Oxford Handbooks Online

Charting the Future for the Law of the Sea

Donald Rothwell, Alex Oude Elferink, Karen Scott, and Tim Stephens

The Oxford Handbook of the Law of the Sea
Edited by Donald Rothwell, Alex Oude Elferink, Karen Scott, and Tim Stephens

Print Publication Date: Mar 2015 Subject: Law, International Law
Online Publication Date: Jun 2016 DOI: 10.1093/law/9780198715481.003.0039

Abstract and Keywords

This chapter assesses the future of the law of the sea in light of the analysis of the past and present development of the law of the sea provided in the preceding chapters. It looks at key themes emerging from this Handbook, with particular attention to the future of maritime limits and zones, law of the sea actors and institutions, substantive regimes under the law of the sea, and regional seas. It considers the future for the UN Nations Convention on the Law of the Sea (LOSC), the 'Constitution of the Oceans'.

Keywords: UNCLOS (UN Convention on the Law of the Sea), United Nations (UN), coastal states, maritime boundaries, high seas, territorial sea

1 Introduction

In this concluding chapter the future of the law of the sea is assessed in light of the analysis of the past and present development of the law of the sea provided in the preceding chapters.[1] Key themes that emerge from this *Handbook* are considered, with particular attention given to the future of maritime limits and zones, law of the sea actors and institutions, substantive regimes under the law of the sea, and regional oceans management. To conclude, consideration is given to the future of the 1982 United Nations Convention on the Law of the Sea (LOSC), the 'Constitution of the Oceans'.

(p. 889) 2 Lines in the Sea: The Future for Maritime Limits and Zones

The history of the law of the sea revolves around the competing interests of coastal and flag States (Chapter 1). The twentieth century witnessed adjustments in those relations through, first, the 1958 Geneva Conventions and then the LOSC. However, while the focus in recent decades has been upon the treaties that make up the contemporary law of the sea (Chapter 2), the impact of State practice in the interpretation of law of the sea instruments, and the resulting developments that have occurred in customary international law, should not be overlooked. Together, these sources of international law not only provide the basis for the contemporary law of the sea as they relate to maritime limits and zones, but also provide pointers to how other dimensions of the law of the sea may be developing.

2.1 Spatial definition of maritime zones

One of the most significant achievements of the LOSC was the clarity that it brought to the spatial definition of the six maritime zones recognized under the Convention and the associated limits of internal waters, and archipelagic waters within archipelagic States. The LOSC not only expanded the breadth of the territorial sea, contiguous zone, and continental shelf, but gave recognition to the exclusive economic zone (EEZ) and deep seabed. While the spatial extent of the high seas was reduced under the LOSC compared to its Geneva Convention definition, the impact of the high seas being constrained to the area beyond the 200 nautical mile (nm) limit was lessened by Article 58 and the application of many of the central provisions of the Part VII high seas regime within the EEZ.

As observed in Chapter 4, while Article 7 of the LOSC provides clarity with respect to straight baselines, as derived from the ICJ's judgment in the *Anglo-Norwegian Fisheries* case[2] and the 1958 Convention on the Territorial Sea and Contiguous Zone, some aspects of State practice with respect to straight baselines remain heavily contested. By way of contrast, archipelagic baselines found in Article 47 of the LOSC are, as noted in Chapter 7, a more contemporary development. A total of 22 States have drawn archipelagic baselines in reliance upon Article 47, which in turn triggers the distinctive archipelagic regime provisions of Part IV of the Convention. While there may have been a temptation for certain States to interpret Article 47 liberally, State practice to date has been relatively conservative in this regard.

(p. 890) With this relative clarity in the law with respect to baselines, there has been accompanying certainty in the delimitation of internal waters and the territorial sea, and archipelagic waters and the territorial sea for archipelagic States. Nevertheless, there remain on-going controversies in this area (which the United States highlights via its Freedom of Navigation program[3]) and on-going debates over the status of certain contested waters such as the Northwest Passage (Chapters 6 and 32) and the South China Sea (Chapter 28). In the great majority of instances, there are significant levels of compliance with the LOSC and associated customary rules with respect to recognized limits of the territorial sea, contiguous zone and the EEZ.[4] Continental shelf limits of 200

nm laid down in Article 76 remains subject to coastal State submissions to the Commission on the Limits of the Continental Shelf (CLCS) where the shelf extends beyond that distance (Chapter 9). Owing to the unexpectedly high number of submissions to the Commission and the associated workload and capacity issues this has created, it may now take several decades for there to be a final determination of the outer limits of all coastal State continental shelves. This will have some implications for giving certainty to the Part XI regime of the deep seabed; however, this is only a marginal issue and the vast majority of the 'Area' comprising the deep seabed is defined.

2.2 Substantive regime of maritime zones

The law of the sea under the LOSC has had to reconcile the development of new maritime zones (EEZ and Area), with the juridical expansion in the breadth of some maritime zones (territorial sea, contiguous zone, and continental shelf) and the diminution of the extent of others (high seas). Not surprisingly, this has led to some variations in State practice as to the content of the substantive regimes, especially with respect to the EEZ which is the most 'modern' of the maritime zones over which coastal States exercise sovereign rights and jurisdiction. The Area, while also a LOSC creation, is not a zone within which coastal States exercise sovereign rights and jurisdiction but rather, is an internationalized zone under significant regulatory control by the International Seabed Authority (ISA) (Chapter 11). While the substantive regulatory system within that zone remains under active development, the preparatory work to date of the Authority working with States parties has permitted an orderly development of the Part XI regime for the Area which will increasingly fall under the spotlight as deep seabed mining activities intensify in the coming decade.

(p. 891) The substantive regimes of the territorial sea, contiguous zone, and continental shelf remain largely identical to those recognized under the Geneva Conventions. Hence, through the combination of long-standing State practice resulting in the development of customary international law, and now conventional law, there has been relative stability in these zones. Navigational rights and freedoms within the territorial sea and international straits have traditionally raised sensitivities, and will continue to do so, as States expand their national security concerns to encompass an ever increasing range of old and new activities (Chapter 26). However, the balance that the law of the sea has traditionally maintained between coastal State sovereignty and navigational rights and freedoms of maritime States (Chapters 6 and 24) has proven to be resilient under the LOSC and should remain so in the future. In comparison to other maritime zones, the contiguous zone has not achieved the same level of coastal State endorsement. This may be due to the narrowly defined maritime enforcement focus of that zone, being limited to customs, fiscal, immigration, and sanitary matters, and the fact that it overlaps with the EEZ and continental shelf. Nevertheless, State practice has highlighted some robust examples of the contiguous zone being utilized to assist in law enforcement.[5] As notions of security continue to expand, coastal States may increasingly also look to the contiguous zone to

provide an additional buffer to their sovereign interests in the territorial sea and to enhance their maritime security.

