THE 1982 UNITED NATIONS LAW OF THE SEA CONVENTION: UNRESOLVED ISSUES REMAIN

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SUMMARY

Despite the 1982 United Nations Law of the Sea Convention (UNCLOS) being generally viewed as one of the major successes of United Nations treaty-making, unresolved issues remain. These range from maritime boundary disputes to straight baselines to artificial islands to military activities in the exclusive economic zone to environmental issues. Four decades have altered the fundamental nature of the regime relating to the law of the sea and have created major implementational challenges. The oceans are becoming more crowded by competitive human activities and, as technology progresses and geopolitical shifts occur, it has become imperative that the unresolved issues be resolved. In so doing UNCLOS's initial vision can be augmented. This article focuses on five of the more problematic unresolved issues.

1 INTRODUCTION

Although the 1982 United Nations Law of the Sea Convention (UNCLOS)[1] (ratified by South Africa on 23 December 1997) is generally accepted as a success story in the history of United Nations (UN) treaty-making, with some 160 states as parties, there are in practice still many unresolved issues.

This article concerns a discussion of five major issues that remain unresolved close on four decades after UNCLOS was concluded. At the signing ceremony on 10 December 1982, the UN Secretary-General Javier Peréz de Cuéllar declared, "International law is now irrevocably transformed, so far as the seas are concerned".[2] However, this "irrevocable transformation" did not result in the disappearance of intractable problems that existed before UNCLOS was signed, and interpretational problems also emerged following the signing of UNCLOS.

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* The author wishes to thank the law library of the University of Western Australia for assisting in the accessing of various materials referred to.

1 1982 21 *ILM* 1261. See Barrie "Exit Mare Liberum: The 1982 Law of the Sea Convention" 1983 9 *SAYIL* 78.

2 *The Law of the Sea: Official Text of the United Nations Law of the Sea With Annexes and Index* (1983) xxiv.

It is not within the ambit of this article to discuss extensively the historical background leading to UNCLOS, nor its contents. This has been done more than adequately elsewhere.[3] The focus of the article is rather on five of the persistent remaining unresolved issues that continue to plague UNCLOS. To place these unresolved issues in context, it is nevertheless opportune to set out a brief holistic overview of the history and contents of UNCLOS.

The First United Nations Conference on the Law of the Sea 1958 (UNCLOS I) followed demands by coastal states to extend their jurisdiction over the natural resources off their ocean borders. UNCLOS I adopted four conventions. These were the Geneva Conventions on the Territorial Sea and Contiguous Zone (TSC);[4] on the High Seas (HSC);[5] on the Continental Shelf (CSC)[6] and on the Fishing and Conservation of the Living Resources of the High Seas.[7] These are generally referred to as the four 1958 Geneva Conventions on the Law of the Sea. UNCLOS I also adopted an optional protocol on the compulsory settlement of disputes, and eight resolutions concerning nuclear tests on the high seas; pollution of the high seas by radioactive materials; fishery conservation; cooperation in conservation measures; killing of marine life; coastal fisheries; historic waters; and the convening of a second UN Conference on the Law of the Sea.

The Second United Conference on the Law of the Sea (UNCLOS II) had no real impact on the four 1958 Geneva Conventions on the Law of the Sea, and newly independent states continued to call for a reassessment of the law of the sea and an extension of their sovereignty over the seas adjacent to their coasts. On 17 December 1970, the UN with General Assembly Resolution 2750 (XXV) decided to convene a third conference in 1973 to adopt a comprehensive convention on the law of the sea. This Third United Nations Conference on the Law of the Sea is known as UNCLOS III. UNCLOS III (1973–1982) was characterised by various features: (i) near-universal participation gave its decisions legitimacy; (ii) the conference was of long duration; (iii) dealing with various issues relating to the ocean in a comprehensive manner was a quantitatively enormous task; (iv) a consensus procedure was followed, which in effect meant no voting took place until all efforts at consensus had been exhausted; (v) most substantive meetings were informal, without records, making it possible to resolve many intractable issues in privately-set-up negotiating groups; (vi) the three committee chairmen were tasked to formulate a single negotiated treaty text; (vii) the consensus formula was abandoned at the final stage owing to

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3 Much has been written on UNCLOS. Among recent works are Rothwell, Elferink, Scott and Stephens (eds) *Oxford Handbook on the Law of the Sea* (2015); Tanaka *The International Law of the Sea* (2016); Walker *Definitions for the Law of the Sea* (2012) and Rothwell and Stephens *The International Law of the Sea* (2016). Of specific relevance to South Africa is Vrancken *South Africa and the Law of the Sea* (2011) and Vrancken and Tsamenyi (eds) *The Law of the Sea: The African Union and Its Member States* (2017). Oxman "The 1982 Convention on the Law of the Sea: An Overview" 1983 69 *American Bar Association Journal* 156 and Sanger *Ordering the Oceans and Making the Law of the Sea* (1987) give a cryptic historical overview of UNCLOS.

4 516 UNTS 205; 1958 52 *American Journal of International Law* 814.

5 450 UNTS 82; 1958 52 *American Journal of International Law* 842.

6 499 UNTS 311; 1958 52 *American Journal of International Law* 858.

7 599 UNTS 285; 1958 52 *American Journal of International Law* 851.

differences of opinion and UNCLOS was adopted on 30 April 1982 by 130 states in favour, 4 against, 18 abstentions and 18 unrecorded.

2 UNCLOS

UNCLOS has four main features. *First*, comprising, as it does, 320 articles and 9 annexes, it covers global marine issues comprehensively and is rightly referred to as the "constitution of the oceans". *Secondly*, the breadth of the territorial waters is limited to 12 miles seaward of a state's territory. *Thirdly*, a compulsory dispute settlement is set out. *Fourthly,* three new institutions are created: the International Seabed Authority; the International Tribunal for the Law of the Sea (ITLOS) and the Commission on the Limits of the Continental Shelf.

Viewed holistically, UNCLOS, by spatially distributing state jurisdiction, has attempted to ensure international cooperation in the oceans by reconciling the various interests of states and protecting the common interests of the international community.

