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Binding the International Maritime Organization to the United Nations Convention on the Law of the Sea

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Abstract

The International Maritime Organization's member states are considering a range of measures to reduce greenhouse gas emissions from shipping, including a fuel oil levy to fund low and zero carbon technology research and development. This article evaluates whether the International Maritime Organization is legally bound by the United Nations Convention on the Law of the Sea—in particular its Articles 203 and 278—despite the organization not being a party to the Convention and not having expressly accepted the obligations it imposes. The article critically analyses and applies the *pacta tertiis* principle and examines whether the relevant portions of the Convention constitute an 'objective regime.' It then considers what viewing the Convention as binding would mean for the IMO's implementation of the proposed levy and its other climate measures, and how doing so could help unify the climate and maritime legal regimes.

Keywords

International climate change law – international organizations – third-party obligations – objective regimes – law of the sea – International Maritime Organization

Introduction

As part of their effort to reduce greenhouse gas (GHG) emissions, the International Maritime Organization (IMO)'s member states are considering a mandatory fuel oil levy to fund the research and development of low and zero carbon shipping technology.[1] The proposal would also create an International Maritime Research and Development Board (IMRB or Board) under the auspices of the IMO Secretary-General that will distribute approximately $5 billion raised by the levy to governmental, academic, and private applicants. The program is supported by the shipping industry and a mix of developed and developing states. The Board's draft terms of reference give it significant discretion to decide what projects are funded and whether there are intellectual property conditions attached to its grants.[2]

This proposal comes against the backdrop of a long-running debate about whether the climate regime's common-but-differentiated-responsibilities (CBDR) principle or the maritime regime's non-discrimination principle should apply to climate measures for shipping, including measures that involve technology transfer and technical assistance.[3] The CBDR principle holds that states have different obligations to reduce their greenhouse-gas emissions based on their capacities, while the non-discrimination principle requires global uniformity on vessel-source pollution standards regardless of what flag the vessel flies.[4] The conflict between these principles is a sticking point in the negotiations over the IMRB, in particular the extent to which developing states will be

1 IMO, *Report of the Marine Environment Protection Committee on its Seventy-Eighth Session*, (24 June 2022), Doc. MEPC 78/17, 45–46; IMO, '*Report of the Marine Environment Protection Committee on its Seventy-Fifth Session*,' (15 December 2020), Doc. MEPC 75/18, 32–33; IMO, '*Comprehensive Impact Assessment on States Establishment of the International Maritime Research and Development Board and the* IMO *Maritime Research Fund*,' (10 March 2021), Doc. MEPC 76/7/8. See International Chamber of Shipping Press Release 'Missed Opportunity to Decarbonise Shipping at MEPC 77,' (26 November 2021), available at: https://www.ics-shipping.org/press-release/missed-opportunity-to-decarbonise-shipping-at-mepc-77/.

2 IMO, 'Proposed Draft Amendments to MARPOL Annex VI (Establishment of the International Maritime Research and Development Board and the IMO Maritime Research Fund)' (10 March 2021), Doc. MEPC 76/7/7, Annex 4.

3 *See* Sophia Kopela, 'Climate Change, Regime Interaction, and the Principle of Common but Differentiated Responsibility: The Experience of the International Maritime Organization,' (2014) 42:1 *Yearbook of International Environmental Law*, pp. 81–85 (discussing UNFCCC and Kyoto Protocol's CBDR principle and the IMO's non-discrimination principle under its constitution and the United Nations Convention on the Law of the Sea).

4 Ibid.

given preferential treatment in the dissemination of research funding or the technology developed by it.[5]

This article seeks to find a middle ground in that debate by evaluating whether the CBDR principle as manifested in the maritime legal regime—rather than the climate regime—can serve as a source of differentiation between states in the context of the IMRB proposal. Specifically, it analyses whether two of the United Nations Convention on the Law of the Sea's[6] previously overlooked provisions could legally bind the IMO in its implementation of the program. Article 203 of the Convention requires that international organizations grant preferences in funds and other assistance to developing states for environmental purposes. Article 278 obliges 'competent' international organizations to cooperate on the development and transfer of marine technology in a way that promotes the social and economic development of developing states. These provisions embody the CBDR principle as it is expressed in the Convention,[7] and more explicitly demand assistance and technology transfer for developing states than analogous articles in the IMO Convention.[8] Therefore, if these articles legally bind the IMO, under international law's rules of responsibility, the IMO and its agents—including the IMRB—will be required to implement the research and development program in a way that explicitly favors developing

5 IMO, *Comments on the Proposal to Establish an International Maritime and Research Board*, (21 April 2021) Doc. MEPC 76/7/20.

6 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 11 November 1994) 1833 UNTS 3 (LOSC or Convention).

7 Daniel Bodansky, 'Regulating Greenhouse Gas Emissions From Ships: The Role of the International Maritime Organization,' in Harry Scheiber et. al., eds., *Ocean Law Debates: The 50-Year Legacy and Emerging Issues for the Years Ahead*, (Brill-Nijhoff, 2016), pp. 13, 15–16; James Harrison, 'Article 202,' in Alexander Proelss, ed., *The United Nations Convention on the Law of the Sea: a Commentary*, (C.H. Beck 2017), p. 1346. *See also* Lavanya Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law,' (2012) 88:3 *International Affairs*, pp. 606–608 (discussing Stockholm Declaration's 'common protection imperative' and differentiation in environmental treaties).

8 *Compare* LOSC above, note 6, Art. 203 and 278 *with* Convention on the Intergovernmental Maritime Consultative Organization (adopted 6 March 1948) 289 UNTS 3, as amended. A consolidated version is contained in IMO, *Basic Documents, Volume I* (IMO, 2010 ed.), pp. 8–32 (hereinafter IMO Convention), Article 25; Part X. Article 17 of The International Convention for the Prevention of Pollution from Ships imposes technical assistance obligations on states but unlike the LOSC, is not specifically addressed to international organizations. (*See* The International Convention for the Prevention of Pollution from Ships (adopted 11 February 1973, as modified by the Protocol of 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61 (hereinafter MARPOL). The registered version of the 1978 MARPOL Protocol attaches and incorporates the 1973 Convention as an annex; the Convention begins at 1340 UNTS 184.

states.[9] Pursuant to that reading, the IMO's other climate policies, including energy efficiency measures and any market-based mechanism, would likewise need to be administered in a way that transfers marine technology and gives assistance to developing states.[10]

At first glance, viewing Articles 203 and 278 as legal obligations for the IMO appears implausible: the IMO is not a party to the LOSC; it is not named in these provisions; and it has never expressly accepted any obligations imposed by them. Binding the IMO therefore arguably violates international law's *pacta tertiis* principle which requires consent to be bound. It would also be inconsistent with the Vienna Convention on the Law of Treaties on International Organizations (VCLT-IO), which mandates express written acceptance of obligations by 'third party' organizations.[11] Yet the IMO is widely recognized as a 'competent international organization' under the LOSC, and the text of Articles 203 and 278 are directed towards international organizations.[12] In this article, I look at whether the LOSC directly binds the IMO by critically evaluating the *pacta tertiis* principle and the VCLT-IO, rather than analyse whether it would be possible to bind the IMO to the LOSC based on its member states' obligations on the basis of theories such as 'transitory binding' or 'functional succession.'[13]

The generally-prevailing view that treaty obligations must be expressly accepted in writing by international organizations is not an established rule of law, and the VCLT-IO is not in force. Some scholars propose that the *pacta tertiis* principle and VCLT-IO procedures should be relaxed if certain conditions

9 International Law Commission, 'Draft Articles on the Responsibility of International Organizations,' *Yearbook of the International Law Commission* (2011), vol. II, Part Two (hereinafter ILC DARIO Articles), Art. 6, 4; *see* Report of the International Law Commission on the Work of Its Sixty-third Session, *General Assembly Official Records*, Sixty-sixth Session, supp. no. 10 (a/66/10 and add. 1) (hereinafter ILC DARIO General Commentary), para. 3.

10 Several of the LOSC's provisions on marine scientific research also arguably also apply to IMO (*see, e.g.*, LOSC, above, note 6, Art. 242, 243), but this article evaluates Articles 203 and 278 because of their implications for the IMO's climate mitigation measures.

11 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 25 ILM 543, 21 March 1986, Art. 35.

12 The IMO's role under the LOSC is discussed in detail in section 2.0 below.

13 Kristina Daugirdas, 'How and Why International Law Binds International Organizations,' (2016) 57:2 *Harvard International Law Journal*, p. 325 (discussing grounds for binding international organizations to their members' legal obligations).

14 See Christian Tomuschat, 'International Organizations as Third Parties Under the Law of International Treaties,' *The Law of Treaties Beyond the Vienna Convention*, E Cannizzaro, ed. (OSAIL 2011), 206; Francesco Salerno, 'Treaties Establishing Objective Regimes,' in E Cannizzaro, ed. *The Law of Treaties Beyond the Vienna Convention* (OSAIL 2011); Christine Chinkin, *Third Parties in International Law* (Clarendon Press 1993), 35; Caroline

are met.[14] According to them, a more flexible approach is warranted if various factors are present, including where: there is legal proximity between organizations and their members; when the language of the treaty itself supports interpreting it as imposing a legal obligation on international organizations; and if an organization has acceded to functions assigned to it, and implicitly, legal obligations that accompany those functions.[15] An additional basis for viewing a treaty's 'third party obligations' differently are when the treaty constitutes an 'objective regime,' which is a regime that has effects for states, entities, or individuals that have not or cannot join it.[16]

In my view those scholars are correct, and according to their logic, Articles 203 and 278 should be interpreted as imposing legal obligations on the IMO. I justify that conclusion by first briefly discussing the IMO's institutional structure and legal mandate for technology transfer and technical assistance programs for the reduction of GHG emissions from shipping (section 1). In section 2, I develop my central thesis that Articles 203 and 278 may bind the IMO based on a relaxed application of the *pacta tertiis* principle, and because the LOSC's technical assistance and technology transfer rules for international organizations constitute an objective regime. I provide a history of Articles 203 and 278 and the IMO's involvement in the drafting of the LOSC, and discuss its role as the competent international organization under the LOSC responsible for setting uniform vessel-source pollution standards. I also evaluate the IMO Secretary-General's reports about the meaning of those provisions, and statements by the IMO's plenary organs on the LOSC and the legal relevance of the LOSC for the IMO. I then set out scholarly views on binding non-party international organizations to treaties and apply them to the case at hand.