Sovereign rights over the continental shelf are clearly articulated under the LOSC. However, to a degree, the interaction between the EEZ and the continental shelf and the all-encompassing bundle of sovereign rights and jurisdiction granted to coastal States over the water column, seabed, and subsoil, from the outer limit of the territorial sea to the 200-nm limit, through Parts V and VI of the LOSC, mean that coastal States have very extensive substantive rights in this area. Nevertheless, one point of distinction is the continental shelf beyond 200 nm which intersects with the high seas. In this regard, Article 82 of the LOSC and its mechanism anticipating payments and contributions to the States Parties through the International Seabed Authority by coastal States exploiting living resources beyond 200 nm looms as one of the more contentious provisions of the law of the sea.

The substantive regime of the EEZ has been one of the more contested developments arising from the LOSC, no doubt partly due to the way in which the EEZ emerged from State practice framed around claims to exclusive fishing zones and the legacy of this process and the rapidity with which the EEZ was endorsed by States following the conclusion of the LOSC but at a time when the convention had yet to enter into force. Particular challenges have arisen with respect to (p. 892) conformity in EEZ State practice over matters such as coastal State laws regarding fishing and conservation of marine living resources, protection, and management of the EEZ marine environment, and EEZ marine scientific research, which in turn have raised issues with respect to navigational rights and freedoms, and maritime regulation and enforcement (Chapters 8 and 25). Not surprisingly, coastal State regulation and management of the EEZ has featured prominently in cases before the International Tribunal for the Law of the Sea (ITLOS), and there remain on-going concerns over the phenomenon of ‘creeping jurisdiction’. While there are legitimate concerns that some coastal States are seeking to extend aspects of territorial sea sovereignty into the adjoining EEZ, these positions have been contested by maritime powers through both actions at sea, and diplomatic and legal means. Given the incentives for the international community to maintain the freedom of navigation within the EEZ, it has to be anticipated that assertions of sovereignty and excessive jurisdiction in the EEZ will continue to be challenged. Nevertheless, creeping jurisdiction remains a legitimate cause for concern as highlighted by the actions of the Russian Federation in the *‘Arctic Sunrise’* case[6] and China’s practices in the South China Sea.

2.3 Interaction of maritime zones

The modern law of the sea under the LOSC provides for different levels of interaction between maritime zones, the most prominent of which are the EEZ/continental shelf, continental shelf beyond 200 nm/high seas, and the Area/high seas. The interaction between the EEZ/continental shelf is already an element in some maritime boundary

delimitations (Chapter 12), and also functionally an issue where the Part V and VI regimes intersect (Chapter 8). As exploration and exploitation of the continental shelf beyond 200 nm become more common, the interaction between that regime and the high seas will also become more pronounced than it currently is, and it raises distinctive issues that do not exist where the EEZ and continental shelf are conterminous to 200 nm. A similar dynamic will also arise in the context of operations conducted within the Area and the high seas. This intermingling of maritime zones is a consequence of how the LOSC divides ocean space between coastal States, maritime States and the international community more generally. It adds an additional complexity to the law of the sea that has only gradually begun to be appreciated and has the potential to create future tensions as use of the oceans becomes more congested by multiple users.

(p. 893) 3 Actors and Institutions: The Future of Ocean Managers

The complexity of oceans governance is, at least in part, a consequence of the diverse and, increasingly, fragmented nature of the actors and institutions responsible for or otherwise involved in oceans governance. As demonstrated in Chapters 13 and 14 of this *Handbook*, the traditional ocean actors—coastal, port, and flag States—continue to maintain primary responsibility for the implementation and enforcement of the law of the sea. Nevertheless, the balance of the power between flag States and coastal/port States has undoubtedly shifted from the former to the latter over the last two decades of the development of the law of the sea and this trend seems set to continue. As discussed in Chapter 13, port State jurisdiction in particular is no longer confined to limited regulatory spheres (such as safety of shipping) but is now more comprehensive in scope, applying to activities associated with fishing and marine pollution, for example. Moreover, port State control in many regions is developing from a right into an obligation, and is increasingly founded on a clear legal mandate, developed in both global and regional instruments (Chapter 13), as well as on existing principles of customary international law. The developments in port State control powers does not, however, diminish the responsibility of flag States for their vessels and an undoubted parallel trend over the same period has been to develop more detailed rules designed to enhance flag State responsibility (Chapter 14). This development has been particularly noticeable in the context of fisheries management following the adoption of the 1995 United Nations Fish Stocks Agreement (FSA), and is likely to be explored further in the pending ITLOS Advisory Opinion on the responsibility of flag States of illegal, unreported, and unregulated (IUU) fishing in the waters of other States (Chapter 14).[7]

As noted in Chapter 14, the binary approach to developing the law of the sea—based on flag State jurisdiction or spatial control—is no longer adequate. Today, a plethora of global and regional organizations and institutions contribute to the development of oceans governance in terms of its substantive content, implementation, and enforcement. The LOSC itself establishes institutions intended to manage the Area (the ISA), the process of extended continental shelf delineation (CLCS) and disputes (ITLOS) (Chapter 17). The latter institution in particular, together with the ICJ and the dispute settlement mechanisms provided for under the LOSC, have notably and substantively contributed to the development of the law of the sea over the last 40 years through international adjudication and arbitration, especially in the (p. 894) areas of maritime delimitation and marine environmental protection (Chapter 18). Nevertheless, while the LOSC permits the UN Secretary General to convene a meeting of the parties,[8] this body does not function as the supreme body of the LOSC regime and there is significant disagreement between the parties as to what role this body should play, particularly with respect to the substantive development of the Convention (Chapter 17). Rather, the UN General Assembly provides oversight of law of the sea matters, including the implementation of the LOSC as is

comprehensively described in Chapter 16. In addition to the annual UN Secretary General reports on oceans and the law of the sea and, since the adoption of the FSA, fisheries, and the associated General Assembly resolutions, other subsidiary institutions and processes have been established by the UN in order to further oceans governance. These include the UN Open-ended Informal Consultative Process on the Law of the Sea (established in 1999), the Regular Process (established in 2002), and the Biological Diversity Beyond Areas of National Jurisdiction (BBNJ) Working Group (established in 2004; mandate reviewed in 2011) (Chapter 16). Although the UN General Assembly has quasi-universal participation and thus provides an appropriate global forum for the development of the law of the sea, the detachment of much of the UN's institutional infrastructure from the Convention itself has implications for the evolution of the LOSC as a treaty (Chapter 3). In contrast to other treaties—particularly those operating in the sphere of international environmental law—the LOSC has not been developed through formal amendment or by means of interpretation using decisions and resolutions adopted by the parties. Instead, it is more heavily reliant on State practice and the development of initiatives within UN and other fora (such as the UN conferences on the environment) for its evolution and this inevitably challenges its ability to maintain contemporary relevance. This has proven particularly problematic in the areas of maritime security and marine environmental protection.

