UNCLOS at 30

Abstracts

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A collection of extended papers will be published in 2013
Recent developments in the Law of the Sea in the Practice of the United Kingdom

- **Renewable Energy in Northern Ireland**
  
  Recent arrangements to facilitate the development of renewable energy off the coast of Northern Ireland
  

- **Exclusive Economic Zone**
  
  Power to declare an EEZ (section 41 of the Marine and Coastal Access Act 2009). Progress in discussions with eight maritime neighbours.
  

- **International Seabed Authority**
  
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- **Commission on the Limits of the Continental Shelf**
  
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  UK submissions: (a) Bay of Biscay; (b) Hatton-Rockall; (c) Ascension Island; (d) Falklands Islands, South Georgia and South Sandwich Islands; (e) British Antarctic Territory.
  

- **Biodiversity beyond National Jurisdiction (BBNJ)**
  
  UN Discussions. UK position. Marine Genetic Resources (MGR).
The South China Sea Disputes and China’s Approach to UNCLOS

The disputes in the South China Sea have attracted serious concerns in the world community including our academic world. As a key player in curbing and finally solving such disputes, China’s role is indispensable. This paper attempts to discuss the recent developments in the South China Sea and the responses of China to them. Significant issues concerning the law of the sea will be analytically discussed and include particularly China’s U-shaped claim and historic rights in international law, China’s practice in and position on islands and baselines, and foreign military activities in the EEZ.

Despite its existence in the Chinese map for more than six decades, the U-shaped line has never received a wide recognition in the world community, much less the other claimants to the South China Sea. Though related issues have been discussed in the past, the U-shaped line still remains as a legal conundrum not only for China but also for the world community, particularly after the map with the U-shaped line, together with China’s Note verbale against the claims to the outer continental shelves made by Malaysia and Vietnam, was submitted to the UN Commission on the Limits of Continental Shelf in May 2009. What is the legal nature of that line? What has China claimed within the line? Do historic rights exist within the line?

Recently China expressed its position on the status of Japan’s Okinotorishima by stating that it is a rock rather than an island, thus without entitling EEZ and continental shelf. China even proposed to discuss this issue at the UNCLOS meetings. There are hundreds of natural features in the South China Sea including islands/islets, atolls, reefs, banks. One source tells us that among about 170 features in the South China Sea only about 36 tiny islands are above water at high tide. What about the legal status of the islands and reefs in the South China Sea? Will China claim EEZ and continental shelf from these islands and reefs?

China publicised in 1996 part of its baselines to measure its maritime zones along its mainland coast, circling Hainan Island and the Paracel Islands. The straight baselines for the Paracel Islands comprise 28 base points encircling these islands. As China is not a mid-ocean archipelagic State, is China’s such practice consistent with UNCLOS? More interestingly, China publicised baselines for the disputed Diaoyu Islands (Senkaku in Japanese) this year. Baselines are critical for the measurement of maritime zones under national jurisdiction as well as for maritime boundary delimitation between neighbouring coastal States. Thus problematic baselines will definitely cause problems in the above two areas. When a maritime zone is designated by a coastal State with problematic baselines, then it will become controversial under international law and challengeable by other countries. Potential maritime disputes or conflicts would then arise.

The Impeccable Incident in the South China Sea in 2009 triggered a new round of discussion on foreign military activities in the EEZs of coastal states. China opposes such activities and this opposition has been concurred in by other developing countries. As we know, there is a controversy on whether the conduct of military activities in the EEZ of another country is legitimate. Some States may invoke Article 58(1) of UNCLOS to justify their military activities in other countries’ EEZ. But in regard to the legal nature of the EEZ as under national jurisdiction, there may be a requirement of due regard. Since the UNCLOS is not clear in this respect, will this left-over grey area be clarified with the developments of the international law of the sea?
Energy at sea: A New Challenge?

Energy issues appear at the forefront of both doctrinal analysis and practical considerations in recent times. New areas have opened up for the extraction of fossil fuels, both on land with the commercial exploitation of shale gas and at sea with the discovery of extensive natural gas and oil reserves situated under the continental shelf in places such as the Eastern Mediterranean or Brazil. These new areas of production create further the prospect of an increasing network of pipelines, again both on land and underwater, that would crisscross the oceans, transferring energy to areas far remote from the original place of production and creating both a security and an environmental hazard. On the other hand, the future remains steadily focused on the generation of renewable energy, which lays at the heart of the climate change negotiations globally and the energy policy of the European Union regionally. Indeed, renewable energy constitutes the core of the UN Global Sustainable Energy Initiative, recently announced by the UN Secretary-General Ban Ki-moon, which aims to ensure universal access to modern energy services, double the global rate of improvement of energy efficiency and double the share of renewable energy in the global energy mix. It is in this context that the vast potential of the seas for the generation of renewable energy comes to the fore. Analyses of the renewable energy generation potential of the oceans suggest harnessable energy far in excess of global electricity demands. These resources include the generation of electricity from offshore wind, tides, currents and waves as well as capturing usable power from ocean thermal energy gradients.

