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## The Ocean Governance Regime

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## 2

# The Ocean Governance Regime

## *International Conventions and Institutions*

ELIZABETH MENDENHALL

### **Introduction**

Like the ocean itself, the international institutions and organizations tasked with governing maritime activities are sprawling and complex. The contemporary ocean governance regime comprises the rules, norms, principles, and decision-making procedures designed to collectively manage the myriad users and multiple uses of the Earth's oceans. The regime itself has a rich and storied history, culminating in a flurry of regime-building activities in the second half of the twentieth century. In general, ideas about the collective governance of ocean space emerged alongside growth in human activities on and under the seas, and as the intensity of uses increased, so, too, did the calls for formulating international consensus about the status of marine space and maritime resources. This chapter reviews the historical development and contemporary status of the ocean governance regime. It lays the foundation for deeper analyses of climate change and ocean governance in subsequent chapters.

### **Customary International Law**

The basic principles of contemporary ocean governance evolved out of centuries of state practice and jurisprudential debates, especially among the early modern Europeans, who elaborated and systematized customary international laws of the sea. Although Hugo Grotius is widely touted as the progenitor of the "freedom of the seas" principle, this concept has important antecedents in the ancient Indian Ocean trading system and Roman ideas about the status of the Mediterranean (Anand, 1983). A competing principle – the idea of a territorial sea that is owned and/or controlled by a coastal state – can be traced back to medieval claims over coastal European seas, and early modern declarations of dominion over broad swaths of the Atlantic by English and Iberian powers (Fulton, 1976). In his later works Grotius himself contributed to the idea that any area that could be physically controlled could be politically claimed, and this more limited notion of the territorial sea became embedded in state proclamations and practice starting in the eighteenth century. The contemporary ocean governance regime reflects a balance or compromise between these two competing principles: freedom of the seas and territorialization.

Another centuries-old customary international law of the sea is the practice of national flagging, whereby each ship must fly the national flag of the state under whose jurisdiction it falls. Although flags and other banners had been used as symbols of affiliation since ancient times, the practice of national registration originated in early modern Europe as part of taxation schemes related to maritime trade and was first codified by the British (Mansell, 2009). The “flag state” norm developed in part through efforts to control and eradicate piracy and privateering during the modern period. The national flag requirement aided in the identification of pirates, while defining the flag as a symbol of sovereign jurisdiction, but not sovereign violence, was a key part of the de-legitimization of privateering (Thomson, 1994).

Although these customary international laws are reflected in the contemporary ocean governance regime, the bulk of what we now call the “law of the sea” was negotiated and adopted by the international community in the last century. After World War II, increasing ocean use prompted a series of unilateral national claims and caused several visible environmental and ecological disasters. The need for more detailed and comprehensive rules became apparent, and under the auspices of the United Nations, the international community constructed a detailed and weighty architecture to manage the ocean. In particular, the United Nations Convention on the Law of the Sea (UNCLOS) serves as a framework or umbrella institution for ocean governance by empowering, coordinating and complementing other agreements related to maritime activities. This chapter will review this and other basic components of the contemporary ocean governance regime, focusing on the institutions (bodies of rules and norms), organizations (empowered agencies) and legal instruments tasked with achieving shared interests and solving collective problems in the vast ocean.

### **International Organizations**

Several international agreements related to ocean governance were negotiated and implemented prior to UNCLOS, but most were eventually subsumed or replaced by it. Two important exceptions are the International Whaling Commission and the International Maritime Organization, which have evolved and grown alongside and complementary to the UNCLOS-centered ocean regime. These organizations are referred to indirectly in the UNCLOS text as “competent international organizations” through which the duties of state parties can be pursued and fulfilled.

#### ***International Whaling Commission***

The International Whaling Commission (IWC) was established as a voluntary membership organization in 1946, with the goal of developing the commercial whaling industry while avoiding unsustainable whaling practices. In the first several decades of its operation, the IWC failed to prevent the serial collapse of whale populations. Its single global quota system (undivided by states) encouraged over-capitalization

by whalers competing for a diminishing number of whales (Kalland and Moeran, 1992: 12). Specific quotas were difficult to set and enforce. The IWC depended on unreliable catch information provided by whalers themselves, and cetologists (zoologists who study whales and dolphins) had neither the data nor the consensus models required to make authoritative statements about the status of whale stocks (Peterson, 1992: 161).

In the 1970s, major shifts in the membership and institutional structure of the IWC changed this approach to the management of whaling. In 1972, the Stockholm Conference adopted Resolution 33, calling for a ten-year moratorium on commercial whaling. The United States presented this idea to the IWC, where it was rejected (Miyaoaka, 2013: 31). Instead, in 1974 new procedures in the IWC Scientific Committee mandated the collection of more data and refinement of scientific models in order to strengthen the relationship between scientific information and decision making (Peterson, 1992: 164). During the late 1970s and early 1980s, a successful campaign by environmentalists and anti-whaling governments, especially that of the United States, encouraged more states to become IWC members. Although many of these states joined for domestic reasons, their presence tipped IWC decision making in favor of non-whaling states and anti-whaling interests (Stoett, 1997: 66). By 1982, the majority of IWC members had no involvement in whaling, thereby shifting the balance of opinion against whaling. The IWC voted to introduce a moratorium on commercial whaling starting in 1986.