In section 3, I interpret the text and purpose of Articles 203 and 278 in order to analyse the substance of the obligations they impose on the IMO, and how they legally interact with the IMO's analogous obligations under its constitution. I next explain their relevance for the IMO's implementation of the proposed fuel oil levy (section 4). As I argue, if these provisions apply to the IMO, they oblige it to grant preferences to developing states—in particular small island developing states and least developed countries—in both the awarding of research grants and the dissemination of any technology developed from

Laly-Chevalier, '1986 Vienna Convention, Observance, Application and Interpretation of Treaties: Treaties and Third States' in O Corten and P Klein, eds., *The Vienna Conventions on the Law of Treaties* (Oxford University Press 2011).

15 As discussed in section 2, the factors these scholars describe are not set out as a test but instead a set of circumstances that could support finding that an organization should be bound to an obligation that it has not expressly accepted.

16 See sources discussed in section 2.1.

the program. I explain that the proposal as currently drafted does not comply with that objective, but it grants the IMO discretion to implement the program consistent with Articles 203 and 278. Finally, I conclude by reflecting on how viewing Articles 203 and 278 as legally binding would have a normative benefit in that it would bridge the climate and maritime legal regimes and further a constitutional mindset for the IMO.

1 The IMO's Institutional Structure and Technology Transfer and Assistance Mandate

Assessing whether Articles 203 and 278 impose obligations on the IMO requires understanding the IMO's legal personality and its mandate. This section therefore provides a brief overview of the IMO's institutional structure and the features of its technical assistance and technology transfer policies.

The IMO is a specialized agency of the United Nations with nearly universal membership.[17] It states it "is regarded as the sole competent international organization with a global mandate to regulate all non-commercial aspects of international shipping, including reduction or limitation of GHG emissions."[18] Pursuant to its constitution, the IMO is a powerful international organization that establishes global legally binding rules on pollution from international ships and shipping; these rules are adopted by its Marine Environmental Protection Committee (MEPC) and are designated as annexes to the MARPOL.[19] The IMO has instituted a number of GHG reduction regulations and related

17 UN General Assembly Res. 204 (III), *Agreement between the United Nations and the Inter-Governmental Maritime Consultative Organization*, (18 Nov. 1948) at 61; Doc A/RES/204(III) (Nov. 18, 1948) (adopting Economic and Social Council Resolution 165(VII), 27 August 1948, Art. II; see 'IMO Member States,' available at: https://www.imo.org/en/OurWork/ERO/Pages/MemberStates.aspx.

18 IMO, 'Position Paper to UNFCCC Ad-hoc Working Group,' (7–18 Dec. 2009) IMO Doc. AWG-LCA 8, 6; see Yubing Shi, *Climate Change and International Shipping: the Regulatory Framework for the Reduction of Greenhouse Gas Emissions* (Brill-Nijhoff, 2017), pp. 179–180 (discussing IMO mandate to regulate GHG emissions using technical means).

19 IMO Convention, above, note 8, Art. 1, 2, 11, 38; MARPOL, above, note 8, Art. 16(2). Some of the IMO's rules are addressed to the international shipping sector, others to individual ships. (*Compare* IMO, *Adoption of the Initial IMO Strategy on the Reduction of Greenhouse Gases From Ships and Existing IMO Activity Related to Reducing GHG Emissions in the Shipping Sector*, (13 April 2018) Doc. MEPC 304(72) (hereafter IMO GHG Strategy), p. 5 (calling for carbon intensity of shipping sector to decline *with* IMO, *Amendments to the Annex to the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution From Ships, 1973, As Modified by the Protocol of 1978 Relating Thereto*, (15 July 2011), Doc. MEPC 203(62) (energy-efficiency measures directed to various categories of ships).

technical assistance measures, and is considering additional measures to meet its 2018 goal of reducing shipping's GHG emissions 50 percent below 2005 levels by 2050 consistent with the Paris Agreement's global warming temperature limitation goals.[20]

In addition to granting it prescriptive jurisdiction over vessel-source pollution, the IMO Convention and MARPOL give the IMO a technology transfer and technical assistance mandate.[21] Article 38 of the IMO Convention states that the MEPC "shall ... provide for the acquisition of scientific, technical, or any other practical information on the prevention and control of marine pollution from ships, for dissemination to States, in particular to developing countries, and where appropriate, make recommendations and develop guidelines."[22] And Part X of the Convention establishes a Technical Co-Operation Committee and charges it with considering any matter "related to the Organization's activities in the technical cooperation field."[23] MARPOL obliges its members states to "promote, in consultation with [the IMO] and other international bodies," support for parties which request assistance for the training of personnel, and the supply of equipment and facilities to further MARPOL's aims and purposes.[24]

Pursuant to that mandate, the IMO has implemented various technical cooperation and assistance programs for developing states, 47 percent of which relate to environmental protection.[25] The IMO does not define 'developing states,' for the purposes of these programs, but notes that the "designations

20 IMO Doc. MEPC 304(72), above, note 19; *see* Baine P. Kerr, 'Bridging the Climate and Maritime Legal Regimes: The IMO's 2018 Climate Strategy as an Erga Omnes Obligation,' (2021) 11:2 *Climate Law* 119.

21 IMO Convention, above, note 6, Art. 38(c); 43; MARPOL, above, note 6, Art. 17. The interaction between the IMO Convention's Article 38 and Articles 203 and 278 of the LOSC are evaluated in section 3.

22 IMO Convention, above, note 6, Art. 38(c); IMO, *Amendments to the Convention on the Inter-governmental Maritime Consultative Organization*, IMO Assembly Res. A400/X (29 November 1977) (establishing the Technical Co-operation Committee as a plenary organ in 1977).

23 IMO Convention, above, note 6, Art. 43.

24 MARPOL, above, note 6, Art. 17.

25 IMO, *Technical Cooperation 2019 Annual Report*, (IMO 2019), p. 8. The IMO's programs include its Integrated Technical Cooperation Program (ITCP), which IMO describes as "a framework of regional and global programmes designed to respond to the technical assistance needs of Member States." (Ibid., p. 6.) The goal of the ITCP and IMO's other programs is the 'strengthening of institutional capabilities and human resource development.' (Ibid, p. 7.) In 2019—the most recent year that reports are available—IMO spent $15.5 million on technical cooperation activities consisting of advisories and needs assessments, trainings, and fellowships to attend the World Maritime University and the IMO International Maritime Law Institute. (Ibid.) 47 percent of these activities related to environmental protection. (Ibid., p. 8.).

'developing countries' and 'developing regions' are intended for statistical convenience and do not express a judgement about the stage reached by a particular country or area in the development process."[26] Past IMO and United Nations practice reveals that certain categories of developing states—specifically small island developing states (SIDS) and least developed countries (LDCS)—have been given specific consideration in IMO assistance programs, and should be given such consideration in the future.[27]

The IMO has also enacted voluntary technology transfer measures specific to reducing GHGS from shipping.[28] These measures called on states to transfer energy efficiency technology and cooperate on such transfer, in particular with SIDS and LDCs.[29] The IMO's 2018 GHG Reduction Strategy called for the Secretary-General to make provisions to support SIDS and LDCs, and calls for the IMO to assess periodically the provision of financial and technological resources and capacity building to implement the Strategy."[30] The Strategy also refers to the IMO's 2018–2023 Strategic Plan, which calls for the IMO to pay particular attention to SIDS and LDCs, and includes as candidate short and mid-term measures supporting developing states with technical assistance.[31]

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26 Ibid., p. 6, note 1.

27 These categories of states are not part of the IMO Convention or the LOSC, but as discussed below, in recent decades the IMO has consistently addressed measures to them following their recognition at the 1992 Rio Conference and the adoption of UN General Assembly Resolution 56/227.

28 IMO, *Promotion of Technical Cooperation and Transfer of Technology Relating to the Improvement of Energy Efficiency in Ships*, (17 May 2013), Doc. MEPC 229(65), Annex 4.

29 *Id*. A number of voluntary energy efficiency technical cooperation programs for shipping have been initiated under IMO auspices following the 2013 resolution. They included: the Global MTTC Network, funded by the European Union, which established regional maritime technology cooperation centers on energy efficient shipping; and the GloMEEP, an energy efficiency partnership funded by the United Nations Development Program and the World Bank's Global Environmental Facility. *See* 'Partnerships and Projects,' IMO website, available at: https://www.imo.org/en/OurWork/PartnershipsProjects/Pages/Default.aspx. These energy-efficiency specific programs augment trainings that assist developing countries with implementation of energy-efficiency and GHG emissions data collection measures. IMO, 'Annual Report on ITCP,' IMO Technical Cooperation Committee, IMO Doc. TC/70(3), Annex 1, p. 19.