This contribution will concentrate on a discussion of the legal regime governing offshore energy production and transport in international law, as the development and operation of such projects face a highly complex, extremely specialized and fragmented web of legal regimes.

Three major areas of applicable rules may be readily identified. Firstly, the law of the sea regulates the overall placement of energy-generation installations and energy-transporting pipelines in the marine area. The delimitation of maritime areas of coastal State sovereignty or jurisdiction is the necessary prerequisite for any exploration and exploitation of offshore resources. Likewise, energy activities intersect with other uses of the seas, such as navigation, fisheries or tourism. The Law of the Sea Convention sets out the framework for energy activities; but does it cover the whole picture?

Secondly, international environmental law regulations play an increasingly important role in the overall placement and regulation of offshore energy projects. Such concerns go beyond the by now customary obligations to prevent pollution of the marine environment to also include wider fisheries and biodiversity concerns. The latter may be addressed with the creation of Particularly Sensitive Sea Areas or Marine Protected Areas within waters under coastal State jurisdiction or even in the high seas, under diverse conventional regimes of global and regional dimensions. Lack of coordination between institutions with differing mandates poses a challenge of both a doctrinal and practical character.

Thirdly, the rules on energy financing, which include issues of investing in energy infrastructure, are an indispensable part of the regulation of energy activities. Especially in the EU context, elaborate rules on the interconnectivity of energy networks and the creation and operation of smart grids perplex the situation further. The overarching objective of energy efficiency, including the major

issue of the tax treatment of alternative energy sources, play an increasingly important role in shaping domestic and regional energy policies and legislations.

It is readily evident from this enumeration that the regulation of offshore energy resources requires the accommodation of many conflicting claims or concerns or equally urgent claims for fisheries, tourism and investment, all in a global environment of the ongoing financial crisis. I will concentrate in the present context on LOS issues with the occasional foray into other regimes, especially environmental considerations.
Delimitation of the continental shelf beyond 200M and prospects for revenue sharing between states and the international community

This paper will focus on the legal regime for the continental shelf beyond 200M that the 1982 UNCLOS established. Two aspects of this regime will be scrutinized, namely, the delimitation of the continental shelf beyond 200M and the prospects for the implementation of bilateral and multilateral revenue-sharing provisions for mineral resources exploited in this part of the continental shelf.

Delimitation will include first, the delineation of the final limits of the CS beyond 200M demarcating the end of coastal State jurisdiction and by extension, the beginning of the deep sea-bed ‘Area’, minerals exploitation of which is to be administered by the International Sea-bed Authority (ISA); and second, delimitation in the more traditional sense of the term within international law, namely, maritime boundary delimitation between adjacent and opposite coastal/island States.

Elaborating on the two different aspects of delimitation considered here, an initial observation on the decision-making process for delineation of the continental shelf beyond 200M is the absence of a role for the ISA in this exercise. This is despite the fact that the expansion of a State’s continental shelf beyond 200M necessarily impinges on the remaining sea-bed Area within the ISA’s remit.

Turning to the second aspect of delimitation of the continental shelf beyond 200M between adjacent or opposite States, an initial question is as to whether the generally applicable rules of maritime delimitation are equally relevant for the delimitation of these sea-bed areas. Here it is first important to note that there is no distinction made in the relevant UNCLOS provisions (Article 83) for delimitation of continental shelf boundaries within and beyond 200M. Moreover, several existing maritime boundary delimitation agreements already make provision either implicitly or explicitly for boundary lines going beyond 200M. On the other hand, at least until very recently with the ITLOS decision in the *Bangladesh/Myanmar* case delivered on 14 March 2012, no international court or tribunal has directly undertaken the task of continental shelf delimitation beyond 200M.¹

A further aspect of this paper involves the possible presence of shared or transboundary natural resources. Within this context, the first bilateral agreements (between Mauritius and the Seychelles) on overlapping continental shelf entitlements beyond 200M, incorporating a joint development regime with shared revenues, will be considered here.² The final substantive part of this paper also relates to revenue sharing with respect to the requirement under Article 82 of the Convention for payments and contributions from the exploitation of the continental shelf beyond 200M for distribution by the ISA to designated members of the international community. Issues arising from the future application of Article 82 have been considered *inter alia* by the ISA and the International Law Association (ILA) and will be revisited here.³


To What Extent may a Coastal State exercise its Rights on its Outer Continental Shelf before the Outer Limit has been established in accordance with Article 76 and Annex II of UNCLOS?

