The 200 Mile Limit

BUNKERING AND SHIP-TO-SHIP TRANSFERS WITHIN THE EXCLUSIVE ECONOMIC ZONE

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Abstract

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Abstract:

The codification of the law of the sea at the third United Nations Conference on the Law of Sea (UNCLOS III) was a significant development within that body of law. With it came the establishment of a *sui generis* area in the seas named the Exclusive Economic Zone (EEZ). Each coastal state can establish an EEZ up to 200 nautical miles from the baseline of which its territorial sea is measured. Within the new zone, the separation of activities that belong under the freedom of the high seas took place.

Sovereign rights and jurisdiction over such activities as fishing, erecting artificial installations and marine scientific research were attributed to coastal states. While traditional freedoms of the high seas, such as navigation, were assigned to flag states. The attempt to create a compromise represents the latest solution to the classic conflict between the free sea (*mare liberum*) and the closed sea (*mare clausum*). However, making a new zone between the high seas and the territorial waters of coastal states left legal ambiguity with activities that are not explicitly attributed to the coastal state or the flag state. Two of those unattributed activities are bunkering and ship-to-ship transfers. The uncertainty involving the two activities has created disputes which have found their way to the International Tribunal for the Law of the Sea (ITLOS).

In the cases of the *M/V "Saiga"* and *M/V "Virginia G,"* the activity of bunkering foreign fishing vessels was adjudicated at ITLOS. The three options available to the Tribunal were to attribute bunkering to the coastal state, the flag state, or deciding the activity based on equity. In *M/V "Saiga,"* ITLOS used judicial restraint and refused to settle the issue of bunkering, despite the request of both parties.

However, the situation in the case of *M/V "Virginia G"* required a decision. Through arguments using the text of UNCLOS and the practices of coastal states, ITLOS decided the bunkering of foreign fishing vessels to be under the jurisdiction of the coastal state due to a connection with fishing. Bunkering in all other instances and arguments based on marine pollution were not considered.

Currently, before ITLOS is the case of the *M/T "San Padre Pio."* The unattributed activity of conducting a ship-to-ship transfer within the EEZ of a coastal state will be decided. An analysis of the argumentation utilized in earlier cases was used to predict the outcome of this dispute. The Tribunal will likely find a solution based on incompatible laws and will not have to categorize ship-to-ship transfers, thus leaving the activity's attribution unsettled.

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ICJ	International Court of Justice	p.8
IMO	International Maritime Organization	p.2
ITLOS	The International Tribunal for the Law of the Sea	p.3
LOSC	Law of the Sea Convention	p.3
MARPOL	International Convention for the Prevention of Pollution from Ships	p.40
MEPC	Marine Environment Protection Committee	p.59
PCIJ	Permanent Court of International Justice	p.14
STS	Ship-to-Ship	p.4
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1. Introduction

1.1 Background

"We are tied to the ocean, and when we go back to the sea - whether it is to sail or to watch it - we are going back from whence we came."[1] The ocean covers more than 70 percent of the surface of the planet. It is a vast part of the Earth with unique characteristics, including geographical features, species, and weather effects.[2] When one thinks of the high seas[3], it represents one of the last places that, at first glance, remain outside the legal control and territory of any single nation, kingdom, or individual. The ocean symbolizes unexplored depths, unexploited resources, and undiscovered life.

This vast openness portrays, although somewhat incorrectly, the freedom of the high seas, or more specifically, the freedom of navigation; however, the ocean, including its freedoms, are regulated through international agreements, customs, and domestic legislation. The law of the sea and maritime law are two of the primary bodies of law that cover the waters. Typically, the former handles disputes between states, and the latter handles disputes between private parties.[4]

The law of the sea has developed significantly during the last century. Previously, it was viewed as one of the most stable forms of international law.[5] Due to various reasons, some of which will be discussed more in-depth, the law of the sea was codified at the third United Nations Conference on the Law of the Sea (UNCLOS III). This codified version created, *inter alia*, new defined territorial boundaries, territorial regimes, rights and duties, and a tribunal specific to the convention. Generally, there are some important motivations for the regulation of the seas.

The ocean is a highway that connects distant lands and facilitates business. It is the primary means of transport for international trade. A report from 2018 stated that 80 percent of the

[1] John F Kennedy, 'Remarks in Newport, Rhode Island at the Australian Ambassador's Dinner for the America's Cup Crews, 14 September 1962'.
[2] 'Find out about the World's Ocean Habitats and More' (National Geographic, 21 March 2019).
[3] 'high seas', Bryan A Garner and Henry Campbell Black (eds), *Black's Law Dictionary* (Eleventh edition, Thomson Reuters 2019) 1616, The ocean waters beyond the jurisdiction of any country. Also termed *Mare Liberum* (the free seas), open seas, and main seas.
[4] 'maritime law', Garner and Black (n 3), 1159, the rules governing contract, tort, and workers' compensation claims or relating to commerce on or over water. Also termed admiralty law.
[5] René-Jean Dupuy and Daniel Vignes, *A Handbook on the New Law of the Sea. 1* (Nijhoff 1991) XL, VI.

global trade volume and 70 percent of the global trade value is carried by sea and handled at ports.[6] The estimated tonnage of transported goods per year is 11 billion.[7] At any given time, there are around 50,000 merchant ships at sea, with as many as five million containers.[8] The importance of the ocean to the global economy is undeniable.

However, there is an impact on the environment due to the significant number of ships at sea. Various sources estimate that shipping contributes about 3 percent of the global greenhouse gas emissions per year.[9] The concern of greenhouse gas emissions is encapsulated in the Paris Agreement, in which parties to the treaty have agreed to reduce emissions to return the global average temperature to pre-industrial levels.[10] The agreement does not explicitly mention the shipping industry or emissions by vessels. Nevertheless, the International Maritime Organization (IMO), which is responsible for the regulation of global shipping, has adopted mandatory measures on energy-efficient designs and management in its strategy to reduce greenhouse gas emissions.[11]

In addition to air pollution, there are oil spills. There are thousands of oil spills each year, and they can cause severe harm to the life of sea creatures and coastal lands.[12] This harm also includes affecting the living resources which coastal states may rely on for their economy or food supply.[13] Rights, access, and management of fishing resources form a significant historical interest for all states. Though, early in the formulation of the freedom of the high seas, arguments that fishing is an activity that belongs under the coastal states' jurisdiction were made.[14]

The use of the ocean to facilitate trade and the prevention of environmental harm are examples of the competing interests at stake on the seas. It can be argued that these interests stem from one of the oldest disputes regarding the use of the seas, the rights of the coastal state versus the freedoms of the high seas. The agreement reached at UNCLOS III, which

[6] 'Review of Maritime Transport 2018 | UNCTAD'.
[7] 'Shipping and World Trade: Driving Prosperity' (*ICS*).
[8] Chris Baraniuk, 'What It's like to Sail a Giant Ship on Earth's Busiest Seas' (*BBC*).
[9] Naya Olmer and others, 'Greenhouse Gas Emissions from Global Shipping, 2013–2015' (International Council on Clean Transportation 2017) 2; 'Ocean Shipping and Shipbuilding - OECD' (*OECD*).
[10] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) U.N. Doc. FCCC/CP/2015/L.9/Rev/1. art 4(1)
[11] 'Reducing Greenhouse Gas Emissions from Ships' (*International Maritime Organization*).
[12] 'Oil Spills | National Oceanic and Atmospheric Administration' (*National Oceanic and Atmospheric Administration*, August 2020).
[13] ibid, Oil spills harm species by oiling them which causes several issues (unable to keep warm) and by being toxic.
[14] Charles Quince, *The Exclusive Economic Zone* (Vernon Press 2019), 6.

this paper will refer to as the Law of the Sea Convention (LOSC), prescribed a new territory that was previously considered part of the high seas, named the Exclusive Economic Zone (EEZ).[15] This new zone nestles between the territorial waters of a coastal state and the high seas, and it shall not extend beyond 200 nautical miles from the baseline of which the territorial sea is measured.[16]

The EEZ grants certain sovereign rights to the coastal states and some of the freedoms of the high seas, including freedom of navigation, to flag states. Activities such as fishing are under the regulatory authority of the coastal state.[17] At the same time, activities like laying submarine cables are rights afforded to the flag state.[18] However, not all activities are explicit. These competing rights created ambiguities in the law, which became evident as the first case brought before the International Tribunal for the Law of the Sea (ITLOS) included this issue[19]; within the EEZ, which activities belong under the jurisdiction of the coastal state and which activities belong under the freedom of the high seas?

1.2 Purpose and Scope

This thesis aims to examine some of the ambiguous activities and analyze the legal arguments on which category they belong. Pertinent articles found in the LOSC define the categories. Firstly, article 56 prescribes the rights, jurisdiction and duties of the coastal state in the EEZ. Secondly, article 58 lists the rights and duties of other states in the EEZ. And finally, in situations where the LOSC does not attribute rights or jurisdiction, article 59 provides a basis to resolve the conflict. Therefore, any activity conducted in the EEZ falls within one of these three articles.

One such activity that may be up for debate is anchoring. In the fall of 2020, a Canadian Member of Parliament suggested that the Government of Canada use the "200-mile limit" to control freighter traffic and anchorage within the territorial waters of Canada's west coast.[20] The suggestion inspired this research and is referenced by the title. The term mile

[15] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 U.N.T.S. 397 (LOSC), pt V.
[16] ibid art 57.
[17] ibid, art 56(1)(a).
[18] ibid, art 58(1).
[19] *M/V 'Saiga' (Saint Vincent and the Grenadines v Guinea)* (Prompt release, Judgment of 4 December 1997) ITLOS Rep 1997 16.
[20] Green Party of Canada, *Paul Manly: The Government Must Stop Allowing Freighters to Anchor in the Southern Gulf Islands* (2020).

represents a nautical mile and will be used interchangeably throughout the thesis.[21] Although there has not been any bill put forward regarding using the EEZ to regulate anchorage, a bill is making its way through the government regarding banned anchorage areas within territorial waters.[22] At first glance, anchoring appears to be a clear case of an activity under the freedom of navigation; however, anchors can drag against the seabed and may cause damage to the marine environment.[23] The protection and preservation of the EEZ's marine environment fall under the jurisdiction of the coastal state.[24] Anchoring may be an activity left in legal limbo within the EEZ under the LOSC.

As mentioned above, the first dispute before ITLOS involved the arrest and detention of the M/V Saiga. The conflict was between Saint Vincent and the Grenadines, the flag state and Guinea, the coastal state. The dispute concerned the activity of the tanker bunkering fishing vessels within Guinea's EEZ.[25] Bunkering at sea or offshore bunkering is the act of a tanker replenishing another vessel's bunkers, or tanks, with fuel for its use.[26] For the purpose of this thesis, the term bunkering is used to represent bunkering at sea. Bunkering is not the only activity that involves a transfer between ships.

Currently, before ITLOS is the case of *M/T "San Padre Pio" No. 2*, involving the states of Switzerland and Nigeria. The dispute arose from the arrest of the M/T San Padre Pio, which was flying Switzerland's flag, by Nigerian authorities for allegedly conducting a ship-to-ship transfer of fuel in Nigeria's EEZ.[27] Ship-to-ship (STS) transfers can be defined as the transfer of cargo, which can be oil or gas cargo, between two merchant tanker vessels positioned alongside each other, either still or while underway.[28] Although bunkering is an STS transfer in the literal sense, it can be considered a separate activity since the contents of

[21] 'nautical mile', Garner and Black (n 3), 1239, A measure of distance for air and sea navigation, equal to one minute of arc of a great circle of earth; equal to 1,852 meters.
[22] Alistair MacGregor, Private Member's Bill C-250 (43-2) - First Reading - An Act to amend the Canada Shipping Act, 2001 (anchorage prohibition) - Parliament of Canada.
[23] Allison Broad, Matthew J Rees and Andrew R Davis, 'Anchor and Chain Scour as Disturbance Agents in Benthic Environments: Trends in the Literature and Charting a Course to More Sustainable Boating and Shipping' (2020) 161 Marine Pollution Bulletin 111683.
[24] LOSC (n 15), art 56(b)(iii).
[25] *M/V 'Saiga' (No 1)* (n 19); *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Rep 1999 10.
[26] David Testa, 'Coastal State Regulation of Bunkering and Ship-to-Ship (STS) Oil Transfer Operations in the EEZ: An Analysis of State Practice and of Coastal State Jurisdiction Under the LOSC' (2019) 50 Ocean Development & International Law 363, 364.
[27] ITLOS Press Release, 'The Swiss Confederation and the Federal Republic of Nigeria Transfer Their Dispute Concerning the M/T "San Padre Pio" to the Tribunal' (17 December 2019) ITLOS/Press 298.
[28] Anish Wankhede, 'What Is Ship-to-Ship Transfer (STS) and Requirements to Carry Out the Same?' (*Marine Insight*, 6 May 2019).

the transfer are for fuel consumption, which produces unique arguments under the freedom of navigation.

Since STS transfers are currently being adjudicated, they will serve as the focus of the research. The objective is to answer the following research questions:

1. How has ITLOS's decisions and interpretations influenced or resolved the issue between the coastal state and flag state rights within the EEZ?

2. What types of arguments have been the most persuasive?

3. Can previous arguments and judicial reasonings at ITLOS offer a guide on how the *M/T "San Padre Pio" No. 2* case may be decided, or how will ITLOS categorize STS transfers?

4. Finally, can a trend be identified, either towards coastal state rights or towards flag state rights?

Concerning the scope, this thesis will focus solely on merchant ships. The definition used is any vessel engaged in commercial transport of cargo or passengers, including tankers, containers and bulk carriers.[29] Therefore, merchant ships exclude military vessels, non-military government vessels, pleasure crafts, and floating structures. This limitation is merely the result of a lack of cases regarding other types of vessels.

Although the LOSC provides different dispute resolution mechanisms, only the cases before ITLOS are analyzed.[30] However, this limitation does not restrict the examination of case law from other jurisdictions in the context of arguments at ITLOS and historical development (customary law). ITLOS provides cases with activities to examine, namely, bunkering and STS transfers. Bunkering will be the primary focus of analysis and evaluation to lead to an evaluative prediction on how STS transfers will be resolved. Other activities will be mentioned in the context of predictions based on the review of the ITLOS cases while keeping in mind the case of *M/T "San Padre Pio" No. 2* regarding STS oil transfers is ongoing.

Both the activities of bunkering at sea and STS transfers can be referred to as replenishment at sea, especially within the naval context. As a former sailor in the Royal Canadian Navy,

[29] 'Merchant Vessels | Maritime-Connector.Com' (*Maritime Connector*).
[30] LOSC (n 15), art 287.

the author of this thesis has been involved in many replenishment at sea evolutions. Part of the motivation for the research comes from the acquired knowledge of the high degree of risk these activities possess and understanding the necessity of being able to refuel and resupply while underway.

1.3 Methods and Approach

The primary method used is the doctrinal research method. The benefit of this method is that it is similar to what is used by practicing lawyers and judges, but researchers are not restricted to find a "concrete answer for a client."[31] One definition that fits the undertaken objective is:

> [T]he messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability … to organize dispersed, fragmentary, prolix, and rebarbative material.[32]

Although there is scholarly debate on defining the method's precise discipline, the author of this thesis agrees that it is primarily hermeneutical.[33] Texts and documents are the main research object, and their interpretation is the main activity.[34] The approach taken was to interpret the LOSC as it relates to the issue at hand by analyzing its written text and decided cases.

In order to analyze the arguments presented and applied in the judicial reasonings, Huhn's theory of the 'five legal arguments' was used. By categorizing the arguments, themes may be derived to understand how ITLOS decided the case and to predict future decisions. Although written from an American lawyer and academic's perspective, his approach categorizes arguments into five distinct types: text, intent, precedent, tradition, or policy analysis.[35]

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[31] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 107.
[32] ibid, citing Richard Posner, 'In Memoriam: Bernard D. Meltzer (1914-2007)' (2007) 74(2) University of Chicago Law Review 435, 437.
[33] Mark Van Hoecke, *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 17.
[34] ibid 4.
[35] Wilson Ray Huhn, *The Five Types of Legal Argument* (Third edition, Carolina Academic Press 2014), 13.

The first type of argument is textual. As will be discussed in the sources section, treaties, such as the LOSC, are a primary source of law and are made up of legal text. Legal text can be unclear, ambiguous, or vague;[36] therefore, to harness the legal text to use it in an argument, it must be interpreted. The three methods to interpret text are according to its plain meaning, with the help of canons of construction and intratextual arguments.[37]

The second argument type is based on the intent of the people who wrote the text.[38] Intent can be drawn from the text itself, previous versions of the text, the text's history, official comments, or contemporary commentary. An argument based on precedent belongs to the third type, which cites case law or judicial decisions.[39] Next, the fourth type of argument is one of tradition. Huhn describes this type of argument as being based on customary law that reflects the customs of the people and traditions of the community.[40] It is akin to the common law but has a place in an international law context, as it can be used to describe arguments based on customary international law or that draw on state practice. The last argument type derives from policy. Consequentialist in nature, it differs from the other four arguments. It looks at the result depending on the interpretation and if the result would be acceptable.[41] These categories are measured against the rules and principles of interpreting treaty law and serve as a basis to evaluate the decisions from ITLOS.

However, in particular to the present issue, the lack of cases is a weakness of this approach. ITLOS has only examined the activity of bunkering in an EEZ, and that was in three cases. Nevertheless, ITLOS consists of twenty-one judges when sitting *en banc*. In cases where the Tribunal or a chamber of the Tribunal does not have a judge of one of the nationalities that are party to the dispute, that party may choose to sit a person to serve as a judge *ad hoc*.[42] With that number of judges, there is an opportunity for quite a few opinions. For example, in *M/V "Saiga" No. 2*, there were ten opinions of the majority, including the judgment and two dissenting opinions.

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[36] ibid, 19.
[37] ibid, Plain Meaning: courts interpret text to its plain meaning, or the text is so clear it does not require further interpretation, 20; Canons of Construction: rules of inference that draw meaning from the structure or context of a written rule, 22; Intratextual: using one portion of the legal text to interpret another portion either by a comparison of words or by deducing the meaning of portions of the text from their position within the text, 25.
[38] ibid, 31.
[39] ibid, 41.
[40] ibid, 45.
[41] ibid, 51.
[42] Rules of the Tribunal (adopted 28 October 1997, last amended 25 March 2021) ITLOS/8 (Rules of ITLOS), art 8, 19.

Along with doctrinal research methods, a historical legal research method was employed to gain insight into the development of certain legal principles. The method involved examining significant events, such as important cases, to understand how the law of the sea ended up in its present form. It was predominantly used in the chapter regarding the development of the freedom of the high seas and the events that led to the EEZ's creation.

