



## Recent Irish State Practice on the Law of the Sea

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## IRISH STATE PRACTICE ON THE LAW OF THE SEA 2009 & 2010

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### Introduction

Ireland has played a leading role in developing and setting international standards for regulatory action in the field of maritime affairs over the past six decades. As a result, Irish state practice and policy in relation to the Law of the Sea is followed with great interest by practitioners and international lawyers worldwide. Indeed, international interest in Irish state practice may be traced back to the 1950s when Ireland became one of the first coastal States to establish a system of straight baselines following on from the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case and the subsequent codification of the applicable rules in the 1958 Convention on the Territorial Sea and Contiguous Zone.<sup>1</sup> Similarly, the landmark and dramatic decision of the Irish High Court in *ACT Shipping (Pte) Ltd v Minister for the Marine and Others* is frequently cited in many jurisdictions as an important statement of the law concerning the entitlement of a vessel in distress to enter a port of refuge.<sup>2</sup>

As noted in one commentary, this case ‘gives an almost textbook-like account

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<sup>1</sup> *Fisheries (United Kingdom) v Norway* [1951] ICJ Rep 116 (p.116, 128, 129, as corrected by *Erratum* of October 22, 1956). The Territorial Sea and Contiguous Zone, 516 *UNTS* 205. Ireland signed the 1958 Convention but did not subsequently ratify this treaty which entered into force for states parties on 10 September 1964. The relevant provisions on the baselines were subsequently in Part 11 of the 1982 United Nations Convention on the Law of the Sea. The principal instruments governing the baselines in Ireland today are the Sea-Fisheries and Maritime Jurisdiction Act 2006, the Maritime Jurisdiction Act (Charts) Order 1959, and the Maritime Jurisdiction Act 1959 (Straight Baseline) Order 1959 (into force, 1 January 1, 1960). For commentary on these instruments see, *inter alia*: R. Long, *Marine Resource Law*, (Dublin, Thomson Round Hall, 2007) pp. 121-130; United States Department of State (Bureau of Intelligence and Research) ‘Straight Baselines: Ireland’ Limits in the Seas, International Boundary Study, Series A, No.3 (The Geographer, Jan. 23rd, 1970); P. O’Higgins, ‘Note on the Maritime Jurisdiction Act 1959’ (1960) 9 *ICLQ* 325; C. Symmons, *Ireland and the Law of the Sea* (2nd ed., Round Hall Sweet & Maxwell, 2000), p.40; J. Edwards and M. Mellett, ‘Ireland’s Maritime Boundaries and the Prosecution of Offences Committed within the Territorial Seas of the State’ (1999) *University of Limerick Law Review* 91; C. Symmons, ‘The Background to the imposition of the straight baseline system around the Irish coast: An interesting episode in Anglo-Irish legal relations’ (1998) 13 *International Journal of Marine and Coastal Law* 47.

<sup>2</sup> [1995] 3 *IR* 407.

of how State practice may be established by a court of law as a basis for the definition of the relevant rule of international law".<sup>3</sup>

As an island nation with vital maritime interests, there is little doubt but that Ireland has punched above its weight on the international stage over the past fifty years or so and as a consequence has made a significant contribution to the codification and progressive development of the Law of the Sea.<sup>4</sup> In many ways, this work achieved its apogee under the direction of the late Ambassador Mahon Hayes at the Third United Nations Conference on the Law of the Sea which culminated in the adoption of the United Nations Convention on the Law of the Sea in 1982 (hereinafter the "1982 Law of the Sea Convention").<sup>5</sup> Since then, Ireland has remained very much at the forefront of international legal developments and a quick trawl through the latest law reports of the Superior Courts, statements of the Minister of Foreign Affairs in both Houses of the Oireachtas (the Irish Parliament), recent legislation and newspaper reports, as well as the official publications of government departments and state agencies, reveals that state practice and the underlying policy on the Law of the Sea remains relatively dynamic in Ireland. This brief report presents a short overview of some highlights on state practice and in some instances "inaction" on key issues during the period 2009-2010. For reasons of space, however, only the briefest of summaries and very little scrutiny can be undertaken here.

### **Government Departments and State Agencies**

The overall organisation of the various government department and state agencies with responsibility for maritime affairs remains somewhat fractious since the divestment of the Department of the Marine of a number of key functions in 2007 on the basis of political expediency.<sup>6</sup> Since then, it has become a relatively tough task to trace which public bodies are responsible for the various aspects of the maritime brief.

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<sup>3</sup> G. Biehler, *International Law in Practice: An Irish Perspective* (Dublin, Thomson Round Hall, 2005), p. 85.

<sup>4</sup> See Address by the President of Ireland, Mary McAleese to the International Court of Justice, The Hague, 2 May 2011.

<sup>5</sup> *Irish Treaty Series* No. 1 of 1996. Entered into force with respect to Ireland on 28 July 1996. On the contribution of the Irish Delegation to negotiations at the Third Conference, see, M. Hayes, *The Law of the Sea: The Role of the Irish Delegation at the Third United Nations Conference*, (Dublin, Royal Irish Academy, 2011).

<sup>6</sup> See 'Bringing national maritime policy back into line', *Irish Times*, 20 December, 2007.

During the report period, for instance, it appears that there were over ten government departments and two dozen statutory bodies involved in implementing various aspects of Ireland's Law of the Sea obligations under a broad range of international and regional agreements. As will be seen below, there also appears to be a general trend towards the establishment of coordination groups at an inter-departmental level to harmonise the approach of the various public bodies on issues of common concern.

Perhaps it is best to start with one government department where there is a degree of stability regarding its statutory functions and that is with the Department of Foreign Affairs and Trade (DFAT), which remains the lead department with responsibility for the formulation and implementation of Ireland's foreign policy in relation to the Law of the Sea generally, and for undertaking negotiations concerning the delimitation and delineation of the State's maritime boundaries in particular. In fulfilling their brief, members of the DFAT regularly participate in the work of several international and regional bodies. Thus, for example during the report period, the Legal Division represented Ireland at the twentieth meeting of States Parties to the 1982 United Nations Convention on the Law of the Sea in June 2010.<sup>7</sup>

Participation by other government departments in the work of international bodies varies considerably. This is evident if one looks at the Department of Agriculture, Fisheries and Food (DAFF), which is responsible for fisheries and seafood policy including representing Ireland in the various European Union (EU) technical groups that are working on the reform of the common fisheries policy. Representatives of DAFF also participated in the EU delegation at the annual meetings of a number of regional fisheries management organisations including the 29<sup>th</sup> Annual Meeting of the North East Atlantic Fisheries Commission. Perhaps a little surprisingly, Ireland is not listed as represented at the resumed Review Conference on the Straddling Fish Stocks Agreement, which was held at United Nations Headquarters in New York from 24 to 28 May 2010.<sup>8</sup> That said, this omission may be partly explained by the fact that fisheries management and conservation comes within the competence of the European Union under the common fisheries policy and the EU Delegation represented the interests of the Member States.

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<sup>7</sup> SPLOS/INF24, 1 July 2010.

<sup>8</sup> See United Nations, A/CONF.210/2010/INF/2, 2 June 2010. The full title of this Agreement is the 'Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks'. *Irish Treaty Series* No.2 Of 2004. Entered into force with respect to Ireland on the 18 January 2004.

Elsewhere in the public service, a number of key administrative functions in relation to the marine environment are now split between different government departments and state agencies. For instance, the Minister for Agriculture, Fisheries and Food is responsible for aquaculture and foreshore licensing in relation to sea-fisheries and aquaculture activities. This may be contrasted with role of the Minister for the Environment, Community and Local Government who is vested with responsibility for the administration of all other foreshore activities under the Foreshore Acts 1933-2011, such as foreshore consents for offshore wind farm development.<sup>9</sup> Significantly, the statutory functions relating to dumping at sea, including those that arise under the 1972 London Dumping at Sea Convention and its 1996 Protocol,<sup>10</sup> were transferred from the Minister for Agriculture, Fisheries and Food to the Environmental Protection Agency in 2009.<sup>11</sup> How this arrangement is going to deliver a coherent approach to the difficult task of integrated decision-making and maritime spatial planning will only be revealed in the fullness of time.

Further complexity to the maritime brief is added by the Department of Transport, which is home to the Maritime Safety Directorate and the Irish Coast Guard. The former Directorate discharges important functions under many international agreements concerning shipping, safety at sea, and vessel source pollution. Some of the achievements of the Coast Guard during the report period are considered below.

Mention should also be made of the Naval Service which undertakes law enforcement at sea including fisheries protection duties and in a number of other areas as an aid to the civil power. In relation to the latter, they are supported periodically by the Customs Service and An Garda Síochaná (Ireland's police force) who have important statutory powers in relation to certain offences committed at sea. Over the past decade, the three enforcement bodies have worked together under the *chapeau* of the National Inter-Agency Drugs Joint Task Force in combating drug trafficking at sea. In 2008, a conspicuous achievement of the Task Force was the detention of the yacht 'Dances with Waves' (an unregistered vessel) to the west of Ireland and the subsequent prosecution of the crew for a number of offences under the Misuse of

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<sup>9</sup> Foreshore (Amendment) Act 2011.