Article 76 and Annex II of UNCLOS require a State wishing to establish the limits of its continental shelf beyond 200 miles from the baseline to make a submission to the Commission on the Limits of the Continental Shelf. The Commission shall then make a recommendation to that State. Limits established on the basis of a Commission recommendation are ‘final and binding’.

Somewhere in the region of 100 submissions to establish the outer limit of the continental shelf beyond 200 miles have been, or are likely to be, made to the Commission. At its current rate of progress, it is likely to be several years before the Commission has made recommendations in respect of some of those submissions. That raises the question of whether a coastal State may exercise its rights on the continental shelf beyond 200 miles before the latter’s outer limit has been established in accordance with the procedure described above. A coastal State’s rights on its outer continental shelf (i.e. the continental shelf beyond 200 miles) include the exploration and exploitation of mineral resources and sedentary species, the authorisation of scientific research, the erection of artificial islands and installations, the delineation of the course of pipelines laid by third States, and, arguably, the establishment of marine protected areas. A coastal State’s right to an outer continental shelf is not dependent on a recommendation from the Commission but exists ipso facto and ab initio. However, if a coastal State exercises its rights before it has established the outer limit of its continental shelf in accordance with the procedure laid down in Article 76 and Annex II of UNCLOS, it risks doing so in an area which may subsequently, following the Commission’s recommendation, turn out not to be a part of its outer continental shelf. UNCLOS does not suggest how this potential dilemma may be addressed.

The aim of this paper is to attempt to address that dilemma by taking each of the coastal State’s outer continental shelf rights in turn and suggesting the degree to which a State may exercise such rights without violating international law. The paper will argue that the position will vary, depending on the right concerned. So, for example, a State is entitled to exploit the sedentary species in the area which it presumes to be its outer continental shelf. If its presumption turns out to be correct, such exploitation will be based on its continental shelf rights to exploit sedentary species (Art. 77). If its presumption proves not to be correct, its exploitation of those sedentary species will nevertheless still be justified, but on the basis of the high seas freedom of fishing. On the other hand, if a State attempts to regulate or prohibit the exploitation of sedentary species by other States, it will have violated the right of those States freely to fish on the high seas if the area where such regulation/prohibition occurred subsequently (following a Commission recommendation) turns out not to be part of its outer continental shelf.
Observations on the Article 76 process to date: Coastal states submissions and the work outstanding for the Commission on the Limits of the Continental Shelf

After almost exactly eleven years since the first submission under UNCLOS by Russia in respect of its continental shelf beyond 200 nautical miles, only 18 of the 61 cases on the CLCS's books have been fully worked through to the recommendation stage. Even with new ‘revved-up’ working practices under which the latest and subsequent Commissions will be toiling, it’s difficult to imagine how the next eleven years are going to see all the coastal states who have (or will have) deposited submissions in accordance with UNCLOS, establishing their rights under Part VI of the 1982 Convention.

Part of the problem is that the due process which the Commission developed for dealing with submissions, and to some extent the restrictions laid out in the Convention itself, are not helpful. On the one hand, the Commission’s consistent reluctance to embrace either external experts as additional resource, (allowed under its own Rules of Procedure), or competent international scientific organisations, (allowed under Annex II of the Convention), seems inexplicably counter-productive. On the other hand, Annex II unhelpfully sets the Commission numbers to 21, which at the time of drafting of the Convention may have seemed reasonable, given that the advice from experts then was that the number of likely submissions was to be a manageable 33. As we all know now, we can expect the Commission ultimately to be dealing with around 100, of which nearly half are in a bulge resulting from the May 2009 deadline. The outcome is understandably deeply frustrating for submitting States, and it seems we just can’t fix this. We can’t draft in more Commissioners, and equally we can’t prevail upon the existing ones to work full-time - even if the nominating state would pay them (and few would, we can safely assume). So the status quo will probably prevail for some time - leaving many States, having invested great deals of money and time in delivering on their responsibilities, let down by the process.

We should take stock of the science embedded within this smorgasbord of submissions, in search of more positive reflections on the work in progress. In truth, however, the Article 76 technical exercise is not entirely cerebral. It is as much ensuring that the right data of the right quality are analysed in a way which the Commission can endorse. There is little room for scientific interpretation. Indeed, we can’t tell what science is involved in a particular claim, as these are rarely, if ever, public documents. Furthermore, States having neighbours with potentially overlapping shelf areas, routinely - but probably unnecessarily - guard this information jealously. Few clues are discernible from the published Executive Summaries. In fact, it is curious that one of the ways that coastal states now learn how to prepare the strongest case, (or at least one that will be acceptable by the Commission) is not by consulting the Commission’s cook-book on Article 76 implementation (otherwise known as the Scientific and Technical Guidelines) but to deconstruct and examine forensically the recommendations prepared by the Commission for each submission as they ‘finish’ work on them. These reports variously bless, tinker with, or reject States claims, but being stripped-down versions, only offer fragmentary glimpses of what the Commission will pass and what it won’t. This detective work facing a submitting State, and the expense involved in second guessing what to leave in and what to leave out, is time wasting at best and somewhat obstructive at worst. So the science of submissions, even in a general sense, remains very much in the closet, rather than out in the open.