1.4 Sources

The sources used in the thesis reflect, at times, the sources that an international court or tribunal would use. Since the primary cases for evaluation come from ITLOS, its applicable sources are relevant. According to article 293 of the LOSC, a court or tribunal with jurisdiction shall apply the LOSC and other rules of international law that are not incompatible with the LOSC. Hence, the primary source of the applicable law is the LOSC, and it is within this Convention where the ambiguities exist, and disputes arise.

As mentioned earlier, several dispute resolution mechanisms are found in the LOSC, including ITLOS and the International Court of Justice (ICJ). Whereas article 23 of the Statute of ITLOS[43] states that the provisions of article 293 will decide all disputes and applications, article 38, paragraph 1 of the ICJ Statute[44] states that the court will apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

As will be evidenced in Chapter 3.4, ITLOS also generally follows this set of guidelines for sources of law. Regarding paragraph a, along with the LOSC and the ICJ Statute, other international treaties were used in specific situations, such as interpreting international

[43] See, LOSC (n 15), Annex VI for the Statute of ITLOS .
[44] Statute of the International Court of Justice (adopted 26 June 1945) 33 U.S.T.S. 993 (ICJ Statute).

treaties.[45] Applicable sources are not to be confused with treaty interpretation methods, which are also discussed in Chapter 3.4.

Legal commentaries and treatises on the law of the sea helped to analyze the LOSC at the time of adoption. Along with those sources, newer books on the law of the sea were utilized to assess the development, especially regarding state practices and case law.

The cases before ITLOS are the primary sources used for the analysis of argumentation. They were found on ITLOS's website and included written memorials, orders, and judgments.[46] As noted earlier, one type of legal argument is precedent. Decisions citing other cases for precedent were examined, even if they were *obiter dicta*. Also, disputes from a variety of different jurisdictions, such as from the ICJ, were investigated. The purpose of the other cases was to show how court decisions may have influenced the historical development of the freedom of the high seas and coastal state rights.

Additional sources used in this study were scholarly articles, books, press releases, online news articles, international organizations (for statistical data), and dictionaries. Non-academic sources were also used, such as blog posts by mariners, to get definitions and insight on some activities conducted at sea.

1.5 Outline

To provide a foundation regarding the freedom of the high seas, coastal state rights, territorial boundaries, and the EEZ, an examination of its historical development is required. Chapter 2 consists of the arguable beginning of the freedom of the high seas and its progression to its contemporary state. It is not merely an overview but an attempt to identify activities through tradition, customs, and case law that may help answer what freedom of navigation meant before the LOSC. The story of the development of the freedoms is also the story of the development of coastal states' jurisdictional limits, including the territorial waters and eventually the EEZ.

Chapter 3 dives right into the LOSC. The ambiguities at the centre of this issue are discussed by identifying the relevant articles and examining commentaries at the time of the LOSC's

[45] See, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331 (VCLT).
[46] See, 'International Tribunal for the Law of the Sea: List of Cases' <https://www.itlos.org/en/main/cases/list-of-cases/>.

adoption. Additionally, this chapter describes ITLOS, its rules, and a brief examination of its rules of interpretation.

The evaluation of bunkering within an EEZ takes place in Chapter 4. The cases of *M/V "Saiga," M/V "Saiga" No. 2*, and *M/V "Virginia G"* are broken down by the arguments that were successful in their judgments. The arguments are categorized and evaluated by their type, including the principles of law used in their decisions. Additionally, the judicial reasonings found in the separate and dissenting opinions are assessed.

After evaluating bunkering arguments, Chapter 5 introduces the case of *M/T "San Padre Pio" No. 2.* Using the conclusions reached in scholarly works and the persuasive arguments developed in Chapter 4, a prediction regarding this case's outcome is formulated.

Lastly, Chapter 6 concludes the paper with some closing remarks and a summary of the conclusions. Also, the final section presents a position on the state of activities within an EEZ by identifying trends.

2. Historical Development

2.1 Freedom of the High Seas

The beginnings of the law of the sea can be traced back to ancient Greece and Rome, and its development was helped through the practices of Great Britain, France, Venice, Genoa, Asia, Scandinavia, and the Hanseatic cities.[47] Yet, the beginning of the freedom of the high seas is not clear. Many sources list different origins.[48] But, the most influential moment, if calculated by the number of times it appears in sources, is the work that originated from the famous Dutch lawyer, Hugo Grotius.

Grotius' book *Mare Liberum* (The Free Sea) was published anonymously in the spring of 1609.[49] An increasingly pressing issue provided a cause for Grotius to refute. The issue was regarding the Spanish and Portuguese effort to close off a large ocean area to international trade for their sole benefit.[50] Previously, to prevent a conflict between Spain and Portugal, the Pope granted them sovereignty over parts of the high seas.[51] Although Grotius framed his argument against Portugal exercising its papal right against Dutch ships, other territories previously made similar jurisdictional complaints.[52]

2.1.1 *Mare Liberum* versus *Mare Clausum*

Mare Liberum provides thirteen chapters that list arguments on why the Dutch have a right to the Indian Ocean for trading. The book did more than refute Spain and Portugal's ocean monopoly; it also laid out the basis that the seas are free. He defers to natural law to claim that the sea cannot belong to a single entity. By methodically quoting sources of the past, such as Cicero, he gets to the maxim, "common to all and proper to none."[53] Air is compared to the sea as an analogy to show that the sea cannot be possessed and therefore is for the

[47] Louis B Sohn and others, *Cases and Materials on the Law of the Sea* (Second edition, Brill Nijhoff 2014), 1.
[48] See Dupuy and Vignes (n 5), 386 - "…with the consolidation with the Roman Empire…came a period of several centuries of free use of the sea for all…"; Quince (n 14), 5 - "The concept… was developed and facilitated by…Hugo Grotius'… *Mare Liberum*"; Hugo Grotius, William Welwood and David Armitage, *The Free Sea* (Richard Hakluyt tr, Liberty Fund 2004), xvii - Grotius argues the freedom comes from natural law and not by human custom or prescription.
[49] Grotius, Welwood and Armitage (n 48).
[50] Sohn and others (n 47), 1.
[51] See, Dupuy and Vignes (n 5), 386 - Pope Alexander VI on 4 May 1493 issued a Bull confirming sovereignty of Span and Portugal over the Atlantic.
[52] See, ibid, 387 - In 1540, the Kingdom of Poland refused to recognize Danish claims.
[53] Grotius, Welwood and Armitage (n 48), 25.

common use to all. This analogy fits well for the time, where the limits and boundaries of the ocean were unknown. Grotius used this reasoning for the freedom of navigation and expanded it to include fishing.[54] The inclusion of fishing seemed to hurt the acceptance of his free seas concept overall.

Scottish jurist William Welwood believed the argument was simply a ruse to support the Dutch herring-fleets ability to fish in the coastal waters of Great Britain.[55] In his rebuttal to *Mare Liberum,* Welwood argued that coastal states have the right to "exploit fishery resources germane to their region."[56] Like Grotius, he reasoned his arguments with natural and Roman law. Additionally, he quoted scripture.[57] Along with the claim that coastal states have the right to exploit the fish, they also possess a duty to preserve them.[58] Welwood's rebuttal criticized fishing rights in coastal states' territorial waters, leaving off a critique of the concepts of freedom of navigation and trade.

Another such rebuke was found in John Sneldon's *Mare Clausum* (Closed Sea). He argued that mankind should control the sea, and he used natural law, ancient traditions, and Biblical passages in support.[59] The apt title of Sneldon's reply has lived on not only due to its partial acceptance but because the dispute between *mare liberum* and *mare clausum* persists. Essentially, both Welwood and Sneldon's arguments prevailed for two hundred years, with the *mare clausum* theory being "considered the leading authority on maritime law in England and on the European continent."[60]

Although Grotius' concept of freedom of seas includes the freedoms of navigation, trade, and fishing, the only one that gained traction after the criticisms was the freedom of navigation.[61] Even before *Mare Liberum,* there existed agreements allowing for navigation within what would be considered territorial waters.[62] Agreements such as these may be one reason the freedom of navigation was the more popular concept at that time. Even though the idea of freedom of navigation and trade was separated from the freedom of fishing,

[54] ibid, 28.
[55] ibid, xviii.
[56] Quince (n 14), 6.
[57] See, Grotius, Welwood and Armitage (n 48), Welwood's "Of the Community and Propriety of the Seas", 'God saith to man, "Subdue the earth, and rule over the fish"', 66 .
[58] Quince (n 14), 6.
[59] ibid, 6.
[60] ibid, 7, citing Fulton, *The Sovereignty of the Seas*.
[61] René-Jean Dupuy and Daniel Vignes, *A Handbook on the New Law of the Sea. 2* (Nijhoff 1991), 835.
[62] See, ibid, Spain and England signed a treaty, in which the concept of innocent navigation on the seas were agreed upon, 835.

especially regarding coastal state waters, it is safe to conclude the modern-day origins of the freedom of the seas included economic endeavours.

2.1.2 Freedom of Navigation Defined

While prominent in his book, Grotius failed to define what freedom of navigation means precisely. Two mid-eighteenth-century English dictionaries define navigation as "the act or practice of passing by water" and "the art of sailing, which shews how to conduct a ship at sea to any appointed port."[63] The latter definition appears to be broad as it includes sailing and a ship's operation at sea to reach a destination. This operation may include, among others, planning, plotting courses, ensuring safety, and checking the weather.

A further examination regarding the term navigation provides various other historical meanings, such as trade or commerce conducted by water, vessels collectively, seamanship, a course, and a voyage by water.[64] Compiling the past usages of the term helps to piece together what this freedom includes, but the question of what it meant as a principle still exists.

Freedom of the high seas is a negative rule, meaning that a sovereign power cannot extend its sovereign authority past its territory; therefore, "states are free to use the sea as they deem fit, in particular for the purpose of navigation."[65] A states' flag flying on the mast of a vessel encapsulates the idea of exercising the freedom of navigation. States may fly their flag on the seas and do what is legally permitted under international law, without the hindrance of any other nation.[66] Interestingly, the origin of the requirement of a state having their flag hoisted as a sign of sovereignty over a vessel is not clear.[67] Though, having an actual flag flying and visible to all demonstrates that any interference violates the freedom of navigation of that particular state.

A universally accepted definition of freedom of navigation comprises the freedom of movement for vessels, freedom to enter ports, and use of plants and docks to load and unload

[63] Samuel Johnson, *A Dictionary of the English Language* (The Third Edition, WG Jones 1768); Nathan Bailey, *An Universal Etymological English Dictionary* (The Thirteenth Edition, R Ware 1747).
[64] 'Navigation, n.' <http://www.oed.com/view/Entry/125477> accessed 28 April 2021.
[65] Dupuy and Vignes (n 61), 836.
[66] ibid.
[67] Barry Hart Dubner and Mary Carmen Arias, 'Under International Law, Must a Ship on the High Seas Fly the Flag of a State in Order to A Void Being a Stateless Vessel? Is a Flag Painted on Either Side of the Ship Sufficient to Identify It?' 29 U.S.F. Mar. L.J. 57, 107.

goods and transport goods and passengers.[68] In the *Oscar Chinn Case*, the Permanent Court of International Justice (PCIJ) inferred from the definition that while separate principles, the very concept of freedom of navigation implies freedom of commerce. Although fishing was not a part of the dispute, it noticeably was absent from the definition.

2.1.3 Towards the Twentieth Century

Even though the concept was not initially accepted, it was the practice of major maritime powers that changed the attitude towards the principle of the freedom of the seas.[69] A quote that exemplifies the attitude shift is, "[t]he notion of the freedom of the seas became accepted in Europe only after England had attained the status of global maritime power during the early nineteenth century."[70] Great Britain ditched practices such as issuing fishing licences and tolls for the passage of foreign vessels for a greater emphasis on freedom of the seas.[71]

Certain significant events included the freedom of the high seas as some of the main points of contention. The Barbary Wars in the early nineteenth century was one of these events. Pirates from the Barbary states[72] captured American merchant vessels trading in the Mediterranean Sea and held them for ransom. This hindrance violated the American vessels' rights to sail and to trade. Being a young country, the United States of America would pay the ransoms and eventually a yearly tribute to those states' leaders, which ultimately led to two conflicts known as the First and Second Barbary Wars.[73]

Another prominent event was the dispute between the United States and Great Britain regarding the seal-fur trade in the Bering Sea. The two nations agreed to arbitration to settle the dispute regarding the United States' attempt to protect and conserve seals by asserting territorial jurisdiction in the Bering Sea. Great Britain argued that states have "[t]he right to come and go upon the high sea without let or hindrance, and to take therefrom at will and pleasure the produce of the sea."[74] This argument closely resembles the *mare liberum* rights of Grotius. The Tribunal somewhat agreed and ruled that the United States does not have

[68] *The Oscar Chinn Case (Britain v Belgium)* Judgment No.61, 1927 P.C.I.J. (ser. A) No. 10.
[69] Sohn and others (n 47), 2.
[70] Quince (n 14), 7.
[71] Sohn and others (n 47), 2.
[72] See, David Dzurec, 'Barbary Wars' in Christopher G Bates, *The Early Republic and Antebellum America: An Encyclopedia of Social, Political, Cultural, and Economic History* (2015), 125, "the North African states of Algiers, Morocco, Tripoli, and Tunis" .
[73] ibid, 125.
[74] *Behring Sea Arbitration (Great Britain v United States of America)* (Argument of Her Majesty's Government of 1893) Bering Sea Trib Arbitr 1, 7.

rights to the seals found outside the three-mile territorial sea limit.[75] However, they also created an agreement between the nations to conserve the seals through various restrictions.[76] The decision is an example of the freedoms being limited to protect living resources, which is a reoccurring theme. It is also an example of how complicated the regime around territorial waters, the high seas, and fishing can be since fish do not recognize the territorial limits of humans. A resource vital to the livelihood of a coastal state may be depleted under the freedom of the high seas when that resource migrates out of the coastal state's jurisdiction.

2.2 Evolution of the 200-mile limit

2.2.1 Traditional Territorial Waters

The three-mile limit referenced above is one of the breadths that was accepted for territorial waters. The origins of that limit can be found in what is often described as the cannon-shot rule.[77] As early as 1793, the United States adopted a three-mile limit while the Scandinavian countries used a four-mile one.[78] Several states agreed that the territorial waters should not exceed three miles in the nineteenth century, but many states claimed four, six, and even twelve-mile limits.[79] When the Tribunal referenced the three-mile limit in the *Bering Sea* case, they always referred to it as 'the ordinary three-mile limit.' They seem to acknowledge it as customary, at least between the two parties to the dispute, but at the same time, it is not an absolute 'three-mile limit.'

2.2.2 Coastal State Interests

In the last century, the territorial demands from coastal states started to shift towards more sovereignty. Even so, the concept of the high seas remained a recognized principle, as the PCIJ stated, "[v]essels on the high seas are subject to no authority except that of the State whose flag they fly."[80] The next logical step would be to increase territorial waters, which would minimize the high seas. In the 1930s, there were suggestions for coastal states to

[75] *Behring Sea Arbitration (Great Britain v United States of America)* (Decision of 15 August 1893) UN RPT INTL Arbitr Awards XXVIII 263, 269.
[76] ibid, 270, art 1 - 9.
[77] See, Yoshifumi Tanaka, *The International Law of the Sea* (Third edition, Cambridge University Press 2019). 27, Cannon-shot rule: The limit of a territorial sea is fixed at a distance derived from the range of a cannon-shot.
[78] ibid.
[79] Sohn and others (n 47), 2.
[80] *SS Lotus, (France v Turkey)* Judgment No.9, 1927 P.C.I.J. (ser. A) No.10, para 64.

extend their jurisdiction; however, it was not until the Truman Proclamations in 1945 where things started to take off.[81] The two Proclamations, named after American President Harry S. Truman, declared that the resources found in the subsoil and the seabed of the United States' continental shelf that extended into the high seas were subject to the United States jurisdiction, and that the United States would set up conservation zones on the high seas regarding fishery resources.[82] The Proclamations were separate regimes with distinctions. One was purely to do with the resources found in the seabed and subsoil of the shelf. The other was explicitly on the living resources found in the high seas contiguous to the coasts of the United States, with no mention of a continental shelf.

Interestingly, four years earlier, the United States and the United Kingdom entered into an agreement at the height of World War II. The deal, named the Atlantic Charter, declared that the two nations desired to see no territorial changes and that "peace should enable all men to traverse the high seas and oceans without hindrance."[83] Although much transpired in those four years between the Charter and the Truman Proclamations, the two positions are contrasting.

These declarations were the catalyst that started a whirlwind of jurisdictional extensions. In 1949, several Middle Eastern territories made proclamations.[84] Also, the Latin American States, almost in unison, began to enact new limits.[85] Many of these declarations went beyond the scope of the Truman Proclamations by claiming the superjacent waters of the continental shelf. The reasoning for extending the scope was based on the importance of the living resources that reside in those waters.[86] This was the same reason Truman had for

[81] See, Dupuy and Vignes (n 5), 38, In 1934 A Peruvian arms chief of staff stated that an extension of jurisdiction is highly recommendable by the most eminent geographers. Then in 1939, President Franklin Roosevelt ordered the US Coast Guard to patrol 12 nm from shore, due to the maximum radar range at the time.
[82] Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (adopted 28 August 1945) 13 DSB 485 (Truman Proclamation 2667); Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas (adopted 28 August 1945) 13 DSB 486 (Truman Proclamation 2668).
[83] Franklin D Roosevelt and Winston Churchill, 'The Atlantic Charter' (*Yale Law School: Lillian Goldman Law Library*).
[84] H Lauterpacht, 'Sovereignty over Submarine Areas' (1950) 27 British Year Book of International Law 376, 381, The Middle Eastern States were: Saudi Arabia and Sheikhdoms under British protection (Bahrein, Qatar, Abu Dhabi, Kuwait, Dubai, Shayah, Umm al Qeiwain, Ajman, and Ras el Khaima).
[85] See, David Joseph Attard, *The Exclusive Economic Zone in International Law* (Clarendon 1987), 4, Mexico proposed to have direct dominion over the continental shelf and the submarine terraces (1945); Argentina declared the Epicontinental Sea and continental shelf subject to sovereign power (1946); Panama claims ownership of territorial sea and shelf (1946); Nicaragua declared extending sovereignty over the adjacent shelf (1947);.
[86] ibid, 3.

setting up conservation zones; however, combining the two Proclamations was a considerable extension of claims into the high seas. With sovereign states claiming more of the ocean as their own, the freedoms of the high seas were once again under threat.