The moratorium on commercial whaling persists today, although several whaling states have taken advantage of options to avoid compliance. The IWC rules allow violations in the case of formal objections. These have been filed by several states. The moratorium also contains an exception for whaling for the purposes of scientific research. This has been claimed by Japan, Iceland, and Norway, although the scientific merit of their whale kills is dubious. Another exception is aboriginal subsistence whaling, which takes place in Greenland, Russia, the United States and St. Vincent and the Grenadines. Despite these exceptions, the IWC moratorium on commercial whaling is understood to be durable, and a return to large-scale whaling appears to be inconceivable in contemporary society (Stoett, 1997: 77). The IWC remains the central institution for whaling issues, a status reaffirmed in Article 65 of the UNCLOS.

### *International Maritime Organization*

The International Maritime Organization (IMO) is an inter-governmental organization and a specialized regulatory agency of the United Nations. In 1948, the fledgling United Nations drafted a convention to establish the Inter-Governmental Maritime Consultative Organization (IMCO), which entered into force in 1958. The goals outlined in the founding convention focused on promoting free access and non-discrimination in international shipping, with a secondary interest in maritime safety. The convention has been modified several times to clarify and extend the organization's purview and to alter its functions in line with changes in shipping

technology and the interests of member states. In the late 1970s, amendments to the convention deleted the article that described IMCO functions as merely “consultative and advisory,” added the prevention of marine pollution to the list of goals and changed the name of the IMCO to the “International Maritime Organization.”

The IMO enjoys broad participation. In addition to 172 member states, 79 international non-governmental organizations have consultative status. The Assembly is the IMO’s plenary body and its highest level of decision making, which includes all member states and meets every two years. The Council is the executive organ of the IMO, and its 32 member states manage ongoing business between Assembly sessions. Council members are chosen by the Assembly using specific criteria to ensure representation of states with significant interests in providing and utilizing international shipping services, and also geographical representation. Similar mechanisms to ensure appropriate representation of interested parties are found throughout the IMO institutional structure. Annual membership dues are calculated using a formula that emphasizes the tonnage of the registered merchant fleet. Many international agreements negotiated under the auspices of the IMO have a “double ratification threshold,” such that a sufficient number of states representing a specific proportion of global registered shipping must ratify an agreement before it enters into force (DeSombre, 2006: 74).

The IMO has been described as “quasi-legislative” because it issues codes and recommendations to its members in addition to sponsoring and hosting inter-governmental negotiations and supporting implementation of resulting international conventions (Chircop, 2015: 429). Within the usual functioning of the organization, IMO member states drive the creation of guidelines, regulations and rules through a system of committees and sub-committees. All member states may become members of five main committees: Maritime Safety, Marine Environment Protection, Legal, Technical Cooperation, and Facilitation. A large number of sub-committees take on technical work, and within these, non-governmental observers advocate for specific interests and provide technical expertise (Chircop, 2015: 425). The ongoing process of updating maritime rules and regulations is facilitated by the IMO’s use of a “tacit acceptance procedure” for amendments to many of its conventions (Biermann, 2014: 182). Under this procedure, an amendment automatically enters into force unless a specified number of parties to the original agreement object before a certain date.

The IMO plays a unique role in the ocean governance regime. Its policies shape the balance between the rights of coastal states and the “freedom of the seas” principle (Chircop, 2015: 418). For example, the IMO is responsible for evaluating and adopting ship routing schemes proposed by coastal states for the purpose of enhancing navigational safety and avoiding marine pollution. The organization also places conditions on the freedom of navigation. Regulations created by the IMO apply to all kinds of vessels at sea, including fishing boats and cruise ships, and IMO rules and standards cover all parts of a regulated ship’s life cycle: design, construction, equipment, operation, and disposal. To improve at-sea monitoring, in 2000 the IMO made the use of Automatic Identification Systems mandatory for all ships of a certain

size. Although these technical and operational issues have always been a core function of the IMO, the organization also promotes access to global shipping services.

One of the most controversial aspects of IMO governance is the so-called “flags of convenience” problem associated with ship registries. The IMO requires all ships to be registered in a country and to fly that country’s flag as a signal of registry and jurisdiction. Around the time of the IMO’s establishment, the practice of “open registries” became more prevalent. Open registry states allow ships owned and/or operated by nonnationals to register under their national flag. Such states often use ship registry as a source of domestic revenue, and attract ships registration with the promise of lax enforcement of maritime regulations. Due to the existence of these flags of convenience, the system of flag-state enforcement has been described as a weakness in IMO governance (Chircop 2015: 437).

### *Conventions on Marine Pollution*

Conventions and agreements negotiated under the auspices of the IMO cover many topics related to maritime shipping, but those surrounding the issue of marine pollution have been especially influential in contemporary ocean governance. The right to pollute was an “implicit freedom of the high seas” for many centuries, but in the 1920s marine pollution from industrialized and transnational shipping networks began to arouse international concern (Caldwell, 1990: 294; Vogler, 2000: 57). Attempts in the 1950s and 1960s to regulate oil emissions in the open ocean were thwarted by insufficient monitoring and lack of infrastructure, and those attempts “had essentially no impact on improving the marine environment” (Mitchell, 1993: 245).

