

FURTHER DEVELOPMENT OF THE LAW OF THE SEA CONVENTION: MECHANISMS FOR CHANGE

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I. INTRODUCTION

‘Treaties are like wine and roses—they last while they last’ (de Gaulle)

How do treaties evolve? How in particular do we ensure the ‘durability over time’ of a global convention, intended to elaborate ‘a new and comprehensive regime for the law of the sea’?¹ Earlier attempts to do so all failed. Why should the most recent attempt be any more successful?

The adoption of the United Nations Convention on the Law of the Sea in 1982 brought to a culmination the third, and most ambitious, attempt to codify and progressively develop the law of the sea. The first, at The Hague in 1930, ended without a text being agreed. The second, originating in the work of the International Law Commission, resulted in the adoption of the four Geneva Conventions of 1958. All four conventions entered into force, but with varying, and far from universal, participation. They quickly came under pressure from newly independent developing States and unilateral claims by Iceland, Canada and various Latin American countries. The 3rd UN Conference on the Law of the Sea, convened in 1973, took 10 years to negotiate a replacement regime; further negotiations were required before it entered into force in 1994.

Unlike its predecessors, the 1982 Convention (‘UNCLOS’) was intended to be, as far as possible, comprehensive in scope and universal in participation. Negotiated by consensus as an interlocking package deal,² its provisions form an integral whole, protected from derogation by compulsory third-party settlement of disputes, a prohibition on reservations, and a ban on incompatible *inter se* agreements.³ Within these limits, it was intended to be capable of further evolution through amendment,⁴ the incorporation by reference of other

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¹ UN *The Law of the Sea: UN Convention on the Law of the Sea* (New York 1997) ‘Introduction’, 1.

² *ibid* 1–4. See also H Caminos and M Molitor ‘Progressive Development of International Law and the Package Deal’ (1985) 79 AJIL 871; B Buzan ‘Negotiating by Consensus: Developments in Technique at the UN Conference on the Law of the Sea’ (1981) 75 AJIL 324. P Allott, ‘Powersharing in the Law of the Sea’ (1983) 77 AJIL 1.

³ Arts 279–99, 309, 311(3).

⁴ Arts 312–14. See below.

generally accepted international agreements and standards,⁵ and the adoption of additional global and regional agreements and soft law. Multilateral negotiating processes, both at the UN and in other international organizations and conferences, continue to play a central role in the development of the law of the sea.⁶ So, potentially, do international courts and tribunals, although so few cases have so far been decided on the merits that the jurisprudence has contributed little to evolving UNCLOS law.⁷

UNCLOS is not a 'framework treaty' in the sense applied to a number of environmental treaties.⁸ That is, it makes no formal provision for the adoption of further protocols and annexes as a means of developing the legal regime to meet new priorities and problems. Nor is amendment made easy. The simplified procedure provided for in Article 313 dispenses with the need for a negotiating conference and relies on a non-objection procedure to secure adoption. However, it only takes one objection for this procedure to fail. Amendments proposed at a negotiating conference also require consensus, although they can be adopted by vote when all efforts to reach consensus have failed.⁹ This procedure mirrors the adoption by vote of UNCLOS itself. However adopted, an amendment must still be ratified or acceded to by at least 60 States parties, and it can then enter into force only in regard to others who also accept the amendment.¹⁰ Given all these obstacles, amendment using either procedure is likely to prove an unattractive option. No proposals have so far been made to the Secretary-General.

Since its adoption, the most significant additions to the corpus of UNCLOS law have come in the form of two 'implementing' agreements, the 1994 Agreement Relating to Part XI,¹¹ and the 1995 UN Fish Stocks Agreement.¹²

⁵ See especially Arts 21(2), 119, 207–12. In most cases these global standards are derived from IMO regulatory conventions. See below.

⁶ At the UN, UNCLOS-related matters are considered at meetings of the parties (Art 319); at an Informal Consultative Process; at the General Assembly; at UN-convened conferences, including the 1992 Rio Conference (UNCED) and the 2002 Johannesburg Conference (WSSD); in UN specialized agencies, including IMO, FAO, and UNESCO, and at IAEA.