The first country to establish a 200-mile limit was Chile, in its Presidential Declaration of 1947.[87] Other Latin American countries soon followed. In 1952, Chile, Ecuador and Peru signed the Santiago Declaration on the Maritime Zone, in which they each declared a 200-mile maritime zone over the superjacent waters, seabed and subsoil.[88] They addressed the freedom of navigation by limiting it to innocent and inoffensive passage only.

The concept of innocent passage was not codified under international law until one of the conventions from UNCLOS I came into force in September of 1964.[89] However, the principle existed previously and can be defined as:

> [A] right to use the waters as a thoroughfare between two points outside them; a ship exercising the right must respect the local regulations as to navigation, pilotage, and the like, and of course, it must not do any act which might disturb the tranquillity of the coastal state.[90]

Innocent passage restricts the freedom of the high seas by limiting the rights of flag states to only being able to transit through the waters.

The new 200-mile Maritime Zone also ignored the geographical limitations of the continental shelf. Peru did not have a substantial continental shelf, but under the Santiago Declaration, it could establish the Maritime Zone's full breadth.[91] Fairness may be the reason to ignore the lack of a continental shelf. Still, it diminishes the argument that the extension of the territory is based on the seabed and subsoil resources of the natural extension of a states' continental shelf. About the subsoil resources, one scholar wrote that:

> Seldom has an apparent major change in international law been accomplished by peaceful means more rapidly and amidst more general acquiescence and approval

[87] ibid, 5.
[88] Declaration on the Maritime Zone (adopted 18 August 1952) 1006 U.N.T.S. 14758 (Santiago Declaration).
[89] Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 U.N.T.S. 205, art 14.
[90] 'innocent passage' Garner and Black (n 3), 943, citing J.L. Brierly, *The Law of Nations* 188-89 (5th ed.) (1955).
[91] Attard (n 85), 8.

than in the case of the claims to submarine areas - the sea-bed and its subsoil – adjacent to the coast of littoral states.[92]

The resources found in the subsoil from a continental shelf and the claims of even superjacent waters put the freedom of navigation at risk, especially if the innocent passage provision is readily adopted along with it. Coastal states' claims were not the only threat. In 1967, Malta's ambassador to the United Nations (UN), Arvid Pardo, made a speech that raised the concern that technology by developed states would lead to an imbalance regarding the resources found in the seabed of the high seas, which should be "the common heritage of mankind.'[93] Resources are not unlimited, and therefore those who arrive first or have the technology first will reap the benefit.

Fairness in respect to geography was also apparent in Northern Europe. The United Kingdom challenged a method used by Norway to establish the baseline from which the breadth of territorial waters and fishing zones are derived. Due to the unique geographic circumstance of Norway's coastline, the delimitation was based on fixed points on the mainland, islands, or rocks to create straight baselines.[94] The delimitation gives Norway a substantial amount of internal waters and extends its jurisdiction into the high seas. In the *Fisheries Case*, the ICJ stated the "solution is dictated by geographic realities."[95] While the Court ruled in favour of Norway based on geographical and historical arguments, the case compiled with the declarations of the Latin American states shows how the high seas can be limited with relative ease. The more the coastal states extend their claims into the high seas, the less area there is for exercising the freedom of the high seas.

2.2.3 Before UNCLOS III

A short time later, in 1958, UNCLOS I was held in Geneva. Four agreements were reached during the Conference: The Convention on the Territorial Sea and the Contiguous zone, The Convention on the High Seas, The Convention on Fishing and Conservation of the Living Resources of the High Seas, and The Convention on the Continental Shelf. However, it failed to reach an agreement on the maximum breadth of the territorial sea and exclusive fishery rights.[96] These issues were back on the table in 1960 at UNCLOS II.

[92] Lauterpacht (n 80), 376.
[93] Attard (n 85), 16.
[94] *Fisheries Case (United Kingdom v Norway)* (Judgment) ICJ Rep 1951, 116.
[95] ibid, 128.
[96] Attard (n 85), 11.

Once again held in Geneva, the United States and Canada suggested a 6-mile territorial sea and 6-mile fishing zone.[97] A subsequent vote defeated the proposal, and no agreements were reached at UNCLOS II.[98]

After UNCLOS I and II, significant advancements took place. Technological innovations in fishing in the mid-1960s resulted in new claims.[99] Technology allowed fishing vessels not to enter territorial waters or fishing zones; therefore, companies were no longer purchasing fishing licences from coastal states.[100] Again, fishery resources are a reason for the changing of attitudes towards more coastal rights. From 1958 to 1980, fishing production expanded from 27 million to 80 million tons.[101] The developments caused a new wave of South American countries establishing 200-mile fishing zones for conservation and exploitation.[102] It also carried over to the African nations. States which are not as developed have a technological disadvantage. To preserve the living resources, African countries in the 1970s began to adopt 200-mile territorial waters and 212-mile non-pollution zones.[103] The addition of a non-pollution zone was new, but fishing remained the driving factor for claims.

The theme of fishing rights was the centre of a significant dispute between Iceland and Great Britain named the Cod Wars. The conflict took place over three events that can be defined by Iceland's extension of its fishery limits, almost concurrently with the expansion that began with the Latin America States. Each time Iceland proclaimed a new fishery limit, it triggered a new war.[104] The Second Cod War brought the *Fisheries Jurisdiction* case after a series of skirmishes between Iceland's coastal authorities and British fishing vessels. The ICJ sided with the United Kingdom in that Iceland cannot exclude British fishing vessels in its newly extended 50-mile zone and ordered the states to enter into negotiations.[105] Iceland's response a year later was to set the fishery limit to 200 miles. The final war was ended in 1976 after the states reached an agreement.[106] With 200-mile zones established in South

[97] Tanaka (n 77), 31.
[98] Attard (n 85), 13, If one of the opposing States abstained, it would have received the two-thirds majority required to pass.
[99] ibid, Techniques regarding tuna fishing changed from using bait boats to nets.
[100] ibid.
[101] Dupuy and Vignes (n 5), 15.
[102] See, Attard (n 85), 14, Nicaragua in 1965; Ecuador in 1966, Argentina 1966, Panama 1967.
[103] ibid, 20.
[104] Sverrir Steinsson, 'The Cod Wars: A Re-Analysis' (2016) 25 European Security, 256, 258 and 259, The First Cod War started after Iceland expanded its limit from 4 to 12 miles in 1958; The Second Cod War started after Iceland again expanded its limit from 12 to 50 miles in 1972; Lastly, the Third Cod War started after Iceland expanded its limit to 200 miles in 1975.
[105] *Fisheries Jurisdiction Case (United Kingdom v Iceland)* (Judgment) ICJ Rep 1974, 3, para 79(2).
[106] Steinsson (n 104), 259, The agreement gave Iceland a 200-mile fishery zone and granted the United Kingdom limited fishing rights.

America, Africa and Europe before UNCLOS III, it is safe to say that the state practices after UNCLOS II helped to codify the 200-mile limit under the new regime of the EEZ.

2.3 Summary

The historical development of the freedom of the high seas goes hand-in-hand with the expansion of the jurisdiction of the coastal states. It develops in a near wave-like pattern. Initial powers such as Spain and Portugal had sovereignty over the high seas, which was reduced to a generally applied minuscule 3-mile cannon-shot-rule, and finally extended to 200-miles. Technology played a crucial role in shaping jurisdictional claims. The prospect that the living resources of the sea are endless is refuted by reality. The conservation and management of fishery resources are paramount to the livelihood of the coastal states who rely on them, such as the United States and the seal furs. The dominance of global powers and their technology put the less-developed coastal states at a disadvantage. Fishing is a matter that seems to bring about the most conflict, but the resources found in the seabed became an issue as the technology developed to extract them.

However, the freedom of the high seas and freedom of navigation are fundamental principles that both coastal states and other states utilize to access what belongs to the common good of humanity. And no state was a better advocate for these freedoms than Great Britain. Several of the prominent disputes discussed involved Great Britain defending the freedom of navigation, most certainly for its economic gain.

Nonetheless, through past disputes and conferences, the law of the sea has developed to seek a balance on the issue. The establishment of an EEZ-type regime seemed inevitable. Coastal states were creating fishing zones or simply increasing their territorial waters. A third zone, where there is a meshing of interests between the coastal states and other states, appears to be a logical compromise. At a minimum, it would bring all the coastal nations into uniformity.

3. The Constitution of the Ocean

The agreement reached at UNCLOS III was the culmination of nearly half a century of discussion on the law of the sea. UNCLOS III itself spanned more than fourteen years and included over 150 countries.[107] The twentieth century contained many conflicts, including the two world wars, the Cold War, and various other wars. The need to advance technology for military means also caused the rapid development of marine technology—such as the new techniques that allowed oil to be harnessed from the seabed.[108] The discovery of fine metals in the seabed soon followed.

On 10 December 1982, at Montego Bay, Jamaica, 182 countries signed the LOSC. One notable exception was the United States of America. The American president, Ronald Reagan's position was that the seabed provisions were not balanced enough for America to sign on.[109] However, he viewed the majority of the provisions in the LOSC as fair and balanced concerning the interests of all states. For example, he would recognize coastal states' right to establish a 200-mile EEZ, even if the United States did not ratify it.[110] The American holdout delayed the LOSC coming into force, as it was not until 1994 when a new agreement on the seabed regime was reached.[111] The LOSC officially came into force on 16 November 1994, which codified the freedom of the high seas, the EEZ, and ITLOS.

3.1 Definitions and Boundaries

The LOSC provides definitions that are relevant when exploring the ocean zones. Article 1 introduces the area, which is the seabed and subsoil of the ocean floor beyond national jurisdiction. The resources that are of the common heritage of mankind are contained within the Area. The high seas are defined as all parts of the sea that are not in an EEZ, a territorial sea, or internal waters of a State, according to article 86. The Area is to the high seas as a

[107] *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea, with Annexes and Index: Final Act of the Third United Nations Conference on the Law of the Sea; Introductory Material on the Convention and the Conference.* (United Nations 1983), intro.
[108] Dupuy and Vignes (n 5), 587.
[109] Ronald Reagan, 'Statement on United States Participation in the Third United Nations Conference on the Law of the Sea' (*Ronald Reagan Presidential Library & Museum*).
[110] George D Haimbaugh, 'Impact of the Reagan Administration on the Law of the Sea' (1989) 46 Wash. & Lee L. Rev. 151, 199.
[111] Tanaka (n 77), 41.

continental shelf is to an EEZ. However, the continental shelf may overlap into the high seas, as article 76 allows coastal states to establish a shelf not exceeding 350 miles.[112]

Every state has the right to establish a territorial sea up to 12 miles.[113] Adopting one of the higher territorial sea limits shows how far coastal states' rights have come since the cannon-shot rule. Next, coastal states may establish a contiguous zone up to 24 miles.[114] The contiguous zone provides the coastal state with the ability to exercise control in order to prevent and punish infringement regarding customs, fiscal, immigration or sanitary regulations within the territorial seas. Overlapping with the contiguous zone is the EEZ. Coastal states may establish an EEZ of up to 200 miles.[115] Figure 1 illustrates the boundaries of each zone. Depending on if the coastal state sets the maximum territorial sea of 12 miles, the breadth of the EEZ is typically 188 miles.

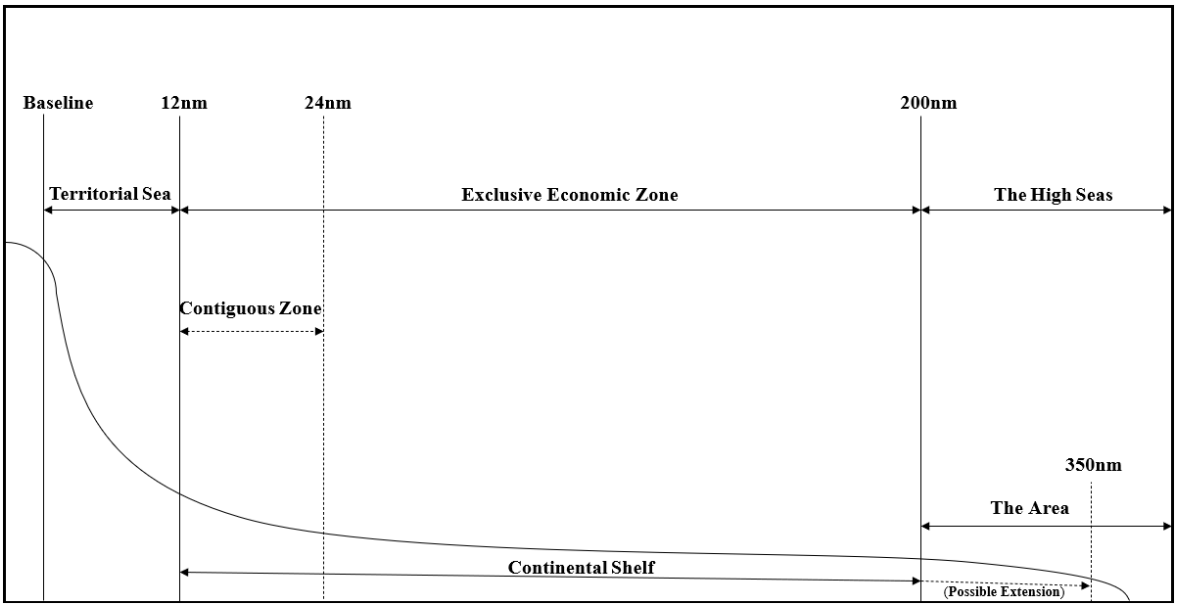

Figure 1 – The Zones

The regimes regarding the types of freedom of navigation permitted are zone-dependent. Within the territorial seas, the freedom of navigation is restricted to innocent passage. The meaning of innocent passage is explicitly stated in article 19 and includes such restrictions as force, weapons use, information gathering, and propaganda. Furthermore, submarines must navigate on the surface and display their flags, pursuant to article 20. Another

[112] LOSC, Annex II establishes the Commission on the Limits of the Continental Shelf where coastal states must submit to the Commission their claims of a continental shelf that goes beyond 200nm.
[113] ibid, art 3
[114] ibid, art 33.
[115] ibid, art 57.

navigational concept is transit passage.[116] Within the EEZ, the regime of the freedom of high seas applies, with specific differences.

3.2 The Freedom of the High Seas

The LOSC defines the High Seas under Part VII. Article 87 establishes the freedom of the high seas as:

> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States;
>
> a) freedom of navigation;
>
> b) freedom of overflight;
>
> c) freedom to lay submarine cables and pipelines, subject to Part VI;
>
> d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
>
> e) freedom of fishing, subject to the conditions laid down in section 2;
>
> f) freedom of scientific research, subject to Parts VI and XIII.
>
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

The list is non-exhaustive, but some items appear to be left off, such as communication. Limitations are found within several of the freedoms, as items c, d, e, and f are all subject to other parts or conditions of the LOSC. However, the freedom of navigation is not limited explicitly. The freedom of fishing has been defined as specific freedom apart from navigation, but commerce, or trade, has been left off. It may be included as part of the *inter alia* of the list or possibly a part of the freedom of navigation.

[116] ibid, art 37, Depending on the international strait, the right to transit passage may apply, which includes the ability to enter, leave, or return to a State that borders the strait. Innocent passage may apply to international straits as well, pursuant to article 45.

Further down in Part VII, the right to navigation is defined according to article 90 as "[e]very State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas." This provision merely outlines that all states can utilize the freedom of navigation on the high seas. States must have a genuine link with vessels granted the right to fly their flag and provide them documents.[117] They must also maintain a register of ships, assume jurisdiction under its internal law, ensure vessels are safe for sea and conform to international regulations, procedures, and practices.[118]

3.3 The Exclusive Economic Zone

Part V of the LOSC pertains to the regime of the EEZ. The rights and duties of the coastal state and other states are defined. To begin, article 56, paragraph 1 is defined as:

> In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment;
>
> (c) other rights and duties provided for in this Convention.

At first glance, sovereign rights are separated from jurisdiction. One explanation is that economic rights fall under sovereign rights, whereas other rights fall under the concept of jurisdiction.[119] Some of these rights are directly taken from the freedom of the high seas. The

[117] ibid, art 91(1)(2).
[118] ibid, art 94.
[119] Quince (n 14), 35.

rights of fishing, establishing artificial structures, and marine scientific research have been explicitly declared to the coastal state. The granting of jurisdiction means that infringements of the domestic laws and regulations of the coastal state subject the infringers to the courts of the coastal state.

Included with the rights are the duties to conserve and manage the living resources and protect and preserve the marine environment. There is some measure of vagueness with those terms and where further interpretation is required. For example, there are internationally agreed-upon pollution standards regarding the exercise of jurisdiction of the marine environment, but the possibility exists for coastal states to regulate further.[120] Articles 60 to 62 provide details concerning artificial structures and the conservation and utilization of living resources. Specifically, article 62, paragraph 4, details a non-exhaustive list of laws and regulations that would be consistent with the LOSC. The activities of bunkering and STS transfers are not explicitly stated in that list.

Article 73 details the actions a coastal state may take in enforcing the laws and regulations. Firstly, the coastal state may take measures such as boarding, inspection, arrest and judicial proceedings to ensure compliance.[121] The coastal state is also obligated to promptly release the ship and its crew after a reasonable bond is posted.[122] The punishment for violating fishery laws must not include imprisonment, and the coastal state must notify the flag state. Article 73 serves as the basis for coastal states to legally limit a flag state's freedoms by investigating and detaining suspected infringers within the EEZ.

The rights and duties of other states are stated as well. Article 58 is defined as:

> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87, of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
>
> 2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

[120] ibid, 77.
[121] LOSC (n 15), art 73(1).
[122] ibid, art 73(2).

Again, the activities of bunkering and STS transfers are not listed. Still, the provision of other internationally lawful uses of the sea related to these freedoms seems to provide room for an argument for their inclusion. Nonetheless, it is still vague. The second paragraph also includes other pertinent rules of international law, which have agreements and international regulations, such as those from the IMO that are applicable.

Included in articles 56 and 58 are competing rules when summarized. Both articles state that the coastal state and the flag state must have due regard for the rights and duties of each other.[123] In doing so, the coastal state must act in a manner that is compatible with the LOSC, while the flag states must comply with the laws and regulations of the coastal state and other rules of international law, as long as they are compatible. It is an attempt to balance the interests. Although, the vagueness of the provisions found in both articles, which are competing, creates ambiguity for activities that are not prescribed in the text.

Another point that has garnered commentary is whether the freedom of navigation is protected from the coastal state. While other navigational regimes could have been selected, such as the innocent passage rights that the Latin American States implemented early on, the freedom of navigation on the high seas was chosen for the EEZ. Some commentary at the time believed that the LOSC does not safeguard the freedom of navigation enough.[124] An opposite inference was that the "general provisions of the LOSC and specific regime of the EEZ clearly indicates concern for safeguarding the freedom of navigation in the EEZ."[125] Despite either opinion on the matter, coastal states will adopt laws to protect their interests, especially in the areas involving unspecified and unattributed activities.