In the 1970s, two conventions negotiated through the IMO directly addressed the problems of vessel-source pollution and dumping at sea. The International Convention for the Prevention of Pollution from Ships (MARPOL) has been lauded for its innovative and effective requirements for reducing ship-based pollution, both operational and accidental. The first MARPOL agreement (1973) did not receive sufficient ratifications to enter into force due to the lobbying efforts of powerful shipping interests in maritime states (Chasek, Downie, and Brown, 2014: 24). After modifications to assuage the concerns of opponents, a new agreement, fused with the previous one to become MARPOL 73/78, entered into force in 1983 (DeSombre, 2006: 74).

MARPOL 73/78 introduced design requirements for oil tankers, including monitoring devices, separators (to reduce discharge) and segregated ballast tanks. The 1978 amendments to MARPOL added a requirement for washing out tanks with crude oil itself, instead of water. These changes facilitated new, less-polluting practices related to ballast exchange and tank cleaning. The MARPOL agreement also shifted responsibility from operators, who manage at-sea discharges, to owners, who purchase constructed ships. Because these provisions targeted the technology itself, instead of its operation, they shifted from the more challenging enforcement at sea to enforcement in port (Wonham, 1996). In 1997 the MARPOL conference of

parties adopted a new protocol that limits emissions of air pollutants and the sulfur content of fuels. The treaty currently covers nearly 98 percent of registered global shipping, by weight (DeSombre, 2006: 74). The MARPOL agreement is generally regarded as a success, despite continued challenges with implementation and enforcement in the developing world (DeSombre, 2006: 75; Karim, 2010).

The 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (commonly called the London Convention), also negotiated under the auspices of the IMO, created a “black list” of substances prohibited from dumping and a “gray list” of substances that could, under particular circumstances, be considered for dumping. The London Convention also mandated that state parties designate an authority to issue permits for all dumping and special permits for dumping of gray-list materials. The IMO is not empowered to monitor or enforce these rules, but the London Convention was the first agreement to authorize coastal states to enforce its provisions (Caldwell, 1990, 146; Chasek, Downie, and Brown, 2014, 24). Article 210 of UNCLOS enjoins member states to adopt national laws and regulations that are at least as effective as “global rules and standards” for marine dumping, which has typically been taken to mean the London Convention.

In 1996, a meeting of the parties to the London Convention adopted the London Protocol, which was intended to modify, update and eventually replace the London Convention. The London Protocol adopted the precautionary approach by prohibiting all dumping, except of those materials specially authorized by a formal list. Materials eligible for consideration – after assessment and licensing – include dredged material, manmade vessels and platforms, fish wastes, and sewage sludge. In addition to the positive listing approach, the London Protocol contains several other innovations when compared to the London Convention, including enhanced reporting requirements, a formalized dispute settlement procedure and a slightly broader definition of dumping. The London Protocol is also more adaptive and dynamic, and it has included amendments regarding marine geo-engineering (see [Chapter 26](#)) and carbon capture and sequestration in the seabed. Yet despite these advancements, the London Protocol did not succeed in replacing the London Convention, and it attracted relatively few state ratifications. The two conventions now exist alongside one another in an unusual informal arrangement described as “two treaties, one family.” The governing bodies of each agreement typically hold joint meetings, although the majority of states in attendance have ratified only one of the treaties (Hong and Lee, 2015).

Although MARPOL and the London Convention and Protocol represent significant strides in the international regulation and restriction of marine pollution, they only target pollution from shipping and dumping. Around 70 percent of marine pollution comes from land-based activities (see [Chapter 21](#)), which indirectly or unintentionally deposit toxins and debris through wind, river outflows, coastal runoff and other pathways (Kirk 2015: 526). These sources of marine pollution have received little international attention in terms of regulation, in part because it was initially assumed that they would only have local impacts and could be effectively controlled by coastal states (Kirk 2015: 519).

### **The United Nations Convention on the Law of the Sea**

The United Nations Convention on the Law of the Sea (see the chapters in [Part V](#) of this volume), also commonly referred to as the Law of the Sea Convention, is the centerpiece of contemporary ocean governance. This expansive institution emerged out of the third (and last) UN Conference on the Law of the Sea, which was tasked with addressing all matters pertaining to the oceans. In the decades following World War II, a series of unilateral and inconsistent declarations of ownership and jurisdiction over coastal ocean space had confused and complicated the application of customary international law. A new consensus was needed to resolve disputes and confront the phenomenon of “creeping jurisdiction.” The first two Law of the Sea conferences, in 1958 and 1960, failed to resolve major disagreements about the width and nature of territorial seas and other jurisdiction zones, or to develop consensus and produce cooperation around issues related to high-seas fishing.