2 1 The Territorial Sea and Contiguous Zone Convention

The 1958 Territorial Sea and Contiguous Zone Convention distinguished between territorial waters and a contiguous zone. UNCLOS contains a number of technical rules on how to delimit these two zones; these are drawn to a large extent from the 1958 Territorial Sea and Contiguous Zone Convention.

According to UNCLOS, every coastal state exercises sovereignty over a belt of sea adjacent to the coast, including its seabed and airspace. This is the territorial sea that is measured seaward from the coast or baselines delimiting the internal waters. Twelve nautical miles is the maximum breadth of the territorial sea. The sovereignty of the coastal state is subject to the right of "innocent" passage for foreign ships. This principle was taken from the 1958 Territorial and Contiguous Zone Sea Convention but UNCLOS describes "innocent" passage in greater detail by prohibiting discrimination based on the flag or destination of a ship and clarifies the right of the coastal state to control pollution. UNCLOS adds a list of activities that are not "innocent passage." It has also extended the contiguous zone adjacent to territorial sea (in which coastal states could under the 1958 Convention prevent and punish infringement of its customs, fiscal, immigration or sanitary laws in its territory or territorial waters) from 12 nautical miles to 24 nautical miles from the coastal baseline.

2 2 The Continental Shelf

The 1958 Convention on the Continental Shelf defined the continental shelf as the area of the seabed and subsoil adjacent to the coast and extending from the territorial sea to where the waters reach a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the

exploitation of the natural resources of the seabed and subsoil. UNCLOS permits a coastal state to establish a permanent outer limit of its continental shelf at either 200 nautical miles from the coastal baseline or the outer edge of the continental margin (the submerged prolongation of the landmass, whichever is further). These elaborate criteria for locating the edge of the continental margin are designed to allocate basically all seabed oil and gas to coastal states. Additionally, UNCLOS gives coastal states effective control over scientific research on the continental shelf, exclusive rights to authorise and regulate drilling, and the right to give consent to the course to be followed by pipelines.

2 3 The Exclusive Economic Zone

Under UNCLOS, every coastal state has the right to establish an exclusive economic zone (EEZ) seaward of the territorial sea and extending to 200 nautical miles from its coastal baseline. Seabed areas beyond the territorial sea and within 200 nautical miles of the coast are subject to the continental shelf and EEZ regimes.

UNCLOS's provisions on the EEZ are extensive and affect an overwhelming proportion of the rights concerning activities in the sea. These rights include the right to control the construction and use of all artificial islands and installations used for economic purposes or which may interfere with the coastal state's exercise of its rights in the EEZ; the right to be informed of and participate in marine research projects and the right to control the dumping of wastes. Rights of all states in the EEZ include the freedoms of the high seas, navigation, overflight and the laying of submarine cables. Flag states must ensure that their ships observe accepted international antipollution regulations. If EEZs or continental shelves overlap, they are to be delimited by agreement between the relevant states on the basis of international law to achieve an equitable solution.

2 4 The High Seas

Similar to the 1958 Convention on the High Seas, UNCLOS does not contain an exhaustive list of the freedoms of the seas. UNCLOS refers to the freedom of navigation, overflight, fishing and the laying of submarine cables and pipelines, the freedom of scientific research and the freedom to construct artificial islands and other installations permitted under international law. The high seas regime places extensive safety and environmental obligations on flag states, and fishing is subject to strict conservation requirements. Whereas the 1958 Convention on the High Seas defined the high seas, UNCLOS states that the high seas encompass all parts of the sea beyond the EEZ, and further that most of the articles referring to the high seas also apply within the EEZ to the extent that they are not incompatible with the articles referring to the EEZ.

2 5 The International Seabed Area

An international seabed area (the "Area") has been created; it comprises the seabed and subsoil "beyond the limits of national jurisdiction" – that is, beyond the limits of the continental shelf subject to coastal state jurisdiction. The Area is declared to be the *common heritage of mankind*. Its principal interest resides in poly-metallic nodules lying at or near the surface of the deep ocean bed. These nodules contain nickel, manganese, cobalt, copper and traces of other metals. The International Seabed Area is open to be used exclusively for peaceful purposes by all states without discrimination. Activities must however be carried out with reasonable regard for other activities in the marine environment.

2 6 Reservations and disputes

UNCLOS requires all parties, without a right of reservation, to submit an unresolved dispute concerning its interpretation, or application at the request of either party, to arbitration or adjudication for a binding decision. There are exceptions to the rule, which for purposes of this article do not need attention. UNCLOS does not allow reservations but does permit declarations and statements. A party may withdraw at any time on one year's notice. Being a compromise document following on great complexities, UNCLOS cannot possibly fully suit all states. It is however the only body of rules related to the use of the oceans that has global legitimacy. The choice before UNCLOS I, UNCLOS II and UNCLOS III was to create imperfect law or no law.

2 7 South Africa and UNCLOS

With its 3 000km long coastline, abundance of marine species off its coast, a seabed containing only partially exploited resources such as natural gas, and sitting on the important sea route around the Cape of Good Hope, South Africa has, for obvious reasons, an intense interest in the implementation and interpretation of UNCLOS.[8]

2 8 Unresolved issues

Although UNCLOS is rightly referred to as the "constitution of the oceans", certain unresolved issues remain. These cover a wide range of issues, which relate constantly to key interpretational and implementational points and often lead to difficult procedural matters arising before the Permanent Court of Arbitration (PCA) (which may arbitrate pursuant to Annex VII of UNCLOS) or UNCLOS's other dispute settlement bodies. The PCA is not a court but is an arrangement to facilitate inter-state arbitrations. It was established pursuant to the Convention for the Pacific Settlement of International Disputes adopted at the 1899 Hague Peace Conference.

[8] See Vrancken *South Africa and the Law of the Sea* in general and Dugard and Tladi in *Dugard's International Law: A South African Perspective* (2018) 539–577.