Cooperation between the LOSC and other institutions and regimes was provided for in the Convention since its inception and reflects a particularly far-sighted aspect of the regime; one that is now increasingly reflected in other areas of international law, most notably, international environmental law. The LOSC seldom identifies its cooperative partners by name but rather, refers to 'competent international organisations'. The International Maritime Organization (IMO) (Chapter 19) constitutes arguably the most important partner organization but others include the Food and Agriculture Organization (FAO), the UN Security Council, regional seas regimes (see Chapters 27, 29, and 30), regional fisheries management organizations (RFMOs) (Chapter 20), and biodiversity and other conservation-related regimes (Chapter 22). A significant challenge to effective oceans governance is managing the connections between these diverse bodies and ensuring regulatory coherence across (p. 895) all regimes. In response to this challenge, the UN General Assembly developed two initiatives designed to improve cooperation between bodies with oceans-related mandates: the Oceans and Coastal Areas Network (UN-Oceans) (established in 2002) and the Ocean Compact (established 2012). To date, however, it is unclear that either process has made much progress in providing a platform for collaboration or a mechanism for improving cooperation across regimes.

The law of the sea has long engaged with private actors with respect to its development, implementation and, to a lesser extent, enforcement. These actors range from national maritime law associations to ship owners and operators to private industry bodies associated with shipping standards or insurance. This tradition continues within the LOSC, which provides for rights and obligations in respect of private corporations involved in mining activities in the Area (Chapter 11) including a limited right to directly petition the Disputes Chamber of the ITLOS. More ambiguously, Article 292(2) of the

LOSC permits an application for the prompt release of a vessel to be made ‘on behalf of the flag State of the vessel’ although in practice this right has been limited to permitting a private operator to engage counsel with the permission of the flag State (Chapter 18). The participation of private entities in the law of the sea continues to both enhance and challenge oceans governance. For example, in some areas of fisheries management market based mechanisms relying on private entities are being developed in order to support enforcement of conservation measures and are operating in addition to port State control (Chapter 14). Less positively and of increasing concern is the rise in ship owners and, in some cases (such as Somalia), coastal States engaging private security operators to protect commercial, resource, or other interests to the extent that these operators are, in essence, carrying out security functions traditionally performed by States. Different but equally serious concerns for oceans governance are raised by the activities of private actors in protesting both legitimate and illegitimate activities of States, as exemplified by the activities of Sea Shepherd in respect of Japanese whaling activities in the Southern Ocean[9] and Greenpeace in respect of Russian oil and gas activities in the Arctic.[10] The increasingly direct engagement of private entities with the law of the sea reflects a more general trend in relation to the participation of non-State entities within the international legal system but the fact that these private participants often operate beyond physical and, in some cases, jurisdictional reach of States creates a very particular challenge for effective oceans governance.

(p. 896) During both the negotiations for the 1958 Geneva Conventions and the LOSC the idea of establishing an institution with overall responsibility for all oceans issues was discussed and rejected (see Chapter 18). Concerns were expressed over the practicality of establishing one organization with such a broad mandate and the risk that it would lead to the development of uniform—and potentially inappropriate—standards across diverse sectors. These reservations remain valid today, but the absence of a comprehensive governance body undoubtedly creates challenges for oceans governance and the development of the law of the sea. Issues and activities risk falling through gaps in regulation between regimes or may be subject to multiple—and possibly conflicting—regimes. Geo-engineering and ocean acidification provide current examples of activities/issues that occupy the interstices between oceans and climate regimes. What is needed for twenty-first-century oceans governance is much more active coordination and cooperation between States, organizations, institutions, and private participants in the development, implementation, and enforcement of ocean-related norms.

4 Substantive Regimes: The Future for Global Oceans Management

The LOSC remains a farsighted framework for global oceans management in recognizing that all major oceans issues intersect and need to be addressed in a coordinated way by the international community. The Preamble to the LOSC acknowledges this explicitly, noting that States parties to the LOSC are '*[c]onscious* that the problems of ocean space are closely interrelated and need to be considered as a whole.'[11] Unlike the terrestrial environment, which, for most management purposes, is two-dimensional and demarcated by defined boundaries, the fluidity, connectivity, and three-dimensionality of the marine environment presents major governance challenges. The remoteness of many ocean areas has also been a management problem throughout the history of the law of the sea, and distinctive responses to particular activities such as piracy (Chapter 37) and pollution (Chapter 23) have had to be developed to ensure that activities well beyond the coast are effectively regulated. Flag, coastal, and port State jurisdiction have all been deployed to assert control over these and other activities, while at the same time safeguarding traditional navigational rights and freedoms (Chapter 24). The extent and validity of these assertions of jurisdiction are of course contingent upon the development and (p. 897) consolidation of substantive law of the sea regimes across a range of specific oceans issue areas. These main substantive regimes are addressed in Chapters 20 to 26 and 33 to 38 of the *Handbook*, and in respect of each of these areas, it is possible to identify several future challenges for global oceans management.

Regional fisheries management (Chapter 20), and the sustainable and equitable use of marine living resources more generally (Chapter 22), remains an area of unfinished business for the law of the sea, particularly so for high seas fisheries. Global indicators of fisheries sustainability (the proportion of species fully exploited or over exploited) have stubbornly failed to show improvement for well over a decade, and there are many individual species that have particular vulnerabilities (Chapter 35). Yet for all the difficulties encountered by States in managing marine living resources individually and collectively, it must be acknowledged that since the LOSC was concluded there has been a substantial improvement in marine living resource governance. The FSA, and an ever-growing collection of RFMOs, have curbed some of the worst excesses in offshore fisheries. But there remains scant evidence that fisheries managers are anticipating the 'wild card' of climate change, which is raising ocean temperatures, changing circulation patterns, and causing ocean acidification (Chapter 34). Most coastal States and RFMOS remain concerned with immediate and pressing management challenges (including illegal fishing) and while this is understandable there is also a need to prepare for the likelihood of significant disruption to the productivity of some fisheries during this century. This suggests a need for fisheries managers to take seriously the precautionary principle and ecosystem approach.

Describing climate change as a ‘wild card’ may be accurate in relation to some of its environmental impacts that may occur abruptly, but it is also causing more gradual changes, such as sea level rise. As global sea levels rise by multiple metres over the twenty-first and successive centuries it will be necessary to revisit the LOSC’s baseline rules, and probably also the regime applicable to islands (Chapter 34). The LOSC seeks to contribute to ‘a just and equitable international economic order’,[12] particularly for developing countries, but this objective will be undermined for many States if they lose their existing maritime entitlements.

More so than fisheries, the control of marine pollution (Chapter 23) has been an oceans management domain in which significant success has been achieved in regulating human impacts upon the marine environment. Vessel-source pollutants and the ocean dumping of hazardous wastes, two major environmental issues of the 1970s, 1970have largely been brought under control and subjected to international oversight through the IMO. The IMO (Chapter 19) has demonstrated a capacity to advance legal protection of the marine environment by balancing the interests of States, vessel owners and operators, and insurers, and side-stepping conventional (p. 898) rules of unanimity in the laying down of stricter international standards. However, while the 1973 International Convention for the Prevention of Pollution, as modified by the Protocol of 1978 (MARPOL) and related pollution control regimes adopted under the auspices of the IMO have been enormously successful in stopping the disposal of hazardous pollutants at sea, they have had no impact upon the largest sources of ocean pollution—those from the atmosphere and the land. The pervasive presence of plastics throughout the marine environment is one of the most visible and intractable manifestations of this problem.

