PART I

The Divided Oceans: International Law Governing Jurisdictional Zones

OUTLINE OF PART I

1

The Law of the Sea in Perspective

Main Issues

The international law of the sea is one of the oldest branches of public international law. Thus, it must be examined from the perspective of the development of international law in general. Originally the law of the sea consisted of a body of rules of customary law. Later on, these rules were progressively codified. The Third United Nations Conference on the Law of the Sea, which successfully adopted the United Nations Convention on the Law of the Sea (the LOSC) in 1982, is of particular importance in the codification of the law. Furthermore, the international community and the situations that surround the oceans are constantly changing. Accordingly, it is also necessary to examine the evolutionary process of the law after the adoption of the LOSC. As a general introduction, this chapter will address the following issues in particular:

(i) What are the principal functions of the law of the sea?
(ii) What are the sources of the law of the sea?
(iii) What are the principles governing the law of the sea?
(iv) What are the specific procedures of the Third United Nations Conference on the Law of the Sea?
(v) What are the principal features of the LOSC?
(vi) What is the evolutionary process of the LOSC and the law of the sea?

1 INTRODUCTION

1.1 General considerations

Historically, the oceans have been and continue to be fundamental to human life. The ever-increasing use of the oceans necessitates international rules governing various human activities in the oceans. The body of international rules that bind States and other subjects of international law in their marine affairs is called the international law of the sea. Like the international law of armed conflict and the law of diplomacy, the law of the sea is one of the oldest branches of public international law. Furthermore, like international human rights law and international environmental law, the law of the sea is a dynamic field of international law. The law of the sea can be said to mirror both classical and novel aspects

of international law. Thus the law of the sea must be studied from the perspective of the development of public international law as a whole.

1.2 Functions of the law of the sea

The law of the sea plays a dual role in international relations.

First, the primary function of international law involves the spatial distribution of jurisdiction of States, and the same applies to the law of the sea. The contemporary international law of the sea divides the ocean into multiple jurisdictional zones, such as internal waters, territorial seas, the contiguous zone, the exclusive economic zone (EEZ), archipelagic waters, the continental shelf, the high seas and the Area. In principle, the law of the sea provides the rights and obligations of a coastal State and third States according to these jurisdictional zones. Consequently, the law seeks to coordinate the interests of individual States. This approach is sometimes called the zonal management approach. Considering that the world is divided into sovereign States, the traditional role of the law of the sea will in no way lose its importance.

Second, given that the ocean is one unit in a physical sense, the proper management of the oceans necessitates international cooperation between States. In general, the spatial scope of man-made jurisdictional zones does not always correspond to marine ecosystems. In fact, several species, such as straddling and highly migratory species, do not respect artificial delimitation lines. The divergence between the law and nature is a serious deficiency in the traditional zonal management approach. International cooperation is thus a prerequisite for conservation of marine living resources as well as biological diversity. Similarly, without international cooperation, the regulation of marine pollution would be less effective because pollution may spread beyond maritime boundaries. Furthermore, a single State's regulation of industrial activities to prevent marine pollution would put that State's economy at a competitive disadvantage. International cooperation is also needed in marine scientific research due to the highly complex nature of the oceans. The law of the sea provides a legal framework for ensuring international cooperation in marine affairs, thereby safeguarding the common interests of the international community as a whole.[1]

These two basic functions – the spatial distribution of national jurisdiction and ensuring international cooperation between States – are not mutually exclusive, but must coexist in the law of the sea. While the first function of the law provides for the zonal management approach dividing the oceans into multiple jurisdictional zones, the second function requires a holistic or integrated management approach focusing on community interests. Thus the international law of the sea should be considered as a dual legal system comprising

[1] The 'common interest of the international community as a whole' or 'community interests' is an elusive concept and it is difficult, *a priori* to define it in the abstract. As Simma pointedly observed, the identification of common interests does not derive from scientific abstraction but rather flows from the recognition of concrete problems: B. Simma, 'From Bilateralism to Community Interest in International Law' (1994-IV) 250 *RCADI* pp. 235–243. In the law of the sea, one can say that community interests include marine environmental protection, the conservation of marine living resources and biological diversity, the management of the common heritage of mankind, suppression of piracy, and the maintenance of international peace and security at sea. In this book, the term 'common interests of the international community' and 'community interests' will be used interchangeably. See also chapter 14 of this book.