⁷ But see the concluding para of s 5 below.

⁸ See in particular the 1985 Ozone Layer Convention and the 1992 Framework Convention on Climate Change. Both treaties are in effect outline agreements, requiring further negotiation of more detailed implementing provisions, eg in the 1987 Montreal Protocol and the 1995 Kyoto Protocol respectively.

⁹ Art 312.

¹⁰ Arts 315–16.

¹¹ Reproduced in UN *UN Convention on the Law of the Sea* (New York 1997). See DH Anderson 'Further Efforts to Ensure Universal Participation in the UNCLOS' (1994) 43 ICLQ 886; J Charney 'Entry into Force of the 1982 UNCLOS' (1995) 35 VaJIL 381.

¹² 34 ILM 1542 (1995). See FAO Fisheries Circular No 898, *Structure and Process of the 1993–1995 UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks* (Rome 1995); DH Anderson 'The Straddling Fish Stocks Agreement of 1995—An Initial Assessment' (1996) 45 ICLQ 463; D Balton 'Strengthening the Law of the Sea: the New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks' (1996) 27 ODIL 125; D Freestone and Z Makuch 'The New International Environmental Law of Fisheries: the 1995 UN Straddling Stocks Convention' (1996) 7 YbIEL 3; P Davies and C Redgwell 'The International Legal Regulation of Straddling Fish Stocks' (1996) BYIL 199.

Rather like Protocols to a Framework Convention, these agreements interpret, amplify and develop the existing provisions of UNCLOS.¹³ They also provide alternative models for what is in effect, although not in form, *inter se* amendment of the Convention.¹⁴ Given their success, it seems unlikely that the consensus/non-objection amendment procedures contemplated by Articles 312 and 313 will be used in the immediate future. These implementing agreements and the thinking which underlies their use, in preference to formal amendment procedures, have been fully explored elsewhere,¹⁵ and the technique will not be considered here. For the same reason, the special problems posed by the incorporation of generally accepted international rules and standards will also be excluded.¹⁶

Nevertheless, amendment, by whatever means, is not the only way in which the Convention can change and evolve. The purpose of this paper is to explore some of the other possibilities. It concentrates on a limited set of questions. How far can UNCLOS be interpreted in an evolutionary way? What role might soft law play in this respect? To what extent can regional agreements or other global treaties provide a mechanism for further development of the law of the sea? The answers we give to these questions depend to a large degree on the assumptions we make about the Convention, its objects and purposes, and its negotiating history. It is necessary therefore to sketch briefly a few additional considerations of a general kind.

The 1982 UNCLOS is not a separate or self-contained legal regime. At numerous points it makes reference to rules of general international law or incorporates generally accepted international rules and standards derived mainly from other treaties. It must also be interpreted and applied in accordance with the normal rules of treaty law, including those which allow other agreements and rules of international law to be taken into account for this purpose.¹⁷ Where relevant, international tribunals deciding UNCLOS cases

¹³ See also the 1993 'Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas' 33 ILM 969 (1994); W Edeson in A Boyle and D Freestone (eds) *International Law and Sustainable Development* (OUP Oxford 1999), 165. Adopted by FAO to reinforce flag state obligations in respect of high seas fishing, this agreement might be regarded as another 'implementing agreement'.

¹⁴ The 1994 Agreement on Part XI amends the Convention by disapplying certain provisions of Part XI and revising others. It also prevails over inconsistent provisions of the Convention. In practice, non-parties to this agreement are assumed to have acquiesced in the amendment of the Convention. The 1995 Fish Stocks Agreement neither specifically amends UNCLOS nor does it prevail over it, but it does make significant changes in the applicable law. See further, s 2 below.

¹⁵ See in particular D Freestone and AO Elferink 'Strengthening the UNCLOS regime through the adoption of implementing agreements etc,' paper given at 3rd Verzijl Symposium, Utrecht, 2004.