<sup>10</sup> *Irish Treaty Series* Nos. 114 and 115 of 2007. Entered into force with respect to Ireland on the 9 March 1982 and on the 24 March 2006 respectively.

<sup>11</sup> Foreshore and Dumping at Sea (Amendment) Act 2009. No. 39 of 2009.

Drugs Act 1977 and the Criminal Justice (Drug Trafficking) Act 1996.<sup>12</sup> This combined operation had an important international dimension as it also entailed the Irish law enforcement bodies working with the Maritime Analysis and Operations Centre - Narcotics (MAOC-N), which is based in Lisbon and is a regional organisation that facilitates the exchange of information regarding drug shipments by sea. The participating states in MAOC-N are Portugal, Spain, United Kingdom, Ireland, France, the Netherlands and Italy. The Agreement establishing MAOC-N entered into force with respect to Ireland in 2010.<sup>13</sup> The same year, MAOC-N was designated by Government Order as an organisation to which Part VIII of the Diplomatic Relations and Immunities Act 1967 applies, and this important regional organisation thus acquired legal personality in Ireland.<sup>14</sup>

Another important initiative which shows further integration of government bodies was the establishment of an Inter-Departmental Maritime Surveillance Co-ordination Group in 2009 with a view to enhancing safety and security within the Irish maritime domain.<sup>15</sup> The Department of Defence and the Naval Service are represented in this forum and recent parliamentary reports indicate that the Group is tasked with developing the technical and data-sharing framework to improve maritime safety.<sup>16</sup>

Also in 2009, some progress was made towards the coordination of the work of the various public bodies involved in the administration of maritime matters with the establishment of an Inter-Departmental Marine Coordinating Group, which brings together the various government departments who have responsibility for various aspects of the maritime portfolio. The remit of the Group extends to the promotion of employment in the maritime sector, the implementation of EU Directives pertaining to the marine, safety and surveillance, bringing forward draft-legislation on maritime issues, the protection of the marine environment, and the future development of offshore resources and harbours.

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<sup>12</sup>See, *The Times* 8 November 2008; *Irish Examiner*, 11 November 2008.

<sup>13</sup> Irish Treaty Series No. 9 of 2011.

<sup>14</sup> S.I. No. 550/2010 — Maritime Analysis and Operations Centre - Narcotics (Designation) Order 2010.

<sup>15</sup> Dáil Éireann Debate Vol. 725, No. 2, Col. 511, p.34.

<sup>16</sup> *ibid.*

Despite this progress, the division of responsibility for maritime matters between various public bodies remains diffuse in Ireland and at odds with developments in other EU Member States such as the United Kingdom, which has put the Marine Management Organisation on a statutory footing under the Marine and Coastal Access Act 2009.<sup>17</sup> The latter organisation is vested with responsibility for matters such as marine planning, fisheries, protecting the environment and marine regulation and licensing. Neither does it accord with the central thrust of the European Integrated Maritime Policy, which places considerable emphasis on the establishment of a holistic governance framework and the adoption of appropriate tools for integrated policy-making with a view to achieving the "sustainable use of the oceans and seas, building a knowledge and innovation base for maritime policy, delivering the highest quality of life in coastal regions, promoting Europe's leadership in international maritime affairs, and raising the visibility of Maritime Europe".<sup>18</sup> Somewhat disappointingly, the most recent reports from the European Commission on the EU's Integrated Maritime Policy suggest that Ireland is behind other EU Member States such as France and the Netherlands in establishing appropriate administrative structures to undertake policy coordination of sea-related matters in conformity with the applicable European guidelines on this matter.<sup>19</sup>

### **Mox Plant**

The dispute between Ireland and the United Kingdom over the commissioning and operation of the Mox Plant at Sellafield came to international attention close to ten years ago when the two countries had recourse to dispute settlement proceedings under the 1982 Law of the Sea Convention and pursuant to the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (the "OSPAR Convention").<sup>20</sup> As a conclusion to one set of proceedings, Ireland formally notified the Arbitral Tribunal established under Annex VII of the 1982 Law of the Sea

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<sup>17</sup> Received the Royal Assent on 12 November 2009.

<sup>18</sup> See European Commission, An Integrated Maritime Policy for the European Union, COM(2007) 575 final of 10.10.2007 and SEC(2007) 1278 of 10.10.2007: and Commission Staff Working Document, SEC(2007) 1278, Brussels, 10.10.2007. This followed the adoption of the Green Paper on a Future Maritime Policy for the European Union by the Commission, COM(2007) 574 final, 10.10.2007.

<sup>19</sup> COM(2009)540 final of 15.10.2009 and COM(2008) 395 final of 26.06.2008.

<sup>20</sup> See, *inter alia*: R Long, *Marine Resource Law*, (Thomson Round Hall, Dublin, 2007) at 640–642; N Lavranos, 'The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbitrator?', (2006) 19(1) *Leiden Journal of International Law* 223; R R Churchill and J Scott, 'The Mox Plant Litigation: The First Half-Life', (2004) 53(3) *International and Comparative Law Quarterly* 643.

Convention of the withdrawal of its claim against the United Kingdom on 15 February 2007. Subsequently, the Arbitral Tribunal issued an Order terminating the proceedings on 6 June 2008.<sup>21</sup> An interesting footnote to these proceedings is that the expenses of the Arbitral Tribunal were borne by both Parties in equal shares.<sup>22</sup> The termination of the international arbitration proceedings was entirely foreseeable in view of the previous landmark decision by the European Court of Justice regarding the relationship of European law and public international law in general, where the Court censured Ireland for bringing proceedings under the dispute-settlement procedure laid down in the 1982 Law of the Sea Convention, without having first informed and consulted the competent EU institutions, and thus had failed to comply with its duty of cooperation under Articles 10 and 292 of the European Community Treaty and Article 192 and 193 of the Treaty establishing the European Atomic Energy Community.<sup>23</sup> Importantly, the European Court of Justice held that the 1982 Law of the Sea Convention now forms an "integral part" of the European legal order and as a consequence the Court has exclusive jurisdiction to rule on disputes concerning the interpretation and application of the provisions of the Convention which form such a part.<sup>24</sup> For EU Member States, this decision appears to firmly close the door on future dispute settlement proceedings outside of the European legal order concerning matters under the 1982 Law of the Sea Convention where the EU exercises shared competence with the Member States. As an ironic postscript to the *Mox Plant* proceedings, it should also be mentioned that there were a number of press reports which revealed that the mixed-oxide fuel plant at Sellafield was shut down in rather dramatic fashion as a consequence of the Fukushima nuclear accident and the uncertainty that had arisen about the future of the nuclear industry in Japan.<sup>25</sup>

### **Agreements on Privileges and Immunities**

Ireland has ratified the Agreement on the Privileges and Immunities of the International Tribunal on the Law of the Sea bringing the total number of States

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<sup>21</sup> *The MOX Plant Case (Ireland v United Kingdom)*, Order No. 6 Terminating Proceedings, Permanent Court of Arbitration, 6 June 2008.

<sup>22</sup> *ibid.*

<sup>23</sup> Case C-459/03, *Commission v Ireland (Mox Plant)* [2006] ECR I-4635.

<sup>24</sup> Para. 82 of Case C-459/03 citing para. 36 of Case C-344/04 *IATA and ELFAA* [2006] ECR I-403.

<sup>25</sup> *The Guardian*, 3 August 2011.



Parties to that Agreement to 40.<sup>26</sup> The privileges and immunities accorded by the Agreement to the ITLOS and persons connected therewith are comparable to those accorded to other international bodies established under the 1982 Law of the Sea Convention such as the International Seabed Authority, which is subject to a similar Agreement: the Privileges and Immunities of the International Seabed Authority. The latter was also ratified by Ireland in 2011.<sup>27</sup>

### **Vessel source pollution**

During the report period, Ireland deposited its instrument of formal accession with the Secretary-General of the International Maritime Organisation to two important multilateral treaties, namely the International Convention on Civil Liability for Bunker Oil Pollution Damage on 23 December 2008, which entered into force with respect to Ireland on 23 March 2009;<sup>28</sup> and the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 Relating Thereto (commonly referred to as 'MARPOL 73/78') on 30 June 2009, which entered into force on 30 September 2009.<sup>29</sup>

The former treaty provides a framework for the adoption of uniform international rules and procedures for determining questions of liability and for adequate, prompt and effective compensation for damage caused by pollution resulting from discharge of bunker oil from ships. As such, it complements a number of other agreements on vessel source pollution that Ireland has ratified in recent years. These include *inter alia* the 1992 International Convention on Civil Liability for Oil Pollution Damage,<sup>30</sup> the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, and its 1976 Protocol.<sup>31</sup> The 1997 Protocol adds a new Annex VI to MARPOL 73/78 and provides regulations on the prevention of air pollution from ships. As an aside, it should be noted that this entails the application of the precautionary approach in line with

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<sup>26</sup> S.I. No. 44/2011. International Tribunal for the Law of the Sea (Privileges and Immunities) Order 2011. There is an *erratum* in the Explanatory Memorandum attached to the Order which refers to the International Seabed Authority and this should read the International Tribunal for the Law of the Sea.