30 IMO Doc. MEPC 304(72), above, note 19, 10. Further IMO technical cooperation programs have been adopted, including a training program for SIDS and LDCs to support GHG reductions from shipping through capacity building established by the Republic of Korea and the IMO (the GHG-Smart Program) and the GreenVoyage2050 Project of Norway and the IMO, which is working with 12 pilot countries in different regions to meet climate change and energy efficiency goals related to international shipping. (*See* 2019 Report (above, note 25)).

Another measure in the Strategy was the establishment of an International Maritime Development and Research Board (IMRB) to oversee "research and development activities addressing marine propulsion, alternative low-carbon and zero-carbon fuels" and technologies to "enhance the energy efficiency of ships."[32] That measure is currently under consideration at the MEPC as well as a broader carbon tax for shipping and other market-based mechanisms.[33]

2 The IMO and its Obligations Under the LOSC

In this section, I explain how the IMO is the legal addressee of Articles 203 and 278, and analyse the IMO's institutional reaction to the duties those articles appear to impose. I then discuss scholarship that critically evaluates the *pacta tertiis* principle and the VCLT-IO, and the concept of objective regimes. I apply those theories to the question posed here before examining what Articles 203 and 278 specifically require the IMO to do in section 3.

The IMO is not a party to the LOSC and is referred to explicitly only once in the Convention—and then in an annex—but it is widely viewed as being the un-named 'competent international organization' referenced in the Convention for the development of universally applicable rules for the protection of the marine environment from pollution from ships.[34] The LOSC obliges its signatories to implement "generally accepted international rules and

31 *Id.*, citing IMO, *Strategic Plan for the Organization*, (8 December 2017), Doc. A30/Res.1110. In 2019, the MEPC approved terms of reference for a voluntary GHG Trust Fund for technical cooperation activities to support SIDS and LDCs' implementation of the 2018 GHG Strategy. It invited member states and international organizations to contribute to the fund and instructed the Secretary-General to report to MEPC on its progress. IMO, *Report of the Marine Environmental Protection Committee on its Seventy-Fourth Session*, (9 June 2019), Doc. MEPC 74/18, pp. 53–54. MEPC 75/18, above, note 1, p. 18.

32 IMO GHG Strategy, above, note 19, p. 10.

33 *See* IMO Doc. MEPC 78/17, above, note 1, p. 45–46; IMO, *Proposal for a Market-based Measure* (*MBM*) *to incentivize GHG reduction and to make equitable transition with an overview of mid- and long-term measures, Submitted by Japan*, IMO Doc. MEPC 78/7/5 (1 April 2022); Seatrade, 'Shipping disappointed as IMO kicks the can down the road on climate change,' (29 November 2021), available at: https://www.seatrade-maritime.com/regulation/shipping-disappointed-imo-kicks-can-down-road-climate-change; IMO, *Proposal to establish an International Maritime Sustainability Funding and Reward* (*IMSF&R*) *mechanism as an integrated mid-term measure, submitted by Argentina, Brazil, China South Africa and United Arab Emirates*, Doc. ISWG-GHG 12/3/9 (1 April 2022).

34 *See* LOSC, above, note 6, Art. 211, 217, 208, 220; Annex VIII, article 2, paragraph 2. *See generally* Robert Beckman and Zhen Sun, 'The Relationship between UNCLOS and IMO Instruments,' (2017) 2:2 *Asia Pacific Journal of Ocean Law & Policy* 201 (discussing IMO's structure and mandate, and its role under the LOSC).

standards," and "internationally agreed rules, standards, and recommended practices" related to the prevention of pollution from ships; these are recognized as IMO regulations developed pursuant to MARPOL.[35] The LOSC thus does not "specify precisely the content and extent of the laws and regulations," on such pollution, but indirectly incorporates regulations adopted by the IMO as minimum standards.[36] Part of the reason why the LOSC operates this way is because it "did not spring out of the minds of delegations to fill a vacuum," but instead was preceded by a mass of national and international instruments, including IMO instruments.[37] In addition, the IMO "was present throughout the [UNCLOS III] conference and took an active part in it."[38]

The primary way the drafters of the LOSC accounted for the differing capabilities of its member states in implementing IMO regulations was by including cooperation and technology transfer provisions.[39] Thus, under the LOSC, IMO regulations apply globally without differentiating between states, and the Convention accounts for this by requiring its signatories to assist developing states and transfer technology to them. Accordingly, Article 202 of the Convention requires that states "promote" technical, scientific, educational and other assistance programs for developing states, directly and through competent international organizations. Such assistance "shall" include capacity building, facilitating participation in international programs, and the supplying of "necessary equipment and facilities." During UNCLOS III, the initial draft of Article 203 provided that "states" shall grant preferences to developing states "in the facilities," of international organizations. The final version was amended to directly address international organizations, stating that developing states "shall" be granted by preferences "by" international organizations in "(a) the allocation of appropriate funds and technical assistance; and (b) the utilization of their specialized services."[40]

35 LOSC, above, note 6, Art. 207, 211. See Erik Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (Kluwer Law International, 1998), pp. 136–137 (the International Labor Organization and the International Atomic Energy Agency share competences with the IMO on certain aspects of vessel source pollution).

36 Alan E. Boyle, 'Marine Pollution Under the Law of the Sea Convention,' (1985) 79:2 *American Journal of International Law*, p. 352.

37 Shabtai Rosenne, 'The International Maritime Organization Interface With the Law of the Sea Convention,' in MH Nordquist and JM Moore, eds. *Current Issues and the International Maritime Organization*, (Martinus-Nijhoff 1999), pp. 254–255.

38 Ibid.

39 Harrison, above, note 7, 1346.

40 James Harrison, 'Article 203,' in Alexander Proelss, ed., *The United Nations Convention on the Law of the Sea: a Commentary*, (C.H. Beck 2017), p. 1354 (citing UNCLOS III documents).

Pursuant to the obligations set forth in Part XIV of the LOSC (Articles 266–278) on the development and transfer of marine technology, signatories to the Convention are directed to promote cooperation on the development and transfer of marine technology to developing states, with regard to the protection and preservation of the marine environment and "with a view to accelerating the social and economic development of the developing States."[41] In so cooperating, states "shall have due regard for all legitimate interests including, inter alia, the rights and duties of holders, suppliers and recipients of marine technology."[42] Article 278 complements these obligations by stating that competent international organizations "shall closely cooperate" with each other on fulfilling their functions and responsibilities technology transfer and assistance. Recalling the unified character of the LOSC, the United Nations General Assembly has long resolved that states and international organizations should promote the transfer of marine technology and provide technical assistance, and cooperate with each other in doing so.[43]

2.1 *The IMO and Articles 203 and 278*

Beginning in 1985, the importance of the LOSC and Articles 203 and 278 for the IMO came into focus. That year, the IMO Assembly requested that the Secretary-General produce a report to help determine the "scope and areas of appropriate IMO assistance to Member States and other agencies in respect of the provisions of the Law of the Sea Convention dealing with matters within the competence of IMO," and to enable the IMO "to develop suitable and

41 LOSC, above, note 6, Art. 266.

42 Ibid., Art. 267.

43 UN General Assembly, *Law of the Sea*, (20 November 1989), Doc. A/Res 44/26, para. 12; UN General Assembly, *Oceans and the Law of the Sea*, (6 January 1999), Doc. A/Res 53/32, para. 18; UN General Assembly, *Oceans and the Law of the Sea*, (27 February 2001) Doc. A/Res 55/7, para. 32; UN General Assembly, *Oceans and the Law of the Sea*, (13 December 2001), Doc. A/Res 56/12, para. 8; 21; UN General Assembly, *Oceans and the Law of the Sea*, (16 January 2003), Doc A/Res/57/141, para. 41, 23. The International Oceanographic Commission (IOC) regards itself as a competent international organization for Part XIV of the LOSC, and in 2005 issued guidelines on the transfer of marine technology. The Commission's guidelines are focused on the transfer of technology related to "the study of the understanding of the nature and the resources of the ocean," rather than the broader categories of technology transfer envisioned by the LOSC. (*Compare* IOC Advisory Body of Experts on the Law of the Sea, *Criteria and Guidelines on the Transfer of Marine Technology Guidelines*, UNESCO (2005) (IOC Information Document 1203), 3 *with* LOSC, above, note 6, Art. 266 (calling for technology transfer "with regard to the exploration, exploitation, conservation and management of marine resources, the protection and preservation of the marine environment, marine scientific research and other activities in the marine environment compatible with this Convention").

necessary collaboration with the Secretary-General of the United Nations on the provision of information, advice and assistance to developing countries on the law of the sea matters within the competence of IMO."[44] Over the course of several decades, the Secretary-General has produced reports on the LOSC and the IMO that were submitted to and implicitly adopted by the IMO Council. Those reports are summarized here and their legal relevance is evaluated in the next section.

The Secretary-General issued the first report in 1987 and submitted it to the IMO Council.[45] The report acknowledged that "some Articles of the Convention assign or suggest to the IMO functions, responsibilities and powers which are deemed to be necessary or desirable for the effective implementation of the particular provisions."[46] It also recognized that the LOSC may be assessed with respect to "new procedures or revised machinery which IMO may need to establish in order to undertake responsibilities assigned to it by the Convention or otherwise assumed by the Organization as a result of the Convention's provisions."[47] With respect to Articles 203 and 278, it states that the IMO is already carrying out cooperation activities on technology transfer for the protection of the marine environment.[48] Specifically, it recognizes that the LOSC gives the IMO "responsibilities" in that field and that Article 278 "enjoins" it to cooperate.[49] The report notes that the IMO Assembly previously resolved that the IMO should cooperate with its member states and other international organizations on "assistance by IMO to Member States and other agencies in respect of the provisions of the Convention on the Law of the Sea dealing with matters within the competence of IMO."[50]

As more of its member states ratified the LOSC, the IMO's plenary bodies continued to recognize the legal relevance of the LOSC for the IMO's work. In 1991, in connection with the IMO's designation of Particularly Sensitive Sea Areas, the IMO Assembly noted that "The United Nations Convention on the

44 IMO, 'Implications of the United Nations Convention of the Law of the Sea 1982 For the International Maritime Organization (IMO), Study by the Secretariat of the IMO,' (27 July 1987), IMO Doc. LEG/MISC/1. Reproduced in the Netherlands Institute for the Law of the Sea, 2 *International Organizations and the Law of the Sea: Documentary Yearbook* (1987), p. 340.