¹⁶ See E Molenaar *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer The Hague 1998) ch 5; PW Birnie in H Ringbom (ed) *Competing Norms in the Law of Marine Environmental Protection* (The Hague 1997), 31; M Valenzuela in AH Soons (ed) *Implementation of the Law of the Sea Convention Through International Institutions* (LOSI Honolulu 1990), 187; B Vukas in Soons (ed) *op cit* 405.

¹⁷ See below, s 2.

may also apply general international law in so far as it is within their jurisdiction and not inconsistent with UNCLOS to do so.¹⁸ All of these points serve to re-emphasize that the 1982 UNCLOS is a treaty which functions within a larger legal system, and which does so to a greater extent than, for example, WTO law or human rights law. Integration within that larger system, not fragmentation from it, must necessarily be the starting point when considering the further evolution of the law of the sea based on UNCLOS.

At the same time, UNCLOS is also different from many other treaties in certain essential respects. It has been described as a 'constitution for the oceans',¹⁹ rather in the same way that the UN Charter is sometimes regarded as a Constitution for the international community of States. Constitutions are typically harder to amend than ordinary law, they usually prevail over other inconsistent law, are normally subject to interpretation and application by a supreme court, and ideally they rest on a broad social consensus and articulate certain basic social and political values. All of these characteristics can be found in some measure in the 1982 UNCLOS. To that extent the term 'constitution for the oceans' is not inappropriate. Beyond stressing the particular character of the 1982 Convention, however, it is not obvious what else any analogy with constitutional law would add to our understanding of how UNCLOS may evolve. Like any Constitution, however, if it cannot or does not evolve it is unlikely to last.

One feature which particularly distinguishes UNCLOS from most treaties, including WTO agreements, is that on its own terms it enjoys a strong degree of pre-eminence over other treaties by virtue of its integral status.²⁰ As we saw above, not only are States parties not free to derogate unilaterally from its provisions,²¹ their freedom to do so multilaterally is also constrained in certain circumstances.²² In part these constraints reflect the need to protect the consensus package-deal on which the Convention is based. Without them it could not long remain an integrated whole. But equally importantly they help sustain the Convention's character as a global regime for the oceans.

On the other hand, while recognizing that the problems of ocean space are 'closely interrelated' and 'need to be considered as a whole',²³ the Convention is replete with references to regional rules, regional programmes, regional co-operation and so on. It is clear therefore that in certain contexts further

¹⁸ Art 293. See *MV Saiga* (No 2) (ITLOS, 1999), para.155; *MOX Plant Arbitration* (PCA 2003) para 19.

¹⁹ Remarks by TB Koh, reproduced in UN *The Law of the Sea: Official Text of the UNCLOS* (London 1983) xxxiii. See further the excellent analysis by S Scott 'The UNCLOS as an International Regime', a paper given at the 3rd Verzijl Symposium, Utrecht, 2004.

²⁰ On the effect of this status on rules of priority over other treaties see below, s 5.

²¹ But they can make 'declarations and statements' in accordance with Art 310. On the effect of these see D Nelson 'Declarations, Statements and Disguised Reservations with Respect to the Convention on the Law of the Sea' (2001) 50 ICLQ 767.

²² See s 5 below.

²³ UN *UN Convention on the Law of the Sea* 'Introduction' 1.

regional development of the law of the sea is not merely envisaged but encouraged. There is an obvious tension between sustaining an integrated global regime and allowing further development on a regional basis. Understanding the limits of permissible regionalism is thus an essential preliminary to any attempt to use regional treaties as a means of developing the law of the sea.

II. RE-INTERPRETING UNCLOS?

The idea that treaties can have a dynamic or living interpretation is an important contribution to the process of evolutionary change in international law. Interpretative techniques of this kind help to avoid conflicts between agreed norms, and save negotiated agreements from premature obsolescence, or the need for constant amendment. Changing values and social context can be reflected in the jurisprudence, a point particularly well observed in international human rights law, but less relevant to a treaty such as UNCLOS²⁴ more importantly, changes in international law and policy can also be accommodated where appropriate and Article 31(3)(c) of the Vienna Convention accordingly provides that in interpreting a treaty account shall be taken of ‘any relevant rules of international law applicable in the relations between the parties’.²⁵ This formulation conceals more than it reveals, and is presently the subject of study by the ILC. How far, if at all, might re-interpretation of UNCLOS be possible under this provision?