<sup>27</sup> S.I. No. 44/2011.

<sup>28</sup> *Irish Treaty Series* No. 6 of 2010.

<sup>29</sup> *Irish Treaty Series* No. 16 of 2011.

<sup>30</sup> *Irish Treaty Series* No. 3 of 1995.

<sup>31</sup> *Irish Treaty Series* No. 1 and 2 of 1995.

Principle 15 of the Rio Declaration on Environment and Development. Undoubtedly, this is further evidence of the normative value of this concept in international law.

Apart from the threat posed by vessel source pollution, there have been a number of other important developments in Irish law concerning the protection of the wider marine environment including Ireland's ratification of the Bonn Agreement which are discussed further on below.

### **Safety of shipping**

Shipping makes a fundamental contribution to the economic well-being of Ireland and the Irish Maritime Development Office is tasked with making Ireland an international centre of excellence for shipping, shipping services, as well as for the training and education of seafarers. In this context, the enactment of the Merchant Shipping Act 2010 brings about a long-overdue updating and consolidation of the law regarding the safety of cargo and passenger vessels.<sup>32</sup> In particular, the 2010 Act updates the Merchant Shipping Acts 1894-2005 and provides for the further implementation by Ireland of the principal multilateral agreement on the subject, the International Convention for the Safety of Life at Sea (commonly referred to as the "SOLAS Convention").<sup>33</sup> Again for reasons of space, only brief mention can be made here of some of the principal features of this important instrument which brings Irish law into line with international best practice on the safety of shipping.

In general, the matters dealt with by the 2010 Act include a broad range of technical and practical matters regarding the construction rules for passenger vessels, cargo ship construction and survey rules, radio rules, navigation and tracking rules, cargo ship bulk carrier rules, fire protection rules, rules for life-saving appliances and arrangements and approval of service stations for inflatable life-saving appliances, rules governing access for persons with reduced mobility and disability on board vessels, as well as the enhancement of the powers of the Marine Casualty Investigations Board, and the overall strengthening of statutory provisions dealing with enforcement and compliance.

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<sup>32</sup> No14 of 2010.

<sup>33</sup> *Irish Treaty Series* No. 3 of 1984. Entered into force with respect to Ireland on 29 February 1984.

There are a number of important definitions in the 2010 Act. A brief perusal of Part 2, for example, reveals that the amendment Act applies to "Irish ships" but this does not include ships of the Naval Service of the Defence Forces which are wholly manned by personnel of that Service.<sup>34</sup> The *ratione materiae* of the 2010 Act is very wide in so far as it applies to cargo, passenger, fishing vessels and leisure craft. Indeed, one particularly laudable feature of this weighty instrument is that it provides a legal basis for the Minister to make regulations for different classes of vessels such as the making of regulations for the safety of passenger boats, fishing vessels, and pleasure craft.<sup>35</sup> This classification of vessels according to their use and area of operations clearly accords with international best practice and it may lessen the regulatory burden borne by the owners and operators of small fishing vessels and pleasure craft in the longer-term.

The statute is well structured and Parts 2 and 3 are given over to updating the Merchant Shipping Acts 1894-2005 including the Merchant Shipping (Safety Convention) Act 1952 with a view to implementing various provisions of the SOLAS Convention. In particular, these parts set down the rules that apply to the construction of passenger steamers (ships), navigation, tracking, bulk carriers, as well as rules for the categorisation of vessels under safety regulations. In line with recent changes in Irish law, Part 4 deals with access for persons with reduced mobility to passenger vessels and these provisions are fully in line with the principal aims of the Disability Act 2005.<sup>36</sup>

Core elements of the 2010 Act are the provisions that aim to enhance the powers of the Marine Casualty Investigations Board (the "Board").<sup>37</sup> In order to understand the significance of these provisions it is relevant to recall that there have been a number of high profile incidents in recent years regarding the recovery of vessels from the seabed in order to facilitate investigations by the Board. In such instances, the investigations conducted by the Board do not 'attribute blame or fault'

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<sup>34</sup> s.2 of the Merchant Shipping Act 2010. Ships that are entitled to fly the national colours and assume national character in Ireland are defined under s.9 of the Mercantile Marine Act 1955 as (a) State-owned ships; (b) ships which are wholly owned by persons being citizens of Ireland (hereinafter referred to as Irish citizens) or Irish bodies corporate and are not registered under the law of another country; (c) other ships registered or deemed to be registered under this Act.

<sup>35</sup> S.15 of the Merchant Shipping Act 2010.

<sup>36</sup> No. 14 of 2005.

<sup>37</sup> The Marine Casualty Investigation Board (MCIB) was established on 5 June, 2002 under s.7(1) of the Merchant Shipping (Investigation of Marine Casualties) Act 2000. No.14 of 2000.

but are aimed at facilitating the making of recommendations to the Minister for Transport for the avoidance of similar casualties in the future.<sup>38</sup> In the relatively brief period of the time since its establishment, the Board has been busy and prior to the enactment of the 2010 Act there were several tragedies on the Irish coast. Most notably, two Irish registered fishing vessels, the *Maggie B* and the *Pere Charles*, were raised from the seabed of the territorial sea, approximately five miles south of Hook Head in County Waterford, in 2007.<sup>39</sup> In light of these tragic events, one of the significant features of the 2010 Act is that it closes an obvious lacuna in Irish law by providing a solid legal plinth in Part 5 of the Act for the raising of a sunken vessel for the purpose of 'examining it and the making of arrangements for its inspection, storage and, if necessary, disposal in due course.'<sup>40</sup> From an international law perspective, it is significant to note that there is an extremely expansive definition of a 'vessel' in this part in so far as it has the meaning assigned to it under the Merchant Shipping Act 2000 and in addition extends to all or any of the following: '(a) a vessel which is sunk, partially sunk, wrecked, grounded, stranded or abandoned, (b) any part of such a vessel, and (c) any article, thing or collection of things being or forming part of the tackle, equipment, cargo, stores, bunkers, oils or ballast of a wrecked vessel.'<sup>41</sup>

In addition, it is also worth noting that the new statutory provisions apply to the raising of foreign flagged vessels from the seabed. In such cases, the diplomatic agent or consular officer of the foreign State who is authorised by any treaty arrangement between Ireland and that State, in which (a) the vessel was registered when it sank, or (b) the owners of the vessel resided, shall, in the absence of the owners and of the master or other agent of the owners, be deemed to be the agent of the owners, as far as relates to the custody and disposal of the vessel.<sup>42</sup>

### **Search and Rescue**

The Irish Coast Guard is responsible for search and rescue functions and has a wide remit under several international agreements concerning the safety of life at sea.

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<sup>38</sup> s.25(2) of the Merchant Shipping (Investigation of Marine Casualties) Act 2000.

<sup>39</sup> See *Irish Times*, 11 November 2007.

<sup>40</sup> s.75 of the Merchant Shipping Act 2010.

<sup>41</sup> S.74 of the Merchant Shipping Act 2010.

<sup>42</sup> S.81 of the Merchant Shipping Act 2010.

Suffice to note here that the 1982 Law of the Sea Convention requires that every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service.<sup>43</sup> Similarly, States Parties to the 1979 International Convention on Maritime Search and Rescue, such as Ireland, must ensure that assistance be provided to any person in distress at sea.<sup>44</sup> In this context, they must 'do so regardless of the nationality or status of such person or the circumstances in which that person is found'.<sup>45</sup> A similar duty to save life arises under the 1989 International Convention on Salvage and under the Merchant Shipping (Salvage and Wreck) Act 1993.<sup>46</sup>

In 2010, the Department of Transport published the *Irish National Maritime Search And Rescue (SAR) Framework* which provides guidance on the organisation of the search and rescue services in Ireland. This framework applies to emergency events occurring within 'the Irish Search and Rescue Region up to the high water mark, within ports as applicable and on the inland waterways as agreed with An Garda Síochána'.<sup>47</sup>

The on-going contribution of the Coast Guard to the safety of shipping and leisure craft on the Irish coast should not be underestimated and during 2010, they are reported as responding to 1,839 marine emergency incidents, a decrease of 54 from the number of incidents that were reported in 2009.<sup>48</sup> The total number of people saved or assisted was 3,570, which is up 443 from the number reported in 2009.<sup>49</sup> Many of these search and rescue operations related to foreign flagged vessels.

### **Safety of Navigation**

On the subject of maritime safety, statutory responsibility for the provision and maintenance of the various aids to navigation (lighthouses, buoys and beacons) around Ireland and the United Kingdom is vested in the three venerable General

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<sup>43</sup> Article 98(2) of the 1982 United Nations Convention on the Law of the Sea.

<sup>44</sup> Annex Chapter 2.1.10 of the International Convention on Maritime Search and Rescue. *Irish Treaty Series* No.2 of 1994.

