

Evolution of the law of the sea: developments in law-making in the wake of the 1982 Law of the Sea Convention

James Harrison

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School of Law, University of Edinburgh

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*"The Sea isn't a place but a fact,
a mystery
under its green and black cobbled coat
that never stops moving."*

Mary Oliver, "The Waves", 1986.

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Abstract

It is no exaggeration to say that the Third United Nations Conference on the Law of the Sea was one of the most important law-making events of the twentieth century. It heralded the beginning of a revolution in international law by introducing a new law-making technique based on consensus decision-making and universal participation. It also produced a comprehensive treaty on the law of the sea. The resulting Law of the Sea Convention is commonly claimed to provide a universal legal framework for all ocean activities.

Upon this background, it is pertinent to ask, what is the future for the LOS Convention and the law of the sea in the twenty-first century? How does the Convention evolve to take into account changing values, policies and preferences of the international community? How have developments in law-making techniques influenced the way in which the law of the sea is created and changed?

This thesis initially establishes the legal basis for the LOS Convention as a universal framework for the law of sea. It shows how the negotiation of the Convention substantially influenced customary international law so that it is possible to speak of a universal law of the sea. Yet, the status of the Convention as universal law poses problems for its future development because it cannot be considered solely from the perspective of the law of treaties. The thesis will therefore consider the mechanisms for change contained within the Convention alongside other law-making processes out-with the formal treaty framework. Central to this analysis is the role of institutions in modern international law-making. The thesis looks at the part played by political and technical institutions in developing the law of the sea through interpretation, modification, and amendment, as well as at the ways in which these institutions have utilised and developed the consensus decision-making techniques first seen at UNCLOS III. It will also analyse the role of courts and tribunals in maintaining and developing the legal order of the oceans.

This analysis shows that the Convention provides the legal framework for the modern law of the sea for all states. In this context, institutional processes have largely replaced unilateral state practice in law-making. Moreover, states have shown a preference for flexibility and pragmatism over formal amendment procedures. The greatest achievement of the LOS Convention is the creation of a stable legal order for the oceans. To ensure this stability is maintained, continued discussion, deliberation and compromise through international institutions is vital.

Abbreviations

DOALOS	United Nations Department for Ocean Affairs and the Law of the Sea
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
OECD	Organization for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
WTO	World Trade Organization

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Declaration

I declare that this thesis has been composed by myself. It is my own work and it has not been submitted for any other degree or professional qualification.

Parts of chapter seven of the thesis will be published in 2007 in the *International Journal of Marine and Coastal Law* under the title “Judicial Law-Making and the Developing Legal Order of the Oceans”.

J. Harrison

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An Introduction to International Law-Making

1. Stability and Change in the Law of the Sea

*“Stability and the protection of acquired rights are essential functions of any legal system, but no legal system can protect itself against revolution except by providing adequate scope for evolutionary change.”*¹

All legal systems contain rules determining the way in which law is made and subsequently modified, amended or abolished. The international legal system is no different in this respect. However, it may be more problematic for international lawyers to identify these so-called “secondary rules”.² Unlike many national legal systems, international law does not have a written constitution which specifies the sources of law or the division of law-making powers.³ Nor is there a supreme legislative organ in the international legal order which can impose laws on a state without its consent. Pauwelyn notes that the international legal system has essentially as many law-makers as there are states.⁴ Thus, international law-making is often a complex and fragmented process which can be difficult to decipher.

It is the category of universal international law⁵ that poses the greatest challenge for international law-making. In the absence of a global legislature, how are universal rules or principles made and how do they change?

The purpose of this thesis is to consider the processes and procedures of international law-making in the law of the sea. From very early in the history of the law of the sea, it was established that no state has exclusive control over the oceans. It was recognised that the seas provide valuable means of communication and

¹ Jenks, *The Common Law of Mankind* (Stevens, 1958) at p. 85.

² Hart, *The Concept of Law* (Oxford University Press, 1961) at p. 91. See also International Law Commission, *Report of the Study Group on Fragmentation of International Law*, UN Document A/CN.4/L.682, 2006, at para. 27.

³ See e.g. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems", (2004) 15 *European Journal of International Law* at p. 552; Brownlie, *Principles of Public International Law* (Oxford University Press, 2003) at p. 1.

⁴ Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003) at p. 15.

⁵ Oppenheim differentiates universal international law from general and particular international law; See Jennings and Watts, eds., *Oppenheim's International Law*, 9 ed., vol. 1 (Longman, 1992) at p. 4.

transportation for all states. At the same time, the oceans and the ocean floor are also sources of valuable resources, living and non-living. In order to promote the peaceful use of the seas, a universal and stable legal framework is needed. That framework must clearly define the rights and responsibilities of all the relevant actors.

Various attempts have been made over the last century to lay down a legal framework for the seas and the oceans. Today, the principal legal instrument is the 1982 United Nations Convention on the Law of the Sea.⁶ Yet, the promulgation of this Convention raises a number of questions about the progressive development of international law. Firstly, on what basis can it be claimed that the LOS Convention has created a universal legal order for the oceans, given its formal status as a treaty? Secondly, how will the law of the sea further evolve following the conclusion of the LOS Convention?

This introductory chapter has three main aims. Firstly, it will clarify the theoretical assumptions that are made for the purposes of this study. Secondly, it will introduce some of the major themes that will be explored in this thesis. Thirdly, it will outline the overall structure of the thesis and how these themes will be addressed.

2. The Theoretical Approach of the Thesis

Many of the issues raised by this thesis concern the constitutional underpinnings of international law. In the absence of a settled constitutional structure within which law-making takes place, the role of theory in international law is particularly significant. Theories attempt to answer some of the basic questions of how international law is made. There are numerous competing theories of international law, including natural law, positivism, the policy-science approach, and critical legal studies.⁷ Each theory offers its own framework for the study and analysis of international law.⁸

⁶ Hereinafter, "LOS Convention".

⁷ See e.g. Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007) at pp. 10-19. See also the contributions in "Symposium: Method of International Law", (1999) 93 *American Journal of International Law*, at pp. 291-423.

⁸ Scobbie, "Wicked Heresies or Legitimate Perspectives? Theory and International Law", in *International Law*, ed. Evans (Oxford University Press, 2006) at p. 89; Boyle and Chinkin, *The Making of International Law*, at p. 10.

This thesis will adopt a positivist approach to international law. Accordingly, the starting point for the discussion of international law-making is Article 38(1) of the Statute of the International Court of Justice⁹ which provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

On the face of it, this article simply sets out the law to be applied by the ICJ in deciding cases brought before it.¹⁰ Nevertheless, it is commonly treated by states and commentators alike as a quasi-authoritative catalogue of the sources of international law.¹¹ The advantage of the so-called “sources doctrine” is that it provides a degree of certainty desperately needed by international law. It sets out a clear list of sources against which international claims can be judged. There are also practical arguments in favour of the sources doctrine. Danilenko argues that “*there is a strong presumption that Article 38 should contain a complete list of sources. It is hardly conceivable that states would establish a major international judicial institution without providing procedural guarantees that it would have access to all the available sources of law governing relations between the contesting states.*”¹² It follows that treaties, custom and general principles are the primary sources of international law.

3. Challenges of Modern International Law -Making

Positivism provides some certainty over the sources of international law. However, it does not necessarily settle the question of how international law is made. Article 38 of the ICJ Statute says nothing of the processes, procedures or techniques

⁹ Hereinafter, the “ICJ”.

¹⁰ See Brownlie, *Principles of Public International Law*, at p. 5.

¹¹ See Jennings and Watts, eds., *Oppenheim's International Law*, at p. 24. C.f. Thirlway, “The Sources of International Law”, in *International Law*, ed. Evans (Oxford University Press, 2006) at pp. 134-138; Jennings, “The Identification of International Law”, in *International Law: Teaching and Practice*, ed. B. Cheng (Stevens, 1982) at p. 9.

¹² Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993) at p. 37.

for creating international law. It is this question which this thesis will address. How is the modern law of the sea created and changed?

Perhaps the most significant development in international law-making in the last fifty years has been the proliferation of international institutions. These bodies have been created in an *ad hoc* fashion, rather than according to a fixed or rigid plan. They co-exist in the same legal system although there is rarely a systematic relationship between them. Nevertheless, international institutions facilitate law-making by providing a permanent forum for discussion, as well as administrative and technical support for law-making initiatives.¹³ Whilst no institutions possess legislative powers *per se*, no modern study of international law-making can ignore their activities.

Several key questions will be addressed in this context. How do international institutions contribute to international law-making, in particular to the creation of universal international law? What are the most important characteristics of these institutions? What types of law-making techniques do they use?

The increasing role of institutions in international law-making attracts claims from some quarters that we are witnessing a gradual constitutionalisation of international law.¹⁴ Constitutionalism in this context can have a number of meanings. Sometimes, it simply refers to a system of shared values which shape the creation and development of international law.¹⁵ A stronger form of constitutionalism asserts the concentration of power in institutional structures, indicating a step away from traditional conceptions of international law based on state sovereignty and consent. This involves a “*realignment of relationships*” between states, individuals and international institutions.¹⁶ According to this view of constitutionalism, government is shifting to the international level where there are insufficient checks and balances on how power is wielded.

The notion of constitutionalism must be treated with care in the context of international law. Direct analogies to domestic constitutional structures should be

¹³ The institutionalisation of law-making also makes it easier for other actors to participate in the law-making process, e.g. campaign organizations, companies; see chapter five, at p. 121.

¹⁴ See e.g. Cass, *The Constitutionalization of the World Trade Organization*, (Oxford University Press, 2005). Ultimately, Cass rejects the idea of the constitutionalisation of the WTO.

¹⁵ De Wet, “The International Constitutional Order”, (2006) *International and Comparative Law Quarterly* 51; see discussion in Chinkin and Boyle, *The Making of International Law*, at pp. 15-19.

¹⁶ Cass, *The Constitutionalization of the World Trade Organization*, at pp. 44-45.

approached tentatively given the fundamental differences between international law and law within the nation state.¹⁷ Moreover, it is not clear that there has been a fundamental shift away from state sovereignty or the traditional sources of international law which warrants the notion of a new international constitutional framework.

Nevertheless, the rise of institutions does raise questions over their legitimacy. One author explains that, “*as international institutions gain greater authority ... and their consensual underpinnings erode, questions about their legitimacy are beginning to be voiced.*”¹⁸ Similar concerns are addressed in the debate over “global administrative law” which is defined by its leading proponents as “*comprising the structures, procedures, and normative standards for regulatory decision-making including transparency, participation, and review, and the rule-governed mechanisms for implementing these standards...*”¹⁹

These challenges associated with institutional law-making will also be addressed in this thesis. Who should participate in the law-making process? Which institutions should make law in a particular area? How should competing values and interests be balanced in the process of making international law, as well as in its interpretation, application and amendment?

The diversity of international law-making also poses challenges for the international legal system. A large number of institutions offer themselves as a forum for law-making. Boyle and Chinkin point out that “*the choice of process depends upon context, political preference and purpose.*”²⁰ Yet, the availability of several law-making institutions may also lead to fragmentation where substantive norms are developed in distinct international fora without any central co-ordination. This threat has increased with the creation of ever more specialized regimes with a narrow perspective on international law. Thus, according to one study, “*the result is the emergence of regimes of international law that have their basis in multilateral treaties and acts of international organizations, specialized treaties and customary patterns*

¹⁷ See Wood, *The UN Security Council and International Law*, (2006) Hersch Lauterpacht Memorial Lectures, lecture 1, at para. 18.

¹⁸ Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 *American Journal of International Law* at p. 597. For a general discussion of legitimacy, see Boyle and Chinkin, *The Making of International Law*, at pp. 24-35

¹⁹ Kingsbury, Krisch and Stewart, “The Emergence of Global Administrative Law”, (2005) 68 *Law and Contemporary Problems* at p. 5.

²⁰ Boyle and Chinkin, *The Making of International Law*, at p. 9.

*that are tailored to the needs and interests of each network but rarely take account of the outside world.*²¹ A further threat of fragmentation is posed by the proliferation of international courts and tribunals which may potentially give differing interpretations of the same rules and principles.²² Overall, fragmentation of the law-making process poses a challenge to the coherent development of international law.

Fragmentation of law-making is particularly pertinent in a field such as the law of the sea which covers a wide range of substantive concerns such as environment, trade, human rights, as well as specific maritime issues. Moreover, there are numerous institutions involved in law-making in this field. The fragmentation debate has largely focussed on how to solve potential difficulties that may arise given the decentralised nature of the international legal system. How are conflicts of norms solved at the international level? How do states co-ordinate law-making activities in a system without any institutional hierarchy?

4. Outline of the Study

This thesis will address many of these larger questions of international law-making in the specific context of the law of the sea.

Chapter two will consider the process of making the law of the sea from a historical perspective. It traces the shift from customary international law-making to treaty-making, culminating in an analysis of the Third United Nations Conference on the Law of the Sea.²³ This Conference was one of the most important law-making events of the twentieth century, heralding a revolution in law-making techniques, as well as producing for the first time a comprehensive treaty on the law of the sea.

Today, the LOS Convention is commonly claimed to provide the universal legal framework for the law of the sea – a “constitution” for the oceans.²⁴ The basis of this claim will be assessed in chapter three. The law of treaties and customary international law will be analysed to determine whether they provide a foundation for the universal application of the LOS Convention.

²¹ International Law Commission, *Report on the Fragmentation of International Law*, at para. 482.

²² See e.g. Guillaume, "The Future of Judicial Institutions", (1995) 44 *International and Comparative Law Quarterly*, 848-862.

²³ Hereinafter, "UNCLOS III".

²⁴ See Koh, "A Constitution for the Oceans", in *The Law of the Sea - Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (United Nations, 1983).

Twenty-five years after its conclusion, it is pertinent to ask, what is the future for the LOS Convention? Will it fall victim to overwhelming pressure for radical change as did previous efforts at law-making in this field? How can the Convention evolve in light of the changing values, policies and preferences of the international community, whilst at the same time maintaining its universal appeal?

Chapters four and five consider the contribution of international institutions to the evolution of the law of the sea. Chapter four is concerned with the development of the Convention through political institutions such as the Meeting of the States Parties and the United Nations General Assembly.²⁵ Chapter five focuses on specific issues of the law of the sea which are dealt with through organizations with a technical mandate. It will concentrate on the regulation of shipping through the International Maritime Organization and the management of deep seabed minerals by the International Seabed Authority. These chapters will consider the role of international institutions in the interpretation, modification and amendment of the LOS Convention. They will also address questions of co-operation and co-ordination between international institutions in the law-making process.

In a horizontal system of law, normative conflicts are likely to occur. Chapter six deals with the interrelationship of various treaty regimes. It analyses general principles of law, as well as the substantive provisions of the LOS Convention and other specific treaties to see how conflicts of law are addressed at the international level.

Chapter seven looks at the development of the LOS Convention by international courts and tribunals. It will consider what contribution judicial institutions have made to the progressive development of the law of the sea through the interpretation and application of the Convention in the context of dispute settlement. It also considers potential obstacles faced by judicial organs in developing the law.

Overall, this thesis aims to analyse how, if at all, coherence and universality can be maintained in the ongoing development of the law of the sea.

²⁵ Hereinafter, “General Assembly”.

Historical Development of the Law of the Sea

1. Introduction

The adoption of the LOS Convention on 30 April 1982 marked a milestone in the development of the law of the sea. For the first time, there was a single, comprehensive treaty governing all uses of the seas and oceans. Moreover, the Convention represented a revolution in the manner in which international law is made.

This chapter seeks to sketch the way in which the law of the sea has developed over the past century. It focuses on law-making techniques, rather than substantive rules, tracing the shift from customary international law to the codification and progressive development of international law by international conferences. Finally, it will outline the procedures and processes utilised at UNCLOS III, identifying the significant characteristics of the Conference which distinguish it from more traditional law-making techniques.

The trends of law-making in the law of the sea reflect wider changes in the international legal system itself and moves towards an increasing institutionalisation of law-making techniques. However, the subject finds its origins in the practice of individual states which contributed to the gradual formation of customary international law through a process of claim and counter-claim.

2. The Origins of the Law of the Sea

Many authors identify the foundations of the modern law of the sea in seventeenth century Europe.²⁶ An early milestone for the subject was undoubtedly the publication in 1609 of *Mare Liberum*, the seminal thesis on the law of the sea by the Dutch jurist Hugo Grotius. Grotius famously argued that the seas are not

²⁶ Brown, "Law of the Sea, History", in *Encyclopedia of Public International Law*, ed. Bernhardt (North-Holland, 1989) at p. 192. C.f. Anand, *Origin and Development of International Law* (Martinus Nijhoff Publishers, 1983) at p. 226. See also the sources discussed by Jenks, *The Common Law of Mankind* (Stevens, 1958) at pp. 74-76.

susceptible to appropriation, thereby setting the foundations for the principle of the freedom of the seas. His thesis prompted other scholarly contributions advocating competing theories on the general principles of the law of the sea.²⁷ Although largely written by academics, these texts often provided support for the position of a particular state.²⁸ Nevertheless, many of these seventeenth century scholars found much of their inspiration in natural law theories or principles of Roman law.²⁹

From the beginning of the eighteenth century and the onset of the enlightenment period, natural law began to lose favour amongst European scholars.³⁰ At this time, positivism became the dominant theory of international law. According to positivist theory, states could only be bound on the basis of their consent. A classic exposition of this theory is found in *The S. S. Lotus*, where the PCIJ held that, “*the rules of law binding upon States ... emanate from their own free will as expressed in conventions or by usages generally accepted as law.*”³¹

3. Customary International Law of the Sea

Throughout this period, customary international law was the principal source of the law of sea. The traditional conception of customary international law is based on consistent trends of state practice and it was to such practice that courts, tribunals and other decision-makers had to turn in order to determine the substance of the law.

At this time, few international courts and tribunals existed and maritime cases were chiefly dealt with by national admiralty courts.³² Although they were national institutions, the law applied by these courts was largely of an international character. Sir Charles Hedges, a seventeenth century Judge of the English High Court of

²⁷ For instance, O’Connell traces the notion of land-kenning to the Scots lawyer, Craig; *The International Law of the Sea* (Oxford University Press, 1982) at pp. 3-4. On the contributions of Welwood and Selden, see Whitty, “Water Law Regimes”, in *The History of Private Law in Scotland* ed. Zimmerman and Reid (Oxford University Press, 2005). For a more detailed discussion of the debate that took place between Grotius and Welwood, see Van Ittersum, “Mare Liberum versus the Propriety of the Seas?” (2006) 10 *Edinburgh Law Review* 239.

²⁸ For instance, O’Connell says that “it is believed that Grotius’ treatise *Mare liberum* was originally part of a legal opinion which he gave professionally to the directors of the Dutch East India Company early in the seventeenth century on the question of their right of access to the trade of the Indies”; O’Connell, *The International Law of the Sea* at p. 9. See also Brown, *The International Law of the Sea* (Dartmouth Publishing Company, 1994) at p. 7.

²⁹ See e.g. Churchill and Lowe, *The Law of the Sea* (Manchester University Press, 1999) at p. 4.

³⁰ See e.g. *Ibid.*, at p. 5.

³¹ *The Case Concerning the S. S. Lotus*, (1927) Series A, No. 10, PCIJ Reports at p. 18,

³² Columbus, *The International Law of the Sea* (Longmans, 1967) at p. 7.

Admiralty, made this clear when he said, “*the Court of Admiralty is a Court of Justice, and the judge who is sworn to administer it is as much obliged to observe the laws of nations as the Judges of the Courts of Westminster are bound to proceed according to the statutes and the common law.*”³³ The admiralty courts drew on a variety of sources, including ancient codes of maritime law³⁴, as well as the contemporary practices of states³⁵ in order to determine customary international law. For instance, in *The Paquete Habana*, the US Supreme Court traced the history of prize jurisdiction from 1403 onwards, examining several international treaties, the work of scholars, and prize court decisions of various countries.³⁶

The task of courts in determining the content of the customary international law of the sea was by no means straightforward. Judges were faced with a mass of evidence, often contradictory, as to what the prevailing customs were. Needless to say, the reliance on the claims and counter-claims of states left much to be desired in terms of the precise formulation of rules. *The Paquete Habana* again provides a good example. In that case, the US Supreme Court was faced with the question whether there was a rule of international law prohibiting small coastal fishing vessels which were flying the flag of an enemy state from being captured as prize. Although the justices seemingly agreed on the material sources which contribute to the formation of customary international law, they profoundly disagreed on their assessments of the prevailing state practice. The majority of the Court concluded that the available evidence supported the existence of an exemption for small coastal fishing vessels. A minority of the Court, led by Chief Justice Fuller, dissented, arguing that the practice was inconclusive and “*in truth, the exemption of fishing craft is essentially an act of grace, and not a matter of right and it is extended or denied as the exigency is believed to demand.*”³⁷ A similar division over the conclusions to be drawn from state practice can be seen in *The S.S. Lotus*. In a decision adopted by the casting vote of the President³⁸, the majority of the Court denied the existence of a

³³ Cited by *Ibid.*, at p. 11. In *Currie v M’Knight*, the UK House of Lords held that the Scots admiralty law was the same as that applied by the English Court of Admiralty; *Currie v. M’Knight*, (1896) 4 S.L.T. 161.

³⁴ For instance, the Rhodian maritime laws, Il Consolato del Mare and the Laws of Oleron.

³⁵ Prentice, ed., *Treatise of the Law Relative to Merchant Ships and Seamen*, 12 ed., (Shaw, 1881) preface.

³⁶ *The Paquete Habana*, (1899) 175 US Reports 677.

³⁷ *Ibid.*, at p. 719.

³⁸ Judge Moore, however, notes that he agreed with the reasoning of the majority on this aspect of the decision so in reality it was adopted by 7 votes to 5.

principle of international law prohibiting Turkey from prosecuting the Master of a French vessel which had collided with a Turkish ship on the high seas. The majority reasoned that the applicable rules of customary international law “*must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear.*”³⁹ Yet, the evidence of state practice was itself ambiguous and there were precedents pointing in both directions. In the words of Judge Weiss, the record of the case demonstrates “*controversial doctrine and contradictory judicial decisions ... invoked by both parties.*”⁴⁰ The actual result of the case largely turns on the assumption made by the majority that states may exercise jurisdiction unless there is a positive rule which prohibits such action. As France was not able to adduce sufficient evidence of such a rule, its arguments failed.

The traditional techniques of deducing customary international law also accorded a significant role to powerful maritime states. In *The Scotia*, decided by the US Supreme Court in 1871, it was said that “*many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of a single state, which were first of limited effect, but which, when generally accepted, became universal obligations.*”⁴¹ The Court described how the Merchant Shipping Regulations promulgated by the British Government in January 1863 became generally accepted and applied by all the major maritime states of the world and therefore formed part of the international law of the sea.⁴²

It can be seen from these few illustrations that traditional conceptions of customary international law, as a means of regulating the activities of a large number of states, suffers from a number of weaknesses. Firstly, divergences in state practice mean that it is often difficult to identify the applicable law at any one time. The more states there are, the more difficult the process. Perhaps one of the greatest weaknesses of custom as a method of law-making is the uncertainty which accompanies the promulgation of new norms. Any evolution in an existing rule requires a breach of

³⁹ *The Case Concerning the S.S. Lotus*, at p. 21.

⁴⁰ *Ibid.*, Dissenting Opinion of Judge Weiss.

⁴¹ *The Scotia*, (1871) 81 US Reports 170, at p. 187.

⁴² The Court cited thirty-three countries which had adopted regulations closely following the 1863 Order in Council; *Ibid.*, at p. 186.

that rule. Therefore, until a stable pattern of state practice has emerged, it is impossible to predict the legality of a state's actions.

It has also been suggested that customary international law is unsuitable for the promulgation of detailed rules or regulations in technical fields. Thus, Oxman says that "*because it is so difficult to prove a level of state practice and opinio juris beyond generalities sometimes barely distinguishable from mere labels, customary international law is a much more blunt instrument than written law.*"⁴³ However, cases such as *The Scotia* would suggest that this assumption is not always valid. What this case demonstrates is the way in which written texts can inspire and influence the formation of customary international law. This fact has major implications for modern law-making techniques.

4. The League of Nations: Early Attempts at Codification

From the beginning of the twentieth century, there was an increasing interest in the idea of codifying international law. It was widely believed at the time that the codification of international law on major topics would contribute to the maintenance of international peace and security.⁴⁴ It was thought that the reduction of rules to writing would promote clarity and certainty in the applicable law. The Second Hague Peace Conference had adopted a resolution which called for the codification of topics which were "*ripe for embodiment in international regulation*"⁴⁵, but the outbreak of the First World War had prevented this initiative from being further pursued. Nevertheless, Rosenne suggests "*that recommendation is the seed which was ultimately to burgeon forth, first as the Committee of Experts for the Progressive Codification of International Law, and later as the International Law Commission of the United Nations.*"⁴⁶

Amongst the first topics considered suitable and necessary to codify was the law of the sea. Specific aspects of the law of the sea had already been the subject of treaty

⁴³ Oxman, "Customary International Law in the Absence of Widespread Ratification of the Law of the Sea Convention", in *1982 Law of the Sea Convention*, ed. Oxman and Koers (Law of the Sea Institute, 1983) at p. 677.

⁴⁴ Rosenne, *Committee of Experts for the Progressive Codification of International Law (1925-1928)* (Oceana Publications, 1972) at p. xxix.

⁴⁵ *Ibid.*, at p. xxix.

⁴⁶ *Ibid.*, at p. xxx.

negotiations. The 1856 Declaration of Paris sought to establish international rules on naval warfare, neutrality, blockades and privateering. This aspect of the law of the sea was further developed by several treaties adopted at the two Hague Peace Conferences in 1899 and 1907 and subsequently at the International Naval Conference held in London in 1909. Non-military aspects of the law of the sea, however, were neglected until after the First World War.

The 1920s saw several codes on the law of the sea produced by private institutions and individuals, including the International Law Association, the Institut de Droit International, the American Institute of International Law, the German Society for International Law, the Japanese Society for International Law, and Harvard Law School.⁴⁷ These private initiatives were swiftly followed by governmental attempts at codification. In 1924 the Council of the League of Nations initiated a process for the codification of international law. To reflect the international character of the project, it was to be carried out by “*a body representing the main forms of civilization and the principal legal systems of the world.*”⁴⁸ The Council duly established a Committee of Experts for the Progressive Codification of International Law. Participation in the Committee was not restricted to individuals from member states of the League of Nations.⁴⁹ This Committee was charged with investigating which topics or fields of law were suitable for codification.⁵⁰

The initial list of topics for potential codification considered by the Committee included the status of territorial waters, the status of government ships engaged in commerce, the suppression of piracy, and the exploitation of the products of the sea.⁵¹ Following a series of debates, the Committee of Experts narrowed down the list to those topics of international law which it considered were “sufficiently ripe” for codification by a general international conference. Of the above topics, only the subject of territorial waters was considered to meet this criterion.⁵²

⁴⁷ See O’Connell, *The International Law of the Sea* at pp. 20-21; Churchill and Lowe, *The Law of the Sea* at pp. 13-14.

⁴⁸ Rosenne, *Committee of Experts for the Progressive Codification of International Law* at p. xxxv.

⁴⁹ The seventeen members of the Committee were selected by the League Council following consultations with governments. Membership of the Committee included the United States although the Soviet Union chose not to participate.

⁵⁰ For a copy of the resolution, see Rosenne, *Committee of Experts for the Progressive Codification of International Law* at p. vii.

⁵¹ *Ibid.*, at p. lxi.

⁵² *Ibid.*, at p. lxx.

In response to this recommendation, the League convened the 1930 Hague Codification Conference, which was attended by delegates from forty-seven governments, including states which were not members of the League. The issue of territorial waters was considered by the Second Committee of the Conference. Despite prolonged discussions, delegates failed to agree a treaty on territorial waters, although they did produce a set of draft articles that were subsequently circulated to governments. This text itself did not create legal obligations. Nevertheless, one commentary explains that it “*later exerted influence to the extent that Governments accepted them as a statement of existing international law.*”⁵³ The draft articles once again demonstrate the influence that a written text can have on the formation of customary international law.

The 1930 Codification Conference was to be the only major multilateral attempt to codify international law during the lifetime of the League whose attention was consumed with more fundamental political crises during the 1930s. Although the Conference had failed to produce substantial results, many lessons were learned which would subsequently influence future attempts at codification.⁵⁴

5. The United Nations: A New Era of Codification

The codification of international law was to become a much more prominent and permanent feature of the international system following the Second World War. The International Law Commission was established by the UN General Assembly in 1947 for the purposes of advancing the codification and progressive development of international law.⁵⁵ The ILC is composed of thirty-four independent experts on international law appointed by the General Assembly.

At its first meeting in 1949, the Commission identified a provisional list of fourteen topics as suitable for codification. This list included the regime of high seas and the regime of territorial seas. It decided to prioritise the codification of the regime of the high seas and J.P.A. François was appointed as special rapporteur on the

⁵³ United Nations, *The Work of the International Law Commission* (United Nations, 1988) at pp. 3-4. See also Churchill and Lowe, *The Law of the Sea* at pp. 14-15.

⁵⁴ Rosenne, ed., *League of Nations Conference for the Codification of International Law (1930)*, (Oceana Publications, 1975) at pp. xliii-xlvi.

⁵⁵ General Assembly Resolution 174 (II), 1947, to which is annexed the Statute of the International Law Commission. The first members of the International Law Commission were elected in 1948.

subject. Following a recommendation from the General Assembly⁵⁶, the Commission started work on the regime of the territorial sea at the third session of the Commission in 1951 and François was appointed as special rapporteur on this topic as well.

The Commission proceeded with these two topics simultaneously, albeit continuing to treat them as separate subjects on its work programme. In furtherance of its work on the high seas, the Commission submitted draft articles on the continental shelf and fisheries to the General Assembly in 1953. The Commission recommended that the General Assembly adopt the articles on the continental shelf in the form of a resolution. In addition, the Commission proposed that the articles on fisheries should be forwarded to the FAO for adoption. The General Assembly, however, refused. Citing *“the physical, as well as the juridical, linking of the problems related to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters”*, the General Assembly resolved that *“it would not deal with any aspect of the regime of the high seas or of the regime of territorial waters until all problems involved has been studied by the Commission and reported by it to the General Assembly.”*⁵⁷ In this way, the General Assembly made it clear that it preferred a comprehensive and coherent approach to codifying the law of the sea. Following this recommendation, the ILC duly submitted a single set of draft articles on the law of the sea to the General Assembly in 1956 along with a detailed set of commentaries.

The draft articles formed the basis for discussions at UNCLOS I which was convened by the General Assembly in order to *“examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments that the conference may deem appropriate.”*⁵⁸ The mandate of the conference is important in a number of respects. Firstly, the General Assembly recognized that the law of the sea raised issues of a political or technical nature, as well as pure questions of law. Secondly, the General

⁵⁶ General Assembly Resolution 374 (IV), 1949.

⁵⁷ General Assembly Resolution 798 (VIII), 1953, cited in Sinclair, *The International Law Commission* (Grotius Publications, 1987) at pp. 45-46. This stance was confirmed in 1954 when nine states once again brought the issue before the General Assembly asking for it not to delay its consideration of the topic of the continental shelf. By Resolution 899 (IX), 1954, the General Assembly again deferred the issue until the International Law Commission had submitted its final reports on the law of the sea; see United Nations, *The Work of the International Law Commission* at p. 40.

⁵⁸ General Assembly Resolution 1105 (XI), 1956.

Assembly, in a significant u-turn, also abandoned its determination to treat the law of the sea as a coherent whole. The mandate foresaw the adoption of more than one international convention on the subject. Indeed, the General Assembly left open the question of whether the outcome of the Conference would be legally binding at all by indicating that the Conference could adopt other such instruments that it deemed appropriate.

UNCLOS I took place in Geneva in 1958. In accordance with Resolution 1105 (XI), an invitation was sent to all Members of the United Nations. The final list of participants included eighty-six states⁵⁹ as well as observers from seven specialized agencies.⁶⁰ Like the previous attempt at codification through the League of Nations, it was recognized that the rules of the law of the sea should be developed with the involvement of as many states as possible. Four principal treaties were negotiated, dealing with the territorial sea and the contiguous zone, the continental shelf, the high seas and fishing.⁶¹ The Conference also adopted an optional protocol on dispute settlement. All substantive decisions of the Conference were subject to a vote of a two-thirds majority.⁶²

Although the draft articles had been prepared by the ILC as a single and coherent text, the four substantive treaties were not linked in any way, so that a state could choose which instruments it would accept. Thus, the balance of rights and obligations crafted by the Commission was weakened at UNCLOS I. As O'Connell notes "*that opened up the possibility for States to adhere to parts only of what was intended to be an over-all scheme, and so distortions and exaggerations became inevitable.*"⁶³ Only those states bound by all four Conventions are subject to the package as it was intended to apply. Even then, states could make reservations to many of the articles upon ratification.⁶⁴ Nevertheless, UNCLOS I had taken a

⁵⁹ At the time, only eighty-two states were members of the United Nations.

⁶⁰ See *Official Records of the United Nations Conference on the Law of the Sea*, vol. 2, at p. xiii.

⁶¹ See O'Connell, *The International Law of the Sea* at p. 22. The work of the fifth committee on free access to the sea by land-locked states did not result in a separate convention but aspects of its work are contained in the Territorial Sea Convention and the High Seas Convention; United Nations, *The Work of the International Law Commission* at p. 42. The Continental Shelf Convention was adopted by 57 votes to 3, with 8 abstentions; p. 57. The Fisheries Convention was adopted by 45 votes to 1, with 18 abstentions. The High Seas Convention was adopted by 65 votes to none, with 2 abstentions. The Territorial Sea Convention was adopted by 61 votes to none, with 2 abstentions.

⁶² Rule 35, Rules of Procedure, in *Official Records of the United Nations Conference on the Law of the Sea*, vol. 2, at p. xxxiii.

⁶³ O'Connell, *The International Law of the Sea* at p. 22.

⁶⁴ See 1958 Continental Shelf Convention, Article 12; 1958 Fisheries Convention, Article 19.

significant step forward. Where there had been previously only customary rules, there were now four substantive treaties on the law of the sea.

The success of UNCLOS I was marred by the failure to solve some small, yet highly significant issues, in particular the width of the territorial sea and the important question of fishing rights. A resolution was adopted requesting the General Assembly to study the advisability of convening a second international conference⁶⁵, which it did in 1960.⁶⁶

The mandate of UNCLOS II was to fill in the gaps in the legal framework left by the first conference. It was not intended to consider new issues or reconsider issues that had been concluded at UNCLOS I. However, the eighty-eight states which attended UNCLOS II were not able to agree on an acceptable formula.⁶⁷ The Conference was only able to conclude that “*the development of international law affecting fishing may lead to changes in practices and requirements of many states.*”⁶⁸ Thus the issues were left to the vagaries and uncertainties of customary international law.

6. Success or Failure? The Impact of the 1958 Conventions

The overall reception of the 1958 Conventions was underwhelming.⁶⁹ The High Seas Convention, with 62 ratifications, was the most widely accepted of the four treaties. The Fisheries Convention, on the other hand, only managed to attract 37 contracting parties.

However, it is certainly not true that they had no normative impact. Many of the rules in the 1958 Conventions would be reproduced in some form in the 1982 LOS Convention. Moreover, some of the proposals on which states could not come to an agreement would have an impact on the formation of customary international law. At the same time, some of the more controversial provisions of the 1958 Conventions

⁶⁵ *Records of the United Nations Conference on the Law of the Sea*, vol. 2, at p.145.

⁶⁶ General Assembly Resolution 1307 (XIII), 1958, at para. 1.

⁶⁷ UNCLOS II failed by one vote to adopt a compromise formula providing for a six mile territorial sea and a six mile fisheries zone; see Churchill and Lowe, *The Law of the Sea* at p. 15.

⁶⁸ Resolution II adopted at the 13th plenary meeting on 26 April 1960.

⁶⁹ For a list of ratifications and accessions, see Churchill and Lowe, *The Law of the Sea*, Appendix 2, Table B.

would be the catalyst for a more wide-ranging reformulation of the law of the sea in the following decades.

During the 1960s, the process of decolonisation saw the creation of several new states⁷⁰, many at lower levels of development. Some of these newly independent states were demanding changes in the law to take into account their special interests. As O'Connell notes, some states, "*inspired more by emotion than legal analysis, purported to find their hands tied by the Convention in the interests of the great powers, and were disposed to overthrow the whole Geneva system as having been contrived without their consent and against their interests.*"⁷¹ In this way, the law of the sea became caught up with more general demands for a New International Economic Order which was being promoted by developing countries within the United Nations at that time.

Although the 1958 Conventions did contain amendment clauses, no attempts were made to invoke these procedures in order to make changes to the legal regime. The relatively low number of contracting parties to these instruments may have contributed to the failure to pursue this option. Moreover, many states had in mind a more revolutionary change to the legal regime, rather than tinkering with what was already there.

In the meantime, the widely perceived weaknesses of the 1958 regime led to a return to unilateralism as a means of asserting legal claims. State practice continued to develop to the degree that the ICJ held in the *Fisheries Jurisdiction Cases* that coastal states could claim a twelve mile exclusive fisheries zone, a "*tertium genus between the territorial sea and the high seas*", as well as preferential fishing rights on the high seas, despite the principle of freedom of fishing as found in the 1958 High Seas Convention.⁷²

By the time the judgment was rendered in the *Fisheries Jurisdiction Cases*, negotiations at UNCLOS III were already underway. Indeed, the Court took note of these multilateral law-making activities.⁷³ The Court recognized that it could not

⁷⁰ Between 1957 and 1973, membership of the United Nations rose from 82 to 135; www.un.org/overview/growth.htm.

⁷¹ O'Connell, *The International Law of the Sea* at p. 24. For instance, in 1971, Senegal unilaterally denounced the Territorial Sea Convention and the Fisheries Convention.

⁷² *Fisheries Jurisdiction Case (UK v. Iceland)*, (1974) ICJ Reports at para. 54.

⁷³ *Ibid.*, at para. 53.

render judgment *sub specie legis ferendae* and it clearly acknowledged the advantages of negotiated outcomes at the international level.⁷⁴

7. The Politicisation of the Law of the Sea: UNCLOS III

In 1967, the Maltese ambassador Arvid Pardo addressed the First Committee of the General Assembly, demanding urgent action to ensure the peaceful development of the law of the sea and in particular the legal regime relating to the deep seabed. In response to this speech, the General Assembly created the Committee on the Peaceful Uses of the Seabed⁷⁵ whose initial mandate was to prepare a survey of state practice on the deep sea-bed and the ocean floor, an account of the scientific, technical, economic, legal and other aspects of the issue, and an indication of practical means of promoting international co-operation in the exploration, conservation and exploitation of the ocean floor.⁷⁶

The work of the Committee led to the adoption by the General Assembly of the 1970 Declaration of Deep Seabed Principles.⁷⁷ In the words of one author, these principles “*obviously filled a void created by the rampant technological revolution in this rampant area.*”⁷⁸ The promulgation of the Declaration differed drastically from the process of codification because the Committee was faced with completely new issues where there was no settled state practice.⁷⁹ Formally, the Declaration was non-binding, although the principles therein were to have a significant influence on the future LOS Convention and international law generally.⁸⁰ Indeed, the Declaration was not an end in itself and it foresaw the establishment of an international regime to implement the principles in a more concrete form.

⁷⁴ Ibid.

⁷⁵ Hereinafter, “the Seabed Committee”.

⁷⁶ General Assembly Resolution 2340 (XXII), 1967, at para. 2.

⁷⁷ General Assembly Resolution 2749 (XXV), 1970. This resolution was adopted by 108 votes in favour and fourteen abstentions. There were no negative votes. C.f. the so-called “moratorium resolution”, General Assembly Resolution 2574D (XXIV), 1969, whose adoption could only be secured by a majority vote of sixty-two votes in favour to twenty-eight against, with twenty-eight abstentions. For an explanation, see Churchill and Lowe, *The Law of the Sea* at pp. 226-228.

⁷⁸ Evensen, “Working Methods and Procedures in the Third United Nations Conference on the Law of the Sea”, (1986) 199 *Receuil des Cours* at p. 436.

⁷⁹ In this aspect, the 1970 Declaration has much in common with the previous activities of the General Assembly in the field of space law, where states were creating the applicable legal principles from scratch; General Assembly Resolution 1962 (XVIII), 1963; see B. Cheng, “United Nations Resolutions on Outer Space: Instant Customary International Law?” in *International Law: Teaching and Practice*, ed. B. Cheng (Stevens, 1982).

⁸⁰ See chapter three, at p. 69.

In 1970, the General Assembly also decided to convene another conference on the law of the sea. The mandate of the Conference was not limited to the deep seabed. UNCLOS III was instructed to “*adopt a convention dealing with all matters relating to the law of the sea.*”⁸¹ Thereby, the General Assembly sanctioned the reform of the whole law of the sea in order to address the concerns of states over the 1958 Conventions. According to one author, “*nothing was now to be taken for granted; everything was to be looked at again in the light of new political, economic and technological realities.*”⁸²

UNCLOS III was described by one of its participants as “*the most comprehensive political and legislative work undertaken by the United Nations in its 38 years of existence.*”⁸³ Clearly there was a lot at stake for all states concerned and UNCLOS III was “*as much a daring venture of international politics and international relations as an exercise in international law.*”⁸⁴ The politically charged atmosphere also affected the methods of law-making to be adopted by UNCLOS III. From the start, it was a drastically different process from previous attempts at codifying the law of the sea.

The politicisation of the law of the sea is partially reflected in the preparatory process of UNCLOS III. In contrast to UNCLOS I, the task of preparing for the conference was not delegated to the International Law Commission. It was thought the balancing of competing state interests could not be undertaken by a body of independent legal experts. As one commentator says, “*states were simply unwilling to leave the promotion of their vital interests to the International Law Commission because they reasoned that only governmental representatives could effectively formulate solutions.*”⁸⁵ In particular, developing countries doubted the representativeness of the Commission and they had serious reservations about its

⁸¹ General Assembly Resolution 3067 (XXVIII), 1973, at para. 3. The Conference did not deal with military issues. Note that by Resolution 2660 (XXV), 1970, the General Assembly adopted a Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil thereof.

⁸² Sanger, *Ordering the Oceans* (Zed Books, 1986) at p. 40.

⁸³ Evensen, "Working Methods and Procedures in the Third United Nations Conference on the Law of the Sea", at p. 430.

⁸⁴ Jens Evensen, "Keynote Address", in *The 1982 Law of the Sea Convention* (Law of the Sea Institute, 1983) at p. xxi.

⁸⁵ Koh and Jayakumar, "An Overview of the Negotiating Process of UNCLOS III", in *United Nations Convention on the Law of the Sea 1982 - A Commentary*, ed. Rosenne and Sohn (Martinus Nijhoff Publishers, 1985) at p. 50.

conservative approach to codification.⁸⁶ Instead, the preparatory work for the Conference was entrusted to the Seabed Committee, whose membership was increased in size to ninety-one members for this purpose. General Assembly Resolution 2750 (XXV) mandated the Committee to prepare draft treaty articles embodying the international regime for the deep seabed area and resources of the seabed beyond the limits of national jurisdiction as well as a comprehensive list of subjects and issues relating to the law of the sea to be dealt with by the Conference, including draft articles on such subjects and issues.⁸⁷ The Seabed Committee met for six sessions between 1971 and 1973. Its final report consisted of six volumes of proposals and counter-proposals submitted by states, as well as a number of studies prepared by the UN Secretariat at the behest of the Committee. Crucially, it failed to produce a draft treaty text.⁸⁸

A further reflection of the political character of UNCLOS III was the fact that oversight of the Conference was undertaken by the First (Political) Committee of the UN General Assembly, rather than the Sixth (Legal) Committee.⁸⁹

Many commentators have stressed the enormity of the task with which UNCLOS III was charged.⁹⁰ It is true that the scope of the issues had grown since the first serious attempt at codification through the International Law Commission.⁹¹ Deep seabed mining, the marine environment and the transfer of marine technology were now key issues in the discussions. More significantly, perhaps, the number of states involved in the negotiations had dramatically increased. Whereas 86 states had attended the 1958 Conference, over 160 states participated at various stages of UNCLOS III.⁹² Resolution 3067 (XXVIII) explicitly called for universality of participation at the Conference and it mandated the UN Secretary General to invite all Members States of the United Nations or its specialised agencies, members of the International Atomic Energy Agency, contracting parties to the ICJ Statute, as well as Guinea-Bissau and North Viet-Nam, who at the time were not yet members of the

⁸⁶ Ibid.; Sinclair, *The International Law Commission* at p. 28.

⁸⁷ General Assembly Resolution 2750 (XXV), 1970.

⁸⁸ See Oxman and Stevenson, "The Preparations for the Law of the Sea Conference", (1974) 68 *American Journal of International Law* 1.

⁸⁹ See Churchill and Lowe, *The Law of the Sea* at p. 17.

⁹⁰ See e.g. Evensen, "Working Methods and Procedures in the Third United Nations Conference on the Law of the Sea", at p. 452.

⁹¹ In particular, see Ibid., at p. 427.

⁹² For a full list, see the Final Act of the Conference; *The Law of the Sea - Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, (1983) at p. 158.

United Nations.⁹³ In addition, invitations were sent to certain inter-governmental and non-governmental organisations and the UN Council for Namibia.⁹⁴ In other words, this was intended to be an attempt at law-making by the international community as a whole.

The negotiations at UNCLOS III were politically charged. Traditional groupings, such as the G77 or the geographical groups inherited from the UN system, did play a role in the negotiations. More importantly, several interest groups spontaneously emerged from the negotiating process such as the coastal states, the strait states, the archipelagic states, and the landlocked and geographically disadvantaged states.

The conflict between the developing countries and industrialised states was one of the most striking dynamics at the Conference. The chief area of controversy between these two factions was the somewhat unusual topic of deep seabed mining, an issue that would ultimately cause the failure of the Conference to agree a text by consensus.⁹⁵ However, political alliances and divisions often varied depending on the issues under discussion. Whilst the industrialised states were largely unified on the issue of deep seabed mining, divisions arose over questions of maritime pollution depending on whether a state identified itself as a coastal state or a maritime state. The challenge for the Conference was to balance all of these diverse interests.

8. A Revolution in Law-Making: Consensus Decision-Making

The procedures for decision-making would clearly be a vital component in the ability of the Conference to reconcile the conflicting claims and counter-claims of states at UNCLOS III. In the words of one participant, "*from the outset it was acknowledged that it would be an exercise in futility to draw up a draft convention unacceptable to one or more of the major groupings within the United Nations.*"⁹⁶ Universal agreement was the aim and it was the negotiating process and procedures which would facilitate its achievement.

⁹³ General Assembly Resolution 3067 (XXVIII), 1973, at para. 7.

⁹⁴ *Ibid.*, at para. 8.

⁹⁵ See below, at pp. 34-35.

⁹⁶ Evensen, "Keynote Address", at p. xxvi.

It is no surprise then that questions of procedure dominated the first session of the Conference in 1973 and it was only after intense inter-sessional negotiations that the second session was able to reach agreement on an acceptable formula. It was clear that majority voting would not be an appropriate method of decision-making as the developing countries would be able to outvote the industrialised states on matters of substance. Even the two-thirds majority employed at UNCLOS I would not safeguard the interest of all states. The compromise reached at the second session of the Conference was on a process of consensus decision-making.

According to Buzan, the formalisation of the consensus decision-making procedures was one of the most important innovations of UNCLOS III.⁹⁷ The Rules of Procedure themselves do not mention consensus⁹⁸, rather they require procedural decisions to be made by a simple majority whilst substantive decisions required a two-thirds majority.⁹⁹ However, the so-called Gentlemen's Agreement, adopted as an annex to the Rules of Procedure, mediates the use of the voting procedures and explicitly calls for consensus decision-making: "*the Conference should make every effort to reach an agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.*"

Consensus is to be distinguished from unanimity which requires the affirmative vote of all negotiating states. In contrast, consensus simply requires that there is "*a very considerable convergence of opinions and the absence of any delegations in strong disagreement.*"¹⁰⁰ Evensen describes the consensus principle as "*the cornerstone of the Conference... it meant the adoption of articles – and the text of the Convention as a whole – by general agreement (or understanding) without resorting to a vote and, in effect, without requiring an unanimous decision.*"¹⁰¹ In other words,

⁹⁷ Buzan, "Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea", (1981) 75 *American Journal of International Law* at p. 328. See also Plant, "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law-Making?" (1987) 36 *International and Comparative Law Quarterly* at pp. 526-527.

⁹⁸ Plant, "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission", at pp. 532-533.

⁹⁹ The Rules of Procedure are reproduced by Buzan, "Negotiating by Consensus", at pp. 347-348.

¹⁰⁰ Vignes, "Will the Third Conference on the Law of the Sea Work According to Consensus Rule?" (1975) 69 *American Journal of International Law* at p. 124.

¹⁰¹ Evensen, "Keynote Address", at p. xxvi.

the consensus decision-making procedure was concerned with achieving an outcome which would balance the interests of all the states involved.

Vignes observes that consensus does not stand alone as a decision-making procedure, rather it is linked to a majority vote, “*as a threat [or] an inducement to achieve consensus.*”¹⁰² However, several procedural safeguards were agreed in order to ensure that a vote could not be taken before efforts at consensus had been exhausted. These safeguards included the deferral of the vote during which time the President of the Conference would make every effort to facilitate an agreement. A deferral of up to ten days could be requested by fifteen delegates of the Conference and a further deferral could be agreed by a majority vote of the plenary.¹⁰³ It should be noted that these safeguards did not apply to the adoption of the Convention as a whole. Rather, the Rules provide that “*the Convention shall not be put to the vote less than four working days after the adoption of its last article.*”¹⁰⁴ This gives some breathing space to allow a last attempt at bringing reluctant states on board. Even with the procedural safeguards, there is an obvious tension between the voting procedures and the principle of consensus.¹⁰⁵ In the end, effective implementation of the consensus procedures relies to a certain extent on the good faith of the negotiators and a strong political will to reach a compromise.

The Gentlemen’s Agreement was only one aspect of the consensus decision-making procedure adopted at UNCLOS III. Buzan also identifies what he calls an “*active consensus procedure*” which was intended to push forward the process of consensus formation by removing the role of proposing solutions from the participants themselves and seeking to prevent the hardening of negotiating positions.¹⁰⁶ Thus, following a failure to make progress in the negotiations, the Conference agreed at its third session in 1975 to mandate the chairs of the three main committees to produce what were known as the Informal Single Negotiating Texts.¹⁰⁷ As its name suggests, the ISNT had no official status and it simply acted as a focus for the negotiations. In the words of the President of UNCLOS III, “*the texts would not*

¹⁰² Vignes, “Will the Third Conference on the Law of the Sea Work According to Consensus Rule?”, at p. 120.

¹⁰³ Rule 37.

¹⁰⁴ Rule 39(2).

¹⁰⁵ Vignes, “Will the Third Conference on the Law of the Sea Work According to Consensus Rule?” at p. 120.

¹⁰⁶ Buzan, “Negotiating by Consensus”, at pp 328-329.

¹⁰⁷ Hereinafter, “ISNTs”.

prejudice the position of any delegation, and would not represent any negotiated text or accepted compromise."¹⁰⁸

As well as the official negotiation process, a number of unofficial negotiating groups operated on the sidelines of the Conference, contributing to its success.¹⁰⁹ These informal groups brought together the important delegations from special interest groups in a private forum which was more conducive to fruitful negotiations. The best known of these was the Evensen Group, which dealt with a variety of issues including the EEZ, the marine environment, marine scientific research and the continental shelf. Many of the compromises produced in this group were to substantially influence the official negotiating texts.¹¹⁰

The interrelatedness of the law of the sea was an important factor during the Conference negotiations where the need to identify compromises between competing state interests was vital to its success. The interrelationship was expressly recognized in General Assembly resolutions from 1969 onwards and ultimately in the preamble to the LOS Convention itself which says, "*the problems of ocean space are closely related and need to be considered as a whole.*"

How this interrelationship was to be achieved in practice was not clear when the Conference opened in 1973. UNCLOS III continued the organizational set-up adopted by the Sea-Bed Committee so that the work was divided into three main committees, covering the seabed regime, the general law of the sea, and the marine environment and marine scientific research. Whilst the work was split on thematic grounds, the issues discussed in the three committees continued to be interlinked. As Paul Bamela Engo, chair of the First Committee, explains, "*some matters under consideration in other Main Committees had significant repercussions in the First Committee*"¹¹¹ and the same was clearly true for the other two committees.¹¹² Given

¹⁰⁸ *Third United Nations Conference on the Law of the Sea, Official Records*, Vol. IV, at p. 26, paras. 92-93.

¹⁰⁹ See Buzan, "'United we stand...' - Informal negotiating groups at UNCLOS III", (1980) 4 *Marine Policy* 183.

¹¹⁰ See Koh and Jayakumar, "An Overview of the Negotiating Process of UNCLOS III", at pp. 106-107.

¹¹¹ Engo, "Issues of the First Committee", in *The 1982 Law of the Sea Convention*, ed. Oxman and Koers (Law of the Sea Institute, 1983) at p. 40.

¹¹² Yankov, "The significance of the 1982 Convention for the protection of the marine environment - Third Committee Issues", in *The 1982 Law of the Sea Convention*, ed. Oxman and Koers (Law of the Sea Institute, 1983) at p. 72.

these *de facto* linkages, states were only willing to make compromises in one committee contingent on the outcome of debates in other committees.

Whilst linkages between particular provisions of a treaty are common¹¹³, it is the linking of the Convention as a whole that characterises the package deal concept that arose at UNCLOS III.¹¹⁴ Evensen, a key participant in the Conference, describes the package deal as “*the notion that all the main parts of the Convention should be looked upon as an entity, as a single negotiated package, where the laws of give and take presumably had struck a reasonable balance between participating states considered as a whole.*”¹¹⁵ It was the objective of the Conference to resolve the outstanding issues in the law of the sea to the satisfaction of as many states as possible and it became clear that compromises between the principal protagonists would be crucial to the its success.

In a significant step, the ISNTs which had been produced by the committee chairs were combined in 1977 into a single document, the so-called Informal Composite Negotiating Text.¹¹⁶ Evensen explains the significance of the ICNT: “*for the first time, the Conference prepared a treaty text where the different parts were coordinated and where obvious contradictions and unnecessary repetitions had been remedied.*”¹¹⁷ All the same, the ICNT remained a negotiating text subject to further compromise. Thus, delegates continued to refine the issues over which there were disagreements, forming seven negotiating groups at its seventh session in 1978 to concentrate on key divisive topics. In another significant step, it was agreed at the same session that “*any modifications to be made in the [ICNT] should emerge from the negotiations themselves and should not be introduced on the initiative of any single person, whether it be the President or a Chairman of a Committee, unless presented to the Plenary and found, from the widespread and substantial support prevailing in Plenary, to offer a substantially improved prospect of a consensus... the revision of the [ICNT] should be the collective responsibility of the President and the Chairmen of the main committees, acting together as a team headed by the*

¹¹³ Lee, "The Law of the Sea Convention and Third States", (1983) 77 *American Journal of International Law* at p. 567.

¹¹⁴ What Plant calls the “grand-package”; "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission", at p. 528.

¹¹⁵ Evensen, "Keynote Address", at p. xxvii.

¹¹⁶ Hereinafter, “ICNT”.

¹¹⁷ Evensen, "Working Methods and Procedures in the Third United Nations Conference on the Law of the Sea", at p. 471.

*President.*¹¹⁸ This move made it much more difficult to change the negotiating text and it was, according to one author, “a recognition that a heavy burden of proof [was] necessary for any proposal to change any one of the large majority of articles that already [enjoyed] widespread and substantial support.”¹¹⁹ At the close of the ninth session in 1980, the title of the document was changed to a “draft convention”, although its status as a negotiating text remained unaffected until its final adoption in 1982.

Negotiations, however, began to turn sour with the election of Ronald Reagan as President of the United States in 1980. President Reagan immediately ordered a root and branch review of the draft convention. Determined to oppose the treaty, the US demanded a vote on the adoption of the treaty at the final session of the Conference on 30 April 1982. As a result, the final text of the LOS Convention was adopted by 130 votes in favour, 4 against, and 17 abstentions. The list of those countries which did not vote in favour of the Convention includes most industrialised states and Soviet states.¹²⁰

As noted above, the principal objection of the industrialised states was to the provisions on the International Seabed Area in Part XI of the Convention.¹²¹ In the final speech to the Conference, the US delegate stressed that whilst those parts dealing with the traditional aspects of the law of the sea reflected prevailing international practice, the deep seabed mining regime was largely unacceptable.¹²² Despite last minute efforts to persuade the US to participate, it refused to sign the Convention and many other industrialised states resolved that they would not consent to be bound by the Convention as it stood in 1982.¹²³

Turkey, Israel and Venezuela also voted against the Convention, albeit for different reasons. Turkey and Venezuela both objected to the methods outlined in the

¹¹⁸ Cited by Buzan, "Negotiating by Consensus", at p. 337.

¹¹⁹ Oxman, "The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)", (1979) 73 *American Journal of International Law* at p. 5.

¹²⁰ The Soviet and Eastern European states changed their position and signed the Convention when it was opened for signature in December 1982.

¹²¹ See Larson, "The Reagan Rejection of the U.N. Convention", (1985) 14 *Ocean Development and International Law* 337.

¹²² See statement of the United States, 192nd meeting, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. 17, at pp. 116-117. See also the statement of the United Kingdom, 189th meeting, *Ibid.*, at pp. 79-80.

¹²³ Churchill and Lowe, *The Law of the Sea* at p. 23.

Convention for delimiting the continental shelf and the EEZ.¹²⁴ Israel, on the other hand, principally opposed the provisions on straits contained in Part III of the Convention.¹²⁵

9. Conclusion

The package deal, combined with the consensus decision-making procedures described above, were negotiating tools which were aimed at achieving a treaty text that was acceptable to as many states as possible. These procedures represent a novel method of law-making which seeks to bring together states in a deliberative process in order to achieve a compromise across the board.

Writing before the conclusion of the Conference, Buzan argues that “*actual resort to [a vote] would in all likelihood have indicated a breakdown of the negotiations... [and] the only sensible conclusion to the negotiating techniques evolved at UNCLOS is to adopt the final revision by consensus.*”¹²⁶ Applying this analysis to the actual events of the Conference, the recourse to a vote at the final session of UNCLOS III indicates the failure to accommodate a number of important interests. If the goal of the Conference was to conclude a treaty covering all aspects of the law of the sea which met with the general approval of all states, the outcome was disappointing.

The Conference did manage to produce a clear and comprehensive set of rules and principles on the law of the sea. Indeed, apart from Part XI, most other sections of the LOS Convention garnered the support of an overwhelming majority of states. The Conference was therefore successful in forging a consensus on many aspects of the law of the sea, including many issues that had evaded settlement since the first attempts at codification.

The Conference was also successful in introducing new law-making techniques. The drafting of an instrument through an international conference has advantages over creating law through custom as it promotes transparency and inclusiveness in the law-

¹²⁴ Statement of Turkey, 189th meeting, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. 17, at pp. 76-78; statement of Venezuela, 192nd meeting, *Ibid.*, at pp. 118-119.

¹²⁵ Statement of Israel, 190th meeting, *Ibid.*, at pp. 84-85.

¹²⁶ Buzan, "Negotiating by Consensus", at p. 332.

making process. Thus, this method of law-making can make a major contribution to promoting stability in international relations.

Law-making techniques and the status of a legal instrument are of course two separate concepts that should not be confused. The outcome of UNCLOS III was a treaty which formally creates legal obligations only for those states which consent to be bound. However, there are ways in which treaties can have an impact on non-parties. To what extent the LOS Convention succeeded in creating a universal framework for the law of the sea will be addressed in the following chapter.

Chapter Three

Towards a Universal Law of the Sea?

1. The Limits of the LOS Convention as a Treaty Instrument

From the outset, the object of UNCLOS III was to conclude a treaty covering all aspects of the law of the sea.¹ At its final session in 1982, the Conference fulfilled this aim by adopting the LOS Convention which was subsequently opened for signature on 10 December 1982.

The LOS Convention aspires to universal participation. It is open to formal acceptance by all states, as well as a range of non-state actors which had attended the Conference.² The target of universal participation has been endorsed by the General Assembly which regularly urges states that have not done so to become parties to the Convention.³

States can consent to be bound by the Convention through ratification or accession.⁴ The LOS Convention required sixty ratifications or accessions in order to come into force. It finally did so on 16 November 1994.⁵ States accepting the Convention following its entry into force will become bound thirty days after indicating their acceptance.⁶ As of May 2007, the number of States Parties was 155. Whilst this includes a significant proportion of the international community, it still falls short of the 192 states who are currently members of the United Nations.

¹ General Assembly Resolution 2750 (XXV), 1970, at para. 3.

² LOS Convention, Article 305.

³ E.g. General Assembly Resolution 61/30, 2006, at para. 3.

⁴ LOS Convention, Articles 306-307.

⁵ Guyana deposited the sixtieth ratification on 16 November 1993. The Convention entered into force as modified by the 1994 Part XI Agreement, which was necessary to ensure the participation in the Convention of the group of industrialised states which objected to the deep seabed provisions of the original Convention. See also chapters three and four for further discussion of the deep seabed regime, at pp. 69-71 and 97 ff..

⁶ LOS Convention, Article 308(2).

According to the fundamental doctrine of *pacta tertiis nec nocent prosunt*, a treaty only creates legal obligations for states which have consented to be bound.⁷ The International Law Commission describes this doctrine as “*one of the bulwarks of the independence and equality of States*”⁸, whilst McNair says that “*both legal principle and common sense are in favour of the rule ... because as regards States which are not parties ... a treaty is res inter alios acta.*”⁹

The limitations of treaties as instruments for the creation of universal law are thus plain. From the strict perspective of the law of treaties, it is necessary for all states to become party to the Convention in order for it to successfully create a universal framework for the law of the sea.