There is some evidence that the trend is toward coastal states. For instance, one scholar discussed the disappearance of the freedom of navigation, concluding that "Grotius' vision of a ship passing through the ocean without interference or being interfered with is no longer accurate when it comes to fishing."[126] Using the case of *Monte Confurco*, French authorities detained a Seychelles vessel, which had frozen fish onboard while passing through the

[123] ibid, art 56(2) and 58 (3).
[124] Quince (n 14), 86, citing John Breaux, 'Letter of Congressman John Breaux, Dec 10 1980', "The LOS Convention fails to offer clear and convincing protection of navigation rights in the new 200 mile exclusive economic zone".
[125] ibid, 87.
[126] Jon M Van Dyke, 'The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone' (2005) 29 Military and Intelligence Gathering Activities in the Exclusive Economic Zone: Consensus and Disagreement II, 107, pt 2.

EEZ.[127] The reality of the situation can be rephrased as, "a fishing vessel found in an EEZ of another country without permission and with fish in its hold will be presumed to have caught the fish in that EEZ."[128] Furthermore, a glance through other parts of the LOSC seems to favour the coastal state overwhelmingly. Article 220, regarding the enforcement rights of the coastal state, grants them broad authority to identify and search commercial cargo vessels if there is a suspicion of violating the pollution regulations of the coastal state.[129] These two arguments and the fact that the EEZ regime was codified, to begin with, which minimized the high seas, show that the balance is slightly tilting towards coastal state rights.

Lastly, a compromise provision of sorts, in case of a dispute, was included in the LOSC. Article 59 prescribes:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as whole.

The first line describes unattributed rights but does not clarify if those rights need to be explicitly attributed or inferred from the non-exhaustive lists. The provision was an attempt at balancing disagreement between the states that desired the unattributed rights to belong under the coastal state regime and the major industrial states who wished to place them under the freedom of the high seas.[130] Resolutions based on equity shares a resemblance to the concept of *ex aequo et bono*, which allows a court or tribunal, such as ITLOS, to decide a dispute equitably while ignoring the law. However, the use of article 59 would still require the consideration of the LOSC, plus all other relevant points that go beyond the parties to the dispute.

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[127] *'Monte Confurco' (Seychelles v France)* (Prompt Release, Judgment of 18 December 2000) ITLOS Rep 2000 86.
[128] Van Dyke (n 126), pt 3.
[129] ibid, pt 4.
[130] Quince (n 14), 99.

3.4 The International Tribunal for the Law of the Sea

The settlement of disputes makes up an integral part of the LOSC. Disputes concerning the law of the sea are not new, as was evident from Chapter 2. Resorting to peaceful means to settle disputes is essential, especially when the use of force and arrests may be necessary. Those actions are dangerous in normal circumstances, but there is an added level of danger at sea.

The LOSC obliges each member state to settle any disputes expeditiously by negotiation or other peaceful means.[131] Article 287 lists the choices of procedure available to member states to resolve disputes. The following four options are ITLOS, ICJ, an arbitration tribunal (Annex VII), and a special arbitration tribunal (Annex VIII). ITLOS is the primary dispute mechanism examined in this thesis.

Proposals for a unique tribunal began in 1969 to handle issues regarding the Area and leaving remaining matters to the ICJ or others.[132] Soon after, a few states advocated for this tribunal to deal with all law of the sea disputes.[133] These early-on suggestions seemed to gain traction. Even though the ICJ had experience with law of the sea disputes, the drafters nonetheless agreed on creating a specific tribunal. Some thought this was controversial since it may cause contradictory jurisprudence.[134] However, the benefit of the "availability of a quick and efficient specialized tribunal, along with judges who possess acknowledged expertise" outweighed that risk.[135] For example, the procedure for the prompt release of vessels or crew is where ITLOS outshines the ICJ.

Annex VI of the LOSC contains the Statute of ITLOS. The Tribunal is located in Hamburg, Germany, but may sit elsewhere if required.[136] As discussed in Chapter 1.3, it is composed of twenty-one judges. There must be no fewer than three judges from each of the geographical areas of the UN.[137] Each judge is elected to a term of nine years and may be

[131] LOSC (n 15), art 283(1).
[132] See, Myron H Nordquist and University of Virginia (eds), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, vol V (Martinus Nijhoff ; Distributors for the United States and Canada, Kluwer Academic Publishers 1985) 333, 'Report submitted by the Secretary-General to the Sea-Bed Committee'.
[133] ibid, footnotes 2 to 4 for reports by Canada, US, and Japan.
[134] John E Noyes, 'The International Tribunal for the Law of the Sea' 32 Cornell International Law Journal 75, 111.
[135] ibid.
[136] LOSC (n 15), Annex VI art 1(2)(3).
[137] See, 'International Tribunal for the Law of the Sea: Members' <https://www.itlos.org/en/main/the-tribunal/members/>, 'The UN Geographical Groups: African States, Asian States, Eastern European States, Latin American States, Caribbean States, and Western European and Other States'.

re-elected.[138] The first group of judges were broken up into three groups of seven, with one group serving a three-year term, another group serving a six-year term, and the last group serving the proper nine-year term. This procedure was used to implement elections every three years and is important to note because the differing judicial philosophies of judges can be a factor, as is demonstrated in the evolution of the jurisprudence of the bunkering of fishing vessels (Chapter 4). Before examining the philosophies pertaining to international law and ITLOS, the jurisdiction and types of disputes are summarized first.

3.4.1 Jurisdiction

The Tribunal has jurisdiction over all disputes and applications submitted to it in accordance with the LOSC and all matters agreed upon by the parties. The jurisdiction is prescribed in article 288 of the LOSC and article 21 of the Statute of ITLOS.

Regarding the jurisdiction *ratione personae*, state parties to the LOSC and other entities may bring their disputes before ITLOS. As stated in article 291, paragraph 2, ITLOS is only open to other entities if the procedure provides explicitly for that. Along with being one of the courts that may interpret the LOSC, it is the sole interpretive body for disputes regarding the seabed. Article 14 of the Statute of ITLOS provides details on the Seabed Disputes Chamber. While the Tribunal, in general, is open to all State Parties, the Seabed Disputes Chamber is available to other entities, including private parties.

ITLOS's jurisdiction *ratione materiae* consists of any dispute concerning the interpretation and application of the LOSC, which is submitted according to Part XV.[139] The jurisdiction includes disputes involving the interpretation and application of international agreements related to the LOSC and all matters expressly provided for in any other agreement which confers jurisdiction.[140] As discussed in Chapter 1.4, according to article 293, paragraph 1, ITLOS must decide disputes according to the LOSC and other rules of international law not incompatible with the LOSC.

Early commentary discussed the other rules of international law element. Initial drafts referred to 'other rules of international law' and 'other applicable law.'[141] As can be seen with the final version of article 293, paragraph 1, the term other applicable law was removed.

[138] LOSC (n 15), Annex VI art 5(1).
[139] ibid, art 288.
[140] Tanaka (n 77), 515.
[141] Nordquist and University of Virginia (n 132), 73.

Additionally, the clause 'not incompatible with this Convention' was added. The removal of 'other applicable law' and the addition of this clause served to ensure that the LOSC has precedence over other laws and that rules will not be applied if they conflict with the LOSC.[142] The primacy is important, but it is still clear that other rules of international law will be used if applicable and not incompatible. Examples of other rules of international law are customary international law and non-treaty sources of international law.[143] The ICJ's list of sources mentioned in Chapter 1.4 is also an example of international law that may apply at the LOSC.

3.4.2 Relevant Disputes

Cases before ITLOS have come under a few different forms, such as the interpretation or application of the LOSC in a dispute (proceedings), delimitation of boundaries, advisory opinions, provisional measures, and the prompt release of vessels. Table 1 breaks down the twenty-nine cases applied to ITLOS. The tally under provisional measures does not include provisional measures that are incidental to other cases before ITLOS.

Cases Breakdown	
Type	**Number**
Advisory	2
Delimitation	3
Proceedings	6
Prompt Release	9
Provisional	9
Total	**29**

Table 1 – Breakdown

Cases involving the interpretation or application of LOSC in a dispute are proceedings that resolve the case on the merits. Parties can agree to have the dispute settled by ITLOS through a special agreement. Such agreements were made in the central cases for this thesis, *The M/V "Saiga" No. 2*, *The M/V "Virginia G*," and the *M/T "San Padre Pio" No. 2*.

One of the most common disputes brought before ITLOS is an application for the prompt release of a vessel or crew. Article 292 of the LOSC lays out the procedure and triggering of a dispute mechanism for this issue. In situations where parties have failed to agree on the

[142] ibid.
[143] Noyes (n 134), 124.

posting of a reasonable bond or the venue for the dispute, then after ten days, the matter can be brought to a court or tribunal that the detaining state accepts or ITLOS.[144] Due to the urgency in the matter and the lack of established prompt release rules, it is doubtful that a flag state would agree to ICJ or other arbitration.[145]

Nine of the twenty-nine cases before ITLOS have regarded the prompt release of a vessel. As shown in Table 2, every single case of prompt release involved the EEZ of a coastal state in one form or another.

Prompt Release Cases at ITLOS					
#	Case Name	Parties	EEZ?	Type	Activity Alleged
1	The *M/V "SAIGA"*	Saint Vincent and the Grenadines v. Guinea	Yes	Tanker	Bunkering
2	The *"Camouco"*	Panama v. France	Yes	Fishing	Fishing
3	The *"Monte Confurco"*	Seychelles v. France	Yes	Fishing	Fishing/Failure to notify entry
4	The *"Grand Prince"*	Belize v. France	Yes	Fishing	Fishing
5	The *"Chaisiri Reefer 2"*	Panama v. Yemen	Yes	Reefer	Transporting illegally caught fish
6	The *"Volga"*	Russian Federation v. Australia	Yes	Fishing	Fishing
7	The *"Juno Trader"*	Saint Vincent and the Grenadines v. Guinea-Bissau	Yes	Reefer	Transporting illegally caught fish
8	The *"Hoshinmaru"*	Japan v. Russian Federation	Yes	Fishing	Fishing
9	The *"Tomimaru"*	Japan v. Russian Federation	Yes	Fishing	Fishing

Table 2 – Prompt Release Cases at ITLOS

The intention behind the prompt release provision was to deal with coastal states detaining a vessel that allegedly violated their regulations, such as in cases of illegal fishing or marine pollution.[146] Flag states needed a recourse that would allow ships and crew to be released and not be detained in perpetuity while the dispute drags on. Issues such as loss of revenue, depreciation of ship's equipment, or time-sensitive activities (fishing seasons) require an expedient process.[147] Again, the theme of coastal state versus flag state is present. The balance between the two is made by giving the detaining state ten days to request and process the payment of a reasonable bond. The bond can then be used to pay any fines that may be issued after the case.

Another common form of dispute is the application for provisional measures prescribed under Article 290 of the LOSC and article 25 of the Statute of ITLOS. The Tribunal may prescribe provisional measures under appropriate circumstances to preserve the parties' respective rights or prevent serious harm to the marine environment, pending the final decision.[148] The request of provisional measures at ITLOS may be incidental to the

[144] LOSC (n 15), art 292(1).
[145] Tanaka (n 77), 532.
[146] Nordquist and University of Virginia (n 132), 67.
[147] ibid, 68.
[148] LOSC (n 15), art 290(1).

proceedings to another court or tribunal or ITLOS itself. One such example is the *"Arctic Sunrise"* Case, where the Kingdom of the Netherlands applied for provisional measures against the Russian Federation, while the proceedings of the case were set for arbitration under Annex VII of the LOSC.[149] Decisions regarding provisional measures may be modified or revoked depending on the circumstances.

3.4.3 ITLOS Decisions

ITLOS is a judicial body of last instance. Decisions made by the Tribunal are final and are binding on the parties to the dispute.[150] Along with ending a dispute, these decisions are valuable with respect to their influence on the law of the sea and international law. Four functions these decisions can have are the identification, consolidation, clarification, and formation of rules.[151] Customary international law is an example of rules in this context.

The threshold for decisions is a simple majority. With the possibility of additional ad hoc judge(s), ties can happen. In the event of a tie, the President has the casting vote.[152] Judgments of the Tribunal must state the reasoning and include the names of the members that have taken part in the decision.[153] Since the arguments behind conclusions must be stated, the judgments provide the basis of the analysis for this thesis.

Article 30 of the Statute of ITLOS entitles judges to write a separate opinion if the judgment does not represent in whole or in part the unanimous opinion of the Tribunal. These separate opinions can be in the form of a separate but concurring opinion or a dissenting opinion.[154] These types of disagreements or judges reaching different conclusions is not a new phenomenon. The number of judges at ITLOS allows for different views and opinions on the law of the sea to be examined.

Perhaps, the most controversial are dissenting opinions, notably when the official judgment is only decided by one vote (eleven to ten). Dissenting opinions, especially ones that conflict with each other and the majority, can damage a court's prestige and hurts its decisions.[155] It

[149] ITLOS Press Release, 'Request for Provisional Measures Submitted Today to the Tribunal in the Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)' (21 October 2013) ITLOS/Press 201.
[150] LOSC (n 15), art 296(1), Annex VI, art 33(1)(2).
[151] Tanaka (n 77), 18.
[152] Nordquist and University of Virginia (n 132), 390, Commentary suggests it is similar in procedure to the ICJ, where the President casts a second vote.
[153] LOSC (n 15), Annex VI, art 30(1)(2).
[154] Rules of ITLOS, art 125(2).
[155] RP Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 14 International and Comparative Law Quarterly 788, 790.

seems unavoidable that there will be dissent in a Tribunal with so many members; however, a unanimous acceptance creates an aura of holding more weight. But dissent can reveal things, such as other principles of law that contradict the ruling and expose what arguments judges find more persuasive. It is particularly valuable in a court of last instance, where:

> [A] dissent…is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed.[156]

Lawyers can garner the types of arguments that may sway the Tribunal to their position in future cases. The dissenting opinion of Judge Ndiaye in the *M/V "Saiga" No. 2* case declared that the Tribunal should not have jurisdiction because the M/V Saiga's registration was not valid due to its expiration at the time of detention, resulting in St. Vincent and the Grenadines not legally being the flag state for the dispute.[157] The reasoning found in that dissent was similar to that of the Judgment in the *"Grand Prince"* case, where the Tribunal found it did not have jurisdiction due to, among other things, the expiration of the registration.[158] It is important to note that in the *"Grand Prince"* case, the sole combined dissenting opinion criticized the court's departure from what they established in the previous instances regarding jurisdiction.[159] A lack of a precedential principle, such as *stare decisis*[160] in common law, allows ITLOS to bypass prior decisions; nonetheless, deviating from precedent is still contentious.

Along with dissenting opinions, judges can write separate, concurring opinions. They include decisions where judges may agree with the majority and vote in favour of it, but for different reasons. Multiple items are voted on, such as jurisdiction, admissibility, the issue, and damages. For example, a judge may agree that damages should be awarded but disagree on the amount. The judge can then write the amount he or she would award in the form of a separate opinion. Since there are multiple items to vote on, there can be a whole gambit of different opinions in any particular case. The majority judgment is what is binding, and the other opinions are *obiter dicta*. But they can still be significant and may outlast or be more

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[156] ibid, 293, citing Charles Evans Hughs, *The Supreme Court of the United States* (1928), 68.
[157] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999, Dis. Op. Ndiaye) ITLOS Rep 1999 234, para 34.
[158] *'Grand Prince' (Belize v France)* (Judgment of 20 April 2001) ITLOS Rep 2001 17, para 93.
[159] *'Grand Prince' (Belize v France)* (Judgment of 20 April 2001, Dis. Op. Caminos et al.) ITLOS Rep 2001 66, para 2.
[160] *'stare decisis*', Garner and Black (n 3), 1696, To stand by things decided. The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.

influential than the majority opinion. One such example from American jurisprudence comes by way of the United States Supreme Court Justice Robert H. Jackson. Along with being notable in international criminal law as the Chief United States prosecutor at the first Nuremberg Tribunal, he wrote a concurring opinion in *Youngstown v. Sawyer*, which has usurped the majority due to the legal test he created.[161] It may still be too early for one such opinion to stick out to the same extent at ITLOS.

However, at the beginning of the next chapter is the examination of cases regarding bunkering, which references separate and dissenting opinions. Arguments that cite decisions are intriguing because they are only binding to the parties of the dispute, as will be discussed in the next section.

3.4.4 Judicial Philosophies and Interpretation

Like the previous section, this section seeks to answer the first research question pertaining to ITLOS's interpretations of the LOSC. The Vienna Convention on the Law of Treaties (VCLT) mandates how to interpret international treaties. To begin, article 31, paragraph 1 states:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The 'ordinary meaning' refers to the text of the treaty, which corresponds to textual and possibly intentional arguments. The 'in the light of its object and purpose' refers to intentional and policy analysis arguments. Article 31, paragraph 2, describes how the purpose can be derived, mainly through the preamble and annexes. Regarding the overall context, article 31, paragraph 3, states that the interpreter must take into account subsequent agreements between parties regarding the interpretation, a subsequent practice that establishes interpretation (customary law), and any relevant applicable rules of international law.

Arguments regarding precedent at first glance cannot be derived from article 31. As discussed under Chapter 1.4, the ICJ uses judicial decisions as a source of subsidiary

[161] See, 'Supreme Court Opinions - Jackson's Most Significant Opinions - Robert H Jackson Center Archive', "The three prong test set out in Jackson's concurrence is widely used when considering the limits of presidential authority, especially in later cases like the Watergate scandal with President Nixon'.

applicable law, subject to article 59 of the ICJ Statute.[162] Article 59 of the ICJ Statute states, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." This article nearly mirrors article 296, paragraph 2 of the LOSC, which states, "[a]ny such decision shall have no binding force except between the parties and in respect of that particular dispute." Even so, arguments of precedent are utilized at ITLOS, not only citing its past cases but from other institutions as well.[163] Therefore, previous cases should not be used to interpret the LOSC on its own but may be used within the overall context of interpreting it and also used as a source of subsidiary applicable law in a dispute.

Along with the knowledge of how ITLOS shall interpret the LOSC, another component regards the philosophical make-up of a judge. A significant aspect of any court or tribunal is the judicial philosophies that each judge possesses to reach a decision. Lawyers can tailor the arguments to fit the composition of the Tribunal. Judicial philosophies are sometimes referred to as schools, doctrines, or methods and are generally defined as how a particular judge interprets the law. The following examination is not an attempt to answer how a judge *should* interpret the law but rather describe the common categories derived from their decisions.[164] Three accepted schools of interpretation for treaties are textualists, intentionalists, and teleological.[165]

All interpretation of law needs to start with the text. In essence, all judges are textualists, they begin with the text, but not all of them end with the text.[166] A textualist examines the text's ordinary meaning. This type of school mirrors arguments based on the text. A textualist judge is more persuaded by textual arguments and may decide cases purely on textual reasoning in light of the ordinary meaning of the words.