Unresolved issues relating to UNCLOS that can conceivably be referred to *inter alia* cover maritime boundary disputes; non-state actors making maritime claims; third-party state interventions in maritime claims; innocent passage for warships; straight baselines; the regime of islands; historic maritime rights; military activities in the EEZ during peacetime and environmental issues in general. The complexity of such unresolved issues was aptly illustrated in the *South China Sea Arbitration* (*The Republic of the Phillipines v The People's Republic of China*).[9] This article focuses on five of these unresolved issues, namely: (i) historic maritime rights; (ii) military activities in the EEZ during peacetime; (iii) the regime of islands; (iv) straight baselines and (v) environmental issues. Being the product of various preparatory conferences such as UNCLOS I, UNCLOS II and UNCLOS III, the final adoption of UNCLOS was the result of various compromises, and it was predictable that ambiguous interpretations would result as time progressed. This is precisely what has materialised.

3 HISTORIC RIGHTS

Historic rights can be defined as rights over certain land or *maritime* areas acquired by a state through continuous usage from time immemorial with the acquiescence of other states, although those rights would not normally accrue to it under international law.[10] The International Court of Justice (ICJ) in the *Anglo-Norwegian Fisheries Case*[11] defined "historic waters" as waters that are treated as internal waters but which would not have that character were it not for the existence of an historical title. Once established as historic waters, such waters are thus regarded as *internal waters*; as confirmed by article 2(1) of UNCLOS, a state enjoys full territorial sovereignty over its internal waters, including the complete freedom to determine the status of such waters in domestic law while complying with its international obligations.[12] Foreign ships, for example, do not have a general right to enter internal waters except in limited circumstances. What precisely is meant by "historic rights" in the context of the oceans has become a matter of controversy because the term, despite its importance, remains undefined in

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9 PCA Case No 2013 19. For a synopsis of the South China Sea Arbitration, see Rosenberg and Chung "Maritime Security in the South China Sea: Coordinating Coastal and User State Priorities" 2008 39 *Ocean Development and International Law* 51; Nordquist, Moore and Fu (eds) *Recent Developments in the Law of the Sea and China* (2006).

10 Blum "Historic Rights" in Bernhardt (ed) *Encyclopaedia of Public International Law* (1984) 120. See Booysen *Volkereg en Sy Verhouding tot die Suid-Afrikaanse Reg* (1989) 201; Kohen and Hébié (eds) *Research Handbook on Territorial Disputes in International Law* (2008) 36. The relevance of historic title in modern times was emphasised in *Territorial Sovereignty and Scope of the Dispute (Eritrea Yemen)* First Phase of the Proceedings 1998 XXII RIAA 209 par 7, where the arbitrator of the tribunal was requested to decide the sovereignty dispute between the parties "in accordance with the principles rules and practices of international law applicable to the matter and on the basis of historical title". This arbitration was related to fisheries and the delimitation line of the territorial sea. See Antunes "The 1999 *Eritrea-Yemen* Delimitation Award and the Development of International Law" 2001 50 *International and Comparative Law Quarterly* 299; Kwiatskova "The Eritrea-Yemen Arbitration" 2001 32 *Ocean Development and International Law* 1.

11 42 ICJ Rep 2001 par 212.

12 O'Connell *The International Law of the Sea* (1982) 417.

UNCLOS. This issue is also most relevant to the waters found in bays and is compounded by the fact that "historical bays"[13] are similarly undefined in UNCLOS. As was held in the ICJ in *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*:[14]

> "It seems clear that the matter continues to be governed by general international law which does not provide for a *single* 'regime' for 'historic waters' or 'historic bays,' but for a particular regime for each of the concrete recognized cases for 'historic waters' or 'historic bays'. Basically the notion of historic rights or waters in customary international law ... is based on acquisition and occupation."

This approach was also followed by the ICJ in *Case Concerning the Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras, Nicaragua Intervening*)[15] where the ICJ observed that the regime of historic bays in the case of the Gulf of Fonseca (wherein the waters would allegedly be "historical waters") was *sui generis.* This implies that each historic bay may have its own *distinctive* regime and must be evaluated on a case-by-case basis.[16]

Such an implication can only lead to complications and make it extremely difficult to establish a definitive list of historic bays. It can only further lead to claims to historic bays evoking protests from other states. The most dramatic example of this is the 1973 claim by Libya to the Gulf of Sidra as internal waters when it drew a closing line of approximately 300 miles across that gulf making the gulf, according to Libya, a historical bay. This led to the United States, Australia, France, Germany, Italy, Norway, Spain and other European Community members protesting this claim. It also led to the United States Sixth Fleet conducting military manoeuvres in the proximity of the contested area with two Libyan Sukhoi-22 fighters shot down above the Gulf of Sidra and 24 persons killed in a later confrontation with Libya.[17]

The necessity for clarity on the issue of "historic rights" and historic bays relating to the law of the sea was brought to the fore on 26 June 1998 when China promulgated the Law on the Exclusive Economic Zone and the Continental Shelf, which in section 14 provides that "the provisions of the Law shall not affect the historic rights enjoyed by the People's Republic of China".[18] This section 14 clearly refers to China's claims in the South China Sea. China sees its "historic rights" in the South China Sea as complementary to its general rights under international law and UNCLOS.

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13 Goldie "Historic Bays in International Law" 1984 11 *Syracuse Journal of International Law and Commerce* 205.

14 1982 ICJ Rep 18 74.

15 1992 ICJ 351 384.

16 Roach and Smith *Excessive Maritime Claims* (2012) 50; Symmons *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (2008) 301.

17 Ratner "The Gulf of Sidra Incident of 1981: A Study of Lawfulness of Peacetime Aerial Engagements" 1984–85 10 *Yale Journal of International Law* 59; Spinnato "Historic and Vital Bays: An Analysis of Libya's Claims to the Gulf of Sidra" 1983 16 *Ocean Development and International Law* 65.

18 An English version of this Law is reprinted in Keyuan *China's Marine Legal System and the Law of the Sea* (2005) 342. See Keyuan "Historic Rights in International Law and China's Practice" 2001 32 *Ocean Development and International Law* 162.

These "historic rights" were widely recognised by members of the international community, including the Philippines, *except* that the Philippines denied the existence of China's "historic rights" in the latter's EEZ. Because there was no clear delimitation of a maritime boundary between China and the Philippines, the limit line of the Philippine's EEZ was not clear and the Philippines sought clarity on the issue, including the status of China's "historic rights" under general international law. The Philippines consequently approached the PCA under article 287 and article 1 of Annex VII of UNCLOS. The PCA concluded[19] that China's activities in the South China Sea interfered with the rights of the Philippines in its EEZ. This arbitral award has been most controversial, and China does not recognise it. China also refused to participate in the arbitration. This type of conflict could have been averted if UNCLOS had been clear as to the meaning of "historic rights".