<sup>45</sup> *ibid.*

<sup>46</sup> Article 10 of the 1989 International Convention on Salvage. Entered into force with respect to Ireland on 14 July 1996 *Irish Treaty Series* No.1 of 1999. s.7 of the Merchant Shipping (Salvage and Wreck) Act 1993, No.34 of 1993.

<sup>47</sup> Para. 1.1.2 of the *Irish National Maritime Search And Rescue (SAR) Framework*.

<sup>48</sup> See statements made by Minister for Transport, Tourism and Sport, Deputy Leo Varadkar, to the Select Sub-Committee on Transport, Tourism and Sport Debate in the Dáil, 12 July 2011.

<sup>49</sup> *ibid.*

Lighthouse Authorities, namely: Trinity House, which was first established in 1514; the Commissioners of Northern Lighthouses; and the Commissioners of Irish Lights.<sup>50</sup> The three Lighthouse Authorities have had an illustrious history and provide an invaluable service to all seafarers irrespective of nationality. One of the principal challenges for the Authorities is to secure adequate fiscal support to keep the system of navigation aids fully operational. Traditionally the Authorities were financed from a number of sources including the General Lighthouse Fund, which was first put on a statutory footing in 1898. The Fund depends mainly upon the collection of light dues charged on commercial shipping at ports in Ireland and the United Kingdom.<sup>51</sup> Financial-aid from the general Lighthouse Fund is supplemented by a contribution from the Irish Exchequer towards the cost of providing services in Ireland. In 2011, it was reported in the Dáil that the Minister for Transport in Ireland and the Minister for Transport in the United Kingdom had concluded a bilateral agreement in 2010 under which Ireland had committed itself to a process aimed at facilitating the Commissioners of Irish Lights becoming self-financing for its activities in the State by 2016.<sup>52</sup> To this end, the two Lighthouse Authorities were reported as considering proposals aimed at increasing Irish light dues income over future years.<sup>53</sup>

### **Seafarer's rights and the 2006 Maritime Labour Convention**

Since time immemorial, a regrettable feature of the global shipping industry has been the frequent and unscrupulous maltreatment of seafarers by ship owners and ship operators. In recent years, there have been a number of press reports in Ireland that have raised public awareness of this issue. In this context it is important to recall that the 1982 Law of the Sea Convention sets down, amongst other matters, the obligations of a flag State with regard to labour conditions, crewing and social matters on ships that fly its flag.<sup>54</sup> In light of this obligation, a particularly welcome development in Irish law is the enactment of Part 6 of the Merchant Shipping Act 2010, which gives effect to the Maritime Labour Convention that was adopted by the

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<sup>50</sup> s.195 of the Merchant Shipping Act 1995 in respect of the United Kingdom and s.634 of the Merchant Shipping Act 1894 in respect of Ireland.

<sup>51</sup> See Report and Accounts on the General Lighthouse Fund for the year ended 31 March 2009 Presented to Parliament by the Secretary of State for Transport pursuant to s. 211(5) of the Merchant Shipping Act 1995. House of Commons 2010

<sup>52</sup> See statements made by Minister for Transport, Tourism and Sport, Deputy Leo Varadkar, to the Select Sub-Committee on Transport, Tourism and Sport Debate in the Dáil, 12 July 2011.

<sup>53</sup> *ibid.*

<sup>54</sup> Article 94 of the 1982 Law of the Sea Convention

International Labour Organisation in Geneva in 2006.<sup>55</sup> Essentially, Part 6 of the Merchant Shipping Act 2010 aims to ensure that the employment and social rights of seafarers on ships that fly the Irish flag are fully implemented. Under the 2010 Act, authorised persons may inspect any ship for the purpose of seeing that it is properly certified and is compliant with the 2006 Convention. Moreover, the Act also requires that Maritime Labour certificates must be issued as a declaration of compliance. The penalty for non-compliance with regulations is a maximum fine of €5,000 on summary conviction, or to such lesser amount as specified in regulations in respect of the offence. The Minister of Transport is empowered to make an application to a court for an order seeking compliance with the regulations or the taking of corrective measures. Although the scheme of protection established pursuant to the 2010 Act only applies to Irish ships and seafarers sailing on those ships, these measures ought to improve the quality and attractiveness of the maritime labour environment for the shipping industry in Ireland and thereby sends out a strong message regarding the protection of seafarer's rights at a global level.

### **Protection of the marine environment**

During the report period, there were a number of important publications on the status of the marine environment in sea areas adjacent to Ireland. Most notably, the Quality Status Report 2010, which was published by the OSPAR Commission, presents a comprehensive evaluation of quality and status of the marine environment in the North-East Atlantic.<sup>56</sup> The overall assessment presented for Region III, which stretches from the continental shelf to the west of Ireland to the semi-enclosed Irish Sea, is somewhat like the Curate's egg, that is to say, good and bad in places. The relevant sections in the report notes, for example, that many bays and estuaries are experiencing eutrophication from anthropogenic impacts from agricultural run-off.<sup>57</sup> The levels of heavy metal concentrations in sediment, fish and shellfish are deemed by the report to be at 'unacceptable levels'.<sup>58</sup> In addition, the high levels of litter on Irish beaches, the unsustainability of fishing activity on certain fish stocks, as well as

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<sup>55</sup> At the time of writing, Ireland has not yet ratified this Convention. In 2007, the EU invited Member States to ratify the Convention by the end of 2010. The provisions for bringing into force the Convention are complex and in 2011 there were only 16 ratifications.

<sup>56</sup> OSPAR Commission, *Quality Status Report 2010*, Regional Summaries, pp.155-157.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

the effects of extensive coastal development and climate change, remain an 'ongoing concern'.<sup>59</sup> Overall, however, the report concluded that the quality status of Region III was 'generally good'.<sup>60</sup> The report calls for caution regarding the future development of offshore wind farms as little is known about the long-term ecosystem effects of these types of developments.<sup>61</sup> In the context of the *Mox Plant* proceedings discussed above, it is also significant that the report notes that the region has benefitted from a reduction in the discharge of radionuclides from the nuclear sector and from discharge of radioactive technetium from nuclear reprocessing activities at Sellafield in the United Kingdom is mentioned specifically.<sup>62</sup>

There have been some major developments within regional marine environmental law that are relevant to Ireland. These developments have increased significance in light of the difficulties encountered by the various United States federal agencies in dealing with the Deepwater Horizon oil spill in the Gulf of Mexico. Most notably, Ireland became a party to the Bonn Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances in January 2010.<sup>63</sup> This regional treaty which now has ten Contracting Parties provides a framework for dealing with both accidental and illegal pollution from shipping, offshore oil and gas operations, as well as from other maritime activities.<sup>64</sup> The treaty, which was originally concluded by States bordering the North Sea in response to the pollution caused to south coast of the United Kingdom from the loss of the *Torrey Canyon* in 1967, was substantially revised in 1983. In 2001, the text of the Bonn Agreement was amended again to facilitate the accession of Ireland.<sup>65</sup> More specifically, the legal definition of the 'North Sea' was amended for the purposes of the Agreement to include, *inter alia*, 'other waters, comprising the Irish Sea, the Celtic Sea, the Malin Sea, the Great Minch, the Little Minch, part of the Norwegian Sea, and parts of the North East Atlantic, bounded on the west and north by the line

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<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.* at 156.

<sup>63</sup> The text of the Bonn Agreement has not yet been published in the Treaty Series.

<sup>64</sup> Belgium, Denmark, France, Germany, Ireland, the Netherlands, Norway, Sweden, the United Kingdom, and the EU. Spain has observer status.

<sup>65</sup> Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances, 1983, as amended by the Decision of 21 September 2001 by the Contracting Parties to enable the Accession of Ireland to the Agreement.



defined in Part II of the Annex to this Agreement'.<sup>66</sup> This amendment nearly doubles the size of the maritime area that comes under the scope of the Agreement. Following-up on Ireland's ratification, the Ministerial Meeting of the Bonn Agreement was held in Dublin Castle in November 2010 and this resulted in the adoption of the Bonn Agreement Action Plan and a ministerial statement referred to as the 'Dublin Declaration'.<sup>67</sup> In the words of the press statement issued by the Bonn Agreement Secretariat at the time of the Dublin meeting:

'The Action Plan will now further strengthen regional cooperation on prevention, preparedness and response to marine pollution from shipping and other maritime activities, including concrete actions on aerial and satellite surveillance of maritime activities, capacities for pollution response, enforcement of environmental rules and standards, and programmes for research and development. The Action Plan also promotes a Bonn Agreement area-wide risk assessment that will take into account the environmental sensitivity of marine and coastal areas and adequate balances of resources for response work.'<sup>68</sup>

The adoption of the Action Plan and the Dublin Declaration demonstrate a clear political commitment by the Contracting Parties to undertake appropriate pollution preparedness and response work at a regional level in north-west Europe.

Apart from the ratification of the Bonn Agreement, Ireland has taken a number of important legislative initiatives to improve the quality of the marine environment. Much effort has been directed towards the implementation of a new generation of EU directives that put in place a science-driven iterative process for the management and regulation of the marine environment. In particular, the transposition into Irish law of the Marine Strategy Framework Directive is a critical step towards achieving good environmental status of marine waters by the year 2020.<sup>69</sup> The national transposition

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<sup>66</sup> Article 2 of the Bonn Agreement.