The on-going failure to control land-based and atmospheric pollution of the marine environment illustrates the reality that in the contemporary law of the sea external threats and impacts can undermine the achievements that have been made ‘on water’ through substantive management regimes applicable to the oceans. This is a hallmark of the Anthropocene, the current geological era defined by the planetary scale of human interference with environmental systems, including the oceans.[13] Addressing extrinsic impacts upon the seas is one of the most significant on-going and future challenges for global oceans governance, and requires much closer coordination between the LOSC and other key global frameworks that have a bearing on oceans issues.

A vital catalyst for greater cooperation and coordination to respond to global ocean threats will be more and better marine scientific research (Chapter 25). This is acknowledged by the on-going United Nations World Ocean Assessment, which seeks ‘to improve understanding of the oceans and to develop a global mechanism for delivering science-based information to decision makers and public’.[14] The LOSC seeks to promote scientific understanding of the marine environment that will further the objectives of the Convention including, but not limited to, its environmental protection goals. However, while there could be no objection to this general goal, the marine scientific research regime of the LOSC (Part XIII) has been the subject of some controversy in certain respects. States have for instance taken different views as to what constitutes legitimate

marine scientific research within the EEZ (eg whether military surveying of the ocean floor of a coastal State's EEZ is research covered by Part XIII). Another controversial issue is how Part XIII, and the LOSC more generally, accommodates marine bioprospecting (Chapter 36). Particularly uncertain is the status of bioprospecting beyond national jurisdiction, and this is one of the key issues being considered in discussions on a possible LOSC implementing agreement to address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ) (Chapter 33).

The most significant response to the realization that oceans issues are closely interrelated (and also intersect with coastal front and land management issues) has (p. 899) been the development of integrated approaches to oceans governance (Chapter 21). 'Integrated oceans management' takes the key direction of the LOSC Preamble, to address ocean issues holistically, and imbues this abstract principle with real operational meaning. This is achieved through established tools and techniques of environmental management that have been applied to terrestrial and coastal ecosystems, including the designation of protected areas. Marine spatial planning is central to this integrated approach, and seeks to consider and manage the full range of activities taking place within maritime domains demarcated by reference to their ecosystemic characteristics, rather than arbitrary jurisdictional boundaries. Integrated oceans management has in many contexts led to more appropriate regulation of marine spaces, including through the creation of marine protected areas. Importantly, it is also prospective in its orientation, with environmental impact assessment and the precautionary approach requiring decision-makers to anticipate and mitigate the environmental threats from planned activities, rather than seeking to address their consequences after the event.

Although highly desirable in theory, in practice, integrated oceans management has yet to be widely and successfully implemented by States. Moreover, to be truly effective, integrated oceans management needs to be scaled-up from coastal to regional levels, particularly in those ocean spaces that attract the very heaviest use. It is very likely that in the twenty-first century a greater emphasis on integrated oceans management will see the expansion in marine protected areas, from the desultory two per cent of ocean space that they currently embrace. However, these new marine parks will fail to live up to their promise if they are mere 'paper parks' that are not accompanied by robust management systems, or if they are declared over 'residual' areas with limited potential for commercial use.[15]

Better and more integrated assessment and management of pressures upon the marine environment is arguably the predominant theme in the contemporary law of the sea. It is rivalled only by the enduring concern of the law of the sea with security questions. Concerns about maritime security (Chapter 26), which can be defined as 'the protection of a State's land and maritime territory, infrastructure, economy, environment and society from certain harmful acts occurring at sea',[16] have animated many aspects of the LOSC's elaborate regime for jurisdiction and enforcement in coastal State maritime zones. This regime seeks to balance coastal State interests in security along the coastal front with the

legitimate interests of other States in the freedom of navigation, including for naval vessels.

Although the LOSC entered into force after the fall of the Berlin Wall, the text was negotiated and concluded against the backdrop of the Cold War in which global (p. 900) security issues were relatively well defined and understood. However, contemporary maritime security concerns have taken on new and complex dimensions as a result of the rising power of some non-State terrorist groups and the emergence of 'rogue' States. Military activities by States in the EEZs of other States has also been a flashpoint, as seen in several incidents between China and the United States over the presence of United States naval and air force assets in the Chinese EEZ. Yet, despite these new and evolving security challenges, the LOSC framework has functioned remarkably well, and even developments such as the Proliferation Security Initiative, advanced by the United States following the 9/11 terrorist attacks, have not stepped beyond accepted rules of exclusive flag State jurisdiction.

In sum, the practice within substantive law of the sea regimes has shown that the LOSC has largely operated as it was designed to. It has provided a framework for cooperation and legal innovation, while also limiting the extent to which these developments in the law can exceed the central compromises achieved in 1982.

5 Regional Oceans Management: An Indispensable Instrument with Mixed Results

The implementation of the LOSC and other global instruments first and foremost is a responsibility of individual States. They have to ensure that the rights and obligations contained in these instruments are translated into national legislation and policies. This concerns such critical issues as the definition of the spatial extent of coastal State jurisdiction and the substantive regime applicable to coastal State zones. Boundary delimitation, another issue that is critical to the national interest of coastal States, mostly takes place at the bilateral level. With this caveat in mind, the analysis in Chapters 27 to 32 of the *Handbook* makes clear that the implementation of the law of the sea at the same time is very much dependent on regional cooperation. Owing to the transboundary nature of many activities and processes in the marine environment, these can only be effectively managed where States agree on coordinated responses. To be successful regional cooperation, just like the implementation of the LOSC and other global instruments, depends on follow-up by the participating States.

Apart from looking at regional cooperation, which will be considered subsequently, Chapters 27 to 32 discuss the practice of States in relation to the definition of coastal State jurisdiction. This analysis indicates a chequered pattern. Most (p. 901) coastal States adhere to the jurisdictional framework set out in the LOSC, but there is little indication that this is explained by their participation in regional cooperation on oceans management and the law of the sea. Similarly, divergences from the LOSC regime seem mostly explained by the interests of individual States and not their location in a specific region. There are no markedly regional patterns as regards divergence from the LOSC framework. At least a certain measure of divergence is witnessed in all regions of the world and no region displays a significantly higher level of divergence as compared to the global average. At the same time, the practice of individual States may be affected by their location in a specific region or their participation in a regional regime. For instance, the Antarctic claimant States have coordinated their approach to the implementation of Article 76 of the LOSC because of their common interest in maintaining the stability of the ATS while at the same time avoiding the weakening of their position as claimant States. In the Mediterranean Sea, regional factors explain why most coastal States in the past did not establish an EEZ. The western coast of Latin America, which is not discussed in the regional chapters of this *Handbook*—provides another example of a coordinated approach through the adoption of the 200-nm zone concept in the late 1940s and early 1950s, 1950well in advance of the general acceptance of the EEZ.[17] At the same time, the concordance of interests was not complete as ‘the interest related to the freedom of navigation in the zone was different’.[18] However, even States that have substantive cooperation on other issues may not be able to define common positions on the law of the sea. For instance, as is pointed out by Long in Chapter 29, the Member States of the then

European Economic Community at the Third United Nations Conference on the Law of the Sea (UNCLOS III) 'had too many divergent interests to forge a strong regional identity on the substantive and procedural matters under negotiation'.