45 Ibid., p. 369.

46 Ibid.

47 Ibid., p. 370.

48 Ibid., pp. 393–394.

49 Ibid.

50 Ibid., p. 394.

51 IMO Assembly, *Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas*, (6 November 1991), IMO Assembly Resolution A.720(17), p. 9, para. 1.3.7.

Law of the Sea (...) with the exception of the sea bed mining provisions, is widely accepted as customary international law".[51] In 1995, the IMO's governing Council declared the IMO to be the "competent international organization" for the United Nations System and the LOSC on matters related to the effect of shipping on the marine environment, and requested that the IMO Secretary-General update the 1987 report on the interface between the IMO and the LOSC.[52] The Council also acknowledged the 1987 report and "endorsed" the Secretary-General's proposal that he monitor the situation to determine if organizational changes were necessary for the IMO to fulfill its role as a competent international organization under the LOSC. The Council acted in response to a UN General Assembly resolution dealing with the entry into force of the Convention and requesting that agencies throughout the United Nations system consider "whether there was a need for agencies to take additional measures to ensure a uniform, consistent and coordinated approach to the implementation of the provisions of UNCLOS."[53]

In 1997, the IMO Secretary-General produced a further study for the IMO Council on the implications of the entry into force of the LOSC. It states that "the basic objectives of international co-operation, as spelt out in articles 202 and 268 ... are already part of the fundamental aims of IMO and its Technical Co-operation Programme, as provided for in the IMO Convention" and the IMO's decisions.[54] It finds that Article 278 of the LOSC "enjoins" on competent international organizations to take all appropriate measures to ensure cooperation among themselves.[55] The study notes that IMO has already developed "very fruitful and cooperative arrangements" with other United Nations organizations regarding the IMO's "assistance for developing states on law of the sea matters."[56] An annex attached to the study states with regard to Article 203 that the "IMO may take these guidelines into account when implementing the duty on technical assistance."[57] With regard to Part XIV of the Convention it

52 IMO Council, *Summary of Decisions*, (21 June 1995), Doc. C 74/D; see also IMO Council, *Relations with the United Nations and the Specialized Agencies, Note by the Secretary-General*, (9 March 1995), Doc. C 74/22(b)/i.

53 UN General Assembly, *Law of the Sea*, (19 December 1994), Doc. A/Res 49/28 para 18; IMO, *Executive Summary, Relations with the United Nations and the Specialized Agencies, Note by the Secretary-General*, (6 October 1997) Doc. C/ES.19/19(b)/1, reproduced in the Netherlands Institute for the Law of the Sea, 13 *International Organizations and the Law of the Sea: Documentary Yearbook 1997* 796; IMO, *'Study on the Implications of the Entry into Force of the United Nations Law of the Sea Convention,'* (6 October 1997), Doc. LEG/MISC/2, attached to IMO Doc. C/ES/19/19(b)/1.

54 1997 Study, above, note 52, p. 843.

55 Ibid., p. 844.

56 Ibid., p. 844.

57 Ibid., p. 862.

states that "the pertinent provisions on the transfer of technology are part" of the IMO's technical assistance programs, and that the "IMO may refer to some of the specific provisions and measures envisaged in UNCLOS."[58]

In 2012, the IMO Sectary-General issued a study on the LOSC's implications for the IMO's work that characterized Articles 203 and 278 as imposing a legal obligation on the IMO. It states that "in accordance with article 203, developing States … must be granted preference by international organizations," and "IMO is among the international organizations subject to the duty to grant preference to developing States when allocating technical assistance."[59] It uses identical wording as the 1997 study in stating that Article 278 "enjoins" international organizations, including IMO, to coordinate on technical cooperation and transfer.[60] The 2014 study repeats the same formulation.[61]

2.2 *The Binding Force of the LOSC on the IMO*

Does the foregoing constitute a sufficient basis to conclude that the LOSC imposes legal obligations on the IMO, in particular that it must give preferences to developing states in the 'appropriate allocation' of funds and specialized services in connection with marine pollution, and closely cooperate on the transfer of marine technology? This sub-section answers that question in two different ways: by addressing whether the *pacta tertiis* principle should be relaxed; and by considering whether Articles 203 and 278 are part of an 'objective regime.'

2.2.1 Pacta tertiis

The principle of consent in public international law is expressed as the phrase '*pacta tertiis nec nocent nec prosunt*,' meaning that a treaty binds its parties and only its parties subject only to narrow exceptions.[62] The consensual foundation for international legal obligations is reflected in the VCLT's distinction

58 Ibid., p. 867.

59 IMO, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization—Study by the Secretariat of the International Maritime Organization*, (19 January 2012), Doc. LEG/MISC 7, p. 81, Annex, p. 16.

60 *Id*., 93.

61 IMO, 'Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization—Study by the Secretariat of the International Maritime Organization,' (30 January 2014), IMO Doc. LEG/MISC 8, 90, Annex, p. 120.

62 This normative principle is present in Articles 11–17 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331, as well as Articles 34, 35, and 36 of that Convention. See generally Martins Paparinskis, 'Regulating Treaties: a Comparative Perspective,' in C. J. Tams, et. al., eds *Research Handbook on the Law of Treaties* (Elgar 2014) (discussing and evaluating consent as a precondition to a treaty's binding force). The related principle of *pacta sunt servanda* is also incorporated into the VCLT in Article

between how a non-party to a treaty accepts rights the treaty affords it – automatically – and how it can accept obligations, only expressly and in writing.[63] Article 35 of the VCLT-IO adopts that formulation by providing that a non-party international organization can accept obligations imposed on it by a treaty only expressly and in writing.[64] Yet, the VCLT-IO is not in force, and there is no established rule of law that governs how international organizations accede to treaty obligations as non-parties.

Here, the reports issued by the IMO Secretary-General acknowledge that Articles 203 and 278 impose obligations, but the IMO has not expressly adopted a statement in writing to that effect. The VCLT-IO states that an organization's "acceptance of . . . an obligation shall be governed by the rules of that organization," and "'rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization."[65] The IMO's constituent instrument appears to invest the IMO Assembly, the IMO Council, and potentially also the MEPC with the authority to accept treaty obligations.[66] Yet none of these organs did so in response to the Secretary-General's reports. Thus, the reports standing alone do not meet the VCLT-IO's standard for the acceptance of a treaty obligation by a non-party international organization.

Scholars who have looked at whether these articles impose legal obligations on international organizations have concluded they do not on that basis.[67] Pinto notes that "the implementation of directives addressed to them might

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26, and provides that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

63 VCLT, above, note 61, Art. 35 and 36.

64 VCLT-IO, above, note 11, Art. 35(1). *See* Tomuschat, above, note 14, 206.

65 VCLT-IO, above, note 11, Art. 35(1); 2(1)(j).

66 See IMO Convention, above, note 8, Art. 2(d) (functions of organization include performing functions assigned to it by other international instruments); 15(i) (Assembly shall perform organization's functions under Article 2); 26 (Council shall perform Assembly's functions between its bi-annual sessions); 38 (MEPC shall consider any matter within the scope of the organization related to prevention and control of pollution of the marine environment from ships and perform any function conferred on the IMO by or under other international instruments related to the prevention and control of marine pollution from ships).

67 See Harrison, above, note 40, p. 1354 (Article 203 is a statement of policy for international organizations rather than a binding obligation because VCLT-IO not followed); Irini Papanicolopulu, 'Article 278,' in A Proelss, ed., *The United Nations Convention on the Law of the Sea: a Commentary* (1808) (finding the same with regard to Article 278); Moragodage Christopher Walter Pinto, 'The Duty of Cooperation and the United Nations Convention on the Law of the Sea,' in Adriaan Bos and Hugo Siblesz, eds., *Realism in Law Making* (Martinus Nijhoff, 1986), p. 152 (same).

still be achieved by their members which are also parties to the Convention."[68] Indeed, Article 203 is complemented by Article 202—which obliges LOSC parties to directly and through competent international organizations transfer technology and provide assistance, especially to developing states. Similarly, Article 278 is a component of Part XIV of the Convention, which details states' obligations to work through international organizations to transfer marine technology and provide assistance.

In my view, it may be interpretatively preferable to avoid surplusage by giving effect to Articles 203 and 278 rather than supplanting them with their neighboring provisions.[69] That is especially so because the drafters of the Convention deliberately chose to address the provisions to international organizations rather than states.[70] Moreover, viewing them as binding rather than hortatory harmonizes the articles within the Convention: Articles 202 and Part XIV of the Convention impose legal obligations on states, thus, the analogous provisions addressed to international organizations should likewise be interpreted as obligations.[71] Doing so also reflects what the United Nations General Assembly has frequently characterized as the Convention's "unified character."[72]

Apart from the language of these particular articles, there are good reasons generally to question whether the procedural requirements of the VCLT-IO should apply to treaty obligations imposed on international organizations. In practice, international organizations do not always follow the VCLT-IO's Article 35, at least when accepting obligations to provide services for their member states.[73] For example, as Tomuschat explains, the Secretary-General of the United Nations and the Secretary-General of the Council of Europe perform depository functions for numerous treaties that their organizations did not or could not ratify, and the United Nations provides staff and facilities for human rights monitoring bodies such as the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with

68 Pinto, above, note 66, p. 152.

69 According to the Latin canon '*verba cum effectu sunt accipienda*;' wherever possible, each legal term and provision ought to be given effect. (See Antonin Scalia and Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012), p. 174).