During the third UN Conference on the Law of the Sea, which took place from 1973 to 1982, representatives of over 150 states convened on 11 separate occasions to discuss the terms of UNCLOS. When the conference began, the law of the sea was in a chaotic state (Beesley, 1983: 183). Existing customary international law regarding the territorial sea had been called into question, and novel issues regarding resource use were emerging in the absence of a clear legal regime. As a result, the agenda for UNCLOS negotiations was very broad, including navigation, fishing, scientific research, seabed drilling and mining, the laying of seabed cables, marine pollution and territorial and jurisdiction claims. The basic goal was to produce a “package deal” treaty that would clarify and codify customary international law, establish new rules for emerging uses and ensure the sustainable and equitable use of ocean resources. Because of their scope, the UNCLOS negotiations produced diverse and shifting coalitions from issue to issue. Because of their length, the position of any given state could change with turnover in government administrations. And because of their broad international participation, negotiators and diplomats needed to balance a number of underlying divisions and antagonisms between North and South, East and West, and coastal, maritime and landlocked states. Despite these challenges, the conference managed to produce a Law of the Sea Convention covering all major issues, which would eventually win broad support from the international community.

#### ***Territory and Jurisdiction Zones***

The territory and jurisdiction zones created by UNCLOS are a central feature of its legacy. These zones specify the duties and rights of various parties and determine who can legitimately access which resources. The seabed is divided into two types of zones: the continental shelf, which belongs to the nearest coastal state (up to 350 nautical miles) and “the Area” which is designated the “common heritage of mankind” and managed by the International Seabed Authority (see later) (Article 136). The water column is divided into four types of zones: the territorial sea, contiguous zone,

Exclusive Economic Zone (EEZ), and high seas (also called the “Area Beyond National Jurisdiction”). In general, the closer a zone is to the coastline, the more control a coastal state has. This section will briefly survey the basic features of the water column zones. Seabed zones will be reviewed in the following section, in conjunction with the instruments created to define and manage them.

The national jurisdiction zones created by UNCLOS are delineated with reference to the “baseline,” which is normally drawn at the low-tide line as represented by official charts of the coastal state (Article 5). Special provisions exist for drawing baselines along coastlines with a high degree of topographical variation, and for archipelagic states made up of a large number of unevenly spaced islands (Article 7 and Article 47). The text of UNCLOS does not specify whether baselines shift in the case of dynamic coastlines and newly constructed or newly submerged islands (see [Chapter 18](#) for a detailed discussion).

The territorial sea extends up to 12 nautical miles from the baseline (Article 3). It is defined as an extension of coastal state sovereignty, and has been recognized as customary international law even for nonparties to UNCLOS (Noyes, 2017: 94). Sovereignty over the territorial sea includes the seabed, the water column and the airspace above the territorial sea, but the exercise of sovereignty is limited. Coastal states have duties to provide information about hazards and regulations to non-national ships, and they must allow all navigation that is “innocent passage.” State parties disagree about whether military ships, nuclear-powered ships and ships carrying hazardous material should qualify as “innocent passage” (Noyes, 2017: 99). Another condition on sovereignty in the territorial sea applies to the situation of international straits, through which coastal states must allow “transit passage” (Article 38). Transit passage through international straits allows submarines to travel in “normal mode” (submerged) and permits the overflight of nonnational aircraft. Unlike “innocent passage” in the territorial sea, “transit passage” cannot be suspended by the coastal state.

Beyond the territorial sea lies the contiguous zone, which can be claimed up to 24 nautical miles from the baseline. In the contiguous zone, a coastal state can “exercise the control necessary” to prevent and punish the infringement of customs, fiscal, immigration or sanitary laws broken in the territorial sea or on state territory (Article 33). The coastal state is also empowered to protect objects of “archaeological and historical nature” within the contiguous zone (Article 303).

The 200-mile Exclusive Economic Zone is a novel and extremely significant contribution to the law of the sea. After the initial wave of major unilateral claims from Latin American states in the 1940s and 1950s, developing and newly independent states in Africa latched onto the concept of seaward extension of their territorial rights. In 1972 Kenya presented a working paper titled “Exclusive Economic Zone Concept” to an Asian-African Legislative Consultative Committee. It was this group that brought the idea to the UNCLOS negotiations. The EEZ concept was supported by developing coastal states as a way to protect their offshore resources from long-distance fishing by developed states (Scott, 2005: 33). The 200-mile EEZ gives

states exclusive control over water column resources – most notably fisheries – for the purposes of exploitation, conservation, and management (Article 56) (see [Chapter 18](#)). EEZ jurisdiction is conditioned by the freedoms of navigation, overflight and the laying of submarine cables and pipelines by other states (Article 58). States are not obliged to demarcate their EEZs, and those that do may run into delimitation challenges because of overlap with the jurisdiction zones of other coastal states. The convention offers several options for dispute settlement, reviewed in the next section of this chapter.

Another area of potential disagreement in the creation of jurisdiction zones is the status of small islands, such as those found in the South China Sea. Islands that are “naturally formed” and never completely submerged can generate a territorial sea, contiguous zone, EEZ, and continental-shelf claim. In contrast, a mere rock that “cannot sustain human habitation or economic life” can only be used to generate a territorial sea and contiguous zone (Article 121). State practice regarding the distinction between rocks and islands is infrequent and inconsistent, such that there is no clear interpretation of UNCLOS and no coherent customary international law (Churchill, 2005: 106).