Given these inherent limitations, it may seem strange that states continue to use treaties as a way of developing international law.¹⁰ The answer may be a lack of any viable alternative. As McNair noted as long ago as 1930, the treaty is “*the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out multifarious transactions.*”¹¹ Little has changed since that time. More than sixty years later, another author similarly concludes, “*law-making by treaty is the only organized procedure for the conscious, rational positing of legal rules, at least at the universal level.*”¹²

International legislation has occasionally been mooted¹³, but the idea of an instrument capable of binding all states *ipso facto* without their consent is not yet

⁷ Article 34 provides that “a treaty does not create either obligations or rights for a third State without its consent.” There are exceptions to this rule which will be discussed below at p. 41 onwards.

⁸ International Law Commission, “Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly”, (1966 - II) *Yearbook of the International Law Commission* at p. 227.

⁹ McNair, *Law of Treaties* (Oxford University Press, 1961) at p. 309. See also Tomuschat, “Obligations arising for states without or against their will”, (1993) 241 *Receuil des Cours* at p. 242.

¹⁰ Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007) at p. 233.

¹¹ McNair, “The Functions and Differing Legal Character of Treaties”, (1930) 11 *British Yearbook of International Law* at p. 101.

¹² Tomuschat, “Obligations arising for states without or against their will”, at p. 239. See similar comments by Simma, “From bilateralism to community interest in international law”, (1994) 250 *Receuil des Cours* at p. 323.

¹³ For instance, Chodosh contends the emergence of what he calls “declaratory international law” which differs from customary international law because it is not necessarily accepted as law by a generality of

generally accepted. Danilenko, for one, says "*there is no evidence that by entering into negotiations leading to treaty norms expressing general interests, members of the international community endorse legislative techniques based on majority law-making.*"¹⁴

One possible exception is the power of the UN Security Council to impose obligations on Members of the United Nations. Whilst most Security Council resolutions deal with specific threats to international peace and security involving a small number of states, some are drafted in general terms.¹⁵ These resolutions come close to legislation. Nor is the Security Council alone in possessing the ability to bind states by its decisions. Some other institutions have powers to create and amend standards which are binding on states without the need for their further consent.¹⁶ However, it should be remembered that all of these law-making powers are conferred by treaty in the first place. Moreover, they can only be exercised within strict limits. Such powers are better understood as delegated law-making than legislation *per se*.

It is inappropriate to describe the LOS Convention as a legislative act. Yet, there may be other ways to account for the transition of the Convention from treaty instrument to universal law. The first stage of the analysis is to look to the law of treaties for any exceptions to the *pacta tertiis* principle which would allow the application of the LOS Convention to third states without them being a party. Secondly, it is necessary to inquire whether the conclusion of a treaty such as the LOS Convention can influence the creation of customary international law.

states; "Neither Treaty Nor Custom: The Emergence of Declarative International Law", (1991) 26 *Texas International Law Journal* 87.

¹⁴ Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993) at pp. 67-68. See also Oppenheim, concluding that international legislation is not a development "which governments are at present prepared to accept"; Jennings and Watts, eds., *Oppenheim's International Law*, 9 ed., vol. 1 (Longman, 1992) at pp. 114-115.

¹⁵ E.g. Security Council Resolution 1373. The legislative function of the Security Council is much debated; e.g. Rosand, "The Security Council as Global Legislator: Ultra Vires or Ultra-Innovation", (2005) 28 *Fordham International Law Journal* 101; Wood, "The UN Security Council and International Law", (2006) *Hersch Lauterpacht Memorial Lectures*, lecture 1, at paras. 23-27.

¹⁶ E.g. Montreal Protocol on Substances that Deplete the Ozone Layer, Article 2(9).

2. Treaty Rights and Obligations for Third States

The first question is to what extent can states have rights or obligations under a treaty without being a party. The general principle is that treaties are only binding on states that have consented to be bound.¹⁷

One exception to this principle is that a treaty can confer rights on third states, sometimes referred to as “*stipulation pour autrui*”.¹⁸ In the *Free Zones Case*, the PCIJ confirmed that third states could enjoy rights under a treaty without becoming a party to the treaty itself.¹⁹ The Court emphasised the importance of the intention of the contracting parties to this effect, as well as the consent of the third state. On the evidence, the Court held that the parties to the 1815 Treaty of Paris and associated instruments had intended to extend to Switzerland a right to the withdrawal of the French customs barrier behind the political frontier and that Switzerland could rely on that right in the proceedings against France.²⁰

The rules relating to the rights of third states under treaties are now found in the 1969 Vienna Convention on the Law of Treaties. Article 36 provides in part, “*a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto.*”²¹ According to this provision, there are two conditions which must be satisfied before a right is conferred on

¹⁷ Vienna Convention on the Law of Treaties, Article 34.

¹⁸ Whether this is correctly classified as an exception was the subject of intense debate in the International Law Commission; see International Law Commission, “Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly”, at p. 226.

¹⁹ *Free Zones of Upper Savoy and District of Gex*, (1932) Series A/B, No. 46 PCIJ Reports 96 at p. 147. For the background of the dispute, see Weber, “Free Zones of Upper Savoy and Gex Case”, in *Encyclopedia of Public International Law*, ed. Bernhardt (North-Holland, 1981).

²⁰ France had argued that it could unilaterally abrogate the prescription in the 1815 treaties because Switzerland, it claimed, had no legal right thereunder. In fact, the Court primarily held that the creation of the free zones had the character of a contract. It then went on to consider whether a treaty could confer a right on a third state; *Free Zones Case*, at p. 147. It has been argued that the decision of the Court on third party rights was therefore obiter dicta; see McNair, *Law of Treaties* at p. 312. In contrast, Chinkin argues that common law concepts such as obiter dicta have no application in international law as there is no system of precedent; *Third Parties in International Law* (Clarendon Press, 1993) at p. 28, footnote 13.

²¹ The source of such rights, whether in the treaty itself or in a collateral agreement, was hotly contested within the Commission; see e.g. International Law Commission, “736th Meeting, Tuesday 2 June 1964”, (1964 II) *Yearbook of the International Law Commission* at p. 80.

a third state. Firstly, the parties to the treaty must have intended to confer a right on a third state. Secondly, the third state itself must consent to the conferral of the right. The consent of third parties to accept a right under a treaty to which it is not a party shall however be “*presumed so long as the contrary is not indicated.*”²²

As well as conferring rights, a treaty can also create obligations for third states without those states actually becoming party to the whole treaty. This situation is covered by Article 35 of the Vienna Convention on the Law of Treaties. Article 35 again stresses the importance of the intention of the parties to the treaty to create an obligation for a third State and the consent of the third state to that obligation. The principal difference between the treatment of rights and obligations in this context is the form of consent. According to Article 35, a third party must accept an obligation under a treaty in writing.²³ The ILC commentary confirms that such obligations are not strictly speaking based upon the treaty itself but on a second collateral agreement between the parties to the treaty and the third state.²⁴

The intention of the contracting parties to confer a right or obligation is central to these provisions. In these circumstances, the parties to the treaty may be characterised as offering a right to a third state or inviting a third state to undertake an obligation.

²² The commentary to Article 35 notes that the issue of consent in relation to third party rights is controversial and a treaty cannot impose a right on a third state because “a right can always be disclaimed or waived.” According to the commentary, the text of Article 35 is intended to leave open the question of whether juridically the right is created by the treaty or by the beneficiary state’s act of acceptance; International Law Commission, “Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly”, at pp. 228-229.

²³ There was much discussion about the form of consent to an obligation in the discussions of the ILC; see 733rd meeting to 735th meeting, (1964 I) *Yearbook of the International Law Commission*, at pp. 64-80. The condition that acceptance must be in writing was added at the Vienna Conference following a proposal by Vietnam; see Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984) at p. 101.

²⁴ International Law Commission, “Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly”, at p. 227. The Commission again cite as authority for the rule the decision of the PCIJ in the *Free Zones of Upper Savoy and the District of Gex Case*, where the Court held that the 1919 Treaty of Versailles was not binding on Switzerland “who is not a Party to the Treaty, except to the extent to which that state has accepted it.” In this context, France was arguing that the 1919 Treaty imposed an obligation on Switzerland to agree to the abrogation of the “free zones”. In its commentary on Article 35, the International Law Commission also cited the *Advisory Opinion on the Status of Eastern Carelia*, (1923) Series B, No. 5 PCIJ Reports 7; *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (1929) Series B, No. 14 PCIJ Reports 4.

How one identifies the intentions of the parties is an important issue. The standard of proof is a high one – in the words of the PCIJ, “*it cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour.*”²⁵

The principal means of identifying intention should be the text of the treaty itself and the normal rules of treaty interpretation apply.²⁶ A third state which is afforded rights or obligations under a treaty need not be specifically named; a treaty may direct itself to all states or to a specific class of states belonging to an identifiable category.²⁷ Further evidence of intention may also be found in *travaux préparatoires*. Such evidence, however, should not be used to infer an intention that cannot be supported by the text of the treaty.

In the case of the LOS Convention, there are no express stipulations which clearly and unambiguously confer rights or obligations on third states. It is true that many provisions in the Convention refer to “States” or to “all States” as opposed specifically to “States Parties”. For example, Article 2(1) says that “*the sovereignty of a coastal State extends, beyond its land and territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.*” This provision seemingly refers to coastal States in general rather than coastal States Parties. Similar phrasing is found throughout the Convention with the exception of Parts XI, XV, and XVII which are largely addressed to States Parties alone.

Does this generic terminology demonstrate the intention of the drafters to grant rights to third states? St Skourtos thinks so. He asserts that “*with regard to the comprehensive objective, the universal aim and the system applied by the Convention concerning the conferment of rights and the imposition of obligations ... it cannot be*

²⁵ *Free Zones Case*, at p. 147. The Court goes on to say that “the question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such”; at pp. 147-148.

²⁶ Chinkin, *Third Parties in International Law*, at p. 33.

²⁷ See International Law Commission, “Draft Articles on the Law of Treaties”, at p. 228.

lightly presumed that this differentiation of terms is to be regarded as meaningless."²⁸ However, it is not obvious that this conclusion is supported by other evidence. Lee argues that *"the intent may most appropriately be ascertained from official statements made by representatives of states participating in [UNCLOS III]."*²⁹ A survey of the *travaux préparatoires* of the LOS Convention reveals strong disagreement amongst states over the precise impact of the Convention on third states with many delegates arguing that the Convention is a package deal which cannot be selectively applied by states. The issue of interconnecting rights and obligations was stressed, for instance, by Deputy Foreign Minister Gouzhenko of the Soviet Union, who said at the closing session of the Conference that *"the Convention is not a basket of fruit from which one can pick only those one fancies. As is well known, the new comprehensive Convention has been elaborated as a single and indivisible instrument, as a package of closely interrelated compromise decisions."*³⁰

It is the interconnection of the LOS Convention that causes problems for the application of Articles 35 and 36 of the Vienna Convention. These provisions allow third states to selectively choose individual rights and obligations under a treaty. Yet, this possibility would appear to have been against the wishes of many states at UNCLOS III. Further support for this view can be found if one considers the wider context of the Convention. Article 309 of the Convention prohibits reservations which are not expressly permitted. Allowing third states to selectively claim rights and obligations under the LOS Convention would undermine this provision.

²⁸ N. St. Skourtos, "Legal Effects for Parties and Non-Parties: The Impact of the Law of the Sea Convention", in *Entry into Force of the Law of the Sea Convention*, ed. Nordquist and Moore (Kluwer Law International, 1995) at p. 167; Wolfrum says "this choice of wording seems to indicate, if this differentiation of terms is not to be regarded as meaningless, that the LOS Convention not only creates or codifies rights and obligations for States Parties, but does so for non-parties as well"; Wolfrum, "The Legal Order for the Seas and the Oceans", in *Entry into Force of the Law of the Sea Convention*, ed. Nordquist and Moore (Kluwer Law International, 1995) at p. 167. Wolfrum also suggests that third states can accept obligations in the LOS Convention by implementing its provisions into their national legislation and that this will satisfy the requirement of written consent in Article 35. Although implementation may amount to state practice for the purposes of determining customary international law, it is dubious whether it constitutes acceptance in written form.

²⁹ Lee, "The Law of the Sea Convention and Third States", (1983) 77 *American Journal of International Law* at p. 547.

³⁰ Cited by Caminos and Molitor, "Progressive Development of International Law and the Package Deal", (1985) 79 *American Journal of International Law* at p. 877.

Indeed, the differential treatment of rights and obligations could be problematic for many multilateral treaties. In his analysis, Sinclair notes that most treaties confer rights and obligations simultaneously and the two can often be intertwined.³¹ Moreover, although Article 36(2) allows conditions to be attached to rights conferred on third states, Chinkin notes that “*onerous conditions could, in the opinion of a third party, transform such a right into an obligation.*”³² These issues are not satisfactorily resolved by the Vienna Convention.

There is a further question of whether the provisions on third states are applicable to general multilateral treaties such as the LOS Convention. Third state is defined by the Vienna Convention as “*a State not party to a treaty*”.³³ This is a very broad definition and it makes no distinction between those states which can become a party and those states which cannot. Nevertheless, the underlying policy of these provisions suggests that they should have a limited application. It is submitted that the concept of *stipulation pour autrui*, literally “for other persons”³⁴, only applies where a state is not able to become a party to the treaty by signature, ratification or accession.

This argument finds some support in the fifth report on the law of treaties by Fitzmaurice where he suggests that the presumption that a treaty has no effects for third states is “*enhanced, and may become absolute, in the case of these treaties which contain specific provision for the participation of third states, either by leaving the treaty open for signature or subsequent ratification by states other than the original signatories, or by the inclusion of an accession clause or its equivalent.*”³⁵ Fitzmaurice admits there is no authority for this position, but he asserts that it is correct as a matter of principle. He explains, “*it seems clear that when a treaty itself makes provision for the admission of third states, then the correct method of procedure, if those third States wish*

³¹ Sinclair, *The Vienna Convention on the Law of Treaties* at pp. 102-103.

³² Chinkin, *Third Parties in International Law* at p. 40. Lachs suggests that if such a situation arises, the criteria applying to obligations must prevail; 736th meeting, (1964 - I) *Yearbook of the International Law Commission* 80, at para. 28. See also the comments of Ago at para. 41, and Waldock at para. 70.

³³ Vienna Convention on the Law of Treaties, Article 2(h).

³⁴ See Garner, ed., *Black's Law Dictionary*, 8 ed., (Thomson West, 2004) at p. 1455.

³⁵ Fitzmaurice, “Fifth Report on the Law of Treaties”, (1960 II) *Yearbook of the International Law Commission*, at p. 77.

to benefit from, or to enjoy the rights provided by the treaty or if they are prepared to assume obligations, is for them to avail themselves of the faculty of becoming parties."³⁶

These comments raise questions over when the provisions on third states apply? The concept of *stipulation pour autrui* is aimed at the situation where a group of states concludes a treaty which has ramifications for other states who are not able to become a party to the treaty. Examples are the 1815 Treaty of Paris and the 1919 Treaty of Versailles, which were considered by the PCIJ in the *Free Zones Case*. These instruments were both peace treaties concluded by a small number of powerful states following the cessation of international conflicts. Despite the limited number of parties to the negotiations, the outcome nevertheless had the character of an international settlement that affected numerous third states who had not been involved in the negotiations and who could not become a full party to the treaty. It was therefore necessary to invoke the rules on third states in order to give full effect to the treaty.

Many modern multilateral treaties, on the other hand, are negotiated in very different circumstances. As Tunkin pointed out during the ILC discussions on this issue, "*if a state had a legitimate interest in the subject-matter of a treaty, it should be invited to the Conference formulating the treaty or at least consulted during its formulation.*"³⁷ All states and many other interested actors were involved in the drafting of the LOS Convention. Moreover, any state, whether or not it attended UNCLOS III, is free to become a party to the Convention. It is submitted that the participation of all states in the drafting of most modern multilateral treaties negates the need for invoking the principles on third party rights and obligations. Similar observations were made by several members of the ILC in their discussion on Articles 35 and 36.³⁸ The special

³⁶ Ibid., at p. 89. Similar reasoning, albeit in a different context, can be seen in the *North Sea Continental Shelf Cases*, (1969) ICJ Reports 3, at para. 28.

³⁷ 736th meeting, (1964 I) *Yearbook of the International Law Commission*, at p. 85.

³⁸ E.g. the comments of Bartos, (1964 I) *Yearbook of the International Law Commission*, at p. 67; Lachs, Ibid., at p. 70; Tabibi, Ibid., at p. 74; El-Erian, Ibid., at p. 75. c.f. Rosenne who "agreed with Mr Lachs that all interested States should, as a matter of principle, be given the opportunity of participating in negotiations on matters of interest to them." He continues, "even if this desirable state of affairs were achieved, a provision of the kind set out in paragraph 1 would still be needed because, without wishing to become parties to an instrument, states might nonetheless wish to assume certain obligations in regard to

rapporteur himself noted that “*it was unlikely that the parties to a general multilateral treaty would resort to devices of the kind envisaged...*”³⁹ Thus, on the basis of these arguments, the application of the provisions on third states to general multilateral treaties such as the LOS Convention is not appropriate.

3. The LOS Convention as an Objective Regime?

Another doctrine supporting the application of a treaty to non-parties is that of objective regimes.⁴⁰ Support for the doctrine is found in the judgment of the PCIJ in the *Case of the S.S. Wimbledon* where the Court considered the implementation of Part XII, Section VI of the 1919 Treaty of Versailles which sets up a treaty regime for the Kiel Canal. The S.S. Wimbledon was a ship flying the flag of the United Kingdom. It had been chartered by a French company to carry munitions to the port of Danzig at the time when Poland was at war with Russia. The ship was stopped from passing through the Kiel Canal by the German authorities because Germany claimed that it was bound by its status as a neutral state not to allow the transit of weapons to a warring party. The UK, France, Italy and Japan brought a claim before the PCIJ claiming that Germany was under a duty to guarantee free access through the Kiel Canal under the terms of the Treaty of Versailles. The Court held that the terms of Article 380 created an international waterway “*intended to provide easier access to the Baltic for the benefit of all nations of the world.*”⁴¹ It is clear from this decision that Part XII, Section VI of the Treaty of Versailles creates a set of rights that are invocable by all states, whether or not

it.” Yet, even Rosenne deemed that there may be some difficulty in determining how the principles on third states apply to general multilateral treaties; *Ibid.*, at p. 75.

³⁹ *Ibid.*, at p. 78.

⁴⁰ For a historical account of the doctrine, see Subedi, “The Doctrine of Objective Regimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States”, (1994) 37 *German Yearbook of International Law* 162.

⁴¹ *Case of the S.S. Wimbledon*, (1923) PCIJ Reports, Series A, No. 1, at p. 22; the Court continues “under its new regime, the Kiel Canal, must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany.” For comment, see Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997) at pp. 24-27.

they are party to the treaty. Nor was it a matter of a single right being conferred on these states; the Court treated Part XII, Section VI of the Treaty as an inseparable whole.

The doctrine of objective regimes was considered by the International Law Commission in its codification of the law of treaties, although ultimately the Commission decided not to include it in the draft articles because it was deemed unlikely to meet with the general acceptance of states.⁴² Nevertheless, Sinclair insists that “*it must not be assumed that the deliberate decision of the Commission and the Conference not to make special provision for treaties creating ‘objective regimes’ in the series of articles on treaties and third states in the Vienna Convention on the Law of Treaties constitutes a denial of the existence of this category of treaty.*”⁴³ Indeed, the doctrine can still find support in the writings of many commentators.⁴⁴ Aust writes that certain treaties have been held to create a status or regime valid *erga omnes*, including demilitarisation treaties⁴⁵, waterway regimes⁴⁶ or a regime for a special area, for example Antarctica.⁴⁷

Although the draft articles on objective regimes prepared by the special rapporteur were not ultimately submitted to the Vienna Conference on the Law of

⁴² International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly", at p. 231, para. 4.

⁴³ Sinclair, *The Vienna Convention on the Law of Treaties* at pp. 105-106. C.f. Danilenko, *Law-Making in the International Community* at p. 63.

⁴⁴ Briery, *The Law of Nations* (Oxford University Press, 1963) at pp. 326-327; Simma, "From bilateralism to community interest in international law", at pp. 358-364; Shaw, *International Law* (Cambridge University Press, 2003) at p. 836; Subedi, "The Doctrine of Objective Regimes in International Law", at p. 836.

⁴⁵ The Committee of Jurists appointed by the League of Nations Council in 1920 describe the 1856 Convention for the Demilitarization of the Aaland Islands as “true objective law”; see inter alia McNair, "The Functions and Differing Legal Character of Treaties", at p. 114.

⁴⁶ In the *S.S. Wimbledon*, by way of analogy to the Kiel Canal, the PCIJ refer to Panama Canal and Suez Canal as “illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits.”

⁴⁷ Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) at pp. 208-209. For a contrary view on the status of Antarctica as an objective regime, see Charney, "The Antarctic System and Customary International Law", in *International Law For Antarctica*, ed. Francioni and Scovazzi (Kluwer Law International, 1996) at pp. 62-71; Simma, "Le Traite antarctique: cree-t-il un regime objectif ou non?" in *Ibid.*. Chinkin suggests that the doctrine of objective regimes was particularly controversial at the time of the ILC discussions because of the situation in Antarctica and the drafting of the Antarctic Treaty; *Third Parties in International Law* at p. 36.

Treaties, this work nevertheless provides a useful account of the scope of the doctrine. Waldock, as special rapporteur on the law of treaties, describes a treaty as creating an objective regime “*when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject matter of the treaty, or that any such State has consented to the provision in question.*”⁴⁸ Waldock’s draft article on objective regimes required states to expressly or impliedly accept the objective regime. Failure to oppose the treaty within a certain time limit amounts to tacit acceptance.⁴⁹

It can be seen from this short analysis that the concept of objective regimes shares many similarities with third state rights and obligations under Articles 35 and 36 of the Vienna Convention on the Law of Treaties. The creation of an objective regime must be clear from the intention of the parties to the treaty. Consent also plays a central role in Waldock’s conception of objective regimes. Yet, there are several aspects of the doctrine of objective regimes which differentiate it from Articles 35 and 36 of the Vienna Convention. Firstly, as noted above, it applies to a whole regime⁵⁰ as opposed to individual treaty articles. Furthermore, the doctrine of objective regimes as proposed by Waldock would only appear to be applicable to certain types of territorial regimes.

Can this doctrine be invoked to support the universal application of the LOS Convention? Unlike Article 35 and 36, it cannot be argued that the doctrine of objective regimes undermines the package deal achieved at UNCLOS III. Indeed, this doctrine emphasises the interconnection of certain treaty articles.

⁴⁸ Waldock, "Third Report on the Law of Treaties", (1964) II *Yearbook of the International Law Commission* at p. 26, Article 63(1).

⁴⁹ Draft Article 63(2). The idea of a deadline was only tentatively proposed by Waldock in order to remove doubts over the acceptance of an objective regime; *Ibid.*, at p. 33, para 22.

⁵⁰ In the *Case of the S.S. Wimbledon*, the Permanent Court of International Justice held that the drafters of the Treaty of Versailles took care to place the provisions on the Kiel Canal in a special section and in this sense, they describe it as a “self-contained” regime; *S.S. Wimbledon*, at pp. 23-24.

Notwithstanding the controversial question of the intention of states attending UNCLOS III, it is not clear that Waldock considered the doctrine was applicable to treaties such as the LOS Convention. In his commentary, he makes clear that his conception of objective regimes would not apply to general law-making treaties⁵¹, a category into which the LOS Convention arguably falls. Waldock explains, “*it excludes from the article cases where the parties have a general treaty-making competence with respect to the subject-matter of the treaty but no greater competence than any other state; in other words, it excludes law-making treaties concerned with general international law or with areas not subject to the exclusive jurisdiction of any state.*”⁵² Therefore, this doctrine, like the provisions on third states generally, are not intended to be applied to general multilateral treaties to which any state can become a party through ratification or accession.

It follows that the law of treaties cannot account for the application of a general multilateral treaty such as the LOS Convention to non-parties. Therefore, it is necessary to look beyond the law of treaties in order to account for any law-making impact that they might have.

4. Customary International Law as a Source of Universal Law?

It is accepted that custom can create universal rights and obligations, although how this source of international law is formed is not always clear. In what ways can the negotiation of a written instrument such as the LOS Convention influence the development of customary international law?

Custom is defined in Article 38(1) of the ICJ Statute as “*general practice accepted as law*”. Thus, customary international law is generally considered as having two aspects, commonly referred to as state practice and *opinio juris*. Beyond these basic

⁵¹ Waldock, "Third Report on the Law of Treaties", at p. 33, paras. 18 and 19.

⁵² *Ibid.*, at p 33.

criteria, however, the requirements for the creation of custom are highly ambiguous.⁵³ As the ILA Committee on the Formation of Customary International Law concludes, “given the inherently informal nature of customary law, it is not to be expected, neither is it the case, that a precise number or percentage of States is required.”⁵⁴ Akehurst similarly argues that context is the overriding consideration and the threshold for the formation of a customary norm depends on the status of the norm that it is alleged has become custom, and whether it is a new norm or it replaces an existing norm.⁵⁵

Some guidance can be gained from decisions of the ICJ on the subject. However, the Court has not adopted a uniform approach to custom. For instance, the Court declared in one case that state practice must be “constant and uniform”⁵⁶ whilst in another case it cited the standard as “extensive and virtually uniform”.⁵⁷ Again, it would appear that context is all important.

From the case-law of the Court, it would also seem that the determination of whether there is sufficient state practice and *opinio juris* is as much a matter of quality as quantity.⁵⁸ In the *North Sea Continental Shelf Cases*, the Court held that a conventional rule could create a customary rule relatively rapidly provided that state practice included that of “States whose interests are specially affected.”⁵⁹ This approach was developed by the Court in the *Legality of Nuclear Weapons Advisory Opinion*, where it decided that there was no prohibition of the possession of nuclear

⁵³ In this regard, the editors of Oppenheim say, “this question is one of fact, not of theory. All that theory can say is this: Wherever and as soon as a line of international conduct frequently adopted by states is considered by states generally legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law”; Jennings and Watts, eds., *Oppenheim's International Law*, at p. 30. Wright lists the numerous difficulties in ascertaining customary international law; “Custom as a Basis for International Law in the Post-War World”, (1966) *Texas International Law Forum* at p. 147.

⁵⁴ International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, (2000) International Law Association London Conference at p. 25.

⁵⁵ Akehurst, “Custom as a Source of International Law”, (1974-5) *British Yearbook of International Law* at p. 17. On this basis, he distinguishes the higher standard set in the *Asylum* case which involved a local custom; at p. 20.

⁵⁶ *Asylum Case (Colombia v. Peru)*, (1950) ICJ Reports 266 at pp. 276-277.

⁵⁷ *North Sea Continental Shelf Cases*, at para. 73.

⁵⁸ International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, at p. 26.

⁵⁹ *North Sea Continental Shelf Cases*, at para. 73.

weapons in customary international law, despite the fact that such a prohibition was favoured by a majority of states. In the opinion of the Court, the opposition of those states possessing nuclear weapons was a significant factor mitigating against the creation of a customary norm.⁶⁰ Of course, determining which states are specially affected is also a question of context. Highlighting the vagueness of the concept, Boyle and Chinkin suggest that “*in a globalised world many states can claim to be especially affected in different ways by the actions of other states, making the concept of ‘specially affected’ state unhelpful.*”⁶¹ The concept is perhaps best understood as emphasising that a simple majority of states cannot make international law for the international community as a whole. In this sense, questions of participation and legitimacy are inherent to the formation of customary international law.⁶²

Despite these ambiguities in the process of custom formation, it is accepted that treaties and other international instruments can have a significant influence.⁶³ A traditional analysis of the interrelationship between treaty and custom starts with the judgment of the ICJ in the *North Sea Continental Shelf Cases*. Contemplating Article 6 of the 1958 Convention on the Continental Shelf as a reflection of customary international law, the Court said that “*it was necessary to examine the status of the principle as it stood when the Convention was drawn, as it resulted from the effect of the Convention, and in light of state practice subsequent to the Convention.*”⁶⁴ Thus, the Court recognised that there are at least three different ways in which treaties can interact with custom: codification, crystallisation and the creation of new customary norms.

⁶⁰ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Reports 226, at para. 73. C.f. the dissenting opinion of Judge Weeramantray.

⁶¹ Boyle and Chinkin, *The Making of International Law*, at p. 30.

⁶² In a similar vein, the ILA Committee on the Formation of Customary International Law concluded that there was a need for “*representativeness*” in state practice and *opinio juris*; *Statement of Principles Applicable to the Formation of General Customary International Law*, principle 14. They further note there are positive and negative aspects to representativeness.

⁶³ D’Amato cites the *Nottebohm* case as an example of a decision where the International Court of Justice relied exclusively on treaties; D’Amato, *The Concept of Custom in International Law* (1971) at p. 113. See also *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, (1985) ICJ Reports at para. 27. The principle is confirmed in Vienna Convention on the Law of Treaties, Article 38.

⁶⁴ *North Sea Continental Shelf Cases*, at para. 60.

Firstly, a treaty can codify customary international law. Codification involves recording the existing rules of the customary rules in the text of a treaty or other written instrument. However, in the process of reducing customary rules to writing, the codifier is inevitably faced with discretionary decisions as to the use of certain words or phrases which will to some extent change what had been flexible concepts in the practice of states.⁶⁵ Commentators have long noted the difficulty of separating codification from the progressive development of international law⁶⁶ and the International Law Commission itself has found the distinction problematic.⁶⁷ Baxter argues that “*to the extent that the codifier progressively develops the law, his text ceases to be ‘declaratory of established principles of international law.’*”⁶⁸ According to this argument, any statement that an instrument codifies custom can only be treated as a presumption which can be overturned where there is evidence to the contrary. Thus, codification does not negate the need to consider subsequent state practice and *opinio juris*.

Secondly, treaties can generate new rules of customary international law by inspiring subsequent state practice.⁶⁹ In the *North Sea Continental Shelf Cases*, Judge Sørensen described how treaties can serve as “*a nucleus around which a new set of generally recognised rules may crystallise.*”⁷⁰ In this situation it is the accumulation of subsequent state practice and *opinio juris* which creates the new rules of customary international law, not the conclusion of the treaty *per se*.

⁶⁵ See Jennings and Watts, eds., *Oppenheim's International Law*, at p. 34; Jennings, "The Discipline of International Law", in *ILA Conference Report 1976*, ed. International Law Association (1976) at p. 624. Baxter notes that “it is only exceptionally that a so-called “codification treaty” concluded under United Nations auspices on the basis of a draft prepared by the International Law Commission asserts on its face that it codifies existing international law”; “Multilateral Treaties as Evidence of Customary International Law”, (1967) *British Yearbook of International Law* at p. 287. Dissenting Opinion of Judge Sørensen in *North Sea Continental Shelf Cases*, at pp. 242-243.

⁶⁶ For instance, de Visscher, cited by Shabtai Rosenne, *Committee of Experts for the Progressive Codification of International Law (1925-1928)* (Oceana Publications, 1972) at pp. lii-liiii.

⁶⁷ The International Law Commission has noted that its work on the law of the sea was “an amalgam of progressive development and codification and that, in the field of the law of the sea at any rate, it was not possible to maintain the distinction between the two categories”; cited by Sinclair, *The International Law Commission* (Grotius Publications, 1987) at p. 7.

⁶⁸ Baxter, "Multilateral Treaties as Evidence of Customary International Law", at p. 289-290

⁶⁹ *North Sea Continental Shelf Cases*, at para. 71.

⁷⁰ Dissenting Opinion of Judge Sørensen in *Ibid.*, at p. 244. His use of the term “crystallise” is somewhat confusing in this context.

Thirdly, the ICJ noted that the negotiation of a treaty instrument can also have a much more direct influence on the creation of custom through the process of crystallisation. Very little attention is given to the concept of crystallisation in the judgment of the ICJ which simply concludes that such a process of crystallisation was possible but that it had not occurred in the case of Article 6. It was noted that the negotiation of Article 6 of the Continental Shelf Convention was “*impromptu*” and this particular provision was the subject of “*long continued hesitations.*”⁷¹ The Court concluded that “*whatever validity this contention may have in respect of at least certain parts of the Convention, the Court cannot accept it as regards the delimitation provision.*”⁷²

From these statements, the concept of crystallisation is somewhat puzzling. How is it different from the process of codification or the generation of new customary norms?

The concept of crystallisation has its origins in the contention of the Netherlands and Denmark in the *North Sea Continental Shelf Cases* that “*the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference ... and this emerging customary law became crystallized in the adoption of the Continental Shelf Convention.*”⁷³ From this short resumé by the Court, the concept of crystallisation appears to stress the negotiation process of a treaty or other instrument as a substantial factor in the formation of the custom, as opposed to previous or subsequent state practice. This can be seen from the

⁷¹ Ibid., at paras. 49-53.

⁷² Ibid., at para. 62. The Court suggest that Article 1 to 3 of the Convention may be regarded as “reflecting, or as crystallising, received or at least emergent rules of customary international law relative to the continental shelf”; at para. 63. Thus, it does not decide whether these articles crystallise or codify custom. Arguably, there was sufficient state practice on the continental shelf prior to the negotiation of the Convention to support the customary status of coastal state rights over the seabed and subsoil of the continental shelf. The Court itself recalls the Truman Proclamation and subsequent state practice as the origins of the practice; at para. 47.

⁷³ Ibid., at para. 61.

pleadings of Denmark and the Netherlands who substantiated their claims that the 1958 Continental Shelf Convention had crystallised customary international law by saying:⁷⁴

Throughout the period during which the codification and progressive development of the law of the sea was under consideration by the International Law Commission the whole doctrine of the coastal State's rights over the continental shelf was still in course of formation. The unilateral claims which had been made by individual States varied in their nature and extent; and many coastal States, including all Parties to the present dispute, had not yet promulgated any claim. The work of the Commission both helped to consolidate the doctrine in international law and to clarify its content ... Thus, just as the work of the Commission and the contribution to that work made by governments were important factors in developing a consensus as to the acceptability of the doctrine and its nature and extent, so also were they important factors in developing a consensus as to the acceptability of the equidistance principle as the general rule for the delimitation of continental shelf boundaries.

One problem with this conception of customary international law is that many commentators are wary of ascribing too much weight to what states say in the international sphere. For instance, D'Amato asserts that only physical acts count as state practice and "*[claims] cannot constitute the material component of custom.*"⁷⁵

Yet, this view does not necessarily reflect the reality of what has traditionally counted as state practice for the purposes of customary international law. Brownlie lists amongst the material sources of custom: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, executive decisions and practices, state legislation, national judicial decisions, replies by governments to the International Law Commission, and recitals in treaties amongst other sources of evidence of customary international law.⁷⁶ Many of these sources are verbal or written in nature, albeit, largely of a unilateral character.

It follows that other verbal or written acts taking place on the international stage should also be counted as state practice. Indeed, the way in which states conduct their international relations has arguably changed over the years. Today, diplomacy is

⁷⁴ *Counter-Memorial of the Netherlands*, North Sea Continental Shelf Cases, ICJ Pleadings, 1968, vol. 1, at pp. 336-337.

⁷⁵ D'Amato, *The Concept of Custom in International Law* at p. 88; D'Amato, "Trashing Customary International Law", at p. 102.

⁷⁶ Brownlie, *Principles of Public International Law* (Oxford University Press, 2003) at p. 6. He notes that the value of these sources varies depending on the circumstances. See also Akehurst, "Custom as a Source of International Law", at p. 5; Shaw, *International Law*, at p. 66.

conducted as much through international institutions as through bilateral exchanges or unilateral statements. It is important that notions of state practice also reflect these developments, in order to acknowledge the increasing importance of multilateralism in the modern international legal system.⁷⁷ In the words of Shaw, “*custom can and often does dovetail neatly with the complicated mechanisms now operating for the identification and progressive development of the principles of international law.*”⁷⁸ Abi-Saab sees this phenomenon as “*new wine [that] we are trying to put in the old bottle of custom.*”⁷⁹ However, it is submitted that this view of custom does no more than recognise that states increasingly interact with one another through international institutions and our view of custom must reflect these changes in modes of state practice. Moreover, acknowledging that the negotiation of international instruments can influence the content of customary international law counters some of the flaws in the customary law-making process, as it provides an opportunity for bargaining and trade-offs.⁸⁰ It also promotes the legitimacy of customary international law-making as institutional processes tend to be both more inclusive and more transparent.⁸¹

On this view, it is the negotiation and conclusion of a treaty or other instrument which counts as state practice. This conception of crystallisation means that rules of customary international law can develop relatively quickly. If combined with *opinio juris communis*, the negotiation and adoption of an instrument alone may provide sufficient evidence of the existence of a rule of customary international law. There is no need for repetition of practice *per se*⁸² and the Court has said that “*the passage of only a short period of time is not necessarily, of itself, a bar to the formation of a new rule of*

⁷⁷ See Charney, "Universal International Law", (1993) 87 *American Journal of International Law* at pp. 543-545.

⁷⁸ Shaw, *International Law* at p. 58. See also Jimenez de Arechaga in Cassese and Weiler, eds., *Change and Stability in International Law-Making*, (Walter de Gruyter, 1988) at pp. 2-4.

⁷⁹ Abi-Saab in *Ibid.*, at p. 10.

⁸⁰ C.f. Kelly, "Twilight of Customary International Law", (2000) 40 *Virginia Journal of International Law* at pp. 538-540.

⁸¹ Charney, "Universal International Law", at pp. 547-548.

⁸² See Brownlie, *Principles of Public International Law*, at p. 7.

customary international law on the basis of what was originally a purely conventional rule."⁸³

In this sense, crystallisation is similar to the concept of "instant custom" as proposed by Cheng who ascribes weight to the views of states in the negotiation of written instruments. However, Cheng appears to classify instruments adopted by the international community as *opinio juris*. He concludes that "*international customary law has in reality only one constitutive element, the opinio juris.*"⁸⁴ It is submitted that Cheng is mistaken in separating *opinio juris* from state practice when in fact the two elements are intertwined. *Opinio juris* serves to determine which practice counts towards the formation of custom⁸⁵ and to distinguish binding state practice from simple comity.⁸⁶ This is clear in the description of Brierly who says that "*evidence that a custom ... exists in the international sphere can be found only by examining the practice of states; that is to say, we must look at what states do in their relations with one another and attempt to understand why they do it, and in particular whether they recognise an obligation to adopt a certain course ... what is sought for is a recognition among states of a certain practice as obligatory.*"⁸⁷ On this basis, the preferable view is to characterise instruments that have been adopted by states or international institutions as a form of state practice, not as *opinio juris*.

It does not follow from this argument that all treaties or other written instruments will create customary international law. It is not simply a case of applying a treaty, a UN resolution or other international instrument and mislabelling it customary law.⁸⁸

⁸³ *North Sea Continental Shelf Cases*, at para. 74.

⁸⁴ Cheng, "United Nations Resolutions on Outer Space: Instant Customary International Law?" in *International Law: Teaching and Practice*, ed. Cheng (Stevens, 1982) at p. 251. This view is doubted by many authors, e.g. Boyle and Chinkin, *The Making of International Law* at p. 227.

⁸⁵ D'Amato, "Trashing Customary International Law", (1987) 81 *American Journal of International Law* at p. 102.

⁸⁶ The ILC Committee on the Formation of Customary International Law concludes that "it is for the purposes of distinguishing practice which generate customary rules from those that do not that *opinio juris* is most useful."; *Statement of Principles Applicable to the Formation of General Customary International Law*, at p. 34.

⁸⁷ Brierly, *The Law of Nations* at pp. 59-61. See also Akehurst, "Custom as a Source of International Law", at p. 33; See also Shaw, *International Law* (Cambridge University Press, 1997) at p. 67.

⁸⁸ See D'Amato, "Trashing Customary International Law", at p. 102.

The negotiation and adoption of an international instrument will only count as relevant state practice if it can be shown that states intended to lay down a rule of customary international law. In other words, it is also necessary to look for *opinio juris* in support of the purported customary rule. Evidence of the subjective element may be found in the text of the instrument itself or in the *travaux préparatoires*.⁸⁹ This is confirmed by the ICJ itself in relation to the normative impact of General Assembly resolutions, where it has held that the simple adoption of an instrument is not sufficient to invest it with potential normative force: “*it is necessary to look at its content and the conditions of its adoption.*”⁹⁰ This is a high threshold to meet and it should not be presumed that a treaty or other instrument creates a customary norm without “*clear-cut and unequivocal*” evidence.⁹¹

As with codification, crystallisation cannot be seen as a distinct process which freezes custom at the time at which the instrument was adopted. It is always necessary to take into account all the relevant state practice in order to determine the customary rule, whether or not the negotiation of a treaty has had a codifying or crystallising effect. It is rare that there will be no other state practice aside from the adoption of an international instrument. In some cases, other forms of state practice will consolidate the rule that is found in an international instrument, confirming its status as customary international law. The situation is more problematic where there is contradictory state practice. In that case, it is necessary to choose which of the competing trends of state practice carries more weight.

This situation was addressed by the ICJ in the *Nicaragua Case*. In that case, the Court gave significant weight to rules of international law on use of force and non-

⁸⁹ Thus, in the case of the General Assembly resolutions on outer space, Cheng accepts they were not capable of creating customary international law because the language of the resolutions did not purport to do so; Cheng, “United Nations Resolutions on Outer Space: Instant Customary International Law?” at p. 255.

⁹⁰ *Nuclear Weapons Advisory Opinion*, at para. 70; see also Higgins, *Problems and Process - International Law and How We Use It* (Oxford University Press, 1994) at p. 24.

⁹¹ International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, principle 19, at p. 42; see also Cheng, “United Nations Resolutions on Outer Space: Instant Customary International Law?” at p. 251 and p. 254; Akehurst, “Custom as a Source of International Law”, at pp. 6-7.

intervention found in international treaties and General Assembly resolutions which it claimed were supported by *opinio juris*.⁹² Moreover, the Court appeared to play down contradictory practice, holding that “[it] does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule ... the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”⁹³ In other words, the contradictory practice was not accompanied by *opinio juris* supporting an alternative rule.

In sum, there are several ways in which treaties can interact with customary international law. State practice and *opinio juris* are central to all of these processes, although it is submitted that there is a need to reconsider our conceptions of state practice for the modern age of international law-making. Thus, the adoption of an instrument may itself influence the development of customary international law through the process of crystallisation. Additional state practice is not strictly necessary if there is unequivocal evidence that states intended to negotiate new legal rules or principles. However, it does not negate the need for a court or tribunal to conduct a thorough analysis of state practice and *opinio juris* and to consider all other forms of state practice, including the physical acts of states. Nor do these processes of custom formation override the need for state practice and *opinio juris* to be representative, including all “specially affected states”. Treaties and other instruments will only have an impact on universal customary international law if they are supported by a real consensus of the international community.

⁹² It cites in particular General Assembly Resolution 2625 (XXV); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States)*, (1986) ICJ Reports 14 at para. 188.

⁹³ *Ibid.*, at para. 186.

5. Customary International Law of the Sea?

How do these principles of customary international law apply in the case of the law of the sea? Can the LOS Convention be seen as codifying, crystallising or creating new customary international law? What evidence of state practice and *opinio juris* would support such a conclusion? It is not intended to consider in detail which parts of the Convention are actually declaratory of customary international law; this issue has been dealt with adequately in other works.⁹⁴ The principal issue is how this process has taken place.

One argument is that the Convention cannot influence customary international law because it was adopted as a package deal. Advancing this view, Caminos and Molitor say that “*if one assumes that the package deal was solidified at the time that the Convention was formally adopted, then those of its provisions that had not attained customary status by that date may have been precluded from ever doing so.*”⁹⁵ They cite numerous declarations and statements made by participants at UNCLOS III to support their argument. On closer inspection, this approach does not seem to be satisfactory. Firstly, it does not explain how one identifies what the customary law of the sea is. Vasciannie notes that “*it would ... require States to deny the independent status of custom as a source of obligations in matters falling within the purview of the LOS Convention: as this requirement has no basis in law, it cannot be supported.*”⁹⁶ More importantly, it is not an argument that has been accepted by states or by international courts and tribunals. Indeed, it may be this argument that a chamber of the ICJ had in mind when it said that certain provisions of the LOS Convention, “*even if*

⁹⁴ Treves, "Codification et Pratique des Etats dans le Droit de la Mer", (1990) 223 *Receuil des Cours* 9; Bernhardt, "Custom and Treaty in the Law of the Sea", (1987) 205 *Receuil des Cours*, 247; Churchill, "The impact of State Practice on the jurisdictional framework contained in the United Nations Convention on the Law of the Sea", in *Stability and Change in the Law of the Sea*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005). The United Nations has published a series of summaries of state practice; United Nations, *The Law of the Sea: Current Developments in State Practice No. II* (United Nations, 1989).

⁹⁵ Caminos and Molitor, "Progressive Development of International Law and the Package Deal", at p. 888.

⁹⁶ Vasciannie, "Part XI of the Law of the Sea Convention and Third States: Some General Observations", (1989) 48 *Cambridge Law Journal* at p. 94.

they in some respects bear the mark of compromise surrounding their adoption may nevertheless be regarded as consonant at present with general international law on the question."⁹⁷

Nor can it simply be claimed that the whole LOS Convention has become customary international law because it was adopted as a package deal. This argument ignores the subtleties of the customary law-making process and it comes too close to advocating the Convention as a form of international legislation.⁹⁸

It should not be surprising that an instrument the length and complexity of the LOS Convention is not susceptible to a simple analysis in terms of its impact on customary international law. The preamble of the LOS Convention itself indicates that it is a "*progressive development and codification of the law of the sea*", although it makes no attempt to distinguish between which provisions are covered by these two processes.

Many states have noted the codifying effect of certain provisions on the Convention. The United Kingdom, for instance, stated at the closing session of UNCLOS III that "*many of the Convention's provisions are a restatement or codification of existing conventional or customary international law and state practice.*"⁹⁹ It is true that several parts of the Convention incorporate provisions found in the 1958 Conventions on the Law of the Sea without substantial change.¹⁰⁰ Nevertheless, it is questionable whether the Convention is a codification in the traditional sense of the word. Any provisions that are found in previous instruments were incorporated because they continued to be politically acceptable, rather than

⁹⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (US v. Canada)*, (1984) ICJ Reports 246 at p. 294.

⁹⁸ Danilenko, *Law-Making in the International Community* at pp. 67-68. See also Plant who dismisses arguments that the package deal is binding on all states who participated in the drafting of the LOS Convention; "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law-Making?" (1987) 36 *International and Comparative Law Quarterly* at pp. 540-543. See also Jennings and Watts, eds., *Oppenheim's International Law*, at p. 32.

⁹⁹ Statement of United Kingdom, 189th meeting, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. 17, at p. 79, para. 200. See also statement of Indonesia, 186th meeting, *Ibid.*, at p. 25, paras. 23-25.

¹⁰⁰ This has influenced the way in which courts and tribunals have interpreted the Convention; see chapter seven at p. 226-227.

because they reflected state practice.¹⁰¹ As noted by Cameroon in its final speech to UNCLOS III, “*this Convention represents for the first time a truly universal law and must be seen as such. Any of its features that bear resemblance in content or form to any custom or agreements or treaties recognised by any region or sub-region or among maritime nations sharing common interests must be viewed as purely coincidental.*”¹⁰² Moreover, as noted above, the codification of a treaty can only be treated as a presumption which should be confirmed by an analysis of subsequent state practice and *opinio juris*.

Many other provisions in the Convention are without precedent in previous law or practice. Of these new norms, some have undoubtedly inspired subsequent state practice which has contributed to their transition into customary international law. Indeed, state practice began to coalesce around certain rules before the whole regime had been finally agreed.¹⁰³

At the same time, state practice in other areas is in fact quite diverse. An analysis of national legislation does not necessarily point to a consistent trend of state practice.¹⁰⁴ Even those states which are formally bound by the Convention have been criticised for apparent divergences from the text of the treaty.¹⁰⁵

¹⁰¹ Indeed, it would appear that it was not always clear that provisions from the previous regime would be retained. Anderson describes how in response to several novel proposals submitted to the Seabed Committee, the United Kingdom introduced a working paper which included many provisions from the 1958 Convention on the High Seas in order to “preserve the essential elements of the existing regime, including the concepts of high seas and freedoms, especially freedom of navigation, lest they be replaced by uncertainty or even chaos.”; *Developments in respect of High Seas Navigation*, (2005) SLS/BIICL Symposium on the Law of the Sea at p. 3.

¹⁰² Statement by Cameroon, 185th meeting, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. 17, at p. 16, para. 84.

¹⁰³ Koh and Jayakumar, “An Overview of the Negotiating Process of UNCLOS III”, in *United Nations Convention on the Law of the Sea 1982 - A Commentary*, ed. Rosenne and Sohn (Martinus Nijhoff Publishers, 1985) at pp. 60-61.

¹⁰⁴ See Churchill, “The impact of State Practice on the jurisdictional framework contained in the United Nations Convention on the Law of the Sea”, at p. 140.

¹⁰⁵ In his separate declaration in the *Juno Trader Case*, Judge Kolodkin complained that states did not heed the calls of the UN General Assembly to harmonise their legislation with the LOS Convention. In that case, Guinea-Bissau had used the term “maritime waters” for both its territorial sea and its EEZ. Judge Kolodkin also noted the tendency of some coastal states to demand prior notification of vessels entering their EEZ for the purposes of transiting, what he thought to be a violation of the principle of

Several authors have concluded from this state of affairs that parts of the Convention have not made the transition into customary international law. For instance, Orrego Vicuña says “*while the basic elements of the regime of the territorial sea, including the twelve mile limit, can be considered to have been transformed into customary law, ... not every detail of the Convention will have followed the same path.*”¹⁰⁶ In the context of the EEZ, Churchill and Lowe conclude that “*it would seem that what is part of customary international law are the broad rights of coastal and other States enumerated in Articles 56 and 58 of the Convention. It is much more doubtful whether the detailed obligations in the articles relating to the exercise of coastal State jurisdiction over fisheries, pollution and research have passed or are likely quickly to pass into customary international law, partly because of a lack of claims embodying duties in the Convention, partly because there is some divergence between States practice and the Convention, and partly because some of the Conventional rules would not seem to have the ‘fundamentally norm-creating character’ necessary for the creation of a rule of customary international law.*”¹⁰⁷ The logical conclusion of these arguments is that there are two distinct and substantively different regimes for the law of the sea, depending on whether a state is a party to the Convention or not.

An alternative view is that the Convention has in large part succeeded in crystallising the law of the sea through the negotiating process at UNCLOS III. Discussing customary international law of the sea in the wake of the LOS Convention, Moore says “*no description of ... the customary international law-making process as applied to oceans law would be complete without noting that for the last seventeen years the UNCLOS process and patterns of practices have been a central feature in the*

freedom of navigation and Article 58(1) of the LOS Convention. See *The Juno Trader Case (Prompt Release) (St Vincent/Guinea-Bissau)*, (2004) 44 ILM 498 .

¹⁰⁶ Orrego Vicuña, “The Law of the Sea Experience and the Corpus of International Law: Effects and Interrelationships”, in *The Developing Order of the Oceans*, ed. Krueger and Riesenfeld (The Law of the Sea Institute, 1984) at p. 15.

¹⁰⁷ Churchill and Lowe, *The Law of the Sea* (Manchester University Press, 1999) at 161-162. See also Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991) at p. 283; Orrego Vicuña, *The Exclusive Economic Zone* (Cambridge University Press, 1989) at p. 252.

customary international law-forming process."¹⁰⁸ Sohn takes a similar view in saying "the interesting thing that happened in the Law of the Sea Conference was that a consensus emerged not only that those rules were necessary but that those rules have been accepted by states ... if states generally agree that it has emerged, this is sufficient, for the practice of states is the main of source of international law."¹⁰⁹ This approach implicitly asserts that the international community set out to create a universal regime at UNCLOS III. Is there sufficient evidence of *opinio juris* to this effect?

The universal application of the rules is supported in part by the text of the Convention itself. Most of the treaty is directed to "States" or "all States".¹¹⁰ It would have been perfectly possible for participants to indicate their intention to create a treaty regime by drafting the Convention in terms of "States Parties". Indeed, this approach was taken in relation to Parts XI, XV and XVII of the Convention.¹¹¹ This differentiation in terminology may be important for the purposes of determining customary international law.

It is also relevant that large parts of the Convention are supported by a consensus of the international community. An analysis of what states say they consider to be the law indicates widespread support for most parts of the Convention as customary international law. The opinion of the United States, as a major maritime state and a non-party to the Convention, is of particular significance. At the closing session of the Conference, the US asserted that "*those parts of the Convention dealing with navigation and overflight and most other provisions of the Convention serve the interests of the*

¹⁰⁸ Moore, "Customary International Law After the Convention", in *The Developing Order of the Oceans: Proceedings of the Law of the Sea Institute Eighteenth Annual Conference*, ed. Krueger and Riesenfeld (Law of the Sea Institute, 1984) at p. 42.

¹⁰⁹ Sohn, "Implications of the Law of the Sea Convention regarding the Protection of the Marine Environment", in *Developing Order of the Oceans*, ed. Krueger and Riesenfeld (Law of the Sea Institute, 1985) at p. 189. He continues, "that states, of course, are the primary makers of international law, and if they decide to make it, they can make it even instantaneously..."; at p. 189. See also comments of Boyle and Chinkin who, although sceptical about instant custom, nevertheless conclude that "once there is international consensus on the basic rule, it is highly unlikely that any state will object if it is then implemented, however rarely, in state practice"; *The Making of International Law* at p. 237. See also *Ibid.*, at p. 260.

¹¹⁰ See above, at p. 43.

¹¹¹ See below, at p. 69.

*international community. These texts reflect prevailing international practice. They also demonstrate that the Conference believed that it was articulating rules in most areas that reflect existing state of affairs – a state of affairs that we wished to preserve by enshrining these beneficial and desirable principles in treaty language.*¹¹² This statement on the status of the Convention was confirmed by subsequent declarations in 1983. Following his decision not to sign the Convention, President Reagan nevertheless proclaimed that “*the United States is prepared to accept and act in accordance with the balance of interests relating to the traditional uses of the oceans – such as navigation and overflight. In this respect, the United States will recognise the rights of other states in waters off their coasts, as reflected in the Convention, so long as rights and freedoms of the United States and others under international law are recognised by such coastal states.*”¹¹³ It would be reasonable to conclude from these statements that the US accepts the whole Convention framework on the navigational and related uses of the seas and oceans as a reflection of customary international law on the subject. Nor was the US alone in recognising the substantial normative impact of the Convention. Records of UNCLOS III reveal concurring opinions of several states.¹¹⁴

Further support for the customary status of the Convention is found in the resolutions and declarations of other international institutions and conferences. Although formally non-binding, as noted in the previous section, these instruments may provide important means of identifying further state practice and *opinio juris communis*.

Of particular importance is the General Assembly which, through its annual resolutions on the law of the sea, asserts a substantial and formative influence in this

¹¹² Statement by the United States, 192nd meeting, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. 17, at p. 116, para. 3.

¹¹³ "United States Ocean Policy", (1983) 77 *American Journal of International Law* cited at p. 620. In the *Gulf of Maine Case*, the ICJ itself took into account the Presidential statement in deciding what weight to confer on the LOS Convention as a material source of customary international law; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (US v. Canada)*, at para. 94.

¹¹⁴ E.g. statement of Kenya, 187th meeting, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. 17, at p. 47, para. 129; statement of Mongolia, 186th meeting, *Ibid.*, at p. 35, para. 160; statement of Mexico, 185th meeting, *Ibid.*, at p. 19, para. 142; statement of Cameroon, 185th meeting, *Ibid.*, at p. 17, para. 84.

area.¹¹⁵ It stands out from other international institutions because it was the organ which originally convened UNCLOS III. Furthermore, it is one of the few international institutions to include all states. The General Assembly has adopted a number of resolutions which support the Convention as a source of customary international law. For instance, the preamble of General Assembly Resolution 49/28, adopted in 1994, recognises “*the universal character of the Convention and the establishment through it of a legal order for the seas and oceans.*”¹¹⁶ Since then, the General Assembly has regularly proclaimed that “*the Convention sets out the legal framework within which all activities in the oceans and the seas must be carried out.*”¹¹⁷ Year on year, the General Assembly calls on states to harmonise their legislation with the provisions of the Convention.¹¹⁸ These statements are clear support for the idea that the LOS Convention creates universal law.

Also important are the activities of other international institutions working in the field of the law of the sea which have, at least implicitly, been operating within the framework of the LOS Convention since its conclusion.¹¹⁹ General Assembly Resolution 40/63, adopted on 10 December 1985, recognised that “*all related activities within the United Nations system need to be implemented in a manner consistent with it.*”¹²⁰ True to this statement, many of the UN organs and specialised agencies treat the LOS Convention as the starting point for all law of the sea issues, regardless of the fact that not all states are party to the Convention. For instance, the 2001 Anti-Fouling Convention¹²¹ and the 2004 Ballast Water Convention¹²², both adopted under the auspices of the IMO, refer to the LOS Convention as customary international law.

¹¹⁵ See chapter four, at p. 91 ff..

¹¹⁶ General Assembly Resolution 49/28, 1994.

¹¹⁷ General Assembly Resolution 55/7, 2000.

¹¹⁸ There is a note of impatience in the tone of General Assembly Resolution 59/24, 2004, which “once again calls upon states to harmonise, as a matter of priority, their national legislation with the provisions of the Convention, to ensure consistent application of those provisions...”

¹¹⁹ See Anderson, “Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea”, (1995) 44 *International and Comparative Law Quarterly* at p. 322.

¹²⁰ General Assembly Resolution 40/63, 1985.

¹²¹ Anti-Fouling Convention, Article 15.

¹²² Ballast Water Convention, Article 16.

How have courts and tribunals approached the customary international law of the sea since the conclusion of the LOS Convention? A number of judicial decisions on the law of the sea appear to attribute weight to the consensus underlying the Convention in the formation of customary international law. The most explicit reference to the negotiating techniques employed at UNCLOS III is found in the *Gulf of Maine Case*, where a Chamber of the Court confirmed that the fact that the LOS Convention had not entered into force “*in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone, which may, in fact, be relevant to the present case, were adopted without any objections.*”¹²³ The Court thus considers that consensus is a critical factor in determining the impact of the Convention on customary international law.

At the same time, courts and tribunals have continued to pay lip-service to the practice of states in relation to the LOS Convention. Thus, in the *Continental Shelf Case between Libya Arab Jamahiriya and Malta*, after attributing weight to the adoption of the Convention by “*an overwhelming majority of states*”, the Court held that the institution of the EEZ is also shown, “*by the practice of states*”, to be part of customary international law.¹²⁴ As noted above, it is true that many states had in fact proclaimed an EEZ whilst the negotiations at UNCLOS III were ongoing. Yet, as one author has said, “*the most striking element in this reasoning is not that provisions of an international agreement are qualified as customary international law but that this was*

¹²³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (US v. Canada)*, at para. 94.

¹²⁴ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, at para. 34. The Court has in other cases held that parts of the LOS Convention are declaratory of custom. In the *Qatar v. Bahrain Case*, the Court found that both parties agreed that most of the provisions of the Convention relevant to the case reflected customary international law; *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Merits)*, (2001) ICJ Reports at para. 167. In its reasoning, the Court refers to Articles 5, 7(4), 15, and 121. The parties to the dispute disagreed over the customary status of Part IV of the Convention on archipelagic states, although the Court did not find it necessary to make a determination on this point in its decision; see paras. 181-183. In the *Nicaragua Case*, the Court held that the LOS Convention provisions on the sovereignty of the coastal state over its territorial sea codifies one of the “firmly established and longstanding tenets of customary international law”; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, (1986) ICJ Reports 14 at para. 212. It also noted the customary right of innocent passage for ships, reflected in Article 18(1)(b) of the LOS Convention, as well as freedom of navigation in the EEZ and on the high seas, at para. 214.

done without embarking upon any empirical research as to whether the respective rules were recognised as law and reflected in State practice."¹²⁵

In many contexts, state practice on the law of the sea is mixed, falling a long way short of being "*widespread and virtually uniform*". However, it is submitted that any inconsistent state practice must be assessed in light of the general acceptance of the Convention. Following the approach of the ICJ in *Nicaragua*, it is suggested that any contrary state practice is not supported by *opinio juris* in favour of rules which diverge from those found in the Convention. Oxman notes that "*there is a fundamental difficulty in attempting to prove the continuing validity of rules of law that are directly at variance with those in the Convention.*"¹²⁶ He continues, "*it would be difficult to find sufficient uniform state practice and opinio juris today to demonstrate convincingly that there is some other generally accepted positive restraint of customary law substantially more restrictive than, or inconsistent with, the Conventional rule of restraint.*"¹²⁷ That is not to say that customary international law was frozen at the time that the LOS Convention was concluded. The law can continue to evolve through consistent trends of state practice, either unilaterally or equally through institutional processes. However, such practice must also be supported by an indication that states are intending to create new rules of customary international law. At present, most of the Convention continues to be supported by the international community as the material source of the international law of the sea.

It is possible to conclude that the process of negotiating the LOS Convention had a substantial impact on the customary international law of the sea by forging and crystallising a consensus on the general rules and principles that apply to most uses of the oceans. Although practice is not in rigorous conformity with the substance of the Convention, there is nevertheless clear evidence that states believe the Convention

¹²⁵ Wolfrum, "The Legal Order for the Seas and the Oceans", at p. 174. See similar comments by Tomuschat, "Obligations arising for states without or against their will", at p. 258.

¹²⁶ Oxman, "Customary International Law in the Absence of Widespread Ratification of the Law of the Sea Convention", in *1982 Law of the Sea Convention*, ed. Oxman and Koers (Law of the Sea Institute, 1983) at p. 672.