70 Harrison, above, note 40, p. 1354 (citing UNCLOS III documents), LOSC, above, note 6, Art. 278.

71 It is frequently asserted that treaties should be interpreted so as to harmonize them with existing rules of international law. (Arnold McNair, *The Law of Treaties* (Oxford University Press, 1986), p. 452 n. 3 (citing cases)).

72 See sources cited at note 43.

73 Tomuschat, above, note 14, pp. 212–213, 220.

Disabilities.[74] The inconsistency of these international organizations' operational practices with the VCLT-IO indicates that international law has developed in a way that departs from that treaty's requirements.[75]

Moreover, as Tomuschat argues, the VCLT-IO's formulation misses an important aspect of international organizations' legal personality that distinguishes them from states: organizations have a much closer relationship with their member states than states do with each other, and in a sense are the legal 'children' of their members.[76] Thus if an organization's members entrust it with certain functions or obligations, this is fundamentally a different legal process – and a less intrusive one – than if a group of sovereign states attempt to impose an obligation on a third state.[77] Therefore, an international organization is not a 'third' party to a treaty concluded by its members in a strict sense.[78] And, as Chinkin points out, the need for organizations to consent to obligations is grounded not in sovereignty, but the concern that the imposition of obligations would improperly enlarge organizations' powers.[79]

These scholars' reasoning applies with particular force here. The state parties to the Convention drafted Articles 203 and 278 with the IMO in mind, and the IMO actively participated in the UNCLOS III conference where the LOSC was written.[80] Before the Convention was adopted, the IMO stated that it was "particularly equipped" to provide technical assistance to developing states, and it has long contended that it has complied with these provisions through its technology transfer and assistance programs and cooperation with other international organizations.[81] Moreover, the IMO has a uniquely central role within the LOSC's regime for the control of pollution from vessels as

74 Ibid., p. 214.

75 Tomuschat, above, note 14, p. 220 (discussing United Nations' customary practice of providing services); see Ian Johnstone, 'Law Making Through the Operational Activities of International Organizations,' (2008) 40 *George Washington International Law Review*, pp. 118–119 (operational practice can contribute to the development of international law).

76 Tomuschat, above, note 14, p. 211.

77 Ibid.

78 *Id.*, p. 214 (citing Giorgio Gaja, 'A "New" Vienna Convention on Treaties Between States and International Organizations or Between International Organizations: A Critical Commentary,' (1987)) 58 *British Yearbook of International Law*, p. 264.

79 Chinkin, above, note 14, p. 89.

80 Rosenne above, note 37, pp. 254–255.

81 UN, 'The activities of the Inter-Governmental Maritime Consultative Organization in relation to shipping and related maritime matters,' (10 June 1974) in *Official Records of the Third United Nations Conference on the Law of the Sea, volume III* (*Documents of the Conference, First and Second Sessions*), UN Doc. A/CONF.62/27, at p. 51; 1997 Study, above, note 52, 844.

the international body responsible for establishing rules of reference for that pollution.[82] Therefore, binding the IMO to the LOSC's obligations—at least Articles 203 and 278, which contain mandatory language and are directed toward the IMO—is more legally sound than would be the case with a truly 'third' organization.

In addition, the IMO itself has accepted the functions imposed by the LOSC, recognized the importance of the Convention for its members, and its plenary organs have implicitly agreed to the obligations imposed by Articles 203 and 278. The IMO Assembly commissioned the reports on the LOSC in order to determine the "scope and areas of appropriate IMO assistance to Member States and other agencies in respect of the provisions of the Law of the Sea Convention dealing with matters within the competence of IMO," and to enable the IMO "to develop suitable and necessary collaboration with the Secretary-General of the United Nations on the provision of information, advice and assistance to developing countries on the law of the sea matters within the competence of IMO."[83] The IMO Council received the Secretary-General's reports that characterized the articles as imposing obligations on the IMO, which expressed his view that "it is imperative for IMO to be kept aware in a timely fashion of the developments and trends in State practice, and indeed in the practice of other international organizations, under the provisions of the Convention on the Law of the Sea, to allow the Organization to make correct assessments and facilitate the fulfilment of its role as a 'competent international organization.'"[84] Taken together, these statements arguably give rise to the inference that the IMO consented to its role under the Convention and any obligations imposed by it, notwithstanding that it did not sign the LOSC or expressly accept that treaty's obligations in writing.[85]

2.2.2 Objective Regimes

Alongside binding the IMO to these provisions based on the foregoing, there has long been support for relaxing the *pacta tertiis* principle generally with respect to so-called 'objective regimes.'[86] The distinction between objective

82 See sources cited at notes 35–37.

83 1987 Study, above, note 44, p. 340.

84 *See* sources cited at note 51.

85 Laly-Chevalier, above, note 14, p. 923 (an organization's consent to fulfill certain functions assigned to it by a treaty could be inferred "from its concern for States becoming parties to it".).

86 Salerno, above, note 14, p. 225; *see* McNair, above, note 70, p. 269; Bruno Simma, 'From Bilateralism to Community Interest in International Law,' (1994) 250 *Hague Academy of International Law: Recueil des Cours*, pp. 217–384.

regimes and other treaties is rooted in the fact that objective regimes have erga omnes effects for individuals and non-state actors even if they could not become parties to them.[87] Scholars therefore argue that, at least in the case of such treaties, *pacta tertiis* is overbroad.[88] They reason that it is not actually a general principle of international law, and the rule in the VCLT and VCLT-IO that obligations must be accepted in writing conflicts with customary rule of freedom of form in treaty making.[89] They suggest that with respect to objective regimes, the acceptance of obligations by third states should follow the more flexible rule that applies to the acceptance of rights, where acceptance is presumed unless the contrary is indicated.[90]

There are several approaches to defining objective regimes. A 'law of treaties' approach differentiates between treaties that create international law (objective regimes) and those which merely settle conflicts between parties.[91] This 'treaty approach' is not reflected in the VCLT, but has been adopted in international practice since the early nineteenth century, including in 2003 by the Ethiopia-Eritrea Claims Commission.[92] There is historical support for a 'public law theories' approach that defines an objective regime as arising when a group of states assert "quasi-legislative competence over a defined territory in the overall public interest," although scholars have noted that this approach may no longer be relevant in light of transfer of that competence to the United Nations.[93] Treaties can also gain acceptance as customary law, and therefore achieve the status of an objective regime, but it is debatable whether that process differs from the usual process of the creation of general international law.[94]

Do the LOSC's provisions on technical assistance and technology transfer for international organizations – i.e., Articles 203 and 278 – constitute an objective

87 Salerno, above, note 14, p. 221.

88 Ibid., p. 230.

89 Ibid., p. 234.

90 Ibid.; *see also* Chinkin, above, note 14, pp. 40–41 (distinction between rights and obligations in VCLT 'excessively formalistic' in light of states' ability to otherwise bind themselves, such as through unilateral declarations).

91 Rosemary Rayfuse, 'Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?,' (1999) 20:1 *Australian Yearbook of International Law* 255 (discussing approaches to defining objective regimes).

92 Salerno, above, note 14, 23 (citing Eritrea–Ethiopia Claims Commission, 1 July 2003, Partial Award, Prisoners of War, Eritrea's claim, 17, para. 39).

93 Rayfuse, above, note 90, 263; see also Chinkin, above, note 14, p. 35.

94 Salerno, above, note 14, p. 241 (treaties creating objective regimes do not become customary upon their ratification; state practice and persistent objector rules still apply in determining their status); Reports of the International Law Commission on the

regime?[95] A legal regime is defined by the International Law Commission as "a set of special rules, including rights and obligations, relating to a special subject matter."[96] These articles arguably are a regime that imposes rights and obligations on international organizations with respect to differentiating between states on the control of marine pollution from ships. The LOSC, described in its preamble as the "legal order for the seas and oceans," is a law-making treaty.[97] And the Articles at issue here are directed toward 'international organizations' as such—rather than organizations that are parties to the Convention—indicating that the drafters of the Convention may have intended for Parts XII and XIV to be binding on non-party organizations.[98]

The public law theory could hold as well: the parties to the LOSC assumed for themselves responsibility for legislating the functions and responsibilities of international organizations with regard to the law of the sea, and with the exception of the United States' position on the International Seabed Authority, that appears uncontroversial.[99] The state parties to the LOSC thus invested international institutions with public authority, in other words the capacity to autonomously make decisions in the common interest of their member states.[100] Moreover, there is some support for viewing portions of the LOSC as

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second part of its 17th session and on its 18th session, (1966) 2 *Yearbook International Law Commission*, pp. 169, 231, UN Doc./CN.4/SER.A/1966/Add.1 ('the source of binding force' for objective regimes 'is custom, not the treaty').

95 *See* Luke T. Lee, 'The Law of the Sea Convention and Third States,' (1983) 77 *American Journal of International Law*, pp. 565–566 (discussing cases and finding LOSC does not qualify as an objective regime).