<sup>67</sup> See [www.bonnagreement.org/eng/doc/MMC\\_invitation\\_enclosure.pdf](http://www.bonnagreement.org/eng/doc/MMC_invitation_enclosure.pdf).

<sup>68</sup> Press Statement, 24 November 2010. Available at: [www.bonnagreement.org/eng/doc/PR\\_10\\_BONN\\_2010\\_final.pdf](http://www.bonnagreement.org/eng/doc/PR_10_BONN_2010_final.pdf)

<sup>69</sup> European Communities (Marine Strategy Framework) Regulations 2011. S.I. No. 249 of 2011. Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) OJ L 164/19, 25 June 2008. For commentary on this Directive see R Long, 'The EU Marine Strategy Framework Directive: A New European Approach to the Regulation of the Marine

measures, which should have been undertaken by 2010 but came into being the following year, apply to marine and coastal waters where the State exercises jurisdiction.<sup>70</sup> They also set down a requirement that account must be taken [by Ireland] of the transboundary effects on the quality of the marine environment of third States in the same marine region.<sup>71</sup> In line with the scheme of the Directive, the said regulations set out a schedule on how this is to be achieved as well as a number of milestones including: an initial assessment of the status of Ireland's marine waters, a determination of good environmental status (what this means is spelt out in further detail in a European Commission Decision),<sup>72</sup> and the establishment of a series of environmental targets and associated indicators by 2012;<sup>73</sup> following on from this, the establishment and implementation of monitoring programmes for the ongoing assessment and regular updates of targets by 2014; and then the most difficult element, which is the design and implementation of a programme of management measures by 2016.<sup>74</sup>

Dumping at sea is well regulated at a regional and international level, and the principal threat to the marine environment now comes from the dumping of dredged material and from the residual threat posed by munitions dumped after the Second World War. In this regard, the Quality Status Report 2010 points out that the 'dumped munitions in the sea are a historical legacy representing a risk to fishermen, other coastal users and marine species.'<sup>75</sup> As noted previously, the Environmental Protection Agency (EPA) is the statutory body in Ireland vested with the power to issue permits under the Dumping at Sea Acts 1996 to 2010. In line with the general thrust of the 1972 London Convention and 1996 Protocol, as well as the 1992 OSPAR Convention, these statutes prohibit the dumping at sea from vessels, aircraft, or offshore installation of a substance or material unless appropriately authorised by the

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Environment, Marine Natural Resources and Marine Ecological Services', 29 (1) (2011) *Journal of Energy and Natural Resources Law* 1; A Trouwborst & H Harm, 'Comparing European Instruments for Marine Nature Conservation: The OSPAR Convention, the Bern Convention, the Birds and Habitats Directives, and the Added Value of the Marine Strategy Framework Directive' (2011) 20(4) *European Energy and Environmental Law Review* 129.

<sup>70</sup> Regulation 3(1) of European Communities (Marine Strategy Framework) Regulations 2011.

<sup>71</sup> *ibid.*

<sup>72</sup> Commission Decision of 1 September 2010 on criteria and methodological standards on good environmental status of marine waters OJ L 232/14, 2.9.2010.

<sup>73</sup> Regulation 5(3) of European Communities (Marine Strategy Framework) Regulations 2011.

<sup>74</sup> *ibid.*

<sup>75</sup> OSPAR Commission, *OSPAR Quality Status Report 2010*, pp.110-112.

EPA. In 2010, the EPA published a Guidance Note that offers useful background information on how the dumping at sea permit system operates in practice as a 'quasi-judicial process' in Ireland.<sup>76</sup> A brief perusal of the scheme set out in the Note reveals that the consent process is rigorous and appears to conform to international best practice. This assertion is also borne out if one examines the Registry of Dumping Permits maintained by the EPA in so far as it appears that only one permit was issued in 2010, and this related to the dumping of 36,000 tonnes of dredged material by the Department of Defence in a position 5.5 km offshore from Power Head, County Cork.<sup>77</sup> This is a marked improvement from the position in the early 1990s when close to two dozen consents to dump at sea were issued annually in Ireland.<sup>78</sup>

## Whaling

Irish law on whaling was influenced by the ratification by Ireland of a number of international agreements on the subject in the 1930s and 1940s.<sup>79</sup> Today, the law on whaling is well settled in so far as commercial whaling was prohibited in Ireland as far back as 1937.<sup>80</sup> More recently, Ireland ratified the 1946 International Convention for the Regulation of Whaling in 1985 and has since played an active part in the work of the International Whaling Commission (IWC).<sup>81</sup> The latter organisation is vested with important functions concerning conservation and management of whale stocks at a global level. Since ratification of the 1946 Convention, Irish foreign policy on whaling has supported the IWC moratorium on commercial whaling. In particular, Ireland has consistently opposed Japan's scientific whaling programme, both at meetings of the IWC and by the Minister of Foreign Affairs working through

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<sup>76</sup> EPA, Dumping at Sea Permit: Application Guidance Note. Available at: [www.epa.ie/downloads/forms/lic/das/DaSGuidanceV1.pdf](http://www.epa.ie/downloads/forms/lic/das/DaSGuidanceV1.pdf).

<sup>77</sup> This Registry must be maintained pursuant to s.5(9)(a) of the Dumping at Sea Acts 1996 to 2010. For further information see:

[www.epa.ie/downloads/forms/lic/das/Dumping%20at%20Sea%20Register%20issued%202010.pdf](http://www.epa.ie/downloads/forms/lic/das/Dumping%20at%20Sea%20Register%20issued%202010.pdf)

<sup>78</sup> See, R Long, *Marine Resource Law*, *op.cit.* note 1, pp. 604-612.

<sup>79</sup> International Convention for the Regulation of Whaling, Geneva, 24 September, 1931. *Irish Treaty Series* No 2 of 1938; International Agreement for the Regulation of Whaling (with Final Act of the Conference) London, 8 June, 1937, *Irish Treaty Series* No 3 of 1938; Protocol to the International Agreement of 8 June, 1937, for the Regulation of Whaling, London, 24 June, 1938. *Irish Treaty Series* No 3 of 1940.

<sup>80</sup> Whale Fisheries Act 1937, No.4 of 1937.

<sup>81</sup> Entered into force with respect to Ireland on 2 January 1985. *Irish Treaty Series* 2010 No.21.

diplomatic channels.<sup>82</sup> Thus, for example, Ireland was one of 40 countries that voted in favour and passed an IWC Resolution in 2007 calling on Japan, *inter alia*, to 'suspend the lethal aspects of its scientific whaling programme indefinitely' conducted within the Southern Ocean Whale Sanctuary.<sup>83</sup>

At the IWC, Ireland is clearly aligned with the anti-whaling states in the on-going controversy surrounding scientific whaling. The current Commissioner from Ireland to the IWC, Mr. John Fitzgerald, attended the 61<sup>st</sup> and 62<sup>nd</sup> Annual Meeting of the IWC, which took place in Madeira and in Morocco in June 2009 and 2010 respectively.<sup>84</sup> At the 61<sup>st</sup> Meeting, Ireland associated itself with the concerns voiced by New Zealand and others regarding Japan's whaling under special permit and recorded their opposition to such programmes.<sup>85</sup> During the course of deliberations on the work of the Scientific Committee on small cetaceans, Ireland expressed disquiet regarding the take by Japan of Dall's porpoise, which is a species of small porpoise found in the North Pacific. Moreover, both Finland and Ireland requested information from Japan regarding the implementation of the new method of 'potential biological removal' for setting catch limits for such species.<sup>86</sup> Ireland also sought clarification regarding the progress that had been made since the previous year with respect to reducing direct takes of the boto in Brazil, Colombia, Peru, and Venezuela. Boto is the Portuguese name given to a river dolphin found in the Amazon and in South America.

Ireland's policy on commercial whaling is further complicated by the evolving nature of EU's policy on this matter. The EU has observer status at the IWC and is not party to the 1946 Convention. Conversely, twenty-three Member States are party to the 1946 Convention. At its March 2009 meeting, the EU Environment Council adopted a decision establishing the position to be adopted on behalf of the EU at three

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<sup>82</sup> See written Answer by the Minister for Foreign Affairs to question 31750/07 on Whale Conservation, 29 November 2007. *Dáil Eireann Debates* Vol. 642 No. 5.

<sup>83</sup> *Ibid.* See Resolution 2007-1, 59th IWC Annual Meeting, Anchorage USA, 2007.

<sup>84</sup> Annex A of the Chair's Report of the 61<sup>st</sup> and 62<sup>nd</sup> Annual Meetings of the International Whaling Commission (IWC). Available at:

[http://iwcoffice.org/\\_documents/meetings/madeira/ChairsReport2009.pdf](http://iwcoffice.org/_documents/meetings/madeira/ChairsReport2009.pdf); and at [http://iwcoffice.org/\\_documents/meetings/agadir/ChairsReportWeb.pdf](http://iwcoffice.org/_documents/meetings/agadir/ChairsReportWeb.pdf).