¹²⁷ *Ibid.*, at p. 674.

provides a repository of the prevailing rules and principles. The negotiation of the Convention has therefore succeeded in promoting a degree of certainty in the applicable law of the sea, mitigating the confusion and ambiguity that was prevalent at the time of the *Fisheries Jurisdiction Cases*.¹²⁸

It does not follow that all parts of the Convention have become customary international law. From the records of UNCLOS III, it is clear that the provisions on deep seabed mining were not supported by consensus and there was not sufficient *opinio juris* for their translation into customary international law. Applying the words of the ICJ from a different context, these provisions were the subject of “*long continued hesitations*”.¹²⁹ The industrialised states consistently raised objections to the regime for deep seabed mining both before and after the conclusion of the Convention. The objections were not to the principle of the deep seabed as the common heritage of mankind. States had managed to reach a consensus over this issue in 1970¹³⁰ and it is arguable that these broad principles have become custom. The same, however, is not true for the details of the institutional regime and the conditions attached to deep seabed mining which led the industrialised states to reject Part XI of the Convention. The verbal protests of the industrialised states presented at the Conference itself¹³¹ were further supplemented by state practice which conflicted with the detail of the treaty text. Several states, including the US, the UK, the Soviet Union, Germany, France and Italy, passed unilateral legislation permitting their nationals to undertake mining. Further to these unilateral acts, Germany, France, the US and the US entered into an Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Seabed in 1982.¹³² The objections and contrary state practice of these important states were fatal for the future of Part XI out-with the treaty framework.

¹²⁸ See chapter two, at pp. 25-27.

¹²⁹ *North Sea Continental Shelf Cases*, at paras. 49-53.

¹³⁰ General Assembly Resolution 2749 (XXV), 1970.

¹³¹ See chapter two, at p. 35.

¹³² See Brown, *The International Law of the Sea* (Dartmouth Publishing Company, 1994) at p. 457. Note that in August 1985, the Preparatory Commission passed a resolution condemning the actions of these states and affirming that the Convention was the only legal regime applicable to the Area; see Churchill and Lowe, *The Law of the Sea* at p. 234.

These objections to the deep seabed mining regime were overcome through the negotiation of the Part XI Agreement.¹³³ Yet, there are other problems for the transition of Part XI into customary international law.

In order to have this effect, a provision must be of a “*fundamentally norm creating character*.”¹³⁴ As Jennings explains, “*a treaty is not capable of becoming a general rule of custom in a form which belongs essentially to the particular treaty context. This is without prejudice to whether that rule, in abstracto or in another context, would be capable of becoming a rule of general law.*”¹³⁵

The provisions on deep seabed mining, however, are specifically directed at States Parties to the Convention. In addition, Part XI is largely concerned with creating and maintaining an international institution which can only occur through the conclusion of a treaty.¹³⁶ These considerations also apply to the provisions on dispute settlement.¹³⁷ Many provisions in Part XV are also addressed to States Parties and they are similarly concerned with the creation of institutional procedures.

These important provisions can therefore only be invoked as treaty provisions. Ultimately, the substantial influence of the LOS Convention on customary international law does not completely mitigate the need for states to consent to be bound by the Convention if it is to be fully effective. This explains why the General Assembly

¹³³ See chapter four, at p. 95 ff..

¹³⁴ *North Sea Continental Shelf Cases*, at para. 72.

¹³⁵ Jennings, “The Discipline of International Law”, at p. 626.

¹³⁶ See Treves, “UNCLOS as a non-universally ratified instrument”, in *The 1982 Law of the Sea Convention*, ed. Oxman and Koers (Law of the Sea Institute, 1982) at p. 685; It is clear that an international organisation can only come into existence upon entry into force of the Convention. However, Jennings notes that it is possible for the international community to create an international organisation which has some competences in respect of third states; Jennings, “The Discipline of International Law”, at p. 628. He cites the *Advisory Opinion on Reparations for Injuries* where the Court held that ‘fifty states, representing the vast majority of the members of the international community, had the power ... to bring into being an entity possessing objective legal personality, and not merely personality recognised by them alone, together with capacity to bring international claims’; *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, (1949) ICJ Reports at p. 185.

¹³⁷ Therefore, apart from the duty to settle law of the sea disputes peacefully, states would not be bound by the provisions to submit disputes under the Convention to arbitration or other courts or tribunals. Of course, states could accept these obligations without becoming a party to the Convention and many law of the sea disputes have been settled by adjudication or arbitration. For a further discussion of judicial aspects of the law of the sea, see chapter seven.

continues to call on all states that have not done so to become a party to the LOS Convention.¹³⁸

6. The Importance of Institutions in Law-Making

The foregoing analysis demonstrates the role that international institutions can play in the development of customary international law. By providing a forum in which states can seek to reconcile their competing interests in an acceptable compromise, these institutional arrangements can foster a consensus which in turn can contribute to the creation of customary international law. Often this consensus will take the form of a written instrument, binding or non-binding.

Transformations in the traditional customary international law-making process would appear to be accepted by several commentators. Danilenko talks of “*an increasing formalisation of the customary law-making process*” through international organizations¹³⁹, whilst Judge Tanaka, in his Dissenting Opinion in the *South West Africa Cases*, stated that “*in the contemporary age of highly developed techniques of communication and information, the formation of custom through the medium of international organisations is greatly facilitated and accelerated.*”¹⁴⁰

¹³⁸ E.g. General Assembly Resolution 61/30, 2006, at para. 3.

¹³⁹ Danilenko, *Law-Making in the International Community* at p. 79. See also Charney, "Universal International Law", at p. 547. Jennings and Watts comment that “members of the international community have in a short space of time developed new procedures through which they can act collectively. While at present this can be regarded as merely providing a different forum for giving rise to rules whose legal force derives from the traditional sources of international law, there may come a time when the collective actions of the international community within the framework provided by international organisations will acquire the character of a separate source of law”; *Oppenheim's International Law*, at p. 46.

¹⁴⁰ Dissenting Opinion of Judge Tanaka, *South West Africa Cases (Second Phase)*, (1966) ICJ Reports 3 at p. 177, cited in Higgins, *Problems and Process* at p. 23. See also Wright who says that international organisations fulfil the two functions of formulating norms of customary international law better than traditional methods; "Custom as a Basis for International Law in the Post-War World", at pp. 157-158. It is interesting to note that Wright does not concentrate on state practice and *opinio juris*, rather he considers procedures for formulating and publicising norms likely to be generally acceptable to states and procedures for facilitating the observance, recognition or acquiescence in such norms by all states. In the early development of international law, these functions were performed through diplomacy and state practice. They are now primarily fulfilled through the opportunities provided by international organisations.

Such institutional processes are arguably indispensable in an increasingly complex international community composed of diverse and often conflicting interests where issues affect all states. Jennings and Watts conclude that “*to some extent the growth in the role of international organisations as a factor in international life contributes to a more rapid adjustment of customary law to the developing needs of the international community.*”¹⁴¹

The role of international institutions in law-making should not be overstated and they should not be mistaken for prototype legislative organs. Far from it. Such institutions are successful in creating universal law only if they are able to successfully foster an *opinio juris communis*. Formal adoption alone is meaningless.¹⁴² The characteristics of an institution and the types of decision-making procedures it utilises are key factors in whether or not it will be able to influence customary international law.

7. Beyond the Law of the Sea Convention?

UNCLOS III successfully managed to settle many of the outstanding controversies that had precipitated the collapse of previous attempts to codify the law of the sea. As a consequence, the LOS Convention is hailed as a milestone in the international legal order. It has been described by one author as “*a shining example of international cooperation, diplomacy and the role of international law in the regulation of international affairs and is considered to be one of the most complex and ultimately successful international diplomatic negotiations that took place in the twentieth century.*”¹⁴³

In the age of international organisations, states also have much more notice of emerging norms and many more opportunities to dissent. On the role of protest in the formation of custom, see *Anglo-Norwegian Fisheries Case*, (1951) ICJ Reports 116.

¹⁴¹ Jennings and Watts, eds., *Oppenheim's International Law*, at p. 31.

¹⁴² J. Brunnee, "COPing with Consent: Law-Making Under Multilateral Environmental Agreements", (2002) 15 *Leiden Journal of International Law* at p. 37.

¹⁴³ Rothwell, "Oceans Management and the Law of the Sea in the Twenty-First Century", in *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, ed. Oude Elferink and Rothwell (Koninklijke Brill NV, 2004) at p. 329.

Whilst the LOS Convention has had huge success in stabilising state claims to jurisdiction over the oceans, it is also true that “*the law needs to be flexible and able to change to reflect new circumstances whether it be increased national sovereignty, greater environmental protection, or enhanced global security.*”¹⁴⁴ The LOS Convention cannot be seen as a *fait accompli*. The law of the sea, like all international law, must be able to balance the need for stability with the desire for change.

How the LOS Convention evolves in light of the ever-changing challenges facing the international community will be considered in the following chapters. In doing so, it will be necessary to take into account the interplay of written instruments and custom, as well as the role of international institutions in the law-making process.

The fact that the Convention reflects a consensus of the international community may pose challenges to the future development of the law of the sea. As Treves notes, “*the impact of the Convention on customary international law, on whose crystallisation and development it exercises a powerful influence, makes the Convention, as well as the main substantive questions it addresses, a matter of interest for all states even beyond the circle of States Parties.*”¹⁴⁵ It is in this context that questions of participation, decision-making procedures and other aspects of legitimacy are relevant.

What is clear from this chapter is that international institutions are a vital aspect of modern law-making techniques and they will form a central part of the analysis of the ways in which the law of the sea evolves. There are many institutions which have an interest in maritime affairs. Their characteristics vary from general political organizations such as the UN General Assembly to technical organizations such as the International Maritime Organization. Moreover, some institutions are created by the LOS Convention itself. The role that these types of institutions play will be considered over the following chapters. Many of the issues that have been addressed in this chapter will be further considered in the context of these other institutions. What role does

¹⁴⁴ Ibid., at p. 350.

¹⁴⁵ Treves, "The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention", in *Stability and Change in the Law of the Sea: the role of the LOS Convention*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005) at p. 66.

consensus play in law-making by international institutions? How do written instruments influence the development of universal international law? The analysis will also demonstrate to what extent the law-making techniques utilised at UNCLOS III have survived or been further developed by other institutions in order to maintain the balance of interests in the law of the sea.

The Institutional Development of the LOS Convention

1. Evolution in the Law of the Sea

Through the negotiation of the LOS Convention, states attempted to “*settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea.*”¹ Yet, in no sense was the adoption of the Law of the Sea Convention the end of the law-making process. The Convention, like all law, is not exempt from “*the imperious necessity of the process of change, that categorical imperative of the universe.*”² The delegate of Sri Lanka summed up the transience of the Convention at the closing session of UNCLOS III: “*it is in the nature of all things that they do not remain static, that there will be growth and there will be decay. The march of technology and changing perceptions and aspirations will, in time, place pressures upon the regimes we establish today.*”³ It follows that if the LOS Convention is to provide an enduring legal framework, it must be able to evolve in light of its shifting legal, political and technological environment. This chapter will begin to consider how this is achieved.

As noted in the previous chapter, most modern law-making takes place through institutional fora where states can collectively discuss issues and resolve problems in a spirit of mutual co-operation. This is particularly true of the law of the sea, where a myriad of organizations are active. Some of these institutions were active prior to the conclusion of the Convention. Others were created by the LOS Convention itself. Still others have subsequently come into being to address a particular threat or challenge faced by the international community. The LOS Convention does not attempt to impose a single institutional framework on the

¹ LOS Convention, preamble.

² Fischer Williams, *International Change and International Peace* (Oxford University Press, 1932) at p. v.

³ Statement of Sri Lanka, 187th meeting, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. 17, at p. 48, para. 161.

development of the law of the sea. Rather, it is subject to what Hey describes as “*a multifaceted and multi-localized process of normative development.*”⁴

Many international institutions have a very specific mandate in a technical field of regulation such as the International Seabed Authority and the International Maritime Organization. The work of these organizations will be considered in the following chapter.

The focus of this chapter is on the general development of the law of the sea regime. The contracting parties to a treaty are usually at the centre of any procedures to modify and change its provisions. General international law confers on them wide powers of interpretation and review for these purposes. The chapter will first consider the role of the States Parties in the development of the Convention regime. The status of the law of the sea as customary international law, however, means that any analysis of law-making cannot concentrate exclusively on treaty mechanisms for modifying the Convention. Doing so, ignores the wider consequences of the Convention for all states, whether or not they are a State Party. Taking these considerations into account, the analysis will consider the continued involvement of the General Assembly in maritime affairs and how it contributes to the maintaining a consensus on the law of the sea.

2. The Convention Amendment Procedures

The primary mechanism for the development of treaties is through amendment procedures. The power of amendment is found in general international law. The 1969 Vienna Convention on the Law of Treaties sets out the principle that “*a treaty may be amended by agreement between the parties.*”⁵ This skeletal provision specifies who should be involved in the amendment process, whilst leaving the details of adoption and approval to be worked out for each individual treaty, taking into account its particular needs.

⁴ Hey, "Reviewing Implementation of the LOS Convention and Emerging International Public Law", in *Stability and Change in the Law of the Sea: the Role of the Law of the Sea Convention*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005) at p. 81.

⁵ Article 39. It sets out several residual rules which are to apply to the amendment of treaties “except in so far as the treaty may otherwise provide.”

As with most modern multilateral treaties⁶, the LOS Convention lays down its own specific amendment procedures. The formal process of amending the LOS Convention is dealt with in a series of articles found in Part XVII. These articles distinguish between amendments to the deep seabed mining provisions in Part XI of the Convention and amendments to the other parts of the Convention. The former articles fall within the competence of the International Seabed Authority and they will be considered in the following chapter.⁷ The current focus is on the ordinary amendment procedures.

The Convention sets out two ways in which amendments can be made to its substantive provisions. They both distinguish between adoption and acceptance. Both procedures confer the power to adopt amendments on the States Parties to the Convention, whilst acceptance is left to individual States Parties.

A simplified amendment procedure is set out in Article 313. This procedure permits any State Party to circulate an amendment proposal to all other States Parties through the UN Secretariat. A proposal which is circulated in this way is considered to be adopted if no State Party objects to the proposal within twelve months of the date on which it was circulated. Adoption is subject to further acceptance by individual states, which will be discussed below.

There are several key characteristics of this procedure which are worthy of note. Firstly, although the simplified procedure provides for the tacit approval of the States Parties, it only requires the objection of a single State Party to frustrate the process of adoption. In effect, each State Party wields a veto over any proposal. Secondly, Article 313 does not require the States Parties to meet in formal session in order to adopt the proposed amendment. As a consequence, the procedure is cost-effective.⁸ At the same time, there are disadvantages to the lack of institutional oversight because it does not allow for any substantive discussion of proposed amendments. Therefore, it would seem that Article 313 is most appropriate for purely technical changes of a *de minimis* nature. Even for technical issues, the need to wait for one year for the adoption of a proposal, as well as the subsequent need for

⁶ Aust explains that before the Second World War, it was relatively rare for a multilateral treaty to have its own amendment procedure and if it did, it would usually incorporate the unanimity rule; *Modern Treaty Law and Practice* (Cambridge University Press, 2000) at p. 212.

⁷ See chapter five, at pp. 167-168.

⁸ Cost-effectiveness appears to be a factor that increasingly influences developments in this area; see Part XI Agreement, section 1, at para. 2.

acceptance by individual states, make this procedure less attractive for adopting quick fixes to the Convention regime.⁹ Another disadvantage of Article 313 is that there is no opportunity for non-parties to participate in the adoption process or to express concerns over proposed amendments. Thus, the simplified procedure is not appropriate for maintaining the universal consensus underlying the Convention.

An alternative amendment procedure is set out in Article 312 of the Convention.¹⁰ Under this procedure, a proposal for an amendment is circulated to all the States Parties by the UN Secretary General in the same way as under Article 313. The crucial difference is that States Parties are asked to approve the convening of an amendment conference in order to discuss the proposal.¹¹ At least fifty per cent of the State Parties must communicate their consent within twelve months. As with the other procedure, there is no formal involvement from non-parties who would be unable to propose changes to the law of the sea framework without the support of a State Party. This provision can be contrasted with the amendment procedures in the 1958 Geneva Conventions on the Law of the Sea where the decision on whether to call an amendment conference was conferred on the General Assembly.¹²

If an amendment conference is convened, Article 312 permits a full discussion and debate over the proposed amendments to take place. This is an improvement over Article 313 in terms of promoting co-operation and compromise. Moreover, Article 312 promotes the adoption of amendments by consensus. It specifies that "*the conference should make every effort to reach an agreement on any amendments by way of consensus and there should be no voting on them until all efforts at consensus*

⁹ In practice, Article 313 has been superseded by regular Meetings of the States Parties; see below, at p. 80 ff.

¹⁰ It only became possible to invoke this procedure ten years after entry into force of the Convention; it was therefore activated on 16 November 2004.

¹¹ See Freestone and Elferink, "Strengthening the United Nations Convention on the Law of the Sea's regime through the adoption of implementing agreements, the practice of international organisations and other means", in *Stability and Change in the Law of the Sea: the Role of the LOS Convention*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005) at p. 176.

¹² Territorial Sea Convention, Article 30; the Continental Shelf Convention, Article 13; High Seas Convention, Article 35; and Fishing and Conservation of Living Resources of the High Seas Convention, Article 20.

have been exhausted."¹³ It is clear that consensus is preferred, but voting remains an option of last resort.¹⁴

The text of the Convention makes no reference to participation of non-parties at amendment conferences. Nevertheless, it is likely that most states would be invited to participate, at least as observers.¹⁵ Thus, it is possible that the interests of non-parties could be taken into account in formulating amendments and a wider consensus could be maintained. However, this outcome is dependent on the successful operation of consensus decision-making techniques. Ultimately, the participation of non-parties in the adoption of amendments is limited, as they possess no voice if it comes to a vote.

A further limitation on both procedures is that amendments only become binding once they have been accepted by individual states. Once amendments have been adopted under Article 312 or Article 313, they are again circulated to the States Parties by the UN Secretariat. Article 316(1) provides that an amendment will come into force thirty days after the deposit of instruments of acceptance by two-thirds of the States Parties or sixty States, whichever is greater. No amendments will be applicable to States Parties which have not accepted them. This provision reflects the principle found in Article 40(4) of the 1969 Vienna Convention on the Law of Treaties which provides that "*the amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.*"¹⁶ Whilst such a process places a high value on consent and the sovereignty of states, it poses a threat to the unity of the law of the sea. As a consequence, the formal amendment procedures threaten a fragmentation in the law of the sea, not only as customary international law, but also as a treaty instrument. It is possible for two alternative provisions to exist side-by-side: an amended text applicable to the relations between those States Parties which have accepted it and the original text applicable to all other States Parties. This possibility is confirmed by Article 316(4) of the LOS Convention which provides that:

¹³ LOS Convention, Article 312(2).

¹⁴ Article 312 also specifies that the amendment conference shall utilise the same decision-making procedure as UNCLOS III, unless otherwise agreed. For a discussion of the procedures applied at UNCLOS III, see chapter two, at p. 30 ff..

¹⁵ It is likely that the ordinary Rules of the Procedure for Meetings of the States Parties will be used for amendment conferences. For discussion of participation of observers at Meetings of the States Parties, see below, at pp. 86-87.

¹⁶ See also the Vienna Convention on the Law of Treaties, Article 34.

A State which becomes a Party to this Convention after the entry into force of an amendment ... shall failing an expression of a different intention by that State:

- (a) be considered as a Party to this Convention as so amended; and
- (b) be considered as a Party to the unamended Convention in relation to any State Party not bound by the amendment.

Whilst the LOS Convention seeks to facilitate the entry into force of amendments, in doing so, it endangers the integrity and unity of the Convention. Freestone and Elferink conclude that, in the context of its amendment procedures, *“the Convention is thus not particularly geared towards maintaining the package-deal intact.”*¹⁷

The Convention has been in force for more than twelve years and these procedures have not yet been invoked. Given the threat to the universal legal framework, it is questionable whether states would want to rely on the formal amendment procedures found in the Convention. In these circumstances, it is necessary to ask, in what other ways the law of the sea framework can be changed or modified.

3. Informal Law-Making by the States Parties

A Conference of the Parties¹⁸ is a common arrangement in many modern multilateral agreements. In assessing their law-making function, Werksman describes how *“many COPs are empowered by the underlying treaty to take decisions or actions that may be required for the achievement of the agreement’s objective or purposes.”*¹⁹ The creation of COPs allows the States Parties to continuously monitor the implementation of a treaty, ensuring its evolution in light of changing legal and political environment.²⁰

¹⁷ Freestone and Elferink, "Strengthening the United Nations Convention on the Law of the Sea's regime through the adoption of implementing agreements, the practice of international organisations and other means", at p. 10.

¹⁸ Hereinafter, referred to as a “COP”.

¹⁹ Werksman, "The Conference of the Parties to Environmental Treaties", in *Greening International Institutions*, ed. Werksman (Earthscan Publications, 1996) at p. 63.

²⁰ See J. Brunnee, "COPing with Consent: Law-Making Under Multilateral Environmental Agreements", (2002) 15 *Leiden Journal of International Law* at p. 4, footnote 12, citing Article 7.2 of the UN Framework Convention on Climate Change. See also Biodiversity Convention, Article 23(2).

The LOS Convention does not follow this model although it does confer some powers on the States Parties. References to the States Parties are scattered throughout the Convention. Aside from the adoption of amendments, mention of the States Parties is also made in the provisions relating to the election, administration and financing of the ITLOS and the Commission on the Outer Limits on the Continental Shelf.²¹

In order to fulfil these tasks, Meetings of the States Parties take place in accordance with Article 319 which confers on the UN Secretary General, the power to “*convene necessary meetings of the States parties in accordance with this Convention.*”²² Yet, the precise character of the Meeting of the State Parties is not clear from the Convention alone.

The role of the States Parties must be considered in light of general international law which confers wide powers of interpretation and review on the contracting parties of a treaty. For instance, Article 31(3) of the 1969 Vienna Convention on the Law of Treaties acknowledges that subsequent agreements and subsequent practice of contracting parties shall be taken into account in interpreting a treaty. It follows that the States Parties may be able to play an incidental law-making role by adopting decisions which fill in the gaps in the Convention regime.

The States Parties meet annually at the headquarters of the United Nations in New York. Given the lack of detail in the Convention itself, the States Parties have adopted Rules of Procedure which govern the conduct of their meetings. The Rules of Procedure address issues such as the convening of Meetings, attendance, participation, and decision-making procedures.²³ The Rules of Procedure fill in many of the gaps found in the Convention on the way in which the States Parties fulfil their functions.

Many of the functions of the States Parties are concerned with the setting up and the administration of the Tribunal and the Commission in accordance with the provisions of the Convention²⁴, as well as other budgetary and administrative affairs

²¹ Hereinafter, referred to as “the Commission”.

²² LOS Convention, Article 319(2)(e).

²³ Rules of Procedure of the Meeting the States Parties, Document SPLOS/2/Rev.4. Hereinafter, “SPLOS Rules of Procedure”. They were first adopted at the initial meeting of the States Parties in 1994. They have been amended on several occasions since in order to address specific issues.

²⁴ See LOS Convention, Annex II, Article 2; Annex VI, Articles 4, 6, 18, 19.

relating to the organization of the Meeting itself. Some of the decisions taken by the States Parties may contribute to the progressive development of the law of the sea. A few examples will be considered.

The Meeting of the States Parties has adopted a series of decisions on the administration and functioning of the Tribunal.²⁵ Some of these decisions have been adopted in accordance with the Convention itself. For instance, Article 18(7) of Annex VI provides that “*regulations adopted at meetings of the States Parties shall determine the conditions under which retirement pensions may be given to members of the Tribunal and to the Registrar and the conditions under which members of the Tribunal and Registrar shall have their travelling expenses refunded.*” It was in pursuance of this mandate that the States Parties adopted the Pension Scheme Regulations at their ninth meeting in May 1999.²⁶ The normative value of these decisions is uncontroversial as they are authorised by the Convention.

Other decisions have been adopted without an express mandate. Despite the lack of a legal basis, such decisions have complemented the rules set out in the Convention, providing additional detail or resolving any ambiguity.

One such decision is the procedures adopted by the States Parties for the election of Members of the Tribunal. The Convention itself sets out basic criteria for the election of judges to the Tribunal. It requires that the composition of the Tribunal shall assure “*representation of the principal legal systems of the world and equitable geographical distribution*”²⁷ and there should be no fewer than three representatives from each of the five geographical regions of the United Nations.²⁸ Beyond these stipulations, it appears that the composition of the Tribunal is flexible. At its fifth meeting in 1996, following informal consultations conducted by the President of the Meeting, the States Parties agreed by consensus on the allocation of all of the seats on the Tribunal between the geographical regions of the United Nations.²⁹ In doing so, the States Parties went beyond the basic conditions of the Convention, agreeing on the way in which these particular provisions should be implemented. The decision of the

²⁵ See e.g. Document SPLOS/8, at para. 9; Document SPLOS/48, at para. 38; Document SPLOS/48, at para. 40.

²⁶ Document SPLOS/48, at para. 40.

²⁷ LOS Convention, Annex VI, Article 2(2).

²⁸ LOS Convention, Annex VI, Article 3(2).

²⁹ The decision provided for 5 judges from the African Group, five judges from the Asian Group, four judges from the Latin American and Caribbean Group, four judges from the Western Europe and Other Group, and three judges from the Eastern European Group; Document SPLOS/14, at para. 15.

States Parties resembles the understanding on the composition of the International Court of Justice which guarantees a seat to the five permanent members of the Security Council and allocates the remaining seats according to the pattern of equitable geographical distribution applied to Security Council.³⁰ There is no explicit legal basis for the decision of the States Parties in the Convention who are only empowered to elect the members of the Tribunal in accordance with the procedure in the Convention.³¹ Nevertheless, the decision has been applied and followed in subsequent elections for the Tribunal³², suggesting that it has had a normative effect.

A similar issue has arisen over the composition of the Commission. In this case, the Convention provides that “*no less than three members [of the Commission] shall be elected from each geographical region*”³³, again leaving the allocation of the remaining seats to the discretion of the States Parties. At the first elections for the Commission in March 1997, the States Parties agreed on the allocation of all of the seats on the Commission, thus supplementing the text of the Convention. They further agreed to vary the procedures set out in Annex II of the Convention. In an understanding reached through consultations between the President of the Meeting and the chairs of the regional groupings, it was agreed that the Group of Eastern European States would not fill the third seat to which it was entitled under the Convention. Instead, this seat would be allocated to the Western European and Others Group.³⁴ Following this concession, the allocation of all twenty-one seats on the Commission was worked out. In describing the arrangement, however, it was stressed by the President of the Meeting that the arrangement was “*on a purely ad hoc basis and relate only to the first election of the members of the Commission.*”³⁵ He continued “*they should not be interpreted as derogating from the relevant provisions of the United Nations Convention on the Law of the Sea. They shall not prejudice arrangements for future elections and do not constitute a precedent.*”³⁶ There are two interesting aspects to this clarification. Firstly, the arrangement clearly does derogate from the Convention, although the President is keen to downplay this. His statement can perhaps be seen as stressing the consensual nature of the derogation. Secondly,

³⁰ See Merrills, *International Dispute Settlement* (Cambridge University Press, 1998) at pp. 137-138.

³¹ LOS Convention, Annex VI, Article 4.

³² Document SPLOS/48, at para. 29; Document SPLOS/135, at para. 36.

³³ LOS Convention, Annex II, Article 2(3).

³⁴ Document SPLOS/20, at para. 13.

³⁵ *Ibid.*.

³⁶ *Ibid.*.

and more importantly, the disclaimer was intended to make abundantly clear that the decision had no normative effect for future elections. In other words, the President was denying any law-making intent. By implication, it is admitted that decisions of the States Parties can create law in this way.

At the second elections for members of the Commission in 2002, the distribution of seats was adjusted so that it was in conformity with the provisions of Annex II of the Convention.³⁷ This time, the decision was not accompanied by any disclaimer on its value as a precedent.

Comparison of these cases suggests that the States Parties are aware that their decisions can have legal value, even though they have no formal status under the Convention. Not authorised by the Convention, such decisions could nevertheless be classified as subsequent agreements or subsequent practice of the parties under Article 31(3) of the 1969 Vienna Convention on the Law of Treaties.

Arguably some other decisions of the States Parties have gone further than interpreting the Convention by actually modifying its provisions. For instance, at the first meeting of the States Parties in 1994, a question arose over the timing of elections to the Tribunal. The Convention provides that the first elections shall take place within six months of the entry into force of the Convention.³⁸ However, given the number of states which had indicated that their acceptance of the Convention was imminent, it was decided to postpone the first election of the Tribunal to 1 August 1996.³⁹ In addition, the decision extended the eligibility for election to candidates from states which were in the process of becoming a party to the Convention.⁴⁰ The decision specified that it was a “*one-time deferment*” to the election schedule and that no further changes would be made unless the States Parties agreed by consensus.⁴¹ A similar decision was adopted at the third meeting of the States Parties, postponing the

³⁷ The following allocation was agreed: four from Africa, six from Asia, three from Eastern Europe, four from Latin America and Caribbean, four from Western Europe and Other; Document SPLOS/91, at para. 97.

³⁸ LOS Convention, Annex VI, Article 4(3).

³⁹ Document SPLOS/3, at para. 16. This was based on a recommendation from the Preparatory Commission; see *Statement by the Chairman of the Preparatory Commission*, Document LOS/PCN/L.115/Rev.1, dated 8 September 1994, at para 43, specifically citing the object of universal participation.

⁴⁰ Document SPLOS/3, at para. 16. For a description of the revised procedure, see *Election of Members of the International Tribunal for the Law of the Sea – Note by the Secretariat*, Document SPLOS/9.

⁴¹ Document SPLOS/3, at para. 16(a) and (f).

first election of the members of the Commission.⁴² Both decisions stress their one-off nature, but they clearly modify the dates prescribed in the Convention.

A further illustration of a decision seeking to modify the Convention is the postponement of the date from which the ten-year period for making submissions to the Commission would be calculated. According to the Convention, a coastal state must submit particulars of its proposed outer continental shelf “*as soon as possible, but in any case within 10 years of the entry into force of this Convention for that State.*”⁴³ However, the States Parties decided that the ten-year time limit should start from 13 May 1999.⁴⁴ Accordingly, states for which the Convention entered into force before that date will not have to make submissions until 13 May 2009.⁴⁵ When making the decision, the States Parties discussed the form of any change to the text of Annex II. Possibilities included an amendment under Articles 312 or 313, an agreement relating to the implementation of Article 4 of Annex II or a decision of the States Parties.⁴⁶ It was decided that a decision of the States Parties, following the precedents for the postponements of elections, was appropriate to effectuate the necessary change. The report of the Meeting summarises: “*Many delegations were of the view that it fell within the competence of the Meeting of the States Parties to adopt by consensus a decision expressing general agreement on the starting date for calculating the 10-year time period.*”⁴⁷

One commentator has suggested that the modifications of the Convention that have been implemented through decisions of the States Parties to date are simply of an administrative nature, concerning time limits that are to be applied on only one occasion.⁴⁸ Whilst this is true of the postponement of the elections for the Tribunal and the Commission, the decision to delay the commencement of the ten year period for submissions to the Commission is of a slightly different character. Firstly, the delay was for a longer period, almost five years, as opposed to just over one year in

⁴² Document SPLOS/5, at para. 20.

⁴³ LOS Convention, Annex II, Article 4.

⁴⁴ Document SPLOS/72. This issue of the timeframe for submissions to the Commission arose again at the sixteenth meeting of the States Parties in 2006 where the possibility of a further extension was mooted; Document SPLOS/148, at para. 72.

⁴⁵ Document SPLOS/72.

⁴⁶ Document SPLOS/73, at para. 78.

⁴⁷ Document SPLOS/72, at para. 79.

⁴⁸ Treves, "The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention", in *Stability and Change in the Law of the Sea: the role of the LOS Convention*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005) at pp. 71-72.

the case of the two elections. Secondly, the deadline was not imminent; it was ten years in the future. Thus, the changes did not have the same urgency or *de minimis* character. Moreover, these instances of decision-making by the States Parties do not suggest that there is any basis to limit the legal effect of their decisions. The practice of the States Parties in these instances acknowledges consensus decisions as a form of law-making, not only for gap filling, but as a way of modifying the legal framework in the Convention, circumventing the formal amendment procedures.

There are certainly advantages of using consensus decisions to modify the Convention regime. Principally, it is quicker than invoking the amendment procedures, which not only require the circulation of proposed amendments to States Parties, but also formally require individual consent before amendments become binding. By contrast, consensus decisions can have immediate effect. The disadvantage of the consensus decisions is the uncertainty over the legal basis for a decision. How much of a problem is this? As Klabbers asks, “*if a healthy majority agrees with the activity, then it can hardly be deemed illegal, for, if it were illegal, how could a healthy majority possibly accept it?*”⁴⁹ This reasoning is persuasive. What is clear is that if such informal techniques of law-making are to be utilised, widespread participation and consensus decision-making are vital.⁵⁰

An inherent limitation of the States Parties as a forum for law-making, noted above, is its limited membership. However, the practice of the States Parties confirms a desire to promote universal participation in their proceedings. Invitations to the first meeting of the States Parties in November 1994 were addressed to all States Parties, as well as all other states and several international organizations and other entities referred to in Article 305 of the Convention. In issuing such a broad invitation, the UN Secretary General acknowledged the desire to achieve universal participation in the Convention.⁵¹

At the first meeting, the provisional Rules of Procedure were adopted by the States Parties subject to an amendment to allow the participation of non-parties in

⁴⁹ Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2002) at p. 160.

⁵⁰ Churchill, "The impact of State Practice on the jurisdictional framework contained in the United Nations Convention on the Law of the Sea", in *Stability and Change in the Law of the Sea*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005) at p. 97; Boyle, "Further Development of the 1982 Law of the Sea Convention", at p. 574.

⁵¹ Document SPLOS/3, at para. 1.

their proceedings. Rule 15 allowed states that had signed the Convention but were not yet parties to attend as observers.⁵² It provides for extensive rights of participation for non-parties, permitting them to take part in discussions and deliberations, albeit without a vote.⁵³ The inclusion of this provision at the time was vital given the number of states which has indicated their intention to become a party to the Convention but had not completed the formalities. Indeed, observer states actually out-numbered States Parties for the first few meetings that took place.⁵⁴

The rules on participation of observers were again amended at the seventh meeting of the States Parties in May 1997, where it was agreed to further extend rights of participation to “*States Members of the United Nations or members of specialized agencies of the United Nations or the International Atomic Energy Agency.*”⁵⁵ The purpose of this amendment was to permit the participation of states which had come into being since UNCLOS III. In other words, rights of participation were universalised so that any state could attend and participate in the proceedings of the States Parties as observers.

Although observer states do not have a right to vote, placing them under a potential handicap, voting is in practice rare. Indeed, the Rules of Procedure encourage the States Parties to “*work on the basis of general agreement*” and the Meeting should only proceed to a vote if “*all efforts at general agreement have been exhausted.*”⁵⁶ General agreement in this provision is probably to be understood as consensus in the sense used at UNCLOS III. In fact, the types of decision-making techniques developed at UNCLOS III to facilitate consensus are regularly put into practice by the Meeting of the States Parties. Informal consultations⁵⁷ and working groups⁵⁸ are common and the President of the Meeting often takes a leading role in forging compromises between various interest groups.

⁵² Document SPLOS/3, at para. 12.

⁵³ SPLOS Rules of Procedure, Rules 18(1) and (6). An equivalent right is given to the International Seabed Authority in Rule 18(2) and (6). Other observers, that is those categories identified in Article 319(3)(b) of the Convention, may attend but may only make written statements on the invitation of the President and with the permission of the Meeting; Rule 18(7).

⁵⁴ The President of the fifth Meeting of the States Parties noted that the number of States Parties had for the first time exceeded one hundred states at that meeting; Document SPLOS/14, at para. 7.

⁵⁵ Document SPLOS/24, at para. 28.

⁵⁶ SPLOS Rules of Procedure, Rule 52.

⁵⁷ For example, the allocation of seats on the Tribunal; see above, at pp. 82-83.

⁵⁸ For example, the consideration of the Agreement on Privileges and Immunities; see below, at p. 88.

If a vote is taken, decisions on questions of substance are made by a two-thirds majority of States Parties present and voting, and questions of procedure by a simple majority.⁵⁹ Voting in practice has only taken place in the course of elections for the Tribunal and the Commission. From this analysis of the actual practice of the Meetings of the States Parties, it is clear that they operate in a way that comes close to the procedures at UNCLOS III.

Another form of law-making undertaken by the States Parties is the negotiation and adoption of treaties.⁶⁰ At the seventh Meeting in May 1997, the States Parties adopted the Agreement on Privileges and Immunities of the International Tribunal for the Law of the Sea. The Agreement fills in the gaps in the Convention which simply provides that “*the members of the Tribunal, when engaged on the business of the Tribunal, shall enjoy diplomatic privileges and immunities.*”⁶¹ The Agreement, on the other hand, makes provision for immunity and other privileges for the Tribunal itself, as well as provisions covering the treatment of judges, staff members, witnesses, experts and advocates appearing before the Tribunal. Therefore, it goes beyond the minimalist provisions in the Convention.

On what basis was the Agreement adopted? The Agreement finds its origins in the discussions of the Preparatory Commission which was charged by Resolution I of UNCLOS III with preparing “*a report containing recommendations for submission to the meeting of the States Parties ... regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea.*”⁶² The draft prepared by the Preparatory Commission was introduced at the second Meeting of the States Parties⁶³ and it was debated over several meetings, through informal consultations, working groups, as well as plenary discussions. The Agreement was informally adopted *ad referendum* by the Working Group at the seventh Meeting and submitted to the plenary for further consideration. At this stage of the proceedings,

⁵⁹ SPLOS Rules of Procedure, Rules 53 and 55. At the ninth Meeting, a proposal to change the necessary majority for decisions on budgetary and financial matters from two-thirds to three-quarters was introduced; Document SPLOS/48, at para. 41. Following extensive discussions, during which opposing opinions were aired, the proposal was withdrawn at the eleventh Meeting; Document SPLOS/73, at para. 46.

⁶⁰ Treaty-making powers are not expressly conferred on the States Parties by the Convention but this has not stopped them!

⁶¹ LOS Convention, Annex VI, Article 10.

⁶² Resolution I, at para. 10.

⁶³ Document SPLOS/4, at para. 32. At that stage, it was called a “draft protocol”. It was changed to a “draft agreement” at the third Meeting; Document SPLOS/5, at para. 15.

the States Parties turned to the question of the appropriate procedure for the adoption of the Agreement and in particular whether it should be adopted by the States Parties or the General Assembly.⁶⁴ Ultimately, it was agreed that the States Parties would adopt the Agreement, although reservations were expressed by two states that they did not have a mandate to do so.⁶⁵

Unlike the authority for its adoption, the legal status of the Agreement is not controversial. As a treaty, it is binding on those states who become a party to it. Although negotiated by the States Parties, participation is not limited to this group of states. The Agreement is open to all States.⁶⁶ Thus, it aspires to universality. The General Assembly has called on “*states that have not done so to consider ratifying or acceding to the Agreement.*”⁶⁷

As well as formal acceptance, the Agreement provides a number of additional ways in which states can indicate their consent to be bound without becoming a full party. Special procedures allow for provisional application by states which intend to ratify or accede to the Agreement in the future⁶⁸, as well as *ad hoc* application of the Agreement, allowing any state to accept the Agreement for the duration of a particular dispute.⁶⁹ In this way, the Agreement attempts to promote its application as widely as possible.

It is clear from the foregoing analysis that the practice of the States Parties on the issue of implementing and modifying the provisions of the Convention has been pragmatic. They have adopted various decisions and instruments which can be seen to have a normative impact. These meetings provide an opportunity for the States Parties, as well as other states attending as observers, to discuss any issues related to the interpretation and application of the Convention and arrive at common understandings. Those decisions which do not fall within powers conferred by the Convention itself arguably fall within inherent powers of interpretation and implementation possessed by the parties to a treaty, stemming from general international law.

⁶⁴ Document SPLOS/24, at para. 26.

⁶⁵ Russia and Brazil; Document SPLOS/24, at para. 27.

⁶⁶ Agreement on Privileges and Immunities, Articles 27 and 29.

⁶⁷ General Assembly Resolution 61/30, 2006, at para. 33.

⁶⁸ Agreement on Privileges and Immunities, Article 31.

⁶⁹ Agreement on Privileges and Immunities, Article 32.

Not everyone accepts a wider role for the States Parties in implementing the LOS Convention. It has been argued by states that the Meeting of the States Parties does not possess general powers of interpretation or implementation in connection with the Convention. For instance, when the Commission asked for advice on the interpretation of certain provisions of the Convention, one delegate stressed that “*the Meeting of the States Parties did not have the competence to give a legal opinion.*”⁷⁰ In discussions on the role of the States Parties in reviewing the implementation of the Convention, other delegations have said that the Meeting is limited to fulfilling those functions ascribed to it by the text of the treaty.⁷¹ Further to this argument, it has been said that the use of the terms “*necessary*” and “*in accordance with this Convention*” in Article 319 point towards a restrictive interpretation of the powers of the States Parties.⁷²

The controversy over the role of the States Parties has not been finally resolved. At the fourteenth Meeting of the States Parties, it was agreed that the UN Secretary General would submit his report on the law of the sea, which also serves as a report to the General Assembly and other institutions, to the Meeting of the States Parties under the title “Report of the Secretary General under article 319 for the information of States Parties on issues of a general nature relevant to States Parties that have arisen with respect to the United Nations Convention on the Law of the Sea.”⁷³ Debates continue, however, over what action the States Parties can take in relation to this report.

From a legal perspective, it is submitted that arguments in support of limiting the powers of the States Parties are not convincing. The text of the Convention is ambiguous and it can be interpreted in a number of ways.⁷⁴ Indeed, it must be

⁷⁰ Document SPLOS/31, at para. 52.

⁷¹ Document SPLOS/135, at para. 82.

⁷² Treves, “The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention”, at p. 58.

⁷³ It had been suggested that a separate report should be submitted by the Secretary General to the States Parties; Document SPLOS/119, at para. 82. At the fourteenth Meeting, the Director of the Division for Oceans Affairs admitted that “there is an omission in that the comprehensive annual report of the Secretary-General on oceans and the law of the sea presented before the General Assembly does not make reference to the fact that it also contains information submitted pursuant to Article 319 of the Convention”; Document SPLOS/119, at para. 83.

⁷⁴ For a discussion of these arguments, see Treves, “The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention”, at p. 58. The General Assembly agreed in 1994 that the report on the law of the sea that the Secretary General makes annually to the General Assembly would also suffice as the report required under Article 319(a) to the States Parties; General Assembly Resolution 49/28, 1994, at para. 15(a).

remembered that the States Parties are not restricted to purely administrative and budgetary tasks, as they are also responsible for adopting most amendments to the Convention regime.

A strict legal analysis does not explain the debate that has taken place over the role of the States Parties in overseeing the implementation of the Convention. These discussions reflect wider political concerns over how the legal order of the oceans develops and who is involved in that process. It is as much a question of legitimacy, as it is of law. For most treaties, a meeting of the contracting parties is the most appropriate forum to decide on the implementation and development of a treaty as it includes all the interested actors. However, this assumption does not necessarily hold true in the case of the LOS Convention. There are several reasons why the States Parties are not always the most appropriate forum for overseeing the progressive development of the law of the sea.

Firstly, the Meeting of the States Parties was not created in an institutional vacuum. There are a number of other international institutions which are active on specific aspects of maritime affairs. The powers of these institutions are not curtailed by the LOS Convention. In many cases, the Convention confirms the role of competent international organizations in fleshing out its skeletal legal framework. The role of other organizations is recognised *inter alia* by Article 319(2)(a) of the Convention which requires the Secretary General to report on developments in the law of the sea to “*all States Parties, the [International Seabed Authority] and competent international organizations*”. The law-making role of these organizations will be considered in the following chapter. For present purposes, it suffices to say that given their specialist, and often technical, remit, these organizations often offer a more appropriate forum than the States Parties for overseeing particular developments in the law of the sea.

A second and more general limitation on the role of the States Parties arises from its restricted membership. Although the States Parties do allow participation of non-parties in their meetings, ultimately the formal procedures place such states at a disadvantage in any decision-making. Treves explains how the Meeting of the States Parties is potentially “*a forum that can be used in order to exercise pressure on non-parties, in which action can be undertaken that might create political difficulty or embarrassment for such non-parties, that might make them regret not being in a*

position to orient, or hamper, such action."⁷⁵ There is always the threat that the interests of non-parties can be overridden by invocation of the voting procedures.

This inherent limitation of the decision-making procedures of the States Parties means that its decisions may not always be considered as legitimate. Concerns over legitimacy cannot restrict the legal powers on the States Parties conferred by the Convention. On the other hand, a lack of legitimacy may prevent it from influencing customary international law of the sea. It follows that other institutions, which place all states on the same footing, may be more appropriate for discussing the general development of the law of the sea.

4. The General Assembly and the Law of the Sea

Of the many other institutions which are involved in the law of the sea, the General Assembly assumes a special position because of its central place in the UN family and its long-standing involvement in this area. The General Assembly has continued to show an acute interest in the law of the sea since the entry into force of the Convention. Although it has no formal powers under the LOS Convention, it has assumed an oversight role on the basis of its general powers conferred by the UN Charter.⁷⁶

The General Assembly is arguably a more appropriate forum than the States Parties for any general review of the law of the sea regime because of its universal membership. Debates on the annual General Assembly resolution on the law of the sea provide an opportunity for all states to discuss developments in ocean affairs and to achieve an ongoing compromise on the interpretation and implementation of the general law on this subject. The debate that takes place in the General Assembly is often more detailed than discussions by the States Parties. As Treves explains, "*the [law of the sea] debate [in the General Assembly is] just the tip of the iceberg. Negotiations for the preparation of the resolution [start] weeks and sometimes months in advance and [see] informal and frank discussions between experts, ambassadors, legal advisors and law of the sea specialists of the most interested*

⁷⁵ Treves, "The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention", at p. 62.

⁷⁶ UN Charter, Article 10.

States.”⁷⁷ Indeed, this process of negotiation and networking by the General Assembly has been further developed through the creation of the Open-Ended Informal Consultative Process on the Law of the Sea⁷⁸, established by General Assembly Resolution 54/33 of 24 November 1999. The purpose of the ICP is to aid the effective and constructive consideration of developments in the law of the sea by the General Assembly, concentrating on areas that call for a strengthening of co-ordination and co-operation between states and international organizations.⁷⁹

The product of these discussions is an annual resolution on the oceans and the law of the sea. These resolutions can play several roles in the law-making process.

Firstly, General Assembly resolutions can provide evidence of state practice and *opinio juris communis*, indicating the content of customary international law.⁸⁰ Given the historic role of the General Assembly in relation to the LOS Convention, its resolutions can arguably also serve as interpretations of the Convention in a similar way to decisions of the States Parties.⁸¹

Resolutions can also serve a more general law-making role, as witnessed in the case of the trust funds created in this field. Three trust funds have been created to date; one is intended to support developing countries which are involved in litigation before the Tribunal, whereas the other two relate to the work of the Commission. Proposals for all three funds originated in the Meeting of the States Parties. Indeed, all three funds are connected with the administrative and financial responsibilities of the States Parties under the Convention. Nevertheless, it was not the States Parties which created the trust funds. Rather recommendations were made to the General Assembly⁸² which formally established the trust funds through Resolution 55/7 adopted on 30 October 2000.⁸³ It is suggested that the referral of the issue to the General Assembly was necessary because of the role played by the UN

⁷⁷ Treves, "The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention", at p. 60.

⁷⁸ Hereinafter, referred to as the "ICP".

⁷⁹ See General Assembly Resolution 54/33, 1999, at para. 2.

⁸⁰ For a discussion of customary international law, see chapter three, at p. 50 ff..

⁸¹ By way of analogy, General Assembly resolutions have been used by the Court in order to interpret the UN Charter. For instance, in the *Nicaragua Case*, the Court relied on General Assembly Resolution 2625 (XXV) to interpret the phrase "use of force"; (1986) ICJ Reports 14, at para. 228. See also the interpretation of "self-determination", in the *Advisory Opinion on Western Sahara*, (1975) ICJ Reports 12, at paras. 54-58.

⁸² Document SPLOS/57 and Document SPLOS/60, at para. 60.

⁸³ General Assembly Resolution 55/7, at paras. 9 and 18. The terms of reference of the Trust Funds are found in Annexes I – III of the resolution.

Secretariat. Under the resolutions, it is the UN Secretary General which is responsible for administering the trust funds. The Secretariat is prohibited by the UN Charter from receiving “*instructions from any government or any other authority external to the Organization.*”⁸⁴ The States Parties are such an external authority. Whilst the UN Secretary General provides secretariat support to the States Parties⁸⁵, it remains under the control of the United Nations organs, in particular the General Assembly which has authorised the UN Secretariat to fulfil its functions under the LOS Convention.⁸⁶ Any additional task which is not mandated in the Convention must be further authorised by the General Assembly. Therefore, it is only the General Assembly that could have set up the trust funds which are administered by the UN Secretariat.

The role of General Assembly in developing the Convention regime is not exclusive. This task is shared by several other institutions, including the States Parties and technical organizations. However, the General Assembly does have a special status because of its universal membership and its place in the UN family. As one commentator has noted, the General Assembly is uniquely placed to further the coherence of oceans policy because of its position as the central, plenary organ of the United Nations.⁸⁷ Whilst it does have a key information gathering function, it will be seen that its actual powers to co-ordinate the activity of other institutions are in fact quite limited.

The UN Charter foresees that the United Nations shall, through the General Assembly and the Economic and Social Council, co-ordinate the policies and activities of the specialized agencies.⁸⁸ Article 58 of the Charter provides that “*the Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies.*” Such recommendations, as their name suggests, are not legally binding. The drafters of the UN Charter did not attempt to create a hierarchical infrastructure with one organ able to control the work of the

⁸⁴ UN Charter, Article 100(1). See Simma, ed., *The Charter of the United Nations : a commentary* 2ed., 2 vols., vol. 2 (Oxford University Press, 2002) at p. 1230.

⁸⁵ General Assembly Resolution 49/28, 1994, at para. 15(g).

⁸⁶ General Assembly Resolution 49/28, 1994.

⁸⁷ Elferink, "Reviewing the implementation of the LOS Convention: the role of the UN General Assembly and the meeting of the States Parties", in *Oceans Management in the 21st Century: Institutional Frameworks and Responses* ed. Oude Elferink and Rothwell (Koninklijke Bill NV, 2004) at pp. 305-306. See also the comments of the UN Commission on Sustainable Development, *Decision 7/1*, at para. 40, contained in Report of the Seventh Session, UN Document E/CN.17/1999/20.

⁸⁸ UN Charter, Articles 58 and 63(2).

others. Rather, the United Nations is founded on a network of co-operative arrangements between the United Nations and several associated, albeit autonomous, “specialized agencies” dealing with specific and often technical issues. This network is founded on a series of so-called relationship agreements.⁸⁹ Many of the provisions in these agreements set out reciprocal rights and obligations of the organizations bound by the agreement. As a whole, the system relies on good will and mutual co-operation rather than coercion.

Nevertheless, the practical value of General Assembly resolutions on the law of the sea and reports of the UN Secretary General on the subject should not be underestimated. There are several ways in which these resolutions contribute to co-ordinating oceans policy.

It is the information reported by international organizations formally or informally that provides the basis for the review process undertaken by the General Assembly. Nor is it only the specialized agencies and other UN institutions that are asked to report on their activities. General Assembly resolutions regularly call on “*the competent international organizations, as well as funding institutions ... to contribute to the preparation of the comprehensive report of the Secretary-General on oceans and the law of the sea*”⁹⁰, regardless of their formal status or position. The report generally contains information on all forms of international co-operation, be it through international organizations or informal co-operative mechanisms. Again, the process of co-ordination relies more on mutual co-operation than any formal powers possessed by the General Assembly. Nevertheless, information sharing is a vital aspect of co-ordination. In this sense, the law of the sea report prepared by the Secretary General and the General Assembly debate make a significant contribution to achieving a coherent oceans regime.

The review process not only provides an invaluable source of information, it also actively tries to influence co-ordinated law-making. Resolutions on the law of the sea are often targeted directly at international organizations, promoting co-operation or recommending certain action.⁹¹ In general, the General Assembly does not identify a particular institution, preferring to address the “competent international

⁸⁹ See also UN Charter, Article 63.

⁹⁰ E.g. General Assembly Resolution 59/24, 2004, at para. 96.

⁹¹ E.g. General Assembly Resolution 59/24, 2004, at paras. 66, 68, 77.

organization” or simply “global and regional bodies”. It therefore follows the approach of the Convention itself.⁹²

Occasionally, the resolution will designate or invite a specific organization to undertake an activity. In most instances where a particular organization is named, it is in relation to an activity that is already underway. For example, the 2004 General Assembly Resolution invites the International Hydrographic Organization and the International Maritime Organization to continue their co-ordinated efforts to jointly adopt measures for the transition to electronic nautical charts.⁹³ Therefore, the resolutions act as a legitimising tool for activities taking place through other institutions.

Attempts at co-ordination can on occasion be resisted. In 2003, the UN Secretary General convened a meeting of interested international organizations to discuss problems with flag state implementation of international standards.⁹⁴ Several UN agencies were invited to attend the meeting, including the IMO, the ILO, the FAO, the OECD, the UNEP, and the UNCTAD. At the meeting, the IMO was highly critical of the initiative, arguing that it would be best left to organizations to pursue a sectoral approach to the problem. Following the meeting, the IMO Secretary General wrote to the UN Secretary General, stressing that, in the view of the former, “*policy issues concerning the role, responsibilities and actions of member States which derive from their obligations as IMO member States and from their adherence to IMO Conventions and regulations are not subjects which need additional coordination at inter-agency meetings.*”⁹⁵ Although such resistance to co-operation is rare, it highlights the limitations of a decentralised system that relies on good will for its successful operation. Ultimately, the law-making activities of institutions may take place in parallel and the question of the applicable law will be left to be resolved by the rules and principles on conflicts of norms.⁹⁶

Perhaps the greatest contribution of the General Assembly to the on-going development of the law of the sea is the adoption of the so-called implementing

⁹² See chapter five, at pp. 132-133.

⁹³ General Assembly Resolution 59/24, 2004, at para. 36.

⁹⁴ See United Nations Secretary General, *Consultative Group on Flag State Implementation - Report of the Secretary General*, (2004) at para. 5. The letter from Greenpeace, the International Transport Workers’ Federation and WWF, calling for ‘a concerted multi-agency approach’ to sub-standard shipping, is contained in Annex I.

⁹⁵ *Ibid.*, at Annex III.

⁹⁶ See chapter six.

agreements. The term “implementing agreement” is not included in the LOS Convention itself, rather it has its origins in the subsequent practice of states in developing the legal framework for the law of the sea. There are two treaties that fall into this category: the 1994 Part XI Agreement and the 1995 Fish Stocks Agreement. These instruments have both had a substantial impact on the LOS Convention, arguably modifying the legal framework as it was adopted in 1982.

Although both the Part XI Agreement and the Fish Stocks Agreement are classified as implementing agreements, it is clear that there are fundamental differences between the two instruments. The impact of these two implementing agreements on the law of the sea regime will be individually considered before looking at what characteristics these two instruments have in common.

5. The 1994 Part XI Agreement

The 1994 Part XI Agreement deals with the regime for the exploration and exploitation of the deep seabed contained in Part XI of the LOS Convention. Given the failure to achieve consensus on this issue at UNCLOS III, it was clear that modifications would have to be made to Part XI, if the LOS Convention was to attain universal participation.

In 1989, the General Assembly called on all states to make renewed efforts to facilitate universal participation in the Convention.⁹⁷ In furtherance of this mandate, the UN Secretary General initiated a series of informal negotiations between interested parties in order to achieve this goal. The first phase of these negotiations involved a small number of key states who defined the problems to be addressed.⁹⁸ A list of nine topics relating to Part XI of the Convention was drafted: costs to States Parties, the Enterprise, decision-making, the review conference, transfer of technology, production limitation, the compensation fund, financial terms of

⁹⁷ General Assembly Resolution 44/26, 1989, at para. 3. The preamble refers to the expressions of willingness to explore all possibilities of addressing issues in order to secure universal participation in the Convention, made at the meeting of the Preparatory Commission in August/September 1989.

⁹⁸ United Nations Secretary General, *Consultations of the Secretary-General on outstanding issues relating to the deep seabed mining provisions of the United Nations Convention on the Law of the Sea - Report of the Secretary General*, (1994) UN Document A/48/950, at para. 4.

contracts, and the environment.⁹⁹ All states were able to participate in the second phase of the consultation which discussed solutions to the perceived problems. Between seventy-five and ninety countries actually attended this phase of consultations.

As at UNCLOS III, an informal group of states emerged which sought to reach a consensus solution. This group produced what was known as the “Boat Paper” which included a draft General Assembly resolution and a draft Agreement on the Implementation of Part XI. The Boat Paper became the main focus of negotiations and as one commentator describes, “*regular revisions of the draft resolution and the draft agreement were prepared by a small group of participants in the light of discussions in the consultations and in the Boat Group.*”¹⁰⁰ Although the consultations were less institutionalised than UNCLOS III, many parallels in the negotiating process can be drawn, notably, the use of small, informal discussion groups and the focus on a single, informal negotiating text. The whole process was overseen by the General Assembly which encouraged states to engage in a productive dialogue.¹⁰¹

A number of possible outcomes for the negotiations were discussed, including a protocol of amendment, an interpretative agreement, and a transitional agreement to apply until a definitive regime could be negotiated.¹⁰² It was accepted by all states that the outcome had to be in the form of a legally binding instrument.¹⁰³ Ultimately, it was decided to submit the resulting instrument to the General Assembly for adoption. The Part XI Agreement was duly adopted by the General Assembly on 28 July 1994, by 121 votes for, 0 votes against, with 7 abstentions.¹⁰⁴

The Agreement has undoubtedly had a considerable impact on the original provisions of Part XI of the LOS Convention. Article 2 of the 1994 Agreement addresses the general relationship between the two instruments by saying that “*the*

⁹⁹ The environment was subsequently dropped from the agenda. It was noted by one commentator that the environment was “qualitatively different from the eight other issues under consideration”, Nandan, “The Efforts Undertaken by the United Nations to Ensure Universality of the Convention”, in *Law of the Sea: New Worlds, New Discoveries*, ed. Miles and Treves (Law of the Sea Institute, 1992) at p. 378.

¹⁰⁰ Anderson, “Further efforts to ensure universal participation in the United Nations Convention on the Law of the Sea”, (1994) 43 *International and Comparative Law Quarterly* at p. 889.

¹⁰¹ E.g. General Assembly Resolution 46/78, 1991, at paras. 4 and 5.

¹⁰² United Nations Secretary General, *Consultations of the Secretary-General*, at para. 1.

¹⁰³ *Ibid.*, at para. 12.

¹⁰⁴ General Assembly Resolution 48/263, 1994.

provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument.” Whilst many of the basic principles underlying the deep seabed mining regime remain the same, the detailed provisions are the subject of far-reaching reform. The language of the Agreement is straightforward and uncompromising. Several provisions of the Convention are simply “*disapplied*”.¹⁰⁵ They are replaced by provisions which seek to improve the rights of investors and to ensure that production is undertaken in line with “*sound commercial principles.*”¹⁰⁶ Article 2(1) makes this process of revision even more explicit by providing that “*in the event of any inconsistency between this Agreement and Part XI, the provisions of the Agreement shall prevail.*”

Whether or not the Part XI Agreement amounts *de facto* to an amendment of the Convention is controversial. Scovazzi is of the view that the “*politically prudent label of an “implementing agreement” is a euphemism for the word “amendment” which would have been more correct from the legal point of view.*”¹⁰⁷ On the other hand, Anderson, who was present throughout the informal consultations, notes that “*the word “amend” was best avoided*” and he points out that the participants in the informal consultations rejected the idea of a protocol of amendment which had been previously suggested in an Information Note produced by the UN Secretariat.¹⁰⁸

The political context may go some way to explaining the importance attached to the title and formal status of the Agreement. Serious political capital was attached to the issue of deep seabed mining by the opposing factions at UNCLOS III. To acknowledge an amendment to the original settlement would have been a concession of defeat for those states which had advocated a strong international regime for the deep seabed. The use of an implementing agreement, as opposed to a protocol of amendment, it is submitted, seeks to conceal the true impact of the 1994 Agreement - a radical reform of the law of the sea regime.

¹⁰⁵ Part XI Agreement, section 2, at para. 3 and para.11(b); section 3, at para. 8; section 4; section 5, at para. 2; section 6, at para. 7; section 8, at para. 2.

¹⁰⁶ See Part XI Agreement, section 2, at para. 2 and section 6, at para. 1(a).

¹⁰⁷ T. Scovazzi, “Evolution of International Law of the Sea”, (2000) 286 *Receuil des Cours* at p. 125. See also in support of this view, D. Nelson, “The New Deep Sea-Bed Mining Regime”, (1995) 10 *International Journal of Marine and Coastal Law*, at p. 192; Boyle, “Further Development of the 1982 Law of the Sea Convention”, at footnote 14. Churchill and Lowe avoid saying that it amends the Convention but accept that it makes substantial changes; *The Law of the Sea* (Manchester University Press, 1999) at p. 238.

¹⁰⁸ Anderson, Written Intervention to the Third Verzijl Symposium, December 2004, at p. 3. The options presented by the UN Secretariat are produced in United Nations Secretary General, *Consultations of the Secretary-General*, at para. 11.