The terms within which ‘evolutionary interpretation’ of a treaty is permissible under Article 31(3)(c) have been narrowly circumscribed in the jurisprudence. While accepting that treaties are to be ‘interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’, the ICJ has also acknowledged ‘the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion’.²⁶ Its approach in the *Namibia Advisory Opinion* and the *Aegean Sea Case* is based on the view that the concepts and terms in question were by definition evolutionary,²⁷ not on some broader conception applicable to all

²⁴ See, eg, *Golder v UK* (1975) 1 EHRR 524 at paras 10–36; *Soering v UK* (1989) 11 EHRR 439 at para 102; *Öcalan v Turkey* (2003) 37 EHRR 10.

²⁵ This includes general principles of law: see *Golder v UK* (1975) 1 EHRR 524 at paras 10–36. But the rules or principles in question must be law: in the *OSPAR Arbitration* (2003) PCA, at paras 101–5, the arbitrators declined to take account of a treaty that was not in force and a draft EC directive that was not yet law. See generally C McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279.

²⁶ *Namibia Advisory Opinion* (1971) ICJ Reports 16, at 31; *Aegean Sea Continental Shelf Case* (1978) ICJ Reports 3, at 32–3. See also *Bankovic v Belgium* (2002) 41 ILM 517, at paras 55–66; *Al-Adsani v UK* (2001) 123 Int LR 24; *Fogarty v UK* (2001) 123 Int LR 54; *McElhinney v Ireland* (2001) 123 Int LR 73. The ICJ’s approach, combining both an evolutionary and an intertemporal element, reflects the ILC’s commentary to what became Art 31(3)(c). See ILC, ‘The Law of Treaties’, commentary to draft Art 27, at para (16), in AD Watts (ed) *The International Law Commission 1949–1998* (OUP Oxford 1999), vol II at 690.

²⁷ See also *Oil Platforms Case* (2003) ICJ Reports, at paras 40–1.

treaties. The WTO Appellate Body has given a similarly evolutionary interpretation to certain terms in the 1947 GATT. In the *Shrimp-Turtle* decision, it referred, inter alia, to the 1992 Rio Declaration on Environment and Development, the 1982 UNCLOS, the 1973 CITES Convention, the 1979 Convention on Conservation of Migratory Species and the 1992 Convention on Biological Diversity in order to determine the present meaning of 'exhaustible natural resources'.²⁸

In all of these cases the question at issue was not general revision or re-interpretation of a treaty. Rather, each case was concerned with the interpretation of particular provisions or phrases, such as 'natural resources,' or 'jurisdiction', which necessarily import—or at least suggest—a reference to current general international law. Ambulatory incorporation of the existing law, whatever it may be, enables treaty provisions to change and develop as the general law itself changes, without the need for any amendment. Such treaty provisions are not intended to operate independently of general international law.²⁹

Evolutionary interpretation of this kind is thus a relatively limited task, consistent with the intention of the parties. It does not entitle a court or tribunal to engage in a process of constant revision or updating of UNCLOS—or any other treaty—every time a newer treaty is concluded that relates to matters covered by UNCLOS. As Judge Bedjaoui points out in *Gabčíkovo*:

Une interprétation d'un traité qui viendrait à substituer un tout autre droit à celui qui le régissait au moment de sa conclusion constituerait une révision détournée. 'Interprétation' n'est pas 'substitution' à un texte négocié et agréé d'un texte tout autre, ni négocié, ni convenu. Sans qu'il faille renoncer à 'l'interprétation évolutive' qui peut être utile et même nécessaire dans hypothèses très limitées, il convient de dire qu'elle ne peut pas être appliquée automatiquement à n'importe quelle affaire.³⁰

On this view, interpretation is interpretation, not revision or rewriting of treaties. The result must remain faithful to the ordinary meaning and context of the treaty, 'in the light of its object and purpose'.³¹

There is no doubt that UNCLOS need not be interpreted as if it were a static instrument, cast in stone somewhere around 1982. Many of its terms are likely to be inherently evolutionary. Articles 74 and 83 of the 1982 UNCLOS are perhaps the most extreme examples, simply requiring delimitation of bound-

²⁸ *Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body (1998) WT/DS58/AB/R, at paras 130–1. See R Howse in J Weiler (ed) *The EU, the WTO and the NAFTA* (OUP Oxford 2000) at 54.