South Africa has not as such made any demands regarding "historic waters" or "historic bays", and because all its bays meet the requirements of article 10 of UNCLOS, which defines a bay as having a closing line of a distance not exceeding 24 nautical miles between the two low-water marks, it would appear the doctrine of "historical bays" has no relevance along the South African coast.[20]

It has become important that the term "historical rights", which includes "historical bays" and "historical waters", be clearly defined. A UN International Law Commission (ILC) study[21] on the juridical status of historic waters completed in 1962 could not come to a conclusive definition and the issue was not incisively discussed at UNCLOS III. According to Zou,[22] UNCLOS deliberately avoids the issue of "historic rights" or "historic waters" and leaves it to be governed by customary international law. The Preamble to UNCLOS specifically declares that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

As illustrated above, claims to historic bays give rise to serious international disputes. At present, article 298(1)(*a*)(i) of UNCLOS states that disputes involving historic bays or titles may be exempted from the compulsory procedure of peaceful settlement of international disputes embodied in Part XV of UNCLOS.[23] This does not augur well for the

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19 *The South China Sea Arbitration supra.* See Dupuy "A Legal Analysis of China's Historic Rights Claims in the South China Sea" 2013 101 *American Journal of International Law* 124; Beckman, Townsend-Gault, Schofield, Davenport and Bernard (eds) *Beyond Territorial Disputes in the South China Sea* (2013) 144; Symmons "Maritime Zones from Islands and Rocks" in Jayakumar, Koh and Beckman (eds) *The South China Sea Disputes and Law of the Sea* (2014) 60; Hayton *The South China Sea: The Struggle for Power in Asia* (2014).

20 Vrancken *South Africa and the Law of the Sea* 92. For a discussion of False Bay see Barrie "Historical Bays" 1973 6 *Comparative and International Law Journal of Southern Africa* 39.

21 UN Doc A/CN4/143 6.

22 Zou "Certain Controversial Issues in the Development of the International Law of the Sea" in Minas and Diamond (eds) *Stress Testing the Law of the Sea* (2018) 171.

23 Tanaka *The International Law of the Sea* 60.

settlement of such disputes. Roach and Smith[24] in 2012 identified 34 historic bays claimed by 19 states as not meeting the international legal standard.

4 NAVIGATION BY WARSHIPS AND MILITARY SURVEY ACTIVITIES IN THE EEZ DURING PEACETIME[25]

Despite the EEZ being a zone of coastal state resource sovereignty and jurisdiction, it is not a zone that gives the coastal state capacity to regulate navigation. Articles 58 and 90 of UNCLOS are clear that every state has the right to sail ships flying its flag on the high seas and that the EEZ is subject to the coastal state's lawful use of its EEZ. In principle, warships thus enjoy freedom of navigation within the EEZ of coastal states. When UNCLOS was concluded, however, some states were of the opinion that article 301, which provides for the peaceful uses of the oceans, may be limited regarding the activities of foreign warships. Brazil,[26] in its ratification of UNCLOS, asserted that article 301's reference to "peaceful uses of the oceans" applied in particular to maritime areas under the sovereignty or jurisdiction of the coastal state and that consequently states were not to conduct military exercises or manoeuvres in such areas.

This interpretation has been contested by states such as the United States, the United Kingdom, Italy and the Netherlands; they maintain that article 58(1) of UNCLOS states that the rights enjoyed by coastal states in their EEZs are subject to the freedoms referred to in article 87, which relate to navigation, overflight, laying of submarine cables, pipelines and other lawful international uses of the sea. These states hold the view that the freedoms of the seas associated with the operation of ships *imply* the legality of naval manoeuvres in a foreign state's EEZ in peacetime. It is also submitted by such states that military exercises and activities of military aircraft such as aerial reconnaissance fall under the freedoms of the seas conditional on the rights and interests of third states. The United States protested against provisions of the Iranian Marine Areas Act 1993, which sought to place limitations on foreign warships within the EEZ on the grounds that the freedom of navigation by foreign warships was being constrained.[27] The argument is also put forward that because UNCLOS does not specifically prohibit military uses of the oceans in the EEZ in peacetime, it is permissible and should be regulated by customary international law. So viewed, military activities in the EEZ must be seen to be a historically lawful use of the oceans. Contrary to the above arguments, states such Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, Uruguay and

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[24] Roach and Smith *Excessive Maritime Claims* 36.

[25] See Vrancken *South Africa and the Law of the Sea* 414 for examples of the varied military uses of the ocean in peacetime. In cases of international armed conflict, a different body of treaty and customary law applies.

[26] Rothwell and Stephens *The International Law of the Sea* 296.

[27] Van Dyk "Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country" 2004 28 *Marine Policy* 29; Kaufman "Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflicts" 2002 32 *California Western International Law Journal* 253.

India submit that if UNCLOS does not expressly mention military uses of the ocean within the EEZ, it cannot be lawful. It seems incomprehensible to accept that article 246(2) of UNCLOS requires the consent of a coastal state for marine research within its EEZ but that it does not refer to military activities within the EEZ of another state.