The Agreement, as a treaty, is only formally binding on those states which have accepted it. Article 4(2) provides that only those states or entities that are a party to the LOS Convention may become bound by the 1994 Part XI Agreement. At the same time, it would appear that states becoming a party to the LOS Convention after the conclusion of the 1994 Agreement must accept both instruments. Article 4(1) of the Agreement provides that “*after the adoption of this Agreement, any instrument of ratification or formal confirmation of or accession to the Convention shall also represent consent to be bound by this Agreement.*” It follows that states accepting the LOS Convention after the conclusion of the Part XI Agreement do not need to submit any additional instrument agreeing to accept the application of the Agreement.¹⁰⁹ This is not surprising given that they are to be treated as a “single instrument”. There are obvious parallels between this provision and Article 40(5) of the 1969 Vienna Convention on the Law of Treaties which provides that states becoming party to a treaty after entry into force will be bound by any amendments which have been made to that treaty. There is one important difference. Whilst the Vienna Convention simply creates a presumption that a state accepts an amending agreement when it consents to be bound by a treaty, allowing a state to indicate its intent *not* to be bound, the Part XI Agreement does not give states this choice. States becoming party to the LOS Convention after 28 July 1994 will automatically be bound by the terms of the Part XI Agreement and there is no opportunity to opt out.

States which are already party to the LOS Convention must indicate their consent to be bound by the Agreement separately. The Part XI Agreement provides several alternative ways in which they can do this: signature, signature subject to ratification, and accession.¹¹⁰ In addition, Article 5 of the Agreement creates a so-called “simplified procedure” which aims to facilitate the acceptance of the Agreement by as many states as possible.¹¹¹ This article provides that all States Parties to the LOS Convention which have signed the Part XI Agreement are presumed to have consented to be bound, unless they notify the UN Secretary General to the contrary within 12 months of the adoption of the Agreement. Thus, Article 5

¹⁰⁹ According to UN data, forty states became bound by the Part XI Agreement simply by “participation” in the LOS Convention. See www.un.org/dept/los.

¹¹⁰ Part XI Agreement, Article 4(3)(a) (b) and (c).

¹¹¹ Cross-referenced in Part XI Agreement, Article 4(3)(c).

creates a presumption in favour of consent¹¹² for those states which have signed the Agreement. The simplified procedure still allows States Parties which signed the Agreement a degree of choice and they can opt out if they wish.

States that have not accepted the Part XI Agreement by any of the mechanisms in Articles 4 and 5 will not *prima facie* be bound. It follows that, as a matter of treaty law, there are a number of States Parties to the LOS Convention for which the 1994 Agreement is not yet law.¹¹³ Indeed, the Secretary General of the International Seabed Authority stated in his 2000 report that, “*it continues to be a matter of concern that, as of 5 June 2000, 35 members of the Authority which became States Parties to the Convention prior to the adoption of the Agreement had not yet completed the necessary procedural steps to become parties to the Agreement.*”¹¹⁴

Are there other ways in which these states could be bound by the obligations contained in the Part XI Agreement? Has the Part XI Agreement created customary international law where the LOS Convention failed? It is true that the Agreement was adopted by an overwhelming majority of the General Assembly, with no dissenting votes, and that the Agreement has been repeatedly approved by the General Assembly through its resolutions on the law of the sea. It would appear to have overcome the objections of the industrialised states at UNCLOS III. There is, however, one further consideration that may prevent the Part XI Agreement having a law-making character. This limitation stems from the fact that the Agreement is largely concerned with the creation and operation of an international institution. Acceptance of a treaty is the only way to create institutional obligations.¹¹⁵

¹¹²According to data of the UN Division of Ocean Affairs and Law of the Sea, fifteen states became bound by the Agreement in this way. These states were Barbados, Cote d'Ivoire, Serbia and Montenegro, Grenada, Guinea, Iceland, Jamaica, Namibia, Nigeria, Sri Lanka, Togo, Trinidad and Tobago, Uganda, Zambia, and Zimbabwe; see www.un.org/dept/los. Four states opted out of the simplified procedure; Brazil, Cape Verde, Sudan and Uruguay.

¹¹³As of 31 January 2005 the Part XI Agreement was binding on 117 States in total whilst there were 145 States Parties to the Law of the Sea Convention. For example, Bosnia and Herzegovina succeeded to the Convention on 12 January 1994, before the adoption of the Agreement, but is has not signed, ratified or acceded to the Agreement. The same is true for Comoros, Djibouti, Dominica, Gambia, Ghana, Guinea-Bissau, Guyana, Iraq, Mali, Marshall Islands, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Sao Tome and Principe, Somalia, Vietnam, and Yemen.

¹¹⁴Document ISBA/6/A/9, *Report of the Secretary-General of the International Seabed Authority under article 166, paragraph 4, of the United Nations Convention on the Law of the Sea*, dated 6 June 2000, at para. 4. See also 2001 Law of the Sea Report of the UN Secretary General, at para. 4; 2002 Law of the Sea Report of the UN Secretary General, at para. 4.

¹¹⁵See chapter three, at p. 70.

Nevertheless, those states which are party to the Convention but not the Part XI Agreement may be deemed to have consented to the Part XI Agreement through their participation in the International Seabed Authority. There is widespread support for the theory that the practice of states can modify or amend treaties.¹¹⁶ The ILC draft articles on the law of treaties originally provided for this possibility.¹¹⁷ Although it was removed from the final text of the Convention on the Law of Treaties by the Vienna Conference¹¹⁸, Akehurst suggests that “*it is difficult to interpret the deletion of Article 38 as a clear rejection of the view that existing law allowed a treaty to be amended by subsequent practice, especially since the Vienna Convention did not exclude the possibility of termination of treaties by desuetude and expressly allowed a treaty to be interpreted in light of subsequent practice.*”¹¹⁹ Indeed, the process of modification through institutional practice would appear to be confirmed by the ICJ in its 1971 *Namibia Advisory Opinion*. In that case, South Africa had objected to the ICJ dealing with the merits of the question posed by the Security Council because, it argued, the resolution containing the question had not been adopted by an affirmative vote of nine members of the Council, including the concurring votes of the permanent members, as required by the UN Charter. Whilst this was true, the Court held that “*the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Security Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions.*”¹²⁰ The Court based its decision on the consistent and uniform practice of the states involved.

¹¹⁶ See Akehurst, "The Hierarchy of the Sources of International Law", (1974-5) *British Yearbook of International Law* at p. 275.

¹¹⁷ International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly", at p. 236.

¹¹⁸ By a vote of 53 in favour, 15 against and 26 abstentions.

¹¹⁹ Akehurst, "The Hierarchy of the Sources of International Law", at p. 277.

¹²⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, (1971) ICJ Reports 16 at p. 10, para. 22. As Aust points out, it would seem from the *travaux préparatoires* that this situation was not originally intended by the permanent members; *Modern Treaty Law and Practice* at p. 195. It is for this reason that the decision of the Court is best seen as an example of amendment by subsequent practice, as opposed to an interpretation.

There are several similarities between the *Namibia Advisory Opinion* and the situation of the International Seabed Authority.¹²¹ Both circumstances concern the internal practices of an institution where a procedure has been followed for a number of years and there have been no objections by any of the participating states. The practice of the Authority since 1994 is based on the structures outlined in the Part XI Agreement. All Members of the Authority, whether or not they have formally accepted the Agreement, are participating in meetings of the organisation according to the amended procedures set out in that instrument.¹²² On this basis, it is arguable that the institutional provisions of the Part XI Agreement are binding on all Members of the Authority, regardless of whether they have formally consented to be bound by the Part XI Agreement.

This argument does not apply to those states which are not Members of the Authority because they have consented to neither the LOS Convention nor the Part XI Agreement and they cannot be bound by either instrument with regard to the operation of the Authority. Nevertheless, that is not to say that they are totally free and unfettered in their activities in the Area. There is strong support for the argument that the general principles relating to the International Seabed Area contained in the 1970 Declaration and confirmed in Part XI of the LOS Convention are part of customary international law or are general principles of international law.¹²³ These principles include the concept of the common heritage of mankind and the prohibition on claiming sovereignty or sovereign rights in the Area.¹²⁴ The Part XI Agreement does not disturb these general principles. According to this argument, those states which have not consented to be bound are nevertheless prohibited from exploiting the resources of the Area out-with the Part XI regime.¹²⁵

6. The 1995 Fish Stocks Agreement

Jurisdiction over fisheries was another issue that caused deep divisions at UNCLOS III. Although the concept of the EEZ solved the question over the extent of

¹²¹ Hereinafter, "the Authority".

¹²² For instance, Guyana has had a seat on the Council, as constituted under the Part XI Agreement, despite the fact that it has not accepted the Agreement in any of the ways prescribed in Article 4.

¹²³ See chapter three, at p. 69.

¹²⁴ See LOS Convention, Article 137.

¹²⁵ See Tomuschat, "Obligations arising for states without or against their will", (1993) 241 *Receuil des Cours* at pp. 260-261.

a coastal state's fisheries rights, further difficulties arose over what to do about fish stocks which crossed the jurisdictional zones created by the Convention. Ultimately, states did manage to reach a compromise on the status of so-called highly migratory and straddling fish stocks, albeit at the cost of ambiguity. The solution arrived at in Articles 63 and 64 of the Convention stresses the need for co-operation without setting down any more detailed procedural or substantive obligations.¹²⁶ Kwiatkowska concludes that the fisheries issue was part of the "*unfinished business of UNCLOS III.*"¹²⁷

The close of UNCLOS III did not signal the end of attempts at law-making in the field of fisheries. During the 1980s, evidence of declining fish stocks increased and it was clear that a simple duty to co-operate was not adequate in order to prevent over-fishing. The concern of the international community is reflected, *inter alia*, in General Assembly Resolution 44/26, adopted on 20 November 1989, which called on states and other members of the international community to "*strengthen their cooperation in the conservation of marine living resources, including the prevention of fishing methods and practices that can have an adverse impact on the conservation and management of marine living resources.*"¹²⁸

The issue was given more substantial consideration at the UN Conference on Environment and Development¹²⁹ convened by General Assembly Resolution 44/228 of 22 December 1989.¹³⁰ The LOS Convention was accepted as the basic framework for the discussions at UNCED, whilst it was recognised that this framework was in need of further clarification and development.¹³¹ Thus, Programme C of Agenda 21

¹²⁶ Paul Fauteux, "The Canadian Legal Initiative on High Seas Fishing", (1993) 4 *Yearbook of International Environmental Law* at p. 53. Nelson nevertheless suggests that Article 63(2) is "not necessarily an empty shell" given that the parties are under a duty to conduct negotiations in good faith, paying reasonable regard to the fishing rights and interests of each other; "The Development of the Legal Regime of High Seas Fisheries", in *International Law and Sustainable Development*, ed. A. Boyle and D. Freestone (Oxford University Press, 1999) at p. 121.

¹²⁷ B. Kwiatkowska, "The High Seas Fisheries Regime: at a point of no return?" (1993) 8 *International Journal of Marine and Coastal Law* at p. 327

¹²⁸ E.g. General Assembly Resolution 44/26, 1989, at para. 19. This call was reiterated in subsequent resolutions in 1990, 1991, and 1992.

¹²⁹ Hereinafter referred to as "UNCED".

¹³⁰ General Assembly Resolution 44/228, 1989, at para. 12(c). See also concerns advanced by the World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987) at p. 268.

¹³¹ During the negotiations, the US advocated the concept of Large Marine Ecosystems as the organising principle of Chapter 17 but it was rejected in favour of strengthening the EEZ concept; see Biliiana Cicin-Sain and Robert W. Knecht, "Implications of the Earth Summit for Ocean and Coastal Governance", (1992) 24 *Ocean Development and International Law* at p. 339.

confirms the application of the LOS Convention – “*the provisions of the UN LOS Convention on the marine living resources of the high seas sets forth rights and obligations of States with respect to conservation and utilisation of these resources*” - at the same time as noting that management of fish stocks is “*inadequate.*”¹³² No conclusive agreement could be reached at UNCED; states simply agreed to convene a further conference with a view to promoting the effective implementation of the provisions of the LOS Convention on straddling and highly migratory fish stocks.¹³³

It was on this basis that the Fish Stocks Conference was convened by General Assembly Resolution 47/192 of 22 December 1992. This resolution once again stressed that “*the work and results of the conference should be fully consistent with the provisions of the United Nations Convention on the Law of the Sea, in particular the rights and obligations of coastal States and States fishing on the high seas, and that States should give full effect to the high seas fisheries provisions of the Convention with regard to fisheries populations whose ranges lie both within and beyond exclusive economic zones (straddling fish stocks) and highly migratory fish stocks.*”¹³⁴

The Fish Stocks Conference was open to all states.¹³⁵ Somewhat predictably, the conference divided into factions familiar to UNCLOS III. Doulman describes how the debate was dominated by fifty to sixty states, with the principal disagreement arising between distant water fishing states and coastal states.¹³⁶ As one author comments, “*working methods were modelled on those of [UNCLOS III].*”¹³⁷ The Chairman of the Fish Stocks Conference adopted a prominent role in the negotiating process, preparing compromise texts and facilitating informal negotiations between the principal protagonists.

Ultimately, the Fish Stocks Agreement was adopted by consensus at the final session of the Conference in August 1995. The conclusion of the Agreement was welcomed by General Assembly Resolution 50/24 which called on all states and other

¹³² Agenda 21, at paras 17.44 and 17.45

¹³³ Agenda 21, at para. 17.49(e).

¹³⁴ General Assembly Resolution 47/192, 1992, at para. 3.

¹³⁵ General Assembly Resolution 47/192, 1992, at para. 4.

¹³⁶ Doulman, "Structure and Process of the 1993-1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks", (1995) *FAO Fisheries Circular No. 898 FID/C898* in part 6.

¹³⁷ Anderson, "The Straddling Stocks Agreement of 1995 - an Initial Assessment", (1996) 45 *International and Comparative Law Quarterly* at p. 467.

entities eligible to do so to ratify or accede to the Agreement and to consider applying it provisionally.¹³⁸

There are several fundamental differences between the Fish Stocks Agreement and the Part XI Agreement. Unlike the previous implementing agreement, the Fish Stocks Agreement does not “disapply” any provisions of the Convention. In many ways, this was not necessary, as most of the fisheries provisions in the Convention are themselves highly ambiguous. The Fish Stocks Agreement complements the fisheries provisions in the Convention by providing further detail on the way in which they should be implemented. Considering the relationship of the Fish Stocks Agreement with the Convention, Freestone argues that “*although not always explicit, many of the underlying values developed in the 1995 regime can be found to be rooted in the LOS Convention.*”¹³⁹

The Agreement promotes the conservation of fish stocks by drawing on the principles of sustainable development expressed in the instruments adopted at UNCED, such as the Rio Declaration on Environment and Development, Agenda 21¹⁴⁰, and the Convention on Biodiversity.¹⁴¹ A few examples will demonstrate this approach. The Fish Stocks Agreement confirms the obligation in the LOS Convention to take conservation and management measures based on the best scientific evidence available.¹⁴² It adds that states, including coastal states acting in areas under their jurisdiction, should apply the precautionary approach which is described in detail in Article 6 and Annex II of the Agreement.¹⁴³ The precautionary approach was developed from Principle 15 of the 1992 Declaration on Environment and Development. The Agreement also promotes the ecosystem approach, obliging

¹³⁸ General Assembly Resolution 50/24, 1995, at para. 4.

¹³⁹ Freestone, "International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle", in *International Law and Sustainable Development*, ed. A. Boyle and D. Freestone (Oxford University Press, 1999) at p. 146. In particular, he points to the fact that the objectives of the fisheries provisions must be balanced with the obligations to protect and preserve the marine environment; at pp. 146-149.

¹⁴⁰ The preambular language of the Agreement affirms its origins not only in the LOS Convention, but also in Chapter 17 of Agenda 21. See *Ibid.*, at p. 155.

¹⁴¹ In regard to the latter, the objective of the Agreement to promote the “long-term conservation and sustainable use” of straddling and highly migratory fish stocks is clearly influenced by the Convention on Biological Diversity which has the objective of “the conservation of biological diversity [and] the sustainable use of its components.” See Convention on Biological Diversity, Article 1.

¹⁴² Fish Stocks Agreement, Article 5(b); LOS Convention, Article 119(1)(a).

¹⁴³ Article 6(2) says that “States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate information shall not be used as a reason for postponing or failing to take conservation measures.”

states to consider the impact of other factors, human and natural, on the status of target fish stocks and other species and to generally protect the biodiversity of the marine ecosystem.¹⁴⁴

Whilst all of these principles and concepts post-date the LOS Convention, they are compatible with it. The synergy between the Agreement and the Convention is reflected in Article 4 of the Agreement which says that “*nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention*”. This provision confirms that the Agreement is not intended to override or replace any of the provisions in the Convention, but to further develop the original obligations contained therein.

The Fish Stocks Agreement also differs from the Part XI Agreement because it is open to participation by all states or other entities regardless of whether they are a party to the LOS Convention.¹⁴⁵ It is in this sense a free-standing treaty. States and other entities can become a party to the Agreement either through ratification¹⁴⁶ or accession.¹⁴⁷

Actual participation in the Agreement is, however, low at sixty-six parties.¹⁴⁸ Moreover, a number of major fishing states stand out as non-parties.¹⁴⁹ Given low participation in the Agreement, it is appropriate to ask whether the Fish Stocks Agreement has succeeded in influencing the general framework of international fisheries law in a similar manner to the LOS Convention?

One argument is that the Agreement can be invoked as an interpretation of those provisions already found in the LOS Convention. Anderson suggests that “*in*

¹⁴⁴ Fish Stocks Agreement, Article 5(d), (e)(f) and (g). Birnie and Boyle say that the duty to monitor the impact of fishing on the ecosystem as a whole “is very much in keeping with Article 194(5) of the 1982 [LOS Convention] and with the general obligation to protect the marine environment codified in Part XII, but it is the very first time it has been spelt out explicitly in a major fisheries agreement”; Birnie and Boyle, *International Law and the Environment* (Oxford University Press, 2002) at p. 675.

¹⁴⁵ 1995 Fish Stocks Agreement, Articles 37 and 39. Thus it was possible for Denmark, Iran and the United States of America to agree to be bound by the Agreement without, at the time, being a State Party to the LOS Convention. Since its ratification of the Fish Stocks Agreement on the 19 December 2003, Denmark subsequently ratified the LOS Convention (and by operation of Article 4 of the Part XI Agreement, that Agreement as well) on the 16 November 2004.

¹⁴⁶ Fish Stocks Agreement, Article 38.

¹⁴⁷ Fish Stocks Agreement, Article 39.

¹⁴⁸ See http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm <checked 15 May 2007>.

¹⁴⁹ See similar comments by Boyle, “Further Development of the 1982 Law of the Sea Convention”, at pp. 570-571.

*construing the relevant provisions of the Convention, for example, it would probably now be considered appropriate in many if not all instances to take into account the terms of the Agreement, as a “subsequent agreement ... regarding the interpretation of [a] treaty or the application of its provisions”, within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties, if only because the interpretation and application of a treaty are inextricably bound up with its implementation.”*¹⁵⁰ Indeed many provisions in the Fish Stocks Agreement simply lay down general principles which could arguably be taken into account for interpretative purposes under Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties.

Interpretation may not explain all the ways in which the Agreement influences third states. Interpretation cannot be used to read new and novel obligations into the Convention which does little more than promote co-operation. Edeson comments that *“the [Fish Stocks Agreement] presents a paradox, for while it is very carefully worded to appear to do no more than implement the [LOS Convention], it does, nonetheless, introduce significant changes in the international legal regime governing the stocks to which the Agreement applies.”*¹⁵¹

Interpretation aside, some of the provisions of the Agreement could influence the development of the customary international law of the sea. The fact that it was negotiated by the international community using a consensus procedure is significant for its impact on custom. Moreover, much of the Agreement is directed at states in general rather than specifically at the states parties. One commentator has said, *“like*

¹⁵⁰ Anderson, "The Straddling Stocks Agreement of 1995 - an Initial Assessment", at p. 468. Freestone and Elferink concur: "the Agreement and the LOS Convention are fundamentally inter-related in the sense that one can be used to inform the interpretation of the other"; "Strengthening the United Nations Convention on the Law of the Sea's regime through the adoption of implementing agreements, the practice of international organisations and other means", at p. 20. See also Birnie and Boyle, *International Law and the Environment* at p. 673.

¹⁵¹ W. Edeson, "Towards Long-Term Sustainable Use: Some Recent Developments in the Legal Regime of Fisheries", in *International Law and Sustainable Development*, ed. A. Boyle and D. Freestone (Oxford University Press, 1999) at p. 173. See also Hayashi, "The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention", (1995) *Ocean and Coastal Management* at p. 53. He says "the most significant of them are those relating to the precautionary approach, compatibility of management measures, regional organisations and the freedom of high seas fisheries, duties of the flag state, regional cooperation in enforcement, port state jurisdiction, provisional measures and practical arrangements."; at p. 56. See also Birnie and Boyle, *International Law and the Environment* at p. 673; E. Franckx, "Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention of the Law of the Sea", (2000) 8 *Tulane Journal of International and Comparative Law* at p. 61.

much of the language in the LOS Convention, the goal is universal application through direct state usage thus requiring a dissenting state to explain its objections."¹⁵² It is only Article 21 of the Agreement dealing with enforcement and the dispute settlement provisions which are drafted specifically in terms of "States Parties". Indeed, it is no coincidence that it is the enforcements provision that has caused the most controversy.¹⁵³

Support for the Agreement as reflecting general rules and principles of international law can be found in several General Assembly resolutions on fisheries. The General Assembly has called on "all states" to comply with certain provisions of the Agreement, not differentiating between parties and non-parties. For instance, General Assembly Resolution 57/143 calls on "*all states to ensure that their vessels comply with the convention and management standards that have been adopted by sub-regional and regional fisheries management organisations and arrangements in accordance with relevant provisions of the Convention and of the Agreement*"¹⁵⁴, echoing Article 18(1) of the Agreement. Similarly, General Assembly Resolution 59/25 urges "*all states to apply the precautionary approach and the ecosystem approach widely to the conservation, management and exploitation of fish stocks.*"¹⁵⁵ These resolutions can be invoked as evidence of state practice and *opinio juris communis* supporting the creation of new norms of customary international law.

This conclusion is confirmed by additional state practice which shows that some states have started to implement the provisions of the new fisheries regime, whether or not they are actually bound by the Agreement. Jackson notes that the Fish Stocks Agreement formed an essential backdrop to the negotiation of the 2001 Windhoek Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, even though the Agreement had not entered into force

¹⁵² Orebeck, Sigurjonsson, and McDorman, "The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement", (1998) 13 *International Journal of Marine and Coastal Law* at p. 123. They continue "such language is designed to create obligation to non-parties to the 1995 Agreement but mere semantics cannot overcome the principle that treaties are only binding upon ratifying states", at p. 124. Indeed, Jackson notes that one of the strengths of the Agreement is its "ready-made language which could be applied in almost any regional fisheries convention"; "The 2001 Convention on the Conservation and Management of Fishery Resources in the South East Atlantic: an Introduction", (2002) 17 *International Journal of Marine and Coastal Law* at p. 47.

¹⁵³ 2003 Fisheries Report of the UN Secretary General, UN Document A/58/215, at para. 57.

¹⁵⁴ General Assembly Resolution 57/143, 2002, at para. 8; General Assembly Resolution 59/25, at para. 9.

¹⁵⁵ General Assembly Resolution 59/25, 2004, at para. 4.

at that time.¹⁵⁶ In a similar way, the 2000 Honolulu Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean¹⁵⁷, and the 2003 Antigua Convention for the Strengthening of the Inter-American Tropical Tuna Commission¹⁵⁸ all recall the relevant provisions of the LOS Convention and the Fish Stocks Agreement. Rather than re-negotiate their constituent instruments, other regional fisheries management organizations have adopted a step-by-step approach to integrating the provisions of the Agreement into their practice.¹⁵⁹ The UN Secretary General concludes in his 2003 Report on Sustainable Fisheries that “*practice since the adoption of the Agreement demonstrates that even before entry into force, provisions of the Agreement have been widely used as a benchmark for measuring State practice.*”¹⁶⁰

That is not to say that all of the Agreement is now reflected in customary rules. Other paragraphs of the General Assembly resolutions are directed solely at states parties to the Agreement. Thus, paragraph 10 of General Assembly Resolution 57/143 urges “*States parties to the Agreement, in accordance with [Article 21(4)] to inform either directly or through the relevant regional or sub-regional fisheries management organisation or arrangement, all States whose vessels fish on the high seas in the same region or sub-region of the form of identification issued by those States parties to officials duly authorised to carry out boarding and inspection functions in accordance with article 21 and 22 of the Agreement.*” It would appear that this resolution recognises that the enforcement provisions remain a matter of purely treaty law.

¹⁵⁶ See Jackson, "The 2001 Convention on the Conservation and Management of Fishery Resources in the South East Atlantic: an Introduction", at p. 34. See also Hedley, "Entry into Force of the United Nations Fish Stocks Agreement: An Initial Assessment", (2001) 24 *International Fisheries Bulletin*, available at <http://www.intfish.net/ops/papers/2.htm> <checked 15 May 2007>. The Convention entered into force in April 2003 with three contracting parties: Namibia, Norway and the European Community.

¹⁵⁷ The Convention entered into force on 19 June 2004; see General Assembly Resolution 59/25, 2004, at para. 7.

¹⁵⁸ The Convention is not yet in force. The Convention has 13 signatories but only five ratifications or accessions; <http://www.iattc.org/IATTCdocumentationENG.htm> <checked 15 May 2006>.

¹⁵⁹ 2003 Fisheries Report of the UN Secretary General, UN Document A/58/215, at para. 46.

¹⁶⁰ 2003 Fisheries Report of the UN Secretary General, UN Document A/58/215, at para. 7.

7. Review of the Fish Stocks Agreement

As the Fish Stocks Agreement is a separate treaty, it has its own mechanisms for change.¹⁶¹ The principal means for amending the Fish Stocks Agreement is through an amendment conference. According to the Agreement, the UN Secretary General will convene such a conference if it is supported by at least one half of the parties to the Agreement.¹⁶² The Agreement specifies that the conference shall be operated according to consensus decision-making procedures, unless otherwise decided.¹⁶³ However, as with the LOS Convention, amendments adopted by the conference will only become binding on states once they have been individually accepted.¹⁶⁴

A different procedure applies to certain changes made to the annexes of the Agreement. The annexes form an integral part of the Agreement¹⁶⁵, but they tend to contain scientific and technical information.¹⁶⁶ The Agreement provides that “revisions” to the annexes that are adopted by consensus at a meeting of the States Parties are to “*take effect from the date of its adoption*” without any further action on the part of the States Parties¹⁶⁷. It does not specify what the difference between a revision and an amendment is except that “*revisions shall be based on scientific and technical considerations.*”¹⁶⁸ This condition implies that revisions should only be made to keep the annexes up-to-date with scientific and technical knowledge and not to make changes of a more political character. The distinction will be difficult to maintain in practice.

The Agreement also makes a distinction between amendment and review. Article 36 provides for a review conference four years after the entry into force of the Agreement.¹⁶⁹ The mandate of the conference is to review and assess the adequacy of the Agreement in achieving its objectives and proposing means of strengthening the

¹⁶¹ The Part XI Agreement, on the other hand, is subject to the amendment procedures applicable to Part XI in the LOS Convention; see chapter five, at pp. 166-167.

¹⁶² Fish Stocks Agreement, Article 45(1).

¹⁶³ Fish Stocks Agreement, Article 45(2).

¹⁶⁴ Fish Stocks Agreement, Article 45(5).

¹⁶⁵ Fish Stocks Agreement, Article 48(1).

¹⁶⁶ Current annexes contain information on guidelines for the collection and sharing of data, and guidelines for the application of precautionary reference points.

¹⁶⁷ Fish Stocks Agreement, Article 48(2).

¹⁶⁸ Fish Stocks Agreement, Article 48(2).

¹⁶⁹ Fish Stocks Agreement, Article 36(1).

substance and methods of implementation.¹⁷⁰ What is interesting about the provision for a review conference is that participation is open, not only to States Parties to the Agreement, but also to “*all states and entities which are entitled to become parties to the Agreement as well as those intergovernmental and non-governmental organizations entitled to participate as observers.*”¹⁷¹ The precise rights of participation of non-parties are not specified in the text and these details will have to be resolved through the preparatory process which will clarify the mandate of the review conference and its rules of procedure.¹⁷² Nevertheless, the Agreement procedure appears to recognise that it is not appropriate for the States Parties to the Agreement to make substantial changes to the regime without the participation of the wider international community.¹⁷³

Alongside the formal amendment and review processes, the Parties to the Agreement meet regularly to consider its implementation. The Fish Stocks Agreement itself does not contain a provision for a regular Meeting of the Parties. However, an informal procedure for overseeing the implementation of the Agreement was created by the General Assembly in 2001.¹⁷⁴ The purpose of these informal meetings is to consider implementation of the Agreement through national and regional initiatives, to make appropriate recommendations to the General Assembly on the scope and content of the Secretary General’s annual report on fisheries, and to prepare for the review conference.¹⁷⁵ The outcome of such meetings is usually a series of suggestions or recommendations for the consideration of the General Assembly.¹⁷⁶ Participation in this forum, it should not be surprising to learn, includes not only parties but also non-parties to the Agreement.¹⁷⁷

In pursuit of its oversight of the law of the sea and oceans policy, the General Assembly considers fisheries issues separately from other maritime issues. The UN Secretary General reports to the General Assembly biennially on developments

¹⁷⁰ Fish Stocks Agreement, Article 36(2).

¹⁷¹ Fish Stocks Agreement, Article 36(1).

¹⁷² The rules of procedure were not formally adopted and the Review Conference operated according to consensus procedures.

¹⁷³ See Report of the Second Informal Meeting of Parties to the Fish Stocks Agreement, UN Document ICSP2/UNFSA/REP/INF.1 at para. 56 and para. 76.

¹⁷⁴ General Assembly Resolution 56/13, 2001, at para. 6.

¹⁷⁵ General Assembly Resolution 56/13, 2001, at para. 6.

¹⁷⁶ Report of the First Informal Meeting of Parties to the Fish Stocks Agreement, UN Document ICSP/UNFSA/REP/INF.1 at para. 9.

¹⁷⁷ General Assembly Resolution 57/143, 2002, at para. 18. See also the Reports of Informal Meetings of Parties to the Fish Stocks Agreement: First report, at para. 13; Second report, at paras. 26 to 29.

relating to the conservation and management of straddling and highly migratory fish stocks.¹⁷⁸ In addition, the UN General Assembly adopts separate resolutions on sustainable fisheries, which as discussed above, may influence the development of the law.

All of these mechanisms, formal and informal, interact. In process of preparing for the first review conference in 2006, the informal consultations of States Parties to the Agreement played a central role. The General Assembly requested the Secretary General to commence preparations for a review conference in 2004.¹⁷⁹ The first consultations on what would be discussed at the review conference were held during the third round of informal consultations of parties to the Agreement, with the fourth and fifth meetings focussing exclusively on preparation for the review conference.¹⁸⁰ Whilst the informal meetings discuss the substance of the review conference, the General Assembly has exercised a close oversight of the process. It has requested all interested actors to submit information and views to the review conference, stressing that states and entities which are not parties to the Agreement can nevertheless “*participate fully*” in the preparatory process “*on an equal footing with [the] states parties, except without voting rights*” whilst affirming at the same time that “*every effort will be made to adopt recommendations on the basis of consensus.*”¹⁸¹ In this way, the participation of all interested states is ensured in continuing efforts to achieve an ongoing consensus on fisheries law and policy.¹⁸²

8. Implementing Agreements as Modifying Agreements

A multitude of treaties could be said to implement the LOS Convention. However, the concept of implementing agreement is only usually applied to the two instruments discussed above.¹⁸³ It is true that the title of a treaty itself carries no legal

¹⁷⁸ General Assembly Resolution 50/24, 2004, at para. 5.

¹⁷⁹ General Assembly Resolution 59/25 2004, at para. 16.

¹⁸⁰ General Assembly Resolution 60/31, 2005, at para. 23.

¹⁸¹ General Assembly Resolution 60/31, 2005, at para. 25.

¹⁸² The first review conference took place at the UN headquarters in May 2006. The Conference adopted a set of outcomes, promoting measures to strengthen the Fish Stocks Agreement. It was decided to resume the Review Conference at a date to be agreed, not later than 2011. It also agreed to continue to informal consultations of the States Parties. See Report of the Review Conference, UN Document A/CONF/210/2006/15, Annex.

¹⁸³ Some authors do suggest other candidates. For instance, Treves suggests that the Convention on the Protection of the Underwater Cultural Heritage is similar in characteristics, even though it does not

value *per se*.¹⁸⁴ Nevertheless, the two implementing agreements do share a number of important features that sets them apart from other treaties.

Perhaps the most important characteristic of the implementing agreements stems from the status afforded to them by the General Assembly as guardian of the law of the sea. In common with the LOS Convention, the General Assembly has set a target of “*universal participation*” for the two implementing agreements.¹⁸⁵ This indicates a clear aspiration to create universal law. Indeed, the two agreements are similar in content to the LOS Convention because they seek to create general rules and regimes.

The way in which the two instruments were adopted is also important. Although taking place in very different institutional settings, the two implementing agreements were both negotiated according to consensus decision-making techniques modelled on those developed at UNCLOS III. It was intended that these instruments were to balance all interests so that they would be acceptable to as many states as possible.

These characteristics also have consequences for the subsequent implementation and progressive development of the implementing agreements. The two instruments do have their own institutional mechanisms. However, as with the Convention itself, the designation of these two instruments as implementing agreements by the General Assembly also means that they are subject to regular scrutiny and debate by that organ. The General Assembly is perhaps the only international institution which can ensure a comprehensive and coherent approach to oceans policy and the law of the sea. Moreover, the General Assembly includes all states so that it can guarantee that the law of the sea develops in the interests of the international community as a whole.

It follows that other issues which impact on the general law of the sea may also be subject to development under the guidance of the General Assembly. One

present itself as an implementing agreement. He goes on “the main difference being perhaps that its substantive rules are more controversial”; “The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention”, at p. 56. The Convention does not foster the same support as the other implementing agreements. Whilst the General Assembly notes the importance of cooperation to protect and preserve objects of an archaeological and historical nature found at sea in accordance with the Convention, it merely “notes” the rules annexed to the 2001 Convention; General Assembly Resolution 61/30, 2006, at paras. 7 and 8.

¹⁸⁴ McNair, *Law of Treaties* (Oxford University Press, 1961) at p. 22.

¹⁸⁵ See General Assembly Resolution 60/30, 2005, at paras. 2 and 3.

issue that is currently under discussion in various fora is the protection of biodiversity beyond national jurisdiction. The current rules contained in the LOS Convention are lacking in detail and leave much to be desired. The issue falls within the scope of numerous treaties and institutions including the Convention on Biological Diversity, the International Seabed Authority, regional fisheries management organizations, the International Whaling Commission, as well as other technical institutions such as the IMO and the FAO.¹⁸⁶ However, sectoral approaches alone are not going to solve the problem. In addition, various questions arise over jurisdiction and general obligations to protect biodiversity in these areas.

It is perhaps no surprise that the General Assembly has seized itself of the issue. In Resolution 58/240 adopted in December 2003, the General Assembly called on international institutions to consider ways to address threats to marine ecosystems and biodiversity beyond the limits of national jurisdiction.¹⁸⁷ At the following session, it created an Ad Hoc Open-ended Informal Working Group to examine *inter alia* the legal issues involved and to consider options and approaches to promote international co-ordination and co-operation in the protection of biodiversity in areas beyond national jurisdiction.¹⁸⁸ In particular, the Working Group is called on to consider genetic resources beyond areas of national jurisdiction and whether there is a governance or regulatory gap.¹⁸⁹ Discussions of the Working Group are conducted by consensus in order to achieve a general agreement on the applicable provisions. It is unclear at this stage what will be the outcome of this initiative. Several participants have argued it is appropriate to negotiate a new implementing agreement.¹⁹⁰ From the preceding analysis, it is possible to speculate that an instrument negotiated by consensus under the auspices of the General Assembly could have a significant impact on the legal order of the oceans for all states, modifying the framework found in the LOS Convention.

¹⁸⁶ See in particular Subsidiary Body on Scientific Technical and Technological Advice, *Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work* (Convention on Biological Diversity, 2003); Changbo et al., "Summary of the First Meeting of the CBD Ad-Hoc Open-Ended Working Group on Protected Areas", (2005) 9 *Earth Negotiations Bulletin*, available at <http://www.iisd.ca/vol09/> <checked 15 May 2007>.

¹⁸⁷ General Assembly Resolution 58/240, 2003, at para. 52.

¹⁸⁸ General Assembly Resolution 59/24, 2004, at para. 73.

¹⁸⁹ General Assembly Resolution 61/30, 2006, at para. 91.

¹⁹⁰ First Report of the Working Group, UN Document A/61/65, at paras. 25, 29, 55, 58, and 61. See also paragraph 11 of the summary of trends prepared by the co-chairs annexed to the Report.

Furthermore, the creation of the Working Group reaffirms the role of the General Assembly in overseeing the development of the law of the sea. Participants at the first meeting of the Working Group were in broad agreement that “*the General Assembly was generally considered to be the appropriate forum for addressing marine biological diversity beyond areas of national jurisdiction, owing to its role as the global forum with competence to deal comprehensively with complex, multidisciplinary issues.*”¹⁹¹ It is the universal nature of its membership and its overarching mandate that places the General Assembly at the forefront of the continuing development of the universal law of the sea.

9. Conclusion

This chapter has considered a variety of mechanisms for change in the legal order of the oceans. It started with the formal amendment procedures found in the LOS Convention itself. The disadvantage of these procedures is that they confer decision-making powers on the States Parties to the Convention alone. As long as some states remain outside the formal treaty regime, it is unlikely that these treaty-based mechanisms for change will be invoked.

The majority of changes made to the law of the sea to date have been achieved through informal mechanisms. Even the States Parties have preferred the use of consensus decision-making techniques instead of their formal decision-making powers. They offer the advantage of speed and efficiency, albeit at the cost of legal certainty. More importantly, these informal procedures allow the participation of all states and they are therefore able to promote a universal consensus on the law of the sea.

The General Assembly has also continued to play a major role in developing the law of the sea despite the lack of any formal powers conferred by the Convention. Again, it is the fact that it includes all states that makes this organ an appropriate forum for law-making, as it is able to maintain the delicate balance of interests that was achieved in the LOS Convention.

¹⁹¹ First Report of the Working Group, UN Document A/61/65, at para. 7.

Elferink describes several characteristics of the LOS Convention which make it more difficult to design an institutional framework for monitoring the implementation of the Convention.¹⁹² Firstly, he notes that the LOS Convention, unlike most other treaties, is not limited to one specific issue, but deals with most uses of ocean space. He also says that many of the substantive issues covered by the Convention already fell within the mandate of pre-existing international organizations or institutional frameworks.

A major challenge is promoting the coherent development of the law of the sea in a system where law-making is de-centralised. It has been seen that the Convention itself does little to achieve this aim. The General Assembly has limited powers to promote coherence. It is therefore necessary to look to the operation of other organizations as well as general principles of law to see how to meet this challenge.

¹⁹² Elferink, "Reviewing the implementation of the LOS Convention: the role of the UN General Assembly and the meeting of the States Parties", at p. 299.

Law-Making by Technical International Organizations

1. Technical standards and the LOS Convention

For many years, states have co-operated on technical aspects of the law of the sea through *ad hoc* conferences and international organizations.¹ Since the Second World War, the number of organizations operating in this field and the types of standards which they adopt have proliferated.² Each of these institutions operates autonomously according to the powers and functions in their constituent instrument. Nevertheless the new legal framework created by the LOS Convention is highly relevant. The Convention covers all traditional and new uses of the oceans. Although international organizations of this type cannot become a party to the Convention, it is the legal framework within which their member states must function. Therefore these institutions have adapted their practices and procedures to accommodate the new legal order of the oceans.

On the whole, these technical organizations create standards and guidelines that are applied by and between their member states. The work of some organizations is, however, incorporated into the general framework for the law of the sea by the LOS Convention. As a result, the outcome of the law-making process in these technical organizations will have wider implications for all states, whether or not they are a member of the organization or formally bound by a particular rule or standard.

This chapter examines the law-making processes in two technical organizations whose standards are made binding by the LOS Convention. How are these standards adopted and amended? To what extent is the law-making role of these organizations limited by the LOS Convention?

¹ See Breuer, "Maritime Safety Regulations", in *Encyclopedia of Public International Law*, ed. Bernhardt (North-Holland, 1997).

² The option of creating a single technical organization for the law of the sea was briefly mooted by the International Law Commission in its codification of the law of the sea, but the idea was firmly rejected by the special rapporteur who considered that it was neither feasible nor necessary; 1956 Report of the International Law Commission, (1956 II) *Yearbook of the International Law Commission* at p. 2, paras. 12 and 18.

2. The International Maritime Organization

At the time UNCLOS III was convened, international co-operation in regulating shipping was already common. Many rules and regulations in the form of treaties had been negotiated at the international level to deal with shipping safety and pollution from ships. Most of these matters were dealt with by technical international organizations with considerable expertise and experience in dealing with shipping issues.

In this context, the IMO stands out from other standard-setting agencies because of its sole focus on maritime issues. The International Maritime Organization³ was created in 1948 in order to provide a permanent forum for the discussion of shipping issues and the adoption and amendment of shipping standards.⁴ Today, instruments adopted by the IMO are one of the key sources of international standards in this area.⁵

The IMO is open to all states.⁶ The majority of States Parties to the LOS Convention are also IMO members with one or two exceptions.⁷ In any case, meetings of the Organization are open to all UN members, who may participate in proceedings as observers, albeit without a vote.⁸ In addition, non-members may acquire more formal participation rights if they are party to a treaty falling under the auspices of the IMO.⁹

The purpose of the IMO, as defined in its constitution, is “*to provide machinery for co-operation among Governments in the field of governmental*

³ The Organization started its life as the Intergovernmental Maritime Consultative Organization, later changing its name to the International Maritime Organization in 1982 to reflect the increased role that it has come to play in the regulation of maritime affairs; see the 1975 amendments to the IMO Convention.

⁴ For a historical introduction to the IMO, see M'Gonigle and Zacher, *Pollution, Politics, and International Law: Tankers at Sea* (University of California Press, 1979) chapter 3.

⁵ A paper produced by the IMO Secretariat says that “the expression “competent international organization”, when used in the singular in [the LOS Convention], applies exclusively to IMO, bearing in mind the global mandate of the Organization as a specialized agency within the United Nations system”; IMO Document LEG/MISC/4, at p. 2.

⁶ IMO Convention, Article 4. UN members and states attending the 1948 Conference have an automatic right to membership; Articles 5 and 6. Other states may apply subject to approval of two thirds of the Members; Article 7.

⁷ For a list of all IMO members, see www.imo.org <checked 26 May 2006>. There are seven States Parties who are not IMO members, five of which are land-locked countries.

⁸ Rule 4 of the Rules of Procedure of the Assembly provide that the Secretary General may invite, *inter alia*, UN members as observers. Similar rules apply to the proceedings of the IMO Council and the IMO Committees.

⁹ See below, at p. 121.

regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; [and] to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety (sic.), efficiency of navigation and prevention and control of marine pollution from ships."¹⁰ Although the Organization was created primarily as a forum to discuss maritime affairs and to recommend action to its members¹¹, it may also prepare draft treaties and convene diplomatic conferences for their adoption.¹² Most technical standards adopted under the auspices of the Organization take the form of an international treaty. As treaties, these standards are formally binding only on those states which have accepted them. However, most IMO treaties are open to participation by all states, whether or not they are a member of the Organization.

Today the IMO is responsible for more than forty international conventions and agreements on a variety of maritime matters¹³ and it continues to be the forum where new regulatory treaties in this field are negotiated and adopted. Moreover, the role of the IMO in standard setting does not finish when a regulatory treaty is adopted. These treaties, by their very nature, need to adapt to present day problems and to keep up with technological and scientific developments.¹⁴ The majority of the regulatory treaties recognise the IMO as a forum for the drafting and adoption of technical amendments.¹⁵ De La Fayette describes how "*the IMO has been re-examining all the instruments it has adopted on a regular basis since its inception.*"¹⁶ Modifications to the major regulatory treaties are frequently considered by IMO committees.

¹⁰ IMO Convention, Article 1(a). The original text of Article 1 only referred to the adoption of standards in the field of maritime safety and efficiency of navigation. When the 1954 OILPOL entered into force, the IMO acted as depositary and later acted as a forum for the adoption of amendments to this treaty and its successor, the 1973/78 MARPOL Convention. The text of the IMO Constitution was subsequently amended in 1975 to reflect this aspect of its work in adopting standards to prevent and control pollution from ships. At the same time, it created a Marine Environment Protection Committee with the same status as the Maritime Safety Committee.

¹¹ IMO Convention, Articles 2(a) and (c).

¹² IMO Convention, Article 2(b).

¹³ For instance, the 1966 Convention on Load Lines, the 1972 Convention on the International Regulations for Preventing Collisions at Sea, the 1974 Convention on Safety of Life at Sea, the 1973/78 Convention on the Prevention of Pollution from Ships, the 1979 Convention on Maritime Search and Rescue, the 1995 Convention on Standards of Training, Certification and Watchkeeping for Seafarers, the 2001 Convention on the Control of Harmful Anti-Fouling Systems on Ships, the 2004 Convention for the Control and Management of Ships' Ballast Water and Sediments.

¹⁴ Indeed, see LOS Convention, Article 211(1).

¹⁵ Usually as an alternative to an *ad hoc* diplomatic conference.

¹⁶ De La Fayette, "The Marine Environment Protection Committee: The Conjunction of the Law of the Sea and International Environmental Law", (2001) 16 *International Journal of Marine and Coastal Law* at p. 200. SOLAS Convention, Article 8. MARPOL Convention, Article 16.

The Maritime Safety Committee and the Marine Environment Protection Committee are the two organs which are responsible for the adoption of amendments to most regulatory treaties.¹⁷ The mandates of these committees recognise that they may perform any additional functions attributed to them by international conventions, in addition to the purely advisory functions bestowed on them by the IMO Constitution.¹⁸ Both committees include representatives from all IMO member states. In addition, when amendments to the regulatory treaties are being discussed, contracting parties that are not IMO members are granted rights of participation. Thus, the SOLAS Convention provides that “*Parties to the Convention, whether or not Members of the Organization, shall be entitled to participate in the proceedings of the Maritime Safety Committee*”¹⁹ and similar provisions can be found in most other regulatory treaties.²⁰ It follows that most states are involved in the drafting and adoption of amendments, not only the parties to the treaty.

In addition to states, many industry representatives and other interest groups actively participate in the proceedings and discussions of the IMO committees²¹, in particular organizations representing shipping interests and the marine insurance industry.²² Environmental groups have also started to play a prominent role in discussions of the Marine Environmental Protection Committee. Consultation and co-operation with non-governmental international organizations is provided for in Article 62 of the IMO Convention. According to the IMO rules of procedure, NGO representatives may submit written statement on items on the agenda and with permission, they may make oral contributions.²³ It is only states and other international organizations, however, that may submit agenda items in the first place

¹⁷ The two lead committees are also assisted by a plethora of specialized sub-committees whose role it is to consider the technical aspects of proposed amendments. These include the Sub-Committee on Dangerous Goods, Solid Cargoes and Containers, the Sub-Committee on Ship Design and Equipment, and the Sub-Committee on Fire Protection. See *Guidelines on the Organization and Method of Work of the Maritime Safety Committee and the Marine Environment Protection Committee and their Subsidiary Bodies, as amended*, in MSC/Circ.1099/MEPC/Circ.405, at Annex, para. 2.1.

¹⁸ MEPC: IMO Convention, Article 38. MSC: IMO Convention, Article 28(b). See also Article 3(d).

¹⁹ SOLAS Convention, Article 8(b)(iii).

²⁰ For instance, MARPOL Convention, Article 16(2)(c); Anti-Fouling Convention, Article 16(2)(b); Ballast Water Convention, Article 19(2)(b).

²¹ De La Fayette concludes that “NGOs are generally well respected by member governments and some have a great deal of influence”; De La Fayette, “The Marine Environment Protection Committee”, at p. 166.

²² Prominent organizations are the International Chamber of Shipping, INTERTANKO, INTERCARGO, and the International Council of Classification Societies.

²³ See Rules 5 and 6 of the *Rules governing relationship with non-governmental international organizations*.

or propose amendments to the treaties.²⁴ Guidelines adopted by the IMO to promote effective and efficient working procedures within the organization provide that new amendments should not be included as part of the work programme until a “*compelling need*” for the amendment has been demonstrated by the proponents.²⁵

An amendment must pass through several stages before it is finally adopted. Proposals are usually considered initially by a technical sub-committee, before the broader policy implications are discussed by the main committee. The main committee will provisionally approve an amendment before it is circulated to states for final adoption at a subsequent meeting.²⁶ The time in which an amendment is adopted depends largely on the complexity of the issue and the political will of IMO members.

Many amendments are proposed on an *ad hoc* basis, often as a reaction to a specific shipping incident. In the wake of the Prestige incident in November 2002, the Member States of the European Communities submitted a proposal to amend MARPOL Annex I which would serve to accelerate the phasing in of double-hull tankers and ban the transport of heavy grade oil in single-hull tankers.²⁷ The proposals were immediately circulated by the IMO Secretary General in April 2003 prior to the forty-ninth session of the Marine Environment Protection Committee. It was not possible to resolve differences at this meeting and the Committee agreed to hold an extra session in December 2003²⁸ where a revised regulation 13G and a new regulation 13H were subsequently adopted.²⁹ The amended regulations entered into force on 5 April 2005, less than two and a half years after the sinking of the Prestige.

Other amendments are introduced as part of a rolling programme of review of IMO technical regulations. For instance, revisions of Annexes I and II of the

²⁴ In practice, NGOs may seek a sponsor state for a particular amendment.

²⁵ See *Guidelines on the Organization and Method of Work of the Maritime Safety Committee and the Marine Environment Protection Committee and their Subsidiary Bodies, as amended*, in MSC/Circ.1099/MEPC/Circ.405, at Annex, para. 2.10.2.

²⁶ The requirement for circulation of amendments is laid down by the Conventions themselves. See SOLAS Convention, Article 8. MARPOL Convention, Article 16.

²⁷ See IMO Document MEPC 49/16/1.

²⁸ See IMO Document MEPC 49/22, at para. 16.35.

²⁹ IMO Resolution MEPC.111(50). The amendments were adopted despite the concerns of some delegations that it was inappropriate to alter rules which had only recently been changed after the Erika incident in 1999. For a summary of the debate, see Tan, *Vessel-Source Marine Pollution* (Cambridge University Press, 2006) at pp. 139-155. A similarly speedy reaction can be observed in the wake of the Erika incident; for a discussion, see De La Fayette, "The Marine Environment Protection Committee", at pp. 194-200.

MARPOL Convention were finally adopted in 2004 following a comprehensive and time-consuming review that lasted nine years.³⁰ The revised annexes incorporate all amendments adopted since the Convention entered into force, as well as additional changes adopted as a result of the review process. Similar reviews have also been undertaken in relation to Annexes III³¹ and IV.³² Most recently, the Marine Environment Protection Committee commenced a review of Annex V, following a request from the General Assembly in its 2005 resolution on the law of the sea to “to assess its effectiveness in addressing sea-based sources of marine debris.”³³

Formal procedures for the adoption of amendments are specified in the regulatory treaties. They usually require amendments to be adopted by a two-thirds majority of the parties, present and voting.³⁴ However, the practice of the two main IMO committees tends to aim towards the adoption of amendments by consensus.³⁵ Votes are rarely taken in the committees and the participants try to reach a compromise on the proposed changes.

Once adopted, amendments are then communicated to the parties for acceptance.³⁶ Tacit acceptance procedures were included in most IMO regulatory treaties concluded after 1972 in light of concerns that many amendments were not entering into force.³⁷ Amendments to the technical annexes will enter into force for all states who have not objected at least six months after the date on which it was deemed to have been accepted.³⁸ The amendment procedures therefore facilitate the entry into force of technical amendments that have been adopted by the IMO.

³⁰ See IMO Document MEPC 52/24, at para. 5.1.

³¹ Adopted at the fifty-fifth session of the MEPC.

³² Adopted at the fifty-first session of the MEPC.

³³ General Assembly Resolution 60/22, at para. 67. The Committee established a correspondence group at its fifty-fifth session in order to develop the framework, method of work and timetable for the review.

³⁴ SOLAS Convention, Article VIII(b)(iv); MARPOL Convention, Article 16(2)(d); Ballast Water Convention, Article 19(2)(c); Anti-Fouling Convention, Article 16(2)(c).

³⁵ IMO Document LEG/MISC/4, at p. 7.

³⁶ SOLAS Convention, Article 8(b)(v) and (c)(ii).

³⁷ See “IMO 1948-1998: A Process of Change”, *Focus on the IMO Paper*, 1998, at pp. 9-11. See also M’Gonigle and Zacher, *Pollution, Politics, and International Law: Tankers at Sea* at p. 107.

³⁸ The period for entry into force changes from treaty to treaty and it can be specified by the committee at the time of adoption. However, the treaties usually set a minimum period of time during which objections can be made. The MARPOL Convention prescribes a minimum period of ten months. In May 1994, the Contracting Governments to the SOLAS Convention approved an accelerated amendment procedure which reduces the minimum period from one year to six months where exceptional circumstances prevail. It is very rare that states actually rely on their right to object to amendments adopted under the tacit acceptance procedures. Of all the amendments to the SOLAS Convention and the MARPOL Convention that have been adopted to date, less than fifteen objections

The tacit acceptance procedures under the SOLAS Convention apply to any amendments to the Annexes apart from changes to chapter I.³⁹ Amendments to this chapter require the consent of individual states before changes can come into force. However, new chapters can be added to the Convention with relative ease using the tacit acceptance procedures. For instance, when a diplomatic conference agreed in December 2002 to add a new chapter on measures to enhance maritime security to the Annex of the SOLAS Convention, the amendment was able to enter into force for all parties within two years.⁴⁰ In contrast, the MARPOL Convention has several annexes, each dealing with a different source of marine pollution. The Convention specifies that the adoption of a new annex to the MARPOL Convention is to be treated in the same way as an amendment to the main text of the Convention and requires the express consent of a state before it becomes bound.⁴¹ It is not possible to add new annexes using the tacit acceptance procedure. Therefore, the new annex on the prevention of air pollution from ships adopted by the MARPOL Contracting Parties in 1997 needed to be accepted by two-thirds of the parties, the combined merchant fleets of which constitute not less than fifty per cent of gross tonnage of the world's merchant fleet, before it could enter into force. As a result, the Annex did not enter into force until 19 May 2005 and it is moreover only formally binding on those states which have given their express consent.⁴² De La Fayette suggests that one of the reasons for choosing to frame the regulations on anti-fouling systems as a new convention rather than an additional annex to MARPOL is that "*the entry into force provisions for amendments to MARPOL constitute an almost insurmountable barrier to early entry into force.*"⁴³ Where amendments are perceived as urgent, the

have been made and the majority of these have been subsequently withdrawn; See International Maritime Organization, *Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions, as at 31 December 2003*, (2004).

³⁹ SOLAS Convention, Article 8(b)(iv).

⁴⁰ Chapter XI-2 entered into force on 1 July 2004. One objection was made by the Government of Finland; see *Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary General performs depositary functions, as at 31 December 2003*, Document J/86/87, 2004, at p. 36.

⁴¹ MARPOL Convention, Article 16(5).

⁴² XXX IMO figures, as at 30 April 2006; see www.imo.org <checked 22 May 2006>.

⁴³ De La Fayette, "The Marine Environment Protection Committee", at p. 172.

Committees may also adopt resolutions encouraging states to give early and effective application to amendments.⁴⁴ Such resolutions are, however, only hortatory.

One significant advantage of the amendment procedures in these regulatory treaties is that it is possible to predict the date on which the amendment will enter into force. When adopting amendments, the committees will indicate the date on which the amendment will be deemed to be accepted and the date on which it will enter into force, subject to the minimum periods provided in the Conventions. This procedure allows the shipping industry to prepare for changes to the regulations. To further protect the interests of ship-owners, the SOLAS and MARPOL Conventions specify that amendments which relate to the structure of a ship shall only apply to ships the keels of which have been laid on or after the date on which the amendment enters into force.⁴⁵

In addition to legally binding standards, IMO committees also adopt non-binding instruments which can serve a variety of purposes. Sometimes, non-binding instruments are adopted as a prelude to the negotiation of a treaty. For instance, the IMO adopted guidelines on ballast water⁴⁶ and anti-fouling systems⁴⁷ before treaties on these topics were successfully negotiated. A similar process can be seen in the case of regulations on ship recycling. At the twenty-third session of the IMO Assembly, Guidelines on Ship Recycling were adopted along with an instruction to the Marine Environment Protection Committee to keep the matter under review.⁴⁸ At its twenty-fourth session, the Assembly requested the Committee to start work on developing a legally binding instrument.⁴⁹ This process could take several years, during which time the Guidelines will indicate to industry what types of measures they should be taking.

Other IMO resolutions, whilst not formally binding, are directly related to the technical standards found in regulatory treaties. Sometimes, the treaty itself may

⁴⁴ For example, IMO Resolution MEPC.114(50) calling for the early and effective application of regulations 13 G and H of Annex I to the MARPOL Convention.

⁴⁵ SOLAS Convention, Article 8(e).

⁴⁶ IMO Resolution A.774(18) on Guidelines for Preventing the Introduction of Unwanted Pathogens from Ships' Ballast Water and Sediment Discharges. See Tan, *Vessel-Source Marine Pollution*, at pp. 162-174.

⁴⁷ MEPC 46(30) on Measures to Control Potential Adverse Impacts Associated with Use of Tributyl Tin Compounds in Anti-Fouling Paints.

⁴⁸ IMO Resolution A.962(23) subsequently revised by Resolution A.980(24).

⁴⁹ IMO Resolution A.981(24) on a New Legally Binding Instrument on Ship Recycling. Work on a legally binding instrument commenced at MEPC 54 in March 2006.

make reference to guidelines or recommendations. For instance, the Ballast Water Convention includes several references to guidelines that the parties must take into account in implementing the Convention. Since the adoption of that treaty, the Marine Environment Protection Committee has been working hard to develop the necessary guidelines.⁵⁰ In addition, IMO committees may adopt resolutions which seek to promote a uniform interpretation of a technical regulation.⁵¹ As the parties to a treaty are competent to adopt authoritative interpretations, such interpretative resolutions cannot be completely dismissed simply because of their non-binding status.

The IMO plays a more significant role in setting technical standards than was perhaps anticipated when the Organization was first created in 1948. The decision-making procedures within the IMO seek to ensure that initiatives are supported by a consensus of interested actors. This is not a formal requirement of the IMO Convention or the regulatory treaties. Rather, it is a reflection of the desire for a consensual and inclusive approach to law-making in all aspects of the law of the sea. It is submitted that the use of consensus in the IMO recognises the fact that the resulting standards will have an impact on the general legal framework as a consequence of the rules of reference found in the LOS Convention.

3. The Regulation of Shipping and Rules of Reference

Regulatory treaties adopted by technical organizations tend not to deal with jurisdictional issues.⁵² Most regulatory treaties were directed at flag states whose jurisdiction over ships flying their flag is long-standing and chiefly uncontested.⁵³ As the IMO itself says, “*in principle IMO treaties do not regulate the nature and extent*

⁵⁰ See the reports of MEPC 54 and 55.

⁵¹ Such uniform interpretations are common in relation to the technical annexes to the SOLAS Convention and the MARPOL Convention.

⁵² IMO Document LEG/MISC/4, at p. 8.

⁵³ See e.g. SOLAS Convention, Chapter 1, Regulation 6. Coastal state jurisdiction is not addressed by the SOLAS Convention. Port states were also intended to play a role in regulating standards. However, port state control does not raise substantive issues of maritime jurisdiction as the ship is at that stage voluntarily in the territorial jurisdiction of the port state. See e.g. SOLAS Convention, Chapter 1, Regulation 19. Port state jurisdiction is a different concept that has been developed in Article 218 of the LOS Convention.

of coastal state jurisdiction in connection with their implementation."⁵⁴ Where regulations were intended to be applied by coastal states, the question of jurisdiction was largely avoided. Thus, the 1973/78 MARPOL Convention provides that "*any violations ... within the jurisdiction of any Party to the Convention shall be prohibited...*"⁵⁵ whilst defining jurisdiction in light of international law at the time of application or interpretation.⁵⁶ This formulation was designed to ensure consistency with general international law and the outcome of negotiations that were taking place at that time through UNCLOS III.⁵⁷

Negotiating a new jurisdictional framework was the focus of UNCLOS III. Whilst not specifying the content of technical standards, the Convention often qualifies the powers of states to legislate on maritime matters by reference to international standards.⁵⁸ The effect of so-called "rules of reference" varies depending on the precise phrasing of a particular provision.

The jurisdiction of a state over ships flying its flag is a long held principle of international law. In the words of one study, "*creating the conditions that enable the safe and efficient navigation of ships through the world's oceans is primarily the responsibility of flag states.*"⁵⁹ Yet, the powers of a flag state are not completely unfettered. The LOS Convention builds on the provisions on the 1958 Convention on the High Seas, setting out the obligations and duties of flag states in securing safety of navigation. Article 94 of the LOS Convention requires the flag state to adopt rules and regulations for ships flying its flag regarding "*administrative, technical and social matters*" and in particular:

- (a) the construction, equipment and seaworthiness of ships;
- (b) the manning of ships, labour conditions and the training of crews...;
- (c) the use of signals, the maintenance of communications and the prevention of collisions.