More worrying still, is that these observations hardly provide encouragement to the States responsible for the additional forty-odd ‘preliminary information' documents - those enjoying extra time thanks to SPLOS 183 - to finish the job. Most are due for conversion to their final form before
2019, but in reality there is now no longer any real deadline. The current Article 76 ambience also
doesn't augur well for bringing the few remaining non-ratifying States with potential outer shelf areas
to delineate into the fold. It seems that the final links in the slowly emerging outer limit to national
maritime jurisdiction may never be forged, and one of the attainable goals of the 1982 Convention
missed.
On a fateful night in September 1994, the Estonian cruise ferry *M/S Estonia* sank off the Finnish coast in international waters (Finnish fisheries zone) claiming over 850 lives. Instead of removing the wreck, the three states most concerned (Estonia, Finland and Sweden) concluded an agreement in February 1995, by which they designated the wreck and its surrounding area as a maritime grave. Most notably, the parties undertook the obligation to criminalise any activities disturbing the peace of the final place of rest, in particular any diving or other activities with the purpose of recovering victims or property either from the wreck or the sea-bed. The agreement was supplemented a year later by a Protocol which opened the original treaty to all states. In 2000, the initiation of criminal proceedings in Sweden against nationals of third states pursuant to relevant domestic legislation prompted several reactions.

The *M/S Estonia* case still raises a variety of challenges for the law of the sea both of a jurisdictional and substantial character. Does the law of the sea provide a standard to cope with tragedies of such immense proportions, and who is to decide? How are those marine sites to be protected from desecration and looting? Alleviating the tension between competing interests such as humanitarian considerations and safety of navigation constitutes an exercise in ocean governance *par excellence*. In the event, the concerned states adopted a specialised regional solution, even though its effectiveness requires compliance by a variety of actors. Its opposability vis-à-vis non-participating states could be contested in view of traditional notions of international law such as the freedom of the high seas and the *pacta tertiis* rule. Despite its novelty and complications, the *Estonia* arrangement inspired a comparable solution for the *Titanic*. Could such solutions attain an objective character and in what ways?

UNCLOS does not directly address the issue of the protection of maritime graves in international waters. Could, nonetheless, its provisions or their underlying principles lend themselves to an interpretation in favour of such protection? How would such an interpretation interact with other relevant parts of the Convention? What can other multilateral agreements, such as the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, add to the picture? Besides participation in specialized regimes, actions through competent international organisations - primarily the IMO but also regional institutions – could also promote coordination among states enhancing thus the protection of such sites.

This contribution examines the intricate issue of maritime graves by revisiting the *M/S Estonia* case. In the light of more recent developments in state practice it explores the idea of special protection under international law for maritime graves.

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**Governance of areas beyond national jurisdiction – a LOSC unfinished agenda**

Nearly 50% of the earth surface is covered by marine areas beyond national jurisdiction. That is, areas that are beyond the limits of the Exclusive Economic Zones recognized by the 1982 LOSC, and of the continental shelf which the Convention recognized may extend beyond 200 nautical miles to its outer geomorphological limits.¹ Since the finalization of the 1982 Convention, human activities in the ocean and in ABNJ have burgeoned, as have their impacts.² These impacts are not necessarily the result of new activities but of the unprecedented increase of existing activities such as maritime transport, the laying of submarine cables (for internet connections) and, of course, fishing.

In the thirty years since the conclusion of the 1982 UN Law of the Sea Convention it has become clear that the regime for Areas beyond National Jurisdiction (ABNJ) upon which the 1982 Convention seems to be premised has not materialised. This paper looks at the limitations of the current ocean governance regime, identifies important issues that need to be addressed more specifically in ABNJ – such as basic principles of ocean governance, environmental impact assessment for new activities and the establishment of marine protected areas. In 2004, in order to address the full range of issues particularly related to the conservation of biodiversity in areas beyond national jurisdiction, the UN General Assembly agreed on the recommendation of the UN Informal Consultative Process on the Oceans and the Law of the Sea (UNICPOLOS) to establish an *Ad Hoc* Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (known as the BBNJ process).³ This BBNJ Working Group met first in 2006; its most recent meeting (its fifth) was in May 2012. The Rio +20 UNCSD in June 2012 agreed a time line for this process.

The paper will also look in detail at the Sargasso Sea project – which is designed to see what protection measures can be put in place for a unique ecosystem in ABNJ using existing international institutions without waiting for the UN to take more comprehensive action.