A further aspect of naval operations in a third state's EEZ that has been contentious is that of military survey activities or scientific research. Such activities may gather innocuous oceanographic data or may attempt to secure data relating to military intelligence. Must such activities be seen to fall under article 246 of UNCLOS (which refers to legitimate marine scientific research) or does such research fall under article 87 (which grants high seas freedoms that are also enjoyed within the EEZ)? The legality of such military and hydrographic surveys in another state's EEZ without its authorisation remains highly debatable. Military surveys raise particular sensitivities associated with the national security of coastal states. The United States and the United Kingdom take the position that military surveys may be undertaken freely in the EEZ without the authorisation of the coastal state. China is of the view that military surveys in the EEZ are subject to the regulation of the coastal state.[28] The difference in these positions is practically illustrated by two incidents. In March 2001, an unarmed hydrographic survey ship USNS *Bowditch* was confronted by a Chinese naval frigate and ordered to leave the EEZ. The *Bowditch* complied but returned a few days later accompanied by an armed United States naval escort. In March 2009, the United States ocean surveillance ship USNS *Impeccable*, which was undertaking military survey activities in China's EEZ, was surrounded and harassed by five Chinese vessels. The *Impeccable* withdrew but returned to the same area under the escort of a United States guided-missile destroyer. The United States protested these incidents. China responded by asserting that the *Bowditch* and the *Impeccable* were operating in the Chinese EEZ in violation of international and Chinese Law.[29] Hydrographic and military survey activities in the EEZ of another state, owing to their highly political nature, strongly affect the interests of coastal states.[30] What is the dividing line between scientific research and military surveys? It seems at present that disputes on these issues will remain unresolved.[31]

5 THE REGIME OF ISLANDS

According to article 121(1) of UNCLOS, an island is "a naturally formed area of land surrounded by water, which is above water at high tide". According to

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[28] Tanaka *The International Law of the Sea* 369.

[29] Pedroza "Close Encounters at Sea: The USNS *Impeccable* Incident" 2009 62 *Naval War College Review* 101.

[30] Bateman "Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research" 2005 29 *Marine Policy* 167.

[31] Franckx "American and Chinese Views on Navigational Rights of Warships" 2011 11 *Chinese Journal of International Law* 187. For South Africa's approach to the military uses of its EEZ in peacetime, see Vrancken *South Africa and the Law of the Sea* 414–419.

article 121(2), the normal baseline[32] around all islands is the same as the normal baseline used off the mainland. According to article 121(3), that baseline may be used to determine territorial waters, the EEZ, the continental shelf and the contiguous zone of the island. A proviso,[33] however, is that the "island" must be able to "sustain *human habitation or economic life of its own*". This means that rocks that cannot sustain human habitation or economic life of their own do not have territorial waters or EEZs or continental shelves or contiguous zones.

The interrelationship between the test for "economic life" and "human habitation" is not free of controversy. A literal interpretation suggests that the text of article 121(3) provides for a test requiring either "human habitation" *or* "economic life of its own". That would mean that only one of these tests must be met. It could also be argued that the phrase is a *single* concept. In support of the latter interpretation, it could be submitted that it is difficult to imagine economic life detached from human life and hence the two elements are intertwined.

UNCLOS does not elaborate as to the *extent* to which a piece of land surrounded by water and above water at high tide can be regarded as an island. This has created problems, with "island" being interpreted extremely broadly to include even permanently submerged features such as rocks. Some states go to extreme attempts to define small pieces of maritime land as being islands. These various interpretations of "island" have caused some controversy, as emerged in the *South China Sea Arbitration*.[34]

The *South China Sea Arbitration* was confronted with these issues. It is beyond the ambit of this article to discuss this arbitration in detail as it has been adequately done elsewhere; what follows is a brief review of the *South China Sea Arbitration*'s views on what constitutes "human habitation" and what constitutes an "economic life of its own". These two terms in article 121(3) remain prone to different interpretations. According to the *South China Sea Arbitration*, a critical factor for "human habitation" is the *non-transient* character of the habitation, such that the inhabitants can fairly be said to constitute the natural population for whose benefit the resources of the island's exclusive economic zone are seen to merit protection. The habitation must be a stable community of people for whom the feature constitutes a home on which they can remain.[35] Regarding "economic life of its own", the South China Sea Arbitration linked it to human habitation and held that the economic life will ordinarily be the life and livelihoods of the *human population* inhabiting the "maritime feature". Economic life must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea. Extractive economy activity to harvest the natural resources of a feature for the benefit of a population

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[32] A normal baseline may not depart from the general direction of the coast. In the *Anglo-Norwegian Fisheries* case ICJ Rep 1951 127 par 128, the ICJ held that the belt of territorial waters must follow the general direction of the coast. This is the basic principle governing the baseline. Exceptions are referred to below.

[33] See the judgment of ITLOS Vice-president Vukas in *Volga (Russian Federation) v Australia* 2002 ITLOS Reports 10; 2003 42 *ILM* 159.

[34] *Supra* par 542.

[35] *South China Sea Arbitration supra* par 543.

elsewhere cannot reasonably be considered to constitute the economic life of the island as its own.[36] Importantly, the *South China Sea Arbitration* also held that a feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does *not* meet the requirements of being an "island" as referred to in article 121(3) of UNCLOS. In a nutshell, the tribunal held that a lack of vegetation, drinkable water and other items needed for survival would make human habitation impossible.[37]

Smith[38] states that the *South China Sea Arbitration* pointed out that state practice indicated excessive, if not abusive, interpretations of what constitutes an "island" as referred to article 121(3) of UNCLOS.

One problem that emerged after the signing of UNCLOS relates to "artificial islands". Article 60 of UNCLOS states that "[a]rtificial islands, installations and structures do not possess the status of islands". Thus, they have no territorial sea, EEZ or continental shelf of their own. Article 67 of UNCLOS declares that the rights of coastal states with regard to artificial islands are limited to those parts of the EEZ where no interference is caused to the use of recognised sea lanes essential to international navigation. Not being more specifically defined, an "artificial island" has in state practice been interpreted extremely broadly. Some states such as China and Malaysia have built large artificial islands on rocks and reefs. Malaysia has an artificial island consisting of a fishing port and a 1.5 km airstrip.[39] China and Japan, in order to extend their maritime spaces, are making use of article 121(3) of UNCLOS to turn "rocks" into "islands" that can fulfil the conditions of sustaining "human habitation" or "economic life on their own". The result is that an artificial island built on a rock or a reef may be seen to be an "island" that can consequently generate its own territorial sea, EEZ and continental shelf whereas a "rock" could not. This type of activity could be seen as tantamount to territorial accretion and is creating international concern.[40]

Being undefined, artificial islands vary from those found in offshore-Dubai to much smaller installations used solely for scientific research elsewhere. State practice is not uniform when it comes to the reasons for building artificial islands. Under article 60 of UNCLOS, a coastal state has exclusive jurisdiction to construct and operate artificial islands for *economic purposes* in its territorial sea, its EEZ or on its continental shelf. Such islands may also be built for exploration or marine scientific research. "Economic purposes" is not defined. Brazil, Cape Verde and Uruguay claim that coastal states have the right to construct artificial islands, whatever their nature and purpose. By contrast, Germany, Italy, the Netherlands and the United Kingdom hold the view that a coastal state has the right to build artificial islands for economic

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36 *South China Sea Arbitration supra* par 547.