both the zonal and the integrated management approaches. Reconciliation between the two different approaches and between division and unity of the oceans should be an essential issue in the law.[2]

2 MARINE SPACES IN THE LAW OF THE SEA

2.1 Scope of the oceans in the law of the sea

The ocean as a subject of the law of the sea is one single unit and is essentially characterised by *the continuity of marine spaces*. In other words, as Gidel pointed out, the marine spaces governed by the law of the sea must communicate freely and naturally with each other all over the world.[3] This means that each marine space must be connected to another sea or the ocean by a narrow outlet, normally a strait. Accordingly, for instance, the law of the sea is not applicable to the Caspian Sea because it is separated from the ocean.[4] Moreover, in order to freely and naturally communicate through the ocean, the water level must essentially be the same. Indeed, it appears to be unreasonable to argue that rules of the law of the sea are applicable to a distinct body of water at an altitude different from sea level, such as a lake located in a mountain several hundred or even thousand metres high. It must be concluded, therefore, that rivers and lakes are part of terrestrial territory and are not governed by the law of the sea.[5] It is also to be noted that under the law of the sea, the ocean is understood to cover three elements, i.e. seabed and the subsoil, adjacent water column and the atmosphere above the sea.

2.2 Typology of marine spaces

As explained earlier, marine spaces are divided into several jurisdictional zones in the contemporary international law of the sea. On the basis of the national jurisdiction of the coastal State, these marine spaces can be divided into two main categories: marine spaces under national jurisdiction and spaces beyond national jurisdiction. The former category contains internal waters, territorial seas, international straits, archipelagic waters, the contiguous zone, the EEZ and the continental shelf, while the latter contains the high seas and the Area, namely the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. Further to this, the present writer proposes to divide the marine spaces under national jurisdiction into two sub-categories.

[2] The present writer presented the idea in: Y. Tanaka, *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea* (Farnham, Ashgate, 2008), in particular pp. 21–25.

[3] G. Gidel, *Le droit international public de la mer: le temps de paix*, vol.1. *Introduction, La haute mer* (reprint, Paris, Duchemin, 1981), p. 40.

[4] *Ibid*. This view is echoed by many writers, including: R. R. Churchill and A. V. Lowe, *Law of the Sea*, 3rd edn (Manchester University Press, 1999), p. 60; Nguyen Quoc Dinh, P. Daillier, M. Forteau and A. Pellet, *Droit International Public*, 8th edn (Paris, L.G.D.J., 2009), p. 1276; P. Vincent, *Droit de la mer* (Brussels, Larcier, 2008), pp. 11–12; L. Caflisch, 'Règles générales du droit des cours d'eau internationaux' (1989-VII) 219 *RCADI* p. 24; S. Vinogradov and P. Wouters, 'The Caspian Sea: Current Legal Problems' (1995) *ZaöRV* pp. 618–619; J.-P. Pancracio, *Droit de la mer* (Paris, Dalloz, 2010), p. 411.

[5] Gidel, *Le droit international public de la mer*, vol.1, pp. 40–42; Churchill and Lowe, *The Law of the Sea*, p. 60.

The first sub-category concerns marine spaces governed by territorial sovereignty. This category of marine spaces contains internal waters, territorial seas, international straits and archipelagic waters. Territorial sovereignty is characterised by completeness and exclusiveness. Territorial sovereignty denotes complete jurisdiction in the sense that it comprises three elements unless international law provides otherwise:

(i) Territorial sovereignty comprises comprehensive jurisdiction, which includes both legislative and enforcement jurisdiction, over the State's territory.
(ii) The State exercises its jurisdiction over all matters within its territory. In other words, territorial sovereignty contains no limit *ratione materiae*.
(iii) The State exercises its jurisdiction over all people regardless of their nationalities. Territorial sovereignty thus contains no limit *ratione personae*.

At the same time, territorial sovereignty is exclusive in the sense that only the State in question may exercise jurisdiction over its territory. In summary, in its territory, the State exercises legislative and enforcement jurisdiction over all matters and all people in an exclusive manner unless international law provides otherwise.

It is important to note that territorial sovereignty is exercisable solely within the territory in question. In this sense, territorial sovereignty is spatial by nature. A jurisdiction that relates to a certain space and can be exercised solely within the space in question may be called 'spatial jurisdiction'.[6] Territorial sovereignty is a typical example of spatial jurisdiction. In light of the comprehensive character of territorial sovereignty, one may call territorial sovereignty the complete spatial jurisdiction. In short, internal waters, territorial seas, international straits and archipelagic waters are marine spaces under territorial sovereignty or complete spatial jurisdiction.