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¹ Art. 76, LOSC  
³ For details of the meeting to date see [http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm](http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm)
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Protection of the environment and governance of straits used in international navigation under the 1982 United Nations Convention on the Law of the Sea

The 1982 United Nations Convention on the Law of the Sea (“LOS Convention”)1 was negotiated over a period of nine-years.2 The regime of international straits, or straits used in international navigation, proved to be one of the key areas of contention. Negotiation positions were drawn among different groups of States representing different interests.3 The negotiations centered on military and security issues, safety of shipping and environmental protection. Broadly speaking the division was between the shipping interests and the coastal State interests. The loss of high seas freedom of navigation resulting from the expansion of the breadth of the territorial sea to 12 nautical miles was the red line for the two Super maritime powers - the United States and the former Soviet Union.4 On the other side, with the advent of super tankers carrying oil the increased threat of costly environmental pollution, and also the risks from the transport of nuclear waste, coastal Strait States demanded competence to the regulate passage of foreign flagged ships through straits. Ultimately, compromise was reached, which resulted in the relatively complex regime codified in Part III Straits used for international navigation, including the new regime of transit passage.5

The 1982 LOS Convention created multiple categories of straits according different regulatory competence to the coastal States and passage rights to foreign flagged vessels.6 The most important result of UNCLOS III on the question of straits was without doubt the creation of the entirely new regime of transit passage. Article 38 defined the rights of passage accorded to foreign flagged vessels and Article 42 the competence of coastal States to regulate transit passage. The traditional non-suspendable innocent passage rights were maintained for straits that fell within the scope of Article 45. In addition the Convention recognized the regime of passage in straits of regulated in whole or in part by long-standing conventions in Article 35(c). Importantly, in response to the Strait States Group’s concerns over protection of their coasts and waters from accidental sources of vessel pollution, the 1982 LOSC expressly allowed for the establishment of sea-lanes and separation schemes in straits to be approved by the competent international organization (i.e. IMO). Furthermore, as part of the compromise brokered in Part III States bordering straits subject to transit passage were granted limited regulatory competence to adopt pollution control laws. This limited regulatory competence over transit passage straits was to some degree supplemented with Article 233, which allowed states bordering transit passage straits to take enforcement measures against foreign flagged vessels in the case of actual or threatened major damage to the environment. One other innovative feature of Part III on straits was Article 43 which exhorted cooperation between the

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strait States and User States to conclude agreements of co-operation on navigational and safety aids and other measures related to the prevention, reduction and control of pollution.\(^7\) To date article 43 has been implemented only in the Singapore and Malacca Straits.\(^8\)

Since the adoption of the 1982 LOSC thirty years ago, the world has changed in many ways that may not have been foreseeable during the time the Convention was negotiated. In 1990 the political balance of powers that drove the negotiations for Part III and created the transit passage regime changed. One of the maritime super powers that had sought to preserve the open sea corridors in straits, the former Soviet Union, disappeared into history. International environmental law underwent a rapid development following the 1992 United Nations Conference on Environment and Development (“UNCED”), held in Rio de Janeiro that included the adoption of the 1992 Convention on Biological Diversity\(^9\) as well as other important developments. The economic boom during the past decade in the emerging economies placed a greater demand for oil and consequently led to increases in transport of oil through straits adding to the risks of pollution. Furthermore, over the past three decades the International Maritime Organization (“IMO”) evolved into an important actor in developing instruments and measures such as particularly sensitive sea areas (“PSSA”) and Emission Control Areas (“ECA”) that went beyond the sea-lanes and traffic separation schemes expressly mentioned in Part III of the Convention. In addition to environmental concerns, the past decade has witnessed a serious increase in piracy attacks and possible terrorism attacks against international shipping have had a significant impact on key straits used in international navigation raising important questions. In addition, the technological advances of the past three decades on the one hand have provided sophisticated tools for the enhancement of safety of shipping but on the other hand have also resulted in significant increase in costs especially for the coastal States.

Part III on straits used in international navigation attempted to balance the countervailing interests that were broadly divided between the shipping interests advocating for freedom of navigation and the coastal State interest to protect their coastal and marine environment with the transit passage regime. This paper will examine the transit passage regime within the context of the developments over the past thirty years, focusing on protection of the marine and coastal environment of straits.

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\(^8\) Robert Beckman, “Singapore strives to enhance safety, security, and environmental protection in its port and in the straits of Malacca and Singapore,” *14 Oceans & Coastal Law Journal* (2009) 176

Climate Change and Ocean Governance

The Law of the Sea Convention was negotiated at a time when climate change was not yet part of the international environmental agenda. Nevertheless, it is not a static or immutable legal regime and it is not difficult to apply Part XII to greenhouse gas emissions and climate change insofar as they affect the marine environment. For that reason the UNFCCC institutions and the international standards they adopt are, in effect, part of the architecture of ocean governance.