However, deriving the ordinary meaning may not be so easy. In a dissenting opinion, Judge Anderson in the *"Volga"* case brought up the fact that the word 'bond,' as a noun, has twelve

[162] ICJ Statute (n 44), art 38(1)(d).
[163] See, *M/V 'Saiga' (No 2)* (n 25), para 133, where the Tribunal cited to the ICJ for the conditions of a defense on the "state of necessity", which they in-turn adopted.
[164] See M.L.A Hart, John Rawls, Richard Dworkin for examples of contemporary legal theorists.
[165] Jan Klabbers, *International Law* (2021), 57 to 58; 'International Judicial Monitor - General Principles of International Law', excerpted and adapted from David J. Bederman, Christopher J. Borgen, and David A. Martin, 'International Law: A Handbook for Judges'.
[166]Antonin Scalia and Bryan A Garner, Reading Law: The Interpretation of Legal Texts (Thomson/West 2012), 16, Even judges without textualist convictions habitually open their opinions by stating: 'We begin with the words of the statute'.

different dictionary definitions.[167] Luckily, there is a canon of construction[168] for using the context to select the right word. The Supremacy-of-Text Principle states, "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."[169] Therefore, the context to which the text appears, as described in article 31, paragraph 3, of the VCLT and using a canon of construction, is vital in choosing the correct definition.

Canons of construction are prevalent in American judicial interpreting but are also utilized in International Law, but there are some criticisms regarding their use. One often-used critique is "there are two opposing canons on almost every point."[170] However, a separate canon overcomes this critique.[171] Additionally, some of the canons appear to be implicitly included within the VCLT. This view originates from a proposal that certain general canons of construction be codified, which became articles 31 and 32 of the VCLT.[172] These rules are a valuable tool for a textualist, but contradicting canons can lead to different interpretations.

The second school of interpretation is that of an intentionalist. There can be a certain tension or dispute between the text and the actual intent of the drafters. To that notion, the doctrine of the intentionalist corresponds to intentional arguments under Huhn's theory. However, intent arguments can also be used to interpret the text by using the canons of construction. A textualist or intentionalist can derive the meaning of the text from the preamble, purpose clause, or recital of a treaty.[173] But as described in Chapter 1.3, an intentionalist also uses intent arguments based on the history of the text, including the *travaux preparatoires*. This method is not popular with international law, as it conflicts with article 32 of the VCLT. Article 32 limits preparatory works to being a supplementary means of interpretation that

[167] *'Volga' (Russian Federation v Australia)* (Prompt release, Judgment of 23 December 2002, Dis. Op. Anderson) ITLOS Rep 2002 10, para 9.
[168] See, footnote 37 for definition.
[169] Scalia and Garner (n 166), 56.
[170] ibid, 59, citing Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L, Rev. 395, 401.
[171] See ibid, 59, Principle of Interrelating Canons - No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.
[172] Sean D Murphy, 'The Utility and Limits of Canons of Construction in Public International Law', *Between the Lines of the Vienna Convention: Canons of Construction and Other Interpretive Principles in Public International Law: A Practitioners' Handbook* (Wolters Kluwer 2018), 6.
[173] Scalia and Garner (n 166), 217, Prefatory-Materials Canon.

may only be used if the primary methods found in article 31 leave the meaning ambiguous, obscure, or it leads to an absurd result.[174]

Perhaps, a more significant issue with this method is a similar criticism found in common law jurisdictions regarding determining the legislature's intent. The intentions of individual politicians in drafting the law may not result in the law's actual text, which was agreed upon after negotiations and amendments. The same can be argued with international law, only in this context, the intent of a specific agent(s) represents each state's intent.

The variety of different positions at the conventions can lead to contradictory intentions, even though the final draft was agreed upon. Another valid point against this school is the lack of clarity that states would have by joining a treaty after it was in force. They may also unknowingly then agree to the intent that was created during treaty negotiations, along with the treaty itself.[175] Despite these reasons and the difficulty in deciphering intent, it is a doctrine for interpretation.

The final school is teleological, meaning to effectuate the purpose of a treaty.[176] It is the international law's version of purposivism.[177] It can also be framed as a consequentialist view, looking towards the outcome or result of the law and choosing the interpretation that offers the best result. This school aligns well with the policy analysis type of argument. Additionally, turning to the purpose of the treaty can be used in textual interpretation. In cases where there are multiple textual interpretations, the one that furthers the purpose rather than obstructs it should be chosen.[178] Although, that application is limited to two competing textual interpretations, whereas a teleological judge furthers the treaty's purpose over the text. The answer to what the treaty's purpose is could very well be a judge's subjective view.

3.5 Summary

Although the freedom of the high seas is applied to the EEZ, it is more limited. For example, the right to fish has been re-assigned to the coastal state. The non-exhaustive list found in article 62 and the vague definitions of freedom of navigation cause ambiguity. Judicial

[174] VCLT (n 45), art 32.
[175] 'International Judicial Monitor - General Principles of International Law' (n 165).
[176] ibid.
[177] 'Purposivism', Garner and Black (n 3), 1493, The doctrine that texts are to be interpreted to achieve the broad purposes that their drafters had in mind; judge-interpreter should seek as answer not only in the words of the text but also in its social, economic, and political objectives.
[178] Scalia and Garner (n 166), 63, Presumption Against Ineffectiveness.

interpretation is required to resolve this issue. It is also important to keep article 59 in mind to settle the ambiguities in an equitable way within a specific dispute; however, it may not be the best recourse to decide how an activity conducted in an EEZ should be categorized generally. The initial debate over whether the freedoms are safeguarded in the LOSC or whether the coastal state has more rights to limit them seems to be sliding toward the direction of the coastal state, especially after early commentary and case law.

The LOSC provides a unique institution to resolve these issues. ITLOS has the mandate to interpret the LOSC and how it is applied by using the Convention and other rules of international law, as long as it is compatible. The early commentary was correct in its predictions that ITLOS would be the preferred dispute mechanism to handle certain disputes, such as the prompt release of vessels. To interpret the LOSC, ITLOS should use the procedure prescribed in the VCLT. The issue involving bunkering and STS transfers can now be better understood in the context of being non-explicitly attributed. Still, particular arguments can be made to justify their inclusion under articles 56 or 58.

4. Bunkering Within the EEZ

4.1 Background on Bunkering

As defined earlier, the activity of bunkering consists of one vessel refuelling another vessel. The fuel is stored in the ship's bunkers or fuel tanks. Looking back to Grotius' concept of the free seas and the centuries that followed, propulsion was limited to the wind using sails and humans using oars. Technology changed the situation. The invention of the steam engine soon found its way onto vessels.[179] Also, from Chapter 2, the freedom of navigation was the only freedom out of the high seas freedoms that had initial acceptance until Great Britain emerged as a naval power. Steam power seems to coincide with the dominance of Great Britain on the seas. The new engines required coal that was burned to produce the steam, and the coal was stored in the ship's bunkers, to which the activity is named.[180]

Initially, vessels were still fitted with sails. The combination of both steam and wind benefited commercial vessels and caused a security threat as privateer vessels now had the "ability to use their steam propulsion to attack, independent of wind or tide."[181] However, the combination was phased out. By the 1890s, steam solely powered vessels without the redundancy of sails, which created the issue of navigation endurance being limited by the capacity of fuel stores and the efficiency of the steam engine.[182] This new detrimental effect on navigation joined the previous factors of limited provisions and weather conditions.

Naturally, vessels bunkered at ports. Due to the military necessity of keeping ships at sea, the concept of bunkering at sea was formed. Colliers, which are vessels designed to carry coal, similar to modern-day tankers, were created to move coal for trade and ensuring ports were stocked. Soon, they were transferring coal directly to another vessel at anchor.[183] Several methods of bunkering coal at sea were tested to maximize efficiency and safety, but the activity did not reach sufficient speed until oil replaced coal as the fuel source.[184]

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[179] See, Warwick Brown, 'When Dreams Confront Reality: Replenishment at Sea in the Era of Coal | International Journal of Naval History' (1 December 2010), The Royal Navy began using steam-power in 1821.
[180] 'Bunker, v.' <http://www.oed.com/view/Entry/24801> accessed 28 April 2021.
[181] Marc Milner, *Canada's Navy: The First Century* (2nd ed, University of Toronto Press 2009).
[182] ibid.
[183] Brown (n 179).
[184] ibid.

Today, the reasons to bunker at sea can be economical, for example, to avoid port fees and wait times. Bunkering can also be unavoidable, such as when vessels cannot go to port due to geographical issues or legal barriers.[185] The necessity in these situations provides a more substantial argument towards categorizing bunkering as a navigational activity; a ship needs fuel to sail.

Bunkering is also internationally regulated. The International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention) came into force in November of 2009. The Convention applies to pollution damage caused in the territorial sea or EEZ of a state party and preventative measures to minimize the damage.[186] Other provisions in the Bunker Convention include the requirement for compulsory insurance for shipowners and jurisdiction assignment to the coastal state if there is an incident. The IMO holds the treaty and also has other general regulations on bunkering.

The International Convention for the Prevention on Pollution from Ships (MARPOL) was adopted at the IMO and is the main international convention covering prevention of pollution of the marine environment by ships from operations or accidental causes.[187] It is separated into various Annexes that detail different regulatory regimes. Annex I contains the regulations for the Prevention of Pollution by Oil. Vessels must keep an oil record book when bunkering, keep an emergency plan for pollution incidents, and abide by several equipment and vessel requirements.[188] Each state must ensure the vessels follow international regulations, including MARPOL, if that flag state is a state party. Article 94, paragraph 5 of the LOSC states that "each state is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance." While each state has responsibility, if that state is not the vessel's flag state, it must report the facts to the flag state, who in turn must take any necessary action.[189] Article 94 is under the high seas regime, but they also apply in the EEZ, as long as they are not incompatible with the EEZ regime according to article 58, paragraph 2 of the LOSC.

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[185] See, 'Shallow Ports Keep US from Exporting Even More Crude' (Journal of Petroleum Technology, 21 May 2018), In the United States Gulf Coast, the shallow ports prevent larger tankers from fulling refuelling.
[186] International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (adopted 23 March 2001, entered into force 21 November 2008) (Bunker Convention) 2009 ATS 14, art 2.
[187] 'International Convention for the Prevention of Pollution from Ships (MARPOL)' (*International Maritime Organization*).
[188] 'Annex I- Regulations for the Prevention of Pollution by Oil - Index' (*MARPOL Training*).
[189] LOSC (n 15), art 94(6).

The following two disputes (three cases) before ITLOS deal with the activity of bunkering at sea. In each case, the tanker or the vessel transferring the fuel is detained for providing fuel to a foreign fishing vessel within a coastal states' EEZ. The case of *M/V "Norstar"* is also briefly discussed to gain insight into how ITLOS views bunkering on the high seas versus in an EEZ. Lastly, the results are summarized and addressed before the activity of STS transfers is analyzed.

4.2 The *M/V "Saiga"* Case

As mentioned in the introduction, the first dispute brought before ITLOS was the *M/V "Saiga"* case. The flag state, Saint Vincent and the Grenadines, applied for the prompt release of the vessel M/V Saiga, based on article 292 of the LOSC. The Judgment was delivered on 4 December 1997, in which the Tribunal ordered the coastal state, Guinea, to promptly release the vessel and the crew upon receiving a reasonable bond.[190]

The dispute originates from the interdiction and detention of the M/V Saiga by Guinean Customs for supplying fuel to foreign fishing and other vessels within Guinea's EEZ. After the arrest, which included two crew members of the M/V Saiga suffering injuries, the vessel was brought into Conakry, Guinea, where it was held during the case.[191] Saint Vincent and the Grenadines paid no bond because Guinea did not request one. This stalemate led to the application before ITLOS.

Before examining how the Tribunal handled bunkering, it is important to consider Guinea's domestic law, which it used to detain the vessel. Guinea accused the M/V Saiga of smuggling, which is a violation of the Customs Code of Guinea.[192] This violation seems at first glance to be in contradiction to a reasonable interpretation of article 56 of the LOSC. Customs jurisdiction is not one of the sovereign rights or jurisdiction granted to coastal states.

In the Judgment, the Tribunal discussed, by way of *obiter dictum*, the activity of bunkering. The Tribunal initially stated, "it can be argued that refuelling is by nature an activity ancillary to that of the refuelled ship."[193] This premise would mean that the categorization of bunkering would solely depend on the purpose and activity of the ship it is refuelling.

[190] *M/V 'Saiga' (No 1)* (n 19), para 86(3), (4).
[191] ibid, para 30.
[192] ibid, para 36.
[193] ibid, para 57.

Scenarios, such as bunkering more than one vessel simultaneously, could result in the tanker taking part in multiple activities. That could also lead to the question of whether a fishing vessel is always considered to be under the activity of fishing. It could be somewhat difficult to prove the activity of the receiving vessel at the time transfer and which party has the burden of proof.

The Tribunal then provided examples, including the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington Convention) and the state practices of Guinea-Bissau, Sierra Leone, and Morocco. An argument based on state practice is an argument based on tradition. Arguments based on tradition can take on the form of customary international law; however, if it is actually customary international law is another discussion. Shortly afterward, it becomes apparent that this was just the Tribunal, scratching the surface of the issue without deciding one way or another. Some distinction needs to be clarified between customary international law and treaty law.

For the purpose of categorizing arguments, treaties or agreements will be considered an argument based on tradition if the parties to the dispute are not parties to the agreement. In contrast, if the parties to the dispute are also parties to international agreements that may be applicable law under the LOSC (if not incompatible), those arguments are likely to be textual, intentional or policy.

Regarding the examples that the Tribunal provided, the Wellington Convention is an agreement between the South Pacific States[194] concerning the banning of driftnets for fishing in a specific area due to the damage the nets cause to albacore tuna and the marine environment.[195] The definition of 'driftnet fishing activities' includes the provisioning of fuel.[196] Also, the location of concern is in the high seas, making this a more potent example. Since some states have agreed to classify the bunkering of fishing vessels as an activity under fishing, by using agreements that limit the high seas freedoms, it is easier to adopt the position that it is even more reasonable to limit the EEZ freedoms.

[194] See, 'Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific' (*New Zealand Treaties Online*), The State Parties to the Wellington Convention are Australia, Cook Islands, Fiji, France, Micronesia, Kiribati, Marshall Islands, Nauru, Niue, Palau, Solomon Islands, Tokelau, Tuvalu, United States of America, Vanuatu, and Samoa.
[195] Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington Convention) (adopted 24 November 1989, entered into force 17 May 1991) 1991 NZTS 14, 2.
[196] ibid, art 1(c)(vi).

The Wellington Convention is more than just a treaty between some states in the South Pacific. Two additional protocols to the Convention were established, allowing states to agree to the treaty's provisions if they do not have territory in the specific area or if they possess territory that is contiguous to it.[197] Although, the United States is the only country to sign on to the first protocol, while Canada and Chile were the only countries to sign onto the second protocol. Also, it led to the UN General Assembly passing a resolution that called for the moratorium on driftnet fishing worldwide.[198]

However, the Tribunal subsequently followed up the argument for the refuelling of fishing vessels belonging to the jurisdiction of the coastal state by stating:

> [T]he position of States with exclusive economic zones which have not adopted rules concerning bunkering of fishing vessels might be construed as indicating that such States do not regard bunkering of fishing vessels as connected to fishing activities. In support of this view it could be argued that bunkering is not included in the list of the matters to which laws and regulations of the coastal State may, *inter alia*, relate according to article 62, paragraph 4, of the Convention.[199]

They provide two separate arguments. First, the Tribunal counters its initial argument based on tradition, with another argument also based on tradition. Since several States do not have any regulations regarding bunkering of fishing vessels in their EEZs, it may be more reasonable to consider it an activity under article 58. The second argument was intratextual, based on article 62, paragraph 4, which is a list of regulations that coastal states may adopt for the optimum utilization of the living resources within the EEZ. Since the bunkering of fishing vessels is not on the list, it cannot be categorized as an activity under article 56, leaving only the possibilities of articles 58 or 59. But it is not that simple of an argument because the list is non-exhaustive; further interpretation needs to be conducted to determine if the bunkering of fishing vessels is part of the '*inter alia'* of that list.

After contemplating the arguments for article 56 or article 58, the Tribunal stated it was unnecessary for it to make a conclusion on bunkering, and it settled the matter of the prompt release without reaching one. Since it was the first case before ITLOS, the Tribunal may

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[197] 'Protocol I to the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific' (*New Zealand Ministry of Foreign Affairs and Trade*); 'Protocol II to the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific' (*New Zealand Ministry of Foreign Affairs and Trade*).
[198] UNGA Res 46/215 (20 December 1991) UN Doc A/RES/46/215.
[199] *M/V 'Saiga' (No 1)* (n 19), para 58.

have wanted to exercise judicial restraint, but it was also a missed opportunity to clarify the matter.

Dissenting opinions, in this case, provided some astute insight. Firstly, the majority had to decide whether Guinea's actions against the M/V Saiga were due to a violation of maritime law regarding fishing or customs law regarding smuggling. If it were the former, then a complaint under article 73 would be permissible, and article 292's rule regarding prompt release could be enforced. However, if it were the latter, Guinea may have violated international law by illegally detaining a foreign vessel for customs violations in its EEZ. The majority decided that if given a choice between a legal classification that implies a violation of international law or one that avoids the implication, the Tribunal must side with the latter. President Mensah's dissenting opinion summarized the dissent of the other dissenting judges effectively. By the majority deciding that Guinea detained the M/V Saiga due to a fisheries offence over a smuggling offence, they were "asserting that a law which assimilates bunkering to fisheries activity is NOT a violation of international law."[200] The inference drawn from this legal syllogism seems to have been missed by the majority. They chose which justification to apply instead of what the evidence showed or what was the will of Guinea. The result could be viewed as, even though the majority explicitly stated that they would not decide on the issue of bunkering, generally or narrowly, they implicitly did so by declaring it was not a violation of international law. In any case, the prompt release of the vessel was ordered.