⁵⁴ Report of the Secretary General, Impact of the Entry into Force of the LOS Convention on Related Existing and Proposed Instruments and Programmes, 1997, UN Document A/52/491, at p. 22.

⁵⁵ MARPOL Convention, Article 4(2).

⁵⁶ MARPOL Convention, Article 9(3). See also the 1972 Dumping Convention, Article 13.

⁵⁷ See IMO Document LEG/MISC/4, at p. 6; see also Blanco-Bazan, "IMO Interface with the Law of the Sea Convention", in *Current Maritime Issues and the International Maritime Organization*, ed. Moore and Nordquist (Martinus Nijhoff Publishers, 1999) at p. 273; Wolfrum, "IMO Interface with the Law of the Sea Convention", in *Current Maritime Issues and the International Maritime Organization*, ed. Moore and Nordquist (Martinus Nijhoff Publishers, 1999) at p. 231. These sources note that the IMO Secretariat was actively involved in the negotiations at UNCLOS III in order to ensure consistency in its own work.

⁵⁸ On the diversity of language, see e.g. Vukas, "Generally Accepted International Rules and Standards", in *Implementation of the Law of the Sea Convention through International Institutions*, ed. Soons (Law of the Sea Institute, 1990) at pp. 406-408.

⁵⁹ Law of the Sea Report of the Secretary General, 2006, UN Document A/61/63, at para. 59.

Having listed the types of issues that a flag state's regulations should address, Article 94(5) of the Convention continues:

In taking the measures called for [above] each State is required to conform to generally accepted international standards, procedures and practices and to take any steps which may be necessary to ensure their observance.

Therefore, the flag state does not have complete discretion over the standards which it prescribes. Such measures must “conform to” international standards, procedures and practices. This provision is based on the text of Article 10 of the 1958 High Seas Convention and guidance on its interpretation can therefore be found in the drafting history of that instrument.⁶⁰

The original draft article prepared by the International Law Commission only included a reference to navigational safety and collision avoidance.⁶¹ For such measures, the Commission makes clear that the rule of reference seeks to ensure that states do not prescribe rules at variance with international standards and thus cause confusion amongst seafarers.⁶² As Hudson stressed to other members of the International Law Commission during its debate on the subject, “*any ship sailing on the high seas was in danger if each ship was free to navigate as it pleased.*”⁶³ It is practical necessity that dictates that uniform international standards are developed to promote safety of shipping.⁶⁴ Thus, the rule of reference promotes the universalisation of so-called “maritime rules of the road”⁶⁵ so that there is a single standard that is binding on all ships wherever they are in the world, and whatever flag

⁶⁰ In *M/V Saiga (No. 2)*, the ITLOS referred to the commentaries of the International Law Commission in interpreting Article 91 of the LOS Convention; see chapter seven, at p. 227. For a historical account of these provisions, see Oxman, “The Duty to Respect Generally Accepted International Standards”, (1991) 24 *New York University Journal of International Law and Politics* 109.

⁶¹ See International Law Commission, “Commentary to the Articles concerning the law of the sea”, (1956) 2 *Yearbook of the International Law Commission* at p. 280.

⁶² *Ibid.*, at p. 281.

⁶³ Report of the sixty-fourth meeting of the International Law Commission, 10 July 1950, (1956) 1 *Yearbook of the International Law Commission*, at p. 194, at para. 86b.

⁶⁴ Churchill and Lowe, *The Law of the Sea* (Manchester University Press, 1999) at p. 265.

⁶⁵ Oxman attributes this phrase to Manley Hudson; “The Duty to Respect Generally Accepted International Standards”, at p. 123. See also International Law Association, *Report of the Committee on Coastal State Jurisdiction relating to Marine Pollution*, (2000) at p. 479.

they fly.⁶⁶ This provision reflected the position under customary international law where states had already accepted some uniform standards on navigational safety.⁶⁷

Subsequently, the Commission added a reference to other types of regulations concerned with safety of at sea. It noted that “*regulations concerning the construction, equipment and seaworthiness of ships, and the labour conditions of crews, can contribute much to the safety of navigation.*”⁶⁸ Yet these topics raise different issues of policy and practice. In these instances, there is no practical necessity that all ships navigating on the high seas must apply the same standards. The rules of reference in this regard would therefore seem to serve a different objective. The drafting history of Article 10 suggests that the object and purpose of the rules of reference relating to these issues is to prevent the proliferation of sub-standard shipping.⁶⁹ Thus, in this context, the term “conform to” would appear to require a different interpretation; it would appear to prescribe an international minimum standard that states may exceed if they wish.

The jurisdiction of flag states over pollution and environmental protection is similarly linked to international standards. These obligations were introduced for the first time at UNCLOS III.⁷⁰ Article 211(2) of the LOS Convention created a new obligation for flag states to adopt regulations which “*shall at least have the same effect as that of generally accepted international rules and standards.*” The meaning of this provision leaves no doubt that it is intended to create an international minimum

⁶⁶ See Shearer, "Collisions at Sea", in *Encyclopedia of Public International Law*, ed. Bernhardt (North-Holland, 1989) at p. 64. The Chair of the International Law Commission summarised the discussion on the issue at the sixty-fourth meeting by saying that “it appeared to be the desire of the Commission for international unification to be achieved in that field”, in (1950 I) *Yearbook of the International Law Commission*, at p. 194, para. 94. At the time when the 1958 Convention was formulated, the rules on collision avoidance were contained in a non-binding instrument, so the article not only achieved uniformity, but also created a legal obligation. The rules are now codified in the 1972 Convention on the International Regulations for Preventing Collisions at Sea. It should also be recognized that the rules themselves are inherently flexible as the master of a ship is at all times required to act in such as way as to secure the safety of a ship. In extreme circumstances, this may involve ignoring a particular rule.

⁶⁷ See chapter two, at p. 19.

⁶⁸ See International Law Commission, "Commentary to the Articles concerning the law of the sea", at p. 280.

⁶⁹ Oxman, "The Duty to Respect Generally Accepted International Standards", at p. 127, footnote 47. On flags of convenience, see Ignarski, "Flags of Convenience", in *Encyclopedia of Public International Law*, ed. Bernhardt (North-Holland, 1989) at pp. 125-127.

⁷⁰ The environment had appeared on the international agenda following the 1972 Stockholm Conference on the Human Environment. Recommendation 92 of that Conference covered the marine environment. The 1958 Conventions had little to say on the environment. Article 24 of the High Seas Convention simply provides that states shall draw up regulations to prevent pollution by discharge of oil from ships “taking into account existing treaty provisions on the subject.”

standard whilst continuing to permit flag states to adopt stricter pollution measures if they wish.⁷¹ The purpose, as with the provisions on safety and labour standards, is to prevent sub-standard shipping. As Tan explains, “*the lack of any flag state incentives to prescribe and enforce pollution control measures is the very reason why a minimum standard has had to be imposed on the flag states.*”⁷²

Rules of reference play a different role when it comes to prescribing the powers of coastal states. It is again necessary to analyse each article individually according to its wording, its context, and its object and purpose in order to determine its effect.

Article 21 confers a power on coastal states to adopt laws on “*the safety of navigation and the regulation of maritime traffic*” in its territorial sea. There is no express limit on this power in relation to international rules or standards. However, a limit may be implied from Article 21(4) which provides that “*foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations [adopted by the coastal state] and all generally accepted international regulations relating to the prevention of collisions at sea.*” This provision suggests that the laws and regulations adopted by the coastal state should be compatible with generally accepted international regulations. Any other interpretation would require a ship in innocent passage to comply with two sets of incompatible norms.

More express limits are placed on the power of coastal states in the case of other types of shipping standards. For instance, Article 21(2) provides that “[*coastal state*] laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards.” This provision serves to limit the jurisdiction of

⁷¹ See for example Boyle, “Marine Pollution under the Law of the Sea Convention”, (1985) 79 *American Journal of International Law* at p. 353; Oxman, “The Duty to Respect Generally Accepted International Standards”, at p. 131. Articles 208(3) and 210(6) adopt a comparable approach, requiring coastal states to adopt rules on seabed pollution and dumping which are no less effective than minimum international standards. Note that these two provisions do not refer to generally accepted international rules or standards but “international rules, standards and recommended practices and procedures” and “global rules and standards” respectively. Oxman suggests that the absence of the qualifying words “generally accepted” suggests in strictly textual terms that the underlying idea may not be precisely the same, although he argues that careful interpretation could lead to that outcome; “The Duty to Respect Generally Accepted International Standards”, at pp. 132-133. He reaches a similar conclusion in the case of the term “global” rules and standards, at p. 135.

⁷² Tan, *Vessel-Source Marine Pollution* at p. 179.

coastal states in prescribing standards on these matters.⁷³ The purpose of this provision is to facilitate international trade by preventing the proliferation of technical standards which would stop a ship from freely transiting the world's coastal zones.⁷⁴ In doing so, it requires the coastal state to prescribe the international standard.

One of the most significant innovations at UNCLOS III was to extend the jurisdiction of coastal states over environmental issues. Yet, from very early in the negotiations at UNCLOS III, any extension in the exercise of coastal state jurisdiction was linked to the idea of internationally accepted rules and regulations.⁷⁵ In the words of one study, the way in which the Convention referred to international standards “*reflected the crux of a delicately weighed balance of power arrived at between coastal states and shipping nations.*”⁷⁶ For instance, the power of coastal states to adopt regulations on pollution from ships within their EEZ is limited by reference to international rules and regulations. In this zone of maritime jurisdiction, coastal state may only adopt regulations “*conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.*”⁷⁷ This provision again acts to limit the competence of a coastal state by setting an upper limit on their prescriptive powers⁷⁸, deterring coastal states from using environmental regulations as a means to restrict the navigational rights of foreign ships.⁷⁹ Under this provision,

⁷³ Ships themselves may be subject to higher standards prescribed by the flag state in accordance with Article 94.

⁷⁴ See Churchill and Lowe, *The Law of the Sea*, at p. 94; Tan, *Vessel-Source Marine Pollution*, at p. 180.

⁷⁵ See Rosenne and Yankov, eds., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, 5 vols., vol. 4 (Martinus Nijhoff Publishers, 1991) at p. 183 ff..

⁷⁶ International Law Association, *Report of the Committee on Coastal State Jurisdiction relating to Marine Pollution*, at p. 487; see also Vignes, "La valeur juridique de certaines regles, normes ou pratiques mentionnees au T.N.C.O. comme "generalement acceptees"", (1979) 25 *Annuaire Francais de Droit International* at p. 712; Boyle, "Marine Pollution under the Law of the Sea Convention", at p. 353.

⁷⁷ LOS Convention, Article 211(5).

⁷⁸ See, however, Article 211(6) which will be discussed below.

⁷⁹ See Attard, *The Exclusive Economic Zone in International Law* (Oxford Univ. Press, 1987) at p. 95; Orrego Vicuña, *The Exclusive Economic Zone* (Cambridge University Press, 1989) at p. 85. There would appear to be no limits on the competence of coastal states to regulate pollution in their territorial sea; LOS Convention, Article 211(2). It is questionable whether setting higher standards would have the effect of hampering innocent passage. On this issue, in a slightly different context, see Oxman, "Environmental Protection in Archipelagic Waters and International Straits - the role of the International Maritime Organization", (1995) 10 *International Journal of Marine and Coastal Law* at p. 476.

coastal states must prescribe the international standards if they wish to adopt pollution legislation in their EEZ.⁸⁰

Whether the rule of reference seeks to set a uniform or minimum standard, international rules and regulations will thereby be binding on all states. In the words of Oxman, “*the effect of the [rules of reference] is to impose a legal obligation on a state to respect a standard which it would not otherwise be legally bound to respect.*”⁸¹ Thus, the Convention serves to incorporate certain international standards into the general framework for the law of the sea.

This effect depends on the wording of the rule of reference. Other rules of reference confer a greater discretion on coastal states in standard setting. Provisions that simply require states to “take into account” international rules and standards do not make compliance with the standards compulsory.⁸²

4. The Incorporation of “Generally Accepted” Standards

There are two primary questions related to which technical standards are incorporated by rules of reference. Which organizations set these standards? Which particular standards are incorporated?

There are many international organizations which have the power to adopt technical standards relevant to the law of the sea. Rarely do rules of reference specify the source of the standards to be applied. The only organization to be named in the Convention is the International Civil Aviation Organization.⁸³ Otherwise the Convention simply makes references to the “competent international organization” or “organizations” or says nothing at all about which organizations are to adopt standards.⁸⁴

⁸⁰ They differ from the uniform standards found in Article 94 because coastal states are not under an obligation to prescribe the international standards. Indeed, a coastal state must choose to create an EEZ. See also LOS Convention, Article 60(5) for rules of reference in relation to the regulation of off-shore platforms and structures.

⁸¹ Oxman, “The Duty to Respect Generally Accepted International Standards”, at p. 144.

⁸² LOS Convention, Articles 207 and 212.

⁸³ LOS Convention, Article 39(3); see the comments of Rosenne, “IMO Interface with the Law of the Sea Convention”, in *Current Maritime Issues and the International Maritime Organization*, ed. Moore and Nordquist (Martinus Nijhoff Publishers, 1999) at p. 253.

⁸⁴ See the list of organizations prepared by DOALOS in Law of the Sea Bulletin, vol. 31. See also Kingham and McRae, “Competent international organizations and the law of the sea”, (1979) *Marine Policy* 106.

The primary institution involved in the regulation of shipping is the IMO, although the work of several other institutions is also relevant, including the FAO, the ILO and the IAEA. It would appear that standards adopted by any of these organizations may be incorporated by rules of reference.

None of these organizations have exclusive competence and their mandates often overlap. However, it is common for technical organizations to co-operate with one another and co-operation is often called for in their constituent instrument.⁸⁵ Forms of co-operation vary from the simple sharing of information to the conferral of reciprocal participation rights. Sometimes, organizations will draft standards, guidelines or policies together. For instance, the IMO and the ILO often form joint working groups to address shared concerns.⁸⁶

More important than the source of the standards is that fact that they are “generally accepted”. It is this qualification which most rules of reference use to incorporate standards into the LOS Convention⁸⁷ Determining a precise interpretation of “generally accepted” is difficult. The ILA Committee on Coastal State Jurisdiction relating to Marine Pollution says that “*the drafting history of this provision suggests that it was intentionally kept vague in order not to upset the delicate balance which the notion incorporates.*”⁸⁸ The use of this term creates a degree of dynamism, as the standards may change over time, without amending the LOS Convention.⁸⁹ On the other hand, it also creates uncertainty, as it is not clear at any one time which

⁸⁵ E.g. IMO Convention, Articles 60-62.

⁸⁶ E.g. Joint ILO/IMO Committee of Training, Joint ILO/IMO/BC Working Group on Ship Scrapping.

⁸⁷ Other qualifications are used in different contexts. Article 210 calls for states to adopt laws that are “no less effective in preventing, reducing, and controlling [pollution from dumping] than the global rules and standards”. It is suggested that global rules and standards are equivalent to generally accepted international rules and standards. See Vukas, “Generally Accepted International Rules and Standards”, at pp. 406-408; Boyle, “Marine Pollution under the Law of the Sea Convention”, at p. 355. Articles 208 and 209 require seabed activities to be no less effective than “international rules, regulations and standards and recommended practices and procedures”. The adoption of seabed standards will be dealt with below, at p. 157 ff. Finally, the rule of reference in Article 42(1)(b) in relation to the legislative competence of strait states is formulated in terms of “applicable international regulations regarding the discharge of oil, oily wastes, and other noxious substances in the strait.” Article 54 applies this in turn to archipelagic sea-lanes. The term “applicable rules and standards” suggests those standards that are formally binding on the state and includes generally accepted international standards. See Van Reenen, “Rules of Reference in the New Convention on the Law of the Sea in Particular Connection with the Pollution of the Sea by Oil from Tankers”, (1981) *Netherlands Yearbook of International Law* at pp. 12-13; International Law Association, *Report of the Committee on Coastal State Jurisdiction relating to Marine Pollution*, at pp. 481-482.

⁸⁸ International Law Association, *Report of the Committee on Coastal State Jurisdiction relating to Marine Pollution*, at p. 480.

⁸⁹ Sohn, “Implications of the Law of the Sea Convention regarding the Protection of the Marine Environment”, in *Developing Order of the Oceans*, ed. Krueger and Riesenfeld (Law of the Sea Institute, 1985) at p. 109.

standards fall within the ambit of a rule of reference. Yet the utility of the rules of reference is severely diminished if it is unclear which standards are incorporated. Boyle critically concludes that “*to say that states have a duty to regulate pollution is to beg the question what regulations they must adopt, a question that the Convention does not satisfactorily answer.*”⁹⁰

Clarifying the interpretation of which standards are “generally accepted” is therefore vital. The question was raised by the IMO in a letter to the chair of the drafting committee at UNCLOS III: “*it would be useful if it would be clearly indicated whether the term “generally accepted rules and standards” is intended to refer to international standards which have received sufficient international endorsement in an appropriate international forum, for example, by their adoption by the competent international body or by a diplomatic conference for general application or, alternatively, whether rules and standards would be considered as being “generally accepted” only if they are contained in formal treaty instruments which are in force.*”⁹¹

The focus of this analysis is on which IMO standards qualify as “generally accepted”. It is true that many of the major maritime states are in practice already a party to the most of the important IMO regulatory treaties. In commenting on the implications of the entry into force of the LOS Convention, the IMO Secretariat reported that acceptance of relevant IMO treaties has increased since 1982. The Secretariat suggested that the obligation in the LOS Convention to apply generally accepted rules and standards had acted a “*paramount incentive*” for states to become a party to the regulatory treaties.⁹² The SOLAS Convention, for instance, is binding on 98.52% of the world merchant fleet in terms of tonnage.⁹³ Similar figures apply to the 1966 Convention on Load Lines⁹⁴ and the 1972 Convention on the International Regulations for Preventing Collisions at Sea.⁹⁵ The two compulsory annexes of the

⁹⁰ Boyle, "Marine Pollution under the Law of the Sea Convention", at p. 357. See also Churchill and Lowe, *The Law of the Sea* at p. 347; Birnie and Boyle, *International Law and the Environment* (Oxford University Press, 2002) at p. 353.

⁹¹ Letter dated 23 May 1980, cited by Vukas, "Generally Accepted International Rules and Standards", at pp. 416-417.

⁹² United Nations Secretary General, *Impact of the Entry into Force of the 1982 United Nations Convention on the Law of the Sea on related existing and proposed instruments and programmes*, (1997) at p. 21.

⁹³ *Ibid.*

⁹⁴ 98.49%.

⁹⁵ 97.60%.

MARPOL Convention have been accepted by a similarly high percentage of the world merchant fleet.⁹⁶ Such high levels of participation leave little doubt that these treaties are indeed generally accepted.

Nevertheless, not all regulatory treaties benefit from such high levels of participation. For instance, some of the optional annexes to MARPOL have struggled to attract parties.⁹⁷ Treaties that have been negotiated more recently, such as the 2001 Anti-Fouling Convention and the 2004 Ballast Water Convention, may not attract high levels of participation for many years to come.

It is difficult to locate a precise threshold of general acceptance. In doing so, it is necessary to take into account the warning words of the ICJ in the *North Sea Continental Shelf Cases* that it should not be lightly presumed that a state which has not formally accepted an instrument has become bound in another way.⁹⁸

One argument is that rules and standards are generally accepted if they have satisfied the conditions for entry into force.⁹⁹ This approach appears to assume that the conditions for entry into force of regulatory treaties are set at a level that is equivalent to general acceptance. Valenzuela makes the argument that “*the condition ... for the entry into force of IMO conventions – that is the requirement of a substantial number of states parties having amongst them more than half the tonnage of the world’s merchant fleet – seems to have precisely this purpose.*”¹⁰⁰ Yet, the level of acceptance needed for entry into force varies from treaty to treaty: twenty-five states representing fifty per cent of world tonnage in the SOLAS Convention¹⁰¹, fifteen states representing fifty per cent of world tonnage in the MARPOL Convention¹⁰², thirty states representing thirty-five per cent of world tonnage in the Ballast Water Convention¹⁰³, and twenty-five states representing twenty-five per cent of world tonnage in the Anti-Fouling Convention.¹⁰⁴ The risk of this approach is that,

⁹⁶ 97%. IMO figures, as at 31 January 2005. 56 states are not parties to MARPOL.

⁹⁷ Annex III has 92.99%; Annex IV has 54.35%; Annex V has 95.23%; and Annex VI has 60.04%.

⁹⁸ *North Sea Continental Shelf Cases*, (1969) ICJ Reports 3 at para. 28.

⁹⁹ For instance, Valenzuela, "IMO: Public International Law and Regulation", in *The Law of the Sea and Ocean Industry: New Opportunities and Restraints*, ed. Johnston and Letalik (Law of the Sea Institute, 1984) at p. 145. For a similar approach, see Boyle, "Marine Pollution under the Law of the Sea Convention", at p. 356.

¹⁰⁰ Valenzuela, "IMO: Public International Law and Regulation", at p. 145.

¹⁰¹ SOLAS Convention, Article 10(1).

¹⁰² MARPOL Convention, Article 15(1).

¹⁰³ Ballast Water Convention, Article 18(1).

¹⁰⁴ Anti-Fouling Convention, Article 18(1).

as Timanegis puts it, “*small minorities could impose their wishes on other states.*”¹⁰⁵ Furthermore, this interpretation seems to suggest that all international standards that have entered into force are generally accepted. Yet, the LOS Convention makes a distinction between generally accepted international standards and “applicable international standards”.¹⁰⁶ The latter concept implies a lower level of acceptance. This distinction would be lost if all treaties in force were considered to be generally accepted.

An alternative interpretation of “generally accepted” concentrates not on formal acceptance of a standard but on whether or not a standard has been accepted in state practice. Thus, Van Reenan argues that “*the meaning of “generally accepted international rules” can be found in the criteria for determining whether certain treaty rules have become world-wide rules of customary law.*”¹⁰⁷ Others have argued that the strict threshold for the creation of customary law is too high and that a lower level of acceptance is appropriate.¹⁰⁸ Vukas thus argues that “*such extensive interpretations are plausible in this case, taking into account the intentions of the drafters and the texts of the corresponding provisions of the LOS Convention dealing with other sources of pollution, where no extensive application was envisaged and the habitual terminology was used.*”¹⁰⁹

Hakapää argues that this interpretation removes the distinction between customary international law and generally accepted international standards.¹¹⁰ According to this criticism, the rules of reference are redundant if they simply create an obligation to comply with international standards which are already binding as part of customary international law. It could be also argued that the rules of reference act as clarification that generally accepted international standards have become part of

¹⁰⁵ Timanegis, *International Control of Marine Pollution* (Oceana Publications, 1980) at p. 606.

¹⁰⁶ The term applicable international regulations is found in Articles 42, 60, 94, 213, 214, 216, 217, 218, 219, 220, 220, 226, 228, and 230.

¹⁰⁷ Van Reenan, "Rules of Reference in the New Convention on the Law of the Sea in Particular Connection with the Pollution of the Sea by Oil from Tankers", at p. 11. He continues that “it is identical to what the Court [in the North Sea Continental Shelf Cases] calls a “general rule of international law”, at p. 12.

¹⁰⁸ Timanegis, *International Control of Marine Pollution* at p. 605. See also Hakapää, *Marine Pollution in International Law* (Suomlainen Tiedeakatemia, 1981) at p. 121; International Law Association, *Report of the Committee on Coastal State Jurisdiction relating to Marine Pollution*, at p. 478.

¹⁰⁹ Vukas, "Generally Accepted International Rules and Standards", at p. 420.

¹¹⁰ Hakapää, *Marine Pollution in International Law*, at p. 121.

customary international law, whilst acknowledging that these standards may change over time.

Some comment is also needed on how customary international is determined in this context. Some commentators suggest that a standard must be reflected in the actual practice of states and the shipping industry. Asserting the importance of action rather than rhetoric, Oxman places the emphasis firmly on the enforcement of international standards.¹¹¹ In his opinion, statements made at diplomatic conferences and through international organizations should not be accorded significant weight. To do so, he argues, would attribute to them a legislative competence that was not intended.¹¹²

Clearly actual state practice can be an important indicator that certain standards are generally accepted. However, the practice of states in adopting standards should not be ignored. In the negotiation of international standards, states have ample opportunity to express their views on the desirability of such standards and whether or not they are accepted. The mere adoption of a standard is not sufficient to create customary international law. The practice of states in adopting a standard must also be accompanied by evidence of *opinio juris communis*.¹¹³ Sohn concludes that “*once a rule is generally accepted, usually by consensus at a meeting of an international organization or a diplomatic conference, each state has under the new customary international law developed by the Law of the Sea Conference the duty to act in accordance with it. The necessary safeguard is in the words “generally accepted” which imply that a preponderant majority of states, including almost all states with any special interest in that rule, have accepted the rule as one fairly balancing the interests of all states.*”¹¹⁴

In the case of the IMO, it is significant that the drafting of standards involves not only parties to regulatory treaties, but includes other states and industry actors. Therefore, all interests are taken into account and universal agreement can be achieved. Furthermore, formal procedures are generally set aside in favour of adopting international standards by consensus. Majority views are not normally

¹¹¹ Oxman, "The Duty to Respect Generally Accepted International Standards", at p. 152.

¹¹² Ibid., at pp. 149-150.

¹¹³ See chapter three, at pp. 50-59.

¹¹⁴ Sohn, "Implications of the Law of the Sea Convention regarding the Protection of the Marine Environment", at p. 109.

forced upon dissenters, rather participants aims towards achieving a compromise, balancing the interests of all states.

It is not only through the IMO that states can express an opinion on which standards are “generally accepted”. Further evidence of what amounts to generally accepted international standards can also be found in General Assembly resolutions on the law of the sea. These resolutions regularly deal with maritime safety and the protection of the marine environment, reviewing developments in regulatory activity. A careful reading of these resolutions reveals that the General Assembly calls upon states to comply with certain instruments adopted by the IMO, whether or not they are a party thereto. For instance, in its 2005 resolution, the General Assembly “*calls upon states to effectively implement the International Ship and Port Facility Security Code and related amendments to the International Convention for the Safety of Life at Sea.*”¹¹⁵ This plea was repeated in its 2006 resolution.¹¹⁶ Another paragraph of the 2005 resolution “*urges states to take all necessary measures to ensure the effective implementation of the amendments to the International Convention on Maritime Search and Rescue and to the International Convention for the Safety of Life at Sea relating to the delivery of persons rescued from sea to a place of safety upon their entry into force as well as the associated Guidelines on the Treatment of Rescued Persons at Sea*”¹¹⁷. In 2006, states were similarly required to “*ensure that masters on ships flying their flag take the steps required by relevant instruments to provide assistance to persons in distress at sea*”¹¹⁸. A footnote refers to the SOLAS Convention and the Search and Rescue Convention as the relevant instruments. These resolutions go beyond simple bringing instruments to the attention of states or encouraging states to ratify or accede to international standards.¹¹⁹ They are addressed to all states, urging and encouraging them to ensure effective

¹¹⁵ General Assembly Resolution 60/22, 2005, at para. 53.

¹¹⁶ General Assembly Resolution 61/30, 2006, at para. 60.

¹¹⁷ General Assembly Resolution 60/22, 2005, at para. 59.

¹¹⁸ General Assembly Resolution 61/30, 2006, at para. 70.

¹¹⁹ C.f. General Assembly Resolution 61/30, 2006, which “encourages states that have not done so to become parties to the Protocol of 1997 (Annex VI – Regulations for the Prevention of Air Pollution from Ships) to the International Convention for the Prevention of Pollution from Ships, 1973 as amended by the Protocol of 1978 relating thereto, and furthermore to ratify or accede to the International Convention on the Control of Harmful Anti-Fouling Systems of Ships 2001, as well as the International Convention for the Control and Management of Ships’ Ballast Water and Sediments 2004, thereby facilitating their early entry into force”; at para. 81. See a similar call in relation to the 1996 Protocol to the Convention on the Prevention of Dumping of Wastes and Other Matter 1972 in General Assembly Resolution 60/22, 2005, at para. 63.

implementation of these instruments, whether or not they are a party. It is submitted that these resolutions are further evidence that these instruments are generally accepted for the purposes of the LOS Convention.

This interpretation of “generally accepted” potentially incorporates non-binding instruments which are accepted as customary international law. The inclusion of non-binding instruments in the rules of reference is supported by the ILC commentary on Article 10 of the High Seas Convention which says “*this expression covers regulations which are a product of international cooperation, without necessarily having been confirmed by formal treaties.*”¹²⁰ In order to be captured by the rules of reference, however, there must be an indication that the instrument was intended to have some normative impact or is generally complied with by states. This may be seen from the wording of an instrument, from statements made during its negotiation, or from subsequent practice of states.

5. Enforcement of Generally Accepted Standards

The LOS Convention not only addressed the incorporation of technical standards but also ways in which they should be enforced. It is notable that enforcement is not linked to institutional mechanisms but to action taken by states.

Article 94(4)(a) of the LOS Convention obliges a state to undertake surveys of each ship flying its flag both “*before registration and thereafter at appropriate intervals.*” Almost all of the IMO regulatory treaties require ships to be regularly surveyed and these regulations can be used to interpret the term “*appropriate intervals*” in Article 94(4)(a) of the Convention. In addition, Article 217(3) of the Convention requires that ships carry on board certificates required by and issued pursuant to general international rules and standards. These certificates may be inspected by port states and the Convention specifies that “*these certificates shall be accepted by other States as evidence of the condition of the vessels and shall be regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond*

¹²⁰ International Law Commission, "Commentary to the Articles concerning the law of the sea", at p. 281. It continues, “this applies particularly in the case of signals.” Until 1972, the International Regulations on Signals were contained in a non-binding instrument.

substantially with the particulars of the certificate.”¹²¹ This language is also borrowed from IMO regulatory treaties, such as the SOLAS Convention¹²² and the MARPOL Convention.¹²³ This provision also underlines the requirement in such regulatory treaties that parties shall ensure that no more favourable treatment is given to ships of non-parties.¹²⁴

The obligations created by the rules of reference also fall under the dispute settlement provisions in Part XV of the LOS Convention. Indeed, adjudication may be one way in which the content of generally accepted international standards can be clarified.¹²⁵ To date, no such dispute has arisen and the likelihood of inter-state litigation is relatively low. As one UN report summarises:¹²⁶

...despite a fairly high level of dissatisfaction among some States at the deficiencies in the performance of some other States, there has been no rush to litigation to rectify the problems adumbrated in the various contributions to the present report. ... [T]he most likely reason for the lack of litigation is an extreme reluctance of States to challenge each other in adversarial cases in court, coupled with the high cost of doing so. Thus it appears that the rather remote prospect of litigation is not sufficient to induce recalcitrant flag States to honour their international legal obligations.

In practice, it is much more likely that states will pursue issues of compliance with generally accepted international standards through diplomatic institutions, such as the IMO¹²⁷, other technical organizations, and in some cases the General Assembly. Indeed, in the absence of judicial interpretation of the Convention, taking into account what states say during the discussions and deliberations in international organizations is perhaps the best way in which to determine which international standards are in fact generally accepted.

¹²¹ LOS Convention, Article 217(43).

¹²² SOLAS Convention, Annex, Chapter 1, Regulations 17 and 19.

¹²³ MARPOL Convention, Article 5.

¹²⁴ Eg MARPOL Convention, Article 5(4).

¹²⁵ Vukas, "Generally Accepted International Rules and Standards", at p. 421.

¹²⁶ United Nations Secretary General, *Consultative Group on Flag State Implementation - Report of the Secretary General*, (2004) UN Document A/59/63, at para. 219.

¹²⁷ The Sub-Committee on Flag State Implementation was created in 1992 to assess the implementation of mandatory IMO conventions and to identify the difficulties which flag states face in fully implementing IMO instruments. See also *Resolution on the Self-Assessment of Flag State Performance*, Resolution A.881(21); *Voluntary audit scheme adopted at IMO's 24th Assembly*, IMO Briefing 51/2005, 7 December 2005.

6. Traffic Measures & the International Maritime Organization

The role of the IMO is not confined to adopting technical shipping standards of the type considered in the previous section. In areas beyond national jurisdiction, the IMO has for a long time been involved in adopting and approving certain types of navigational measures. The General Provisions on Ships' Routeing provide that the "*IMO is recognized as the only international body responsible for establishing and recommending measures on an international level concerning ships' routeing.*"¹²⁸ The types of measures which the Organization can approve under this instrument include routeing systems, traffic separation schemes, separation zones, traffic lanes, roundabouts, inshore traffic zones, two-way routes, recommended routes, deep water routes, and areas to be avoided.¹²⁹ Yet, such measures have generally been seen as recommendatory given that ships sailing in international waters have the right to freedom of navigation.¹³⁰

The LOS Convention creates a much more complex regime of maritime jurisdiction where the ability of coastal states to adopt legislative and regulatory measures are delicately balanced against the interests of other members of the international community. In order to maintain this balance, states are obliged to seek the approval of the IMO, as the "competent international organization", before they impose compulsory navigational measures in these maritime zones; what Oxman terms the "*approval role*" of the IMO.¹³¹

The role played by the IMO in this context differs from the drafting of general rules and regulations described above. The power to initiate the process of adopting navigational measures resides solely with the coastal state concerned. The IMO is called on to review the proposals in order to uphold the balance of interests found in the LOS Convention. In doing so, the IMO is also involved in interpreting and applying the Convention in order to decide where the balance should be struck.

¹²⁸ *General Provisions on Ships' Routeing*, IMO Resolution A.572(14), as amended, at para. 3.1.

¹²⁹ *General Provisions on Ships' Routeing*, Resolution A.572(14), as amended, at para. 2.1.

¹³⁰ Plant, "International Traffic Separation Schemes in the new Law of the Sea", (1985) *Marine Policy* at p. 145.

¹³¹ Oxman, "Environmental Protection in Archipelagic Waters and International Straits - the role of the International Maritime Organization", at p. 468. It is the Maritime Safety Committee which fulfils this role; see Resolution A.858(20) on the procedure for the adoption and amendment of traffic separation schemes, routeing measures other than traffic separation schemes including the designation and substitution of archipelagic sea-lanes and ship reporting systems.

One area where the IMO has an approval role is in relation to measures to promote safety of navigation in international straits. The purpose of the regime on international straits found in Part III of the Convention is to limit the interference of coastal states within major maritime traffic routes that would otherwise fall within the territorial sea of the coastal state and thus within their “sovereign” jurisdiction.¹³²

Strait states are under a general duty to co-operate with user states in “*the establishment and maintenance ... of necessary navigational and safety aides and other improvements in aid of international navigation.*”¹³³ The Convention does not specify the framework in which such co-operation should take place and it may be conducted on an *ad hoc* or institutional basis.¹³⁴

The power of strait states to adopt legislative measures is provided in Article 42 subject to specific limitations, as well as a general prohibition that states bordering straits shall not hamper transit passage and that transit passage shall not be suspended.¹³⁵ Article 42(1)(a) provides that “*states bordering straits may adopt laws and regulations relating to transit passage through straits in respect of ... the safety of navigation and the regulation of maritime traffic, as provided in article 41.*” Whilst seeming to be general in scope, the reference to Article 41 would appear to limit the types of safety measures that a strait state can adopt. Sea-lanes and traffic separation schemes are the only two types of measures mentioned in that article.

Navigational measures adopted under Article 41 are also subject to a special adoption procedure. Central to this process is the approval role of the IMO. Article 41(4) requires strait states to submit proposals to designate, prescribe or substitute sea-lanes and traffic separation schemes to the IMO “*with a view to adoption*”. The IMO is prevented from adopting any measures without the agreement of the strait state. At the same time, that state may only designate, prescribe or substitute the applicable measures once it has been “adopted” at the international level. Thus, it

¹³² See Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea", (1980) 74 *American Journal of International Law* 77.

¹³³ LOS Convention, Article 43.

¹³⁴ See 2006 Law of the Sea Report of the UN Secretary General, UN Document A/61/63, at paras. 69-71.

¹³⁵ LOS Convention, Articles 41(2) and 44. In addition, the competence of the strait state to regulate pollution from ships is limited to “giving effect to applicable international rules and regulations regarding the discharge of oil, oily waste and other noxious substances in the strait”; Article 42(1)(b); see Rosenne and Nandan, eds., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, 5 vols., vol. 2 (Martinus Nijhoff Publishers, 1993) at pp. 375-376.

appears that IMO Members and the strait state must negotiate a mutually acceptable solution.¹³⁶ Adoption by the IMO would appear to be a prerequisite to the validity of traffic measures applied to international straits. Article 41(7) provides that “*ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article*”. The Virginia Commentary concludes that “*by implication, there is no obligation under this Convention to respect sea lanes or traffic separation schemes unless they have been established in accordance with the conditions [in Article 41].*”¹³⁷

In light of these considerations, the IMO acts as an important forum in which the interests of all states, the strait state and user states, can be taken into account and balanced in deciding whether to adopt proposed traffic measures. The role of the IMO is to scrutinise measures formulated by the strait state in order to decide whether such measures are “necessary” to promote safety of navigation. It must also ensure that the proposal complies with “generally accepted international regulations”.¹³⁸ In this context, the General Provisions on Ships’ Routeing may be relevant.¹³⁹ The General Provisions serve to clarify the role of the IMO in the decision-making process and what factors should be taken into account when determining whether a particular traffic measure is necessary.¹⁴⁰ However, these factors are not exhaustive and the IMO may take into account other considerations on a case-by-case basis. The Organization may often adopt a pragmatic approach, seeking to achieve a compromise between the strait state and other interested actors.

The IMO also plays an approval role in relation to sea-lanes through archipelagic waters. The concept of archipelagic waters and archipelagic sea-lanes was introduced by Part IV of the LOS Convention which seeks to reconcile the political and security interests of archipelagic states with the interests of maritime and shipping states.¹⁴¹ The Convention provides that archipelagic states can exercise

¹³⁶ See Rosenne and Nandan, eds., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, at p. 363. Where the strait passes through the territorial sea of two or more states, those states must cooperate in formulating proposals before submitting them to the IMO for consideration; LOS Convention, Article 41(5).

¹³⁷ *Ibid.*, at p. 365.

¹³⁸ LOS Convention, Article 41(3).

¹³⁹ *General Provisions on Ships’ Routeing as amended*, Resolution A.572(14).

¹⁴⁰ See *General Provisions on Ships’ Routeing as amended*, Resolution A.572(14), paras. 3.2 and 3.3.

¹⁴¹ In general, see Munavvar, *Ocean States - Archipelagic Regimes in the Law of the Sea* (Martinus Nijhoff Publishers, 1995); Office for Ocean Affairs and the Law of the Sea, *Archipelagic States -*

sovereignty over waters enclosed by archipelagic baselines¹⁴² but that this sovereignty is subject to the right of vessels to continuous, expeditious and unobstructed transit passage through archipelagic sea-lanes between one part of the high seas or EEZ and another part of the high seas or EEZ.¹⁴³ In order to ensure that this balance of interests is maintained, the Convention provides for international scrutiny and the approval of archipelagic sea-lane proposals by the IMO. Under Article 53 of the LOS Convention, the archipelagic state is under an obligation to refer any proposals for an archipelagic sea-lane to the IMO “*with a view to their adoption.*”¹⁴⁴ Again, the IMO is acting as a forum in which competing interests can be reconciled. Thus, the procedure foresees a dialogue between the archipelagic state and other IMO members; neither side has the power to impose a measure without the consent of the other and mutual accommodation is necessary.¹⁴⁵

The conditions in the Convention for prescribing archipelagic sea-lanes are set out in some detail. Article 53(4) provides that “*sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight.*” Indeed, failure to prescribe sea-lanes or air routes will not affect the rights of shipping to pass through archipelagic waters. Article 53 provides that “*if an archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.*”

The application of these provisions may be problematic as there is no indication in the Convention of what is considered to be “*routes normally used for international navigation.*” This issue is one that is left for determination in the process of deciding individual proposals for archipelagic sea-lanes in the IMO.

Any proposals for archipelagic sea-lanes must comply with generally accepted international regulations.¹⁴⁶ As the concept of archipelagic sea-lanes was an innovation, the IMO has developed a new set of regulations on this topic. The General Provisions on the Adoption, Designation and Substitution of Archipelagic

Legislative History of Part IV of the United Nations Convention on the Law of the Sea (United Nations, 1990).

¹⁴² LOS Convention, Article 49.

¹⁴³ LOS Convention, Article 53(3).

¹⁴⁴ LOS Convention, Article 53(9).

¹⁴⁵ See Munavvar, *Ocean States - Archipelagic Regimes in the Law of the Sea* at p. 169.

¹⁴⁶ LOS Convention, Article 53(8).

Sea-lanes were first adopted by the Maritime Safety Committee in May 1998.¹⁴⁷ These provisions purport to clarify how proposals for archipelagic sea-lanes shall be dealt with by the Organization. In this sense, they complement the provisions found in the Convention itself. They specify the procedure for the adoption of proposals and the criteria to be taken into account in the designation process. As the LOS Convention only devotes twelve short paragraphs to the subject of archipelagic sea-lanes, it was to be anticipated that the IMO would be faced with filling in certain gaps. Therefore, the General Provisions on Archipelagic Sea-lanes can be considered as an interpretation of the LOS Convention.

Yet, some commentators have argued that the General Provisions on Archipelagic Sea-lanes go further and modify the balance of rights and interests in the archipelagic waters regime. In particular, Johnson suggests that the requirement for archipelagic states to consult and to take into account the opinions of other states "*seem to lessen the practical effect of any pre-existing power of veto held by the archipelagic states*" and "*in this way, the General Provisions reinforce the ascendancy of user interests in the archipelagic sea-lanes passage regime.*"¹⁴⁸ It is true that the General Provisions on Archipelagic Sea-lanes add a number of procedural obligations that do not appear in Article 53 of the LOS Convention. As well as requiring a state proposing a particular archipelagic sea-lane to consult at an early stage with other user governments and the IMO¹⁴⁹, the proposing government must also explain the suitability of its proposed sea-lane for the continuous and expeditious of foreign ships and aircraft¹⁵⁰, including reference charts and other supporting data.¹⁵¹ Furthermore, if it is submitting a partial archipelagic sea-lanes proposal, the state must also provide periodic reports to the IMO of its plans for conducting further surveys and studies towards the proposal of additional archipelagic sea-lanes.¹⁵² Yet, there is no direct conflict between the General Provisions on Archipelagic Sea-lanes and the LOS Convention and it is clear that they were

¹⁴⁷ IMO Resolution MSC.71(69) as amended by Resolution MSC.165(78).

¹⁴⁸ Johnson, "A Rite of Passage: The I.M.O. Consideration of the Indonesian Archipelagic Sea-Lanes Submission", (2000) 15 *International Journal of Marine and Coastal Law* at p. 324.

¹⁴⁹ General Provisions, at para. 3.6. For similar arguments on the concept of partial designation, see J. L. Batongbacol, "Barely Skimming the Surface: Archipelagic Sea Lanes Navigation and the IMO", in *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, ed. Oude Elferink and Rothwell (Koninklijke Brill NV, 2004) at p. 56.

¹⁵⁰ General Provisions, at para. 3.8.

¹⁵¹ General Provisions, at para. 3.10.

¹⁵² General Provisions, at para. 3.12.

intended to be complementary, as the General Provisions specify that “*archipelagic sea-lane proposals shall conform with the relevant provisions of the [LOS Convention] including Article 53, and the requirements of this Part.*”¹⁵³ As the General Provisions on Archipelagic Sea-lanes do no more than promote maximum possible co-operation between the archipelagic state and other states at all stages of the process, it is difficult to accept the argument that they are contrary to the LOS Convention.

Another objection to the General Provisions on Archipelagic Sea-lanes is how they deal with the concept of a “partial archipelagic sea-lanes proposal”. This term derives from the General Provisions which define a partial archipelagic sea lanes proposal as one “*which does not meet the requirement to include all normal passage routes and navigational channels as required by [the LOS Convention].*”¹⁵⁴ It further provides that the IMO will retain “*continuing jurisdiction*” over the process of adopting archipelagic sea-lanes until the requirements of the LOS Convention are met.¹⁵⁵ Batongbacal argues that “*the concept of a partial proposal or designation was not envisaged in the LOS Convention*” and it has the effect of undermining the provisions on archipelagic sea-lanes.¹⁵⁶ He concludes that the concept converts much of Article 53 into “*excessive verbiage*” as “*if a complete [archipelagic sea-lanes] designation must at all times include “all routes”, then there is no situation in which substitution can be called for, nor is there any opportunity to eliminate redundant routes.*”¹⁵⁷ Yet, the view that the concept has no foundation in the Convention is difficult to accept. Arguably, it is no more than a procedural device which aims to satisfy the condition in Article 53(4) that archipelagic sea-lanes must include all normal passage routes used as routes for international navigation or overflight.

The definition of normal passage routes is vital to the process of designation. However, the General Provisions simply reproduce the text of the LOS Convention without further clarification. In practice, the Organization has opted to deal with this question on a case-by-case basis through negotiations at the Maritime Safety

¹⁵³ General Provisions, at para. 4.1..

¹⁵⁴ General Provisions, at para. 2.2.2.

¹⁵⁵ IMO Resolution MSC.71(69), at para. 3.5.

¹⁵⁶ Batongbacal, “Barely Skimming the Surface: Archipelagic Sea Lanes Navigation and the IMO”, at pp. 55-56.

¹⁵⁷ *Ibid.*, at p. 56.

Committee.¹⁵⁸ Through discussing specific proposals for archipelagic sea-lanes, states may be able to reach compromises on an acceptable solution.

Article 53 also permits archipelagic states to promulgate traffic separation schemes “*for the safe passage of ships through narrow channels in such sea lanes.*”¹⁵⁹ Again, such measures must be submitted to the IMO for approval and its role in this regard resembles the approval of traffic measures in international straits.¹⁶⁰

A final area where the IMO has powers of approval under the LOS Convention is for certain areas of the EEZ.¹⁶¹ It has been suggested that in terms of navigation, the EEZ is analogous to the high seas and therefore it is not normally appropriate to apply mandatory navigational measures.¹⁶² Indeed, there is no general provision in the LOS Convention which allows coastal states to adopt mandatory navigational measures in the EEZ. An exception is found in Article 211(6) of the LOS Convention which says that a state may propose special mandatory measures to protect a particular, clearly defined area of its EEZ from pollution from ships if generally accepted international standards are inadequate to meet special circumstances of a technical nature. It would appear that two categories of measures are anticipated under Article 211(6).

Paragraph (a) allows coastal states to adopt “*laws and regulations for the prevention, reduction, and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organization, for special areas.*” The reference to special areas brings to mind the concept of special areas in Annexes I, II and V of the MARPOL Convention. A special area in that context is defined as “*a sea area where for recognized technical reasons in relation to its oceanographical and ecological condition and to the particular character of its traffic the adoption of special mandatory measures ... is required.*”¹⁶³ In his analysis of Article 211(6), Timagenis

¹⁵⁸ Batongbol also brings attention to the important role played by informal negotiations between interested actors outside of the formal IMO framework; *Ibid.*, at p. 54. Indeed, he argues that the IMO is not the appropriate forum to resolve conflicts over the designation of archipelagic sea-lanes as its competence is limited to commercial vessels, whereas the key issues in this context are concerned with state and military vessels; at p. 66.

¹⁵⁹ LOS Convention, Article 53(6).

¹⁶⁰ LOS Convention, Article 53(9).

¹⁶¹ LOS Convention, Article 211(6).

¹⁶² Plant, "International Traffic Separation Schemes in the new Law of the Sea", at pp. 145-146.

¹⁶³ MARPOL Convention, Annex I, Regulation 1(10). Provisions on special areas are also found in Annexes II and V.

says that “*special area was mainly understood during the negotiations to refer to the special areas established by the [MARPOL] Convention. The language used, however, (through the Organization) clearly suggests that other special areas may be included.*”¹⁶⁴ In support of this conclusion, a leading commentary on the Convention suggests that, whilst they share similar characteristics, the two concepts “*must not be confused.*”¹⁶⁵ However, the similarities are striking and further supported by the fact that the coastal state must provide information on the “necessary reception facilities”, a requirement of the special areas under the MARPOL Convention.

Whether or not paragraph (a) is linked to special areas under the MARPOL Convention, it is clear that coastal state may adopt “*additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels*” under paragraph (c) of Article 211(6). These additional laws and regulations are not required to implement international rules and standards and they can be unilaterally proposed by the coastal state. The provision is not very precise as to what types of measures the coastal state may adopt, simply saying that they may include “*laws relating to discharges or navigational practices.*”¹⁶⁶ The types of measures that could be proposed under this provision are therefore potentially quite wide. The one restriction is that any measures adopted may not “*require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards.*”¹⁶⁷ Nevertheless, the implications for freedom of navigation in the EEZ are potentially significant.

In order to prevent the imposition of unilateral impediments to freedom of navigation, Article 211(6) requires the coastal state to consult other interested states through the competent international organization and to submit scientific and technical evidence and other materials in support of its proposals. The proposal should specify a clearly defined area which has extraordinary oceanographical and ecological conditions. The exceptional nature of the provision is stressed by the fact that technical and scientific evidence must be submitted by the coastal state in support of the proposal. Under the procedure, the competent organization has twelve months

¹⁶⁴ He calls for the concept of special areas to be further clarified; Timagenis, *International Control of Marine Pollution* at pp. 612-613 in footnote 73.

¹⁶⁵ Rosenne and Yankov, eds., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, at p. 181.

¹⁶⁶ LOS Convention, Article 211(6)(c).

¹⁶⁷ *Ibid.*.

to consider the proposal and if it agrees that the conditions are met, the coastal state may adopt the proposed laws and regulations.¹⁶⁸ Again, the role of the IMO is to ensure that the interests of coastal states and shipping states are balanced so that protective measures do not unduly infringe on freedom of navigation in this zone.

Article 211(6) has been linked to the concept of Particularly Sensitive Sea Areas¹⁶⁹ as developed by the IMO, although it is clear that these two concepts are distinct.¹⁷⁰

None of these procedures where the IMO is given a role in approving additional coastal state measures specify exactly what is meant by approval. Is a simple majority or a higher level of approval required? If a state has voted against a measure, is it bound to comply? It is submitted that an interpretation that assumes that measures can be approved by a majority does not reflect the underlying motivations of states involved in the process. It is only through consensus decision-making that all interests can be satisfactorily balanced. It is this type of decision-making which is reflected in the practice of the Organization.

7. The International Maritime Organization as a forum for change?

The regime of maritime zones created by the LOS Convention seeks to balance the interests of coastal states and maritime states. The Convention calls for ongoing co-operation and compromise through established organizations in the implementation of its jurisdictional regime. It has been seen how international organizations, and in particular the IMO, play a crucial role in helping to maintain this delicate balance.

Whilst the LOS Convention provides some flexibility, is the regime as set out in this instrument fixed? Are the circumstances in which the IMO can authorise the

¹⁶⁸ For further comment, see Rosenne and Yankov, eds., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, at p. 205.

¹⁶⁹ Hereinafter, referred to as "PSSA".

¹⁷⁰ Most commentators assert the differences. See e.g. De La Fayette, "The Marine Environment Protection Committee", at p. 190. Associated protective measures under Article 211(6) can be proposed in connection with a PSSA; see below, at p. 150 ff..

application of mandatory measures limited to those that are authorized in the LOS Convention?

Claims for stronger regulation often go hand-in-hand with calls for increased jurisdiction over prescribing and enforcing standards. As a consequence, the IMO can become a forum where the boundaries of the jurisdictional regime are discussed, clarified and developed.

The PSSA is one concept that raises the extent of coastal state prescriptive and enforcement jurisdiction. A PSSA is defined as “*an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities.*”¹⁷¹ Although sharing the goals of Special Areas under MARPOL and provisions adopted in accordance with Article 211(6) of the LOS Convention, the concept of the PSSA is inspired by a wider conception of marine protected areas and it is distinct from these two types of measures.¹⁷²

In fact, the creation of a PSSA involves two distinct but related processes. Designation of an area as a PSSA does not in itself involve any restrictions on shipping in the area. An application for PSSA must satisfy at least one of the criteria identified in the Guidelines¹⁷³ as well showing that the area is at risk from international shipping.¹⁷⁴ The purpose of designation is more rhetorical, raising the profile of the environmental sensitivity of the area, heightening the awareness of mariners, and informing and educating policy-makers.¹⁷⁵

¹⁷¹ *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, IMO Resolution A.982(24) at Annex, para 1.2. Hereinafter, “the Revised Guidelines”.

¹⁷² See De La Fayette, who concludes that “a PSSA may be considered as a special type of MPA devised to protect sensitive areas from international shipping activities”; “The Marine Environment Protection Committee”, at pp. 190-191. She suggests that “PSSAs are not created pursuant to any specific treaty. However, they may be regarded as fulfilling general obligations in the LOS Convention and in a number of treaties designed to protect the marine environment and/or biodiversity”, in particular Article 194(5) of the LOS Convention; at p. 186.

¹⁷³ These include ecological criteria, social, cultural and economic criteria, and scientific and educational criteria. Thus, the PPSA is much wider in scope than simply protecting the marine environment, although the Guidelines note that “the criteria for the designation of PSSAs and the criteria for the designation of Special Areas are not mutually exclusive”; Revised Guidelines, at para. 4.5.

¹⁷⁴ Revised Guidelines, at para. 5.1.

¹⁷⁵ See Report of the Third International Meeting of Legal Experts on Particularly Sensitive Sea Areas; (1994) *International Journal of Marine and Coastal Law*, at p. 461. This conclusion is supported by

In addition, all applications for a PSSA must be accompanied by proposals for so-called “*associated protective measures*”. The Guidelines on the Identification and Designation of PSSAs indicate that associated protective measures may include ships’ routing measures, reporting requirements, discharge restrictions, operational criteria, and prohibited activities.¹⁷⁶ This list is purely indicative and other measures may be proposed. The PSSA procedure specifies a number of factors which should be taken into account including the appropriateness of a measure to address the vulnerability of the area and the characteristics and the size of the proposed area.¹⁷⁷ According to the Guidelines, the “*IMO should provide a forum for the review and re-evaluation of any associated protective measures adopted, as necessary, taking into account any pertinent comments, reports, and observations ... Member Governments which have ships operating in the area of the designated PSSA are encouraged to bring any concerns with the associated protective measures to the IMO so that any necessary adjustments may be made.*”¹⁷⁸ This provision implies that consent for a measure may be withdrawn or amended in the future if concerns are raised by affected states. In all cases, associated protective measures must have an identified legal basis.¹⁷⁹ The Guidelines specify that a measure may find its legal basis in an IMO regulatory treaty or under Article 211(6) of the LOS Convention.¹⁸⁰ Thus, it would appear that the concept of the PSSA does not provide any additional legal authority for the adoption of measures that are not already available under other instruments. This conclusion would appear to be confirmed by the preamble to the Guidelines which say that the Guidelines should be “*implemented in accordance with international law.*”¹⁸¹

The procedures for the designation of PSSAs are important means for ensuring that all interests are taken into account in deciding whether or not such action should be taken. The Guidelines themselves specify that their aim is to “*ensure that ... all interests – those of the coastal state, flag state, and the environmental and shipping communities – are thoroughly considered...*”¹⁸²

the fact that designation can be sought for an area which already has protective measures applied to it; see para. 7.2.

¹⁷⁶ Revised Guidelines, at para. 7.5.4. See also paras. 6.1-6.2.

¹⁷⁷ Revised Guidelines, at para. 8.2.

¹⁷⁸ Revised Guidelines, at para. 8.4..

¹⁷⁹ Revised Guidelines, at para. 7.5.2.3.

¹⁸⁰ Revised Guidelines, at para. 7.5.3.

¹⁸¹ Revised Guidelines, at preamble. See also para. 9.2.

¹⁸² Revised Guidelines, at para. 1.4.2.

The two distinct processes involved in designating a PPSA and associated protective measures are highlighted by paragraph 7.10 which require the proposing state to “*submit a separate proposal to the appropriate sub-committee to obtain approval of any new associated protective measure.*”¹⁸³ However, the two processes are inter-connected as a PSSA will only be designated “in principle” until the associated protective measures have been approved.¹⁸⁴ On this view, the PSSA provides “*a managerial framework from which to develop appropriate protective measures related to both shipping and non-shipping activities that can be taken at either the national or the international level.*”¹⁸⁵

The first two areas which were designated as PSSAs did not challenge this view of the concept. Since the Guidelines were revised in 2001, many more applications have been submitted. Calls for increased powers for coastal states in areas of environmental sensitivity have led to allegations that the concept of the PSSA is being used to undermine the jurisdictional framework in the LOS Convention. Subsequent discussions over which areas should be designated as PSSAs and what measures should be applied therein have raised heated discussions over the legality of extending compulsory navigational measures beyond the territorial sea. Two case studies will be considered in order to assess these arguments.

The first case study is the proposal for compulsory pilotage in the Torres Strait by Australia and Papua New Guinea. These states made this proposal as part of their application to extend the pre-existing Great Barrier Reef PSSA to include the Torres Strait.¹⁸⁶ In order to protect the vulnerable marine ecosystem in the strait, these two countries proposed a recommended two-way shipping route through the strait and the extension of the compulsory pilotage system that operated in the existing PSSA, replacing the system of recommended pilotage that already had previously been adopted for the strait.¹⁸⁷ As the area proposed for designation fell within an

¹⁸³ Revised Guidelines, at para. 7.10.

¹⁸⁴ See Revised Guidelines, at para. 8.3.4.

¹⁸⁵ Gjerde and Freestone, "Introduction to Special Issue on Particularly Sensitive Sea Areas", (1994) 9 *International Journal of Marine and Coastal Law* at p. 435.

¹⁸⁶ See IMO Document MEPC 49/8.

¹⁸⁷ Under IMO Resolution A.710(17); see IMO Document LEG 89/15, at paras. 4-6. According to the proposal, compliance with the recommended pilotage scheme had fallen from 70% to 32% for eastbound voyages, and from 55% to 38.5% for westbound voyages; *ibid.* at para. 6.

international strait, the associated protective measures were to be addressed in the context of Part III of the Convention.¹⁸⁸

The first proposed measure was uncontroversial as it fell squarely within the ambit of Article 41 which allows strait states to apply sea-lanes and traffic separation schemes in international straits with the approval of the IMO. However, compulsory pilotage does not feature in Article 41 and the legal basis for such a measure was questioned by several states.¹⁸⁹ Australia and Papua New Guinea argued that the LOS Convention did not prohibit the establishment of compulsory pilotage schemes in such areas.¹⁹⁰ Opponents, on the other hand, said that the right of unimpeded transit passage was one of the most critical freedoms in the LOS Convention and they feared that failure to comply with the scheme may lead to the strait states imposing sanctions on transiting vessels.¹⁹¹ Others thought that the introduction of compulsory pilotage *per se* was an impediment of the right to transit passage and therefore incompatible with the LOS Convention.¹⁹²

Given the polarisation of views, the IMO Legal Committee was unable to reach a conclusion on the legality of compulsory pilotage in straits used for international navigation.¹⁹³ Yet, when the Marine Environment Protection Committee and the Maritime Safety Committee came to consider the application, they were able to agree on language that left the precise legal implications of the measures ambiguous. The Marine Environment Protection Committee agreed to extend the existing system of pilotage within the Great Barrier Reef to the Torres Strait without specifying that it is compulsory.¹⁹⁴ At the same time, the United States and others stressed that they only supported the measure if it was interpreted as a recommendation.¹⁹⁵ The correct interpretation of this resolution is controversial.¹⁹⁶ What is clear is that the current resolution does not provide a satisfactory solution for

¹⁸⁸ IMO Document LEG 89/15, at para. 9.

¹⁸⁹ See IMO Document LEG/ 89/16, at para. 224.

¹⁹⁰ See IMO Document LEG/89/15, in particular at paras. 11 and 23.

¹⁹¹ See IMO Document LEG 89/16, at para. 232.

¹⁹² *Ibid.*, at para. 233.

¹⁹³ *Ibid.*, at para. 241.

¹⁹⁴ As Roberts notes, “no where (sic) in the relevant IMO resolution does it explicitly refer to compulsory pilotage”; Roberts, “Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal”, (2006) 37 *Ocean and Coastal Management* at pp. 101-102.

¹⁹⁵ See IMO Document MEPC 53/24, at para. 8.6.

¹⁹⁶ See Roberts, “Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal”, at p. 97.

shipping interests who need a degree of certainty over whether or not the measures are mandatory.

Although Article 41 makes no mention of compulsory pilotage, it is not completely clear that such measures are not authorised thereunder. It may be argued that pilotage is sufficiently similar to the measures which are anticipated in Article 41 that they are impliedly allowed under the Convention. Even if this interpretative approach is not accepted, it would be difficult to object to a compulsory pilotage scheme if it had been adopted by consensus at the IMO. The IMO includes all interested states and its competence over navigational measures is recognised by the LOS Convention itself. It is submitted that a consensus decision could possibly modify the jurisdictional framework in the Convention. Precedents for such an approach have been discussed in the context of the Meetings of the States Parties.¹⁹⁷ It follows that the only safe way for a strait state to enforce such measures is with the consensus backing of the international community. In the current scenario, consensus is lacking and the precise status of those measures applied in the Torres Strait is left in limbo. As Roberts concludes, “*any attempt by Australia to take enforcement action against, or refuse entry to, any ships that fails (sic.) to carry a pilot may well result in a legal challenge by the flag state of that vessel.*”¹⁹⁸

Similar tensions can be seen in the proposal for a ship reporting system in the Western European Waters PSSA. “Ship reporting” refers to a system which requires a ship to report its name, position and related information to the coastal state when it enters a certain jurisdictional zone. Again, ship reporting is not expressly envisaged by the LOS Convention. The concept was first developed by Chapter V of the SOLAS Convention.¹⁹⁹ Under these provisions, states wishing to develop ship reporting systems, whether mandatory or not, are required to take into account the guidelines of and criteria developed by the Organization.²⁰⁰ However, it is not clear from the regulation to which maritime zone states can apply mandatory ship reporting systems, nor whether states are required to submit such proposals to the IMO for approval or not. In the opinion of one study, ship reporting systems and vessel traffic

¹⁹⁷ See chapter four, at p. 80 ff.