However, it is doubtful whether viewing climate change through the law of the marine environment greatly alters the overall picture. This is not to argue that the UNFCCC regime is a self-contained regime separate from UNCLOS. On the contrary, the problem is precisely the inter-relationship between the two. It is characteristic of most environmental regulatory treaties that they build upon the due diligence obligation and require parties to take internationally agreed measures or apply international rules and standards. Once those measures, rules or standards are agreed it is very difficult to sustain the argument that the due diligence obligation has some separate and if necessary stronger character. Due diligence inevitably represents a compromise between what is possible and what is economically acceptable – a compromise fatally reflected in the UNFCCC and Kyoto. Reformulating that problem in terms of the precautionary principle or approach does not change things. The UNFCCC already acknowledges the applicability of the precautionary approach, but that has not resulted in States going any faster or any further. They can legitimately say that what has been agreed represents their adoption of a precautionary approach. Is any international court likely to disagree?
Climate change responses: Is UNCLOS fit for purpose?

Climate change is often described as the most significant environmental challenge of our time. It is a global – and, indeed, a complex, even “super wicked” - problem, the effects of which will be felt far beyond the location at which greenhouse gases (GHG) are emitted. The Intergovernmental Panel on Climate Change (IPCC) has noted that:

Natural systems at risk include glaciers, coral reefs and atolls, mangroves...and polar and alpine ecosystems.... While some species may increase in abundance or range, climate change will increase existing risks of extinction of some vulnerable species and loss of biodiversity. It is well-established that the geographical extent of the damage or loss, and the number of systems affected, will increase with the magnitude and rate of climate change.2

On the global scale, climate change is expected to lead to changes in the distribution of species, including invasive species but also migratory species (with consequences for fisheries management and marine protected areas) and to relationships between predator and prey. Loss of Arctic sea ice threatens biodiversity across an entire biome, with the related pressure of ocean acidification resulting from higher concentrations of carbon dioxide in the atmosphere.3

For the oceans, climate change has both direct and multiplier effects on existing challenges for marine species and habitat conservation in particular, and the potential to act synergistically with current anthropogenic threats from coastal development, pollution, and unsustainable fishing practices. These effects include the potentially negative aspects of human responses to climate change such as ocean iron fertilization (OIF) which seeks to enhance plankton growth and absorption by the oceans of CO2 from the atmosphere. The uncertainties and controversies surrounding such “marine geoengineering” methods have recently been considered both nationally and internationally, with the international debate over OIF having taken place largely outside UNCLOS, under the 1972 London Convention and 1996 Protocol (LC/LP) and the 1992 Convention on Biological Diversity (CBD). Nonetheless the impact of OIF on marine biological diversity has been considered by the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and has been raised in the annual oceans reports by the UN Secretary General, which has served further to focus attention on the issue of OIF. Moreover, recent discussion under the LC/LP and CBD has occurred against the legal backstop of UNCLOS and the customary law obligation to protect and preserve the marine environment, with concerns raised in some quarters regarding the compatibility with UNCLOS of proposed amendment of the LC/LP to address OIF/marine geoengineering.4 It is in this context that this presentation will assess the suitability of UNCLOS for the regulation of climate change responses in the 21st century.

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1 R J Lazarus, ‘Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future’ (2009) 94 Cornell Law Review 1153, 1159, drawing on public policy literature which characterizes a ‘public-policy problem with the kinds of features presented by climate change as a “wicked problem” that defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution’.

2 IPCC, Climate Change 2001: Synthesis Report, Working Group 2 at para. 2.3; see also Secretariat to the Convention on Biological Diversity, Biodiversity and Climate Change (2007), at 24.


4 See discussion at the 34th Consultative Meeting of the Contracting Parties to the LC and 7th meeting of the Contracting Parties to the LP, 29 October – 2 November 2012. There is also an Intersessional Working Group on Ocean Fertilization: for the most recent report see LC/34/4, 27 July 2012. Relevant documents available online on http://docs.imo.org/.
Enhanced Environmental Protection: The Baltic Sea Approach

The Baltic Sea is a brackish inland sea, perhaps the largest body of brackish water in the world. Its distinctive geographical and hydrological features make the Baltic environment vulnerable to a variety of threats, such as eutrophication, hazardous substances, overfishing and radioactive pollution, to name a few. In fact, the Baltic is one of the most polluted marine areas in the world.

The Law of the Sea Convention (UNCLOS) provides for enhanced cooperation on a regional level between states bordering enclosed or semi-enclosed seas with respect to the protection and preservation of the marine environment.¹ The 1974/92 Conventions on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Conventions) add flesh to the bones of those UNCLOS provisions.² They bring together the coastal states of the Baltic Sea catchment area and the European Union under a comprehensive regime encompassing all marine areas and sources of pollution.³ From a substantive perspective, the 1992 Helsinki Convention reflects basic principles common to most regional seas agreements such as the precautionary and the polluter-pays principle or Best Available Technologies and Best Environmental Practices.⁴ At the same time, its institutional component, the Baltic Marine Environment Protection Commission (Helsinki Commission or HELCOM), serves as a focal point for continuous cooperation on the shaping of a common environmental policy and its effective implementation.