The discussion of bilateral delimitation practice indicates commonalities between the different regions. The (expected) presence of in particular hydrocarbon resources is a significant factor explaining the conclusion of many bilateral delimitation agreements. Bilateral considerations are instrumental to shaping the outcome in individual cases and the regional context in general has little impact on shaping outcomes, apart from instances in which States take into account—or sometimes wilfully disregard—the position and interests of third States in defining the extent of their bilateral boundaries.

Chapters 27 to 32 indicate that coastal geography is a main determinant in shaping the area of application of cooperative mechanisms. In particular, semi-enclosed seas that are only linked to other ocean areas through narrow straits have been a clear focal point for regional cooperation.[19] In the case of sea areas facing the (p. 902) open ocean, the definition of the seaward extent of regional cooperation may be more arbitrary. However, the employment of the Antarctic Convergence in the framework of the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention) proves that this may not necessarily be the case. The political geography of a region is another major and, in some instances, the primary factor in shaping regional cooperation. The clearest illustration of this point is provided by the Antarctic Treaty System (ATS) that is a result of the diverging views of participating States on the territorial status of Antarctica. The development of this regime has always had to accommodate the opposing views on this question. Other examples are provided by the North-East Atlantic and the South China Sea. In the former case, the European Union's growing involvement in oceans management has had a major role in shaping regional cooperation between its member States and between those member States and third States. In the case of the South China Sea, the disputes over the Paracel Islands, Spratly Islands and Scarborough Reef, and the status and delimitation of the South China Sea, have largely frustrated regional cooperation. The main challenge facing the coastal States in the South China Sea—and this is equally relevant to other regions faced with pervasive maritime disputes—is managing these disputes in such a way that regional cooperation is not largely ineffective.[20]

Chapters 27 to 32 of the *Handbook* illustrate the great variety in regional cooperation as regards institutional set-up and substantive coverage. One fundamental division is between treaty-based cooperation, entailing the existence of legally binding obligations, and cooperation based in action plans or other informal mechanisms. Although the former may lead to a greater compliance-pull, the regional chapters indicate that there is no one on one relationship between institutional set-up and regime effectiveness. The regional chapters indicate that the substantive outputs produced by regional cooperation differ enormously. The 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and its Annexes comprehensively cover sea-based activities—with the exception of fisheries and navigation, which are regulated in

other international fora—and the OSPAR Commission and its subsidiary bodies have produced a plethora of instruments based on the Convention and its Annexes. Cooperation is less advanced in many other regions. This may be explained by issues such as capacity and the urgency to regulate sea-based activities. Cooperation in many other regions, moreover, is of more recent origin than in the North-East Atlantic. As the analysis in relation to, among others, the Arctic, the Caribbean Sea and the (p. 903) Indian Ocean indicates, there is a continuing development of regional cooperative mechanisms. Those new mechanisms may enhance future cooperation.

Regional cooperation is not necessarily limited to the coastal States of a specific region. For instance, the LOSC's provisions on high seas fisheries indicate that cooperation has to involve all States whose nationals exploit the resources of a given area,[21] whether they come from the region or the other side of the globe. Maritime security is another matter that has led to the involvement of States from outside of the region concerned because of their interests in, for instance, merchant shipping that may be affected. On the other hand, cooperation on the protection of the marine environment in most instances is limited to the coastal and other relevant States of the particular region. The polar regions seem to be outliers in this respect, having attracted more than average interest from extra-regional States. In the case of Antarctica, this can be explained by the absence of undisputed coastal State jurisdiction and the common heritage/common interests characteristics of Antarctica and the ATS. The Arctic is not materially different from other marine regions as far as its political geography and law of the sea is concerned: there are no significant sovereignty disputes and coastal States have extended their jurisdiction in accordance with the law of the sea. The difference in the amount of outside interest in this case is likely explained by the rapid changes the region is facing due to climate change and the opportunities this may offer in terms of shipping and resource development.

One challenge for regional cooperation on the protection and preservation of the marine environment is the growing need for addressing the threats to ABNJ. This will require a larger involvement from extra-regional States and actors such as the ISA. For the moment, no uniform approach exists in this respect. In the future, two options seem to be available: the adoption of an overarching framework at the global level with implementation at the regional level, or, in the absence of agreement at the global level, a piecemeal approach centred on cooperation at the regional level.

The analysis in Chapters 27 to 32 points out that some regional frameworks for cooperation lag behind the development of the law at the global level in both fisheries management and the protection and the preservation of the marine environment. To some extent, this is explained by the fact that it may take considerable time to update a treaty-based regime. This seems to be confirmed by the fact that newly developed instruments in general take into account recent developments at the global level. However, the prolonged reaction time of some regional regimes suggests that the time needed to adjust a constitutive treaty may not be the only explanatory factor.

(p. 904) Regional cooperation is bound to remain essential to the effective implementation of the law of the sea and sustainable oceans management. The regional chapters of this *Handbook* point out that this cooperation in many cases is suboptimal. Some improvement may be possible through further guidance developed at the global level and outside assistance to the regions concerned. However, the main factors contributing to the success or failure of regional cooperation are to be found at that level and may include among others the overall political relationship between the States concerned, cultural and socio-economic divergences, the presence or absence of pervasive territorial or maritime disputes, the significance accorded to and prioritizing of oceans management by individual States, the effective implementation of regional instruments by individual States, the nature and extent of sea-based activities and financial resources and capacity.

6 The Law of the Sea Convention: What Future for the Constitution of the Oceans?

The continued relevance of the LOSC will first and foremost be determined by its capacity to deal with new developments relating to the oceans and human activities taking place in them.[22] Chapters 1, 2, and 3, dealing respectively with the history of the law of the sea, the LOSC, and the mechanisms to adapt the LOSC to changed circumstances and regime interaction, paint a distinctly optimistic picture in this respect. In contrast to the four 1958 Geneva Conventions on the law of the sea that preceded the LOSC, the latter is much more comprehensive in nature. Whereas the Geneva Conventions failed to address a number of salient issues in a satisfactory manner, such as the breadth of the territorial sea, the regime of archipelagic waters, and the rights of States over fisheries adjacent to their coasts, the negotiators of the LOSC were successful in addressing all major issues that were on the agenda of UNCLOS III.[23] (p. 905) The comprehensive nature of the LOSC, taking on board and balancing the interests of many different States, should guarantee that the basic jurisdictional framework it has defined will be resilient. In fact, more than 30 years after the adoption of the Convention and 20 years after its entry into force, there have been only limited and, to date, unsuccessful challenges to this basic framework. Another indicator in this respect is that treaties dealing with specific subjects in general defer to the jurisdictional framework contained in the LOSC. The broad participation in the LOSC, albeit falling short of the near universal participation of some other conventions, is another measure of its success.[24] As the position of the United States, which accepts that most of the LOSC reflects customary law, illustrates, the existence of a significant number of non-parties does not necessarily pose a fundamental challenge to the Convention.