4.3 The *M/V "Saiga" No. 2* Case

It was not long after the first case that both St. Vincent and the Grenadines and Guinea agreed to grant ITLOS jurisdiction to settle the dispute on the merits.[201] Among other issues, St. Vincent and the Grenadines asked ITLOS to find that the actions of Guinea violated its right to "enjoy the freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, as set forth in Articles 56(2) and 58 and related provisions of the Convention."[202] These actions included the detention of the vessel, the arrest of the crew, and the removal of the cargo. St. Vincent and the Grenadines also asked that Guinea's

[200] *M/V 'Saiga' (Saint Vincent and the Grenadines v Guinea)* (Prompt release, Judgment of 4 December 1997, Dis. Op. Mensah) ITLOS Rep 1997 39, 44.
[201] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Notification of Special Agreement of 20 February 1998).
[202] *M/V 'Saiga' (No 2)* (n 25), para 28(1).

customs laws "may in no circumstance be applied or enforced in the exclusive economic zone of Guinea."[203] On the other hand, Guinea asked ITLOS to find that the actions of Guinea did not violate the right of St. Vincent and the Grenadines and vessels flying its flag to enjoy the freedom of navigation and that its customs laws can be applied within the EEZ.[204] There were other legal issues in this case, but these two were directly related to the activity of bunkering.

4.3.1 The Judgment

The first question was whether the sale of gasoil that violates Guinea's customs law applies in its EEZ or is it in contravention to the LOSC. Guinea argued that since some of the bunkering was in the contiguous zone, customs rules apply. The Tribunal refuted this claim by using textual reasoning: the coastal state can only control customs within their territorial sea and use the contiguous zone to prevent or punish infringement that takes place in their territorial waters.[205] As mentioned earlier, the first twelve miles of the EEZ overlaps with the contiguous zone of a coastal state. The customs violations must have occurred within Guinea's territorial waters for Guinea to detain the Saiga in order to punish the infringement of customs law. The Tribunal then went on to explore if customs regulations apply at all in the EEZ.

According to article 60, paragraph 2 of the LOSC, the coastal state may apply customs regulations with respect to artificial islands, installations, and structures. The establishment of such is under the jurisdiction of the coastal state, under article 56, paragraph 1(b). Since the LOSC explicitly states that only to that activity a coastal state may apply customs regulations, it can be inferred that all other activities within the EEZ cannot be subject to customs regulations. This inference is a textual argument that uses the *expressio unius est exclusion alterius* canon, which means that the expression of one thing implies the exclusion of others.[206] However, Guinea also relies on article 58, paragraph 3, which is regarding the 'other rules of international law,' for the basis that customs law can be extended into the EEZ.

[203] ibid, para 28(2).
[204] ibid, para 30.
[205] LOSC (n 15), art 33(1).
[206] Scalia and Garner (n 166), 107.

Guinea utilizes the doctrines of 'public interest' and 'necessity,' which are found in international law. First, they argue that as a developing state, it is in the public interest of Guinea to regulate customs laws in the EEZ to prevent fiscal losses. But, applying the doctrine would curtail the rights of flag states, found in article 58 and expand the rights of coastal states found in article 56. This application would undo the balance that the EEZ seeks to establish with the division of rights and the explicit customs right found in article 60. The Tribunal dismissed it as incompatible with the LOSC since this would give the coastal states the broad ability to regulate any activity that may cause fiscal losses.[207] An inference can be made from these arguments that 'other rules of international law' that cause coastal states to gain more rights than what is found in the LOSC while limiting the freedoms of flag states are incompatible with the LOSC. This reasoning was both textual and policy-based, as applying the public interest doctrine would create an unbalanced result.

Next, the Tribunal examined the doctrine of necessity by referring to a test created from ICJ jurisprudence.[208] The test comes from *Gabðíkovo-Nagtmaros Project* case, wherein its Judgment, the ICJ stated that a defence based on 'state of necessity' must meet two conditions: the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril and the act did not seriously impair an essential interest of the State towards which the obligation existed.[209] Using this precedent, ITLOS dismissed Guinea's argument on applying the doctrine. Therefore, the Tribunal concluded that notwithstanding artificial installations, applying customs laws within an EEZ to the activity of bunkering was in contravention to the LOSC. By a vote of eighteen to two, ITLOS ruled the detentions of the Saiga and that the subsequent Guinean court decisions were a violation.

However, the issue of bunkering in an EEZ was not conclusively decided. Although provisions of article 58 played a role in finding certain regulations incompatible, the Tribunal did not find one way or another if the activity of bunkering belongs under the freedom of navigation. Both parties requested that ITLOS adjudicate bunkering as it pertains to articles 56 and 58.[210] Again, similar to the first Judgment, the Tribunal employed judicial restraint and refused to decide the issue since it was unnecessary.

[207] *M/V 'Saiga' (No 2)* (n 25), para 131.
[208] ibid, para 133.
[209] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) ICJ Rep 1997 7, paras 51 and 52.
[210] *M/V 'Saiga' (No 2)* (n 25), para 137.

4.3.2 Other Opinions

Also, once again, the separate and dissenting opinions were critical and provided varying views. Judge Zhao viewed bunkering as a means to evade the customs duties of coastal states. Also, the judge proceeded to eliminate bunkering as a part of the freedom of navigation due to it not being explicitly stated anywhere in the LOSC.[211] He further reasoned that navigation means the act of navigating and that international law needed to separate navigation and commercial activities. The exclusion of bunkering as an activity under the high seas freedoms due to it not being explicit, even though the list was non-exhaustive, and that it is a commercial activity seems to go against the historical development of that freedom. From the beginning, the freedom of the high seas has been associated with commercial activities, including trade. This sentiment is also echoed with the dissenting opinion of Judge Warioba, where he argues that fiscal interests are an underlying concept of the EEZ and a right of the coastal state and not a freedom, and that unwarranted bunkering encourages smuggling.[212] The underlying concept seems to point toward an intent-based argument.

Judge Nelson provided an informative take on the intent of the LOSC regarding customs in his separate opinion. He noted that in the *travaux préparatoires*, several states tried to include customs laws and regulations within what would become article 56, and that it was expressly rejected.[213] Previously, Guinea argued that the coastal states of Africa brought to the attention of the Conference the issues and reasons for the proposal to include customs regulations in the EEZ.[214] The removal of the provision from article 56 appears to make it clearer that the Conference intended to exclude customs regulations. Though, when it comes to an argument based on tradition, Guinea's claim that it has been the practice and will of the coastal African states to address smuggling and customs offences that cause fiscal losses may have some merit. In the opinion of Judge Nelson, allowing these types of arguments would be detrimental to the LOSC. Nelson states:

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[211] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999, Sep. Op. Zhao) ITLOS Rep 1999, 113.
[212] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999, Dis. Op. Warioba) ITLOS Rep 1999, 195, para 81.
[213] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999, Sep. Op. Nelson) ITLOS Rep 1999 116.
[214] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Rejoinder of Guinea of 28 December 1998) 431, 458.

> The view that "these drafts [which] have not been included in the overall compromise concerning the exclusive economic zone at the Conference allows no formal conclusion" […] or "that it would be misleading to conclude that the coastal State does not have jurisdiction to control and regulate customs and fiscal matters related to economic activities in the EEZ" seems, in my view, to contain within it the seeds of destruction of the Convention. It would have the startling result that proposals which have not been accepted by the Conference would somehow still remain like shades waiting to be summoned, as it were, back to life if and when required.[215]

It seems that Guinea's traditional argument or its policy argument is still incompatible with the LOSC.

One point that may have been lost from the first case was Guinea's argument regarding separating the transferring ship from the receiving ship. Judge Vukas explored the argument further in his separate opinion. He reasoned that since Guinea only deems the bunkering of foreign fishing vessels to be in violation, both parties must agree that all other forms of bunkering are legal.[216] He also stated that bunkering should be considered an internationally lawful use of the sea under article 58, paragraph 1, and the purpose of the navigation for tankers is to refuel vessels. This approach is quite different, as the previous arguments usually seek to distinguish the commercial activity from the actual sailing.

The most influential or persuasive opinion came from Judge Laing. His forty-page opinion explored the concept of bunkering in context to the freedom of navigation thoroughly. But, he also makes a case for the use of article 59. He states, "many articles of the Convention deal with jurisdictional issues, which can be phrased in terms of attribution."[217] The LOSC grants jurisdiction based on the attribution of rights and duties. Although he did not reach a complete conclusion, Judge Laing offered a *prima facie* conclusion that offshore bunkering is "not inconsistent with at least a measure of tolerance of the use of this maritime space by all States that are legitimate users of non-territorial waters within their respective functional or other spheres."[218]

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[215] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (n 213), 161.
[216] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999, Sep. Op. Vukas) ITLOS Rep 1999, 140, para 10.
[217] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999, Sep. Op. Laing) ITLOS Rep 1999 154, para 55.
[218] ibid, para 56.

In closing, there were eight separate opinions and two dissenting opinions in this case, out of which four of the separate opinions and one of the dissenting opinions discussed the issue. This dispute brought interesting and complex legal arguments regarding the text of the LOSC, the intent of its drafters, legal tests from other courts, customary practices, and policy consequences. Specifically, regarding the issue of applying customs regulations to a vessel engaged in the activity of bunkering a fishing vessel, the arguments used in the Judgment are broken down in Table 3 and in more detail in Appendix A.

Type	Number
Textual	4
Precedent	1
Policy	1

Table 3 – M/V "Saiga" No 2 Judgment Arguments

The text of the LOSC was not in Guinea's favour, and its use of intent, tradition and policy arguments did not seem to sway the majority. But, based on the result of this case, it is difficult to determine how the Tribunal intends to rule on the activity of bunkering.

4.4 The *M/V "Virginia G"* Case

The *M/V "Virginia G" case* resulted from the vessel's detention by the coastal state of Guinea-Bissau for the offshore bunkering of foreign fishing vessels in Guinea-Bissau's EEZ on 21 August 2009. The flag state, Panama and Guinea-Bissau, initially submitted the dispute through Annex VII arbitration, but then through a special agreement, transferred it to ITLOS.[219] ITLOS decided the case on 14 April 2014. Among the variety of legal issues in the case, the Tribunal unanimously found that the regulation of bunkering of foreign fishing vessels in the EEZ of Guinea-Bissau did not violate Panama's rights under article 58, paragraph 1, and article 56, paragraph 2, of the LOSC.[220] For the first time, the Tribunal made a definitive ruling regarding the activity of bunkering. The arguments made by both parties, and which ITLOS relied upon, are similar to the *M/V "Saiga"* case.

[219] *M/V "Virginia G" (Panama v Guinea-Bissau)* (Notification of Special Agreement of 4 July 2011).
[220] *M/V "Virginia G" (Panama v Guinea-Bissau)* (Judgment of 14 April 2014) ITLOS Rep 2014, 4, para 452(6).

4.4.1 The Considered Arguments

Both Panama and Guinea-Bissau somewhat agreed on the definition of bunkering and that it is an economic activity.[221] Panama raised many claims regarding this issue. The arguments can be broken down into three themes: coastal states have no right, bunkering is closely related to navigation, and imposing fees for the right to bunker is a customs extension. The Tribunal listed Panama's position within paragraphs 163 to 184. They are categorized in Table 4 and further detailed in Appendix B-1.

Type	Number
Policy	10
Textual	6
Intent	3
Precedent	2
Traditional	2

Table 4 – Panama's Considered Arguments

Panama relied heavily on policy arguments in regards to the activity of bunkering. Since the activity is unattributed, in order to conclude that bunkering belongs under the freedom of navigation, Panama took such positions as it is the navigational purpose of a tanker, vessels require fuel to navigate, it is a general service not related to fishing, and that there is minimal risk to the marine environment. The textual arguments were the common ones seen in the *M/V "Saiga"* cases, but Panama did use the due regard for the rights and duties of other states provision found in article 58, paragraph 2 of the LOSC. Panama also disputed the text of the domestic law of Guinea-Bissau, as the definitions of fishing vessels and other vessels were not distinguished, and logistical support activities were not defined in the legislation.[222] The first appeal to precedent was to declare that there has been no precedent or case law on bunkering, most likely to counter any cases that Guinea-Bissau may cite. However, Panama used *M/V "Saiga" No. 2*, which stated that a coastal state could not impose customs regulations, apart from artificial structures, in the EEZ.[223] Guinea-Bissau charges fees for licences to bunker in its EEZ. Missing from the considered arguments was that the regulations are incompatible with the LOSC, but the inference is present.

[221] ibid, para 162, "Bunkering is the term used in the shipping industry to describe the selling of fuel from specialized vessels, such as oil tankers, which supply fuel to other vessels whilst at sea".
[222] ibid, para 173.
[223] ibid, para 179.

Paragraphs 186 to 205 of the Judgment detailed the positions of Guinea-Bissau that the Tribunal considered. The arguments are distributed similarly at the top and are found in Table 5 and expanded in Appendix B-2.

Type	Number
Policy	10
Textual	5
Traditional	3
Intent	2
Precedent	1

Table 5 – Guinea-Bissau's Considered Arguments

As expected with a respondent, Guinea-Bissau attempted to counter Panama's assertions while justifying the regulations. The majority of its arguments were to show that bunkering is an economic activity apart from navigation that served to aid predatory fishing and is a risk to cause environmental harm. *M/V "Saiga"* was once again cited to establish that the Tribunal found that it cannot be said that bunkering has never caused an oil spill, which is in contrast to Panama's minimal risk position. The precautionary principle of international environmental law was a tradition-based argument raised. For example, principle 15 of the Rio Declaration declared that:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[224]

The threat of serious or irreversible damage from accidents resulting from bunkering perhaps gives credence to giving coastal states the right to regulate it. In that regard, Guinea-Bissau also states that the economic interests of a flag state do not surpass the rights and duties of a coastal state, especially in preserving and protecting the marine environment.

4.4.2 The Reasoned Decision

The Tribunal had to decide if the coastal state has the right to regulate the bunkering of foreign fishing vessels, if Guinea-Bissau's regulation was compatible, and if a fee for the licence is allowable. There were other issues, but the chosen ones were the most pertinent to

[224] UNGA 'Report on the United Nations Conference on Environment and Development' (12 August 1992) A/CONF.151/26 (Vol. I) 189.

the activity of bunkering more generally. The domestic legislation discussion is important to analyze to see if there is a limit to how far the coastal state can regulate the activity.

The Judgement held that the coastal state could regulate the activity of bunkering of foreign fishing vessels, that ITLOS can determine if domestic law is compatible, that Guinea-Bissau's domestic law is consistent with the LOSC, and that the charging of fees for a bunkering licence is permitted. Arguments are categorized in Table 6 and expanded in more detail in Appendix B-3.

Type	Number
Textual	9
Traditional	7
Precedent	4
Policy	3
Intent	1

Table 6 – ITLOS's Judgment

The result was quite different than the considered arguments. Where policy arguments dominated the analysis from both Panama and Guinea-Bissau, ITLOS relied on the text of the LOSC, Guinea-Bissau's domestic law, and other agreements.[225] The competing intratextual arguments of whether the bunkering of foreign fishing vessels is attributed to the coastal state by reading article 56 with article 62 or attributed to the flag state by reading article 58 with 87 was decided. ITLOS found that the list in article 62, paragraph 4 is non-exhaustive and interpreted it to include fishing support activities. Before doing so, they rejected the precedent found in the arbitration award in the *Dispute Concerning Filleting in the Gulf of St. Lawrence*, in which the Arbitral Tribunal determined that the article 62 list could not include subjects that are of a different nature than those already in the list.[226] Specifically, the Arbitral Tribunal held that ships with fish filleting equipment are not included in article 62, paragraph 4 of the LOSC, because fish processing equipment is not related to fishing equipment.

[225] *M/V "Virginia G" (Panama v Guinea-Bissau)* (n 220) para 216, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009) (Panama is State Party); Convention on the Determination of the Minimum Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (2012) (Guinea-Bissau is a State Party).
[226] ibid, para 214; *Dispute Concerning Filleting within the Gulf of St Lawrence (Canada v France)* (Decision of 17 July 1986) ILR 82 591, para 52.

The dismissal of that interpretation by ITLOS was likely correct if interpreted with the *ejusdem generis* canon in mind. The reasoning in the *Filleting Decision* was based on a wrong application of the principle. In a list, the canon can only apply if the general terms that make it a non-exhaustive follow at the end of the list.[227] For example, a list containing dogs, cats, goldfish, and other such animals, would exclude a lion. The nature of the list is of common house pets. However, article 62, paragraph 4, states:

> […] These laws and regulations shall be consistent with the Convention and may relate, *inter alia*, to the following: […]

The introductory provisions 'may relate' and '*inter alia*' make this list non-exhaustive, but it does not have an item in the list, such as 'other such laws and regulations.' One example of the interpretation of the principle comes from the Supreme Court of Canada, which held that the precondition for the rule is that general words follow the specific enumeration, not precede it.[228] Therefore, the principle of *ejusdem generis* should not be applied to limit that list. The Tribunal took the more general view that all items of that list must have a direct connection to fishing and that one exists with bunkering.[229] After reaching this conclusion, the Tribunal used the direct link to fishing and traditional arguments to override bunkering's relation to navigation.

Other states' practices and agreements from various regions, coupled with the lack of objections, were used to side with the coastal states, which broke the intratextual stalemate.[230] The critical policy argument was that bunkering allows vessels to stay at sea longer, logically allowing them to catch more fish; therefore, the coastal state was best to regulate the activity. After it was held that coastal states have the right to control the bunkering of foreign fishing vessels, all the other arguments fell into place and aligned with Guinea-Bissau.

The Tribunal left one intriguing remark, "[t]he coastal state, however, does not have such competence with regard to other bunkering activities, unless otherwise determined in

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[227] Scalia and Garner (n 166) 199, *Ejusdem Generis* Canon: Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.
[228] See, *National Bank of Greece (Canada) v Katsikonouris* [1990], 2 S.C.R. 1029, 'The precondition for application of the rule is not met, for in the clause under consideration the general words precede and do not follow the specific enumeration. The rationale for applying the rule is accordingly absent.'
[229] *M/V "Virginia G" (Panama v Guinea-Bissau)* (n 220) para 215.
[230] ibid, para 218.

accordance with the Convention."[231] The activity of bunkering has only been narrowly decided, leaving uncertainty in other contexts besides fishing. Also, in traditional ITLOS fashion, it used judicial restraint and did not explore the arguments for protecting the marine environment.

Along with the Judgment, there were five declarations, four separate opinions and four dissenting opinions. Since the vote was unanimous regarding the bunkering of foreign fishing vessels, the dissenting opinions were pertinent to the other legal issues. However, the declarations provided some further insight. For example, Judge Nelson raised the subject of the lack of argumentation using article 59 and that perhaps it should have been used since bunkering is a residual right.[232] The position from the *M/V "Saiga"* cases where bunkering should be determined by the activity of the receiving ship (ancillary approach) was not examined. *Ad hoc* Judge Treves wondered why that argument was disregarded and questioned if a fishing vessel is in transit back to port would be a scenario that is more related to navigation than fishing.[233] The argument was absent from the Judgment. It leaves an issue regarding the other two competencies assigned to the coastal state: establishing artificial installations and marine scientific research. The ancillary approach would give the coastal state jurisdiction over bunkering for all the sovereign rights attributed to them. If the reasoning of this case holds in future cases, the coastal state will likely have to resort to protection or preservation of the marine environment arguments.