The second sub-category relates to marine spaces beyond territorial sovereignty but under the national jurisdiction of the coastal State. It is clear that the EEZ and the continental shelf are included in this category.[7] Considering that the contiguous zone becomes part of the EEZ where it is established, it may not be unreasonable to put the contiguous zone into the same sub-category as the EEZ.[8]

The coastal State jurisdiction over the EEZ as well as the continental shelf – called sovereign rights – is limited to the matters defined by international law (limitation *ratione materiae*). In this regard, sovereign rights must be distinguished from territorial sovereignty per se, which is comprehensive unless international law provides otherwise. Apart from this, however, sovereign rights have commonalities with territorial sovereignty:

(i) Sovereign rights concern a certain space and can be exercised solely within the space in question, that is to say, the EEZ as well as the continental shelf. In this sense, such rights are spatial by nature.

[6] It would appear that the concept of territory is not wholly unambiguous in international law. Hence it would seem to be wise to use the term 'spatial' jurisdiction, not 'territorial' jurisdiction. In fact, Gidel used the term 'souveraineté spatiale', not 'souveraineté territoriale'. Gidel, *Le droit international public de la mer*, vol.1, p. 238.
[7] LOSC, Articles 56(1), 77(1). 1833 *UNTS* p. 3.
[8] Where the EEZ is not claimed, however, the contiguous zone forms part of the high seas.

(ii) Concerning matters defined by law, the coastal State may exercise legislative and enforcement jurisdiction in the EEZ as well as the continental shelf.
(iii) The coastal State exercises its jurisdiction over all people regardless of their nationalities within the certain space in question. Thus, sovereign rights contain no limit *ratione personae*. In this respect, jurisdiction over the EEZ as well as the continental shelf should be distinguished from personal jurisdiction.
(iv) Sovereign rights are exclusive in the sense that no one may undertake the exploration and the exploitation of natural resources without the express consent of the coastal State.

The essential point is that, in common with territorial sovereignty, the sovereign rights over the EEZ and the continental shelf are spatially limited by nature. The fact that jurisdiction can be exercised solely within the certain space is the essential element of spatial jurisdiction. The coastal State jurisdiction over the EEZ and the continental shelf is also essentially characterised by the spatial element. Hence, it may be argued that the sovereign rights over the EEZ and the continental shelf can be regarded as a sort of spatial jurisdiction, not as personal or any other type of jurisdiction, although it must be distinguished from territorial sovereignty.[9] Considering that, unlike territorial sovereignty, sovereign rights are limited in their material scope, however, these rights should be called limited spatial jurisdiction.[10]

In summary, spatial jurisdiction comprises both complete spatial jurisdiction (= territorial sovereignty) and limited spatial jurisdiction (= sovereign rights). In either case, it must be stressed that coastal State jurisdiction over marine spaces is spatial by nature. It follows from the above discussion that marine spaces in the law of the sea can be categorised as follows (see Figures 1.1 and 1.2):

(a) Marine spaces under national jurisdiction
  (i) Marine spaces under territorial sovereignty (or complete spatial jurisdiction): internal waters, the territorial sea, international straits, and archipelagic waters.
  (ii) Marine spaces under sovereign rights (or limited spatial jurisdiction): the contiguous zone (where the EEZ is established), the EEZ, and the continental shelf.

[9] J. Combacau, *Le droit international de la mer, Que sais-je?* (Paris, PUF, 1985), p. 21. This issue will be discussed in Chapter 4, sections 3.3. and 4.7. Coastal State jurisdiction over the EEZ and the continental shelf is sometimes described as 'functional jurisdiction'. This is not an unreasonable view. However, every jurisdiction is functional in the sense that certain functions are attributed to the jurisdiction. It appears that the functional nature is not an inherent feature of coastal State jurisdiction over the EEZ and the continental shelf.