¹⁹⁸ *Ibid.*, at pp. 106-107. Roberts continues “this may well be the only way to resolve the divergent views over the legal basis of compulsory pilotage measures in a strait used for international navigation”.

¹⁹⁹ SOLAS Convention, Chapter V, Regulation 11(1).

²⁰⁰ SOLAS Convention, Chapter V, Regulation 11(3).

services are “at present both tied in principle to the territorial sea concept, even though nothing seems to prevent [SRS] from sometimes extending beyond.”²⁰¹ Yet, as Plant notes, “it is ... difficult to envisage any IMO authorization of ... [ships’ reporting systems] extending beyond territorial waters that would not involve some effect upon the navigation/environmental protection balance in those waters affected in the Convention.”²⁰² Such measures could possibly fall under Article 211(6)(c) if they are authorized by the IMO if the conditions therein are satisfied.

In the case of the Western European Waters PSSA, the applicant states proposed *inter alia* an obligation for certain tankers to report to the coastal state authorities at least 48 hours before entering the PSSA.²⁰³ Whether or not the application was based on Regulation V/11 or on Article 211(6) of the LOS Convention is unclear. In any case, it was opposed by several states as the size of the proposed PSSA covered a large proportion of the territorial seas and the EEZs of the proposing states, including several major shipping routes. In presenting their objections, Russia, Panama and Liberia, supported by private shipping interests, stressed that “if such a large and diverse area of the ocean is designated a PSSA and associated measures restricting navigation are applicable to foreign vessels in the region, there is a danger of the exception becoming the norm and the fundamental principles of [the LOS Convention] being undermined.”²⁰⁴ In the opinion of these states, the designation of the Western European Waters PSSA and its associated protective measures did not adequately balance ecological interests with the interests of commercial navigation.²⁰⁵ Another concern of these states was that the measure would be used to detain vessels which had not complied with the reporting obligation. They argued in the IMO Legal Committee that “if the intention of the proposed reporting obligation is to refuse certain ships that are in compliance with international rules and standards from entering or navigating in the PSSA, then that would be in contravention of the fundamental provisions of [the LOS

²⁰¹ See International Law Association, *Report of the Committee on Coastal State Jurisdiction relating to Marine Pollution*, at p. 452.

²⁰² Plant, “The Relationship Between International Navigation Rights and Environmental Protection”, in *Competing Norms in the Law of Marine Environmental Protection*, ed. Ringbom (Kluwer Law International, 1997) at p. 26.

²⁰³ See IMO Document MEPC 49/22, at para. 8.12.5.

²⁰⁴ *Designation of a Western European Particularly Sensitive Sea Area*, IMO Document LEG 87/16/1, 15 September 2003, at para. 10.

²⁰⁵ IMO Document LEG 87/16/1, at para. 11.

Convention].”²⁰⁶ The fundamental provision that is indicated is probably the right of freedom of navigation found, *inter alia*, in Article 58 of the LOS Convention. In its submission, DOALOS agreed that any attempt to arrest a vessel for failing to comply with a ships’ reporting system in the EEZ would be incompatible with the LOS Convention, but that it did not agree that this was the intention of the proposal.²⁰⁷ In the course of the discussion, the applicant states made an undertaking that the reporting requirement would not be used to prohibit entry into the PSSA.²⁰⁸ The final resolution approving the ships’ reporting system is ambiguous as to precisely what enforcement action a coastal state may take, providing that “*all means will be used to obtain the full participation of ships required to submit reports [and] if reports are not submitted ... information will be passed on to the relevant flag state authorities for investigation and possible prosecution.*”²⁰⁹

From the perspective of legislative jurisdiction, the DOALAS paper suggested that by adopting Regulation V/11 of the SOLAS Convention, states had implicitly agreed that a reporting obligation *simpliciter* does not offend the principle of freedom of navigation.²¹⁰ This interpretation assumes that Regulation V/11 allows mandatory ship reporting systems to be applied to the EEZ which, as it was suggested above, is unclear from the text alone. Yet, it seems that by adopting the ship reporting scheme for Western European Waters, IMO members have indeed implicitly accepted that Regulation V/11 can be applied to the EEZ and that such an extension of coastal state prescriptive jurisdiction is acceptable in these circumstances.

The debate over these proposals illustrates that although the IMO is a technical forum, legal perplexities that go to the heart of the jurisdictional regime can be raised. It should be remembered that the IMO Legal Committee was first created to deal with difficult legal issues that arose following the sinking of the *Torrey Canyon* off the coast of the United Kingdom in March 1967.²¹¹ The adoption of the 1969

²⁰⁶ IMO Document LEG 87/16/1, at para. 12.

²⁰⁷ For support of this view, see *Comments made by the Division for Ocean Affairs and the Law of the Sea of the United Nations (DOALOS) in connection with issues raised in document LEG 87/16/1*, IMO Document LEG 87/WP.3, at p. 2.

²⁰⁸ See IMO Document LEG 87/17, at para. 200.

²⁰⁹ IMO Resolution MSC.190(79), at para. 9.

²¹⁰ IMO Document LEG 87/WP.3, at p. 2.

²¹¹ See Balkin, "The Establishment and Work of the IMO Legal Committee", in *Current Maritime Issues and the International Maritime Organization*, ed. Nordquist and Moore (Martinus Nijhoff Publishers, 199) at pp. 291 – 308.

Intervention Convention provides an early precedent of the IMO tackling questions of maritime jurisdiction.²¹²

It has been seen how the IMO is used as a forum in which to clarify the balance between the interests of coastal states and maritime states on a case-by-case basis. Many of the legal issues raised by applications for PSSA status concern the authority to adopt associated protective measures rather than the actual legal basis for the PSSA itself. The revised Guidelines adopted in December 2005 clarify that proposed associated protective measures should have a secure legal basis.²¹³ This change places the burden firmly on the proposing state to demonstrate that such measures are available, at the same time as confirming that compulsory measures cannot be taken by the coastal state without the explicit approval of the IMO. In this context, the ability of the IMO to forge consensus will be of continuing importance in defining the precise scope of the jurisdictional framework for the law of the sea. Ultimately, where there is truly a desire for change to the jurisdictional framework, it is through such discussions in the IMO and similar technical institutions that a consensus will be forthcoming.

This approach has advantages over invoking the formal amendment procedures in the LOS Convention. Firstly, the IMO possesses an expertise and experience in maritime and navigational issues that the Meeting of the States Parties does not have. Secondly, the formal amendment procedures risk fragmentation of the legal framework, whereas the use of consensus decisions in the IMO promotes unity and certainty in the law of the sea. Finally, the use of consensus decision allows changes to be made quickly, without the need to wait for an instrument to come into force. Therefore, the IMO has the ability to play a significant role in clarifying and developing the legal order of the oceans.

8. Regulation of the International Seabed Area

Although the presence of minerals on the deep seabed was first discovered in 1873, it was not until the second-half of the twentieth century that their exploitation

²¹² See Blanco-Bazan, "IMO Interface with the Law of the Sea Convention", at p. 270.

²¹³ See the Revised Guidelines, in particular, paras. 6.1.3 and 7.5.2.3.

became technologically feasible.²¹⁴ The regulation of deep seabed mining was a topic that was addressed for the first time by delegates gathering at UNCLOS III. The aim of the Conference was to agree “*an equitable international regime – including an international machinery – for the area and the resources of the seabed and the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction.*”²¹⁵ It was also to take into account the Declaration of Principles governing the Seabed and the Ocean Floor adopted by the General Assembly in 1970. The 1970 Declaration established that the International Seabed Area was the common heritage of mankind and “*shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.*”²¹⁶ Moreover, any activity in the Area “*shall be carried out for the benefit of mankind as a whole.*”²¹⁷ Putting these revolutionary principles into practice required the creation of innovative forms of international co-operation and governance. It was generally accepted that a new international organization was necessary for this purpose, although the precise form and powers of any institutional mechanisms were the subject of intense debate and disagreement.

As with other areas, it was not intended that the LOS Convention should include a comprehensive legal code covering all aspects of regulation. The proposed regime would permit the progressive adoption and amendment of standards for seabed mining, allowing a flexible approach. However, there was disagreement over the extent of the discretion to be wielded by any institutions created for this purpose. Industrialised countries were adamant that the decision-making procedure of the proposed institution “*fairly reflects and effectively protects the political and economic interests and financial contributions of participating states.*”²¹⁸ This was one of the issues that caused the failure to achieve consensus at UNCLOS III.²¹⁹ A compromise was eventually reached through extended negotiations leading to the adoption of the Part XI Agreement in 1994.²²⁰

²¹⁴ For an introduction, see Churchill and Lowe, *The Law of the Sea* at pp. 223-224.

²¹⁵ General Assembly Resolution 2750C (XXV), 1970, at para. 2.

²¹⁶ General Assembly Resolution 2749 (XXV), 1970, at para. 2.

²¹⁷ General Assembly Resolution 2749 (XXV), 1970, at para. 7.

²¹⁸ United States, Department of State, “Law of the Sea”, Current Policy No. 371, January-February 1982, cited by Larson, “The Reagan Rejection of the U.N. Convention”, (1985) 14 *Ocean Development and International Law* at footnote 13.

²¹⁹ See chapter two, at p. 35.

²²⁰ See chapter four, at p. 97 ff.

The constituent instrument of the so-called International Seabed Authority²²¹ is found in Part XI of the LOS Convention, as modified by the Part XI Agreement. The Authority came into existence on 16 November 1994, the same day that the LOS Convention entered into force. It is this organization which is responsible for standard setting in relation to deep seabed mining and to ensure that such activities are carried out in accordance with the principle of the common heritage of mankind. The Authority is an autonomous international organization with its own secretariat and separate legal personality.²²² It has its headquarters in Jamaica where its organs meet to conduct the business of regulating deep seabed mining. States Parties to the LOS Convention are *ipso facto* Members of the Authority.²²³

According to the LOS Convention, the primary function of the Authority is organising, carrying out and controlling activities in the Area.²²⁴ This role includes both setting the detailed standards that should be complied with by deep seabed mining companies, as well as supervising the implementation of these standards and the general provisions of Part XI.²²⁵

The Authority has a power to adopt a variety of rules, regulations and procedures related to the administration of the Area in order to fill in any gaps in the legal framework. The range of rules that the Authority can develop is relatively wide, covering the financial management and internal administration of the organization, as well as the technical conditions for prospecting, exploration, and exploitation of polymetallic nodules and other deep sea mineral resources.²²⁶ Specific mention is made of regulations relating to the prevention and control of pollution, the protection and conservation of natural resources in the Area²²⁷, the protection of human life²²⁸,

²²¹ Hereinafter, referred to as “the Authority”.

²²² LOS Convention, Articles 156 and 176,

²²³ Initial membership of the Authority was wider given that states which had signed the Part XI Agreement or who had consented to its adoption in the General Assembly were eligible for provisional membership of the Authority; see Part XI Agreement, Article 7 and Annex, section 1, para. 12. It is on this basis that the United States was a member of the first Council, the first Finance Committee, and the first Legal and Technical Commission. All provisional membership expired on 16 November 1998.

²²⁴ LOS Convention, Article 153. The Area is defined as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”; LOS Convention, Article 1(1)(1).

²²⁵ The Convention also sees a role for the Authority in carrying out deep seabed mining through the so-called Enterprise. However, the operational role of the Enterprise was drastically reduced by the Part XI Agreement, Annex, Section 2.

²²⁶ LOS Convention, Articles 160(2)(f)(ii) and 162(2)(o)(ii). See also Annex III, Article 17.

²²⁷ LOS Convention, Articles 145 and 209. Article 209 requires States to adopt national laws which are at least as effective as the rules adopted by the Authority. See also Article 214.

²²⁸ LOS Convention, Article 146. It does not specify which these treaties are, although it probably refers to conventions adopted by the ILO which has competence in this field.

and the erection, emplacement or removal of installations for the purpose of pursuing mining activities in the Area.²²⁹

Article 153 of the Convention stipulates that all activities in the Area shall be carried out in accordance with *inter alia* the rules, regulations and procedures adopted by the Authority.²³⁰ Thus, decisions of the Authority are legally binding on Member States without any need for further acceptance or approval and whether or not an individual Member State has consented.

In addition to binding Member States, the rules and regulations adopted by the Authority are also directly binding on investors by way of exploration or exploitation contracts concluded with the Authority.²³¹ The standard clauses for contracts to explore the Area for polymetallic nodules are contained in an annex²³² to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area. They clearly stipulate that “*the Contractor shall carry out exploration within the terms and conditions of the contract, the Regulations, Part XI of the Convention, the Agreement and other rules of international law not incompatible with the Convention.*”²³³ Article 209(2) of the Convention also requires states to adopt laws and regulations to prevent, reduce and control pollution in the Area by any vessels flying their flag or other installations operating under their authority which are “*no less effective than*” the standards adopted by the Authority. This rule of reference also makes standards directly binding on States Parties without their specific consent.

It would appear from this short analysis that the Authority has a quasi-legislative function as it can adopt measures that are automatically binding on states and investors. There is no need for subsequent acceptance of standards. Rather than formal provisions on entry into force, it is the process of adopting rules, regulations and standards that seeks to safeguard the interests of all states and other actors.

9. Standard Setting by the International Seabed Authority

In order to safeguard the interests of all states, the power of the Authority to adopt rules, regulations and procedures are subjected to a specific and sometimes

²²⁹ LOS Convention, Article 147.

²³⁰ See also LOS Convention, Article 137(3).

²³¹ See Rothwell, "Building on the Strengths and Addressing the Weaknesses: the Role of the Law of the Sea Institutions", (2004) 35 *Ocean Development and International Law* at p. 137.

²³² Document ISBA/6/A/18, Annex 4.

²³³ Document ISBA/6/A/18, Annex 4, Section 13.1.

complex decision-making procedure. This power is divided between three organs of the Authority: the Legal and Technical Commission, the Council and the Assembly.

It is only Members of the Authority who possess voting rights and the ability to propose candidates to serve on its organs. Yet, provision is also made for the participation of non-parties in the deliberations of the Authority. The internal rules of procedure of the Authority clarify rights of participation in the organization. Rule 82 of the Rules of Procedure of the Assembly permits all states which are not Members to take part in the deliberations of the Assembly as observers. They have speaking rights but they may not vote. To date, forty-three states have registered as observers and many of them actively participate in meetings of the Assembly. Other international organizations and NGOs have more limited rights of participation.²³⁴ Similar participation rights apply to meeting of the Council.²³⁵ These participation rights allow all interests to be represented in the decision-making process.

The standard setting process starts with the Legal and Technical Commission, a group of independent experts, elected by the Council.²³⁶ It is the role of the Commission to consider the technical aspects of the regulations and to draft proposals for further consideration by the Council.²³⁷

The Council is the “executive” organ of the Authority²³⁸ and it consists of thirty-six representatives of the Member States, elected every four years by the Assembly.²³⁹ Which states would have a seat on the Council and how it would make decisions was the subject of intense discussion during the consultations leading to the Part XI Agreement.²⁴⁰ The composition of the Council is finely balanced to guarantee that all the major interest groups, such as consumers of minerals, land-based

²³⁴ Rules of Procedure of the Assembly, Rule 83(3)-(6).

²³⁵ Rules of Procedure of the Council, Rule 75. According to Rule 74, any member of the Authority not represented on the Council may send a representative to participate in discussions without a vote; see also LOS Convention, Article 161(9).

²³⁶ See LOS Convention, Article 163. See also Article 165(1).

²³⁷ See LOS Convention, Article 165. Meetings of the Legal and Technical Commission are closed, although discussions on general issues are held in open session which members of the Authority are allowed to attend without participating in the discussions. For a summary of the drafting history of the Rules of Procedure of the Commission, see Document ISBA/10/A/3, dated 31 March 2004, at paras. 31-32.

²³⁸ LOS Convention, Article 162(1). For a full list of the powers and functions of the Council see Article 162(2). To describe it solely as an executive organ is misleading as it also plays an important part in policy-making.

²³⁹ Elections are staggered so that there are in fact elections for half the members every two years; LOS Convention, Article 161(3).

²⁴⁰ The Part XI Agreement “disapplies” Article 161(1), replacing it with a slightly amended text; section 3, at paras. 15 and 16.

producers of minerals, and developing countries, are represented.²⁴¹ The composition is significant, not only for participation in debates, but also for the voting procedures.²⁴²

In practice, the composition of the Council is also subject to a detailed political compromise; the agreed allocation of seats in the Council is ten seats to the African Group, nine seats to the Asian Group, eight seats to the Western European Group, seven seats to the Latin American and Caribbean Group, and three seats to the Eastern European Group.²⁴³ As this adds up to thirty-seven and the official total of seats on the Council is thirty-six, it is agreed that each regional group other than the Eastern European Group will relinquish a seat in rotation.²⁴⁴

The Part XI Agreement promotes consensus decision-making for all organs.²⁴⁵ It provides that the Council may defer the taking of a decision in order to facilitate further negotiation whenever it appears that all efforts at achieving consensus have not been exhausted.²⁴⁶ In the absence of consensus, the adoption of decisions by the Council is subject to a qualified majority vote. For voting purposes, the Council is divided into four chambers²⁴⁷ and it is necessary that a majority of all the chambers support a proposal in order for it to be approved.²⁴⁸ In addition, the Council must “*seek to promote the interests of all members of the Authority*”²⁴⁹, although whether this creates a legal obligation is open to question.

A stricter decision-making procedure applies to the adoption of binding rules and regulations. Under Article 161(8)(d) of the LOS Convention, the Council must adopt any rules or regulations by “*consensus*”. The use of the terms consensus, in this context, is confusing, as it has a different meaning to consensus as understood in the context of UNCLOS III or other organs of the Authority. In these cases, the task of facilitating consensus was given to the chair of the committees and there was

²⁴¹ The state having the largest domestic product on the date of the entry into force of the Convention automatically has a seat.

²⁴² See below, at pp. 163-164.

²⁴³ See <http://www.isa.org.jm/en/members/the.council.stm> <checked 10 December 2005>.

²⁴⁴ Ibid.

²⁴⁵ Part XI Agreement, section 3, at para. 2.

²⁴⁶ Part XI Agreement, section 3, at para. 6.

²⁴⁷ See Part XI Agreement, section 3, at para. 15. The first three chambers are defined by paragraphs (a) – (c). The fourth chamber is made up of the developing countries defined in paragraphs (d) and (e).

²⁴⁸ Part XI Agreement, section 3, at para. 5.

²⁴⁹ Part XI Agreement, section 3, at para. 5.

always the threat of a majority vote if consensus could not be achieved.²⁵⁰ However, in the context of adopting rules and regulations through the Council, Article 161(8)(e) defines consensus as “*the absence of any formal objection.*”²⁵¹ This would appear to be closer to unanimity than consensus, as no alternative decision-making process exists. The Convention does set out a conciliation procedure that can be invoked by the President of the Council in order to reconcile the differing views of members. According to this procedure, a committee of nine members, with the President as chair, is mandated to produce a proposal that will be acceptable to all members. If it cannot reach agreement, the committee shall report the grounds on which a proposal is being opposed. Whilst this procedure aims to facilitate consensus, it does not avoid the need for all members of the Council to agree, or at least to fail to object. Thus, it appears that the Council, when adopting rules, regulations and procedures, must reach agreement by unanimity and each member of the Council effectively holds a veto.

Once the proposed regulations are agreed by the Council, they are sent to the Assembly for final approval. A two-thirds majority of the Assembly is necessary in order to approve the proposal from the Council, although it will first attempt to achieve consensus on the issue.²⁵²

Any rules, regulations or procedures adopted by the Council are provisionally valid, pending the approval of the Assembly. If the Assembly does not approve the regulations adopted by the Council, they will remain provisionally valid until amended by the Council in light of the views of the Assembly.²⁵³ There is no time-limit by which the Council must re-evaluate the regulations rejected by the Assembly. If the Council fails to reconsider its decision, for whatever reason, the rules, regulations and procedures adopted by it continue to be binding. Thus, the role of the Assembly, the most democratic of the organs, is very limited. In practice, however, it is unlikely that investors will want to sign contracts incorporating rules and regulations which have not been agreed by the Assembly. Legal certainty demands that rules are in fact approved by the Assembly before they are applied to investors.

²⁵⁰ See chapter two, at pp. 31-32.

²⁵¹ LOS Convention, Article 161(8)(e).

²⁵² See Rule 61 in the Rules of Procedure of the Assembly.

²⁵³ LOS Convention, Article 162(2)(o)(ii).

The adoption of the first set of regulations on prospecting and exploration for polymetallic nodules²⁵⁴ further illustrates the centrality of the Council in the decision-making process. The regulations were drafted by the Legal and Technical Commission between 1997 and 1998 and then sent to the Council for discussion. The draft regulations were scrutinised by the Council over several successive sessions, where amendments and drafting changes were made before the regulations were provisionally adopted by the Council on 13 July 2000.²⁵⁵ The regulations were authoritatively adopted by the Assembly on the same day following a short debate.²⁵⁶ As can be seen, the Assembly had very little input into the decision-making process, merely confirming what had been previously agreed by the thirty-six members of the Council. However, when discussing the draft regulations, the Council met in informal sessions which were open to all interested members of the Authority. Therefore, the interests of other states not directly represented on the Council could be taken into account at an earlier stage in the law-making process.

The composition of the Council is designed to ensure that all interests are taken into account in the decision-making process. Moreover, the requirement of “consensus” means that none of these interests can be overridden. These mechanisms therefore guarantee that the rules and regulations adopted by the Authority are in fact generally accepted.

Non-binding instruments are also used by the Authority to develop the regulatory framework of deep seabed mining. Regulation 38 of the Polymetallic Regulations confers on the Legal and Technical Commission the power to adopt “*recommendations of a technical or administrative nature for the guidance of contractors to assist them in the implementation of the rules, regulations and procedures of the Authority.*” Indeed, several of the regulations, especially those dealing with environmental issues, mention that such guidelines will be developed in the future.²⁵⁷ The Commission issued its first set of recommendations relating to

²⁵⁴ The regulations are limited to prospecting and exploration and a further set of regulations will have to be adopted to apply to exploitation of polymetallic nodules at some stage in the future when exploitation is more likely.

²⁵⁵ 2001 Report of the Secretary General of the International Seabed Authority, Document ISBA/7/A/2, at paras. 22-23.

²⁵⁶ See Document ISBA/6/A/18.

²⁵⁷ See Regulations 18(b), 31(2) (4) and (5).

environmental baseline studies in 2001²⁵⁸, based on the outcomes of a workshop convened by the Authority in June 1998. These recommendations aim to define the biological, chemical, geological and physical components to be measured by the contractors in order to ensure the effective protection of the marine environment. They define the type of data that a contractor should gather in performance of its duties under the regulations. They also specify which activities require prior environmental impact assessment and monitoring programmes and it specifies some of the measurements and observations that the contractor should make both during and after performing a specific activity. Whilst recommendations are, by their very nature, non-binding, they represent an important indication of what is expected of contractors. Indeed, the fact that recommendations are drafted and adopted by the same body that determines whether contractors are complying with their obligations under the Convention could have a significant influence on the decision of a contractor to abide by them. Yet, the procedure for adopting recommendations does not involve any input from the political organs of the Authority. Paragraph 2 of Regulation 38 provides that the Council may request that the recommendations be withdrawn or modified if it finds that they are inconsistent with the intent and purpose of the Regulations. It is surprising that this is worded as a request and it does not make clear whether or not such recommendations will continue to be valid. Regardless of their formal status, recommendations that have been rejected by the Council will lose much of their persuasive authority.

10. The International Seabed Authority as a Forum for Change?

The ability of the Authority to adopt rules and regulations confers on it a powerful tool to develop the legal regime for deep seabed mining. It provides a flexibility in the deep seabed mining regime that allows the international community to react to pressing issues and concerns that may not have been foreseen at the time that the Convention was drafted.

²⁵⁸ See Document ISBA/7/LTC/1/Rev.1. The Council took note of the recommendations and said that further consideration should take be given to them at a future session although there is no record of any further action; see Document ISBA/7/C/7, at para. 9.

Many of the Regulations adopted to date reproduce what was already contained in the Convention or the Part XI Agreement. Yet, there are also some significant innovations, adding further details to the duties of contractors, as well as granting powers to certain organs of the Authority which were not foreseen by the treaties. For example, if a contractor, through its activities in the Area, causes or is likely to cause serious harm to the marine environment, the Regulations allow the Secretary-General of the Authority to take immediate measures to prevent, contain or minimise the harm.²⁵⁹ Such measures are provisional and will be effective for no longer than ninety days or until the Council has decided what measures it wishes to impose. The measures adopted by the Council may include orders for the suspension or adjustment of operations, taking into account the recommendations of the Legal and Technical Commission.²⁶⁰ These provisions on protecting the deep seabed environment are important developments. At the time when the Convention was drafted, the rich diversity of the deep seabed environment was not fully appreciated and it may be that the Authority comes to play a significant role in regulating this aspect of deep seabed activities in the future.²⁶¹

In order to ensure the effective regulation of deep seabed activities, it may be necessary for modifications to be made to the regulatory framework. The Authority also plays a central role in making such changes.

Modifying the rules and regulations is relatively straightforward. There is no special procedure for adopting amendments to the regulations and ordinary procedure for the adoption of regulations will apply. The Legal and Technical Commission is mandated to keep regulations under review and propose changes to the Council.²⁶² It is important to note that the rights of existing contractors are safeguarded because any modifications to the regulations will not be applicable to existing contracts of work. It is necessary to negotiate changes to existing contracts on a case-by-case basis. Section 24.2 of the current standard terms of contract provides that a contract “*may also be revised by agreement between the Contractor and the Authority to facilitate*

²⁵⁹ Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, contained in the Annex to Document ISBA/6/A/18, at Regulation 32(2).

²⁶⁰ Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, Regulation 32(5).

²⁶¹ See Scovazzi, "Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some considerations on the Role of the International Seabed Authority", (2004) 19 *International Journal of Marine and Coastal Law* 383.

²⁶² LOS Convention, Article 165(2)(g).

the application of any rules, regulations and procedures adopted by the Authority subsequent to the entry into force of this contract.” The contractor therefore retains a strong position in negotiations and it cannot be forced to accept an amendment against its will.

Making changes to the provisions of Part XI itself is more problematic. Like all forms of international organizations, the Authority is subject to constraints imposed by its constituent instrument in accordance with the concept of *ultra vires*. This concept was described by the International Criminal Tribunal for the Former Yugoslavia in the *Tadic Case* in relation to the Security Council: “*the Security Council is an organ of an international organization established by treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be.*”²⁶³

As noted above, Part XI provides the constituent instrument of the Authority. The Part XI Agreement specifies that the Authority must act “*in accordance with Part XI and with this Agreement.*”²⁶⁴ The Authority has those powers conferred on it by the Convention and the Agreement, as well as any “*incidental powers ... as are implicit in, and necessary for, the exercise of those powers and functions with respect to activities in the Area.*”²⁶⁵ At all times, the Authority must act consistently with the Convention and the Agreement.

It is to these instruments that we must first look in order to determine the process of making changes to the legal regime. The amendment procedure for Part XI is set out in Article 314 of the Convention. According to this procedure, the Authority is the forum for the adoption of amendments. Any Member of the Authority can propose amendments by submitting a written communication to the Secretary-General of the Authority who shall in turn circulate the proposal to all other Member States. The proposed amendment is then subject to the approval of the

²⁶³ *Prosecutor v. Tadic*, (1999) IT-94-1 at para. 28. See *Constitution of the Maritime Safety Committee of the IMCO*, (1960) ICJ Reports 150; Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2002) at p. 249; Schermers and Blokker, *International Institutional Law* (Martinus Nijhoff Publishers, 1995) at p. 575; Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003) at pp. 285-298.

²⁶⁴ Part XI Agreement, section 1, at para. 1. See also paras. 5(f) and 15 of section 1.

²⁶⁵ Part XI Agreement, Section 1, para. 1; see also LOS Convention, Article 157(2). The doctrine of implied powers is a general principle of international law recognised by the ICJ in *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, (1949) ICJ Reports 174.

Assembly and the Council, the latter acting by “consensus”.²⁶⁶ There appears to be no formal role for the Legal and Technical Commission under this procedure, although in practice it is likely that the Commission would be asked to proffer advice to the other organs.

Following adoption of the proposal by these two organs, there is a second stage that must be completed before the amendments enter into force. According to Article 316(5) of the Convention, an amendment to Part XI shall enter into force for all States Parties one year after the deposit of instruments of ratification or accession by three-fourths of the States Parties. This provision is notable in that amendments that have been accepted by three-fourths of the membership become binding on all the Parties. There is no opportunity for an objecting state to prevent the application of the amendment to itself, short of denouncing the Convention.²⁶⁷ However, acceptance by over three-fourths of Member States is a higher threshold than that required for amendments to other parts of the Convention. It is likely to make the amendment procedure a slow process.

The question arises whether modifications to Part XI of the Convention can be made through other mechanisms other than the formal amendment procedures? In academic writing and state practice, there is some support for the proposition that the practice of international organizations can modify the constituent instrument itself.²⁶⁸ As Klabbers notes, there is but a fine line between a formal amendment and a collective decision to engage in a certain practice unforeseen in the constituent document.²⁶⁹ In the *Certain Expenses Advisory Opinion*, the ICJ took into account institutional practice when deciding whether the funding for peace-keeping activities of the United Nations fell with the “*expenses of the Organization*” for the purposes of Article 17(2) of the UN Charter.²⁷⁰ The Court stressed that there is no procedure in the structure of the United Nations to determine the validity of a given act and “*each organ must, in the first place at least, determine its own jurisdiction.*”²⁷¹ It continued,

²⁶⁶ LOS Convention, Article 161(8)(d). See above for a discussion on the definition of consensus in this context, at p. 162.

²⁶⁷ On denunciation, see LOS Convention, Article 317. Even then it is arguable that the general principles of Part XI prohibiting exploitation in the national interest are part of customary international law. See chapter three, at p. 69.

²⁶⁸ See also chapter four, at pp. 102-103.

²⁶⁹ Klabbers, *An Introduction to International Institutional Law* at p. 91.

²⁷⁰ *Certain Expenses of the United Nations (Advisory Opinion)*, (1962) ICJ Reports 151 at p. 157.

²⁷¹ *Ibid.*, at p. 168.

*“when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.”*²⁷²

The proceedings of the Preparatory Commission for the LOS Convention also illustrate that in spite of formal limitations on the powers of an institution, states are willing to adopt a flexible attitude to the question of modifications. The Commission was created by Resolution I adopted at UNCLOS III. Its constituent instrument made it clear that any action taken by the Commission must be in conformity with the provisions of the Convention.²⁷³ Nevertheless, states participating in the Preparatory Commission were pragmatic and they used it as the forum in which to seek further compromises on an acceptable multilateral regime for deep seabed mining. One can only conclude that some of the decisions of the Preparatory Commission had the effect of modifying the terms of Resolution II, which is an integral part of the Convention. For instance, the so-called New York Understanding, adopted unanimously by the Commission in September 1986, extended the time-limit within which a minimum investment must be made by pioneer investors from developing countries. The date was postponed from 1 January 1985 to the date on which the LOS Convention entered into force. Whilst this is a purely technical change which was made for practical purposes, the Understanding also made more substantive alterations, allowing pioneer investors to specify the part of the seabed that they shall be allocated.²⁷⁴ Another decision of the Preparatory Commission, known as the Understanding on the Fulfilment of Obligations by the Registered Pioneer Investors and their Certifying States made adjustments to the regime foreseen by Resolution II, including the waiver of the \$1 million annual fee for investors.

Such questions are not only of theoretical value. Although deep seabed mining is not yet a reality, the Authority is nevertheless faced with a change in the circumstances prevailing at the time that Part XI was negotiated. The text of Part XI as it stands is premised upon the mining of polymetallic nodules which, when UNCLOS III opened, were the only type of mineral resource known to exist in the

²⁷² Ibid., at p. 168.

²⁷³ See Resolution I, contained in the Final Act of UNCLOS III.

²⁷⁴ See Churchill and Lowe, *The Law of the Sea* at pp. 236-238.

deep seas. However, our understanding of the oceans is continuously expanding²⁷⁵ and with it, the regulatory challenges that the Authority must meet. One example is the treatment of polymetallic sulphides and cobalt-rich crusts, two types of deep sea minerals that were only discovered during the closing stages of UNCLOS III. This type of resource differs enormously from polymetallic nodules as they are found on the side of underwater mountains, rather than on flat abysmal plains.

It is the exploration of polymetallic sulphides and cobalt-rich crusts that is the focus of the Authority's current standard setting activities. Yet, drafting regulations for these types of deposits raises very different issues to polymetallic nodules. The drafting process has prompted difficult questions over the extent to which the regulations must conform to the provisions of the LOS Convention and the Part XI Agreement. The issue has been summarized by the Secretary-General of the Authority as follows:²⁷⁶

The basic formal elements of the regulations would be the same as that for polymetallic nodules. However, because of the localised nature of the deposits there will be differences relating *inter alia* to the size of the area allocated for exploration under the contract, the size of the eventual exploitation area and the system for participation by the Authority either through the application of the parallel system which may not always be practical in this case, or other form of participation, such as equity participation, as well as environmental regulations appropriate to the unique environment in which these deposits are found.

In a paper outlining the considerations to be taken into account when drafting regulations for these minerals, the Secretariat noted that the size of areas to be allocated under the LOS Convention is not appropriate for polymetallic sulphides and cobalt-rich crusts and that the anti-monopoly provisions contained in Annex III of the Convention also cannot be applied without difficulty.²⁷⁷ The draft regulations prepared by the Secretariat foresee a system of equity participation by the Authority in lieu of the site-banking system.²⁷⁸

There are admitted difficulties in agreeing a regulatory regime in this field because of the lack of available scientific knowledge and, as the Secretary General

²⁷⁵ The Census of Marine Life is an ongoing research project which aims to map ocean life throughout the world. In May 2006, a research cruise taking part in the project reported finding several new species, including forms of plankton and fish. See Richard Black, *Deep Ocean Trawl Nets New "Bugs"*, BBC News, 04 May 2006, available at news.bbc.co.uk/1/hi/sci/tech/4973249.stm <checked 25 May 2006>.

²⁷⁶ Nandan, *Administering the Mineral Resources of the Deep Seabed*, (2005) SLS/BIICL Symposium on the Law of the Sea at pp. 18-19.

²⁷⁷ Document ISBA/7/C/2, at paras. 19 and 22.

²⁷⁸ Document ISBA/7/C/2, at para. 24.

noted in his report to the ninth session of the Authority, “*the objective should be to progressively develop a regulatory regime as prospecting and exploration activities take place and better knowledge of the resources and the environment in which they occur is gained.*”²⁷⁹ On the face of it, such changes would require an amendment of the Convention and the Part XI Agreement which lay down in detail certain conditions that any regulations must meet. For instance, Article 8 of Annex III of the LOS Convention places an obligation on contractors to specify an area sufficiently large to accommodate two mining operations, one by the contractor and one reserved for the Authority itself. This parallel system of mining was central to the compromise reached at the UNCLOS III and it was maintained, albeit with minor changes, in the Part XI Agreement.²⁸⁰

To what extent could modifications to these provisions be made without formal amendments? The discussions within the Authority to date have not contemplated the adoption of amendments. Key to the successful adoption of a decision at variance with the constituent instrument of an organization is the amount of support that it has amongst the membership. If a decision is adopted by consensus, it is difficult to see whether objections could later be raised. Where the decision of the organ conflicts with the text of the treaty, it may be that nothing short of consensus will suffice.²⁸¹

It has already been seen that the procedure for adopting rules, regulations and procedures under the Part XI Agreement promotes consensus within the Authority. The adoption of regulations by the Council requires consensus and the Assembly should also attempt to reach a consensus where possible. There remains the possibility, nevertheless, that a decision may be adopted by a majority vote of the Assembly. In such a situation, can a dissenting state claim that the decision was *ultra vires*? There are several options open to such a state.

Having a forum to challenge an allegedly *ultra vires* decision is often an obstacle for states who are objecting to a decision. As Klabbers says “*in the absence*

²⁷⁹ 2003 Report of the Secretary-General of the Authority, Document ISBA/9/A/3, at para. 59.

²⁸⁰ See Part XI Agreement, section 2, para. 5.

²⁸¹ See Churchill, “The impact of State Practice on the jurisdictional framework contained in the United Nations Convention on the Law of the Sea”, in *Stability and Change in the Law of the Sea*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005) at p. 97; Boyle, “Further Development of the 1982 Law of the Sea Convention: Mechanisms for Change”, (2005) *International and Comparative Law Quarterly* at p. 567.

of a well-developed system of judicial review, the ultra-vires doctrine has little chance of successful application.”²⁸² Yet, the LOS Convention does provide a quasi-comprehensive dispute settlement procedure. Article 187 provides that the Sea-Bed Disputes Chamber of the ITLOS has jurisdiction, *inter alia*, over disputes between a State Party and the Authority concerning acts of the Authority alleged to be in violation of Part XI or alleged to be in excess of jurisdiction or a misuse of power. Whilst the adoption of *ultra vires* rules or regulations would *prima facie* appear to fall within this category, a closer examination of the section on the settlement of disputes under Part XI casts doubt on whether a state can seek judicial review of rules, regulations and procedures adopted by the Authority *in abstracto*. Article 189 limits the jurisdiction of the Seabed Disputes Chamber. It provides that in exercising its jurisdiction under Article 187, the Chamber is prevented from deciding whether any rules, regulations or procedures adopted by the Authority are in conformity with the Convention and from declaring any such instruments invalid.²⁸³ It would thus appear that the opportunity for judicial review does not exist in relation to the law-making powers of the Authority.

Article 189 is without prejudice to Article 191 which provides the ability for the Council or the Authority to request advisory opinions from the Chamber “*on legal questions arising within the scope of their activities.*” Advisory opinions by their nature are not binding. The Chamber would not be able to strike down any *ultra vires* regulations. Ultimately, any remedy ultimately lies with the political organs of the Authority.

As with the IMO, there will be no certainty in the legal situation until a consensus prevails. Companies will be unlikely to want to invest in the absence of a clear legal regime. It is therefore important that the Authority provides a standing forum in which states can debate and discuss the legal framework applicable to deep seabed activities, with the aim of maintaining the consensus that was achieved through the Part XI Agreement.

²⁸² Klabbers, *An Introduction to International Institutional Law* at p. 242. Klabbers continues, “the only possible remaining defence then is to try to stop an illegal decision from being taken by trying to persuade the organization’s other members of its undesirability, but that, typically, is an exercise in politics.” See also Pauwelyn, *Conflict of Norms* at p. 290; Schermers and Blokker, *International Institutional Law* at pp. 279-280.

²⁸³ It is limited to deciding whether the application of any rules and regulations in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under the Convention or claims of damages.

11. Conclusion

The mandate of technical organizations is primarily to negotiate and adopt international standards in their particular field of competence. Although their mandates are technical, most organizations have been faced with difficult legal and political questions over the interpretation and development of the LOS Convention. Given the lack of any central mechanisms for solving such legal issues, these organizations have often assumed the role of a forum in which these general issues on the law of the sea can be debated.

It is interesting to note that such organizations have tended to work towards consensus, regardless of their formal decision-making processes. In this sense, participation and decision-making processes of these institutions have come to resemble UNCLOS III. Indeed, given the relative informality of their role under the Convention, consensus would seem to be the only way in which decisions of technical organizations can legitimately influence the LOS Convention regime.

A further question that arises is whether the technical organizations can go beyond filling in gaps in the Convention to making changes or modifications. Again, it would seem that states have been willing to use whatever fora are available to work towards a consensus of the international community as a whole, utilizing technical as well as political organizations. Where consensus decisions have been achieved, there is no reason to doubt that they can be seen as modifying the legal framework.

The decisions, resolutions and standards adopted by technical organizations have therefore contributed towards filling in gaps, resolving ambiguities and developing the legal framework of the LOS Convention, on a step-by-step basis. These negotiations contribute to a continuing crystallisation of the law of the sea. Instruments adopted by international organizations are a valuable source of state practice, which, as Rothwell says, "*provides an additional and most important mechanism for the Convention to gradually evolve over time and thereby remain of ongoing contemporary relevance.*"²⁸⁴

²⁸⁴ Rothwell, "The impact of state practice of the jurisdictional framework contained in the LOS Convention: a commentary", in *Stability and Change in the Law of the Sea*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005), at p. 149.

The advantage of developing practice through international organizations is that it is possible to reach a collective view over developments in the law. There is less risk of fragmentation than through unilateral state practice. Indeed, international organizations are also used in order to scrutinise unilateral practice. It follows that unilateral practice plays a less significant role in the development of the law of the sea in the twenty-first century than in previous periods.²⁸⁵

This analysis raises the possibility of several institutions acting as agents of interpretation and modification of the law of the sea framework. These organizations sometimes co-operate in their law-making endeavours and the General Assembly plays a central role in encouraging co-ordination.²⁸⁶ However, this is an area of weakness in international law. The General Assembly has stressed the importance of improved co-operation and co-ordination between international organizations, funds and programmes in the development of the law of the sea.²⁸⁷ Ultimately, however, there is no hierarchical framework which dictates a single competent organization for a particular issue. States may exploit these overlaps in the mandate of international organizations through a strategy of “regime-shifting”.²⁸⁸ Therefore it is necessary to address possible solutions to the problem of fragmentation in law-making.

²⁸⁵ Boyle, "EU Unilateralism and the Law of the Sea", (2006) 21 *International Journal of Marine and Coastal Law*, at p. 20.

²⁸⁶ See chapter four, at pp. 94-96.

²⁸⁷ General Assembly Resolution 60/30, 2005, at para. 104.

²⁸⁸ See Helfer, "Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking", (2004) 29 *Yale Journal of International Law* 1.

Conflicts of Treaties and the Law of the Sea

1. Fragmentation in the Law-Making Process

Much modern law-making is conducted through the conclusion of treaties. It is the nature of treaties that they have a particular focus, concentrating on a specific aspect of international affairs. As one commentator warns, “*chaque traité aurait une tendance à se présenter comme constituant à lui seul un univers juridique presque complet, une sorte de monde.*”¹ This trait is consolidated if one considers that most treaties are negotiated within an institution committed to a single issue of international law and with few incentives to look beyond its own limited sphere of activity.

Despite their inherent specificity, all treaties belong to a single system of international law.² The definition of treaty in the Vienna Convention on the Law of Treaties acknowledges this connection between treaties and the wider framework of international law.³ It follows that “*no treaty, however special its subject-matter or limited the number of parties, applies in a normative vacuum but refers back to a number of general, often unwritten principles of customary international law concerning its entry into force, and its interpretation and application.*”⁴

The normative environment of a treaty includes not only general international law, but also other treaties and other rules of customary international law. This is

¹ Reuter, *Introduction au Droit des Traités* (Librairie Armand Colin, 1972) at p. 127.

² Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003) at p. 37; International Law Commission, *Report of the Study Group on Fragmentation of International Law*, (2006) UN Document A/CN.4/L.682, at para. 33. Hereinafter, International Law Commission, *Fragmentation of International Law*. C.f. Hafner, *Risks Ensuing from Fragmentation of International Law* (2000) in *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10* (A/55/10), annex.

³ “An international agreement concluded by states in written form governed by international law”; Vienna Convention on the Law of Treaties, Article 2(1)(a).

⁴ See Koskeniemi, *Fragmentation of International Law: The Function and Scope of the Lex Specialis Rule and the Question of Self-Contained Regimes*, (2004) at p. 7; paper available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf <checked 11 November 2007>.

particularly true for the LOS Convention. There are a multitude of other legal instruments which deal with aspects of maritime affairs and the law of the sea.

The Convention has been described in some quarters as a “framework convention”.⁵ Unlike other framework conventions⁶, it does not create an institutional structure for the conclusion of additional protocols or implementing agreements. Other treaties are concluded in a variety of international institutions or *ad hoc* conferences. Often these other instruments have no formal relationship with the LOS Convention. They are not *strictu sensu* “implementing agreements” which are adopted to give further detail to a framework treaty.⁷ Nevertheless, they interface with the basic principles of the law of the sea found in the LOS Convention.

Another label for the LOS Convention is an “umbrella convention”.⁸ This designation merely reflects its overarching character as the instrument which provides the background for all other law-making activity in the law of the sea.

The potential overlap of the LOS Convention with other instruments is greater still given that the law of the sea is not a “self-contained” sphere of law that can be strictly delimited from other disciplines.⁹ In the words of one study, “denominations such as “trade law” or “environmental law” have no clear boundaries.”¹⁰ Whilst being concerned directly with the law of the sea, the LOS Convention also touches on *inter alia* trade, the environment, and human rights. The *Swordfish dispute* between Chile and the European Communities aptly illustrates the interface of the LOS Convention with other international regimes.¹¹ In that dispute, Chile denied European fishing vessels access to its ports because it argued that the EC had failed in its duty to conserve high seas stocks of swordfish as outlined *inter alia* in Articles 116-119 of the LOS Convention. The case was brought before the

⁵ See for instance, *Southern Bluefin Tuna Arbitration (Australia and New Zealand v. Japan) Award on Jurisdiction and Admissibility*, (2000) 39 ILM 1359 at para. 51.

⁶ See Birnie and Boyle, *International Law and the Environment* (Oxford University Press, 2002) at pp. 10-11. C.f. UN Framework Convention on Climate Change.

⁷ See chapter four for a discussion of the two instruments that have been designated as implementing agreements by the UN, at p. 97 ff.

⁸ See for instance, *Southern Bluefin Tuna Arbitration*, at para. 51; also IMO Document LEG/MISC/4, at p. 3.

⁹ See International Law Commission, *Fragmentation of International Law*, at p. 65 onwards.

¹⁰ International Law Commission, *Fragmentation of International Law*, at para. 55; See also Birnie and Boyle, *International Law and the Environment*, at p. 2.

¹¹ See Orellana, “The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO”, (2002) 71 *Nordic Journal of International Law* 55.

ITLOS. In turn, the EC argued that Chile was obliged under Article V of the GATT to grant freedom of transit to European goods. Thus, parallel dispute settlement proceedings were instituted through the Dispute Settlement Understanding of the World Trade Organization. The dispute was provisionally settled before a decision was reached on the merits in either forum. Nevertheless, it demonstrates the dangers of institutional fragmentation, as well as the interrelationship between treaties dealing with what at first sight appear to be distinct aspects of international law.

The lack of a single international legislative organ makes it more difficult to co-ordinate law-making activities at the international level. As a result, there is a greater risk of states concluding incompatible instruments. Jenks wrote in 1953 that conflict of treaties is one of a number of weaknesses inherent in the development of international law.¹² The challenge, in his words, is to develop “*the multiplicity of law-making treaties on every aspect of modern life which constitute the international statute book*” into “*a coherent body of international law.*”¹³ This remains true today.

This chapter addresses those rules and principles which promote the achievement of this aim. International law has no basic hierarchy in the sources of law.¹⁴ Conflicts of treaties are primarily addressed through priority rules which seek to determine which treaty is applicable in the case of a particular conflict. Such priority rules are largely concerned with which treaty provisions are enforceable in the context of litigation. Out-with litigation, they play a secondary role, as there is no imminent question of enforceability. In this scenario, other mechanisms for determining which treaty should take priority, such as rules on state responsibility, rules on the termination or suspension of treaties, or other institutional mechanisms must be considered. It is only taking into account all of these rules that it is possible to appreciate how international law struggles towards coherence.

¹² Jenks, "The Conflict of Law-Making Treaties", (1953) 30 *British Yearbook of International Law* at p. 416.

¹³ *Ibid.*, at p. 420.

¹⁴ See Akehurst, "The Hierarchy of the Sources of International Law", (1974-5) *British Yearbook of International Law* at p. 273.

2. Priority Rules and Conflicts of Treaties

Most analyses of conflicts of treaties start with Article 30 of the Vienna Convention which provides in full:

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (i) as between States parties to both treaties the same rule applies as in paragraph 3;
 - (ii) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

It is clear that Article 30 does not offer one simple rule that applies to all conflicts of treaties. There are several rules which may apply to a treaty conflict depending on its particular circumstances.

In preparing the draft articles on the law of treaties, the special rapporteur stressed that conflicts of treaties did not normally raise questions of validity.¹⁵ Rather, priority rules are invoked in order to determine which of the competing provisions should prevail in the legal relations between two states.

¹⁵ Waldock, "Second Report on the Law of Treaties", (1963 II) *Yearbook of the International Law Commission* at p. 53. In this sense, he distinguished himself from previous special rapporteurs. See for instance, Lauterpacht, "First Report on the Law of Treaties", (1953 II) *Yearbook of the International Law Commission* at p. 156; Fitzmaurice, "Third Report on the Law of Treaties", (1958 II) *Yearbook of the International Law Commission* at p. 44. Waldock did prescribe invalidity for conflicts with *jus cogens*; see Articles 53 and 64 of the Vienna Convention on the Law of Treaties. See also Article 59 on termination.

The central priority rule in Article 30 is the *lex posterior* principle.¹⁶ This principle is firmly based in a contractual notion of treaties. It reflects the idea that states can change their minds and that the later expression of intent should prevail.¹⁷ One problem with the *lex posterior* principle is determining which treaty is later in time.¹⁸ Most authors agree that the relevant date is the date of adoption.¹⁹ However, it has also been argued that the date of entry into force is more important for the purposes of determining the later treaty.²⁰ Pauwelyn criticises the process of dating treaties altogether, arguing that “*the fiction of later legislative intent overruling earlier legislative intent loses its attraction as soon as the same context – same constellation changes.*”²¹ The rarity of such constellations casts doubt on reliance on the later intention of the parties. This view is supported by the International Law Commission in its recent report on the fragmentation of international law, where it says that “*the straightforward priority of one treaty over another ... cannot be reasonably assumed on a merely chronological basis*” and it has called for “*a more nuanced approach*” to resolving treaty conflicts.²² The ILC continues that “*it may often be more useful to refer directly to the will of the parties than to the lex posterior principle for which, as also noted above, it may simply give expression.*”²³

To some extent, Article 30 permits a flexible approach to resolving treaty conflicts. *Lex posterior* is not the only priority rule in this article.²⁴ Article 30(2) allows the drafters of a treaty some leeway to specify its relationship with other treaties. However, states are limited under this provision to confirming the priority of another treaty, whether it is earlier or later. According to one author, “*an explicit*

¹⁶ International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly", (1966 II) *Yearbook of the International Law Commission* at p. 217.

¹⁷ *Ibid.*, at p. 217.

¹⁸ See Vierdag, "The Time of the Conclusion of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", (1988) *British Yearbook of International Law* 75.

¹⁹ Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984) at p. 98; Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) at p. 182.

²⁰ Czaplinski and Danilenko, "Conflicts of Norms in International Law", (1990) *Netherlands Yearbook of International Law* at p. 19.

²¹ Pauwelyn, *Conflict of Norms*, at pp. 368-369

²² International Law Commission, *Fragmentation of International Law*, at para. 272, and paras. 225-226. See also Pauwelyn, *Conflict of Norms* at p. 370; Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007) at p. 248.

²³ International Law Commission, *Fragmentation of International Law*, at para. 243. See also para. 252.

²⁴ The special treatment of the UN Charter will be discussed below, at pp. 185-187.

conflict clause claiming priority over future treaties must anyhow give way to the lex posterior principle."²⁵

It is apparent that Article 30 is not without controversy. There are not many authors who accept Article 30 as an authoritative statement of priority rules in international law. It is a common view that "*the rules laid down in Article 30 are intended to be residuary rules – that is to say, rules which will operate in the absence of express treaty provisions regulating priority.*"²⁶

An alternative priority rule, suggested by many commentators, is the *lex specialis* principle. According to this maxim, the more specific treaty provision should apply.²⁷ Reuter suggests that *lex specialis* is implied in Article 30 because this provision only deals with two treaties with the same degree of generality.²⁸ Nevertheless, the concept of speciality or generality is also highly ambiguous. Several indicators have been suggested, such as the subject matter and the number of contracting parties²⁹, although none are completely satisfactory. Ultimately the principle of *lex specialis* simply acts as another latin label for the intention of the parties, without necessarily shedding any light on how to identify such an intention.

Sometimes *lex specialis* and *lex posterior* will lead to the same conclusion. This was the case in the *Mavromattis Concessions Case* where the PCIJ considered the relationship between the Mandate for Palestine conferred on the United Kingdom in 1922 and Protocol XII to the 1923 Lausanne Peace Treaty. The Court concluded that, "*in cases of doubt, the Protocol, being a special and more recent agreement, should prevail.*"³⁰ Yet, these principles may also suggest contradictory outcomes, in

²⁵ Pauwelyn, *Conflict of Norms*, at p. 335.

²⁶ Sinclair, *The Vienna Convention on the Law of Treaties* at p. 97. See also Aust, *Modern Treaty Law and Practice*, at p. 174; Pauwelyn, *Conflict of Norms*, at p. 263; Boyle and Chinkin, *The Making of International Law*, at p. 252. The residual character of the rules of priority in Article 30 has most recently been supported by the International Law Commission Study Group on the Fragmentation of International Law: "ultimately, it was left for the will of States to establish priority among successive treaties in accordance with their interests"; International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, (2004) at p. 15, para. 38.

²⁷ This maxim was applied by the Permanent Court of International Justice in the *Mavromattis Concessions Case* as a general principle of law; *Mavromattis Palestine Concessions*, (1924) PCIJ Reports, Series A, No. 2, at p. 31.

²⁸ Reuter, *Introduction au Droit des Traités*, at p. 130. See also International Law Commission, *Fragmentation of International Law*, at para. 64, and footnote 74.

²⁹ Pauwelyn, *Conflict of Norms*, at p. 389.

³⁰ *Mavromattis Palestine Concessions*, at p. 31.

which case the fiction of intention is fully revealed. The International Law Commission concludes that “*the question boils down to an assessment of which aspect – “speciality” or “temporality” – seems more important in this connection.*”³¹ What is more important would appear to depend on the particular context of a conflict. Whilst providing flexibility in the priority rules, this conclusion also leads to a lack of certainty in the way in which normative conflict will be solved. In this situation, it is perhaps best to treat the *lex posterior* principle in Article 30 as a presumption which can be rebutted if there is evidence of a contrary intention on the part of the contracting parties.

3. Conflicts of Absolute or Reciprocal Obligations

It is the nature of the priority rules that they determine the applicable law between two particular states in the case of a treaty conflict. This role is stressed by Article 30 which differentiates between the situation where the parties to a treaty are identical and where they differ.

Where the parties to the two treaties are identical, the special rapporteur made clear that the contracting parties are “*fully competent to abrogate or modify the earlier treaty which they themselves drew up.*”³² According to Article 30(3), the provisions in the later treaty will prevail for all parties. In practice, however, this situation is very rare.

Most treaty conflicts will therefore be governed by Article 30(4) which confirms the validity of both treaties involved in the conflict. Article 30(4) creates two different treaty regimes between the respective parties.³³ In the words of one commentator, “*the purpose of Article 30 is to determine, in the event of competing treaties, which one governs the mutual relationship between the contracting parties.*”³⁴

³¹ International Law Commission, *Fragmentation of International Law*, at para. 233.

³² International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly", at p. 216.

³³ See Karl, "Conflicts Between Treaties", in *Encyclopedia of Public International Law*, ed. Bernhardt (North-Holland, 1984) at p. 473.

³⁴ Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (2003) at p. 72.

Two outcomes are possible. Where two states are party to both of the conflicting treaties, the later treaty, as *lex posterior*, will apply and the earlier treaty will not be enforceable between the two states to the extent of the conflict. Otherwise, the earlier treaty will continue to apply to those states which are not party to the later treaty.

It is clear that in this case the operation of the *lex posterior* principle is only really appropriate for solving conflicts between treaties of a reciprocal character. This type of treaty provides for “*a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the other individually.*”³⁵ In this scenario, it is possible for a state to apply different rules in its relations with two sets of states.

The situation in the case of treaties containing commitments of an “absolute”³⁶ nature is more complex. It will not be possible to enforce the later treaty without also affecting the rights and obligations of states under earlier treaty.³⁷ In the words of Fitzmaurice, absolute obligations do not lend themselves to “*differential application*”.³⁸

In this context, the priority rules must also be seen in light of Article 41 of the Vienna Convention which covers the relationship between multilateral treaties and modifying agreements. This article provides:

Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- (a) the possibility of such a modification is provided for by the treaty; or
- (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

³⁵ Fitzmaurice, "Third Report on the Law of Treaties", at p. 27.

³⁶ What Fitzmaurice, as special rapporteur on the law of treaties, called “interdependent” or “integral” obligations.

³⁷ See *Reservations to the Genocide Convention Advisory Opinion*, (1951) ICJ Reports 15.

³⁸ Fitzmaurice, "Second Report on the Law of Treaties", (1957 II) *Yearbook of the International Law Commission*, at p. 55.

Article 41 implies that some sorts of modifications are not permitted where they may affect obligations of an absolute character.³⁹ The commentary to Article 41 makes it clear that such agreements that do not meet these conditions will not be invalid.⁴⁰ The principal question is, whether an *inter se* agreement can be enforced between its parties?

The text of Article 41 is not drafted in terms of priority⁴¹ and some commentators have concluded that it does not intend to deviate from the priority rules found in Article 30.⁴² According to this view, the *inter se* agreement, as *lex posterior*, would apply, although the parties to the later agreement may have to make reparations for violating the rights of the other parties to the original multilateral treaty.⁴³

On the other hand, some authors interpret Article 41 as a priority rule which operates so that the original multilateral treaty will prevail over *inter se* agreements which do not meet the conditions of Article 41.⁴⁴ As Pauwelyn says “*to allow one of the parties to enforce the inter se agreement as against another party to the inter se agreement would not only be giving effect to an illegal instrument from the point of view of both parties, it would constitute, moreover, confirmation of the breach vis-à-vis third parties, given that the implementation of the inter se agreement necessarily breaches the rights of third parties.*”⁴⁵ According to this view, a court should refuse to enforce the *inter se* agreement in order to protect the rights of contracting parties to the original multilateral treaty.

In addition, Pauwelyn suggests a general application of Article 41 to all subsequent agreements. He asserts that “*two multilateral treaty norms stemming*

³⁹ Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties* (2005) at pp. 328-329; Pauwelyn, *Conflict of Norms*, at p. 306.

⁴⁰ International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly", at p. 217. Invalidity was reserved for conflicts with *jus cogens* obligations. See further Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, at pp. 66-70.

⁴¹ This understanding is confirmed by the fact that Article 41 is found in Part IV of the Vienna Convention on the Law of Treaties which covers the amendment and modification of treaties, rather than in Part III which covers the Application and Interpretation of Treaties.

⁴² See e.g. Karl, "Conflicts Between Treaties", at p. 473.

⁴³ See below, at p. 184.

⁴⁴ Pauwelyn, *Conflict of Norms*, at pp. 310-313. See also Boyle and Chinkin, *The Making of International Law*, at p. 255.

⁴⁵ Pauwelyn, *Conflict of Norms*, at p. 313.

from entirely different contexts could also fall under the scope of Article 41.”⁴⁶ Yet, it is submitted that this interpretation is neither supported by the text nor the drafting history of Article 41. According to Article 41, it only applies to agreements concluded by “two or more of the parties to a multilateral treaty ... as between themselves alone”. As noted by the International Law Commission in its report on fragmentation in international law, “during the debates in the ILC on treaty conflict, a distinction was made between subsequent agreements between some of the parties to modify the application of the treaty in their relations *inter se* and subsequent treaties in which, in addition to parties to the earlier treaty, also other parties participated.”⁴⁷ According to this view, Article 41 only applies to those *inter se* agreements concluded between a sub-set of the parties to the original multilateral treaty. It is submitted that there are also good policy grounds in support of this interpretation. The difference stems from the fact that in the case of *inter se* agreements between a sub-set of the parties, all parties to the later treaty have voluntarily accepted the limitation on their rights and obligations by becoming a party to the first treaty. By refusing to enforce the *inter se* agreement, a court will not affect the rights of any states who are not party to the original multilateral treaty. This is not true when there are additional states which are party to modifying treaty but not to the original multilateral treaty. In this situation, not enforcing the later treaty will also affect the rights of third states.

In the case of a later multilateral treaty conflicting with absolute obligations in an earlier multilateral treaty, the priority rules are of limited practicality. That is not to say that there are no other ways in which treaty conflicts may be settled. Where a state cannot comply with two provisions of an absolute nature, Sadat-Akhavi explains that “the State concerned is free to comply with its obligations towards either State, but it has to compensate the other.”⁴⁸ An affected state may make a claim under the rules of state responsibility demanding reparation from states which have violated an obligation owed to it. In some circumstances, the conclusion

⁴⁶ Ibid., at p. 321.

⁴⁷ International Law Commission, *Fragmentation of International Law*, at para. 295. See the comments of the special rapporteur; 753rd meeting of the International Law Commission, (1964 I) *Yearbook of the International Law Commission*, at p. 197, para. 84. See also the discussions at the 754th meeting, at p. 197, paras. 1-88.

⁴⁸ Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, at p. 72.

of the later treaty may also constitute a material breach of the original treaty, in which case it can be invoked by affected states as a ground for termination or suspension, as well as reparations.⁴⁹ More often, solutions to complex treaty conflicts may have to be negotiated by political institutions. In the words of the International Law Commission, “*conflicts between specialized regimes may be overcome by law, even [if] the law may not go much further than require a willingness to listen to others, take their points of view into account and to find a reasoned resolution at the end.*”⁵⁰

4. Hierarchy in Treaty Obligations

One exception to relative priority of treaties is found in Article 30(1) and relates to the position of the UN Charter.⁵¹ Article 103 of the Charter provides that “*in the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.*” It is generally accepted that the UN Charter has priority over all other international agreements, whether concluded before or after the Charter.⁵²

The scope of Article 103 of the Charter is particularly wide. In the words of one commentator, “*there are no exceptions to the obligations under treaty and customary law over which Charter obligations prevail, other than jus cogens norms.*”⁵³ Article 103 of the Charter prioritises not only the provisions in the Charter but also Security Council resolutions.⁵⁴ Of course, any conflict with the Charter is unlikely, although not completely unknown. In the *Lockerbie Case*, the UK

⁴⁹ Vienna Convention on the Law of Treaties, Article 60.