<sup>85</sup> See Chair's Report of the 61st Annual Meeting of the International Whaling Commission (IWC) available at: [http://iwcoffice.org/\\_documents/meetings/madeira/ChairsReport2009.pdf](http://iwcoffice.org/_documents/meetings/madeira/ChairsReport2009.pdf).

<sup>86</sup> *ibid.*

annual meetings of the IWC between 2009 and 2011.<sup>87</sup> A brief glance at the substance of this decision reveals that the EU supports the current moratorium on commercial whaling, but could support proposals for the management of aboriginal subsistence whaling, provided certain conditions were fulfilled. The overarching objective of EU in relation to the IWC is to ensure an effective international regulatory framework for the conservation and management of whales.

Following on from this and during the course of the debate on the 'Future of the IWC' at the 62<sup>nd</sup> Annual Meeting, Ireland supported the EU position and emphasised the importance of the role of the organisation as the world's foremost authority on the conservation and management of whales.<sup>88</sup> Moreover, while acknowledging the divergent viewpoints of the Contracting Parties on some of the principal conservation issues, Ireland pointed out that there was a greatly increased level of international understanding on how to deal with current challenges faced by the IWC. The Chair's Report on the 62<sup>nd</sup> Annual Meeting records that Ireland drew attention to a number of important matters facing the organisation including trade, catch limits, sanctuaries, conservation, as well as the emerging threats to cetaceans.<sup>89</sup> Italy supported Ireland's statement on the future of the IWC.<sup>90</sup> On the issue of small cetaceans, Ireland supported the view expressed by Switzerland that all cetaceans come within the remit of the IWC, or in the words of the report on the session: 'all cetaceans fall under the application of the IWC.'<sup>91</sup>

### **Offshore oil and gas**

A protracted dispute has persisted in Ireland over the development of the Corrib gas field on the north-west coast of Ireland. Among the issues that arose during the course of a number of technical studies on the Corrib field development were concerns regarding responsibility for the safety of offshore pipelines and for policing

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<sup>87</sup> EU Council Decision 7146/09 of 3 March 2009 establishing the position to be adopted on behalf of the European Community at the next three annual meetings and the related inter-sessional meetings of the International Whaling Commission with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule.

<sup>88</sup> Chair's Report of the 62<sup>nd</sup> Annual Meeting of the International Whaling Commission (IWC) available at: [http://iwcoffice.org/\\_documents/meetings/agadir/ChairsReportWeb.pdf](http://iwcoffice.org/_documents/meetings/agadir/ChairsReportWeb.pdf).

<sup>89</sup> *ibid.* at p.9.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.* p.27.

the conditions under which safety related consents are granted by licensing bodies. The Petroleum (Exploration and Extraction) Safety Act 2010 addresses these concerns in primary legislation and confers statutory responsibility for the safety of petroleum exploration and production on the Commission for Energy Regulation and thus brings about important changes of the law pertaining to exploration and exploitation of offshore hydrocarbons. This in turn necessitated the amendment of a whole raft of statutes that regulate offshore activities.<sup>92</sup> Although the enactment of the Petroleum (Exploration and Extraction) Safety Act 2010 was principally driven by concerns regarding the safety measures that apply to downstream gas pipelines, this instrument is nonetheless particularly timely in view of the difficulties previously mentioned surrounding the Deepwater Horizon incident in the Gulf of Mexico.

New terms governing offshore hydrocarbon development were issued by the Irish government in 2007.<sup>93</sup> The revised terms were informed by an expert report published the same year and this brings about some major changes to the consents that apply to exploration and extraction activities.<sup>94</sup> In a further significant move for offshore exploration, a frontier exploration licence was issued in the Rockall Licensing Round in 2009.

### **Extended continental shelf claims**

As is well known, Ireland has an extensive continental shelf and has made a number of submissions to the United Commission on the Limits of the Continental Shelf. The latter is the international body mandated to consider the scientific and technical data submitted by coastal States and to make recommendations in accordance with Article 76 of the 1982 Law of the Sea Convention as to where those limits extend beyond 200 nautical miles measures from the baselines.<sup>95</sup> The Commission is made up of

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<sup>92</sup> These include the Continental Shelf Act 1968 (No. 14 of 1968); the Electricity Regulation Act 1999, (No. 23 of 1999); the Foreshore Act 1933 (No. 12 of 1933); the Gas Act 1976 (No. 30 of 1976); the Petroleum and Other Minerals Development Act 1960 (No. 7 of 1960); and Sea-Fisheries and Maritime Jurisdiction Act 2006 (No. 8 of 2006).

<sup>93</sup> Licensing Terms For Offshore Oil And Gas Exploration, Development & Production 2007.

<sup>94</sup> Report prepared for the Department of Communications, Marine and Natural Resources, Indecon International Economic Consultants in association with London Economics, *Expert Advice on Review of Irish Petroleum E&P Licensing Terms* (Indecon, 2007).

<sup>95</sup> Article 3, Annex II, 1982 United Nations Convention on the Law of the Sea.

scientific and technical experts in a number of fields including geology, geophysics, and hydrography. In 2007, Mr. Peter Croker, who works with the Petroleum Affairs Division at the Department of Communications, Energy and Natural Resources, was re-elected as a member of the Commission for a term of five years from 2007 to 2012.

Ireland's submissions to the Commission are followed closely by States Parties and indeed non-parties to the 1982 Law of the Sea Convention. Only a brief overview can be provided here. The first submission made by Ireland relates to a sector of the continental shelf that is to an area that is commonly known by its scientific name as the Porcupine Abyssal Plain. This sector (which is approximately half the size of the State's land territory) is not disputed by any other country, and the Commission adopted and issued its recommendations concerning the limits of this area in 2007 by a vote of 14 votes to 2, with 2 abstentions.<sup>96</sup> As pointed out subsequently by the Minister for Foreign Affairs in the Dáil, the Irish Government accepted these recommendations and work commenced to designate in domestic law the additional seabed enclosed by these limits as continental shelf belonging to the State.<sup>97</sup> In 2009 the Government extended the State's continental shelf into the area abutting the Porcupine Abyssal Plain in accordance with the Commission's recommendations in 2007. This is achieved by means of the Continental Shelf (Designated Areas) Order 2009, which provides that this is an area within which the rights of the State to explore and exploit the natural resources of the seabed and subsoil of the continental shelf may be exercised.<sup>98</sup> The geographical coordinates of this area were deposited with the Secretary-General of the United Nations.<sup>99</sup> At the time of writing, Ireland has yet to bring forward legislation, which will implement the requirements set down in the 1982 Law of the Sea Convention, concerning the payments and contributions with respect to the exploitation of the continental shelf beyond 200 miles.<sup>100</sup>

The second sector of Ireland's continental shelf claim is more complex and relates to a large area in the Celtic Sea and the Bay of Biscay. In an innovative move,

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<sup>96</sup> CLCS 54, Nineteenth-session, New York, 5 March-13 April 2007.

<sup>97</sup> *Dáil Debates* Vol. 649, 11 March 2008

<sup>98</sup> S.I. No 163 of 2009.

<sup>99</sup> Article 16 of the 1982 United Nations Convention on the Law of the Sea. For the exact coordinates, see:

[www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/irl\\_mnz73\\_2009.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/irl_mnz73_2009.pdf)

<sup>100</sup> Article 82 of the 1982 United Nations Convention on the Law of the Sea.

this area was the subject of a joint-submission made by Ireland, the UK, France, and Spain in May 2006. This was the first joint submission received by the Commission and established an important precedent that has been followed by several other states worldwide.<sup>101</sup> Again the area covered by the joint-submission is extensive and amounts to approximately 80,000 square kilometres, which equates to an area that is slightly larger than Ireland's land territory. In March 2007, the Commission adopted a recommendation on this submission, which again was the first recommendation on a joint-submission made by States Parties to the 1982 Law of the Sea Convention.<sup>102</sup> Negotiations on the division of this area between the four coastal States were scheduled to commence in 2010.

In March 2009, Ireland made a submission to the Commission in relation to the Hatton-Rockall Area of the North-East Atlantic. This submission is far more controversial than the previous two as it relates to an area that is disputed by both Iceland and Denmark (on behalf of the Færoe Islands). Moreover, Ireland and the United Kingdom reached agreement on a bilateral delimitation of the continental shelf in 1998.<sup>103</sup> This bilateral boundary agreement has not been accepted by Denmark (in relation the Faroës), or indeed Iceland. Over the past ten years or so, the four countries have tried to resolve their differences by means of negotiation but thus far have been unable to do so. Although the details of the submission had been communicated previously by Ireland to Denmark, Iceland, and the United Kingdom, the limits in the disputed area cannot be considered by the Commission without the consent of all the countries concerned. On the 27 May 2009, the Secretary-General of the United Nations received a *note verbale* from both Iceland and Denmark outlining their concerns and the Commission subsequently decided to defer further consideration of the submission in line with the applicable provisions of their rules of procedure and with a view to taking into consideration any further developments that might occur during the intervening period. Instructively, the Minister for Foreign Affairs expressed the view in the Dáil that Ireland's submission at this particular time 'stops the clock on the deadline and preserves Ireland's legal position.'<sup>104</sup> Moreover,

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<sup>101</sup> See, for example joint submission by Mauritius and the Republic of Seychelles on the 1 December 2008 and the subsequent recommendation by the Commission on 30 March 2011.