96 International Law Commission, ILC Study Group, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Conclusions of the Work of the Study Group' UN Doc. A/CN.4/L.702 (18 July 2006), 11–12; *see also* Margaret Young, *Regime Interaction in International Law* (Cambridge 2012), p. 5 (discussing ILC's definitions of special regimes).

97 LOSC, above, note 6, Preamble.

98 *See* Ibid., Parts XII and XIV; Stephen Vasciannie, 'Part XI of the Law of the Sea Convention and Third States: Some General Observations,' (1989) 48:1 *Cambridge Law Journal* 90–91 (noting that some rules in Part XI of the Convention are addressed to 'all states' and some to 'state parties;' former may have been intended to have erga omnes effects).

99 The United States is not a party to the LOSC but recognizes it as customary international law, apart from Part XI on deep seabed mining. (John A. Duff, 'The United States And The Law Of The Sea Convention: Sliding Back From Accession And Ratification,' (2005) 11:1 *Ocean & Coastal Law Journal*, p. 10.).

100 See Armin Von Bogdandy, Matthias Goldmann, and Ingo Venzke, 'From Public International to International Public Law,' (2017) 28 *European Journal of International Law*, pp. 126–127 (discussing international institutional law as international public law). The LOSC's treatment of the IMO and other competent international organizations thus reflects 'international public law' as that concept is described by Von Bogdandy, et. al.

establishing customary international law, including, as noted above, from the IMO Assembly.[101]

As Rayfuse states, proof of the establishment of an objective regime should require evidence of non-objection by third parties.[102] Because the handful of states that are not parties to the LOSC continue to object to the entire treaty or portions of it, the LOSC as a whole does not meet that test.[103] But, those same states do not explicitly oppose the portions of the LOSC that establish obligations for technical assistance on environmental protection (Part XII, section 3) or marine technology transfer for the benefit of developing states (Part XIV).[104] Moreover, the third parties impacted by Articles 203 and 278—including the IMO—have not objected to viewing Articles 203 and 278 as imposing obligations. And the United Nations General Assembly repeatedly referred in its resolutions to the "obligations" imposed on international organizations by Part XIV of the LOSC.[105] Thus Articles 203 and 278 are arguably part of an objective regime on international organizations' assistance for developing states under the LOSC, which further supports relaxing the *pacta-tertiis* principle with regard to those provisions. They can thus be viewed as legal obligations that presumptively bind the IMO in the absence of any statement by it to the contrary.[106]

3 The IMO's Obligations under Articles 203 and 278

Assuming these provisions are legal obligations for the IMO per the discussion above, what specifically do they require the IMO to do in terms of differentiating between its member states? Article 203 mandates that the IMO give "preference" to "developing states" in the "allocation of appropriate funds and

101 IMO Assembly Resolution A.720, above, note 50.

102 Rayfuse, *above,* note 90, p. 268 (finding that 1994 Fish Stocks Agreement is not an objective regime).

103 *See, eg,* statement by Turkey on its opposition to 2012 adoption of General Assembly resolution on Oceans and the Law of the Sea, available at https://www.un.org/press/en/2012/ga11325.doc.htm.

104 Ibid. (Turkey supports equity in the law of the sea); IMO, *Comments on intellectual property rights and impact assessment on States*, (30 April 2021), Doc MEPC 76/7/57 (comment by Turkey supporting universal access to technology developed pursuant to IMRB funding).

105 UN Doc A/Res/55/7 above, note 43, para. 34; UN Doc A/Res/57/141, above, note 43, para. 23.

106 Salerno, above, note 14, p. 234.

technical assistance" and the use of its "services" for specific environmental purposes. None of these terms are defined, but their ordinary meaning and that given to them by the IMO serve as interpretive guideposts.[107] Preference can mean "the act, fact, or principle of giving advantages to some over others," or "priority in the right to demand and receive satisfaction of an obligation."[108] Thus, the IMO is obliged to give advantages or priorities to developing states in the right to demand and receive the enumerated categories of assistance.

The LOSC does not categorize states as 'developing' or not. But as Harrison writes, "the term should be interpreted in light of United Nations practice," and the United Nations General Assembly has resolved that "capacity-building is essential to ensure that States, especially developing countries, in particular the least developed countries and small island developing States, as well as coastal African States, are able to fully implement the Convention."[109] The IMO's practice is consistent with the resolution, because as discussed above, it has emphasized small-island developing states (SIDS) and least-developed countries (LDCS) in its technical assistance programs, including for GHG reduction measures.[110]

Harrison construes the "allocation of appropriate funds and technical assistance and the utilization of specialized services" as the provision of financial and other types of technical assistance, as well as services such as advice.[111] That reading is consistent with a common legal interpretation of "and" as the same as "together with," and is logical given the article's placement in section 3 of Part X, labelled "technical assistance."[112] A teleological interpretation[113] is similar: section 3 is included in Part X as a reflection of the presence of the CBDR principle in the law of the sea whereby developing countries'

107 See VCLT, above, note 61, Art. 31(1).

108 'Preference,' *Merriam-Webster.com Dictionary* (2021).

109 UN General Assembly, *Oceans and the Law of the Sea*, (18 April 2013), Doc A/Res/67/78, para. 9.

110 Harrison, above, note 40, p. 1354, (citing Myron Nordquist, Shabtai Rosenne, Alexander Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV* (J.G. Merrills 1990), p. 104). The IMO Convention also does not define 'developing states.' But, IMO's member states have elaborated the meaning of 'developing countries' under Article 38 of the IMO Convention for the purposes of climate policy. (See also MEPC 304(72) above, note 19, pp. 1, 6, 9 (calling for GHG reduction technology transfer and assistance programs to be aimed 'particularly' or 'especially' at SIDS and LDCS).

111 Harrison, above, note 40, p. 1354.

112 Scalia and Garner, above, note 68, pp. 117–118 (discussing conjunctive/disjunctive semantic canon of construction); 221 (explaining title-and-headings canon).

113 *See* VCLT, above, note 61, Art. 31(1) (treaties should be interpreted in light of their object and purpose).

environmental protection capabilities should be strengthened by developed countries in recognition of differential abilities to meet legal obligations.[114] Therefore, Article 203 can be interpreted to mean that the IMO is obliged to give priority or advantages to SIDS and LDCs in the allocation of 'appropriate' funds as well as other technical assistance and advice in order to help them meet their obligations to prevent, reduce, and control pollution of the marine environment and minimize its effects.

What is the substance of the IMO's obligation to cooperate on technology transfer under Article 278? As Pinto argues, provisions that use the word 'shall' in the LOSC indicate a mandatory duty, and obligations to cooperate could be breached if a party to the Convention refused to enter into negotiations at the request of another.[115] He reasons that obligations to cooperate in the LOSC, including related to the transfer of technology, thus impose a positive duty to act.[116] Pinto's characterization of the scope of the obligations under Articles 278 is thus similar to the general duty to cooperate under international law, which is understood "as the obligation for States to enter into coordinated action under a legal regime so as to achieve its specific goal."[117]

Here, the goals of the LOSC's regime for cooperation on technology transfer includes the protection and preservation of the marine environment "with a view to accelerating the social and economic development of the developing States."[118] And the LOSC obliges its members to take a number of actions either "directly or through competent international organizations" to achieve that end.[119] Thus, the IMO's obligation under Article 278 includes "taking all appropriate measures to ensure" it acts as a forum for its members to transfer marine technology for the purpose of environmental protection and preservation in a way that accelerates social and economic development in developing states, and closely engages with other competent international organizations and states.

Articles 203 and 278 are not the IMO's only technical assistance and cooperation obligations—it is also required to engage in technical assistance and cooperate on environmental matters under its constitution, the IMO Convention. How to reconcile these sources of law? The *lex specialis* principle provides that "a special rule of law takes precedence over a relevant general rule" when both

114 Harrison, above, note 40, p. 1347 (citing Ellen Hey, Common but Differentiated Responsibilities, MPEPIL, para. 15, available at: http://www.mpepil.com).

115 Pinto, above, note 66, p. 145.

116 Ibid.

117 Elisa Morgera et. al., *Unraveling the Nagoya Protocol* (Brill, 2015), p. 210.

118 LOSC, above, note 6, Art. 266.

119 Ibid., Art. 266, 268, 269, 271, 272, 273, 275, 276.

cover the same legal subject.[120] Here, Article 203 is more specific than the articles in the IMO Convention on technical assistance: it requires that IMO give preferences or advantages to developing states in the distribution of enumerated categories of assistance, while the Convention's Article 25 provides that the IMO's Marine Environmental Protection Committee "shall provide for the acquisition of scientific, technical, and any other practical information on the prevention and control of marine pollution from ships for dissemination to states, in particular to developing countries." Similarly, Article 278 is more specific than Article 38(e), its analogous provision in the IMO Convention, which requires that the MEPC cooperate with international organizations on matters related to the marine environment, but does not specify that cooperation should be taken out on the transfer of marine technology with the purpose of accelerating developing states' economic development. Thus, the LOSC sets out more specific rules on how the IMO is to carry out technical assistance and technology transfer, and under the *lex specialis* principle it should take precedence over the IMO Convention.

Pursuant to the LOSC's Article 237, the provisions in Part XII of the Convention, including Article 203, are "without prejudice to obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment."[121] That could mean that obligations in the IMO Convention – which relates to the protection and preservation of the marine environment and was concluded before the LOSC – could govern over any obligations in the LOSC. But, Article 237 is addressed to "obligations assumed by states," while Article 203 and Article 38 of the IMO Convention are addressed to the IMO. As stated earlier, this article examines whether the IMO is itself bound by the LOSC – as opposed to being indirectly bound through its member states – therefore an evaluation of whether Article 237 bears on the IMO's obligations under Article 203 is outside its scope.