The “high seas” encompass all parts of the ocean that fall outside the other jurisdiction zones (Article 86). All states have rights to navigation, overflight, laying of cables and pipelines, construction of artificial installations, fishing, and scientific research, among other activities in the high seas (Article 87 provides a non-exhaustive list). The convention invalidates any sovereignty claims in the high seas, and it reserves high-seas areas for “peaceful purposes” (Article 88). Enforcement of international and national law on the high seas is the purview of “flag states.” There is a limited “right of visit” for a warship if it suspects that a nonnational ship is engaged in piracy, slavery or unauthorized broadcasting, or if the ship is without a nationality (Article 91 and 110).

### *Instruments for Implementation*

Several UNCLOS provisions associated with navigation, safety, and pollution obligate states to observe the rules of preexisting treaties and organizations. The convention also created three new instruments to facilitate implementation and resolve disputes among state parties: the Commission on the Limits of the Continental Shelf, the International Tribunal for the Law of the Sea and the International Seabed Authority. The features and functions of these institutions help make UNCLOS an evolving and adaptive institution.

The Commission on the Limits of the Continental Shelf (CLCS) is a technical organ established by Annex II of the convention. Its purpose is to make recommendations about the application of Article 76, which uses a complex and highly technical formula for the establishment of the outer limits of the continental shelf. Coastal states have the exclusive right to exploit the natural resources of their continental shelves (Article 77), so they have an incentive to maximize their continental-shelf

claims. The 21 members of the CLCS are persons elected by states parties every five years, and those members must be experts in geology, geophysics or hydrography. Although the treaty does not precisely specify representational criteria for CLCS members, the parties have implemented an equitable geographical distribution scheme in the members' selection process. Commission members "serve in their personal capacities," and each member is funded by the state party that nominated that person for election (Annex II, Article 2). The convention also encourages the CLCS to cooperate and exchange scientific and technical information with other expert bodies, including the Intergovernmental Oceanographic Commission of UNESCO and the International Hydrographic Organization (Annex II, Article 3).

States seeking recommendations on the outer limits of their continental shelves must submit their claims and supporting scientific information to the commission within ten years after the convention enters into force for that state (Article 4). Since UNCLOS entered into force, the meetings of the states parties have effectively amended this provision to extend the deadline for submissions and to allow the submission of preliminary information to be considered and commented upon before the final submission (Churchill, 2017: 43).

In addition to the commission, UNCLOS provides multiple options for the settlement of disputes among its member states. These include adjudication by the International Court of Justice, two types of international arbitration and submission to the International Tribunal for the Law of the Sea as established in Annex VI (Article 287). Although states are obligated to resolve disputes via peaceful means, they are also permitted to exclude some issues from compulsory dispute settlement, including maritime boundary disputes and military activities (Article 298).

The International Tribunal for the Law of the Sea (ITLOS) has ruled on 25 cases and issued two advisory opinions since its instantiation. Like the CLCS, the tribunal is made up of 21 members with demonstrated competence in their subject matter (in this case, legal affairs) and representing an equitable geographical distribution and the "principal legal systems" of the world (Article 2). Tribunal members are nominated by state parties and elected to nine-year terms by secret ballot. A quorum of 11 members is required to constitute ITLOS, and decisions are made by a majority of those ruling on a case. The jurisdiction of the tribunal is broad, comprising "all disputes and all applications submitted to it in accordance with [UNCLOS]" (Article 21). It also has special jurisdiction over provisional measures while cases are pending and over situations requiring "prompt release" of seized vessels and crews (Articles 290 and 292). Its rulings are only binding between parties to a dispute, and they are not intended to set more general precedents (Annex VI, Article 33).

The creation of the International Seabed Authority (ISA) was the subject of prolonged contention during UNCLOS negotiations (Hollick, 1981: 287). The designation of the seabed beyond national jurisdiction as the "common heritage of mankind" – formally affirmed by UN General Assembly Resolution 2749 in 1970 – required the creation of a central institution to manage seabed resource development. The ISA is established within Part XI of UNCLOS, which covers all activities

in the area. Its basic purpose is to “organize and control activities in the Area, particularly with a view to administering the resources of the Area” (Article 157). In effect, the ISA’s role is to manage seabed mining in the Area Beyond National Jurisdiction.

The ISA is an autonomous institution that became fully operational in 1996. Its principal organs are an assembly, a council and a secretariat, all headquartered in Kingston, Jamaica. All state parties to UNCLOS are automatically members of the ISA, and all ISA members can designate one representative in the assembly. In addition to the adoption of general policies, the assembly elects 36 members that comprise the council. The members of the council must be elected from within five different categories: the largest consumers of minerals (four members), the largest investors in seabed mining (four members), the largest exporters of minerals (four members), developing countries with “special interests” such as large populations or land-locked status (six members) and whatever countries need to be placed on the council in order to achieve geographical representation (18 members) (Article 161).