<sup>102</sup> CLCS/64 - Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, Twenty-fourth session,

<sup>103</sup> *Irish Treaty Series* No 1 of 1990. Entered into force in relation to Ireland on 11 January 1990.

<sup>104</sup> Written Answer to Dáil Question 9997/10, 2 March 2010.



he also expressed the view that the four states intended to keep the matter under regular review and would 'continue to work for the creation of conditions that will permit consideration of the submission by the Commission as soon as possible.'<sup>105</sup>

### Underwater cultural heritage

With one of the richest stores of underwater cultural heritage in the world, the progressive development of international law on this subject is of undisputed importance for Ireland. At a domestic level, there have been a number of important decisions of the Superior Courts on offshore wreck. In 2007, the Supreme Court handed down its long awaited decision on the licenses sought by Mr. Bemis under the National Monuments Acts in relation to the *Lusitania*, which was torpedoed by a German submarine in 1915 and whose wreck remains on or in the seabed, several miles south of the Old Head of Kinsale in Co. Cork.<sup>106</sup> This judgment appears to bring to a close a set of legal proceedings that deserve a book in their own right. As far back as 1996, the High Court had ruled that Mr. Bemis was 'the sole and exclusive owner of all rights, title and interest in the R.M.S. 'Lusitania,' her hull, tackle, appurtenances, engines and apparel' and that he was entitled to a declaration of title in those terms.<sup>107</sup> This accorded with previous decisions of the United States Federal District Court for the Eastern District of Virginia and the Queens Bench Division (Admiralty) in England.<sup>108</sup> Since the conclusion of the legal proceedings in the Irish courts, there have been several newspaper reports of the recovery of a number of artefacts from the wreck including part of the ship's telegraphy.<sup>109</sup>

In light of the wealth of historical wreck and other material on the seabed, it is surprising to note that Ireland has not yet ratified the UNESCO Convention on the Protection of the Underwater Cultural Heritage, despite playing a significant role in

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<sup>105</sup> *ibid.*

<sup>106</sup> *Bemis v. Minister for Arts, Heritage, Gaeltacht and the Islands & anor* [2007] IESC 10, [2007] 3 IR 255.

<sup>107</sup> *Bemis v. Owners of R.M.S. 'Lusitania'* [1996] IEHC 2.

<sup>108</sup> *F. Gregg Bemis Junior v The R.M.S 'Lusitania'* United States Federal District Court for the Eastern District of Virginia, Norfolk Division, judgment 18 April 1995; and *Pierce and Another v. Bemis and Others, The Lusitania* [1986] 1.A.E.R. 1011.

<sup>109</sup> *Irish Times*, 23 August 2011.

its conclusion in 2001.<sup>110</sup> Over the past decade, the 2001 Convention has been ratified by 40 countries including three EU Member States (Spain, Portugal, and Italy) and entered into force on 1 January 2009.<sup>111</sup> This omission is all the more remarkable in view of the fact that the Minister for Arts, Heritage and the Gaeltacht indicated in the Dáil that ratification of the UNESCO Convention was under consideration in 2002.<sup>112</sup> At the time of writing, there appears to have been no move to make this a reality in the intervening years.

### **Driftnet fishing**

The global moratorium on large-scale pelagic driftnet fishing on the high seas has led to several United Nations General Assembly Resolutions on the subject and to extensive state practice to implement the ban worldwide.<sup>113</sup> In parallel with these developments, driftnet fishing has been the subject of protracted litigation in the Irish Courts since a prohibition on the use of this type of gear for tuna fishing was first introduced on a regional basis by the European Community in 1998.<sup>114</sup> In *Browne v Ireland*, the Supreme Court accepted that the relevant EU regulation which prohibited the use of driftnets by vessels of Member State within their exclusive fishing limits or on the high seas was directly applicable to the State to the same extent as if it were an Act of the Oireachtas (the Irish Parliament), and in the circumstances the Minister was empowered by s.3 of the European Communities Act of 1972 to make regulations for that purpose.<sup>115</sup> More recently, an application on the part of the Attorney-General and several government departments to dismiss a claim for compensation by a group of fishermen who were owners or part-owners of fishing vessels involved in driftnet fishing for tuna prior to the prohibition on driftnets failed in the High Court.<sup>116</sup> This claim had its origin in a compensation package which arose 'on the margins' of a

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<sup>110</sup> See R. Long, *Marine Resource Law*, above n. 1, pp.534-541.

<sup>111</sup> For the States that have ratified, see:

<http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha#1>

<sup>112</sup> Replies to Dáil Questions Nos. 253 to 255, 7235/02, 27 February 2002.

<sup>113</sup> UNGA Resolutions 44/225, 45/197 and 46/215.

<sup>114</sup> Council Regulation (EC) No. 1239/98 of 8th June, 1998, OJ L 171/1, 17.6.1998.

<sup>115</sup> [2003] 3 I.R. 205

<sup>116</sup> *Thomas Kennedy, Michael Murphy, Michael Hennessy, O'Mathuna (Baid) Teoranta, Vincent Browne, John O'Donnell, Paul Flannery, John Graham, Kieran O'Driscoll, Donal Healy, Neil Minihane, Gerard Minihane and Peter Carlton v The Minister for Agriculture, Fisheries and Food, the Minister for Finance, Ireland and the Attorney General*, High Court Unreported, 15 April 2011.

European Council of Fisheries Ministers in 1998 as a means to alleviate the hardship that tuna fishermen would suffer as a consequence of the driftnet prohibition.

From a normative perspective, there is little doubt but that Irish state practice on the use of large-scale driftnets is fully consistent with developments in both EU and international law. As an aside it should also be mentioned that a number of scholars have suggested that the prohibition on this type of gear is now established as a binding rule of customary international in view of the widespread level compliance with the General Assembly resolutions on the subject.<sup>117</sup> Irish state practice appears to support this view.

### **Fisheries enforcement**

Ireland has significant fishery resources in sea areas under national jurisdiction and sovereignty. Similar to sea-fisheries in other Member States, these resources come within the scope of the European common fisheries policy.<sup>118</sup> Nevertheless, it should not be forgotten that the 1982 Law of the Sea Convention attributes significant powers to the coastal State in relation to the adoption of laws and regulations to ensure that nationals of other States comply with the conservation and management measures that apply to fisheries resources in sea areas under the sovereignty and jurisdiction of the coastal State.<sup>119</sup> These prescriptive powers facilitate the boarding, inspection, arrest and the institution of judicial proceedings to ensure compliance with fisheries conservation and management measures.<sup>120</sup>

In Ireland, the fisheries enforcement task is undertaken by the Naval Service working in conjunction with the Sea Fisheries Protection Agency and An Garda Síochána (the Irish Police Force). More specifically, the Naval Service is empowered under the Sea-Fisheries and Maritime Jurisdiction Act 2006 to board and inspect vessels and, when necessary, to formally detain vessels and direct them to port.<sup>121</sup>-. In the vast majority of cases, fisheries offences committed in sea areas under Ireland's

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<sup>117</sup> See, inter alia: D. Rothwell & T. Stephens *The International Law of the Sea* (Oxford and Portland, Hart Publishing, 2010), p.312.

<sup>118</sup> Case 804/79 *Commission v United Kingdom* [1981] E.C.R. 1045.

<sup>119</sup> Art 62 of the 1982 UNCLOS.

<sup>120</sup> Art 72 of the 1982 UNCLOS.

<sup>121</sup> No.8 of 2006.

sovereignty and jurisdiction relate to non-compliance with the rules underpinning the common fisheries policy.

The task of fisheries enforcement at sea is an onerous one and the record of achievement by the Irish enforcement authorities during the report period speaks for itself. In 2009, for example, the Naval Service carried out 1,841 inspections at sea of vessels of twelve nationalities (Ireland, Spain, the United Kingdom, France, Belgium, Germany, the Netherlands, Russia, Norway, Denmark, (Faroes), Portugal and Iceland).<sup>122</sup> These boarding resulted in the detention of 15 fishing vessels (see Table 1 below). The following year, the Naval Service carried out 1,684 inspections at sea of vessels of the various nationalities that are shown in Table 1.<sup>123</sup> These inspections resulted in the detention of eight fishing vessels flying the flags of Ireland, Spain, and the United Kingdom.

Overall, it appears that the enforcement task is implemented in a relatively even-handed manner in so far as 826 vessels registered in Ireland were inspected in 2010 and this resulted in the detention of 3 vessels. If the trends for the two consecutive years of 2009 and 2010 are compared then there is slight drop in the number of vessels detained from 15 down to 8. Apart from Irish vessels, a considerable effort is undertaken to inspect the activities of vessels flying the flag of Spain with a total of 436 inspections recorded in 2010. This level of enforcement effort is a reflection of the large number of Spanish flagged that have access to Ireland’s EEZ under the common fisheries policy. The level of compliance in 2009 and 2010 by these vessels appears to be good with only one detention in 2009 followed by three detentions in 2010.