As Chapters 2 and 3 of the *Handbook* indicate, the framework character and incorporation of other regimes through rules of reference make the LOSC flexible and allow it to adapt to changed circumstances without the need to renegotiate the package deal that the Convention represents. Chapter 3, moreover, points out that the Convention has been adapted through subsequent State practice, in this way circumventing the cumbersome amendment procedures of the Convention. The two implementation agreements to the LOSC have also been successful in adapting the Convention without resorting to these procedures.

Another way of looking at the future of the LOSC is considering whether a different comprehensive regime could successfully replace the Convention. There are a number of considerations that indicate that this is not a feasible option. First, as Churchill points out in Chapter 2, ‘[a]t the present time there appears to be no desire in the international community to replace the LOSC, or even radically to amend it.’

Second, the experience of negotiating the LOSC suggests that the development of an instrument to replace the LOSC would be extremely cumbersome. The negotiations on the LOSC had their inception in the 1960s, 1960leading to the adoption of the LOSC in 1982, but could be argued to have only been completed in 1994 with the Implementation Agreement on seabed mining, which allowed broad participation in the Convention. The current debate on the regime of ABNJ in the framework of the UN General Assembly, which has already lasted for some 10 years without any certainty about the eventual end result, is a further case in point.

(p. 906) Third, there simply does not seem to be room for a major overhaul of the current jurisdictional framework contained in the LOSC. This point is aptly captured by Treves in Chapter 1:

> With necessary additions, such as the notion of the common heritage, the traditional legal framework and technique could adapt to encompass the coastal States' claims to exclusive rights over broad areas of the sea and combine these claims with the needs of international communication and with those of intensified and more institutionalized cooperation for the exploitation of common resources and the protection of the marine environment which characterize the law of the sea of the final decades of the twentieth century and of today.

The mainstay of the current regime is the compromise between the security and economic interests of coastal States and the needs of international communication. Unless there is a major shift in the forces supporting this compromise, the likelihood of a significantly different regime replacing the LOSC is close to zero. Intensified and further institutionalized cooperation can be accomplished within the current LOSC framework.

Although a radical break with the LOSC regime seems to be beyond our time horizon, piecemeal adaptation of the Convention has been taking place from the time of its adoption. In itself, such adaptation is necessary to ensure the continued relevance of the Convention. As Buga remarks in Chapter 3 in discussing modification by subsequent practice, such adaptation:

> …helps strike a balance between the core concepts of the LOSC and the contemporary norms that have emerged since its inception, in other treaty regimes and in the realm of custom. If approached with due caution…subsequent practice can contribute to developing the Convention in accordance with the evolving needs of the international community. …

A closer look at some of the current developments in relation to the LOSC assists in answering the question whether piecemeal adaptation might in the longer run pose a threat to the effectiveness of the LOSC or some of its specific parts. In this connection, the following topics will be considered: the spatial extent of areas within national jurisdiction, the substantive regime of areas within national jurisdiction, the regime for

mining in the Area, the possibility of future implementation agreements to the LOSC and dispute settlement under Part XV of the Convention.

One obvious point of controversy in relation to the spatial extent of maritime zones concerns the practice of many States on straight baselines. The widespread and longstanding practice deviating from Article 7 of the LOSC has drawn protests from both neighbouring States and States with significant maritime interests. States in general seem to have been successful in managing their differences over straight baselines without major conflict. After the 1951 *Anglo-Norwegian Fisheries* case,[25] which settled the general law on this matter, States have not invoked third party (p. 907) settlement to address the legality of specific baselines.[26] In that light, it seems likely that the current situation will persist. The continued existence of seemingly inconsistent practice could contribute to fostering doubts about the normative pull of the Convention.

Projected sea-level rise will impact on the location of baselines, negatively affecting the extent of coastal State jurisdiction and, in the case of certain small island, States, may even threaten their very existence. The LOSC, which to a large extent accepts the ambulatory nature of baselines and the resultant outer limits of maritime zones, currently is not equipped to deal with this matter. In the light of the equities that would be involved in protecting the law of the sea interest of in particular small island developing States, this would seem to be an issue that could be successfully addressed without calling into question the broader framework of the LOSC.

The interpretation and application of Article 121(3) of the LOSC, like that of Article 7 on straight baselines, has led to controversy. What is most striking about Article 121(3) of the LOSC is the seeming lack of protest against apparently inconsistent State practice outside of the framework of bilateral boundary delimitations. Apparently, individual States in general have little incentive to raise this issue to prevent encroachments on the commons of the high seas and the Area.[27] The open-textured nature of Article 121(3) moreover makes it difficult for a State to unequivocally argue non-compliance. Whether the current trend in respect of Article 121(3)—practically divesting it of any meaning—is reversible is doubtful.

The implementation of Article 76 of the LOSC has proven to be much more complex than was envisaged during its negotiation at UNCLOS III. Two aspects of the implementation process could eventually prove to be controversial. Coastal States may become dissatisfied with the CLCS, for instance because it is felt that the Commission is arrogating to itself an interpretative power that rests with coastal States. It is conceivable that coastal States in that case might be tempted to seek to circumvent the requirements imposed by Article 76. The reverse could also be the case. States without a continental shelf beyond 200 nm might feel that the Commission gives undue consideration to the interests of broad margin States. Major disagreements concerning the implementation of Article 76 might be more disruptive than some of the other issue areas identified above, due to the perception that Article 76 already has made major

inroads into the extent of the Area. On the other hand, the limited interest of most States without a continental shelf beyond 200 nm in the implementation of Article 76 thus far, suggests that concern about encroachment on the Area will not spur States into action.

(p. 908) Major change in the law of the sea in general has been the result of coastal States extending their maritime domain. Current trends do not suggest that there will be a major drive by coastal States to erode the balance of interests contained in the LOSC. For one thing, many important coastal States have equally or even more important maritime interests.[28] Second, the continued focus on, in particular, port State measures and cooperative schemes between States to address deficiencies in flag State implementation, attest that States prefer other avenues for resolving deficiencies in flag State enforcement than extending coastal State jurisdiction beyond the scheme contained in the LOSC. Third, major maritime powers can be expected to maintain their categorical rejection of any inroads by coastal States into what they consider to be the LOSC *acquis* concerning military uses of the oceans. Finally, the example of the 2001 UNESCO Convention on Underwater Cultural Heritage indicates that shifts in the balance between the rights of coastal States and other States in one issue area will not necessarily have an impact on other issue areas.[29]

Having fallen short of initial expectations for a long time, exploratory mining activities in the Area in the last decade have significantly increased. The prospect of actual exploitation of mineral resources in the foreseeable future ushers in a new era for the ISA. The supervisory role the ISA will have to assume in this case poses challenges for which the Authority in its present form may not be equipped. The creation of effective supervisory mechanisms will require both funding and capacity building.[30] What these mechanisms will eventually look like will depend on the interests that will be able to shape their future development. Another challenge for the ISA will be the definition of its role under the revenue sharing provisions of Articles 82 and 160(1)(g) of the LOSC. The provisions themselves provide very limited guidance and the coastal States that will have to implement Article 82 seem to have little appetite to give the Authority a significant role. A failure to properly take into account developments after the Convention’s adoption in 1982 on such issues as transparency, accountability, and good governance would possibly reflect negatively on the Authority, and potentially, the LOSC itself.