The most revealing position came from the Joint Declaration from Judge Kelly and Judge Attard. The pair had a different intratextual argument. They would have held that the activity of bunkering, in any scenario, belongs under article 56, paragraph 1 (b)(iii) of the LOSC, when read together with articles 211 and 220.[234] Article 211 pertains to pollution from vessels. Paragraph 5 gives the coastal state the right to adopt laws and regulations for the purpose of enforcement, to prevent, reduce and control pollution from vessels. The mentioned paragraphs of article 220 detail the enforcement measures that a coastal state may take. Judge Kelly and Judge Attard's position is different from the traditional restraint

[231] ibid, para 223.
[232] *M/V "Virginia G" (Panama v Guinea-Bissau)* (Judgment of 14 April 2014, Dec. Nelson) ITLOS Rep 2014, 130, para 10.
[233] *M/V "Virginia G" (Panama v Guinea-Bissau)* (Judgment of 14 April 2014, Dec. ad hoc Treves) ITLOS Rep 2014, 149, para 8.
[234] *M/V "Virginia G" (Panama v Guinea-Bissau)* (Judgment of 14 April 2014, Joint Dec. Kelly and Attard) ITLOS Rep 2014, 142, Specifically articles 211(5) and 220(3)(5)(6).

that ITLOS takes. Nonetheless, their view would grant the coastal states the full authority of bunkering within an EEZ.

4.5 Bunkering on the High Seas

The previous cases separated the activity of bunkering from being a part of the freedom of navigation if the receiving vessel is a foreign fishing vessel and it takes place within an EEZ. In 2019, the *M/V "Norstar"* case was brought before ITLOS, with Panama once again the applicant. Panama, the flag state, was accusing Italy, the coastal state, of violating the Norstar's freedom of navigation by ordering its arrest even though it was not in the high seas.

In its Judgement, ITLOS held that no state may exercise jurisdiction over a foreign ship on the high seas (unless in exceptional cases), that bunkering on the high seas falls under freedom of navigation, and that detaining a vessel in territorial waters for acts on the high seas violates the freedom of navigation.

The arguments made to substantiate those findings are worth noting, even though this is out of the EEZ context. Firstly, the Tribunal uses textual arguments based on the articles of the high seas freedoms to establish that no state may exercise jurisdiction over another on the high seas.[235] To reinforce the premise, a policy argument is forwarded, which states that the freedom of navigation would be "illusory" if ships were subject to the jurisdiction of other states on the high seas.[236] If states could enforce their laws on other states, the concept of freedom of navigation would become obsolete. Additionally, the precedent found from *S.S. Lotus* was cited to establish the principle.[237] The freedom of navigation was once again held up as a fundamental right of all states on the high seas.

Next, the activity of bunkering was examined. The Tribunal referenced the *M/V "Virginia G,"* which found that the bunkering of foreign fishing vessels within an EEZ came under the jurisdiction of the flag state. It also cited that the coastal state does not have the competence to regulate other bunkering activities, as discussed earlier. Applying precedent in such a manner has the effect of narrowing the *M/V "Virginia G"* ruling even more. Using the two precedent arguments, the Tribunal ruled that bunkering on the high seas is a part of the

[235] *M/V 'Norstar' (Panama v Italy)* (Judgment of 10 April 2019) ITLOS Rep 2019, para 215.
[236] ibid, para 216.
[237] ibid, citing *S.S. Lotus*, 25; See footnote 77.

freedom of navigation under the LOSC.[238] Compared to the previous case, one issue with this conclusion is that *"Virginia G"* connected bunkering to fishing, whereas *"Norstar"* linked it to navigation.

Article 87, paragraph 1(e), places the freedom of fishing under the freedom of high seas, whereas article 56 puts it under the coastal state within the EEZ regime. The Tribunal did not consider that bunkering on the high seas was connected to the other freedoms, such as fishing, but lumped it in with navigation.

The high seas freedom of navigation is the regime under EEZ as well as the high seas. Placing bunkering as an activity under the high seas freedoms vice, specifically, navigation would be more compatible with the Tribunal's previous ruling. Alternatively, ITLOS could have chosen to place the activity depending on the purpose of the receiving vessel. Since fishing and marine scientific research are part of the freedom of high seas, bunkering can be dependent on the freedom being exercised. Within the EEZ, both fishing and marine scientific research are rights of the coastal state; thus, bunkering can be under the coastal state's jurisdiction for those activities.

The policy argument from *"Virginia G"* regarding the premise that refuelling a fishing vessel at sea keeps that vessel at sea longer, which results in the catching of more fish, is still as much as a reality in the high seas as it is in the EEZ. Since fishing is a high seas freedom, bunkering in that scenario would still have the legal protection of being free from hindrance by other states, barring other international agreements.

The result now places bunkering as part of the freedom of navigation of the high seas, while in the high seas, even if the receiving vessel is a fishing vessel. However, if that same scenario occurs in an EEZ, bunkering becomes a part of the right to regulate fishing by the coastal state, even though the freedom of navigation is still the right of the flag state.

Lastly, the Tribunal found that a coastal state violates a flag state's freedom of navigation under article 87 of the LOSC even when it detains a vessel within waters where it has jurisdiction. They stated that:

[238] ibid, para 219.

> This principle prohibits not only the exercise of enforcement jurisdiction on the high seas by Staes other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas.[239]

Therefore, Italy could not apply its criminal laws to activities on the high seas conducted by foreign vessels.

4.6 Summary

Bunkering at sea is an activity between at least two vessels: the transferring ship and the receiving ship. A tanker selling and transferring fuel to another vessel constitutes commercial activity. It is an activity under the purview of the freedom of the high seas. However, within an EEZ, it is not as clear. The arguments for bunkering being an exercise of the freedom of navigation is more evident for the receiving ship. They require the fuel to navigate.

However, bunkering at sea is a high-risk activity. The risks include the possibility of the vessels colliding, catching fire, or having an oil spill.[240] As alluded to in the introduction, the environmental harm from oil spills would be a concern to the coastal state. The coastal state has jurisdiction to protect and preserve the marine environment of its EEZ.[241] The cases discussed above illustrate the importance of these disputes being brought before a court or tribunal in order to have judicial interpretation. A great deal of importance was placed on tradition-based arguments, with state practice and other agreements being deciding factors. The Tribunal's mention of the lack of objection of other states is crucial to consider in light of what appears to be the growing expansion of coastal states' rights and jurisdiction.

The lessons from the *M/V "Saiga"* cases were implemented in the *M/V "Virginia G*" case, as customs laws were scrapped for fishing laws. Based on these cases, scholar David Testa concluded that the bunkering of vessels engaged in oil exploration, exploitation activities, and marine scientific research should be classified under article 56, whereas the bunkering of ships involved in transiting and laying submarine cables and pipelines should be classified under article 58.[242] This approach is reasonable, but the arguments used to support the bunkering of fishing vessels do not necessarily extend to oil exploration and scientific

[239] ibid, 224.
[240] Anish Wankhede, 'Bunkering Is Dangerous: Procedure for Bunkering Operation on a Ship' (*Marine Insight*, 4 February 2019).
[241] LOSC (n 15), art 56(1)(b)(iii).
[242] Testa (n 26), 379.

research, besides the ancillary activity approach. The argument that refuelling a fishing vessel extends the duration of the vessel's time at sea to fish pertains to the conservation and management of fish stocks, which does not apply to exploration or research. The separate declarations in the *M/V "Virginia G"* case may provide room to expand the findings in the Judgment to include Testa's position or those from the declaratory Judges, for future disputes.

The more recent decision in *M/V "Norstar"* seems to contradict some of the logic used in the EEZ cases. The movement of bunkering from under the freedom of navigation to fishing still leaves uncertainty with the unattributed nature of bunkering. The EEZ is linked to the high seas due to the high seas freedom of article 87 being explicitly referenced in article 58 (excluding the three given to article 56).

Another point to consider is how narrow the Tribunal interprets the LOSC when deciding cases. In the first two cases, it did not attempt to resolve bunkering. In the last case, the Tribunal stopped once it reached a conclusion that would decide the case, leaving the activity still unsettled in every aspect except for refuelling foreign fishing vessels.

However, the arguments offer an essential guide. Textual arguments lead the way in being used by the Tribunal. Using the plain meaning, canons of construction and intratextual methods of textual interpretation appear to be the most persuasive. Both parties in the *M/V "Virginia G"* case led with policy arguments. The decisive reason was that bunkering keeps vessels at sea longer. That overruled their need for fuel for other reasons, such as to transit back to port.

5. STS Transfers Within the EEZ

5.1 Background on STS Transfers

As defined earlier, an STS transfer is an activity conducted by two vessels, either underway or stationary, in which goods are transferred while the vessels are alongside one another. The goods can be cargo of various forms, including oil or gas. STS transfers require proper coordination, equipment, and approval, with each ship's master being responsible for the operation.[243] The activity can be dangerous.

Due to an increasing number of collisions in areas where STS transfers occur, issues such as liability, contractional matters, personal injuries, and pollution were given attention.[244] MARPOL was amended to include regulations on STS transfers.

Included within the IMO structure is the Marine Environment Protection Committee (MEPC). The Committee is responsible for addressing environmental issues and can make binding amendments to MARPOL.[245] Amendments to MARPOL Annex I for the prevention of marine pollution during STS transfers came into force on 1 January 2011.[246] The newly added Chapter 8 includes regulations requiring vessels to have an STS operations plan and to notify the coastal state within 48 hours of transfer if occurring in that states' territorial waters or EEZ;[247] it also explicitly excludes bunkering from the regulation. Even though STS transfers are unattributed in the LOSC, vessels still need to notify the coastal state of the activity, which qualifies as other rules of international law, not incompatible with the LOSC.

STS transfers and bunkering are very similar. They are both activities that provide logistical support to the receiving ship. However, STS transfers may also be a commercial enterprise for the receiver, such as in the scenarios of vessels receiving cargo due to change of ownership or for transport reasons.[248] Bunkering can be classified as an STS transfer, though

[243] Wankhede (n 28).
[244] 'Member Seminar on the Risks and Regulations of Ship to Ship Transfer Operations' (*UKP&I*, 1 March 2011) <https://www.ukpandi.com/news-and-resources/news/2011/member-seminar-on-the-risks-and-regulations-of-ship-to-ship-transfer-operations/> accessed 6 April 2021.
[245] 'Marine Environment Protection Committee (MEPC)' (*International Maritime Organization*) <https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MEPC-default.aspx> accessed 4 April 2021.
[246] 'Member Seminar on the Risks and Regulations of Ship to Ship Transfer Operations' (n 235).
[247] Resolution MEPC. 186(59) (adopted 17 July 2009) (Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973).
[248] Wankhede (n 28).

it is considered a separate activity through international and domestic regulations, nautical terminology and the fact that bunkering's purpose is to refuel the receiving ship.

5.2 The *M/T "San Padre Pio" No. 2* Case

5.2.1 Background

The dispute between Switzerland and Nigeria regarding the M/T San Padre Pio occurs over two cases before ITLOS. Initially, the countries agreed to an Annex VII Arbitration, but Switzerland requested provisional measures in the interim. Switzerland is a land-locked country, which is unique as far as the previous cases are concerned since it argues from the position of not possessing any coastal state rights.

The M/T San Padre Pio was conducting STS transfers with other vessels within Nigeria's EEZ. Gasoil was the type of cargo. It was transferred to other vessels and intended to be used by the Odudu Terminal, an oil installation located within Nigeria's EEZ and operated by the company Total.[249] The Master and some of the crew of the M/T San Padre Pio are being charged with "conspiring to distribute and deal with petroleum product without lawful authority or appropriate licence, and with having done so with respect to the petroleum product onboard."[250]

Switzerland has argued in its submission that Nigeria has breached Switzerland's freedom of navigation under article 58 for detaining the San Padre Pio in contradiction of the LOSC when read in conjunction with article 87.[251] This is the common intratextual argument, previously used with bunkering. Switzerland references the precedent found in *M/V "Norstar"* regarding bunkering being part of freedom of navigation, which should apply in the present case since the M/T San Padre Pio was not conducting an STS transfer with a foreign fishing vessel. They are raising the point that the activities are analogous to one another.

Nigeria's initial response claimed that Switzerland ignores other paragraphs of article 58, namely that the activity must be compatible with the other provisions of the LOSC.[252] Nigeria then stated that under article 56, Switzerland violated its coastal state rights of

[249] *M/T 'San Padre Pio' (Switzerland v Nigeria)* (Provisional Measures, Order of 6 July 19) ITLOS Rep 2019, para 30.
[250] ibid, para 33
[251] ibid, para 80.
[252] ibid, para 95.

exploitation, conservation and management of natural resources by transferring gasoil to foreign vessels.[253] Nigeria also accuses the ship of transferring substandard oil, which may have been stolen from Nigeria, and subsequently sold to Nigerian vessels. In turn, those vessels transport the fuel to Nigeria's EEZ oil installations or sell it back to the country. An interesting thing to note is that Nigeria uses both the vernacular STS transfer and bunkering either separately or combined. Both Switzerland, ITLOS and commentators on the matter refer to the issue as solely STS transfers. Even in Nigeria's description, the fuel is transferred to its oil installations or resold within the country. Therefore, the activity was likely an STS transfer and not bunkering at sea, as defined in this thesis. Nigeria rejects the provisional measures because it is pursuing criminal charges against the Master and some of the crew. The provisional measures were granted, including the order that Switzerland is to pay a bond of USD 14,000,000.[254]

After the order, both nations agreed to transfer the matter from arbitration to ITLOS.[255] The case is ongoing, with the latest information at the time of writing being that the written submission of Nigeria was due on 9 April 2021.[256] The submissions are not publicly posted, but the arguments are likely similar to what was made during the provisional measures.

5.2.2 Comparisons

The Tribunal composition has changed from *M/V "Virginia G"* to the first case of the *M/T "San Padre Pio"* to the present case. Only nine judges remain from the *M/V "Virginia G"* case.[257] From the first *M/T "San Padre Pio"* provisional measures case, sixteen judges return. There will be a degree of continuity.

One glaring difference from the bunkering cases is that the receiving ships are not fishing vessels. Immediately, the present case is distinguishable, as policy arguments such as bunkering fishing vessels keeps them at sea longer and increases the likelihood of predatory fishing will not be relevant. For the sake of a hypothetical inquiry, a position can be established that an STS transfer for food provisions could be used by a fishing vessel to feed

[253] ibid, para 98
[254] ibid, para 146
[255] *M/T 'San Padre Pio' (No 2) (Switzerland v Nigeria)* (Notification of Special Agreement of 3 December 2019).
[256] *M/T 'San Padre Pio' (No 2) (Switzerland v Nigeria)* (Order of 5 January 2021).
[257] The remaining judges are: President Hoffman and Judges Jesus, Pawlak, Yanai, Kateka, Bouguetaia, Paik, Attard, Kulyk.

its crew and to stay at sea longer. It would have the same direct connection to fishing – providing logistical support to a fishing vessel.

STS transfers can be bifurcated into STS oil transfers and STS non-oil transfers. STS oil transfers are more closely related to bunkering, but splitting it up will lose the arguments regarding keeping a ship and sea longer (unless that cargo is later to be used as fuel on that receiving vessel). One position is that STS oil transfers' only claim under article 56 comes from protecting the marine environment.[258] The protection of the marine environment is relevant when discussing where to categorize STS oil transfers. State practice aside, MARPOL Annex I, Chapter 8 is an international agreement that creates an obligation on vessels conducting STS oil transfers inside an EEZ to notify the coastal state. It is a restriction on the freedom to perform this activity, which certainly is to be interpreted as part of the freedom of navigation in the high seas – if that issue arises – and similarly in the EEZ, subject to notification.

Some facts share a resemblance to the *M/V "Saiga"* cases. Firstly, Nigeria and Guinea are both African nations and the domestic laws that Nigeria refers to are regarding the illegal trade of gasoil, which are stolen from Nigeria, refined illegally, and resold to the country. Guinea used customs laws within the EEZ, which were found to be in contravention to the LOSC. The alleged infractions in the present case have occurred in the EEZ.

The M/T San Padre Pio is a motor tanker and the transferring ship. The receiving vessels were used to transport the cargo to the artificial installation within the EEZ. For the first time, the freedom to construct an artificial structure, such as an oil platform, and the relevant rights and duties afforded to the coastal state may be relevant.

Article 60, paragraph 2 grants the coastal state jurisdiction over customs with respect to its artificial installations. Around such a structure, the coastal state may establish a reasonable safety zone that cannot exceed 500 metres (1/4 of a nautical mile) around its outer edge.[259] Switzerland states that the STS transfers took place "outside any safety zone that Nigeria could have established in accordance with UNCLOS… and well beyond the 200-metre area around installations to which Nigeria purports to extend its civil and criminal law."[260] The reference to criminal and civil law is telling, as the LOSC does not grant jurisdiction for

[258] Testa (n 26), 378.
[259] LOSC (n 15), art 60(4)(5).
[260] *M/T 'San Padre Pio' (Switzerland v Nigeria)* (n 249), para 30.

domestic criminal law within an EEZ, except for rules and regulations in accordance with Part V (EEZ).[261] In any event, the suggestion that the M/T San Padre Pio did not breach the safety zone of Nigeria's artificial oil platform is disputed by Nigeria. If it is determined that the vessel was conducting the transfer within the safety zone, customs regulations could apply if not incompatible with the LOSC.

Assuming that the M/T San Padre Pio did not enter the safety zone, the Tribunal will have to decide on the activity of STS transfers to a non-fishing vessel to provide fuel to the operation of an artificial structure. The receiving vessels act as intermediaries. They then become transfer vessels and conduct transfers from ship to artificial installation. The question that needs to be answered is whether the purpose of the receiving vessel matters if that vessel itself becomes a transfer vessel. A policy argument can be established, similar to those raised by Guinea in the *M/V "Saiga,"* where the STS transfers fiscally damages the country. However, would the result be different if the transfer was conducted on the high seas? Likely not, and there lies the problem with this policy argument. The sovereign rights and jurisdiction afforded to the coastal state under the LOSC do not account for this type of regulation.