⁵⁰ International Law Commission, *Fragmentation of International Law*, at para. 487.

⁵¹ The concept of *ius cogens* also reflects a hierarchy.

⁵² Nothing is said in the preparatory work over the consequences of priority of the Charter; Simma, ed., *The Charter of the United Nations : a commentary* 2ed., 2 vols., vol. 2 (Oxford University Press, 2002) at p. 1293. One commentary suggests that Article 103 was intended by its drafters to prioritise the Charter over past and subsequent treaties, including treaties with states which are not members of the UN; Cot and Pellet, eds., *La Charte des Nations Unies - Commentaire article par article*, (Economica, 1985) at p. 1373. It is doubtful whether a conflict with the UN Charter leads to invalidity. See Wood, *The UN Security Council and International Law*, (2006) Hersch Lauterpacht Memorial Lectures, Lecture 1, at para. 52.

⁵³ Wood, *The UN Security Council and International Law*, Lecture 1, at para. 56.

⁵⁴ See UN Charter, Article 25.

government argued that Security Council Resolutions 748 and 883 prevailed over the rights of Libya under the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. In its defence, Libya argued that the 1971 Convention was *lex posterior* and therefore it was the applicable law. In its order on provisional measures, the ICJ rejected this submission, finding that “*prima facie [Article 25] extends to the decision contained in resolution 748 (1992); and ...in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.*”⁵⁵

The absolute priority of the Charter under Article 103 has important implications. Firstly, it is also not necessary to determine whether the Charter contains absolute obligations or not. The Charter has priority regardless. More importantly, Article 103 prioritises the Charter over all other incompatible agreements, whether or not non-members are a party to them.⁵⁶

Why is the UN Charter given special treatment? One explanation for the priority accorded to the UN Charter is its constitutional status and its central position in the international legal system. For instance, Simma et al. argue that the Charter should prevail over treaties with third states “*since the Charter presumes or aspires to be the ‘constitution’ of the international community accepted by the great majority of states.*”⁵⁷ Fassbender also asserts that the UN Charter is a constitution of the international community, citing *inter alia* the intention to create a new world order, and the universality and inclusiveness of the instrument.⁵⁸ Even self-proclaimed sceptics of an international constitutional order accept that Article 103 is the “*chief constitutional element*” of the Charter.⁵⁹

⁵⁵ *Lockerbie Case (Libya v. United Kingdom) (Provisional Measures) Order of 14 April 1992* (1992) ICJ Reports 2, at para. 42. See also *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327; *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities (T-315/01)*, (2005) 2005 European Court Reports Page II-03649.

⁵⁶ See Simma, ed., *The Charter of the United Nations : a commentary*, at p. 1298. As membership of the UN increases, this characteristic decreases in importance.

⁵⁷ *Ibid.*, at p. 1295.

⁵⁸ Fassbender, "The United Nations Charter as Constitution of the International Community", (1998)

36 *Colombia Journal of Transnational Law*, at pp. 573-584.

⁵⁹ Wood, *The UN Security Council and International Law*, Lecture 1, at para. 17.

The Charter therefore challenges the contractual nature of international law, suggesting a limited hierarchy of treaties. Whilst many commentators vigorously dismiss any notion of international constitutionalism, hierarchy is not necessarily a new phenomenon in international law. Some commentators have argued that Article 103 of the UN Charter is simply a reflection of the so-called hierarchic principle which can be traced back to international law of the nineteenth century.⁶⁰

What are the implications of the hierarchic principle for modern international law? Jenks concludes his discussion of the hierarchic principle by asking whether “*certain other instruments may perhaps be regarded, on account of their intrinsic character and the degree of acceptance which they have secured, as being similar in legal status to the Charter?*”⁶¹ It is probably not possible nor advisable to lay down a strict test as to what characteristics a treaty must possess to qualify as “*lex superior*”. Nevertheless, widespread acceptance by the international community and aspirations to universality are two important criteria. Whether or not other treaties can meet this standard is a question that must be considered on a case-by-case basis taking into account the text of the treaty, the context of its conclusion and related state practice.

5. The LOS Convention and Conflicts of Treaties

How do these principles apply to the law of the sea? It is permissible to conclude subsequent treaties that are incompatible with the LOS Convention? Will such treaties be enforceable?

The starting place for any discussion of the relationship between the Convention and other treaties is the text of the Convention itself. How did the drafters intend to regulate this relationship? As Sadat-Akhavi notes, conflict clauses

⁶⁰ Jenks, "The Conflict of Law-Making Treaties", at pp. 436-437. See also Covenant of the League of Nations, Article 20. See Lauterpacht, "The Covenant as Higher Law", (1936) *British Yearbook of International Law* 54.

⁶¹ Jenks, "The Conflict of Law-Making Treaties", at p. 439. He continues “the General Treaty for the Renunciation of War of 27 August 1928 would appear to be in this category, and any treaty involving a violation of it may reasonably be regarded as invalid because of the illegality of its object”. This conclusion on invalidity may be doubted given the subsequent work of the International Law Commission on this subject.

appear not only as articles in a treaty, but also as preambular statements and in appendices to treaties.⁶² There are several provisions of the LOS Convention which are relevant to its relationship with other treaties and sources of law.

The primary conflict clause is found in Article 311. This is a complex provision which covers a variety of scenarios which shall be considered in turn.

Article 311(1) provides:

1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.

This provision deals solely with the relationship between the LOS Convention and the 1958 Geneva Conventions on the Law of the Sea. Compared to the other paragraphs of this provision, the interpretation of Article 311(1) is relatively straightforward. As UNCLOS III was convened as a direct result of dissatisfaction with the previous codifications of the law of the sea, it is not surprising that the Convention assumes priority over these treaties. Moreover, this is no more than an application of the *lex posterior* principle.

As a matter of strict treaty law, the 1958 Conventions will continue to apply to those states which are parties to those Conventions but which have not consented to be bound by the LOS Convention. This simplistic conclusion does not, however, take into account the impact of the LOS Convention on the customary international law of the sea. In the *Gulf of Maine Case*, the ICJ held that custom based on the LOS Convention rather than the 1958 Conventions provided the applicable legal framework for maritime boundary delimitations.⁶³ Therefore it is possible to conclude that the 1958 Conventions have largely been rendered redundant through *desuetude*.⁶⁴

Article 311(2) is more general in scope. It provides:

2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by

⁶² Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, at pp. 85-86.

⁶³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (US v. Canada)*, (1984) ICJ Reports 246 at para. 124; See also *UK-French Continental Shelf Case*, (1977) 54 International Law Reports at p. 47.

⁶⁴ On desuetude, see Akehurst, "The Hierarchy of the Sources of International Law", at p. 275.

other States Parties of their rights or the performance of their obligations under this Convention.

Some authors have attempted to argue that this provision should be interpreted *contrario sensu* and that it therefore provides for the priority of the LOS Convention over other treaties.⁶⁵ On its ordinary meaning, however, Article 311(2) does not expressly deal with situations of conflict or incompatibility at all. Thus, Orrego Vicuña argues that it “*necessarily reflects the situation in which the compatibility between the two treaties has not been affected by the relationship to the rights and obligations concerned ... to the extent that the provision of those other agreements might be incompatible with the new Convention, any conflict will be resolved according to the general rules of the Law of Treaties.*”⁶⁶

It is possible to shed light on the interpretation of Article 311(2) by reference to its drafting history. According to the *travaux préparatoires*, this provision was initially intended to deal with the relationship between the Convention as the general law of the sea and the technical treaty law in this field.⁶⁷ The Virginia Commentary explains that “*one of the major problems which [the Conference] had to face was that the restructuring of the general law of the sea embodied in the new Convention is not and cannot easily be matched by a parallel restructuring of the detailed and often highly technical and politically delicate conventional law relevant to the law of the sea or to maritime and related matters.*”⁶⁸ In this sense, Article 311(2) is seen as an interpretative principle to ensure that technical rules and standards that were promulgated under the old law of the sea regime continue to be applied in light of the new legal framework.⁶⁹

⁶⁵ Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties* at p. 334. The Virginia Commentary is more cautious, simply suggesting that paragraph 2 “can be taken to imply a measure of priority for the 1982 Convention in the sense that it provides a yardstick against which the compatibility of those other agreements is to be measured.”; Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, 5 vols., vol. 5 (Martinus Nijhoff Publishers, 1989) at p. 243.

⁶⁶ Orrego Vicuña, “The Law of the Sea Experience and the Corpus of International Law: Effects and Interrelationships”, in *The Developing Order of the Oceans*, ed. Krueger and Riesenfeld (The Law of the Sea Institute, 1984) at p. 8.

⁶⁷ Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, at p. 238. There was some discussion over whether a conflict clause was necessary.

⁶⁸ *Ibid.*, at p. 238. See also Oxman, “The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)”, (1980) 74 *American Journal of International Law* at p. 36.

⁶⁹ See also International Law Commission, *Fragmentation of International Law*, at para. 268.

From the text, it is clear that Article 311(2) is not limited to agreements concluded before the LOS Convention.⁷⁰ Nevertheless, all it would appear to require is that any agreements concerning the law of the sea should be interpreted as far as possible in the context of the legal framework of the Convention. It does not provide a direction on how to solve conflicts if they do arise.

This interpretation would also appear to be supported by the limited case law that there is in this area. The *La Bretagne Arbitration* between France and Canada concerned the interpretation of a 1972 Agreement which gave certain fishing vessels flying the French flag access to fish stocks in Canadian waters. The dispute was whether Canada could regulate the filleting of fish by French vessels in the Gulf of St Lawrence. To a degree, the answer turned on the interpretation of the term “fishery regulation” in the 1972 Agreement. The Tribunal had stressed that the 1972 Agreement was a bilateral treaty that struck a bargain between the two states involved. However, the Tribunal also had to address the impact of the LOS Convention on the 1972 Agreement. Both parties to the dispute agreed that an interpretation of the 1972 Agreement should take into account the subsequent development of the law by the LOS Convention, whilst differing on the outcome of such an approach. The Tribunal held that “*even if the [LOS Convention] at present regulated relations between the two parties, the Tribunal notes that it would not impair the validity of the relations established by the 1972 Agreement, because of the clause in Article 311(2).*”⁷¹ The decision must be treated with some care as the LOS Convention was not in force at that time. Nevertheless, the Tribunal appears to be suggesting no more than that the 1972 Agreement continued to govern the relationship between the two parties as it did not fundamentally clash with the new principles on the law of international fisheries set out in the LOS Convention.

In the *Southern Bluefin Tuna Arbitration*, the Tribunal invoked Article 311(2) to support the view that the Convention was still applicable between the

⁷⁰ Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, at p. 241.

⁷¹ *La Bretagne (France v. Canada)*, (1986) 82 International Law Reports 590 at para. 51.

parties and it had not been displaced by the 1993 Convention on the Conservation of Southern Bluefin Tuna.⁷²

From this analysis, it would appear that Article 311(2) does not provide a conflict clause at all. Rather it seeks to promote a harmonious interpretation and application of the Convention with other treaties on the law of the sea.

Articles 311(3) and (4) deal with subsequent agreements modifying or suspending the operation of the Convention:

3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification of suspension for which it provides.

It has been suggested that these Articles were largely inspired by Article 41 of the Vienna Convention.⁷³ Certainly, the two sets of provisions have similarities. Article 311(3) repeats the two conditions for the lawful conclusion of *inter se* agreements found in Article 41 of the Vienna Convention. In addition, it provides that an *inter se* agreement must not conflict with the basic principles of the LOS Convention, although Freestone and Elferink argue that this third condition adds little if anything to what was already covered by the other two conditions.⁷⁴

If the effect of these two sets of provisions is the same, it would follow that *inter se* agreements which do not satisfy the conditions of Article 311(3) may not be enforced by the parties to them. As Boyle explains “*the implication of Article 311(3)*

⁷² *Southern Bluefin Tuna Arbitration*, at para 52.

⁷³ Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, at p. 243: “paragraphs 3 and 4 deal in standard manner with inter se modifications, closely following the provisions of article 41 of the Vienna Convention of 1969.” These paragraphs also deal with *inter se* suspensions, as in Article 58 of the Vienna Convention on the Law of Treaties.

⁷⁴ Freestone and Elferink, “Strengthening the United Nations Convention on the Law of the Sea’s regime through the adoption of implementing agreements, the practice of international organisations and other means”, at p. 181. Indeed, several commentators argue that the two conditions in Article 41(b) also overlap; e.g. Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, at p. 58.

is that drafters of the [LOS Convention] sought to limit the right of parties to derogate from the Convention in later agreements. The assumption is that, in the event of the kind of conflict envisaged in Article 311 arising, [the LOS Convention] will prevail over a later treaty dealing with the same subject matter, notwithstanding the *lex posterior* rule.”⁷⁵ According to this view, this Article seeks to rebut the presumption of *lex posterior* in the case of conflicts.

Rosenne goes further, suggesting that Article 311(3) is not simply a priority clause but that it could invalidate an *inter se* agreement because of its very precise wording.⁷⁶ Rosenne argues that acting under his/her powers under the Convention, the UN Secretary General could set in motion “a process by which breach of article 311 could be established and the later treaty found to be void because of a specific provision to that effect in the Convention.”⁷⁷ This latter argument is difficult to accept. Given the relative rarity of invalidity as a sanction in international law, it should not be accepted without solid textual support. It is suggested that such support cannot be found in Article 311 which makes no reference to invalidity.

It is accepted that Article 311(3) provides a limited priority to the LOS Convention. Whether or not a subsequent treaty is enforceable will therefore depend on whether it satisfies the conditions in Article 311(3). Yet, clarifying the scope of these conditions is not straightforward.⁷⁸

It is clear that states may not contract out of some provisions of the Convention because they constitute “basic principles of the Convention” or they reflect one of its objects or purposes. In other words, some of the provisions of the Convention may be of an absolute character. Obligations to protect the marine environment or to conserve fish stocks are possible candidates as they are owed to all states collectively.

At the same time, it is clear that Article 311(3) does not confer absolute priority on all of the provisions in the LOS Convention. Some provisions may be

⁷⁵ Boyle, "Further Development of the 1982 Law of the Sea Convention", at p. 577. See also Boyle and Chinkin, *The Making of International Law* at p. 255.

⁷⁶ Rosenne, *Breach of Treaty* (Grotius Publications, 1985) at p. 93.

⁷⁷ *Ibid.*, at p. 92.

⁷⁸ See the comments of Oxman in a slightly different context; Oxman, "The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)", at p. 35.

modified through subsequent *inter se* agreements provided that such modifications do not purport to affect third states. Indeed, many treaties do contract out of general principles found in the Convention. Several treaties have been concluded to further international co-operation in the fight against crime and terrorism. For instance, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances aims to promote international co-operation to address various aspects of illicit traffic in drugs, including trafficking by sea. Article 17 encourages co-operation between states by *inter alia* requesting authorization from the flag state to interdict ships suspected of engaging in illicit traffic.⁷⁹ The 2005 Protocol of the SUA Convention also affects the high seas freedoms of the contracting parties to that instrument by allowing high seas interdiction by states other than the flag state if certain conditions are met.⁸⁰ These treaties clearly have the potential to interfere with freedom of navigation on the high seas⁸¹ yet they both include provisions which stress their *inter se* character. Thus, the 2005 SUA Protocol provides that “*nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.*”⁸² A similar provision is found in the UN Drugs Convention.⁸³ It is therefore made clear that these treaties do not seek to modify the general jurisdictional framework of the LOS Convention or undermine the principle of freedom of navigation for third states.

What types of treaties are captured by Article 311(3)? Does it apply to all other treaties conflicting with the LOS Convention? If it is inspired by Article 41 of the Vienna Convention on the Law of Treaties, it would follow that it would not be applicable to other general multilateral treaties of a general law-making nature.⁸⁴ Yet, there may be arguments that support the priority of the Convention over all

⁷⁹ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 17(3).

⁸⁰ 2005 SUA Protocol, Article 8bis.

⁸¹ The principle of exclusive flag state jurisdiction in Article 92 of the LOS Convention provides that it is subject to “exceptional cases expressly provided for in international treaties”, thus foreseeing some *inter se* modifications.

⁸² 2005 SUA Protocol, Article 9.

⁸³ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 17(1). Paragraph 11 further provides that “any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal states in accordance with the international law of the sea.”

⁸⁴ See above, at pp. 182-185.

other treaties. Certainly, Article 311(3) of the LOS Convention uses different language to Article 41 of the Vienna Convention and therefore it does not follow that the two provisions necessarily have an identical scope. The fact that the Convention is largely accepted as customary international law by the international community may also permit a wider application of this priority rule to any agreement conflicting with object and purpose or the basic principles of the Convention. After all, most states have consented to the basic principles in the LOS Convention. Furthermore, the LOS Convention has several outstanding characteristics which stress its central importance to the modern international legal system. It is a treaty that was negotiated by the international community as a whole which is intended to have universal application. Much of the Convention sets out principles of a “constitutional” character, such as those provisions specifying the maritime jurisdiction of states.⁸⁵ Applying other treaties over and above the Convention would undermine the compromise achieved by the international community and the delicate balance of interests inherent therein.

Signs of the importance attached to the LOS Convention are also found in successive General Assembly resolutions on the law of the sea. Although not legally binding, these resolutions provide pertinent evidence of the attitude of the international community and arguably qualify as practice in the implementation of the Convention. For the purposes of defining the relationship between the LOS Convention and other treaties, General Assembly resolutions demonstrate the ongoing support of the international community for the LOS Convention. Resolutions on the law of the sea regularly confirm that the Convention is intended to provide “*the legal framework within which all activities in the oceans and seas must be carried out.*”⁸⁶ The General Assembly has also repeatedly underlined the universal and unified character of the Convention. The use of such terminology implies that the Convention should not *prima facie* be set aside in favour of a conflicting treaty, whether or not that other treaty includes third states. In order

⁸⁵ See Scott, “The LOS Convention as a Constitutional Regime for the Oceans”, in *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005).

⁸⁶ General Assembly Resolution 60/30, 2005, preamble and para. 4.

words, it is sometimes appropriate to apply the hierarchic principle to the LOS Convention because of its “*intrinsic character and the degree of acceptance*”.⁸⁷

The Convention does not, however, benefit from a general application of the hierarchic principle. Article 311(5) brings attention to the fact that other treaties may be afforded express priority over the LOS Convention. It provides:

5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.

The list of agreements expressly permitted or preserved throughout the Convention is extensive. The Virginia Commentary on the Convention counts at least seventy articles containing a reference to other sources of international law.⁸⁸

One special conflict clause is found in Article 301 which provides:

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

This provision promotes compatibility between the LOS Convention and the UN Charter. It does not directly correlate with Article 103 of the Charter as it does not confer priority to the Charter as a whole or any measures adopted thereunder. Nevertheless, it is sufficiently broad to capture most such measures. It would presumably include Security Council resolutions as these are required to be in furtherance of the purposes of the Organization.⁸⁹ Thus, the fifteen members of the Security Council would be able to modify the law of the sea for all states, although this is a power that they should clearly use with care, for fear of upsetting the consensus of the international community reflected in the LOS Convention.

A new applicable law clause was introduced in the negotiation of the Part XI Agreement which adapted the deep seabed regime to reflect a more free market philosophy. The Agreement incorporates the relevant provisions of the WTO.⁹⁰ At

⁸⁷ See Jenks, cited above, at p. 187.

⁸⁸ Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, at p. 423.

⁸⁹ UN Charter, Article 24(2).

⁹⁰ Part XI Agreement, Section 6, at para. 1(b).

the same time, it makes clear that “*the principles contained in paragraph 1 shall not affect the rights and obligations under any provision of the agreements referred to in paragraph 1(b), as well as the relevant free trade and customs union agreements, in relations between States Parties which are parties to such agreements.*”⁹¹ Thus it confers a limited priority on the WTO covered agreements for the purposes of Part XI of the Convention.

6. Dispute Settlement and Treaty Conflicts

Priority clauses are primarily invoked in the context of litigation in order to guide the court on the applicable law. Therefore, it is significant that a third-party procedure is available in the case of a treaty conflict involving the LOS Convention. Most disputes under the Convention will be subject to compulsory adjudication in accordance with Part XV of the Convention.

Article 293 defines the applicable law for a court or tribunal acting under Part XV. It provides that courts and tribunals deciding disputes under the Convention may apply both the Convention and “*other rules of international law not incompatible with this Convention.*”⁹² It appears from this provision that courts and tribunals are limited in the law that they can apply.

Whether or not a treaty is compatible with the LOS Convention must be partly determined with reference to the substantive conflicts clauses described above. Nevertheless, this provision seems to confirm that the LOS Convention will take priority over conflicting treaties unless the conflicting treaty is permitted by the Convention. In practice, many deviations are permitted. Nevertheless, Article 293

⁹¹ Part XI Agreement, Section 6, at para. 2. See also Boyle, "Further Development of the 1982 Law of the Sea Convention", at p. 582.

⁹² Article 293(2) continues that ‘paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree’. Deciding a case on the basis of equity, however, fundamentally alters the role of a court or tribunal which is no longer involved in developing the Convention on the basis of legal principles, but of settling the dispute according to concepts of fairness. In this sense, such a role is more akin to the alternative dispute settlement procedures that states may choose under section 1 of Part XV.

partly acts as a conflict clause, conferring priority on the LOS Convention over other sources of law that are incompatible with it.⁹³

This conclusion must, however, be treated with care. As noted above, one important factor to be taken into account in solving conflicts of treaties is the intention of the parties. Courts and tribunals acting under Part XV should not lose sight of this consideration in determining the applicable law in a law of the sea dispute. Although Article 293 promotes the general priority of the Convention, there may be occasions when it is appropriate to set it aside if an instrument has been adopted by a consensus of the international community as a whole with the intention of modifying the general law of the sea. This thesis has demonstrated several occasions in which states have deemed to modify the law of the sea framework through informal decisions or implementing agreements. For instance, the Part XI Agreement clearly modifies the LOS Convention. However, according to a strict interpretation of Article 293 of the LOS Convention, it would not be applicable law. Thus, Blazkiewicz concludes that *“the current wording of Article 293 may prima facie hamper the role of the development and administration of international law of the sea by judicial bodies having jurisdiction under the LOS Convention.”* He continues, *“judicial bodies must recognize these new norms, as they are binding between states, even if they are incompatible with the Convention.”*⁹⁴

In practice, it is inconceivable that a court or tribunal would not apply the Part XI Agreement, whether or not a state was actually a party to that treaty. Other instruments which may be incompatible with the LOS Convention but have been adopted by consensus must be treated in a similar fashion. By applying such instruments, a court would be doing no more than recognizing the powers of states under general international law to interpret and modify a treaty through subsequent practice.⁹⁵ In this sense, the priority of the Convention should not be seen as fixed

⁹³ See Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, at p. 73. See also Bartels, *International Law in the WTO Dispute Settlement System*, (2005) BIICL Fifth Annual WTO Conference; Klein, *Dispute settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005) at p. 58; Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, at p. 73.

⁹⁴ Blazkiewicz, "Commentary", in *Stability and Change in the Law of the Sea: the Role of the LOS Convention*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005) at p. 160.

⁹⁵ In the *Namibia Advisory Opinion*, the ICJ accepted that institutional practice could modify the UN Charter, in spite of Article 103.

and it can evolve as emerging priorities become evident through the activities of international institutions and state practice.

There may not always be an opportunity to bring an issue before a court or tribunal. Thus the question of enforceability of treaties does not directly arise. Nevertheless, it is important to know which treaty prevails in order to promote certainty in the applicable law. In this situation, solutions to a treaty conflict may be pursued through international institutions. Institutions can be used as a forum in which states can co-operate on solutions to conflicting rules and standards. Discussions can taken place over the balance to be reached on a case-by-case basis as conflicts arise. The General Assembly, as a universal forum with a wide competence, may be an appropriate forum in which all of the relevant issues can be raised.

7. Conflict Clauses in other Treaties

Conflict clauses in other treaties may provide additional guidance on how potential incompatibilities may be solved. These are important guides of whether or not states intended to modify the universal law of the sea by concluding a conflicting instrument. Thus, the Part XI Agreement is clear that it is intended to replace certain provisions of the deep seabed mining regime found in the LOS Convention.⁹⁶

On other occasions, treaty conflict clauses reveal a recognition of the importance attached to the LOS Convention and the fact that the parties did not intend to change the applicable law. The 1992 Convention on Biological Diversity provides one pertinent example. This treaty was concluded at the UN Conference on Environment and Development and it constitutes an important instrument in the field of international environmental law. The Convention is open to all states⁹⁷ and it currently has 190 contracting parties.⁹⁸ The objective of the Convention is the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic

⁹⁶ See chapter four, at p. 97 ff..

⁹⁷ Convention on Biological Diversity, Article 35.

⁹⁸ See <http://www.biodiv.org/world/parties.asp> <checked 15 May 2007>.

resources.⁹⁹ The Convention applies to the components of biodiversity found in the national jurisdiction of contracting parties, including any areas of maritime jurisdiction.¹⁰⁰ It also extends to processes and activities carried out under the jurisdiction or control of a contracting party beyond the limits of national jurisdiction.¹⁰¹ It therefore covers ships operating on the high seas, as well as activities in the International Seabed Area carried out under the auspices of a State Party.

Prima facie, the Convention on Biological Diversity and the LOS Convention seem to pursue complementary objectives.¹⁰² The LOS Convention itself introduced important obligations to protect the marine environment. The Convention on Biological Diversity generally promotes this aim, as well as introducing several more specific concepts such as the precautionary principle and the ecosystem approach which are not included in the LOS Convention. The singular focus of the Convention on Biological Diversity may mean that it prioritises factors that would otherwise be given more careful consideration as part of the balance of interests in the LOS Convention. In the words of one study, “*fundamental differences relate to the underlying philosophies of the Conventions and their respective focus and structure.*”¹⁰³

From the perspective of the Convention on Biological Diversity, the consequences of any conflicts, unlikely as they are, are governed by Article 22. Paragraph 2 of this provision says that “*Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea*”. This is a special conflict clause which governs the relationship between the Convention on Biological Diversity and the LOS Convention.¹⁰⁴ It does not refer to priority but it does require the Convention on Biological Diversity to be applied consistently with the international

⁹⁹ Convention on Biological Diversity, Article 1.

¹⁰⁰ Convention on Biological Diversity, Article 4(1).

¹⁰¹ Convention on Biological Diversity, Article 4(2).

¹⁰² Subsidiary Body on Scientific Technical and Technological Advice, *Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work* (Convention on Biological Diversity, 2003) at p. 27, para. 107.

¹⁰³ Wolfrum and Matz, cited by Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties*, at p. 333.

¹⁰⁴ See Boyle, "Further Development of the 1982 Law of the Sea Convention", at pp. 578-580.

law of the sea.¹⁰⁵ By implication, the drafters of the Convention on Biological Diversity did not intend to alter the balance of rights and obligations in the LOS Convention. Any tension between these two treaties should be solved through synergetic interpretation. At the same time, the new provisions on the protection of biodiversity cannot be invoked to undermine rights pertaining to states under the LOS Convention.

Another instrument worthy of comment is the 2001 Convention on the Protection of the Underwater Cultural Heritage. This agreement was negotiated under the auspices of UNESCO with the aim of codifying and progressively developing the rules relating to the protection and preservation of underwater cultural heritage. The annex to the 2001 Convention contains a series of rules concerning activities directed at underwater cultural heritage. The Convention also prescribes which states may take measures to protect underwater cultural heritage and therefore it has the potential to affect the jurisdictional framework in the LOS Convention.

Article 7 covers the protection of underwater cultural heritage in internal waters, archipelagic waters and the territorial sea, requiring states to apply the rules in the annex. Article 8 says that states may “*regulate and authorize activities directed at underwater cultural heritage in their contiguous zone*” in accordance with Article 303(2) of the LOS Convention. Therefore, it does no more than confirm the LOS Convention provisions. Articles 9 and 10 cover underwater cultural heritage on the continental shelf or in the EEZ. It confirms that a state may “*prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law.*”¹⁰⁶ The reference to international law arguably includes the LOS Convention. However, it continues to designate the coastal state as a “*co-ordinating state*” which may take all practicable measures ... and if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting.”¹⁰⁷ It does not specify what measures may be deemed necessary but it is possible that such measures could

¹⁰⁵ Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties*, at p. 333.

¹⁰⁶ Underwater Cultural Heritage Convention, Article 10(2).

¹⁰⁷ Underwater Cultural Heritage Convention, Article 10(4).

interfere with the rights of other states within the EEZ. Any such actions could be deemed to be incompatible with the LOS Convention, yet the 2001 Convention provides that “*nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.*”¹⁰⁸ Whilst seeking to improve the protection of underwater cultural heritage, it is apparent that the 2001 Convention was not intended to modify the general law of the sea.¹⁰⁹ Inconsistencies may arise, but the 2001 Convention makes it clear that it cannot be invoked to justify interferences with rights under the LOS Convention.

It can be seen that treaties which have an obvious overlap with the law of the sea often include a provision to govern their relationship with the LOS Convention. It is noticeable that most of these treaties do not cite the LOS Convention itself, but refer to the “*international law of the sea.*” This phrasing indicates a recognition that the law of the sea is a subject of customary international law. Thus, the conflict clauses also apply to states which are not party to the LOS Convention.

Another treaty with important implications for the law of the sea is the 1959 Antarctic Treaty. Its interaction with the law of the sea is complex and the following analysis can do no more than raise some of the principal problems involved. The primary purpose of the Antarctic Treaty is to advance the peaceful use of Antarctica¹¹⁰ and freedom of scientific investigation on the continent.¹¹¹ It does so by encouraging co-operation and information exchange.¹¹² The Treaty itself is often claimed to create an objective regime so that it has implications for non-parties.¹¹³

The Treaty applies to the area lying south of the 60° south latitude¹¹⁴, much of which is ocean. The drafters of the Treaty were aware of the implications for the

¹⁰⁸ Underwater Cultural Heritage Convention, Article 3. See also Article 10(6).

¹⁰⁹ It may be that this was the intention of some states in negotiating the Convention which was not adopted by consensus and was the subject of some controversy.

¹¹⁰ Antarctic Treaty, Article I.

¹¹¹ Antarctic Treaty, Article II.

¹¹² Obligations to cooperate or consult appear throughout the treaty; see Antarctic Treaty, Articles II, III, IV, VII and XI.

¹¹³ See chapter three, at p. 48. This claim is, needless to say, controversial.

¹¹⁴ Antarctic Treaty, Article VI.

law of the sea. Article 6 provides that “*nothing in the present treaty shall in any way affect the rights, or the exercise of the rights, of any states under international law with regard to the high seas within that area.*” In analysing this provision, it should be remembered that it was drafted before the conclusion of the LOS Convention.¹¹⁵ Most states claimed a territorial sea but at that time, the majority of the Southern Ocean would have been high seas. It confirms that large parts of the Treaty area should be subject to the general law of the sea.

How much of the Treaty area is high seas is today controversial. The concept of the EEZ has come into existence and the legal character of the continental shelf has developed through the negotiations at UNCLOS III. Coastal states can today claim sovereign rights and jurisdiction over much larger areas of sea than in 1959. Yet, Article 4(2) of the Antarctic Treaty prohibits the assertion of a “*new claim or an enlargement of an existing claim to territorial sovereignty in Antarctica.*” Whether or not this covers the creation of new maritime zones is much disputed.¹¹⁶ Several states do claim an EEZ or an extended continental shelf in their Antarctic territories, although they are contested by other states.¹¹⁷ The rights or wrongs of these arguments largely depends on an interpretation of the Antarctic Treaty itself.

If the prohibition on new claims did include claims of maritime jurisdiction, it would appear that the Antarctic Treaty seeks to modify the general legal framework of maritime jurisdiction, creating a *sui generis* regime applicable to this area.¹¹⁸ On this interpretation, it would appear that the rights of coastal states in the area covered by the Antarctic Treaty are much more limited than under the LOS Convention as they cannot claim an EEZ or continental shelf.

¹¹⁵ See T. Scovazzi, "The Antarctic Treaty System and the New Law of the Sea: Selected Issues", in *International Law for Antarctica*, ed. F. Francioni and T. Scovazzi (Kluwer Law International, 1996) at p. 386.

¹¹⁶ Kaye and Rothwell, "Southern Ocean Boundaries and Maritime Claims: Another Antarctic Challenge for the Law of the Sea?", in (2002) 33 *Ocean Development and International Law*, at pp. 379-380.

¹¹⁷ Australia, Chile and Argentina claim an EEZ in their Antarctic territories.

¹¹⁸ This position would appear to be confirmed by the practice of states in relation to submissions to the Commission on the Limits of the Outer Continental Shelf. See for instance, the reaction to the claim by Australia in its submission to the Commission. See the *Note from the Permanent Mission of Australia accompanying the lodgement of Australia's submission to the Commission*. For a discussion of the complexities of this relationship, see Watts, *International Law and the Antarctic Treaty System* (Cambridge University Press, 1992) at pp. 156-163.

This example serves to underline that the solution of treaty conflicts cannot be solved by the application of general principles *in abstracto* and that context is all important.

8. Conclusion

Conflicts of treaties is a complex area of international law. It is difficult to determine any absolute hierarchy in the absence of universal legislative, administrative or judicial organs. Recourse to pragmatism and *ad hoc* solutions reflects the reality of the international legal system. Whilst some general principles do exist, it is often a matter of taking into account the particular context of a conflict in order to achieve a solution.

Many conflict clauses point towards mutual accommodation of treaties. The International Law Commission states, “*such formulations do imply a willingness to acknowledge the existence of parallel and potentially conflicting treaty obligations. But they fall short of indicating clearly what should be done in case conflicts emerge. Instead, recourse is to compromise formulas that push, as it were, the resolution of problems to the future.*”¹¹⁹ In this case, it is important that political institutions are available in which solutions to treaty conflicts can be worked out on a case-by-case basis. These institutions can take into account a variety of factors in order to determine the priority of treaties.

In the case of the LOS Convention, however, courts and tribunals may play a valuable role in maintaining its integrity. They are aided by the general acknowledgement that this instrument provides a universal and unified framework for the law of the sea. It follows that conflicting treaties which seek to modify the basic principles of the law of the sea will generally be unenforceable unless there is a clear indication that a modification to the settlement found in the Convention is intended by the international community as a whole. This is a high threshold to meet. Yet, the priority of treaties is ultimately a question of context and no absolute hierarchies can be assumed.

¹¹⁹ International Law Commission, *Fragmentation of International Law*, at para. 276.

Judicial Development of the LOS Convention

1. Dispute Settlement and the Law of the Sea

Courts and tribunals have a long and distinguished history of settling disputes over the law of the sea. In doing so, judicial institutions such as the Permanent Court of International Justice and the International Court of Justice, as well as *ad hoc* arbitral tribunals, have contributed to the formation of a comprehensive and organised body of rules in this field¹, as well as to other general issues of international law.²

In the past, the contribution of courts has largely been through determining the content of the customary international law of the sea. The conclusion of the LOS Convention potentially changes the role that judges will play. For the first time, there is a comprehensive treaty instrument on the law of the sea. Yet, courts and tribunals will still play a significant role in settling ocean disputes as adjudication is given a prominent place amongst the dispute settlement provisions in Part XV of the Convention. The inclusion of compulsory dispute settlement in a treaty of the complexity of the LOS Convention was a landmark achievement, differentiating it from the 1958 Conventions on the Law of the Sea.³ Not only are courts and tribunals important means for the peaceful settlement of disputes, they may also contribute to the stability of the law of the sea by promoting the uniform interpretation and implementation of the Convention. For many states, compulsory dispute settlement was seen as a *quid pro quo* to the achievement of the package deal.⁴ According to

¹ Oda, "The International Court of Justice and the Settlement of Ocean Disputes", (1993) 244 *Recueil des Cours* at p. 127.

² For example, in deciding the *North Sea Continental Shelf Cases*, the ICJ made a significant contribution to clarifying the relationship between treaties and customary international law, as well as the law on delimitation of the continental shelf; *North Sea Continental Shelf Cases*, (1969) ICJ Reports 3. Similarly, in *Anglo-Norwegian Fisheries Case*, the ICJ went a long way in clarifying the concept of persistent objector and the principles pertaining to the formation of customary international law; *Anglo-Norwegian Fisheries Case*, (1951) ICJ Reports 116.

³ An optional protocol on dispute settlement was concluded at UNCLOS I.

⁴ Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Martinus Nijhoff Publishers, 1987) at pp. 39, 68 and 241. See also the comments of Oxman, "The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session", (1975) 69

the oft-quoted speech of the first President of the Conference, “*the provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention. Dispute settlement will be the pivot upon which the delicate equilibrium must be balanced.*”⁵ One commentator describes the dispute settlement system as “*the cement which should hold the whole structure together and guarantee its continued acceptance and endurance for all parties.*”⁶

It is the purpose of this chapter to analyse the dispute settlement mechanisms available under the LOS Convention and to assess the ways in which the judicial process can contribute to developing the legal order of the oceans. How do courts interpret and apply the Convention? Are courts limited to upholding the *status quo* or can they contribute to the progressive development of the law of the sea?

2. Dispute Settlement in the LOS Convention

The settlement of disputes in international law is largely a matter for states. In this sense, little has changed since the PCIJ said in 1923 that “*it is well-established in international law that no state can, without its consent, be compelled to submit its dispute with other states either to mediation or to arbitration, or to any other kind of pacific settlement.*”⁷ Today, few treaties provide for compulsory settlement of disputes without the consent of the disputing parties. The LOS Convention is different as it contains extensive provisions in Part XV and several annexes on the settlement of disputes. The system of dispute settlement in the LOS

American Journal of International Law at pp. 795-796, and again at Oxman, "The Third United Nations Conference On the Law of the Sea: The 1976 New York Sessions", (1977) 71 *American Journal of International Law* at pp. 266-267.

⁵ See also the words of the Second President of UNCLOS III; Koh, "A Constitution for the Oceans", in *The Law of the Sea - Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (United Nations, 1983).

⁶ Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", (1997) 46 *International and Comparative Law Quarterly* at p. 38. See also Rothwell, "Oceans Management and the Law of the Sea in the Twenty-First Century", in *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, ed. Oude Elferink and Rothwell (Koninklijke Brill NV, 2004) at p. 353. C.f. Klein who argues that compulsory dispute settlement is not requisite for disputes concerning certain activities; *Dispute settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005) at pp. 362-363.

⁷ *Advisory Opinion on the Status of Eastern Carelia*, (1923) PCIJ Reports, Series B, No. 5, at p. 27.

Convention is complex and it involves a variety of procedures, both binding and non-binding.⁸ By becoming a party, a state automatically consents to the compulsory settlement of most disputes that may arise under the Convention.

The Convention does not create a single dispute settlement organ competent to decide all ocean disputes. Participants at UNCLOS III were unable to agree on which forum should decide disputes arising under the Convention. The compromise in Article 287 creates a list of four dispute settlement organs from which States Parties may make a choice: the ICJ, the ITLOS⁹, *ad hoc* arbitration or special arbitration.

According to Article 287, a dispute will be submitted to an organ accepted by both disputing states, unless they agree otherwise.¹⁰ If the choices of disputing states do not coincide, a dispute will be submitted to *ad hoc* arbitration. Arbitration is therefore the default forum for most law of the sea disputes.¹¹ Arbitration is the most flexible of the four options as the parties to a dispute are able to select their own adjudicators and to determine certain aspects of the procedure.¹² For some types of dispute, however, arbitration is not the default forum.

Article 290(5) provides that requests for provisional measures are to be submitted to the ITLOS if the parties cannot agree on an alternative forum within two weeks of a request being made.¹³ The role of the ITLOS under this procedure is limited in two ways. Firstly, the jurisdiction of the ITLOS in these proceedings is restricted to dealing with the request for provisional measures and the Tribunal may

⁸ For a legislative history of the dispute settlement provisions, see Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, particularly at pp. 24-25, 53-54, 73-75.

⁹ The ITLOS is created by the LOS Convention.

¹⁰ LOS Convention, Article 287(4).

¹¹ LOS Convention, Article 287(5). In this respect, the Convention differs from the original "Montreux formula" which would, where no agreement could be reached, have deferred to the choice of the defendant state. See Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* at pp. 53 and 73.

¹² See LOS Convention, Annex VII, Articles 3 and 5. For this purpose, a list is maintained by the UN Secretary General based on nominations received from States Parties; see LOS Convention, Annex VII, Article 2. However, appointments may be made of persons who are not on the list. Indeed, the parties can agree to vary the size and composition of the tribunal if they wish. In the case that arbitrators are not appointed within a certain time, the task is conferred on the President of the International Tribunal for the Law of the Sea, who shall make a choice from a list of arbitrators proposed by States Parties. The Annex VII Tribunal can determine its own rules of procedure unless the parties agree on a set of rules.

¹³ LOS Convention, Article 290(5).

not touch upon any aspect of the merits of the dispute. Furthermore, it only has the competence to order provisional measures until the composition of the arbitral tribunal.¹⁴

Another special procedure applies to requests for prompt release of ships arrested by a coastal state in its EEZ.¹⁵ According to Article 292, requests for prompt release may be heard by the ITLOS unless the parties agree on another forum within ten days of the arrest of a vessel.¹⁶ Taking a critical view of this procedure, Oda asserts that “*the question of prompt release is inevitably linked with the content of the rules and regulations of the coastal state concerning the fisheries in its exclusive economic zone, and the way in which these rules are enforced.*”¹⁷ Nevertheless, the Tribunal has maintained that its jurisdiction in prompt release cases is strictly limited to deciding whether the coastal state has complied with the obligation to release an arrested vessel on payment of a reasonable bond.¹⁸

Special procedures also apply to disputes arising under Part XI of the Convention. The Seabed Disputes Chamber is created in order to deal with such disputes.¹⁹ It is composed of eleven judges, elected by the ITLOS judges themselves.²⁰ The Chamber is a court within a court and it has its own President and rules of procedure.²¹ The jurisdiction of the Seabed Disputes Chamber is defined under Article 187 which lists six main categories of dispute.²²

The jurisdiction of the Chamber over seabed disputes is, however, not exclusive. States may agree to submit such disputes to alternative dispute settlement

¹⁴ The principal Tribunal has the power to modify, revoke or affirm measures previously ordered by the ITLOS See *The MOX Plant Case (Ireland v. UK) Order of 24 June 2003*, (2003) 42 ILM 1187 at para. 40; see also *Southern Bluefin Tuna Arbitration (Australia and New Zealand v. Japan) Award on Jurisdiction and Admissibility*, (2000) 39 ILM 1359 at para. 66.

¹⁵ LOS Convention, Articles 73(2) and 216(1)(b).

¹⁶ LOS Convention, Article 292(1).

¹⁷ Oda, "Dispute Settlement Prospects in the Law of the Sea", (1995) 44 *International and Comparative Law Quarterly* at p. 866.

¹⁸ The ITLOS has stressed that it cannot deal with other allegations, for instance failure to notify the flag state of an arrest, or the illegal arrest of a vessel. See e.g. *The Camouco (Prompt Release) (Panama v. France) Judgment of 7 February 2000*, (2000) 125 ILR 151 at paras. 59-60; *The Volga (Prompt Release) (Russia v. Australia) Judgment of 23 December 2002*, (2003) 42 ILM 159 at para. 83.

¹⁹ LOS Convention, Article 187.

²⁰ LOS Convention, Annex VI, Article 36.

²¹ For the constitution of the Chamber, see LOS Convention, Annex VI, Article 35.

²² See chapter five, at pp. 171-172.

organs. A state-to-state application may be unilaterally made to an *ad hoc* chamber of the Seabed Disputes Chamber made up of three judges.²³ The Convention also provides that contractual disputes may be submitted to binding commercial arbitration by way of an unilateral application. However, such an arbitral tribunal may only deal with the contractual aspects of the dispute and any questions of interpretation of the LOS Convention must be submitted to the Seabed Disputes Chamber for resolution.²⁴ Finally, the Convention provides that states may by mutual agreement submit a dispute to a special chamber of the ITLOS.

Although the drafters agreed on the need for compulsory dispute settlement as an integral component of a successful compromise, it was also accepted that such a system would only be viable if some exceptions were allowed.²⁵ Section 3 of Part XV lists certain types of disputes which cannot be submitted to the compulsory procedures outlined above.²⁶ These exceptions fall into two categories.

The first type of exception to compulsory adjudication is found in Article 297 which excludes *a priori* certain categories of dispute from compulsory, binding dispute settlement. The disputes covered by Article 297 principally concern the exercise by a coastal State of its sovereign rights or jurisdiction within its EEZ, in particular disputes concerning marine scientific research and marine living resources. These exceptions largely reflect the wide discretions that are conferred on coastal states in regulating these activities in the EEZ. Klein comments, “*it is clearly difficult to determine the content of a legal obligation and insist on its enforcement when the level of discretion incorporated into the norm permits so much flexibility of action and decision-making. The dispute settlement mechanism in [the LOS*

²³ LOS Convention, Article 188(1). The procedure for the constitution of an *ad hoc* chamber is found in LOS Convention, Annex VI, Article 36.

²⁴ Article 188(2)(a). The arbitral tribunal may decide *proprio motu* to refer such a question; Article 188(2)(b). For a discussion of the drafting history of this provision, see Klein, *Dispute settlement in the UN Convention on the Law of the Sea* at pp. 328-329.

²⁵ Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, 5 vols., vol. 5 (Martinus Nijhoff Publishers, 1989) at p. 87; Churchill and Lowe, *The Law of the Sea* (Manchester University Press, 1999) at p. 455.

²⁶ Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* at pp. 165-184.

Convention] reinforces these decisions through the near-complete insulation of the coastal state's discretionary powers from review.”²⁷

The absence of compulsory adjudication does not mean that there is no independent scrutiny available. Such disputes may be subject to a compulsory conciliation procedure.²⁸ Conciliation is compulsory in the sense that provision is made for the appointment of conciliators if one of the states fails to do so.²⁹ Nevertheless, the conclusions and recommendations reached by the commission are non-binding and at most they serve to assert additional political pressure on the coastal state. Moreover, the role of a conciliation commission is further restricted because it is expressly prohibited from calling into question the exercise by the coastal state of any discretion conferred by the Convention.³⁰

The second type of exception to compulsory adjudication is found in Article 298. This provision sets out a list of optional exclusions which States may invoke through a written declaration at any time prior to the submission of a dispute to adjudication. The exceptions cover maritime delimitation disputes³¹, disputes concerning military or law enforcement activities, and disputes in respect of which the Security Council is exercising functions under the UN Charter. The types of disputes covered by Article 298 reflect a desire for states to shield sensitive topics related to their sovereign powers from third party scrutiny and settlement.³² Although some of the terms used in the exceptions are vague, for example military activities or enforcement actions, it is submitted that they cannot be invoked to prevent the submission of all aspects of a dispute from third party settlement. In practice, this may lead to the so-called “salami-slicing” of disputes where the role of a court will be limited because of various exceptions or exclusions from its jurisdiction.³³

²⁷ Klein, *Dispute settlement in the UN Convention on the Law of the Sea* at p. 177.

²⁸ See LOS Convention, Article 297(2) and (3).

²⁹ See LOS Convention, Annex V, Articles 3 and 12.

³⁰ See LOS Convention, Article 298(2)(b) and (3)(c).

³¹ Most maritime delimitation disputes occurring after the entry into force of the Convention will be subject to compulsory conciliation.

³² See Klein, *Dispute settlement in the UN Convention on the Law of the Sea* at p. 256.

³³ See Boyle, "Dispute Settlement and the Law of the Sea Convention", at p. 41. See also Klein, *Dispute settlement in the UN Convention on the Law of the Sea* at p. 291.

As well as these substantive exceptions, section 1 of Part XV also sets out a series of, what Colson and Hoyle term, “*procedural prerequisites*” to the jurisdiction of courts or tribunals.³⁴ These provisions recognize the right of states to settle disputes in ways other than adjudication through the LOS Convention, if they wish. These provisions must be satisfied before the jurisdiction of a court or tribunal is founded.³⁵

Article 280 provides that “*nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice*”. Thus, states retain a freedom of choice in selecting a mode of dispute settlement. In the words of Judge Nelson, “*the whole object of section 1 of Part XV of the Convention is to ensure that disputes concerning the interpretation or application of the Convention are settled by peaceful means and not necessarily by the mechanism for dispute settlement embodied in the Convention.*”³⁶ It follows that states can avoid the judicial settlement of disputes if they can agree on some other method themselves.

The crux of section 1 is the requirement in Article 283 to “*proceed expeditiously to an exchange of views regarding [the settlement of a dispute] by negotiation or other peaceful means.*”³⁷ This provision excludes a state from unilaterally applying for compulsory, binding dispute settlement without first exploring the options of alternative and consensual dispute settlement mechanisms.³⁸ A state initiating the dispute settlement procedures must be able to demonstrate that an exchange of views has taken place.

³⁴ Colson and Hoyle, “Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?” (2003) 34 *Ocean Development and International Law* 59.

³⁵ In *Congo v Rwanda*, the ICJ has said that “when consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application”; *Case Concerning Armed Activities in the Congo (Jurisdiction) (Congo v. Rwanda)*, (2006) at para. 88.

³⁶ Separate Opinion of Vice-President Nelson, *The MOX Plant Arbitration*, at para. 2.

³⁷ LOS Convention, Article 283(1).

³⁸ For a drafting history of the provision, see Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* at pp. 47, 52-53, 93.

Such provisions are not uncommon in international law. In the *Mavromattis Concessions Case*, the PCIJ noted that its jurisdiction under the Palestine mandate was subject to the condition that the dispute could not be settled by negotiation. The Court held that “*the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short.*”³⁹ Thus, it is appropriate to consider these issues on a case-by-case basis and “*no general and absolute rule can be laid down.*”⁴⁰

In the case of the LOS Convention, tribunals have tended to set a very low threshold for states to show that an exchange of views has in fact taken place. For instance, in the *MOX Plant Case*, the ITLOS accepted that an exchange of views could take place by way of written communications between two states; an actual meeting was not necessary.⁴¹ Moreover, it held that “*a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching an agreement have been exhausted.*”⁴² This interpretation would seem to adopt a subjective view of the obligation which would allow one of the states to unilaterally determine when the obligation had been met.⁴³ A similar approach was taken by the Tribunal in the *Land Reclamation Case*, where Singapore had argued that the Tribunal did not have jurisdiction because the requirements of Article 283 had not been satisfied. The Tribunal again noted that the Convention only requires an expeditious exchange of views. Although Malaysia had broken off talks between the two states, the Tribunal held that “*in the circumstances of the case, Malaysia was not obliged to continue with an exchange of views when it concluded that this exchange could not yield a positive result.*”⁴⁴

³⁹ *Mavromattis Palestine Concessions*, (1924) PCIJ Reports, Series A, No. 2, at p. 13.

⁴⁰ *Ibid.*

⁴¹ *The Mox Plant Case (Provisional Measures) (Ireland v. UK) Order of 3 December 2001*, (2002) 41 ILM 405 at para. 58.

⁴² *Ibid.*, at para. 60. A similar conclusion was reached by the Tribunal in the *Southern Bluefin Tuna Cases (Provisional Measures) (Australia and New Zealand v. Japan) Order of 27 August 1999*, (1999) 117 ILR 148 at para. 60. This conclusion was premised on the statement by Australia and New Zealand that negotiations had terminated even though Japan disagreed.

⁴³ Klein, *Dispute settlement in the UN Convention on the Law of the Sea* at p. 33.

⁴⁴ *Case Concerning Land Reclamation in and around the Johor Straits (Provisional Measures) (Malaysia v. Singapore) Order of 8 October 2003*, (2003) at para. 48.

The conclusions of the ITLOS should be treated with care as the Tribunal in these cases was not required to decide definitively whether the conditions of Article 283 had been satisfied, rather whether the arbitral tribunal would *prima facie* have jurisdiction. Thus, a lower threshold may have been appropriate.

A better indication of the correct interpretation of Article 283 may perhaps be gained from the decisions of tribunals fully seized of a dispute. For instance, in the *Southern Bluefin Tuna Arbitration*, the Tribunal held that the negotiations between the parties had been “*prolonged, intense and serious*” and therefore they satisfied the conditions of Article 283.⁴⁵ Whilst the Tribunal in this case appears to undertake an objective examination of the negotiations, as Klein notes, “*the Tribunal was not purporting to set out criteria to meet the requirement under Article 283, but rather that these facts were sufficient to indicate that the obligation to exchange views for settlement by negotiation or other peaceful means had been satisfied.*”⁴⁶

Article 283 was also considered by the Arbitral Tribunal in the *Barbados – Trinidad Arbitration*. The case concerned the delimitation of the EEZ and continental shelf boundaries between these two Caribbean states, a subject on which they had been negotiating for a number of years. Several rounds of negotiations had taken place between July 2000 and November 2003 without any agreement. Nevertheless, the negotiations were ongoing and the two states had agreed to schedule a further round of negotiations in late February 2004. In the meantime, Barbados initiated legal proceedings under Part XV of the LOS Convention in February 2004.

One of the preliminary objections to the jurisdiction of the Tribunal raised by Trinidad was the failure of Barbados to satisfy Article 283. According to this argument, the exchange of views under Article 283 was separate to the negotiations anticipated by Articles 74(1) and 83(1).⁴⁷ The Tribunal did not agree, finding that “*Article 283(1) cannot reasonably be interpreted to require that once negotiations have failed to result in an agreement, the Parties must then meet separately to hold an “exchange of views” about the settlement of the dispute by “other peaceful*

⁴⁵ *Southern Bluefin Tuna Arbitration*, at para. 55.

⁴⁶ Klein, *Dispute settlement in the UN Convention on the Law of the Sea*, at p. 33.

⁴⁷ *Dispute Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf (Barbados v. Trinidad and Tobago)*, (2006) 45 ILM 798, at para. 76.

means”. *The required exchange of views is also inherent in the (failed) negotiations.*”⁴⁸ The Tribunal made it clear that it thought that a reasonable period of time had elapsed since the negotiations had started and therefore Barbados was entitled to have recourse to Part XV.⁴⁹ Moreover, it did not believe that the fact that another round of negotiations had been scheduled was a constraining factor.⁵⁰

The approach taken by the Tribunal conflates negotiations on the substance of the dispute with an exchange of views over possible procedures to settle the dispute. Whilst it is preferable to divide these two aspects of negotiations in theory, the Tribunal recognises that such formal distinctions are not always possible in practice. Ultimately, the Tribunal considered that “*to require a further exchange of views ... is unrealistic.*”⁵¹

Although the tribunals in these cases invoke an objective threshold, in the latter case referring to a reasonable period of time, it is difficult to think of circumstances in which a state would fail to comply with Article 283. Nevertheless, Article 283 cannot be considered as a completely empty shell. At a minimum, it obliges a state to propose the commencement of negotiations. The decision of the ICJ in *Congo v Rwanda* may be instructive in this regard. In that case, the ICJ considered a variety of compromissory clauses invoked by Congo in its claim against Rwanda, many of which required prior negotiations to have taken place. In one instance, the Court held that protests made by Congo at the international level were not sufficient to satisfy the conditions in the compromissory clause in the Convention on Discrimination against Women.⁵² This reasoning suggests that a proposal for negotiation must be made and moreover that the proposal must identify with sufficient determinacy the basis for a claim. This is particularly important where

⁴⁸ Ibid., at para. 203.

⁴⁹ Ibid., at para. 195.

⁵⁰ Ibid., at para. 199.

⁵¹ Ibid., at para. 205. C.f. the Virginia Commentary which says, “this provision ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision, only after appropriate consultations between all the parties concerned”; Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, at p. 29.

⁵² *Congo v. Rwanda*, at para. 91. See also its discussion of the Montreal Convention, at para. 118.

several treaties pertain to a single issue.⁵³ Thus, in this case, mere allegations of violations of international human rights laws were not sufficient.

Of course, seizing a court of a dispute does not necessarily exhaust the duty of states to co-operate and consult. Having found that it had *prima facie* jurisdiction in the *MOX Plant Case*, the *Southern Bluefin Tuna Cases*, and the *Johur Straits Case*, the ITLOS ordered the parties to co-operate and to report at intervals to the President of the Tribunal on their progress.⁵⁴ Moreover, the duty to co-operate often exists as a substantive obligation in its own right. Therefore, states will be under an ongoing obligation to talk to one another, regardless of any order made by a court. This is demonstrated by the ICJ in the *Case Concerning Paper Mills on the River Uruguay* where it held that “notwithstanding the fact that the Court has not been able to accede to the request by Argentina for the indication of provisional measures ... the Parties are required to fulfil their obligations under international law.”⁵⁵ The Court continued by stressing “the necessity for Argentina and Uruguay to implement in good faith the consultation and co-operation procedures provided in the 1975 Statute.” Likewise, the LOS Convention contains numerous obligations to co-operate which will remain binding on states regardless of a dispute arising between them.

There are two further so-called “*procedural prerequisites*” in section 1 of Part XV. Articles 281 and 282 both foresee the settlement of disputes outside the framework of the compulsory procedures of the LOS Convention.

Article 282 allows States Parties to submit disputes concerning the interpretation or application of this Convention to an alternative “*procedure that entails a binding decision*” which shall apply *in lieu* of the procedures in Part XV. In particular, the drafters had in mind the settlement of disputes according to general

⁵³ In the *Southern Bluefin Tuna Cases* ITLOS took into account the fact that New Zealand and Australia had invoked the provisions of the LOS Convention in diplomatic notes addressed to Japan, as well as the Convention on the Conservation of Southern Bluefin Tuna. Failure to do so may have been fatal to their request as they would not have been able to demonstrate that an exchange of views over the settlement of a dispute arising under the LOS Convention had taken place.

⁵⁴ See *The MOX Plant Case*, at p. 15; *Southern Bluefin Tuna Cases*, dispositif, at para. 2; *Land Reclamation Case*, dispositif, at para. 1. In the latter case, the two states came to an amicable settlement which was submitted to the President of the Tribunal.

⁵⁵ *Case Concerning Paper Mills on the River Uruguay (Provisional Measures) (Argentina v. Uruguay) Order of 13 July 2006*, (2006) ICJ Reports at para. 82.

dispute settlement arrangements between states, bilateral or multilateral, or by a special agreement.⁵⁶

Article 281, on the other hand, contemplates situations where states may opt for non-binding dispute settlement procedures, such as conciliation or mediation. It provides:

3. If the States Parties which are parties to a dispute concerning the interpretation and application of this Convention have agreed to seek settlement of the dispute by peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
4. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time limit.

The ordinary meaning of Article 281 simply suggests that if states agree on an alternative form of dispute settlement, they cannot simply abandon it in favour of the compulsory procedure in section 2 unless the agreed procedure has been fully exhausted. Whether or not a procedure has been fully exhausted will depend on the procedure in question. This article should also be read in conjunction with Article 283(2) which provides that if one means of agreed dispute settlement fails, states should proceed to a second exchange of views in order to try to agree on other methods of settlement.

It would also appear that Article 281 allows states by agreement to exclude compulsory dispute settlement procedures altogether. The Virginia Commentary concludes that “*while this may be an undesirable result, it is consistent with the basic principle of Part XV, that the parties are free to decide how they want their dispute to be settled, and to agree that even in certain circumstances they prefer to have it unsettled rather than submit it to the procedures of Part XV.*”⁵⁷ This conclusion does not raise any problems in principle, although several difficulties arise in practice.

A difficult case is presented by the *Southern Bluefin Tuna Arbitration*. The Annex VII Tribunal seized of the dispute held that Article 281 allowed states to

⁵⁶ Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, at p. 26.

⁵⁷ in *Ibid.*, , at p. 24.

impliedly opt out of the compulsory dispute settlement procedures in Part XV. The Tribunal held that Article 16 of the Convention on the Conservation of Southern Bluefin Tuna⁵⁸ amounted to a tacit agreement to exclude compulsory adjudication under Part XV of the LOS Convention.⁵⁹ The Tribunal was clearly influenced by the fact that the actual dispute touched upon a treaty which the parties had not consented to submit to compulsory dispute settlement: “*to hold that disputes implicating obligations under both [the LOS Convention] and an implementing treaty such as the 1993 Convention – as such disputes typically may – must be brought within the reach of section 2 of Part XV of [the LOS Convention] would be effectively to deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties’ choice.*”⁶⁰

Klein supports the decision, suggesting that it “*correctly emphasizes the importance of States’ freedom of choice and the continuing relevance of traditional consent-based methods of dispute settlement.*”⁶¹ Yet, Oxman criticises the Award for ignoring the central place that compulsory, binding dispute settlement in the LOS Convention.⁶² The decision was also criticized by one dissenting arbitrator who argued that Article 16 neither constituted an agreement to seek settlement by a peaceful means of their own choice⁶³ nor excluded any further procedure.⁶⁴ He stressed that there is nothing in Article 16 which shows that the parties have agreed on a method of dispute settlement.⁶⁵ Rather it is an agreement to agree on a method in the future. There is a strong argument that exclusions from compulsory dispute settlement should be expressly agreed.⁶⁶ Indeed, the logic of the Tribunal can be reversed to suggest that its decision effectively deprives of substantial effect the compulsory dispute settlement provisions of the LOS Convention.

⁵⁸ Hereinafter, “CCSBT”.

⁵⁹ *Southern Bluefin Tuna Arbitration*, at para. 57.

⁶⁰ *Ibid.*, at para. 63.