The two implementation agreements to the LOSC of 1994 and 1995 on, respectively, the mining regime of the Area and straddling and highly migratory fish stocks, have been key to further developing and adapting the LOSC to changing (p. 909) circumstances. There have been calls for further implementation agreements, most notably on the regime of ABNJ that is currently being considered in the framework of the UN General Assembly. Scholars have suggested that the law of the sea aspects of sea-level rise might be addressed through an implementation agreement to the LOSC.[31]

Without knowing the contours of possible future implementation agreements, it is difficult to be too specific about their potential impact on the LOSC and the law of the sea more generally. However, it is possible to identify a number of general considerations that

are relevant in this respect. The 1994 Implementation Agreement on deep seabed mining might suggest that future implementation agreements could be used to effect significant change to the LOSC. However, the exceptional context of its negotiation—the pending entry into force of the LOSC without the participation of the developed world—indicates that this agreement in that sense does not provide a precedent for future implementation agreements. The FSA could be said to confirm this point. While the 1994 Agreement indicates that it takes precedence over the Convention,[32] the FSA specifies that it 'shall [not] prejudice the rights, jurisdiction and duties of States under the [LOSC]' and that it shall be applied in a manner consistent with the LOSC.[33] At the same time, it should be realized that the FSA is the result of a compromise between sharply diverging interests. Coastal States were looking for a shift in the balance between their rights and those of States fishing on the high seas. The carefully drafted compromise on this point contained in Article 7 of the Agreement might have diverged from the LOSC regime had the interests represented at the negotiations been different.

The extent of participation in an implementation agreement obviously will be an important factor in shaping its impact on the LOSC and the law of the sea generally. The experience with the FSA points to a number of relevant considerations in this respect. Contrary to the LOSC's entry into force requirement of 60 States, the FSA set this figure at 30.[34] Early entry into force of an agreement will prevent prolonged uncertainty about its status and can be expected to enhance its impact. The FSA at the same time indicates that an implementation agreement may have a significant impact even before its entry into force. It has had a major impact on the negotiation or updating of a number of agreements on regional (p. 910) fisheries management in the second half of the 1990s and beyond.[35] Obviously, this kind of impact is only possible if the nature of an implementation agreement allows for it. For instance, an implementation agreement on access and benefit sharing in respect of marine genetic resources likely will only be successful if it operates as an effective regime at the global level. To the contrary, in the case of an implementation agreement dealing with the law of the sea aspects of sea level rise unilateral actions of coastal States could have a decisive impact on the way in which the regime would develop. Put in general terms, an agreement setting up a multilateral regime will require broad participation, while an agreement enabling action by specific States may have a significant impact even before its entry into force.

The current participation in the 1994 Implementation Agreement and the FSA is lower than in the LOSC—in the case of the latter less than half of the parties to the LOSC.[36] The conclusion of further implementation agreements is likely to lead to a further diversification of the legal relationships between States. How this will affect the effectiveness of the law of the sea will depend on the considerations set out above.

Finally, it can be asked what the consequences of the absence of an implementation agreement would be in a case in which a significant number of States is interested in adapting or developing the jurisdictional framework of the LOSC. It would seem likely that in this case the States concerned might seek to influence the development of the law

through their practice. This could lead to a more fragmented regime than an implementation agreement with limited participation. The latter could act as a focal point of practice, thus avoiding practice going beyond it.

Two recent cases of non-participation in the compulsory dispute settlement procedures of the LOSC—China and the Russian Federation in arbitration procedures started respectively by the Philippines and the Netherlands—might raise the question how this will affect the credibility and stability of the Convention's dispute settlement regime and the Convention generally. Although non-participation in compulsory procedures is not without precedent and, in the case of, for instance, the ICJ has not had a lasting impact on its functioning,[37] in the case of the LOSC the two recent cases of non-participation may point to an underlying problem in this particular case.

(p. 911) Acceptance of compulsory dispute settlement as part of the LOSC was a price certain States had to pay to arrive at a generally acceptable compromise. This did not mean that those States renounced their opposition to compulsory dispute settlement. Even though the LOSC allows for significant exceptions to compulsory dispute settlement, the two recent arbitrations involving non-appearance indicate that this does not preclude that cases may be brought that touch on fundamental interests of States. In both these cases, the power disparity between the claimant and respondent is also obvious. These circumstances militate against the acceptability of third party dispute settlement as a viable option:

> When disputants opt for arbitration or adjudication, they must forgo […] other options [of dispute settlement]. Since States with greater bargaining power are able to guarantee themselves favorable outcomes outside of court, they will be reluctant to submit their claims to arbitration or adjudication unless they can expect a similarly favorable outcome.[38]

These considerations suggest that in the case of the LOSC cases of non-appearance, or disregard for judgments, may prove not to be isolated events. That likelihood may also contribute to dissuading States to initiate compulsory dispute settlement procedures to start with. The perception that the LOSC's system of compulsory dispute settlement can be ignored with impunity may moreover encourage more powerful States to give less weight to the law in determining their policy options.

The current law of the sea to a large extent has been shaped by the interest of the dominant global power—first the United Kingdom and subsequently the United States—in maintaining the freedom of the high seas; in particular the freedom of navigation and, subsequently, also the freedom of overflight. The rise of China, in particular, poses the question whether the interest of dominant global powers in ensuring an order for the oceans in which communicational freedoms are a key factor will be less pronounced in the future. China's posturing in regard of the seas washing its shores might suggest that this might be the case. Certain of China's positions, both in relation to its direct

neighbours and the naval presence of the United States in the region, are difficult to reconcile with the LOSC or public international law generally. However, China's broader interests in securing access to global markets and resources rather suggest that China's long term interests will be better served by supporting the current law of the sea regime.

Reliable predictions of the future are only possible after it lies in the past. Still, it is not impossible to draw some general conclusions about the future of the LOSC. There currently do not seem to be major challenges to its jurisdictional framework on the horizon and the Convention thus far has struck a satisfactory balance between stability and adaptability. At the same time, the above analysis identifies a (p. 912) number of issues that might challenge the effectiveness and stability of the LOSC and there might also be cumulative effects in this respect. It is in any case certain that the LOSC will continue to evolve to address future developments. This may be effected either by the various means available to adapt the Convention to changed circumstances or the development of new customary law. This is likely to be a gradual process with a low probability of a radical breaking of new ground that at least in the short and medium term should be able to ensure the continued effectiveness of the law of the sea.

Notes:

(1) While the authors share collective responsibility for this chapter, Donald R Rothwell was the lead author of Section 2, Karen N Scott of Section 3, Tim Stephens of Section 4, and Alex G Oude Elferink of Sections 5 and 6.

(2) *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116 (hereinafter *Anglo-Norwegian Fisheries*).

(3) JA Roach and RW Smith, *Excessive Maritime Claims* (3rd edn Martinus Nijhoff Publishers Leiden 2012) 637–9.

(4) See generally ibid, 136–48, 153–60, and 170–8.