Since the beginning of the 1980s the Helsinki Commission has been working to improve the Baltic marine environment, largely through its numerous recommendations on a wide array of pressing issues including point source and atmospheric pollution, protection of endangered species as well as pollution from shipping activities in cooperation with the IMO. The Baltic environmental policy is also complemented by Ministerial Declarations, namely, soft law instruments whose implementation is facilitated for the most part by HELCOM.

Some HELCOM initiatives stand out for their novelty and effectiveness. The 1992 Joint Comprehensive Environmental Action Programme (JCP) aims to mitigate point source pollution of the Baltic Sea by identifying and gradually eliminating serious pollution areas (“hot spots”).⁵ Another achievement is the 2007 HELCOM Baltic Sea Action Plan (BSAP), which provides a wide-ranging joint regional policy with common objectives, actions and obligations.⁶ From a legal policy perspective, it can be construed as a compromise between the Maritime Doctrine of the Russian Federation and EU maritime policy. Another notable feature of BSAP is the promotion of active participation of stakeholder groups. Furthermore, the 2010 HELCOM Moscow Ministerial Declaration sets out a common understanding of the current situation and of the goals to be met in the future.⁷ To attain those common goals it provides for enhanced monitoring of the status of the Baltic Sea and promotes coherency and coordination between HELCOM initiatives as well as between them and those of other international institutions. On a more practical note, HELCOM

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¹ UNCLOS Part IX (Arts. 122-123).
³ Denmark, Estonia, EU, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden.
⁴ Art. 3.
states coordinate surveillance efforts and engage in joint operations for the control of oil spills. More recent concerns, such as climate change and emissions from ships are being monitored while HELCOM action is forthcoming. Lastly, HELCOM is undertaking continuous monitoring programmes to promote the regional implementation of the EU Marine Strategy Framework Directive in the Baltic Sea and to revise and update past actions.

This contribution examines the Baltic Sea environmental protection system as a case study of enclosed and semi-enclosed seas environmental governance. It addresses its successes, pitfalls and future prospects and assesses its importance as a model for cooperation under UNCLOS as well as the UNEP Regional Seas Programme.

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The resolution of maritime boundary disputes under Part XV of UNCLOS: have Annex VII arbitration and ITLOS worked in practice?

Part XV of UNCLOS was revolutionary. Building on the obligation under the UN Charter to settle international disputes by peaceful means, it provided unprecedented and broad consent by UNCLOS States Parties to the resolution of law of the sea disputes by way of binding third-party procedures. In particular, it provided standing consent for the final resolution of maritime boundary disputes between States Parties by way of judicial or arbitral proceedings. However, the consent so provided was not without important limits and exceptions, as has been seen in a number of contexts around the world following entry into force of the Convention in 1994.

This presentation will start by providing an overview of the dispute resolution provisions of the Convention, including the essential pre-requisites to judicial or arbitral jurisdiction, the choice of procedures available and the limitations and exceptions provided by the Convention. It will discuss the interrelationship between Part XV and the alternative, preexisting, bases for the peaceful resolution of law of the sea disputes. The overview will identify some of the strengths and weaknesses of the dispute settlement provisions of the Convention as against the alternatives otherwise available at international law. The presentation will then move on to analyse the impact of UNCLOS upon the resolution (or not) of modern maritime delimitation disputes around the world. It will identify a number of “success stories” about the resolution of maritime boundary disputes under the Part XV regime, before moving on to identify other situations in which the limitations of the Part XV have left festering disputes unresolved.

The remainder of the presentation will analyse the track record to date of the two new for a introduced by UNCLOS for the resolution of maritime boundary disputes: namely, the International Tribunal for the Law of the Sea (ITLOS) and Annex VII arbitration. It will address the two boundary disputes resolved to date by way of Annex VII arbitration (Barbados v. Trinidad & Tobago and Guyana v. Suriname). As will be explained, each of those cases made major strides in the interpretation and application of the dispute resolution provisions of the Convention, and the development of international law generally in the context of maritime boundary disputes. It will then move on to address the two Bay of Bengal cases (Bangladesh v. Myanmar and Bangladesh v. India), the first of which was decided by ITLOS in its seminal decision of March 2012 and the second of which is pending before an Annex VII arbitral tribunal. Those and other cases will be used to highlight a number of important practical differences between ITLOS and Annex VII procedures.

The presentation will conclude by asking whether the new ITLOS and Annex VII dispute resolution procedures have worked in practice in the context of maritime boundary disputes, and will identify the speaker’s assessment of what factors might influence States in their selection of dispute resolution procedures under Part XV of the Convention in the future.