[10] French writers call such jurisdiction 'la compétence territoriale limitée' or 'la compétence territoriale mineure'. See for instance, C. Rousseau, *Droit international public: les compétences*, vol. 3 (Paris, Sirey, 1977), p. 8; S. Bastid, *Droit international public: principes fondamentaux, Les Cours de droit* 1969–1970 (Université de Paris), p. 804; Nguyen Quoc Dinh *et al.*, *Droit international public*, p. 536. In the United Kingdom, Brierly contrasts the fullest rights over territory, namely, territorial sovereignty with 'minor territorial rights'. J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edn (Oxford, Clarendon Press, 1963), p. 162. Akehurst also argued that there are lesser rights over territory, that is to say, 'minor rights over territory'. P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. edn (London and New York, Routledge, 1997), p. 158. In Japan, Kuwahara categorised marine spaces according to 'la compétence territoriale majeure' and 'la compétence territoriale mineure': T. Kuwahara, *Introduction to International Law of the Sea* (in Japanese) (Tokyo, Shinzansya, 2002), pp. 18–22. In essence, limited spatial jurisdiction is equivalent to 'minor territorial rights' or 'la compétence territoriale limitée'.

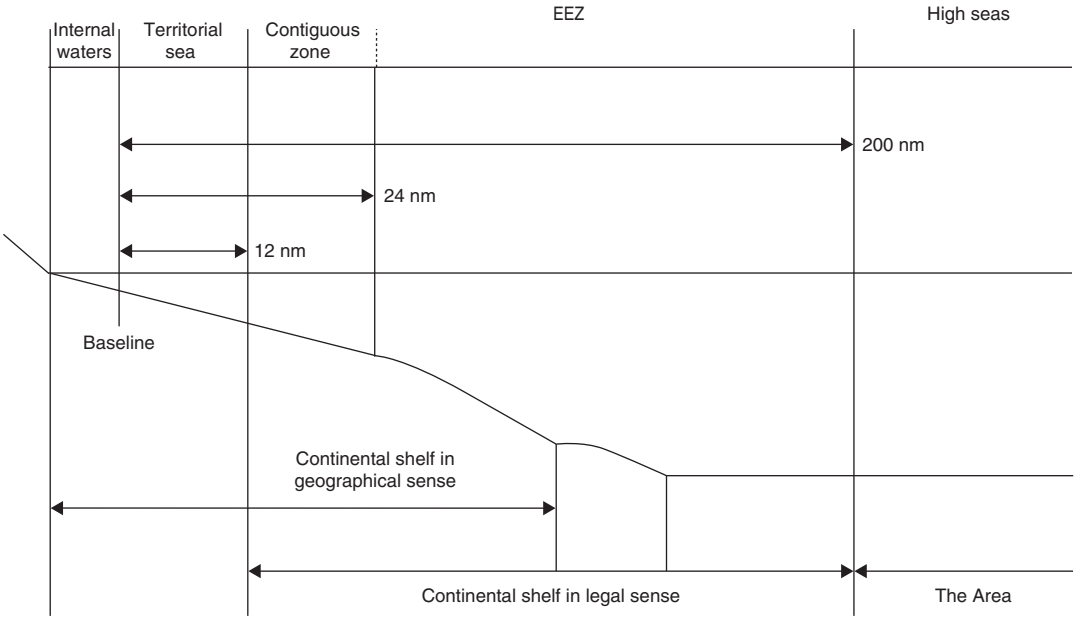

Figure 1.1. The case where the outer edge of the continental shelf does not extend up to 200 nautical miles