37 See Zou in Minas and Diamond (eds) *Stress Testing the Law of the Sea* 171 186.

38 Smith "Maritime Delimitation in the South China Sea; Potentiality and Challenges" 2010 41 *Ocean Development and International Law* 223.

39 See Tanaka *The International Law of the Sea* 132–134, 149–150; Papadakis *The International Regime of Artificial Islands* (1977); Molenaar "Airports at Sea: International Legal Implications" 1999 14 *International Journal of Marine and Coastal Law* 371.

40 Vrancken *South Africa and the Law of the Sea* 182–186.

purposes only. In practice, one finds artificial islands, besides those used for scientific research, built for purposes such as tide observations, resorts or residences, air terminals, transportation centres and traffic control.[41]

The removal of artificial islands or similar installations poses problems. Once removed, how are they to be disposed of? In the North Sea area alone, there were at one stage approximately 400 steel and concrete installations with a mass of 8 million tons and using 18 370 kms of pipeline. In 1991, Shell UK decommissioned the *Brent Spar* and planned to dispose of it at sea off the northwest coast of Scotland, after obtaining a British permit. Greenpeace protesters, however, occupied the *Brent Spar* in May 1995, complaining about possible pollution from waste in the installation. This led to consumer boycotts of Shell products and the company abandoned its plan. In 1995, the United Kingdom and Norway agreed that the *Brent Spar* could be temporarily moored in a fjord off western Norway but remain registered as a British offshore installation. The *Brent Spar's* hull was eventually cleaned and sliced with the slices reused in a quay extension in Mekjarvik, Norway.

South Africa's two main islands are Prince Edward Island and Marion Island. Each island can sustain human habitation owing to the availability of fresh water and food, and South Africa uses the low-water line around each island to determine its territorial sea, EEZ and continental shelf. According to Vrancken[42] there is no reference to artificial islands in South African law but problems could arise if they were to be built close to the landward side of these islands, compelling vessels to navigate further south.

6 STRAIGHT BASELINES

According to article 5 of UNCLOS, the baseline from which all the maritime zones are measured (such as, for example, the territorial sea, contiguous zone and EEZ) is the low-water line along the coast. According to article 7(1) of UNCLOS, under "normal circumstances" a baseline must not depart to any appreciable extent from the "general direction of the coast". Article 14 of UNCLOS however allows states to determine their baselines by methods *other* than the *"normal"* baseline if *special conditions* are present. Such special conditions are alluded to in article 7(1) and (2) of UNCLOS, such as for example where the coastline is "deeply indented and cut into";[43] if there is a *fringe of islands* along the coast in its "*immediate vicinity"* or where the

[41] See Walker *Definitions for the Law of the Sea* 104.

[42] Vrancken *South Africa and the Law of the Sea* 182. In the United States, the Outer Continental Shelf Act 1953 provides that the laws of the United States extend to all artificial islands and installations attached to the seabed erected for the purpose of *inter alia* producing resources. See Gaudet "The Application of Louisiana's Strict Liability Law on the Outer Continental Shelf: A Quandary for Federal Courts" 1982 28 *Loyola Law Review* 101.

[43] The term "deeply indented and cut into" comes from the *Anglo-Norwegian Fisheries Case* 1951 ICJ Rep 116 par 128, which related to the coastline of Norway, which has countless fjords. See Evenson "The Anglo-Norwegian Fisheries Case and Its Legal Consequences" 1952 41 *American Journal of International Law* 609; Green "The Anglo-Norwegian Fisheries Case" 1952 15 *Modern Law Review* 373; Johnson "The Anglo-Norwegian Fisheries Case" 1952 1 *International and Comparative Law Quarterly* 145; Waldock "The Anglo-Norwegian Fisheries Case" 1951 28 *British Yearbook of International Law* 114.

presence of a delta and other natural conditions make the coastline unstable. South Africa follows the "normal baseline" approach along most of the Atlantic Ocean coast as well as along most of the Indian Ocean coast. However, where straight baselines have been drawn, they all fall within one of the exceptions set out in article 7(1) and (2) of UNCLOS.[44]

There is however a substantial body of state practice that does *not* conform to the normal approach (which demands that the baseline must not depart to any appreciable extent from the direction of the coast) and uses *straight* baselines instead. The latter practice, especially in East Asia, is becoming more common than the use of "normal baselines." States that have been criticised for this are China, the Republic of Korea, Japan, Taiwan and Vietnam. By using straight baselines, states can extend the area of their territorial seas and economic zones. An example is China's straight baseline from the Shandong peninsula to the Shanghai area, which covers an area of few indentations and no fringing islands. It has been persuasively submitted that a straight baseline method should not apply in this instance.[45] This practice is becoming extremely controversial and is being challenged by other states and could lead to major maritime disputes and conflicts.

These problems are caused by the ambiguity of the criteria laid down for the drawing of straight baselines. There is no objective test to identify "deeply indented" coasts, or for what constitutes a "fringe of islands". How is a coast's "immediate vicinity" to be determined? Do straight base lines have a maximum length? Myanmar, for example, has established a 222.3 mile straight baseline across the Gulf of Martaban and thereby enclosed 14 300 square miles of ocean as internal waters. Vietnam draws a 161.3 mile straight baseline between Bay Canh Islet and Hon Hai Islet. There is similarly no objective criteria to determine "the general direction of the coast".

Because rules governing straight baselines are so abstract, the rules have to a large extent become subject to the discretion of coastal states, which consequently, as seen above, make excessive straight baseline claims. The view of the ICJ in the *Qatar/Bahrain* case[46] was that the rules relating to the drawing of straight baselines should be applied restrictively.[47] This case is an example of where the International Court of Justice had to rule on the validity of a state's straight baseline claims owing to interpretational problems.