Arguably, the IMO Convention, as the IMO's constitution, always functions as *lex specialis* because it applies specifically to the IMO, while Articles 203 and 278 apply to 'international organizations' and 'competent international organizations,' respectively. That position would be consistent with international organizations' assertions before the International Law Commission that their

120 Dirk Pulkowski, 'Lex Specialis Derogat Legi Generali/Generalia Specialibus Non Derogant,' in J. Klinger, Y. Parkhomenko, et. al., eds, *Between the Lines of the Vienna Convention? Canons of Interpretation and Other Principles of Interpretation in Public International Law* (Kluwer 2018), p. 161.

121 LOSC, above, note 6, Art. 237.

constitutions are *lex specialis* vis a vis customary international law or general principles of law.[122] But even accepting that the IMO Convention should govern over the LOSC, the legal relevance of Articles 203 and 278 depends on the presence of a conflict. That is because whether the *lex specialis* principle "is used as a priority rule or a maxim of interpretation depends on whether the more special and the more general rule stand in conflict, such that the two rules cannot apply concurrently: where two rules conflict with each other, *lex specialis* applies as a priority rule; where no rule conflict exists, it applies as a maxim of interpretation."[123]

Here, there does not appear to be any conflict. The IMO Convention requires that the IMO engage in technical assistance and cooperate on matters related to the marine environment, as does the LOSC, albeit in a more detailed way. Thus, the *lex specialis* principle positions Articles 203 and 278 as 'interpretive guidelines' for the IMO Convention. In practice this means the scope of the general obligations in the IMO Convention on technical assistance and cooperation should be limited by the more specific LOSC provision so as to allow both sets of obligations to operate concurrently.[124] Under that reading, the IMO would be obliged to undertake technical assistance and cooperation pursuant to the terms of its constitution, but the substance of those obligations would be informed by Articles 203 and 278 when the IMO is engaged in technical assistance for the purposes of prevention, reduction and control of pollution of the marine environment, or cooperation on the development and transfer of marine technology.[125]

4 The IMO's LOSC Obligations and the IMRB Proposal

Accepting that the IMO is bound by Articles 203 and 278, I now explore the implications for the IMO's IMRB proposal. This section provides an overview of the levy and the proposal for the IMRB, and discusses how Articles 203 and 278 could impact the IMO's administration of it. It then evaluates how viewing the Articles as binding on the IMO implicates the CBDR principle both for the IMRB proposal and the IMO's climate measures more generally.

122 Daugirdas, above, note 13, p. 329.

123 Pulkowski, above, note 119, p. 163.

124 Ibid., p. 191.

125 See *Southern Bluefin Tuna Case*, *Australia and New Zealand v. Japan*, Award on Jurisdiction and Admissibility, 13 *United Nations Reports of International Arbitral Awards* (4 August 2000), 40 para. 52 (discussing parallelism of treaties and the 'accumulation and accretion of obligations').

The IMRB proposal is closely intertwined with the obligations discussed here because it involves both the distribution of money and the dissemination of technology for low and zero carbon shipping. In 2019 the MEPC began considering whether and how to establish the IMRB. The proposal included a fund would raise approximately $5 billion over 10 to 15 years via a $2 per ton mandatory levy on fuel oil consumption.[126] In spring 2021, a coalition of major maritime states, flag states, SIDS, and the shipping industry submitted a detailed proposal for the IMRB and the governance structure that should apply within the IMO to both collect and spend the funds.[127] Under that proposal, the MEPC would charter the IMRB using an amendment to MARPOL Annex VI. Perhaps reflecting the IMO staff's reputation for neutrality and technical expertise,[128] the board members will be non-governmental professionals appointed by the IMO Secretary-General.[129] The MEPC will oversee the board and approve its annual budget, but the Board will be independent and have the final say over what projects are funded.[130] Since the proposal was made, the MEPC has continued to discuss it, and it remains under consideration along with a broader levy on marine fuel and other market-based mechanisms that could establish similar governance structures.[131]

Thus, the proposal creates an independent subsidiary body of the IMO—the IMRB—that will have decision-making authority, positioning the IMO itself at the center of the program. Pursuant to the International Law Commission's Draft Articles on the Responsibility of International Organizations, the IMRB will be an agent of the IMO under international law, and Articles 203 and 278 would apply directly to it.[132] Therefore, if the IMRB failed to act consistently

126 MEPC 75/18, above, note 1, pp. 32–33.

127 MEPC 76/7/7, above, note 2.

128 Kendall Stiles, 'Disaggregating Maritime Safety Delegation,' in Joel Ostreich, ed. *International Organizations as Self-Directed Actors: a Framework for Analysis*, (Routledge 2012), p. 172; Liesbet Hooghe and Gary Marks, 'Delegation and Pooling in International Organizations,' (2012) 10:3 *Review of International Organizations*, pp. 308–309 (the IMO is viewed by some scholars as exercising a high degree of authority due to majoritarian decision-making, but its staff has relatively little delegated authority from its member states).

129 MEPC 76/7/7, above, note 2, Annex 4.

130 Ibid.

131 See MEPC 78/17, above, note 1, pp. 45–46; IMO Doc. ISWG-GHG 12/3/9, above, note 33; IMO Doc. 78/7/5, above, note 33.

132 See ILC DARIO, above, note 9, Art. 6 (the conduct of an agent of an organization in the performance of its functions shall be considered an act of the organization under international law); 2 (defining agent).

with the articles, the IMO could theoretically be held responsible under international law.[133]

The proposal's criteria for project selection do not contain any preference for developing states if research grants are considered to be 'appropriate funds' for technical assistance within the meaning of Article 203. The Board will establish a procedure where applicants can submit proposals for research projects, and it will also develop a process and criteria for reviewing unsolicited proposals.[134] Qualified applicants may include any government, public, private, or non-profit institution or consortium.[135] The Board staff will review proposals based on their "merit, feasibility, proposed cost, and scientific and technical potential" and recommend them to the board for final approval, which will be made with a majority vote. Criteria that will be used include the potential to meet the objectives in the Board's charter and the potential readiness for the transition to zero and low carbon shipping, safety considerations, and other factors.[136] The proposal's objective is that the Board disseminate knowledge to "*both* developed and developing states, particularly SIDS and LDCs," but this language does not constitute a clear and express advantage or priority for developing states in receiving funds as Article 203 requires.[137]

Under the proposal, the Board is given discretion to attach intellectual property conditions to research grants, but the proposal states that intellectual property resulting from funded projects should be made available to "anyone" in the world on fair, reasonable, and non-discriminatory terms.[138] On the one hand, that appears consistent with the LOSC's Part XIV, which provides that states shall promote the transfer of technology on fair and reasonable terms and conditions, and have due regard for "all legitimate interests including, inter alia, the rights and duties of holders, suppliers and recipients of marine technology."[139] But, as discussed above, Part XIV is also guided by the "social

133 Ibid., Art. 4 (defining internationally wrongful act of international organization).

134 Ibid., Art. 4, 7.

135 Ibid., Art. 7.

136 Ibid.

137 See MEPC 76/7/7, above, note 2, Art. 7 (emphasis added).

138 Ibid., Art. 7(b). *See also* IMO, *Establishment of an International Maritime Research and Development Board and an* IMO *Maritime Research Fund*, (16 September 2021), Doc. MEPC 77/7/6, 4 ("underlying purpose of the IMRB is to ensure that the world economy, including LDCs and SIDS, and nations remote from their markets, will continue to access efficient and economically sustainable maritime transport"); IMO, *Use of intellectual property generated from IMRB projects*, (1 October 2021) Doc. MEPC 77/7/21, Annex, 3 (proposing that intellectual property developed with grant funds be made available to 'all member states' on a fee-free basis).

139 LOSC, above, note 6, Art. 266(1); 269(b); 268.

and economic development of developing states," implying that marine technology should be made available to developing states on preferential terms so as to enable their development.[140] That interpretation is consistent with other international instruments, and therefore is supported by the *in pari materia* canon[141] of construction: Agenda 21 calls for environmental technology transfer to developing states on "preferential and concessional terms;" the Paris Agreement obliges its parties to financially support developing states' access to climate mitigation and adaptation technology developed pursuant to its Article 10 Technology Mechanism; and the International Oceanographic Commission's marine technology transfer guidelines call for transfers to developing states "free of charge, or at a reduced rate for the benefit of the recipient country."[142] Thus, Article 278 implies that the IMRB is obliged to act as a forum for its members states to transfer technology so as to promote the social and economic development of SIDS and LDCs, not merely to make technology available on fair, reasonable, and non-discriminatory terms.

Despite the proposal not incorporating Articles 203 and 278 into the IMRB's terms of reference, it grants the Board discretion to add or change terms to the project selection criteria or attach additional conditions governing intellectual property.[143] Thus, the Board would function both as a policy maker and a policy implementer, and would itself determine the extent to which the program complied with Articles 203 and 278.[144] Moreover, the IMO's institutional role can be expected to increase if there are conflicts between states as to how the program should operate, in which case the Board and staff's decision-making could be seen as a "second-best option."[145] Therefore, as the proposal is

140 Ibid., Art. 278.

141 Paula F. Henin 'In Pari Materia Interpretation in Treaty Law,' in J Klinger et. al., eds *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2018), 211.

142 UN, *Earth Summit Agenda 21* (United Nations 1992), Chapter 34; Paris Agreement, (4 November 2016), United Nations Registration No. 54113, Art. 10(6); IOC Guidelines, above, note 43, 10; *see generally* Abbe E.L. Brown, 'Intellectual Property and Climate Change,' in RC Dreyfuss and J Pila, eds. *The Oxford Handbook of Intellectual Property Law* (Oxford, 2018), pp. 975–976.