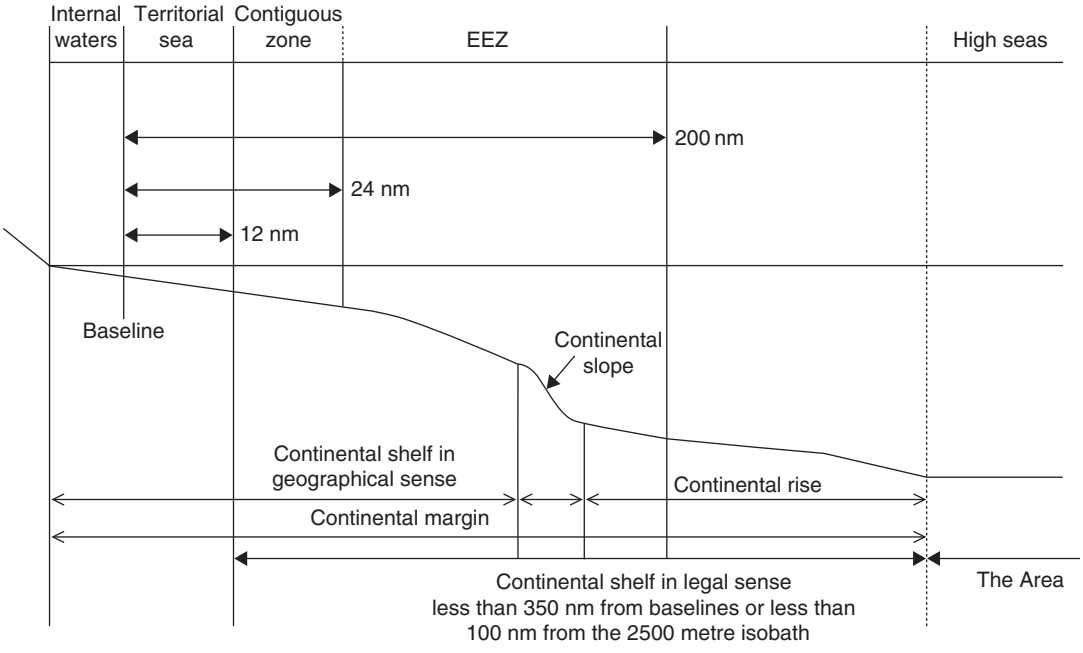

Figure 1.2. The case where the outer edge of the continental margin extends beyond 200 nautical miles from the baselines

(b) Marine spaces beyond national jurisdiction
The high seas and the Area.

Part I of this book will examine rules governing each jurisdictional zone according to this categorisation.

3 SOURCES OF THE INTERNATIONAL LAW OF THE SEA

3.1 Formal sources

As a preliminary consideration, it will be appropriate to briefly examine sources of the international law of the sea. As noted, the law of the sea is an inseparable part of international law in general. Accordingly, the law of the sea is generated from the same sources of international law set out in Article 38(1) of the Statute of the International Court of Justice.[11] Whilst, strictly speaking, Article 38(1) involves only the ICJ, this provision is generally accepted as the statement of sources of international law. Article 38(1) enumerates three formal sources of law, i.e. legal procedures by which a legal rule comes into existence:

(a) international convention, whether general or particular, establishing rules expressly recognised by the contesting States;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognised by civilised nations.

It is conceivable that general principles of law are of limited value in the context of the law of the sea. Thus, the principal focus must be on customary law and treaties.

(a) Customary law

Customary international law can be divided into two categories.

The first category is general customary law. While treaties are binding only upon the parties to them, it is widely accepted that rules of general customary law are binding upon all States in the international community. In this regard, the ICJ, in the *North Sea Continental Shelf* cases, stated that general or customary law rules and obligations 'by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour'.[12] Thus, rules of general customary law are also binding upon newly independent States, even though they did not participate in the formation of these rules concerned. Given that in the context of the law of the sea, there is no treaty to which all States are parties, rules of general customary law continue to be important. Customary law also comes into play in a situation where there is no specific rule in relevant treaties.

[11] For a recent monograph on sources of international law, see H. Thirlway, *The Sources of International Law* (Oxford University Press, 2014).
[12] ICJ Reports 1969, pp. 38–39, para. 63.

The second category involves special or local customary law, which is applicable only within a defined group of States. The well-known example of local customary law may be the practice of diplomatic asylum in Latin America. A special or local customary law may exist between only two States. In this regard, the ICJ in the *Right of Passage over Indian Territory* case held that: 'It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two'.[13]

Orthodox legal theory sees rules of customary law as resulting from the combination of two elements: an objective element of 'extensive and virtually uniform' State practice and the subjective or psychological element known as the *opinio juris*, i.e. a belief that the practice is rendered obligatory by the existence of a rule of law requiring it.[14] A clear statement of the two-element theory can be seen in the *Libya/Malta* judgment, which stated that: 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States'.[15]

Concerning the objective element, at least three issues arise. The first issue involves the question of what constitutes State practice. Some writers consider that only physical acts can count as State practice in the making of customary law. However, it appears that this restrictive view is not supported by the ICJ and States. The better view appears to be that, broadly, State practice includes not only physical acts, namely what they do, but also what they say. State practice also includes omissions because some rules of international law prohibit certain conduct by States. Specifically, evidence of State practice can be detected in diplomatic correspondence, policy statements, press releases, official manuals on legal questions, the opinions of official legal advisers, comments by governments on drafts produced by the International Law Commission, State legislation and national judicial decisions, etc.