For disputes related to seabed mining, ITLOS convenes a specific Seabed Disputes Chamber composed of 11 members of the tribunal, with a quorum threshold of 7 members. The Seabed Disputes Chamber has special jurisdiction over activities in the area, including disputes between state parties and the International Seabed Authority (Article 187). In its rulings, the chamber is empowered to apply “the rules, regulations, and procedures of the Authority” and “the terms of contracts concerning activities in the Area” (Annex VI, Article 38).

### *Implementing Agreements*

Alterations to UNCLOS began before the convention entered into force in November 1994. Two “implementing agreements” were intended to rectify gaps and problems identified in UNCLOS (Harrison, 2011: 86). The first agreement – the Implementing Agreement on Part XI – emerged from four years of informal negotiations spearheaded by the UN Secretary General. There was major concern that UNCLOS would fail to achieve widespread acceptance – of the first 60 states to ratify UNCLOS, 58 were developing countries. The original provisions on seabed mining in Part XI were perceived as a central barrier to universal participation in UNCLOS, and the agreement aimed to win over nonparty industrialized countries who specifically objected to this section. The final implementing agreement amended Part XI of UNCLOS in order to strengthen the position of private investors and weaken the role of the enterprise. This included watering down provisions aimed at benefit sharing, including technology transfer and the taxation and redistribution of mining profits.

The July 1994 Implementation Agreement on Part XI was adopted by the UN General Assembly as a resolution and was combined with the original convention “to be interpreted and applied ... as a single instrument” (A/RES/48/264). The agreement is therefore only open to those states that have already ratified UNCLOS, and any state that ratifies UNCLOS after the agreement was adopted must consent to be bound by both. In other words, states that ratified UNCLOS

before July 1994 had to “opt in” to the implementing agreement, and states that ratified after July 1994 could not “opt out” of the agreement. Thus far, 146 states have ratified the implementing agreement in Part XI.

The second implementing agreement did not nullify, replace or amend any parts of UNCLOS, but rather clarified, elaborated, and modernized the provisions relating to fisheries management. The 1995 Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and High Migratory Fish Stocks (“Fish Stocks Agreement”) focused on the regulation of highly migratory fish stocks and those that straddled the national jurisdiction zones created by UNCLOS (see [Chapter 11](#)). (Unlike the Implementing Agreement on Part XI, the Fish Stocks Agreement is a freestanding treaty that can be ratified by nonmembers of UNCLOS. It entered into force in 2001, and currently has only 82 member states.) The original convention simply enjoined states that fished for straddling or migratory stocks to cooperate over their management (Articles 63 and 64). This requirement was seen as inadequate for effective governance, a fact that was formally acknowledged in the Agenda 21 document produced by the 1992 UN Conference on Environment and Development. In 1993, the UN General Assembly convened a UN Conference on Straddling Fish Stocks and Highly Migratory Stocks, which after three years of negotiations adopted the Fish Stocks Agreement by consensus in August 1995. The agreement was welcomed and promoted by UN General Assembly Resolution 50/24.

The Fish Stocks Agreement reaffirms the duty of states to cooperate in fisheries management and to use the best scientific evidence available (Article 119). It adds two principles of sustainable development to UNCLOS: the precautionary approach and the ecosystem approach. The Fish Stocks Agreement obligates states to consider uncertainty in scientific information about fish stock size and reproduction, and the impact of other marine activities on target and non-target species alike. It also requires states to generally “protect biodiversity in the marine environment” [Article 5(g)]. The Fish Stocks Agreement explicitly addresses the functions and features of regional fisheries management organizations (RFMOs) (described in detail in the next section; see also [Chapters 9 and 10](#)). One of the most controversial elements of the Fish Stocks Agreement restricts fishing in RFMO-governed areas, or fishing of RFMO-governed species, to those states that are RFMO members [Article 8(4)]. Member states are also empowered to engage in enforcement actions against non-member states violating RFMO dictates (Articles 21 and 22). Some nonparties to the Fish Stocks Agreement argue that these provisions undermine the principles of freedom of the high seas and flag-state jurisdiction (Molenaar, 2011).

Upon the completion of the UNCLOS III conference, the president of the conference (Tommy Koh of Singapore) declared the creation of a “comprehensive constitution for the oceans which will stand the test of time.” The description of UNCLOS as a “constitution” is appropriate given its comprehensive scope, widespread participation, hierarchical relationship to other institutions and embeddedness in the overall ocean governance regime (Churchill, 2017: 45). Although the convention

certainly has its failings, there is currently no significant interest within the international community to replace or significantly revise UNCLOS.

### **Regional Fisheries Management Organizations**

RFMOs are autonomous organizations formed by agreement between a group of members that self-regulate their exploitation either of a particular species or of all commercial species within a particular area. Some RFMOs only have an advisory function, but most have a management function. They are open-membership, and they only create legal obligations for their members. There are around 18 RFMOs (the exact number depends on the criteria used), and they have become the preferred vehicle for fulfilling UNCLOS obligations related to the conservation of living resources (Article 117 and 118) (Rayfuse 2015: 440). Although each RFMO is different, common management tools include data collection, dispute settlement and limitations on fishing technology, capacity and effort.