143 MEPC 76/7/7, above, note 2, Annex 4, p. 9 (criteria to be used for grant applications include 'specific project criteria as specified by the IMRB; grant conditions "may include" requirement that patents be made available on fair, reasonable, and non-discriminatory terms).

144 *See generally* Stiles, above, note 127 (discussing delegation of authority to IMO according to various forms of principal-agent theory); Daugirdas, above, note 13, pp. 364–365 (discussing generally the 'significant policy making role' of international organization staff).

145 Stiles, above, note 127, pp. 189–190 (finding that the IMO staff's expansion of powers came from disagreements between states on implementation of maritime safety policies).

currently written, Articles 203 and 278 would be legal obligations the Board would be bound to follow as it designs and implements the program.[146]

The proposal may yet change, and the IMO's member states could potentially constrain the IMO's discretion in its administration of the IMRB or other climate measures in a way that would depart from Articles 203 and 278. In addition to being IMO resolutions, MARPOL Annexes are themselves treaties. An amendment to MARPOL Annex VI creating the IMRB would need to be consistent with Article 311(3) of the LOSC, which provides that state parties to the LOSC may not adopt agreements derogating from provisions that are essential to the effective execution of the object and purpose of the LOSC and reflect its basic principles.[147] Those provisions are not identified, and in diplomatic fora states have opposed agreements by arguing that they are inconsistent with the LOSC and impermissible under Article 311(3).[148] Thus, it is unclear whether a measure implementing the IMRB that derogated from Articles 203 and 278 would constitute an invalid *inter se* agreement under the LOSC, or whether such an argument could impact its negotiation and adoption.[149]

Regardless, in my view, there are good reasons for the IMRB proposal or any of the IMO's climate measures to incorporate the principles underlying Articles 203 and 278. There is a consensus that one of the central obstacles to the wide-scale deployment of zero and low carbon shipping technology is the relative disadvantage of developing states,[150] and the IMO has long

146 Daugirdas, above, note 13, pp. 364-356 (discussing international civil servants' 'on-the-ground autonomy' as policy makers).

147 LOSC, above, note 6, Art. 311(3); see Nele Matz-Lück, 'Article 311,' in Alexander Proelss, ed., *The United Nations Convention on the Law of the Sea: a Commentary*, (C.H. Beck 2017), pp. 2010, 2017–2018. There are similar provisions in the VCLT-IO. (See VCLT-IO, above, note 11, Art. 41 and 58).

148 David Freestone and Alex G. Oude Elferink, 'Flexibility and Innovation in the Law of the Sea,' in *Stability and Change in the Law of the Sea: the Role of the LOS Convention*, AG Oude Elferink, ed. (Martinus-Nijhoff 2005), pp. 182–183 (discussing state practice under Article 311); see also Shirley Y. Scott, 'The LOS Convention as a Constitutional Regime,' in in *Stability and Change in the Law of the Sea: the Role of the LOS Convention*, AG Oude Elferink, ed. (Martinus-Nijhoff 2005), pp. 18–19 (LOSC has characteristics similar to a constitution, but Article 311 is 'nowhere near comparable' with Article 103 of the UN Charter.).

149 See Freestone and Oude Elferink, above, note 147, p. 183.

150 IMO, *Comments on submissions concerning an International Maritime Research and Development Fund*, (21 April 2021), Doc MEPC 76/7/49; see Harilaos N. Psaraftis and Christos A. Kontovas, 'Decarbonization of Maritime Transport: Is There Light at the End of the Tunnel?,' (2021) 13:1 *Sustainability*, p. 237 (discussing technical aspects of implementing MBM for shipping).

faced implementation challenges with vessel-source pollution standards.[151] Technical assistance and technology transfer are therefore necessary for the IMO to achieve its climate strategy. In addition, the disagreement between the IMO's members about whether the climate regime's CBDR principle should apply would only be exacerbated by measures that do not differentiate between developed and developing states.[152]

That differentiation has been repeatedly called for by the IMO. In 2010, its criteria for a market-based climate mechanism for shipping included "the need for technology transfer to, and capacity-building within, developing countries, in particular" LDCS and SIDS, in relation to implementation and enforcement of the proposed mechanism, including the potential to mobilize climate change finance for mitigation and adaptation actions.[153] Shi contends this criterion encompasses the CBDR principle as it is broadly understood because it calls for differentiated treatment between states through technical assistance and technology transfer.[154] Yet, as Karim notes, the IMO's 2016 resolution on technology transfer "does not establish any significant legal obligation for financial assistance or technology transfer."[155]

Viewing the IMO as bound by Articles 203 and 278 would establish just such a legal obligation. It would thus help bridge long-standing disputes over what principles should apply to the IMO's climate policies by legally requiring the IMO to differentiate between its members and grant preferences to SIDS and

151 Saiful Karim, 'Implementation of the MARPOL Convention in Developing Countries,' (2010) 79 *Nordic Journal International Law*, pp. 312–13; Jesper Jarl Fanø, *Enforcing International Maritime Legislation on Air Pollution Through UNCLOS* (Bloomsbury, 2019); Michael Bloor et al., 'Enforcement Issues in the Governance of Ships' Carbon Emissions,'(2015) 4 *Laws*, p. 335.

152 There has been extensive scholarly and diplomatic discussion about the extent to which the climate regime's CBDR principle applies to the IMO's climate measures. *See* Kopela, above, note 3, pp. 96–97 (MBM as possible area for synergy between climate change and maritime legal regimes), Bodansky, above, note 7, pp. 13, 15–16 ('the IMO Secretariat is clearly correct that there is no conflict between the UNFCCC's principle of CBDR-RC and the IMO's principle of non-discrimination'; discussing possible legal and design elements for shipping MBM); Saiful Karim, *Prevention of Pollution of the Marine Environment From Vessels* (Springer, 2015), pp. 118–121 (collecting views and proposals of states and industry organizations); Yubing Shi, 'Reducing Greenhouse Gas Emissions from International Shipping: Is it Time to Consider Market-Based Measures?' (2016) 64 *Marine Policy* 123.

153 IMO, 'Report of the Marine Environment Protection Committee on Its Sixtieth Session, MEPC 60th Session, Agenda Item 22,' (22 April 2010), IMO Doc MEPC 60/22, Annex 9.

154 Shi, above, note 151, p. 128 (citing Lavanya Rajamani, *Differentiated Treatment in International Environmental Law* (Oxford 2006), p. 191).

155 Karim, above, note 151, p. 122.

LDCs. And it could apply beyond the IMRB proposal: some IMO member states have proposed the imposition of a $100 per ton fuel levy meant to reduce GHG emissions, and called for the creation of a subsidiary entity within the IMO that would distribute the funds raised by the levy.[156] More broadly, viewing Articles 203 and 278 as obligations would promote constitutionalism and the rule of law within that important international organization by setting legal parameters for how it exercises its authority and discretion.[157]

Conclusion

As I discuss in this article, the IMO is charged with developing uniform regulations for pollution from ships—including greenhouse gases—but the climate regime is founded on the principle that not all states are equally responsible for mitigating climate change, nor do they have the same capacities to do so. The LOSC addresses the differential capabilities of states in the context of environmental regulations in part by requiring international organizations to give preferences to developing states in the allocation of funds under Article 203, and cooperate on the transfer of marine technology so as to encourage developing states' economic and social development pursuant to Article 278.

Although the IMO is not a party to the LOSC and has never accepted these articles as legal obligations expressly and in writing, several factors support viewing them as such. They include that: the IMO participated in the UNCLOS III conference and has an important role under the LOSC as the international organization responsible for establishing regulations for pollution from ships; the IMO Secretary-General has described the provisions as duties or obligations for many decades, and the IMO Council was aware of that view and did not object; and the LOSC's provisions on technical assistance and technology transfer arguably constitute an objective regime, at least as to the IMO.

Thus, accepting that Articles 203 and 278 bind the IMO, the CBDR as it is articulated in the LOSC can bridge the divide between the climate and

156 *See* IMO, 'Proposed draft amendments to MARPOL Annex VI,' (20 August 2021), IMO Doc MEPC 77/7/4, 3; Annex 3, p. 2. The proposal as drafted calls for 51 percent of the levy's proceeds to be directed towards SIDS and LDCs. (*See Id.*, Annex 1, p. 3.)

157 *See* Jan Klabbers, 'International Constitutionalism,' in R Masterman and R Schütze, eds., *The Cambridge Companion to Comparative Constitutional Law* (Cambridge 2019), p. 514; Jose E. Alvarez, *The Impact of International Organizations on International Law* (Brill 2016), pp. 403–404 (discussing need for legal limits on the actions of international institutions).

maritime legal regimes and provide legal parameters for how the IMO implements climate policies for shipping. As Cassese explains, states and international institutions interact in a "marbled structure" where states confer public tasks on organizations but are also "controlled by them and act as their agents, implementers and enforcers."[158] The IMRB proposal illustrates that marbled structure well: the IMO and its agent, the IMRB, would distribute billions of dollars among the IMO's member states and set the terms for how low and zero-carbon shipping technology is disseminated. A similar dynamic may very well develop for a carbon tax or other market-based mechanism for shipping, as those proposals likewise envision the IMO collecting and distributing large sums of money. Re-evaluating the *pacta tertiis* principle and the VCLT-IO as is done here could therefore constitutionalize the IMO, and unify international law more broadly.

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158 Sabino Cassese, 'Governing the World,' in S Cassese, ed., *Research Handbook on Global Administrative Law* (Elgar 2017), p. 506.