The second issue involves a degree of uniformity of State practice. Whilst generality cannot be determined in abstract, it is generally recognised that universality is not required to establish a new rule of customary law. According to the ICJ, in order to deduce the existence of customary rules, it is sufficient that the conduct of States should, in general, be consistent with such rules.[16] In this regard, the Court further specified that general State practice includes the practice of States whose interests are specially affected.[17] Historically the practice of maritime States had great influence in the development of the law of the sea. However, as will be seen, the traditional law of the sea, which was designed to safeguard interests of maritime States only, was strongly criticised by the decolonised new States.

The third issue involves a time element in customary law-making. It can be presumed that normally a long passage of time is needed to formulate rules of customary international law. However, it appears that the ICJ, in the *North Sea Continental Shelf* cases, took a more flexible approach, stating that 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international

[13] ICJ Reports 1960, p. 39. [14] ICJ Reports 1969, pp. 42–44, paras. 73–77.
[15] ICJ Reports 1985, p. 29, para. 27. [16] The *Nicaragua* case (Merits), ICJ Reports 1986, p. 98, para. 186.
[17] ICJ Reports 1969, p. 43, para. 74.

law'.[18] The flexible approach may facilitate the formation of rules of customary law which may be suitable for a rapidly changing international society. However, care should be taken that the reduction of the time-element requirement does not directly support the doctrine of 'instant custom'.[19]

The subjective element, i.e, *opinio juris*, has been the subject of extensive debate among legal writers. The well-known paradox of *opinio juris* is that States cannot trust in the existence of a rule of customary law requiring them to act or refrain from acting, before a customary rule is established. At the initial stage of the formation of a rule of customary law, it is illogical to consider that States feel a conviction to comply with a rule of law since there is as yet no legal obligation. In response to this question, it would be sufficient to consider that, at the initial stage, the States concerned regard the practice as conforming to a rule which is a useful and desirable rule and one that should exist.[20] Considering that the formation of customary law is a gradual process, it may be argued that a legal conviction matures gradually.

An obvious difficulty concerning *opinio juris* involves finding the evidence for it. In spite of this difficulty, the majority opinion generally recognises the need for the subjective element in order to make custom as law distinct from custom as a mere fact. In this regard, it is notable that to a certain extent, the process of the formation of customary international law is being more institutionalised under the auspices of international organisations, such as the UN General Assembly. In fact, the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* held that UN General Assembly Resolutions 'provide evidence important for establishing the existence of a rule or the emergence of *opinio juris*'.[21] Hence the difficulty in finding evidence for *opinio juris* would not be a decisive reason to abandon this element.

In relation to this, it is to be noted that the ICJ did not mechanically apply the two-element test to the identification of a rule of customary law. For instance, the Court, in the *North Sea Continental Shelf* cases, rigidly applied the two-element test of customary law to the equidistance method and refused to admit the customary law character of that method. However, the Court did not apply to the equitable principles the rigid test of the two elements of custom and regarded the principles as a rule of customary law. While a comprehensive analysis of the ICJ's application of the two-element test is beyond the scope of this chapter, care should be taken in noting that in ICJ case law, the manner of the application of the test may vary on a case-by-case basis.[22]

Furthermore, some mention should be made of the doctrine of the persistent objector.[23] According to the doctrine of the persistent objector, a State which objects consistently to

[18] *Ibid*.
[19] It seemed that the ICJ was wary about supporting the doctrine of 'instant custom'. See the *Nicaragua* case (Merits), ICJ Reports 1986, p. 97, para. 184.
[20] H. Thirlway, *International Customary Law and Codification* (Leiden, Sijthoff, 1972), pp. 53–54; by the same writer, 'The Law and Procedure of the International Court of Justice: Part Two' (1990) 62 *BYIL* p. 43.
[21] ICJ Reports 1996, pp. 254–255, para. 70. See also J.-P. Pancracio, *Droit de la mer*, pp. 43–44 and 47.
[22] See P.-M. Dupuy, 'Le juge et la règle générale' (1989) 93 *RGDIP* pp. 569 *et seq*.
[23] Generally on this subject, see, for instance, J. I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *BYIL* pp. 1–24; P.-M. Dupuy, 'A propos de l'opposabilité de la coutume générale: enquête brève sur "l'objecteur persistant"', in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Paris, Pedone, 1991), pp. 257–272.