RFMOs are widely understood to have failed at their primary task: maintaining the sustainability of fisheries (Cullis-Suzuki and Pauly, 2010). Although the Fish Stocks Agreement requires the adoption of a precautionary and ecosystem-based approach, RFMOs remain deeply flawed and have only made negligible progress in adherence to these principles (Gilman, Passfield, and Nakamura, 2014). Fisheries management organizations are particularly subject to the problem of “regulatory capture,” whereby regimes are controlled by vested interests seeking to justify existing practices (Gjerde et al., 2013; Barkin and DeSombre, 2013). Many flag states simply do not become members of the RFMOs that regulate the fisheries that their nationals exploit. But fishers from RFMO member states can easily register in nonmember states to avoid regulation (Barkin and DeSombre, 2013: 32). Although the Fish Stocks Agreement authorizes RFMO member states to enforce RFMO provisions against nonmember states, this only applies to situations where the nonmember of the RFMO is a member of the Fish Stocks Agreement (Molenaar, 2011: 205). In general, little or no effort is made to keep nonmember fishers out of an RFMO area. The problem of RFMO management is summarized succinctly by Samuel Barkin and Elizabeth DeSombre (2013: 9): “a common pool resource cannot be successfully protected by a sub-group of users.”

Advances in fisheries management aim to redress the insufficiency of RFMOs. Efforts have focused on making ships more traceable at sea and more accountable in port. The 2009 Food and Agricultural Organization Port State Measures Agreement has the explicit goal of blocking the flow of IUU (illegal, unreported, and unregulated) fish into markets. It allows port states to deny entry to foreign boats suspected of illegal fishing and to require detailed documentation and inspection to ensure the legality of catches. Despite these efforts, the persistence of “flags of convenience” and “ports of convenience” make effective governance of global fisheries an extremely difficult task (see [Part III](#) of this volume).

## Conclusion

The heavy and complex architecture of the contemporary ocean governance regime represents decades, even centuries, of investment in diplomacy and legalization. Although lauded for its comprehensiveness and universality, the UNCLOS-centered regime can be criticized for its lethargic response to emerging issues associated with climate change (see [Chapter 20](#)). In particular, jurisdictional boundaries tend to assume that the ocean will not change fundamentally. The law of baselines, from which the territorial sea and EEZ are calculated, does not account for the possibility of a dynamic coastline. Whether the baseline shifts with rising seas remains an open question (see [Chapter 18](#)). The “regions” of RFMOs reflect the spatial extent of fish populations and fishing practices, which may shift in response to warming seas (see [Chapters 12–14](#)). Even the most successful parts of the contemporary governance regime fail to address risks associated with climate change. The London Convention and MARPOL are narrowly focused on vessel-source pollution, without any provision for land-based or atmospheric sources of harmful emissions that cause acidification. In general, current environmental protection efforts aim to prevent over-exploitation by human users, with little attention to more diffuse threats to marine habitats like warming and acidification.

The breadth and depth of UNCLOS represents a substantial “sunk cost” for the international community. Because there is little international enthusiasm for replacement or substantial reform, collective problems must be addressed within the basic framework established by UNCLOS (see [Chapter 16](#)). Whether adjustments and augmentations to the existing regime will be sufficient to confront issues associated with climate change promises to be a key question for the twenty-first century.

## References

- Anand, R. P. (1983). *Origin and Development of the Law of the Sea: History of International Law Revisited*. Publications on Ocean Development, v. 7. The Hague; Boston: Hingham, MA: Martinus Nijhoff; [distributed in the U.S. by] Kluwer Boston.
- Barkin, J. S. and DeSombre, E. R. (2013). *Saving Global Fisheries: Reducing Fishing Capacity to Promote Sustainability*. Cambridge, MA: The MIT Press.
- Beesley, A. (1983). The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners – A Pattern for Future Multilateral International Conferences? *Law and Contemporary Problems*, **46**(2), 183–94.
- Biermann, F. (2014). Earth System Governance: A Core Research Project of the International Human Dimensions Programme on Global Environmental Change. *Earth System Governance: World Politics in the Anthropocene*. Cambridge, MA: The MIT Press.
- Caldwell, L. K. (1990). *International Environmental Policy: Emergence and Dimensions (Duke Press Policy Studies)*, 2nd edn. Durham, NC; London: Duke University Press.
- Chasek, P. S., Downie, D. L. and Brown, J. W. (2014). *Global Environmental Politics Dilemmas in World Politics*, 6th edn. Boulder, CO: Westview Press, a member of the Perseus Books Group.