(5) See for an example of Australia's use of its contiguous zone to interdict vessels carrying asylum seekers en route to Australia: Senate Standing Committee on Foreign Affairs, Defence and Trade (Australia), *Inquiry into the Breach of Indonesian Territorial Waters* (Australian Parliament Canberra 2014).

(6) *'Arctic Sunrise' (Kingdom of the Netherlands v Russian Federation)*, Order of the International Tribunal for the Law of the Sea (22 November 2013).

(7) Further details on the 2013 *Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SRFC)* can be found at <http://www.itlos.org/index.php?id=252#c1276>. It should be noted that the jurisdiction of ITLOS has been contested in the case.

(8) 1982 United Nations Convention on the Law of the Sea, Art 319(2)(e) (hereinafter LOSC).

(9) In 2014, the ICJ found the Southern Ocean Japanese scientific whaling programme to be contrary to the 1946 International Convention on the Regulation of Whaling. See *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Judgment of the International Court of Justice (31 March 2014).

(10) See *'Arctic Sunrise' Case*, n 6. An Annex VII Tribunal has also been established. See *Arctic Sunrise Arbitration (Netherlands v Russia)* Permanent Court of Arbitration, Case No 2014–02 (pending), available at <http://www.pca-cpa.org/showpage.asp?pag_id=1556>.

(11) LOSC, n 8, Preamble, Third Recital (emphasis in original).

(12) Ibid, Preamble, Fifth Recital.

(13) Davor Vidas, 'The Anthropocene and the International Law of the Sea' (2011) 369 *Philosophical Transactions of the Royal Society A* 909.

(14) See United Nations World Ocean Assessment website, at <www.worldoceanassessment.org>.

(15) BS Halpern, 'Conservation: Making Marine Protected Areas Work' (2014) 506 *Nature* 167.

(16) N Klein, J Mossop, and DR Rothwell, 'Australia, New Zealand and Maritime Security' in N Klein, J Mossop, and DR Rothwell (eds), *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge Oxford 2010) 1, 8.

(17) For a discussion, see eg F Orrego Vicuña, *The Exclusive Economic Zone; Regime and Legal Nature under International Law* (Cambridge University Press Cambridge 1989) 3–6.

(18) Ibid, 6.

(19) This approach is also supported by Part IX of the LOSC on enclosed and semi-enclosed seas.

(20) Interestingly, even though ASEAN is a major regional institution it has had little capacity to engage with China on law of the sea matters. This may be explained by the national security focus of these matters in the South China Sea—as opposed to the absence of such a focus in the North-East Atlantic—and the fact that ASEAN's member States have different positions and interests in this respect.

(21) LOSC, n 8, Art 118.

(22) At a more fundamental level, the future of the LOSC is tied up with the continued relevance of the State-centred organization of the international community. Notwithstanding the increasing relevance of non-State actors, it is submitted that this will not affect the focus on the State as the primary actor under public international law, including the law of the sea, in the foreseeable future.

(23) Admittedly, some unfinished business of the Conference was further considered by the Preparatory Commission for the International Sea Bed Authority and for the International Tribunal for the Law of the Sea that operated from 1983 to 1994 and in two cases a satisfactory solution was only achieved with the adoption of the two implementation agreements to the LOSC on respectively seabed mining and the regime for fisheries of highly migratory and straddling fish stocks in the first half of the 1990s.

(24) Still, thirteen coastal States, foremost among them the United States, are not parties to the LOSC. See United Nations Division for Ocean Affairs and the Law of the Sea (Doalos), *Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks; Table recapitulating the status of the Convention and of the related Agreements, as at 10 January 2014*, available at <http://www.un.org/Depts/los/reference_files/status2010.pdf>. In addition, 17 landlocked States are not a party to the LOSC: ibid.

(25) *Anglo-Norwegian Fisheries*, n 2.

(26) Straight baselines have been in issue in cases concerning the delimitation of maritime boundaries. Courts and tribunals in general have taken care to avoid ruling on the legality of straight baseline claims.

(27) A recent exception is the protest of China and South Korea against Japan’s use of Okinotorishima in connection with the determination of the outer limits of its continental shelf beyond 200 nm.

(28) The United States is a case in point. Apart from having a global naval projection, it also has the largest EEZ in the world.

(29) See Advisory Committee on Issues of Public International Law, *Advisory Report on the UNESCO Convention on the Protection of the Underwater Cultural Heritage; Translation*, Advisory Report No 21 (The Hague, December 2011) 12, available at <http://cms.webbeat.net/ContentSuite/upload/cav/doc/Report_nr._21_-_UNESCO_Convention_on_the_Protection_of_Under_Water_Cultural_Heritage(2).pdf>.

(30) LOSC, n 8, Arts 153(4) and 153(5) give the Authority significant competencies to supervise mining activities.

(31) See eg M Hayashi, 'Islands' Sea Areas: Effects of a Rising Sea Level' (10 June 2013) *Review of Island Studies* (translated from 'Shima no kaiiki to kaimen jōshō' (October 2012) 2(1) *Tōsho Kenkyū Journal* 74), available at <http://islandstudies.oprf-info.org/wp/wp-content/uploads/2013/06/a00003.pdf>.

(32) 1994 Agreement Relating to the Implementation of Part XI of the LOSC, Arts 1 and 2 (1994 Implementation Agreement).

(33) 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Art 4 (hereinafter FSA).

(34) In addition, between 1982 and 1995, there had been a significant increase in the number of States.

(35) Admittedly, the FSA operated in a broader political and legal setting, which also propagated the approach contained in the FSA.

(36) The broad participation in the 1994 Implementation Agreement is mostly explained by its specific linkage to the LOSC (see 1994 Implementation Agreement, n 32, Arts 4 and 5). This is not an option for future implementation agreements.

(37) For an overview of non-appearance by respondents before the ICJ, see eg TD Gill (ed), *Rosenne's The World Court; What It Is and How It Works* (6th edn Martinus Nijhoff Publishers Leiden 2003) 78–9.

(38) SE Gent, 'The Politics of International Arbitration and Adjudication' (2013) 2 *Penn State Journal of Law & International Affairs* 66, 76.

Donald Rothwell

Donald R. Rothwell is Professor of International Law at the ANU College of Law, Australian National University, Australia where he has taught since 2006, and was previously Challis Professor of International Law at the University of Sydney (2004-2006). His research areas include the law of the sea, the law of the polar regions, international security law, and international law in Australia. He is author, co-author and editor of 16 books.

Alex Oude Elferink

Alex G. Oude Elferink is Deputy Director of the Netherlands Institute for the Law of the Sea at the School of Law, Utrecht University, The Netherlands. His research interests include the law of the sea, the law of the polar regions, and the relationship between international law and international relations.

Karen Scott

Karen N. Scott is a Professor of Law at the University of Canterbury, Christchurch, New Zealand. Her research interests include Antarctic law and policy, the law of the sea and international environmental law. She is the editor of the New Zealand Yearbook of International Law and a member of the Advisory Board to Gateway Antarctica at the University of Canterbury.

Tim Stephens

Tim Stephens is Professor of International Law and Australian Research Council Future Fellow at the Sydney Law School, University of Sydney, Australia. He is President of the Australian and New Zealand Society of International Law.