Union and the Republic of Mauritius (Brussels, 21 December 2012), *ibid*., L 79, p. 3, and Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Union and the Republic of Mauritius (Brussels, 23 October 2017; no longer in force), *ibid*., L 279, p. 3. The annex to the Protocol defines, in chapter I, paragraph 2, "Mauritius waters" "as beyond 15 nautical miles from the baselines".

Protocol),[597] São Tome and Principe (2007 Agreement and 2019 Protocol),[598] Senegal (2014 Agreement and 2019 Protocol),[599] Seychelles (2020 Agreement and Protocol),[600] and the Gambia (2019 Agreement and Protocol).[601]

278. The conclusion of this analysis is that these fisheries agreements concluded by European Union with 13 States do not require the adjustment of baselines, although they do not forbid such adjustment. As already mentioned above, a change of baselines entails a change of maritime zones, but it affects the implementation of the agreements: in the case of a landward ambulatory baseline because of sea-level rise, the fishing area also moves landward. In the case of the application of fixed baselines, the fishing area remains within the same coordinates, thus staying at a greater distance from the coast. At the same time, in the specific cases of those agreements that define the fishing zones by geographic coordinates expressly mentioned in the text, the ambulation or fixing of baselines can have no effect on this fishing zone.

279. The reading of the regulation B-440, entitled, "International boundaries and national limits" of the International Hydrographic Organization,[602] which presents, in a descriptive manner, the various maritime zones and other notions/concepts related to them, including baselines and limits of maritime zones, did not reveal any reference to a permission or requirement (or not) of the adjustment of baselines in certain circumstances.

280. In conclusion, as observations of a preliminary nature, sources of law other than the United Nations Convention on the Law of the Sea, as examined in the present chapter, are of very limited, if any, relevance.

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[597] Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (Brussels, 14 January 2019), *ibid*., L 77, p. 8, and Protocol on the implementation of that Agreement, *ibid*., p. 18. The Agreement defines the fishing zone by coordinates.

[598] Fisheries Partnership Agreement between the Democratic Republic of São Tomé and Príncipe and the European Community (Brussels, 23 July 2007), *ibid*., L 205, p. 36, and Protocol on the implementation of that Agreement (Brussels, 19 December 2019), *ibid*., L 333, p. 3. Chapter I, paragraph 2, of the annex to the Protocol defines the fishing zone by reference to exclusive economic zone of Sao Tome and Principe, "with the exception of areas reserved for small-scale and semi-industrial fishing", and mentions that "the coordinates of the [exclusive economic zone] shall be those notified to the United Nations on 7 May 1998".

[599] Agreement on a Sustainable Fisheries Partnership between the European Union and the Republic of Senegal (Luxembourg, 8 October 2014), *ibid*., L 304, p. 3, and Protocol on the implementation of that Agreement (Brussels, 14 November 2019), *ibid*., L 299, p. 13. The annex to the Protocol defines, in chapter I, paragraph 2, the "Senegalese fishing zones" as "those parts of Senegalese waters in which Senegal authorises Union fishing vessels to carry out fishing activities", and mentions that "[t]he geographical coordinates of the Senegalese fishing zones and the baselines shall be communicated to the Union … in accordance with Senegalese legislation".

[600] Sustainable Fisheries Partnership Agreement between the European Union and the Republic of Seychelles (Brussels, 20 February 2020), *ibid*., L 60, p. 5, and Protocol on the implementation of that Agreement, *ibid*., p. 15. According to the Agreement, article 2 (e), "the Seychelles fishing zone" means "the part of the waters under the sovereignty or jurisdiction of Seychelles, in accordance with the Maritime Zones Act and other applicable laws of Seychelles …".

[601] Sustainable Fisheries Partnership Agreement between the European Union and the Republic of the Gambia (Brussels, 31 July 2019), *ibid*., L 208, p. 3, and Protocol on the implementation of that Agreement, *ibid*., p. 11. The annex to the Protocol defines in chapter I, paragraphs 2 and 3, the Gambian fishing zone by "geographic coordinates", which shall be notified by the Gambian authorities to the Union services, together with "the geographical coordinates of the Gambian baseline" and of "zones closed to shipping and fishing".

[602] International Hydrographic Organization, *Regulations of the IHO for International (Int) Charts and Chart Specifications of the IHO*, ed. 4.8.0 (Monaco, 2018), pp. 265–268. Available at https://iho.int/iho_pubs/standard/S-4/S4_V4-8-0_Oct_2018_EN.pdf

XIII. Future work of the Study Group

281. In 2024, the Study Group will revert to the subtopics of issues related to statehood and those related to the protection of persons affected by sea-level rise. In 2025, the Study Group will then seek to finalize a substantive report on the topic as a whole by consolidating the results of the work undertaken.