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[44] Prescott "Publication of a Chart Showing the Limits of South Africa's Claims" 1999 14 *International Journal of Maritime and Comparative Law* 559; Vrancken *South Africa and the Law of the Sea* 85–90.

[45] Reisman and Westerman *Straight Baselines in International Maritime Boundary Delimitation* (1992) 133; Roach and Smith "Straight Baselines and the Need for a Universally Applied Norm" 2000 31 *Ocean Development and International Law* 65; Oxman "Drawing Lines in the Sea" 1992 18 *Yale Law Journal* 663.

[46] ICJ Rep 2001 103 par 212; 2001 40 *ILM* 847.

[47] See Roach and Smith *Excessive Maritime Claims* 72–133 for examples of excessive maritime claims.

7 ENVIRONMENTAL ISSUES

A feature of the period following the conclusion of UNCLOS has been the setting out of norms and principles that reflect international priorities for managing the oceans. The majority of these principles have a strong environmental dimension and relate to sustainable use and development, the duty to prevent transboundary environmental damage, integrated oceans management and protecting marine ecosystems.[48] These principles have not been prioritised and consequently there are different views as to what weight each must be accorded. Given the lengthy period that has elapsed since the Rio Declaration adopted at the UN Conference on Environment and Development in 1992,[49] it is imperative that these principles be consolidated in a single instrument,[50] especially in the context of the oceans. UNCLOS would be the ideal instrument for such consolidation. Broadly, the most important environmental principles alluded to in UNCLOS are the protection and preservation of the marine environment and the prevention of transboundary harm; the principle of cooperation; the principle of the common heritage of mankind; the polluter-pays principle; the precautionary principle; the principle of evaluating likely environmental impacts on activities and the principle of sustainability. These principles are briefly referred to to emphasise their importance when it comes to their environmental significance and the need to get clarity on their meaning.

The principle of preventing *transboundary* environmental damage in a maritime context has not yet been directly applied by an international court or tribunal. It has been implied by the ICJ in the *Nuclear Test Cases*,[51] by ITLOS in the *MOX Plant Case*[52] and the *Straits of Johor Case*,[53] and by the Seabed Disputes Chamber of ITLOS in *Seabed Mining Advisory Opinion*.[54] In the latter case, it was held that article 194(2) of UNCLOS (which refers to transboundary environmental harm) creates an *obligation* of due diligence.[55] This was a significant decision of the Seabed Disputes Chamber of ITLOS. The Seabed Disputes Chamber has a central role in mining disputes with respect to exploration for or exploitation of minerals in the “Area”. The Seabed Disputes Chamber, acting under articles 186–191 of UNCLOS, may act as a commercial court hearing disputes between parties to a mining contract or may exercise a review function in considering whether the Seabed Authority has exceeded its jurisdiction. It may also render advisory opinions at the request of the Seabed Authority’s Assembly or Council.

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48 For UNCLOS and South Africa’s duties to protect and preserve the marine environment, see Vrancken *South Africa and the Law of the Sea* 350–405.

49 UN General Assembly A/Conf.151/26 (Vol II), 12 August 1992.

50 Freestone “Principles Applicable to Modern Oceans Governance” 2008 23 *International Journal of Marine and Coastal Law* 385.

51 *Nuclear Tests (Australia v France)* 1974 ICJ Rep 457.

52 *MOX Plant (Ireland v United Kingdom)* 2002 41 *ILM* 405.

53 *Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore)* 8 Oct 2003 www.itlos.org.

54 2011 50 *ILM* 458.

55 *Seabed Mining Advisory Opinion supra* par 113.

Considering that fish are no respecters of national jurisdictions, it has been realised for a long time that *cooperation* between states is imperative when it comes to governing the sea. This was emphasised in the *Fisheries Jurisdiction (United Kingdom v Iceland)* case[56] where the ICJ held that there is a duty to have regard to the rights of other states on the issues relevant to conservation. The ICJ saw this duty as an obligation on states to act together when deciding on measures required for conservation and development of fishery resources. In the *MOX Plant* case,[57] ITLOS held that there is a *duty* to cooperate in the prevention of pollution of the marine environment under part XII of UNCLOS.

The principle of the "common heritage of mankind"[58] was given legal force in UNCLOS for the first time, bolstered by an institutional structure to give it effect.[59] A problem however is that the *common heritage of mankind principle* in the context of UNCLOS *only* applies to *mineral resources* found in the "Area" and is not a general principle relating to other open access oceanic resources. Should it not in some instances be extended further to encompass further defined living resources found in the high seas?

The *polluter-pays principle,* which is to the effect that the costs of pollution should be borne by the polluter, is not directly mentioned in UNCLOS. It may be implicit for example where article 235(2) of UNCLOS declares that states must see to prompt and adequate compensation for damage caused to the marine environment by pollution. Despite the fact that the polluter-must-pay principle is referred to in other environmental conventions, it does not seem to be rational that it is not specifically provided for in UNCLOS.

The *precautionary principle*, largely as a result of the 1992 Rio Declaration and Agenda 21 (which discusses the oceans from a global environmental perspective), has become an important principle in the context of the marine environment. The precautionary principle is a key element that focuses on a new dimension in international law with the goal of protecting the marine environment and the conservation of marine species. Traditionally, there was an obligation to prevent transboundary harm once convincing evidence was presented that harm may occur. The precautionary principle, however,

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[56] 1974 ICJ Rep 3 par 72.

[57] *MOX Plant (Ireland v United Kingdom) supra* par 82–84. See Devine "Provisional Measures Ordered by the International Tribunal of the Law of the Sea in the Area of Pollution" 2003 28 *South African Yearbook of International Law* 263. Kwiatkwska "The Ireland v United Kingdom (MOX Plant) Case: Applying the Doctrine of Treaty Parallelism" 2003 18 *International Journal of Marine and Coastal Law* 1.