⁶¹ Klein, *Dispute settlement in the UN Convention on the Law of the Sea* at p. 39, footnote 42.

⁶² Oxman, “Complementary Agreements and Compulsory Jurisdiction”, (2001) 95 *American Journal of International Law* at p. 302.

⁶³ See the Separate Opinion of Kenneth Keith, at para. 5.

⁶⁴ *Ibid.*, at para. 6.

⁶⁵ *Ibid.*, at para. 8.

⁶⁶ *Ibid.*, at para. 22; see also the Separate Opinion of Judge Wolfrum in *The MOX Plant Case*, at p. 2.

The most problematic aspect in the reasoning of the Tribunal would appear to be its consolidation of the disputes into “*a single dispute arising under both Conventions.*”⁶⁷ By conflating disputes under the CCSBT and the LOS Convention, the Tribunal ignores that jurisdiction over these two treaties is distinct. Part XV only confers jurisdiction on a tribunal to decide claims under the LOS Convention and it would not have been competent to hear claims of non-compliance with the CCSBT.⁶⁸ A better approach to this question is found in the decision of the dissenting arbitrator who acknowledged that the two treaty regimes remained distinct and that the powers of an adjudicator acting under the LOS Convention would be more confined than an adjudicator acting under the CCSBT.⁶⁹

This approach also appears to be sanctioned by a majority of the ITLOS in the *MOX Plant Case* where similar issues of parallel treaties arose under Article 282. Ireland had invoked the dispute settlement provisions of the LOS Convention, whereas the United Kingdom argued that the dispute actually arose under other regional treaties. The Tribunal supported the Irish position, finding that “*the dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation and application of those agreements, and not with disputes arising under the Convention.*”⁷⁰ It reasoned further that although all these instruments may contain very similar obligations to the Convention, they had a separate identity and the disputes were thus distinct.⁷¹

Whilst this latter approach is preferable, it is not without its own problems, as it requires making a clear distinction between jurisdiction, interpretation and application of treaties. The real question in these circumstances is to what extent can a tribunal make reference to other legal instruments in deciding disputes under the

⁶⁷ *Southern Bluefin Tuna Arbitration*, at para. 54. It continues “to find that, in this case, there is a dispute actually arising under [the LOS Convention] which is distinct from the dispute that arose under the CCSBT would be artificial.”

⁶⁸ See Colson and Hoyle, “Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?” at p. 68; Boyle, “The Southern Bluefin Tuna Arbitration”, (2001) 50 *International and Comparative Law Quarterly* at p. 449.

⁶⁹ Separate Opinion of Kenneth Keith, at para. 16. See also *Southern Bluefin Tuna Cases*, at para. 51.

⁷⁰ *The MOX Plant Case*, at para. 49.

⁷¹ *Ibid.*, at para. 50. See also Separate Opinion of Judge Wolfrum, at p. 1; Separate Opinion of Judge Treves, at para. 3. For a slightly different view, see Separate Opinion of Judge Jesus, at paras. 4-7.

LOS Convention? How far should the wider context of international law influence the interpretation and application of the LOS Convention?

3. Judges as Law-Makers?

Part XV of the LOS Convention confers jurisdiction on courts and tribunals over any dispute concerning the interpretation and application of the Convention.⁷² The decisions of adjudicators acting under the LOS Convention are, *strictu sensu*, binding only on the parties to a dispute.⁷³ Nevertheless, the formal status of judicial decisions does not fully capture their significance in the development of the law. It is well-established in practice and in principle that international courts are likely to follow their own decisions unless there are good reasons to depart from them.⁷⁴ Courts such as the ICJ regularly cite their previous case-law in support of decisions and this process is strengthened by lawyers who use the language of precedent in their pleadings.⁷⁵

It is already possible to determine the development of a consistent jurisprudence in the decisions of the ITLOS which has only been in operation for ten years. For instance, the factors that the Tribunal propounded in the initial cases on prompt release have been relied on in subsequent prompt release proceedings.⁷⁶

Nor is the availability of several dispute settlement organs likely to pose problems for the development of coherent jurisprudence on the law of the sea. Practice to date shows encouraging signs that tribunals are willing to follow each others' decisions.⁷⁷ ITLOS has already drawn upon previous law of the sea cases in its own decisions. Thus, in the *The M/V "Saiga" (No. 2)*, the Tribunal invoked the

⁷² LOS Convention, Article 288(1).

⁷³ LOS Convention, Article 296(2). See also Annex VI, Article 33; Annex VII, Article 11.

⁷⁴ See Lauterpacht, *The Development of International Law by the International Court* (Stevens, 1958) at p. 14; Queneudec, "The role of the International Court of Justice and Other Tribunals in the development of the Law of the Sea", in *Implementation of the Law of the Sea Convention Through International Institutions*, ed. Soons (Law of the Sea Institute, 1990) at pp. 584-588.

⁷⁵ Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007) at p. 293.

⁷⁶ *The Camouco Case*, at para. 66; *The Monte Confurco (Prompt Release) (Seychelles v. France) Judgment of 18 December 2000*, (2000) 125 ILR 203 at para. 76; *The Volga Case*, at para. 63; *The Juno Trader Case (Prompt Release) (St Vincent/Guinea-Bissau)*, (2004) 44 ILM 498, at para. 82.

⁷⁷ Miller, "An International Jurisprudence? The operation of "precedent" across international tribunals", (2002) 15 *Leiden Journal of International Law* 483; Charney, "International Law and Multiple International Tribunals", (1998) 271 *Receuil des Cours* 105.

precedents of the “*I’m Alone*”⁷⁸ and the “*Red Crusader*”⁷⁹ in its decision relating to the use of force in the hot pursuit of vessels.⁸⁰ Individual judges have made even more extensive use of the decisions of other courts and tribunals in their separate and dissenting opinions.⁸¹ Reference is made not only to other decisions on the law of the sea but to courts and tribunals dealing with completely different spheres of law.⁸² In *The Camouco*, Judges Wolfrum and Anderson noted the similarities between the role of the Tribunal in prompt release proceedings and the role of international human rights organs, arguing that the decisions of adjudicators in this field could aid the Tribunal.⁸³

Of course, the precedential value of judicial decisions cannot be taken for granted. The authority of judicial decisions results not from their formal status, but rather on whether they are likely to be followed in the future. It is important therefore to consider the degree of support for a decision, both amongst states and the members of the court itself. The annals of international adjudication reveal several judicial decisions that have relatively rapidly faded into insignificance.⁸⁴ In particular, decisions adopted by a slim majority may be viewed with some scepticism. In *The M/V “Saiga”*, the majority of the Tribunal held that for the purpose of deciding the admissibility of the prompt release proceedings, it was sufficient that non-compliance had been alleged by the applicant and that the allegation was arguable or sufficiently plausible.⁸⁵ On this basis, the Tribunal accepted the arguments of Saint Vincent that the arrest of the M/V “Saiga” should be classified as a fisheries offence, as opposed to a customs offence as was submitted by Guinea. However, nine judges voted against this decision, arguing for a higher

⁷⁸ *S.S. “I’m Alone”, (1935) 3 UNRIAA 1609.*

⁷⁹ *The Red Crusader, (1962) 35 ILR 485.*

⁸⁰ *The M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea) Judgement of the Tribunal of 1 July 1999, (1999) 120 International Law Reports 143 at para. 156.*

⁸¹ For example, the Separate Opinion of Vice-President Nelson in the *The Camouco Case*, where he alludes to the jurisprudence of other international courts and tribunals on the concept of reasonableness; at p. 2.

⁸² In *M/V “Saiga” (No. 2)*, the ITLOS cited the decision of the ICJ in the Case Concerning the Gabcikovo-Nagymaros in relation to principles of state responsibility; at para. 133.

⁸³ *The Camouco Case*, Dissenting Opinion of Judge Anderson, at p. 1; Dissenting Opinion of Judge Wolfrum, at para. 14.

⁸⁴ For instance, *The Case Concerning the S.S. Lotus*, (1927) PCIJ Reports, Series A, No. 10. See Boyle and Chinkin, *The Making of International Law*, at p. 294

⁸⁵ *The M/V “SAIGA” Case (Prompt Release) (Saint Vincent and the Grenadines v. Guinea) Judgment of 4 December 1997, (1997) 110 ILR 736 at para. 59.*

standard of appreciation.⁸⁶ Given the degree of dissension on this issue and the strength of the dissenting arguments, it is perhaps little surprise that in its subsequent decisions on prompt release, the Tribunal has adopted a higher standard of appreciation.⁸⁷

In spite of these caveats, decisions of adjudicators acting under Part XV of the LOS Convention are likely to have a significant impact on the interpretation of the Convention for all States Parties to the Convention. As Klein says, “*a decision by a court or tribunal constitutes an authoritative interpretation of the provisions of the Convention and that meaning could then be relevant to all other States Parties.*”⁸⁸ Indeed, as the Convention is largely representative of customary international law, the decisions of courts and tribunals may have significance for all states, whether or not they are a State Party.

Is it going too far to describe courts as “law-makers”? The role of a court in relation to developing the LOS Convention obviously differs from law-making undertaken by political institutions. In the *Nuclear Weapons Advisory Opinion*, the ICJ stressed this distinction by saying, “*it is clear that the Court cannot legislate ... Rather its task is to engage in the normal judicial function of ascertaining the existence or otherwise of legal principles and rules.*”⁸⁹ Courts do not create law *de novo*. Judges are constrained in a number of ways when dealing with an international dispute.

The first constraint on the role of a court is jurisdiction. It has been seen that the LOS Convention provides for jurisdiction over a wide range of disputes although the scope of jurisdiction of a court will differ from case-to-case depending on the basis for a particular claim. Strictly speaking, a court will only be able to decide those aspects of the dispute that fall within its jurisdiction. Nevertheless, it is

⁸⁶ The dissenting judges argued that a case must be “well-founded”, citing *inter alia* Article 113 of the Rules of the Tribunal. See dissenting opinions of President Mensah, at para. 5; Judge Anderson, at para. 4, Vice-President Wolfrum and Judge Yamamoto, at para. 4, and Judges Park, Nelson, Rao, Vukas, and Ndiaye, at para. 8.

⁸⁷ *The Camouco Case*, at para. 61. It should be noted that the facts of the later cases were less complex than the M/V “Saiga”. See also Klein, *Dispute settlement in the UN Convention on the Law of the Sea* at pp. 92-93.

⁸⁸ Klein, *Dispute settlement in the UN Convention on the Law of the Sea* at p. 365.

⁸⁹ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Reports 226, at para. 18.

common judicial practice to address questions that are not strictly necessary for the disposal of a case. Such pronouncements may be found in the main judgment of the court or in separate or dissenting opinions of individual judges. *Obiter dicta* are not binding *per se*, but they may provide valuable guidance for the development of the law.⁹⁰ It is on this basis that broad statements of principle were encouraged by Lauterpacht who concluded that “*there are compelling considerations of international justice which favour a full measure of exhaustiveness of judicial pronouncements of international tribunals.*”⁹¹ However, his opinion was based on the fact that there were few other ways in which the law could progressively develop. Although there is no international legislature *per se*, the availability of various international institutions to discuss and debate issues arising over the content of the law may mean that today this reasoning is less persuasive.

Jurisdiction is not the sole determining factor in what issues a court or tribunal can address. The ability of a court to dispose of a dispute is also partly determined by the submissions of the parties to a dispute. Litigation is largely an adversarial process at the international level. The *non ultra petita* rule purports to restrict a court to deciding those questions that have been brought before it by the litigants.⁹² However, in the *Arrest Warrant Case*, the ICJ clarified that “*while the Court is thus not entitled to decide upon questions not asked of it, the non ultra petita rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning.*”⁹³ As it is the persuasiveness of the court’s reasoning rather than its formal power that provides the authority for its decisions, the *non ultra petita* rule does not necessarily restrict the ability of courts and tribunals to develop the law.

Ultimately, the scope for courts and tribunals to develop the law of the sea depends on the rules of treaty interpretation and application which are found in general international law.

⁹⁰ See Boyle and Chinkin, *The Making of International Law*, at p. 271.

⁹¹ Lauterpacht, *The Development of International Law by the International Court*, at p. 37. C.f. Guillaume, “The Future of Judicial Institutions”, (1995) 44 *International and Comparative Law Quarterly* at p. 854.

⁹² For the *locus classicus* of the rule, see *Asylum Case (Colombia v. Peru) Judgment of 20 November 1950*, (1950) ICJ Reports 395, at p. 402.

⁹³ *Arrest Warrant Case (Congo v. Belgium) Judgment of 14 February 2002*, (2002) ICJ Reports 3, at para. 43.

4. General Rules of Treaty Interpretation

Courts and tribunals are primarily concerned with the interpretation and application of the law. Whilst their role is thus limited, it is generally accepted that the act of interpretation involves a degree of discretion, as there is rarely a single meaning to be attributed to a word or phrase. Hart has argued, “*in most important cases, there is always a choice ... all rules have a penumbra of uncertainty where the judge must choose between alternatives.*”⁹⁴ He concludes that “*at the margin of rules ..., the courts perform a rule-producing function ... this function of the courts is very like the exercise of delegated rule-making powers by an administrative body.*”⁹⁵ This is also true for international courts and tribunals. In this context, Lauterpacht says “*the very fact that the clause is so controversial that the parties are willing to go to the expense and the trouble of litigation ... shows that the provision or term in question is not “clear”.*”⁹⁶

One arbitral tribunal has described that the purpose of interpretation is to discover “*with the maximum possible certainty what the common intention of the Parties was.*”⁹⁷ Thus, a court should not impose its own subjective interpretation of an ambiguous text. At the same time, it admits that the process is not necessarily one hundred per cent accurate. Interpretation is a quest to discover how the parties to a treaty would have interpreted the treaty in those circumstances. In the words of another arbitral tribunal, it requires “*une recherche objective et rationnelle qui permet d'établir l'intention et la volonté communes des parties.*”⁹⁸

⁹⁴ Hart, *The Concept of Law* (Oxford University Press, 1961) at p. 271. For a useful review of the literature in this field see, Lester, “English Judges as Law Makers”, (1993) *Public Law* 269.

⁹⁵ Hart, *The Concept of Law* at p. 132

⁹⁶ Lauterpacht, *The Development of International Law by the International Court* at p. 54. McDougal et al. go further and argue that all text needs interpretation; see McDougal, Lasswell, and Miller, *Interpretation of Agreements and World Public Order* (Yale University Press, 1967) at p. 82; Higgins, *Problems and Process - International Law and How We Use It* (Oxford University Press, 1994) at p. 5.

⁹⁷ *Air Transport Agreement Arbitration (US v. France)*, (1963) 38 *International Law Reports* 182, at p. 229.

⁹⁸ *Arbitral Award on Pollution of the Rhine (The Netherlands v. France)* (2004) available at <http://www.pca-cpa.org/ENGLISH/RPC/PBF/Sentence%20I.pdf> <checked 30 November 2006> at para 62.

This task is made more difficult in the case of multilateral treaties which are the product of prolonged negotiations between numerous states. As said by the ICJ in the *Advisory Opinion on Reservations to the Genocide Convention*, “in a convention of this type, one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties.”⁹⁹ Rather they are the expression of a common will to achieve a certain objective. Such considerations may influence the way in which a court interprets a treaty.

All of these considerations arise in the case of the LOS Convention. The Convention was drafted by more than one hundred states. It was designed to achieve a compromise so that the language is often highly ambiguous. Shearer describes how “on certain critical points, disagreement was papered over by compromises or disguised by opaque texts that elude clear meaning.”¹⁰⁰ Whilst it is common in treaty negotiations for differences of opinion to be blurred by drafting techniques, this trend was accentuated by the consensus decision-making procedures adopted at UNCLOS III.¹⁰¹ Identifying the common will of the parties in this situation is difficult, although there are a number of sources of evidence to which an adjudicator may look.

The general rules on treaty interpretation are found in Article 31 of the Vienna Convention on the Law of Treaties which starts: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Whilst this provision stresses the importance of the text, it does not mandate a purely literal interpretation of the text. All the aspects of this rule are interconnected and they cannot be separated.¹⁰² Nevertheless, this general rule allows some leeway for adjudicators to decide on the correct interpretation taking into account and balancing all of these factors, as well as considering the different types of evidence that are

⁹⁹ *Reservations to the Genocide Convention Advisory Opinion*, (1951) ICJ Reports 15 at p. 23. See also International Law Commission, *Report of the Study Group on Fragmentation of International Law*, (2005) at p. 250.

¹⁰⁰ Shearer, “Oceans Management Challenges for the Law of the Sea in the First Decade of the 21st Century”, in Oude Elferink and Rothwell (eds.), *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, (Koninklijke Brill NV, 2004) at p. 4.

¹⁰¹ See chapter two, at p. 27 ff..

¹⁰² See *Arbitral Award on Pollution of the Rhine*, at para. 62.

available in the case of a particular treaty. How do these principles of interpretation apply in the context of the LOS Convention?

5. Interpreting the LOS Convention

Although the LOS Convention is in one sense simply a legal text, the overtly political nature of the negotiations which preceded its adoption should not be forgotten. As noted above, the treaty was not necessarily drafted to be as accurate as possible, but rather to be as acceptable to as many states as possible. Whilst a drafting committee was appointed by UNCLOS III, it was not possible to solve all problems submitted to it.¹⁰³ As a consequence, one author concludes that “*use of the same word in different provisions is, unusually, not necessarily intended to have the same consequence, and use of different words is not necessarily intended to have different consequences in every case.*”¹⁰⁴ The Convention must be interpreted with these considerations in mind. Thus, it is submitted that the context and object and purpose of the LOS Convention assume a still greater importance. The process may be helped by reference to other sources of evidence as to the intentions of the parties. As Judge Mensah notes, “*it is neither reasonable nor possible for the Tribunal to confine itself in every case to the bare language of the Convention’s provisions. It is permitted, indeed required, to “flesh out” the bones of the provisions to the extent necessary in the circumstances in order to attain the object and purpose of the provisions in question.*”¹⁰⁵

6. Travaux Préparatoires

One source which may offer an insight into the intentions of the parties to a treaty is the records of the discussions that took place during negotiations of the text. Yet the use of *travaux préparatoires* in the interpretation of a treaty is an issue that

¹⁰³ See Nelson, "The Work of the Drafting Committee", in *United Nations Convention on the Law of the Sea 1982 - A Commentary, Vol. 1*, ed. Nordquist et al. (1985) at p. 144.

¹⁰⁴ Plant, "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law-Making?" (1987) 36 *International and Comparative Law Quarterly* at p. 548.

¹⁰⁵ Declaration of Judge Mensah in *The Camouco Case*, at para. 4.

has long been the subject of controversy and debate by courts and commentators. Indeed, Article 32 of the Vienna Convention on the Law of Treaties pointedly classifies the preparatory materials of a treaty as a “supplementary” source of interpretation.¹⁰⁶ The argument against relying on *travaux préparatoires* is forcefully made by Fitzmaurice, who says, “[they] are often extremely confused and confusing. They usually contain material supporting both the points of view in issue ... states come to a conference with many views and intentions that are subsequently abandoned in the course of the conference; but it is not always clear that they were abandoned, and they may remain on the records as representing a view apparently maintained throughout.”¹⁰⁷ Indeed the argument against referring to preparatory materials may be stronger still in the case of some multilateral treaties.¹⁰⁸ In the *Advisory Opinion on Reservations to the Genocide Convention*, Judge Alvarez took the view that “[multilateral] conventions [of a legislative character] must not be interpreted with reference to the preparatory work which preceded them, they are distinct from that work and they have acquired a life of their own.”¹⁰⁹

It may be excessive to say that courts and tribunals should never have recourse to the negotiations of a treaty in its interpretation. Indeed, it is common for the ICJ and other courts and tribunals to take into account the *travaux préparatoires*.¹¹⁰ Usually, such materials are invoked as support for an interpretation arrived at through other means, but Lauterpacht sceptically suggests that “it is not certain that the clarity of the meaning said to have been confirmed by the preparatory work was not actually due to the illumination obtained by the study of the latter.”¹¹¹

In the case of the LOS Convention, reliance on preparatory materials raises other difficulties. Many of the negotiations at UNCLOS III took place in informal sessions and the official records only provide a partial account of the negotiation. As

¹⁰⁶ Vienna Convention on the Law of Treaties, Article 32.

¹⁰⁷ Fitzmaurice, “The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points”, (1951) *British Yearbook of International Law* at p. 15.

¹⁰⁸ McNair, “The Functions and Differing Legal Character of Treaties”, (1930) *British Yearbook of International Law* at pp. 107-108.

¹⁰⁹ Dissenting Opinion of Judge Alvarez, in the *Reservations to the Genocide Convention Advisory Opinion* (1951) ICJ Reports 15, at p. 53.

¹¹⁰ See the cases referred to in *Arbitral Award on Pollution of the Rhine*, at para. 70.

¹¹¹ Lauterpacht, *The Development of International Law by the International Court*, at p. 138.

a consequence, Plant argues that there is a need for “*a more liberal, process-orientated approach.*” He continues, “*interpreters ... should be prepared to look at all formal and informal statements, interventions, texts and proposals made at all stages and in all forums of the negotiation, including informal extra-conference groups, as aids to interpretation of the Convention.*”¹¹² Furthermore, he argues that a special emphasis should be placed on the opinions and writings of the delegates who attended the Conference: “*The delegates and the relevant supporting staff in their ministries are peculiarly placed to know the background of a provision, and their views, in so far as they are able and prepared to make them public – and in many cases they are not – should be particularly influential upon interpretations of the [LOS Convention].*”¹¹³ However, such sources should nevertheless be treated with caution. There is a danger that the opinions of delegates may only provide a partial account of the negotiations; all delegates, including the officers of the Conference, were, after all, acting on behalf of their governments.

In practice, decisions of the Tribunal have not extensively relied on preparatory materials, although individual judges of the ITLOS have been willing to cite official and unofficial records of UNCLOS III in order to support a particular interpretation.¹¹⁴

It should also be noted that it is not only the negotiations at UNCLOS III that may provide guidance as to the meaning of the LOS Convention. As some provisions of the LOS Convention are based on similar, if not identical, provisions of the 1958 Geneva Conventions on the Law of the Sea, the drafting history of these treaties may also be relevant. These materials are much more detailed than those of UNCLOS III, given that the articles were first prepared by the International Law

¹¹² Plant, “The Third United Nations Conference on the Law of the Sea and the Preparatory Commission”, at pp. 555-556. See also Queneudec, “The role of the International Court of Justice and Other Tribunals in the development of the Law of the Sea”, at pp. 595-595.

¹¹³ Plant, “*The Third United Nations Conference on the Law of the Sea and the Preparatory Commission*”, at p. 552.

¹¹⁴ See the Joint Dissenting Opinion of Judges Ndiaye, Nelson, Park, Rao and Vukas in *The M/V “SAIGA” Case* at paras. 23-26; Judge Laing makes numerous references to the Virginia Commentary in his separate opinions in *The M/V “Saiga” (No. 2)* and in *Southern Bluefin Tuna Cases*. It is notable that many of these judges were involved in the negotiations at UNCLOS III themselves as delegates. As noted by the President of the Tribunal, “there is no other international court whose judges were also draftsmen of the Convention that they were asked to interpret and apply”; *ITLOS Press Release of 27 March 2002*, ITLOS/Press64.

Commission and then subjected to a conference procedure where all formal discussions were officially recorded. In *The M/V “Saiga” (No. 2)* the ITLOS relied on the work of the International Law Commission and the reports of UNCLOS I in its interpretation of provisions which had been incorporated from the 1958 High Seas Convention.¹¹⁵ Affirming the subsidiary role of *travaux préparatoires*, however, the drafting history was only invoked as confirmation of an interpretation arrived at through other means, including the subsequent views of states.

7. Interpretative Declarations

Under Article 310 of the LOS Convention, states are able to append unilateral statements on their understanding of the Convention when they sign, ratify, accede thereto.¹¹⁶ In many cases, such statements are remarkably similar to statements made by delegates at the closing sessions of the Conference itself, so there is an overlap with the *travaux préparatoires* themselves. As with *travaux préparatoires*, such declarations cannot constitute an authoritative interpretation of the Convention. However, can they be taken into account by a court or tribunal when interpreting the Convention?

Given that a court or tribunal is trying to promote a uniform interpretation of the Convention, it is questionable how far unilateral statements are of value to the interpretative process. However, where several unilateral statements point in the same direction, they could indicate a common understanding of the text. This possibility is anticipated by Article 31(2)(b) of the Vienna Convention on the Law of Treaties which allows an interpreter to take into account “*any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to that treaty.*”

In many cases, however, the declarations submitted in furtherance of Article 310 only reveal a disagreement over how the Convention should be interpreted.¹¹⁷ For instance, whilst Algeria, Bangladesh, Czech Republic, China, Croatia, Egypt,

¹¹⁵ *The M/V “Saiga” (No. 2)*, at paras. 80-82.

¹¹⁶ Article 310 provides that a state may make a declaration “with a view, *inter alia*, to the harmonisation of its laws and regulations with the provisions of the Convention.”

¹¹⁷ For the text of the declarations, see www.un.org/depts/los.

Iran, Malta, Oman, and Serbia and Montenegro all claim the right to require prior notification or authorisation of the innocent passage of warships through their territorial sea, this interpretation is strongly denied in the declarations of Germany, Italy, the Netherlands, and the United Kingdom. Similar differences appear over the innocent passage of nuclear powered ships or ships carrying nuclear or other hazardous materials, the right to conduct military manoeuvres and exercises in the EEZ of another state, and the right to construct installations of a non-economic nature in the EEZ of another state. In such circumstances, declarations do not provide a valuable source of evidence to an interpreter.

That is not to say that declarations are completely irrelevant. Unilateral interpretations and declarations may be relevant to the resolution of a dispute in another context. Courts and tribunals have taken into account unilateral acts and statements made prior to a dispute¹¹⁸ or in their oral pleadings in deciding disputes.¹¹⁹ It is suggested that declarations made under Article 310 of the LOS Convention may play a similar role in litigation, preventing a state from proposing an interpretation which is contrary to its declaration.

The weakness of both *travaux préparatoires* and unilateral declarations made at signature, ratification or accession is that they may include views which are no longer held by states. Giving too much weight to these sources of evidence may lead to a static interpretation of a treaty, fixing the meaning of the text at the time of its conclusion.

8. The Principle of Effectiveness in Interpretation

Given the inherent ambiguity in much of the LOS Convention, a court and tribunal should adopt the interpretation that gives the intended effect to the Convention. To do so, it is necessary to look to its object and purpose.¹²⁰ The LOS Convention has a number of different objectives, the most important of which is

¹¹⁸ See e.g., *The M/V "Saiga" (No. 2)*, at paras. 69 and 71.

¹¹⁹ *Dispute Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf (Barbados v. Trinidad and Tobago)*, at para. 88. *The MOX Plant Case*, at paras. 78-81.

¹²⁰ In general, see Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", (1949) *British Yearbook of International Law* 48.

perhaps to create a single, comprehensive treaty settling all issues relating to the law of the sea.¹²¹ The treaty settlement seeks to balance the interests of various states. Therefore, any interpretation should also seek to maintain this balance.

The importance of balancing competing interests is illustrated by some of the decisions of the ITLOS on prompt release. For instance, in its judgment in *The Monte Confurco*, the Tribunal held that “*the object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.*”¹²² In *The Camouco*, Judge Treves emphasised the need for balance in the following terms: “*The Tribunal should not give preference to one or the other of these two points of view... both find their legitimacy in the Convention.*”¹²³ The balancing of interests can also be seen in the Tribunal’s decision in the same case on whether or not an obligation to exhaust local remedies should be read into Article 292. The Tribunal stressed that “*no limitation should be read into article 292 that would have the effect of defeating its very object and purpose ... article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period.*”¹²⁴ In other words, applying the local remedies rule to prompt release cases would tip the balance against shipowners, as the safeguard afforded by Article 292 would offer limited protection if it was first necessary to pursue a case through local courts.¹²⁵ Similarly, in *The M/V “Saiga”* the Tribunal refused to accede to the argument of Saint Vincent and the Grenadines that the release of the vessel should be ordered without the posting of any bond at all. It held that “*the posting of a bond or security seems to the Tribunal necessary in view of the nature of the prompt release proceedings.*”¹²⁶ For the Tribunal, the posting of a bond was an important factor in the balance of rights and obligations

¹²¹ LOS Convention, Preamble. See also Oxman, “The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)”, (1980) 74 *American Journal of International Law* at p. 35.

¹²² *The Monte Confurco Case*, at paras. 71 and 72; repeated in *The Camouco Case*, at para. 57. See also the Dissenting Opinion of Vice-President Wolfrum and Judge Yamato in *The M/V “SAIGA” Case* at para. 9.

¹²³ See the Dissenting Opinion of Judge Treves in *The Camouco Case*, at para. 6.

¹²⁴ See *Ibid.*, at para. 58.

¹²⁵ On the ordinary meaning of the text, this was not necessarily the only interpretation. For an alternative argument, see the Dissenting Opinion of Judge Anderson in *Ibid.*, at pp. 1-2.

¹²⁶ *The M/V “SAIGA” Case* at para. 81.

between coastal states and flag states and the Tribunal rejected an interpretation which would have unduly upset one side of that balance.

The notion of balance introduces a great deal of flexibility into the interpretation of a treaty. It is not always obvious where the balance should be struck and competing views may arise. Such was the case in *The Volga*, where the Tribunal had to decide whether the concept of a reasonable bond should be interpreted to permit non-pecuniary conditions. The Tribunal reasoned that “*where the Convention envisages the imposition of conditions additional to a bond or other financial security, it expressly states so.*”¹²⁷ Furthermore, in its opinion, the imposition of such a bond would defeat the object and purpose of Article 73(2) which was to “*provide the flag state with a mechanism for obtaining the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms.*”¹²⁸ Criticising the decision of the majority, Judge Anderson, however, noted that the description of the object and purpose of Article 73(2) was overly one-sided: “*an additional element in the object and purpose is to provide the safeguard for the coastal state...*” He concluded that “*to the extent to which there is some sort of balance in these provisions between the interests of the two states concerned, that balanced treatment should not be tilted in favour of one or the other.*”¹²⁹ Judge *ad hoc* Shearer, who also dissented, urged recognition of the fact that the context of illegal and unregulated fishing had changed since the conclusion of the LOS Convention and “*a new “balance” has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other.*”¹³⁰

This case raises the question of how to interpret the Convention in light of changes in international law and policy. Can the balance anticipated by the drafters change in light of the evolving values of the international community?

It is accepted that the intentions of the parties are not necessarily set in stone when a treaty is drafted and the circumstances in which a treaty was intended to

¹²⁷ *The Volga Case*, at para. 77.

¹²⁸ *Ibid.*, at para. 77.

¹²⁹ Dissenting Opinion of Judge Anderson in *Ibid.*, at para. 18.

¹³⁰ Dissenting Opinion of Judge *Ad Hoc* Shearer in *Ibid.*, at para. 19.

apply may also change. In the words of Higgins, “*the notion of ‘original intention’ has long been qualified by the idea that the parties themselves, because of the nature of the treaty that they agreed to, just have assumed that matters would evolve.*”¹³¹ Indeed, interpreting a treaty without regard to changes in the surrounding circumstances could threaten the ultimate viability of a treaty settlement. Yet, a change of attitude is not going to be found in the text itself, nor in the *travaux préparatoires*. The principal question is therefore how to identify the contemporary intentions of the States Parties.

Recognition that an instrument must be interpreted in light of the context at the time of its interpretation is found in two paragraphs of Article 31 of the Vienna Convention on the Law of Treaties.

First, Article 31(3)(b) obliges an interpreter to take into account the “*subsequent practice in the application of a treaty*” where it amounts to an “*agreement of the parties regarding its interpretation.*” The commentary to this Article makes clear that the practice must establish the agreement of all parties to the treaty, although it is not necessary for the practice to be attributable to all those parties.¹³²

“Practice” is not defined by the Vienna Convention, but it should arguably be considered as a flexible concept, as long as it demonstrates the opinions of the parties. It conceivably includes both physical practice as well as the adoption of international instruments, including non-binding resolutions and declarations.

In particular, the decisions of organs created by the treaty will be highly pertinent. It is on this basis that decisions of the Meeting of the States Parties to the LOS Convention may be relevant to the interpretation of the Convention. Even though they have no formal powers of interpretation under the LOS Convention, the decisions of the Meeting of the States Parties may still constitute evidence of practice

¹³¹ Higgins, “A Babel of Judicial Voices? Ruminations from the Bench”, (2006) 55 *International and Comparative Law Quarterly* at pp. 797-798.

¹³² “Draft Articles on the Law of Treaties: Report of the International Law Commission to the General Assembly”, (1966 II) *Yearbook of the International Law Commission*, at p. 220.

for the purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.¹³³

In the case of the LOS Convention, it is also appropriate to take into account the practice of other international institutions. In particular the annual resolutions of the General Assembly on the law of the sea may provide important context for an interpretation of the Convention. The General Assembly includes all States Parties, as well as other important maritime states.¹³⁴ Other institutions, such as the IMO and the International Seabed Authority will be useful in determining the meaning of the Convention within their particular spheres.¹³⁵ For the purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties, it is important to show that their decisions or other instruments amount to “an agreement of the parties”. In the case of the LOS Convention, a court would be wise to look for a consensus of the international community as a whole in order to prevent a fragmentation of the treaty and customary frameworks for the law of the sea.

Nor is it only decisions adopted by intergovernmental institutions that may be relevant under this provision. One illustration is the Rules of the Tribunal adopted by the ITLOS.¹³⁶ The Rules are authorized by Article 16 of the Statute of the Tribunal and they were drafted exclusively by the Members of the Tribunal without any input from States Parties. Nevertheless, the rules have been invoked by the ITLOS as context for the interpretation of the LOS Convention. In *The Camouco*, the Tribunal interpreted Article 292 of the Convention by reference to Article 113 of its Rules in order to support its conclusion that an applicant must show that its arguments are “*well founded*.”¹³⁷ In the same case, the dissenting opinion of Judge Wolfrum also argued that the Rules guided the Tribunal in what to take into account in determining the reasonableness of a bond, because they require the detaining state to provide information on the value of the ship and on the amount of the requested bond.¹³⁸ Presumably, the Rules are a valid source of interpretative material because

¹³³ See chapter four, at p. 80 ff..

¹³⁴ See chapter four, at pp. 93-94.

¹³⁵ See chapter five.

¹³⁶ The Rules of the Tribunal are contained in document ITLOS/8, adopted on 28 October 1997, as amended on 15 March and 21 September 2001.

¹³⁷ *The Camouco Case*, at para. 49. See in particular the Declaration of Judge Mensah, at para. 4.

¹³⁸ See the Dissenting Opinion of Judge Wolfrum in *Ibid.*, at para. 2.

they have been authorised by the Convention and the ITLOS judges are elected by the States Parties themselves. In this context, it is also possible that some decisions by the Commission on the Limits of the Outer Continental Shelf may also be taken in account in the interpretative process. These decisions are relevant because states have conferred a decision-making power on these institutions. Yet, such decisions are only valid where they are not contradicted by decisions of the States Parties or other state practice.

The role of a court in endorsing relevant decisions of international institutions is important in the absence of any other indication in the LOS Convention of who can adopt authoritative interpretations. The value of the judicial decision is therefore in its clarification and elaboration of which state practice has influenced the interpretation of the Convention.

It is not only instruments directly related to the LOS Convention that can be used to interpret the Convention. Article 31(3)(c) of the Vienna Convention on the Law of Treaties also says that an interpreter shall take into account “*any relevant rules of international law applicable in the relations between the parties.*” This provision promotes the systemic integration of a treaty with other sources of international law.¹³⁹ It also allows a court or tribunal to take into account changes in international law, policy or values which may influence the interpretation of a treaty.

As an example, a so-called evolutionary approach to interpretation was adopted by the ICJ in the *Namibia Advisory Opinion*, where the Court was faced with interpreting and applying Article 22 of the Covenant of the League of Nations and the text of the Mandate for South West Africa, virtually fifty years since their promulgation and in a different institutional context. The Court held that certain concepts connected with the Mandate system were “*by definition evolutionary*” and the parties must be “*deemed to have accepted them as such.*”¹⁴⁰ It followed that the Court had to “*take into consideration the changes which have occurred in the*

¹³⁹ See McLachlan, “The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties”, (2005) 54 *International and Comparative Law Quarterly* 279.

¹⁴⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, (1971) *ICJ Reports* 16 at p. 31; see also *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, (1997) *ICJ Reports* at pp. 76-80.

supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary international law."¹⁴¹

Higgins notes that "*this same trend is discernable across courts, tribunals and arbitration tribunals.*"¹⁴² In a more recent decision, the arbitral tribunal in the ***Iron Rhine Railway Arbitration*** appeared to adopt a more general approach to evolutionary interpretation, holding that "*in the present case, it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive [sic.] interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule.*"¹⁴³ It would seem that the basis of the Tribunal's reasoning in this case is the fact that the treaty was not intended to govern the relationship between the two states for a "*limited or fixed duration*"¹⁴⁴ only and therefore it was necessary that it was applied in light of contemporaneous concerns.¹⁴⁵ The approach of the Tribunal in the ***Iron Rhine Railway Arbitration*** potentially expands the application of evolutionary interpretation to many more modern multilateral treaties.

Some commentators claim that only those rules of international law which are binding on all the parties to the treaty can be invoked in aid of interpretation.¹⁴⁶ McLachlan explains that this is necessary so that an interpretation imposes consistent obligations on all the parties to it.¹⁴⁷ By contrast, French suggests that the concept of uniformity of interpretation, whilst an admirable notion, does not actually match the

¹⁴¹ *Namibia Advisory Opinion*, at para. 53.

¹⁴² Higgins, "A Babel of Judicial Voices? Ruminations from the Bench", at p. 798.

¹⁴³ *Iron Rhine Arbitration (Belgium v. the Netherlands)*, (2005) available at <http://www.pca-cpa.org/ENGLISH/RPC/BENL/BE-NL%20Award%20corrected%20200905.pdf> <checked 30 November 2006> at para. 80.

¹⁴⁴ *Ibid.*, at para. 81.

¹⁴⁵ See *Ibid.*, in particular paras. 220-223.

¹⁴⁶ Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003) at p. 257.

¹⁴⁷ McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties", at p. 315.

reality of the international legal system.¹⁴⁸ Thus, he argues that Article 31(3)(c) refers to all those parties involved in the dispute.

In practice, it may depend on the type of treaty being interpreted. It is submitted that, at least in the case of the LOS Convention, the latter approach is not suitable. The General Assembly has regularly stressed the need to uphold the integrity of the Convention, which calls for a uniform interpretation thereof.¹⁴⁹ Indeed, one of the purposes of compulsory dispute settlement is to guarantee a harmonised interpretation of the Convention. The integrity of the LOS Convention would not be protected if it had different meanings for different parties. At the same time, requiring all the States Parties to the LOS Convention to be bound by an instrument before it can be invoked in interpretation sets a very high threshold.

The appropriate approach would appear to be that suggested, *inter alia*, by Pauwelyn, who argues that other instruments may be taken into account in interpretation if they reflect the common intention of the parties, whether or not the parties are formally bound by the instrument.¹⁵⁰ Therefore, the status of the instrument being invoked is likely to play a less important role than the way in which it was negotiated and whether it is supported by consensus.¹⁵¹

Nevertheless, the purpose of Article 31(3)(c) of the Vienna Convention on the Law of Treaties must be borne in mind. It is fundamental that the rule or principle being invoked can shed light on an ambiguous term in the text being interpreted. The ICJ has stressed on several occasions that treaty interpretation should not turn into treaty revision.¹⁵² Nor should it be assumed that the same words in two treaties should be interpreted in the same way. In the *MOX Plant Case*, the ITLOS stressed that the distinct identities of two instruments is important. The limitations on invoking other instruments in the interpretative process were noted, as

¹⁴⁸ French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules", (2006) 55 *International and Comparative Law Quarterly* at p. 306.

¹⁴⁹ Note the regular call by the General Assembly for states to ensure the integrity of the Convention; e.g., General Assembly Resolution 60/30, 2005, at para. 4.

¹⁵⁰ Pauwelyn, *Conflict of Norms* at p. 260. See also McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties", at pp. 314-315.

¹⁵¹ Boyle and Chinkin, *The Making of International Law* at p. 246.

¹⁵² Separate Opinion of Judge Bejaoui in *Gabčíkovo-Nagymaros Case*, at para. 12. See also International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly", (1966 - II) *Yearbook of the International Law Commission* at p. 219.

*“the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of the parties and travaux préparatoires.”*¹⁵³

It follows that other rules and principles of international law may not be useful in determining the ordinary meaning of a term in a treaty. In that case, they are most useful for interpreting generic phrases. Nevertheless, other instruments may also be useful in providing an indication of the weight to be given to particular issues in determining the meaning of a text and in balancing the competing interests of states.

A study of the few ITLOS decisions to date illustrates that in certain circumstances the Tribunal has been willing to take into account other rules of international law even when there is no express reference to such rules in the text of the Convention. It did so in *The M/V “Saiga” (No. 2)* when it was interpreting Article 94 of the Convention concerning the genuine link between a ship and a flag state.¹⁵⁴ In support of its decision on Article 94, the Tribunal made reference to the 1986 Convention on the Conditions for the Registration of Ships,¹⁵⁵ the 1993 FAO Compliance Agreement, and the 1995 Fish Stocks Agreement.¹⁵⁶ The Tribunal found that these instruments supported the interpretation that was already evident from considering the *travaux préparatoires*. For present purposes, it is pertinent to note that none of these instruments had entered into force at the time of the dispute. This did not seem to matter to the Tribunal, although it did not make clear the basis for taking these other instruments into account.

To take another example, in *The M/V “Saiga”*, the Tribunal looked to other instruments to interpret the phrase “*sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone*” in Article 73 of the Convention. The Tribunal invoked, *inter alia*, Article 1 of the 1989 Convention for

¹⁵³ *The MOX Plant Case*, at paras. 50-51. See also *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, (2003) 42 ILM 118 at paras. 101 and 142; *Methanex v. US*, (2005) 44 ILM 1345 at para. 6.

¹⁵⁴ The Tribunal also referred to the drafting history of the provision; see above, at p. 227.

¹⁵⁵ *The M/V “Saiga” (No. 2)*, at para. 84.

¹⁵⁶ *Ibid.*, at para. 85.

the Prohibition of Fishing with Long Driftnets in the South Pacific¹⁵⁷ as evidence of the fact that the concept of fishing activities could include the provision of fuel and other supplies to fishing vessels.¹⁵⁸ However, in this case, not all judges were convinced that this instrument was relevant to Article 73. Vice-President Wolfrum and Judge Yamamoto objected to the invocation of the Driftnet Convention, arguing that the definition of fishing activities therein was agreed on specifically for the purpose of that treaty and it could not simply be transferred to the LOS Convention.¹⁵⁹ They also noted that Article 1 of the Driftnet Convention concerned flag state jurisdiction, not coastal state jurisdiction which was the subject of the provision being interpreted.

In *The Monte Confurco*, Judge Anderson made reference to the provisions of the Convention on the Conservation of Antarctic Marine Living Resources¹⁶⁰ and particular measures adopted by the parties to that treaty in his analysis of the reasonableness of a bond for the release of a ship that had been caught illegally fishing in the Southern Ocean. He noted that “*this “factual background” is relevant to balancing the respective interests of France and the applicant. Equally, it is material in forming a view of what is a “reasonable” bond within the overall scheme of the Convention.*”¹⁶¹ Similar issues arose in *The Volga* where again Judge Anderson, this time accompanied by Judge *ad hoc* Shearer, suggested that the prompt release provisions of the LOS Convention should be interpreted taking into account international concern for illegal, unregulated and unreported fishing as expressed through instruments such as the CCAMLR and the Fish Stocks Agreement.¹⁶² They suggested that the Convention should be interpreted in such a way as to support and promote the aims of these other instruments. Judge Anderson puts this clearly when he concludes “*the duty of the coastal State to ensure the conservation of the living resources of the EEZ contained in article 61 of the Convention, as well as the obligations of Contracting Parties to CCAMLR to protect the Antarctic ecosystem, are relevant factors when determining in a case under*

¹⁵⁷ Hereinafter, the “Driftnet Convention”.

¹⁵⁸ *The M/V “SAIGA” Case* at para. 57.

¹⁵⁹ Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto in *Ibid.*, at para. 23.

¹⁶⁰ Hereinafter, “CCAMLR”.

¹⁶¹ *The Monte Confurco Case*, Dissenting Opinion of Judge Anderson, at pp. 2-3.

¹⁶² *The Volga Case*, Judge Anderson, at paras. 2 and 21; Judge *ad hoc* Shearer, at paras. 11 and 19.

article 292 whether or not the amount of the bail money demanded for the release of a vessel such as the Volga is 'reasonable'."¹⁶³

It would appear that the ITLOS has been willing to have recourse to other rules and principles of law in order to interpret the LOS Convention. Yet, it has failed to clearly indicate on what basis it was doing so. Further guidance in this matter would not only clarify the applicable principles, but also add greater legitimacy to the decisions of the Tribunal by increasing their transparency.

Reference to other rules and principles of international law does not provide a touchstone against which to interpret all treaty provisions. Nor does it provide an authoritative solution to all cases of ambiguity. It is the role of the court or tribunal to weigh up all of the evidence in order to decide what the correct interpretation of the Convention should be. Nevertheless, the general rules of interpretation are flexible and they allow a court to take into account developments in law and policy since the conclusion of the Convention.

9. Applicable Law

A court may in some circumstances apply other sources of international law. Given the overlap between the LOS Convention and other treaties, it is important to define the scope of applicable law.

Article 293 provides that courts and tribunals deciding disputes under the Convention may apply both the Convention and "*other rules of international law not incompatible with this Convention.*" In this context, other rules of international law can include other treaties, as well as customary international law.

It should be stressed that Article 293 does not act as a *carte blanche* to apply any rules that are applicable between the disputing parties. The concept of applicable law does not enlarge the jurisdiction of a court or tribunal to consider any legal claims arising between the disputing states. Such a liberal concept of applicable law would have the result of converting the jurisdiction of courts and tribunals acting under the LOS Convention into "*an unqualified and comprehensive*

¹⁶³ Ibid., Judge Anderson, at para. 2.

jurisdictional regime in which there would be no limit racione materiae.”¹⁶⁴ In this sense, applicable law and jurisdiction must be clearly distinguished.¹⁶⁵

What is the purpose of Article 293? It is suggested that this provision permits an adjudicator to apply such rules and principles of international law that are necessary in order to decide a dispute under the Convention.¹⁶⁶

Most of the rules that a court or tribunal will have to apply in this way will thus be secondary rules of general international law. The ITLOS has, for instance, referred on several occasions to the law of state responsibility in its judgments. The case of *The M/V “Saiga” (No. 2)* is once again a good illustration of the way in which other rules of international law may be applied. In that case, the Tribunal cited the “*well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act*”¹⁶⁷ and it made reference to Article 42 of the ILC Draft Articles on State Responsibility which specifies the forms that reparation may take.¹⁶⁸ In addition, the law of state responsibility was relevant to the case because Guinea had invoked the doctrine of necessity as a defence to the claims submitted against it.¹⁶⁹ In this context, the Tribunal referred to the decision of the ICJ in the *Gabcikovo-Nagymaros Case* as well as Article 33(1) of the Draft Articles on State Responsibility.¹⁷⁰ Whilst it did not deny that necessity could be invoked as a justification for a violation of the Convention, thus affirming the applicability of the law of state responsibility in the proceedings, the Tribunal nevertheless held that Guinea had not satisfied the Tribunal that its essential interests were in grave and imminent peril.¹⁷¹

¹⁶⁴ See *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, at para. 85; also cited in *Methanex v. US*, at para. 5. See also Boyle and Chinkin, *The Making of International Law* at p. 274.

¹⁶⁵ *The MOX Plant Case*, at para. 19.

¹⁶⁶ See the *dicta* of the PCIJ in *Mavromattis Palestine Concessions*, at p. 28.

¹⁶⁷ *The M/V “Saiga” (No. 2)*, at para. 170.

¹⁶⁸ *Ibid.*, at para. 171. The rules of state responsibility are “saved” by Article 304 of the LOS Convention.

¹⁶⁹ As a subsidiary argument, Guinea cited Article 59 of the LOS Convention.

¹⁷⁰ *The M/V “Saiga” (No. 2)*, at para. 133.

¹⁷¹ *Ibid.*, at para. 135.

These were not the only other rules of international law applied by the Tribunal in *The M/V “Saiga” (No. 2)*. In that case, Saint Vincent also asked the Tribunal to adjudge several claims that had no basis in the Convention itself. First, it alleged that by citing Saint Vincent as civilly liable in connection with criminal proceedings instigated in the domestic courts of Guinea, Guinea had violated its rights under international law.¹⁷² Although the Tribunal dismissed the claim because it did not constitute a violation of international law,¹⁷³ in doing so it failed to explain on what basis it would have had jurisdiction to entertain such a claim if it were indeed arguable. Saint Vincent had also alleged that the Guinean authorities had used excessive and unreasonable force when they were arresting the *M/V “Saiga.”* As the Convention does not contain express rules on the use of force in the arrest of ships, the claim was necessarily based on customary international law. Citing the application of international law according to Article 293, the Tribunal held that “international law ... requires that the use of force must be avoided as far as possible and where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.”¹⁷⁴ To support its reference to general principles of law, the Tribunal referred to the Fish Stocks Agreement, Article 22(1)(f) of which confirmed the principles that it thought were applicable. In other words, the Tribunal was not applying the Agreement; rather it was invoking the Agreement as an illustration of a general principle of law that was applicable to the disputing parties. In the circumstances of the case, the Tribunal held that use of force by the Guinean authorities had violated these principles of international law.¹⁷⁵ It is again clear from the judgment that the claims on the unreasonable and unnecessary use of force were considered as separate from the claim alleging a violation of the Convention's provisions on hot pursuit. Furthermore, the finding of a violation of the rules of international law on the use of force in the course of the arrest is contained in a separate paragraph of the *dispositif*.¹⁷⁶ Given that the jurisdiction of the Tribunal is limited to claims made under the Convention, it is not clear from the judgment on

¹⁷² *Ibid.*, at para. 160.

¹⁷³ *Ibid.*, at para. 162.

¹⁷⁴ *Ibid.*, at para. 155.

¹⁷⁵ The Guinean patrol boat had allegedly fired live rounds in their pursuit of the *M/V “Saiga”* and two crew members were injured when the ship was boarded; see *Ibid.*, at paras. 157-159.

¹⁷⁶ *Ibid.*, at para. 9 of the *dispositif*.

what basis the Tribunal made this finding. It is submitted that the Tribunal ignores the crucial distinction between jurisdiction and applicable law. The allegations made against Guinea may be serious in nature but the gravity of an alleged action provides no basis for jurisdiction. As noted by the ICJ in *Congo v Rwanda*, “the mere fact that rights and obligations erga omnes or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that jurisdiction always depends on the consent of the parties.”¹⁷⁷ Nor does the fact that Guinea breached rules of international law closely related to the substance of the LOS Convention confer jurisdiction on a court or tribunal acting under the LOS Convention. Such an approach to applicable law will undermine the authority of the Tribunal and the prospects for compliance with its judgments and orders.

10. Conclusion

This chapter has considered the role of courts and tribunals in upholding the *status quo* of the LOS Convention whilst satisfying countervailing pressures for progressive development of the legal framework. The inclusion of compulsory dispute settlement provisions in the LOS Convention implies an increased willingness to place the development of international law in the hands of independent adjudicators. In doing so, courts and tribunals must be aware of the inherent limitations on the judicial function which restricts how far they can develop the law.

The concept of applicable law would appear to offer few opportunities for an adjudicator to develop the law. The mandate to apply other sources of international law arguably does not allow a court to consider claims under other sources of law that are not necessary to decide the dispute under the treaty.

Interpretation, on the other hand, would appear to allow courts and tribunals to look beyond the text and to progressively develop the content of the law of the sea in light of changes in policy and law. The aim of interpretation is to identify the intention of the parties although it would appear that there is no single method of

¹⁷⁷ *Congo v. Rwanda*, at para. 125.

doing so. Rather, it is a process of weighing and balancing all of the available evidence in such a way as to deduce the meaning of the words in their context and in light of the object and purpose of the Convention. It would appear that a wide variety of instruments may be invoked for this purpose, including *travaux préparatoires*, the decisions of international institutions, or other international treaties.

Given the status of the LOS Convention as universal law, it would appear to be the practice of the international community as a whole rather than the States Parties *per se* that should guide a court or tribunal in its task. Looking at the activities of the States Parties alone would cause fragmentation between the LOS Convention as a treaty and as customary international law.

In deciding which instruments demonstrate the intention of states, a pragmatic approach seems to be preferred. Indeed, the pragmatism of the courts is perhaps necessitated by the *ad hoc* approach taken by states in developing the law. Throughout this thesis, the variety of mechanisms and instruments that states use to maintain the consensus on the law of the sea has been illustrated. Courts and tribunals play an important role in deciphering, clarifying and confirming these various law-making activities. Subsequent state practice may provide a source of interpretation or it may also act to modify the Convention. Courts and tribunals offer a forum in which informal instruments and state practice can be confirmed as legally binding, providing certainty to the legal framework.

However, it is important to maintain the distinction between jurisdiction and applicable law. States have only consented to the settlement of disputes under the LOS Convention, not under associated treaties. Courts cannot incorporate entire obligations into the LOS Convention simply because states have accepted them through other treaties.¹⁷⁸ It therefore remains important that other treaties contain their own dispute settlement mechanisms. It is for this reason that the Fish Stocks Agreement is so important in providing wide-ranging dispute settlement system for disputes arising under its provisions, as well as other fisheries agreements.¹⁷⁹ It also

¹⁷⁸ See, however, chapter five on the inclusion of rules of reference in the LOS Convention, at p. 126 ff..

¹⁷⁹ Fish Stocks Agreement, Article 30.

means that a court or tribunal acting under the LOS Convention may be able to do no more than order the states to co-operate. Nevertheless, independent oversight of negotiations often proves to make it simpler to arrive at mutually agreed solutions.¹⁸⁰

The contribution of courts and tribunals in developing the law of the sea must be seen as part of a wider system of law-making, involving many types of political, technical and judicial institutions. It is only by considering the variety and complexity of international law-making mechanisms that it can be seen how states strive to maintain the unity and universality of the legal orders of the oceans.

¹⁸⁰ Negotiated settlements were reached in the *Southern Bluefin Tuna Cases* and the *Johor Straits Case*. A provisional agreement was reached in the *Swordfish dispute* before it even reached court. See e.g. Tim Stephens, "The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case", (2004) 19 *International Journal of Marine and Coastal Law* 177.

Chapter Eight

Conclusion

This thesis has addressed the process of international law-making in the context of the law of the sea. The catalyst for the creation of the modern law of the sea was the decision by the General Assembly in 1970 to convene a conference to negotiate a new international framework on this subject. Although the outcome of UNCLOS III was a treaty, it is generally accepted that the LOS Convention largely crystallises customary international law. Apart from the question of deep seabed mining, the Convention is widely acknowledged as creating a universal legal order for the oceans. It is this law-making activity that forms the launch pad for this thesis.

Many lessons can be learnt from UNCLOS III about the creation of universal law. In particular, the consensus decision-making techniques and universal participation at the Conference can be highlighted as significant factors in the impact of the LOS Convention on customary international law. Yet, the success of the Conference should not be taken for granted. The law of sea is not immune from change. New challenges will constantly arise which will put pressure on the prevailing legal framework. Therefore, the law of the sea must continue to evolve. It is the progressive development of the law of the sea in the wake of the LOS Convention which forms the primary subject of investigation in this thesis.

A major feature of legal development in this field is the intertwining of treaty and custom in the law-making process. Whilst this process permitted the rapid development of universal international law, it also created a fundamental tension between the Convention as a treaty and the Convention as a vehicle for the crystallisation of customary international law. This tension surfaces throughout the thesis as the available methods of law-making are analysed.

The starting point for this analysis was the amendment mechanisms contained in the Convention itself. These procedures were perhaps intended by the drafters to be the principal mechanisms for altering the content of the treaty. However, these mechanisms have a fundamental limitation because they relate to the Convention as a treaty instrument. Moreover, they confer powers on the States Parties with no *prima*

facie obligation to consider wider interests of the international community. Invoking the amendment procedures could potentially cause a fragmentation of the law of the sea. Indeed, it is significant that in practice the amendment procedures in the Convention have been abandoned in favour of other law-making techniques. Therefore, it has been necessary to look beyond the Convention for alternative ways to develop the law of the sea in a coherent and universal manner.

What is clear from this thesis is that there is no single mechanism for achieving this aim. Law-making in this field is eclectic. Nevertheless, it is apparent that institutions play a central role in the evolution of the law of the sea. The thesis has considered the activities of a variety of institutions. In particular, it looks at the General Assembly, the Meeting of the States Parties, the International Maritime Organization, and the International Seabed Authority. Some of these institutions have a formal role under the LOS Convention, whilst others do not. Yet, it is concluded that they are all able to contribute to the development of the law of the sea. Indeed, they are not alone. The International Atomic Energy Agency, the Food and Agriculture Organization, and the International Labour Organization, amongst others, also have interests in maritime affairs and they may potentially be involved in law-making.

The important question is *how* do these institutions develop the law of the sea? None of them possess legislative powers *per se*. It is suggested that their contribution to law-making is more often their ability to foster a consensus on the clarification of existing rules or on the formation of new rules. Institutions are important for modern law-making because they provide a forum in which deliberations and discussions on developments in the law of the sea can take place. These institutions, and the instruments which they adopt, are used as vehicles for the continuing crystallisation of the law of the sea. It follows that resolutions of the General Assembly, decisions of the Meeting of the States Parties, and instruments adopted by the International Maritime Organization can all have an impact on the law of the sea. Treaties have retained a role in law-making, such as the 1994 Part XI Agreement and the 1995 Fish Stocks Agreement. However, the formal status of all of these instruments is less important than whether they are supported by a consensus of the international community. Thus, participation in discussions and the decision-making techniques used to adopt instruments are important characteristics of institutional law-making.

Indeed, the analysis of institutional practice in this thesis has revealed that the consensus decision-making techniques developed at UNCLOS III have been imitated by many institutions in the context of the law of the sea, whether or not such techniques are reflected in the formal institutional rules of procedure. In addition, institutions have often opened up their discussions and deliberations to all states in order to promote universality of participation. It appears from this analysis that states are all too aware of the importance of maintaining consensus in order to promote a stable yet flexible framework for the law of the sea.

Informal law-making therefore permits the evolution of a universal framework for the law of the sea. Consensus on the creation and modification of legal rules can be rapidly achieved. However, it also means that there is a lack of legal certainty in the law-making process. It is necessary to look beyond the formal status of an instrument to determine whether or not it is generally accepted.

The eclecticism of law-making also poses challenges for the coherent development of the law of the sea. There is no single institution which has primacy in developing the law of the sea. Indeed, several institutions may deal with the same issue, albeit from different perspectives. Inter-institutional co-operation is therefore vital to the coherent development of the law of the sea. In fact, institutions do co-operate, formally and informally. Nevertheless, the threat of conflict and fragmentation is always present. Indeed, such pressures may be inherent in a legal system without a single legislature or hierarchical structure. It appears that the international conflict rules do no more than provide guidance to states in determining the applicable law in a particular dispute. Continuing co-operation is therefore a vital tool in maintaining a universal legal framework that is accepted by all states. To this end, transparency and universal participation in institutions involved in law-making can also help to promote coherence of the legal order as well as universality of the law. On the other hand, the threat of fragmentation can never be completely eliminated. Even the creation of an International Organization for the Law of the Sea with full competence over the development of the LOS Convention would not eradicate the threat of fragmentation, as the law of the sea itself is not a self-contained regime and it overlaps with other fields of international law. Ultimately, it is a matter of managing the tensions between these regimes through co-operation and compromise.

One advantage of being able to submit disputes under the LOS Convention to international courts and tribunals is that these organs can interpret and apply the Convention in light of state practice, clarifying subsequent developments in the law. To an extent, legal certainty can be achieved through this process. Yet, the role of the courts and tribunals in clarifying the legal framework is dependent on developments taking place through other institutions or other forms of state practice. In addition, the role of judges in this regard is hampered by the fact that they are instructed to interpret and apply the Convention as a treaty. Their competence is further restricted by rules of interpretation, jurisdiction and applicable law. Courts and tribunals may therefore be limited in their ability to contribute to the coherent and universal evolution of the law of the sea.

The conclusion of this thesis is that states have succeeded in maintaining the consensus over the law of the sea since the adoption of the LOS Convention. They have largely achieved this through informal co-operation and compromise. Institutions have been central to this process. Institutions may not offer legislative powers but they are able to provide a forum for co-operation between all states. Debates and discussions within international institutions contribute to a continuing crystallisation of the customary international law of the sea, maintaining the consensus on the applicable legal framework and ultimately developing the universal legal order of the oceans.

Table of Principal Treaties and Instruments

In chronological order:

1945 Charter of the United Nations; 39 AJIL Supp 190; (1945) ATS 1.

1948 IMO Convention; (1948) 53 AJIL Supp 516; (1958) ATS 5.

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1959 Antarctic Treaty; (1961) ATS 12.

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1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (1971) 10 ILM 1151; (1973) ATS 4.

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1994 Agreement on the Implementation of Part XI of the 1982 Law of the Sea Convention; (1994) 33 ILM 1309; (1994) ATS 32; Brown, *The International Law of the Sea*, Vol. II, Dartmouth Publishing, 1994, p.366.

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2. Bartels, "International Law in the WTO Dispute Settlement System", paper delivered at BIICL Fifth Annual WTO Conference, London, May 2005.
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6. Nandan, "Administering the Mineral Resources of the Deep Seabed", paper delivered at SLS/BIICL Symposium on the Law of the Sea, London, March 2005.
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