UNCLOS at Thirty: Open Challenges†
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INTRODUCTION: THE WORLD OF UNCLOS

Three decades have elapsed since the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) and almost two decades since its entry into force. Presently, UNCLOS binds 164 States and has a strong influence on customary law. It is the basic instrument regulating law of the sea questions. It is consequently the point of departure for the general assessment of the law of the sea and of its open problems and prospects. Before examining these problems and prospects, it seems useful to describe briefly the main characteristics of the world as envisaged by UNCLOS. It is a very different world as compared to that prevailing before States met in Caracas in 1974.

First, the world of UNCLOS is a highly institutionalized one in which cooperation between States Parties is an obligation. Under UNCLOS institutions have a powerful role in implementing cooperation, in fleshing out substantive rules and helping to keep these rules abreast of developments. UNCLOS provides for the establishment of new institutions and entrusts tasks to existing ones.

Second, UNCLOS has brought the law of the sea under the jurisdiction of international courts and tribunals. Contrary to the Geneva Conventions and to most codification conventions, under UNCLOS disputes arising between States Parties and concerning its interpretation or application may be submitted, at the initiative of one party to the dispute (as well as, obviously, through the agreement of both Parties) to an international court or tribunal whose judgment is binding. Since UNCLOS has entered into force, practice shows that recourse to international judges and arbitrators is becoming a normal, not necessarily hostile, occurrence in international relations as regards to law of the sea questions. Compulsory settlement has also shown a powerful deterrence aspect. It is well-known that various disputes have not materialized in courts and tribunals, and have been quietly settled by the

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Parties, in light of the fact that one party was fully aware that the other was ready to utilize the compulsory means of settlement set out in UNCLOS.

Third, the world of UNCLOS is a world whose protagonists are not only States. The value of individuals and their role is taken into account, for instance, in the prompt release of vessels and crew proceedings, and in the organization of deep-seabed mining.

THE PRESENT POST-CODIFICATION ERA: A LAW OF THE SEA “SYSTEM” DOMINATED BY UNCLOS

Plurality of Sources

The current international law of the sea, although dominated by UNCLOS, does not consist only of UNCLOS. Rules set out by other sources are relevant and it becomes important to examine the relationship between them and UNCLOS.

a. Customary Law and Its Relation with UNCLOS

For the wide majority of existing States, as Parties to UNCLOS, most of the general law of the sea rules are treaty rules. Still, also in an area of international law dominated by a convention whose ambition is to function as “the constitution of the oceans,” customary law continues to play a relevant role. Not all law of the sea questions are regulated by UNCLOS and not all States are Parties to UNCLOS. The last paragraph of the UNCLOS preamble recognizes the continuing role of customary law stating that: “matters not regulated by this Convention continue to be governed by the rules of general international law.” The fact that UNCLOS as an international treaty does not bind States that are not Parties to it, entails that among non-parties, and in relations between Parties and non-parties, customary rules apply (unless both States involved are Parties to the Geneva Convention relevant in the concrete case).

The relevance of customary law and its relationship with UNCLOS emerge clearly in recent international instruments. These instruments, also because of the influence of non-parties to UNCLOS in their negotiation, put UNCLOS and customary law on the same level, and give them priority over their own provisions. So the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage provides that “Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea” (Article 3). The Preamble to the 2007 Nairobi International Convention on the Removal of Wrecks recalls the importance of the UNCLOS “and of the customary law of the sea.” In the Food and Agriculture Organization (FAO)-sponsored instruments, the clause referring to “international law, as reflected in the United Nations Convention on the Law of the Sea” is normally included (e.g., 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels, preamble; 1995 Code of Conduct for Responsible Fisheries, Article 3.1; 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Article 10). The same