[58] Art 136 of UNCLOS declares that the "Area" and its resources are the common heritage of mankind. The "Area" referred to is the seabed and ocean floor, and the subsoil thereof, *beyond* the limits of national jurisdiction as well as the resources of the "Area". All rights in the resources of the "Area" are vested in mankind as a whole on whose behalf an "Authority" shall act by virtue of article 137(2) of UNCLOS. The principle of the common heritage of mankind has three elements. First, the "Area" and its natural resources may not be appropriated. Secondly, any activities in the "Area" shall be carried out for the benefit of mankind. Thirdly, the "Area" shall be open to use exclusively for peaceful purposes. See Schmidt *Common Heritage or Common Burden?* (1989).

[59] Art 153(1) of UNCLOS provides that activities in the "Area" shall be controlled by the International Seabed Authority on behalf of mankind. All states parties to UNCLOS are parties to the International Seabed Authority, which consists of the Assembly, the Council, the Secretariat and the Enterprise.

calls for action even when there is uncertainty regarding the specific degree of risk concerning the environmental harm. In the *Southern Bluefin Tuna* case,[60] ITLOS granted provisional measures under article 290 of UNCLOS to restrain Japan from undertaking an experimental fishing programme and encouraged the parties to act with caution to ensure effective conservation measures. The majority of ITLOS did *not* however hold that the precautionary principle is a *legal* concept. Including the precautionary principle in UNCLOS would make the principle a binding concept.

Related to the precautionary principle is the *environmental impact assessment* (EIA) issue, which aims to evaluate the possible environmental effects of a *proposed* activity. It has become generally recognised that an EIA should take place at an earlier stage than the developmental stage; it should take place at the stage of the *origination* of the proposed activity and should be an obligation set out in UNCLOS. This was suggested by the Seabed Dispute Chamber in its *Seabed Mining Advisory Opinion.*[61]

Sustainable development can be seen as development that meets the needs of the present without compromising future generations' ability to meet their needs. Axiomatically, humanity's involvement with the ecological and economic development of the oceans is engaged. The ICJ encapsulated this basic idea in the *Gabcikova-Nagymaros Project* case.[62] Various treaties and non-binding agreements relating to the conservation of marine living resources are introducing the concept, such as in section 2 of the 1995 UN Fish Stocks Agreement[63] and section 7.2.1 of the 1995 Code of Conduct for Responsible Fisheries.[64] Despite these developments, there is no uniform understanding of the principle of sustainable development and considerable uncertainty about the principle's normative contents. Because the extent to which the principle can legally bind states is debatable, it is imperative that the principle of sustainable development be set out in greater detail in UNCLOS.[65] The UN Secretary General's 2015 report[66] on oceans and law of the sea focused specifically on the influence of sustainable development on the oceans, referring to the principle's three dimensions – environmental, social and economic – and saw these as being at the core of UNCLOS.

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[60] *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* 1999 117 ILR 148 par 77. See Boyle "*The Southern Bluefin Tuna Arbitration"* 2001 50 *International and Comparative Law Quarterly* 447; Romano "The *Southern Bluefin Tuna* Dispute: Hints of a World to Come ... Like it or Not" 2001 32 *Ocean Development and International Law* 313; Morgan "Implications for the Proliferation of the International Legal Fora: The Example of the *Southern Bluefin Tuna* Case" 2002 43 *Harvard International Law Journal* 541; Marr *The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law* (2003).

[61] 2011 50 *ILM* 458 par 145.

[62] 1997 ICJ Rep par 78.

[63] 2167 UNTS 1996. The full title is the UN Agreement for the Implementation of the UN Convention on the Law of the Sea 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

[64] See Tanaka *The International Law of the Sea* 249 for further examples.

[65] Lowe "Sustainable Development and Unsustainable Arguments" in Boyle and Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (1998) 26; Zou (ed) *Sustainable Development and the Law of the Sea* (2006).

[66] *Oceans and the Law of the Sea, Report of the Secretary-General* UN Doc A/70/74 (2015) par 5.

8 CONCLUSION

The discussion above has only touched briefly on five conspicuous unresolved issues relating to UNCLOS. These unresolved issues should not be allowed to remain unresolved as they could lead to serious confrontations between states. Historic waters must be defined more specifically because such waters are regarded as internal waters. Conflicting views on the use of the EEZ of third states for military activities in peacetime could lead to a conflagration in a short time. A more precise definition of an island, and especially artificial islands, is clearly called for owing to possible abuse of the interpretation of such features. The same applies to straight baselines, as interpretation can be used to extend the jurisdiction of coastal states relative to the ocean. The *South China Sea Arbitration* was seized with the latter two issues. The vastly different approaches by the parties to the issues, and different reactions of the parties to the ruling, bear witness to the need for comprehensive resolution of these issues. The same applies to environmental issues, the principles relating to the common heritage of mankind, the polluter-pays principle, the precautionary principle, EIA and sustainable development.

These serious unresolved issues in UNCLOS call for review and reform. A modification of UNCLOS is essential to its longevity. This can be done in four main ways.[67] First, there is the mechanism previously adopted for the 1994 Implementation Agreement,[68] which was adopted by the UN General Assembly; it modified the effect of Part XI of UNCLOS and facilitated the ratification of UNCLOS by industrialised states. Secondly, the mechanism used with the 1995 Fish Stocks Agreement[69] elaborated on provisions concerning the conservation and management of fish stocks provided in Parts V and VII of UNCLOS. There is nothing to stop similar agreements being negotiated in the future. Thirdly, UNCLOS provides for formal amending procedures in articles 312, 313 and 314. Articles 312 and 313 deal with general amendments to UNCLOS, except those dealing with the deep seabed. Article 312 provides for a review conference. Article 313 provides for a simplified procedure to review UNCLOS that dispenses with the need for a conference. Article 314 provides for amendments to the deep seabed regime. Fourthly, reference can be made to the potential of the UN Secretary-General to convene a Meeting of States Parties to the United Nations Convention on the Law of the Sea (SPLOS) and to take on a more substantive role in reviewing UNCLOS. The UN Secretariat contains a Division for Ocean Affairs and the Law of the Sea (DOALOS), which is part of the UN Office of Legal Affairs. DOALOS could conceivably play a more prominent role in suggesting that UNCLOS be reviewed by emphasising the unresolved issues.

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[67] A more extensive exposition of ways to modify UNCLOS is set out by Tanaka *The International Law of the Sea* 32–38.

[68] 1836 UNTS 1996.

[69] 2167 UNTS 1996.