Table 1: Nationality of fishing vessels boarded by the Naval Service in 2010.<sup>124</sup>

Nationality	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
	201	201	201	201	201	201	201	201	201	201	201	201	
	0	0	0	0	0	0	0	0	0	0	0	0	
Irish	100	84	58	44	72	111	58	111	106	25	37	20	826
Spanish	12	22	20	58	28	20	16	95	70	59	8	31	439

<sup>122</sup> *Dáil Éireann Debate* Vol. 741 No. 1, Question 25204/11, 21 September 2011.

<sup>123</sup> *ibid.*

<sup>124</sup> *ibid.*

UK	14	8	6	18	17	23	8	13	21	11	3	9	151
French	13	19	15	25	17	25	9	41	21	7	7	5	204
Belgian	1	3	0	4	1	2	2	0	0	1	0	3	17
German	2	0	0	0	1	0	0	0	1	0	0	2	6
Netherlands	3	2	0	7	2	0	0	0	0	0	1	3	18
Russian	0	0	5	0	0	0	0	0	0	0	0	0	5
Norwegian	0	1	0	0	0	0	0	0	1	0	0	0	2
Faroes	0	0	2	0	0	0	0	0	0	0	0	0	2
Portugal	0	1	0	0	1	0	1	1	0	0	0	0	4
Denmark	2	2	0	0	0	0	0	1	1	2	0	0	8
Iceland	0	0	1	0	0	0	0	0	1	0	0	0	2
Total	147	142	107	156	139	181	94	262	222	105	56	73	1,684

Table 2: Fishing Vessels Detained by the Naval Service in 2009 and 2010. <sup>125</sup>

Nationality	2009	2010	Total
Irish	4	3	7
Spanish	1	3	4
UK	5	2	7
French	5	0	5
Total	15	8	23

<sup>125</sup> *ibid.*

### Marine scientific research

Ireland has made a major investment in marine scientific research infrastructure over the past two decades. In 2009, the Dáil Committee of Public Accounts was informed that the State had spent upwards of €1.5 million to build an offshore research vessel, the *Celtic Explorer*, and a further €40 million in building specialist research facilities for the Marine Institute at Oranmore, County Galway.<sup>126</sup> The same report records that the Marine Institute employed 147 people and had an annual budget of €40 million in 2005.<sup>127</sup> Among its diverse portfolio of scientific activities, the Marine Institute is implementing *Sea Change: A Marine Knowledge, Research & Innovation Strategy for Ireland 2007-2013* which is aimed at fostering greater development of the maritime sector at national and regional levels.

In 2010, the *Celtic Explorer* undertook a number of foreign research cruises to the North Sea, Eastern Canadian waters, as well as to the Atlantic Continental Margin to undertake a broad range of research activities including research on fisheries, vents and reefs, climate change, oceanography, biogeochemistry, geophysics, geology, as well as a number of cruises which were focused on biodiscovery and deep-ocean ecosystems.<sup>128</sup> The previous year, there were a number of noteworthy research cruises including a multidisciplinary investigation of marine ecosystems in the Atlantic and the Bay of Biscay which was led by one of Ireland's leading deep-water marine scientists, Dr. Anthony Grehan, from the National University of Ireland Galway.

Much of the research activity in sea areas under Ireland's sovereignty and jurisdiction is undertaken by foreign flagged research vessels and up to 50 of such vessels may undertake marine scientific research programmes in any year. That said, the number of visits of foreign research vessels has decreased steadily since the 1990s but remains relatively high at a comparative level is compared to visits elsewhere in Europe.<sup>129</sup> Briefly stated, the scheme implemented by Ireland for administering the activities of foreign research vessels accords with both the letter and spirit of Part XIII

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<sup>126</sup> Dáil Committee of Public Accounts reviewed Chapter 8 of the Marine Institute. Marine Institute Annual Report and Financial Statements 2006, 12 February 2009.

<sup>127</sup> *ibid.*

<sup>128</sup> [www.marine.ie](http://www.marine.ie)

<sup>129</sup> R. Long, *Marine Resource Law*, above n. 1, pp.684-724.

of the 1982 Law of the Sea Convention.<sup>130</sup> One noteworthy development in the law in Ireland is that there are special regulatory requirements and a code or practice governing research in a number of areas that have been designated for special protection under the Habitats Directive.<sup>131</sup> As a general rule, foreign applicants must apply at least 6 months in advance of the proposed research activity in sea areas Ireland's jurisdiction. The summary details published by the Marine Institute reveals that Ireland received in total 25 applications from foreign research vessels in 2010 relating to research cruises to be undertaken in 2011.<sup>132</sup> This figure is made-up of 14 applications from the United Kingdom, 1 from Russia, 2 from Norway, 5 from the Netherlands, 2 from France and 1 from Spain.<sup>133</sup> In addition, it also appears from the information published by the Marine Institute that an Irish scientific observer was embarked on eleven of the foreign research vessels.<sup>134</sup> The range of research activities varied considerably included fisheries research, climate change research, as well as various benthic related studies.

### **Academic activities**

There were a number of academic activities relating to the Law of the Sea during the report period. More specifically, the Law School at Trinity College Dublin hosted a conference which focused on current and problematic Issues in the Law of the Sea in June 2010.<sup>135</sup> The School of Law at the National University of Ireland hosted two research fellows from Mozambique and Sierra Leone under the United Nations Nippon Foundation Fellowship Programme in 2009 and 2010. They worked on legal aspects of integrated ocean management and on fisheries management pertaining to their home states respectively.

The establishment by University College Cork, the Cork Institute of Technology, and the Irish Naval Service of a Maritime and Energy Research Campus

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<sup>130</sup> *ibid.*

<sup>131</sup> National Parks and Wildlife Service, Code of Practice for Marine Scientific Research at Irish Coral Reef Special Areas of Conservation. Available at: [www.npws.ie/licences/educationandscience/marinescientificresearch/](http://www.npws.ie/licences/educationandscience/marinescientificresearch/)

<sup>132</sup> See: [www.marine.ie/home/services/surveys/foreignvessels/home.htm](http://www.marine.ie/home/services/surveys/foreignvessels/home.htm)

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

<sup>135</sup> C. R. Symmons, *Selected Contemporary Issues in the Law of the Sea* (The Hague, Martinus Nijhoff Publishers 2011).

and Commercial Cluster in Cork (referred to as 'MERC3') is one of the most significant developments in maritime research and education since the foundation of the State. This initiative bodes well for the future of inter-disciplinary research and maritime commercial development in Ireland.

### **European research projects**

There are several European research projects underway. Special mention needs to be made of the 'ODEMM Project' which is aimed at developing a set of ecosystem management options that will help deliver some of the objectives of the Marine Strategy Framework Directive, the Habitats Directive, the European Commission Blue Book and the Guidelines for the Integrated Approach to Maritime Policy. The project is coordinated by the University of Liverpool and brings together a high quality inter-disciplinary team of scientists, economists and lawyers. The current author is tasked with undertaking a comprehensive review of the law and policy constraints and various policy options for implementing the ecosystem-approach at the European regional seas levels.<sup>136</sup>

### **Mahon Hayes**

The years 2009 and 2010, saw the late Mahon Hayes complete his fine work on the role of the Irish Delegation at the Third United Nations Conference on the Law of the Sea which has since been published by the Royal Irish Academy.<sup>137</sup> As is recorded elsewhere in this volume, Mahon had a long and distinguished career with the Department of Foreign Affairs and is remembered as an inspirational lawyer and as one of nature's gentlemen by many of those that participated at the Third Conference. In a remarkable career, he acted as Deputy-Leader for the first eight sessions and led the Irish Delegation for the remainder of the Conference and his name will be perpetually linked with achieving international consensus on some of the most intractable issues such as the rules governing the delineation of the outer limit of the

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<sup>136</sup> R. Long, 'Legal Aspects of Ecosystem-based Marine Management in Europe' in A. Chircop, M. L. McConnell, S. Coffen-Smout (ed.), OCEAN YEARBOOK Vol. 26, (Boston/Leiden, Brill Academic Publishers, c. April 2012) 59.

<sup>137</sup> *Op. cit.* note 3 *supra*.



R. Long (Correspondents Report), "Irish practice on the Law of the Sea 2009-2010", IRISH YEARBOOK OF INTERNATIONAL LAW 2009-2010, (Oxford, Hart Publishing, 2012), pp. 251-285.

continental margin.<sup>138</sup> In recent years, he was generous with his time and advice to students taking the Law of the Sea programme at the School of Law in NUI Galway and The Mahon Hayes Memorial Prize in the Law of the Sea has been established to honour his contribution to international law-making, diplomacy and erudite scholarship on this subject. *Ar dheis dé go raibh a anam uasal.*

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<sup>138</sup> Art 76 of the 1982 United Nations Convention on the Law of the Sea.