The receiving ships should be classified as vessels transporting goods, which is an economic activity. One view is that there is no link to freedom of navigation or other internationally lawful uses of the sea as it pertains to STS oil transfers.[262] However, the same principle found in *M/V "Norstar"* should be considered. Given that ITLOS categorized bunkering to belong to the freedom of navigation in the high seas, it is likely that all STS transfers, including oil, would be classified likewise. Therefore, given that article 56 does not give jurisdiction to the coastal state for the STS oil transfer of vessels transporting the cargo, it should be classified as part of the freedom of navigation within the EEZ. Also in support of this position is the intratextual argument of article 58 read together with article 87.

The opposing view focused on linking an STS oil transfer for the economic benefit of using varying vessels for transport.[263] The commercial nature of the activity would then exclude it from being a part of the freedom of navigation under article 58. While the commercial link is valid, it ignores alternative links such as draught restrictions of ports and geographical

[261] LOSC (n 15), art 27(5).
[262] Testa (n 26), 376.
[263] ibid, 378.

limitations, preventing ships from navigating certain areas.[264] Even so, as this thesis established, economic activity has been linked to the freedom of navigation from the time of Grotius and has not been decided differently unless it involves a foreign fishing vessel. Based on the reasonings of the Tribunal previously, it is likely STS transfers have a link with the freedom of navigation.

From the *M/V "Virginia G"* case, the analysis showed that along with textual arguments, traditional-based arguments were mainly used to interpret the LOSC and to decide conflicting views. These came in the form of state practice and other international agreements. Testa utilized the practices of Angola and Belgium as examples of states that have gone past MARPOL in its regulation of the STS transfers.[265] A glance at the state practice from various regions reveals similar findings.

Along with posting data such as the amount of STS transfers conducted in the EEZ, the Danish Maritime Authority states that vessels conducting STS transfers in Denmark's EEZ shall abide by the provisions of the IMO (MARPOL), including having a plan and notifying the coastal authorities.[266] It also referred to the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention) for further regulations on bunkering and STS oil transfers in the Baltic Sea. HELCOM Recommendation 28/3, which is in force, requires the permission of the coastal state, and the ships involved should be at anchor.[267] Permission goes beyond notification. Both Canada and the United States follow MARPOL and incorporate it into their laws.[268] However, several West African states have made regulations that, at a minimum, require approval, not a notification, over smuggling and piracy concerns.[269] Countries from different regions were examined, but due to a lack of regulation or lack of English sources, explicit STS transfer regulations were difficult to ascertain. Advisories from marine companies, such as Skuld, provide notice for countries with more restrictive rules than what is found in MARPOL.

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[264] Wankhede (n 28).
[265] ibid, 379, Angola: Only companies registered in Angola can engage in STS transfers; Belgium: Requires a 145 day authorization request and must include an Environmental Impact Assessment.
[266] 'Transfer of Cargo Oil' (*Danish Maritime Authority*).
[267] HELCOM Recommendation 28/3 (adopted 7 March 2007) (Guidelines on Bunkering Operations and Ship to Ship Cargo Transfer of Oils, Subject to Annex I of MARPOL 73/78, in the Baltic Sea Area), para 3(1) to (4).
[268] Vessel Pollution and Dangerous Chemicals Regulations SOR/2012-69 (Canada Shipping Act, 2011) 2012, art 39(2); 33 CFR § 156.415 (United States).
[269] Øystein Kirchner Gjerding, 'West Africa: STS Operations' (*Skuld*, 3 March 2015), Congo requires advance notice and approval and may charge an approval fee.

The most common divergence from MARPOL was for approval instead of a simple notification. The issue over how many countries need to implement tighter regulations to become customary law is uncertain. The definition of customary law usually involves two requirements: general practice and a sense of legal obligation.[270] Nonetheless, the use of state practice as a tie-breaker to the two competing intratextual arguments during *M/V "Virginia G"* cannot be utilized the same way in this case. There are not competing textual arguments requiring interpretation. There is article 58, read together with article 87 claim once again. However, a legitimate intratextual argument using article 56 is lacking.

5.3 Prediction

By relying on the order from the provisional measures case and past arguments in the bunkering cases, there is an indication that the *M/T "San Padre Pio"* case will be decided much like the *M/V "Saiga"* cases if ITLOS finds that the M/T San Padre Pio did not enter the safety zone of Nigeria's oil platform. Another assumption that needs to be made is that the vessel followed the MARPOL regulations and notified Nigeria 48 hours prior. With those assumptions, ITLOS will likely conclude that the enforcement of domestic laws within the EEZ was incompatible with the jurisdictional rights prescribed to the coastal state under article 56.

After reaching that conclusion, ITLOS will utilize judicial restraint, and it will not decide how to categorize STS oil transfers in the EEZ. The separate and dissenting opinions in the matter will likely shed some light on the position the Tribunal would have taken, if necessary. In this regard, this thesis shares the same position that David Testa reached about bunkering but with STS transfers. STS transfers involving receiving vessels taking part in exploitation, preservation, and marine scientific research should fall under the coastal state's jurisdiction. Otherwise, it belongs as a freedom of navigation, under the rights of a flag state. The activities are very closely related.

The most significant issue with these approaches is determining the receiving vessel's purpose during the transfer. There is a connection to the receiving vessels and exploitation due to the oil structure in the present case. However, there is no list, similar to article 62, paragraph 4, regarding reasonable laws and regulations a coastal state can establish if there is a link to artificial installations. An attempt to apply the *M/V "Virginia G"*'s reasoning in

[270] Klabbers (n 165), 29; Rebecca MM Wallace and Olga Martin-Ortega, *International Law* (7. ed, Sweet & Maxwell 2013), 9.

an analogy to the present case will not work in Nigeria's favour. It was too narrow of a ruling.

One position to consider would be that ITLOS departs from its precedent and takes the position that the activity of STS oil transfers falls under the protection the marine environment provision under article 56, in any scenario. The position comes from the separate declaration from Judge Kelly and Judge Attard from *M/V "Virginia G."* It would be quite the departure, especially after the activity of bunkering was deemed a part of the freedom of navigation on the high seas in the *M/V "Norstar"* case. Furthermore, it could be argued that the protection of the marine environment is already achieved with both the activity of bunkering and STS transfers, since they are internationally regulated through MARPOL and other conventions. Unless a coastal state or a region has a unique interest that needs further marine protection, such as in the Baltic Sea, the already agreed upon regulations could be seen as reasonable in preventing harm to the marine environment.

Finally, the third category needs to be considered. Testa concluded that STS oil transfers should be resolved under article 59.[271] It is a reasonable option, considering the separate opinions in past judgments contemplated why it has not yet been utilized. However, unless argued by the parties to the dispute, ITLOS is unlikely to refer to it in its decision.

[271] Testa (n 26), 378.

6. Final Remarks

6.1 Remarks on the Analysis

The examination of the historical development, including the codification of the law of the sea, assisted in the analysis of arguments used by ITLOS in its reasonings. The way that the freedom of navigation developed through the practice of maritime powers was similarly diminished by the practice of coastal states. A better way to view the conflict of rights between coastal states and flag states is the constant attempt to acquire a balance. The LOSC strived to do that through the establishment of the EEZ. It is a unique regime that meshes the openness of the high seas with the sovereignty of the territorial waters. However, the purposefully vague articles in the LOSC require interpretation when disputes arise. ITLOS is an institution that has been called upon to provide its opinion in settling the ambiguities of unattributed rights.

I knew from the beginning that the lack of cases would be a challenge. The examination of the arguments on the particular issue of bunkering is restricted to two disputes over three cases. The facts were slightly different, but many of the same arguments were used in each case. However, only the *M/V "Virginia G"* case provided a meaningful ITLOS decision to be analyzed. If the analysis was expanded to every case that has come before ITLOS, more evidence would be available to gauge the judicial philosophies of each judge. It was not the goal to categorize each judge as a textualist, intentionalist or teleological, but to see what type of arguments are used to reach conclusions.

Through the examination of the bunkering cases, the decisions by ITLOS influenced coastal states. The *M/V "Saiga"* cases were cited many times as precedent. Even the *obiter dicta* of the first case were used. Based on the results of the analysis of this thesis, I agree with the conclusions reached by Testa, and others, that it is likely that the bunkering of a vessel that has any connection to activities of exploitation, conservation and marine scientific research will be under the jurisdiction of the coastal state in an EEZ.

Even though ITLOS most commonly used textual arguments, they were persuaded by customary international law and the practices of coastal states in various regions. The LOSC took over a decade to be agreed upon and over another decade to come into force. It is not foreseeable that another Conference of that magnitude will take place. Therefore, it is understandable that despite the VCLT, customary international law plays a role in keeping

the LOSC in line with the realities of contemporary issues. That does not mean the text's ordinary meaning is discarded, but competing interpretations can be decided with state practices instead of policy arguments.

There are other aspects of this issue that have been left out of the examination. The context of the disputes was solely evaluated from the flag and coastal state's perspectives. However, there are other parties involved. Crews are composed of people from several nationalities and all of whom have individual rights. When the vessels are detained, so are the people that are on the vessel. Other aspects of international law, such as human rights law, come into play and are relevant in resolving these disputes, such as exhausting all domestic remedies.[272] Nevertheless, this issue was not analyzed, along with civil claims or disputes involving companies and shipowners. Specifically, the physical danger and risk that crew members are subjected to while conducting these activities were not used or mentioned as a policy argument, but there are MARPOL regulations regarding safety at sea.[273]

Another aspect involves the usage of article 73 under the LOSC. Enforcement measures, such as boarding and arresting vessels, come from this provision. The article was discussed in the cases, but any examination involving the detention, use of force and treatment of the vessel and crew was excluded. Specific arguments were categorized in the data collection, but how the coastal state used force was a separate issue than if it had the right to use it.

6.2 Discussion on an Identifiable Trend

Looking back to Grotius' *Mare Liberum*, the freedoms of navigation, fishing, and trade (commerce) were at the heart of his claims. The coming into force of the LOSC and the decisions by ITLOS have eroded those freedoms within the EEZ. Before that, the establishment of the EEZ concept diminished the high seas by decreasing its breadth.

The LOSC is the constitution of the ocean, and it needs to be interpreted by the agreed-upon text. Based on the high seas regime, the freedom of navigation was selected for flag states in the EEZ, not innocent passage. ITLOS has defended the freedom of navigation on the high seas by determining bunkering as an activity under its purview. The Tribunal has also ruled that arresting a vessel in territorial waters for actions on the high seas violates the

[272] LOSC (n 15), art 295, Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.
[273] See, International Convention for the Safety of Life at Sea, 1974 (adopted 1 November 1974, entered into force 25 May 1980) 1184 U.N.T.S. 3 (SOLAS Convention).

freedom of navigation. The high seas remain an area where the Tribunal has not depleted the freedoms found under article 87. International regulations, such as MARPOL, have created obligations to exercise those freedoms, which have been agreed upon in order to prevent polluting the ocean.

The living resources found in the ocean are not unlimited, as once assumed. The conservation and management of these resources are vital to coastal states' livelihood and the preservation of aquatic species. It is apparent from the regulations countries are implementing and international agreements from the past decade, that the direction is towards protecting the marine environment. Flag states are not patrolling the EEZs of other states. Therefore, they are not actively ensuring vessels flying their flag have due regard for the coastal state's rights within the EEZs of coastal states. If examined through the lens of a consequentialist, the best policy would be for greater enforcement rights of unattributed activities within the EEZ afforded to the coastal state. And that is the expected trend on how ITLOS will decide cases if coastal states continue to enact strict regulations. The absence of objections from other states to coastal state policies causes a lack of cases to adjudicate, which will result in the state practices having a deciding role in how to interpret further disputes regarding activities in the EEZ.

Appendix A *M/V "Saiga" No 2* Argument Data

A Judgment Arguments Expanded

Arguments from the Judgment of 1 July 1999	**Paragraph**	**Type**
According to article 33, only customs infringements that take place in the territorial waters gives jurisdiction to the coastal state	127	Textual
According to article 60, paragraph 2, custom laws can apply in an EEZ for artificial islands, installations and structures	127	Textual
In the view of the Tribunal, the Convention does not empower a coastal state to apply its customs laws in respect of any other parts of the EEZ not mentioned in article 60, paragraph 2 (expressio unius est exclusion alterius canon)	127	Textual
Applying public interest doctrine would tilt the favour towards coastal state rights	130	Policy
It would be incompatible with having the balance tilted to that extent, and incompatibility is in contravention to the LOSC under articles 56 and 58	131	Textual
Used a test from ICJ to determine the doctrine of necessity did not apply	133	Precedent

Appendix B *M/V "Virginia G"* Argument Data

B - 1 Panama's Considered Arguments Expanded

Arguments from the Judgment of 14 April 2014	**Paragraph**	**Type**
The LOSC does not explicitly attribute sovereign and jurisdictional rights for the activity of bunkering	163	Textual
The activity is not settled by case law	163	Precedent
Unlawful to exercise sovereign rights not attributed to the coastal state	164	Textual
Bunkering, due to its connection with navigation, must be categorized as part of freedom of navigation and other internationally lawful uses of the sea related to that freedom, under article 58, paragraph 1	165	Policy
Three high seas freedoms were removed and placed under article 56	167	Textual
The intent was to have the high seas freedom regime in the EEZ	168	Intent
If there is a dispute with the freedoms, the shift should be towards the freedoms under article 58	169	Policy
Bunkering is a commercial activity, but it is the navigational purpose of the vessel	170	Policy
Bunkering is more linked to navigation due to the requirement of vessels needing fuel to sail	170	Policy
According to article 56, paragraph 2, coastal states must have due regard to the rights and duties of other states, which are the freedoms	171	Textual
Bunkering a vessel is not an activity of exploring, exploiting or utilizing the natural resources in the EEZ	173	Policy
The domestic law of Guinea-Bissau does not distinguish between fishing and other vessels or define logistical support activities	173	Textual
The domestic law of Guinea-Bissau does not conform to the purpose of the EEZ	174	Policy
Articles 61 and 62 detail how a coastal state can regulation conservation and utilization	174	Textual
Because bunkering is a general service, not strictly related to fishing, and a basic necessity, it cannot be classified as a fishing-related activity	176	Policy
The majority of states throughout the world do no consider vessels engaged in fishing-related activities to be fishing	177	Traditional
Imposing a fee for bunkering is a customs duty and not allowed in the EEZ	178	Policy
Customs is a violation of the LOSC, as was held in the M/V Saiga	179	Precedent
Uses the preamble of the Joint Order No 2/2001 of Guinea-Bissau, where it considers the fee to be a positive contribution towards the country's economic and social development	180	Intent
Lack of bunkering facilities in the area make it a necessary activity	181	Policy
Risks are minimal and have not caused relevant marine harm	182	Policy
The principle of sustainable fisheries used is contrary to Guinea-Bissau's practice and agreements	183	Traditional
The legislative history shows that there is no residual authority in the EEZ	184	Intent

B - 2 Guinea-Bissau's Considered Arguments Expanded

Arguments from the Judgment of 14 April 2014	**Paragraph**	**Type**
EEZ has a *sui generis* status where the interests of the coastal state must prevail over the economic interests of other states	186	Policy
According to the evolutionary interpretation of the Convention, […] the regulation of bunkering of fishing vessels in the EEZ is admissible owing to the sovereign rights and jurisdiction of the coastal state	187	Policy
Bunkering supports fishing operations	188	Policy
In conformity with international law and practices of the sub-region	188	Traditional
Domestic law establishes bunkering as a fishing-related activity	189	Textual
International law also says that bunkering is the responsibility of the coastal state	191	Traditional
Activity is much stronger related to fishing than navigation	192	Policy
No right for the economic activity of bunkering	192	Textual
Freedoms can be restricted as far as necessary to ensure the rights of the coastal state	194	Textual
Bunkering endangers the living resources due to predatory fishing	195	Policy
Bunkering endangers the living resources due to the risk to the marine environment	196	Policy
The precautionary principle in environmental law should be used to avoid risks	197	Traditional
Performance of the flag state is not sufficient to safeguard the uncontrolled exploitation of marine resources	198	Policy
Rejects fishing law has nothing to do with the environment	199	Intent
In *M/V "Saiga,"* the Tribunal stated its impossible to assume no oil spills from bunkering as occurred	199	Precedence
Regulations by coastal states under articles 61 and 62 permits it	199	Textual
Lack of bunkering facilities do not preclude the coastal state the right to control it	200	Policy
Imposing a fee is environmental nature to finance marine pollution	201	Intent
Right to tax, under the polluter, pays principle, since it cannot collect the tax	202	Policy
The coastal state can issue licences, under article 62, safe to assume a fee is a part of that	203	Textual
The fee is a smaller amount than it would be for tax revenue to sell their own oil	204	Policy

B - 3 ITLOS's Judgment Expanded

Arguments from the Judgment of 14 April 2014	Paragraph	Type
The intratextual argument, article 56, read together with articles 61 to 68	209	Textual
Sovereign rights encompass all rights necessary for and connected with the exploration, exploitation, conservation and management of natural resources, including the right to take enforcement measures	211	Textual
Terms conserving and managing go beyond conservation, as articles 61 and 62 provide different aspects	212	Textual
Able to adopt laws and regulations, such as licences based on article 62 para 4, the list is non-exhaustive	213	Textual
Filleting decision in Gulf of St. Lawrence arbitration, Although the list, is not exhaustive, it does not appear that the regulatory authority of the coastal state includes the authority typically to regulate the subject of a different nature than those described	214	Precedent
A connection exists between bunkering and fishing	215	Policy
Used the text of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009), in which Panama is a member state	216	Textual
Used text of Sub-Regional Fisheries Commission in which Guinea-Bissau is a member state	216	Textual
Used the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (neither are member states)	216	Traditional
Used the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (neither are member states)	216	Traditional
Used the Southern Indian Ocean Fisheries Agreement (neither are member states)	216	Traditional
Used the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (neither are member states)	216	Traditional
Used the Convention for the Conservation of Southern Bluefin Tuna (neither are member states)	216	Traditional
The article 56 intratextual argument has been established by state practice	217	Traditional
Several states have domestic regulations in various regions of the world, no objections by other states	218	Traditional
Article 58, when read with article 56, does not restrict coastal states in regulating	222	Textual
Using a PCIJ case allows ITLOS to determine if domestic law is compatible with the LOSC	226	Precedent
Domestic Law must be compatible, as was found in *M/V "Saiga"*	227	Precedent
The text sufficiently establishes fishing related activities as bunkering in Guinea-Bissau's domestic law	229	Textual
Cannot apply a customs tax, as was found in *M/V "Saiga"*	232	Precedent
Satisfied with Guinea-Bissau's arguments on the fee for a bunkering licence	234	Policy
The fee is a smaller amount than it would be for tax revenue to sell their own oil	234	Policy
A coastal state can issue licences, under article 62, safe to assume a fee is a part of that	234	Textual
Imposing a fee is environmental nature to finance marine pollution	234	Intent