
International Law

Discussion Questions

Gleider Hernández, *International Law* (2nd edition, Oxford University Press, 2022)

Chapter 18, The Law of the Sea

Question 1. *'UNCLOS was the definitive codification of the law of the sea and has completely displaced (superseded) earlier customary international law.'* Discuss.

Students may recall the famous statement of the ICJ in *Nicaragua (Merits)* that treaties do not, as a general rule, supersede customary international law, which can exist in parallel with it. In that judgment, the ICJ was considering the UN Charter, which now has 193 States parties, and whether the rules within it had displaced, or existed in parallel, earlier customary international law. UNCLOS is a unique regime in that it elaborated upon and extended significantly the rules set out in the four 1958 Geneva Conventions on the law of the sea. Moreover, UNCLOS was concluded as a comprehensive framework in relation to all maritime zones, reframing existing zones (such as the territorial sea) and bringing new ones entirely into being (such as the exclusive economic zone). Finally, unlike the UN Charter and most multilateral treaties, the decade-long UNCLOS Conference resulted in a decision that UNCLOS was to be a 'package approach', in that no reservations were to be permitted. All of these features could be used to argue that unlike what the UN Charter, which was not meant to be quite as comprehensive and innovative, UNCLOS represents a paradigm shift in the law of the sea, a convention that has generally superseded pre-existing customary international law when they are in conflict.

However, students might do well to recall the objections of large developed States as to the balance struck in the original UNCLOS, as well as the 1994

Implementation Agreement that amended parts of the Convention. They might also wish to bear in mind the non-party status of the United States, the world's foremost maritime nation (both in military and commercial terms). The United States maintains that parts of UNCLOS reflect customary international law, but not the convention in its entirety. As such, it might be unwise to go so far as to insist that UNCLOS represents a *complete* replacement of pre-existing customary international law, as in many respects it operates alongside it.

Question 2. *'The Exclusive Economic Zone and the continental shelf govern essentially identical areas and are unnecessarily complex. It suffices simply to establish one concept to replace both categories.'* Do you agree with this statement? Give a reasoned answer.

The Exclusive Economic Zone (EEZ) and continental shelf in practice are tightly linked, and have a degree of overlap. For example, both can in principle extend up to 200 nm from the shore. However, the two ought not to be confused. Students would be advised first by recalling the core rules establishing each category, respectively.

The EEZ is a special zone that was first created in UNCLOS, in which a coastal State can claim certain sovereign rights and duties (e.g. exploration and exploitation, but also conservation) over natural resources, both living and non-living (UNCLOS, Arts 61-62). However, the coastal State is not sovereign, and must accord certain traditional high seas freedoms such as navigation and overflight (UNCLOS, Art 58).

Conversely, the continental shelf refers primarily to the submerged 'ledges' that project from the continental landmass and create zones of shallow waters. As with the EEZ, a coastal State has sovereign rights of exploration and exploitation (UNCLOS, Art 77). However, the continental shelf is defined, unlike the EEZ, purely by the seabed and subsoil, and does not cover the overlying waters (Art 1 CCS). Moreover, the continental shelf is not defined simply by reference to the

coastline; it follows the actual geographical features of the continental shelf and may extend beyond 200 nm, up to 350 nm from the coastline (Art 76(1) UNCLOS). Finally, States are deemed to have an 'inherent' right to the continental shelf (*North Sea Continental Shelf*), unlike the EEZ which was a creation of the UNCLOS.

Question 3. *'Maritime delimitation is an essentially judicial exercise of discretion, with no real legal rules governing how it is effectuated.'* Do you agree? Give a reasoned response.

Students taking a sceptical view on the legal conditions for maritime delimitation could point out the relatively sparse guidelines in UNCLOS, for example Article 15, which proposes that delimitation should proceed according to the principle of 'equidistance'. They might even wish to rely on the extent to which ICJ case law has relied on equitable considerations and special circumstances (eg *North Sea Continental Shelf*, *Gulf of Maine*, *Tunisia/Libya*) but in a haphazard manner, to the extent that they seem to endow the Court with a discretion to rule on the basis of 'equity'—which the ICJ itself suggested is a general principle of law (see *Gulf of Maine*).

Students that take a less categorical view, however, would make two points. First, they might point that the 'equity' that has been used by the ICJ and other international courts has always been authorised within the relevant treaty rule or customary law principle: it is equity *intra legem* ('within the law'). Secondly, they may note that this relatively uncodified area has seen a degree of systematisation in recent years. For example, in *Maritime Delimitation in the Black Sea* (2009), the ICJ suggested a three-step test of equidistance, special circumstances (such as islands or other geographical features) and proportionality. This test was deployed by the ITLOS in *Bay of Bengal*; and reaffirmed by the ICJ in cases including the *Peru-Chile Maritime Dispute* in 2014 and in the 2017 *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*. Such a test, though not devoid of subjectivity and discretion, lays

out an increased number of considerations which confine and limit judicial discretion.