- Chircop, A. (2015). The International Maritime Organization. In D. R. Rothwell, A. G. O. Elferink, K. N. Scott, and T. Stephens, eds., *The Oxford Handbook of the Law of the Sea*. New York: Oxford University Press, pp. 416–38.
- Churchill, R. R. (2005). The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention. In A. G. Oude Elferink and S. V. Shirley, eds., *Stability and Change in the Law of the Sea: The Role of the LOS Convention No. 24*. Leiden; Boston, MA: Martinus Nijhoff Publishers.
- Churchill, R. R. (2017). The 1982 United Nations Convention on the Law of the Sea. In D. R. Rothwell, A. G. O. Elferink, K. N. Scott, and T. Stephens, eds., *The Oxford Handbook of the Law of the Sea*. New York: Oxford University Press, pp. 24–45.
- Cullis-Suzuki, S. and Pauly, D. (2010). Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations. *Marine Policy*, **34**(5), 1036–42. doi:10.1016/j.marpol.2010.03.002.
- DeSombre, E. R. (2006). *Global Environmental Institutions (Global Institutions Series)*. London; New York: Routledge.
- Fulton, T. W. (1976). *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute*. Millwood, NY: Kraus Reprint Co.
- Gilman, E., Passfield, K. and Nakamura, K. (2014). Performance of Regional Fisheries Management Organizations: Ecosystem-Based Governance of Bycatch and Discards. *Fish and Fisheries*, **15**(2), 327–51. doi:10.1111/faf.12021.
- Gjerde, K. M., Currie, D., Wowk, K. and Sack, K. (2013). Ocean in Peril: Reforming the Management of Global Ocean Living Resources in Areas beyond National Jurisdiction. *Marine Pollution Bulletin*, **74**(2), 540–51.
- Harrison, J. (2011). *Making the Law of the Sea: A Study in the Development of International Law*. Cambridge; New York: Cambridge University Press.
- Hollick, A. L. (1981). *U.S. Foreign Policy and the Law of the Sea*. Princeton, NJ: Princeton University Press.
- Hong, G. H. and Lee, Y. J. (2015). Transitional Measures to Combine Two Global Ocean Dumping Treaties into a Single Treaty. *Marine Policy*, **55**, 47–56. doi:10.1016/j.marpol.2015.01.007.
- Kalland, A. and Moeran, B. (1992). *Japanese Whaling: End of an Era? Scandinavian Institute for Asian Studies Monograph Series 61*. London: Curzon Press.
- Karim, M. S. (2010). Implementation of the MARPOL Convention in Developing Countries. *Nordic Journal of International Law*, **79**(2), 303–37. doi:10.1163/157181010X12668401899110.
- Kirk, E. A. (2015). Science and the International Regulation of Marine Pollution. In D. R. Rothwell, A. G. O. Elferink, K. N. Scott, and T. Stephens, eds., *The Oxford Handbook of the Law of the Sea*. New York: Oxford University Press, pp. 516–35.
- Mansell, J. N. K. (2009). *Flag State Responsibility: Historical Development and Contemporary Issues*. Berlin: Springer.
- Mitchell, R. (1993). Intentional Oil Pollution of the Oceans. In P. M. Haas, R. O. Keohane and M. A. Levy, eds., *Institutions for the Earth: Sources of Effective International Environmental Protection (Global Environmental Accords Series)*. Cambridge, MA: MIT Press.
- Miyaoka, I. (2013). *Legitimacy in International Society: Japan's Reaction to Global Wildlife Preservation*. New York: Springer.

- Molenaar, E. J. (2011). Non-Participation in the Fish Stocks Agreement: Status and Reasons. *The International Journal of Marine and Coastal Law*, **26**(2), 195–234. doi:10.1163/157180811X558956.
- Noyes, J. E. (2017). The Territorial Sea and Contiguous Zone. In D. R. Rothwell, A.G.O. Elferink, K. N. Scott, and T. Stephens, eds., *The Oxford Handbook of the Law of the Sea*. New York: Oxford University Press, pp. 91–113.
- Peterson, M. J. (1992). Whalers, Cetologists, Environmentalists, and the International Management of Whales. *International Organization*, **46**(1), 147–86.
- Rayfuse, R. (2015). Regional Fisheries Management Organizations. In D. R. Rothwell, A.G.O. Elferink, K. N. Scott, and T. Stephens, eds., *The Oxford Handbook of the Law of the Sea*. New York: Oxford University Press, pp. 439–62.
- Scott, S. V. (2005). The LOS Convention as a Constitutional Regime for the Oceans. In A. G. Oude Elferink and S. V. Shirley, eds., *Stability and Change in the Law of the Sea: The Role of the LOS Convention No. 24*. Leiden; Boston: Martinus Nijhoff Publishers.
- Stoett, P. J. (1997). Cetapolitics: The IWC, Foreign Policies, and NGOs. In *The International Politics of Whaling*. Vancouver: UBC Press.
- Thomson, J. E. (1994). *Mercenaries, Pirates, and Sovereigns: State-building and Extraterritorial Violence in Early Modern Europe*. Princeton, N.J.: Princeton University Press.
- Vogler, J. (2000). *The Global Commons: Environmental and Technological Governance*. 2nd edn. Chichester, West Sussex, England; New York: Wiley.
- Wonham, J. (1996). Some Recent Regulatory Developments in IMO for Which There Are Corresponding Requirements in the United Nations Convention on the Law of the Sea. A Challenge to Be Met by the States Parties? *Marine Policy*, **20**(5), 377–88. doi:10.1016/0308-597X(96)00030-9.