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**The European Union and Law of the Sea Dispute Settlement**

The European Union (EU) and the twenty-seven Member States are all party to the 1982 United Nations Convention on the Law of the Sea (the Convention) and its related agreements. As is well known, Part XV of the Convention contains a unique set of comprehensive provisions that provide for both compulsory and binding dispute settlement. These provisions are at the very heart of the Convention and provide sufficient latitude for the creative role of competent courts and tribunals, as well as the EU’s own system of dispute settlement. They thus have contributed to the effectiveness and coherence of the Convention both at an internal level within the EU, and in relations between the EU and third countries, as well as in relations between the EU and international organisations at multilateral and regional levels.

Against this background, this paper examines the division of competence between the EU and the Member States in relation to the law of the sea. This is followed by a brief review of the principal features of the dispute settlement provisions in the Convention as they apply to the EU. This review touches upon a number of matters, including: the EU’s formal position in relation to the dispute-settlement procedures set down by the Convention; EU practice on the peaceful settlement of disputes with third countries by making specific reference to the dispute between the then EC and Canada concerning the detention of the Spanish fishing vessel the *Estai* in international waters in 1994, and the more recent dispute between the EC and Chile in relation to the fishery for swordfish in the eastern Pacific Ocean.

In relation to *inter* Member States disputes concerning the law of the sea, the paper draws attention to the judgment of the Court of Justice of the European Union (CJEU) in the *Mox Plant* Case, and in a number of other cases concerning the protection and preservation of the marine environment. Moreover, the paper mentions how the CJEU has dealt with the jurisdictional framework set down by the Convention and its interface with the fundamental EU rights of free movement of goods, persons and service.

The paper concludes by highlighting a number of cases in the CJEU which demonstrate that the EU’s own system of dispute settlement has a number of enforcement procedures for ensuring compliance with the law by Member States that far exceed the mechanisms that are available under the Convention.
The evolution of ITLOS jurisprudence on prompt release of vessels

The International Tribunal for Law of the Sea has dealt with nine cases relating to prompt release of vessels, envisaged in Article 292 of the United Nations Convention on the Law of the Sea. The jurisprudence of the Tribunal on this matter has generally been consistent and we now have rather a comfortable amount of information regarding, for example, elements to be taken into account in order to fix the amount of bond that the flag State is required to pay to the coastal State for the prompt release of the vessel in question. The evolution of jurisprudence, however, has not only cleared up ambiguities but clarified the core problem of the system itself, i.e. possible prejudice to the domestic judicial procedure taking place in the coastal State.

Article 292(3) of UNCLOS provides that the ITLOS shall deal with the application for prompt release “without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew”. This deference to domestic procedure is quite reasonable, since the international court or tribunal – mostly the ITLOS – dealing with an application for prompt release has been given no power to intervene in domestic procedure under UNCLOS.

However, the ITLOS jurisprudence tells us that this perfectly legitimate objective cannot be achieved in reality. For example, according to Article 73(2), “reasonable bond or other security” must be posted in order for the vessel to get released. This is again quite understandable: the released vessel will never go back to the coastal State in which it was arrested, except in a rare case in which it is completely acquitted of all charges brought forward against it. One would thus think that the amount of caution must be calculated on the basis of the fine that may be incurred, or the value of the vessel, if it is likely to be confiscated at the end of the domestic procedure. However, if we accept this solution, it is the ITLOS that is supposed to estimate what the domestic court will say. The judgment on the prompt release is usually – not always, as we will see – before the domestic court gives its final judgment. If the ITLOS is supposed to try to form such an estimation, how can it be possibly done “without prejudice to the merits of the case” in the domestic procedure?

Another problem occurs when the domestic court decides to confiscate the vessel in question in conformity with the domestic law of the coastal State. If the ITLOS nevertheless orders the prompt release of the confiscated vessel, such an order will squarely go against the clear text of the “without prejudice” clause of Article 292(3) UNCLOS. On the other hand, if the ITLOS is prevented from ordering the prompt release once the vessel in question gets confiscated, the domestic court will certainly be encouraged to proceed to a “prompt confiscation”. Therefore, it is most appropriate that the ITLOS posted the following “warning” in the Tomimaru case (Japan v. Russia, 2007):

“Such a decision [i.e. confiscation] should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law.”

(para. 76)

At least two questions remain, however. In practical terms, it will be extremely difficult, if not absolutely impossible, that the ITLOS finds a particular decision on confiscation rendered by a domestic court to be “inconsistent with international standards of due process of law”. The Tomimaru case, in fact, exemplifies such difficulty. Secondly and more fundamentally, how can the ITLOS identify such “international standards of due process of law”? 
ITLOS cases to be referred to¹