²⁹ *Oil Platforms Case* (2003) ICJ Reports at paras 40–1. See also *Gabčíkovo-Nagymaros Case* (1997) ICJ Reports 7, at para 140–1.

³⁰ (1997) ICJ Reports 7, separate opinion, at para 12. Contrast Sands, 'Sustainable Development: Treaty, Custom and the Cross-Fertilisation of International Law' in Boyle and Freestone (eds) *International Law and Sustainable Development* 39.

³¹ VCLT, Art 31(1). See also *OSPAR Arbitration* (PCA, 2003) at paras 101–5.

aries to be effected 'by agreement on the basis of international law'. A glance at the case law shows that international law on EEZ and continental shelf delimitation has not remained static since 1982.³² Other examples of potentially evolutionary phraseology include references to 'special circumstances' in territorial sea boundary delimitation, the definition of 'pollution of the marine environment', the concept of 'conservation of living resources', and the identification of 'generally accepted international rules and standards'.

At the same time, the case law shows that over-ambitious attempts to reinterpret or 'cross-fertilize' treaties by reference to later treaties or other rules of international law are likely to have only limited success.³³ In this respect UNCLOS is no different from any other treaty. However, the limits of evolutionary interpretation recognized by international tribunals are particularly pertinent in this context. If the integrity and global character of the Convention are to be preserved, courts must necessarily approach interpretation by reference to Article 31(3)(c) with some caution. This is especially important when taking regional treaties into account. For example, an advanced European regional treaty can give little useful guidance on the interpretation of a global treaty such as UNCLOS, particularly on an issue such as land-based sources of marine pollution. Here the interests and concerns of developed and developing States are very different and that is recognized in the wording of Article 207.³⁴ But if such a treaty were representative of a pattern of regional treaties, spread across different regions, and possibly giving effect to UN policy endorsed by consensus at a global level, its evolutionary value as an interpretative guide would be significantly enhanced.

Clearly, a global multilateral treaty, particularly one adopted in implementation of UNCLOS—such as the 1995 UN Fish Stocks Agreement—has greater potential for influencing interpretation of the Convention than a solitary regional agreement. The 1995 Agreement is to be interpreted and applied 'in the context of and in a manner consistent with the [1982] Convention' and is without prejudice to the rights, jurisdiction and obligations of parties to the 1982 UNCLOS.³⁵ To that extent it does not as such amend UNCLOS, unlike the 1994 Agreement on Implementation of Part XI. Nevertheless, high seas freedom of fishing under the Fish Stocks Agreement is significantly different from the traditional concept found in Articles 116–9 of UNCLOS, most

³² See *Tunisia/Libya Continental Shelf Case* (1982) ICJ Reports 18; *Gulf of Maine Case* (1984) ICJ Reports 246; *Libya/Malta Continental Shelf Case* (1985) ICJ Reports 13; *Guinea/Guinea-Bissau Maritime Boundary Arbitration* (1985) 35 ILM 251; *St Pierre and Miquelon Arbitration* (1992) 95 ILR 645; *Jan Mayen Case* (1993) ICJ Reports 38; *Qatar/Bahrain Maritime Delimitation Case* (2001) ICJ Reports.

³³ eg Ireland's attempt to rewrite UNCLOS in the *Mox Plant Arbitration* (PCA, 2003). For a contrary view see Sands in Boyle and Freestone (eds) *International Law and Sustainable Development* 39.

³⁴ See PW Birnie and AE Boyle *International Law and the Environment* (OUP Oxford 2002) 8 at 408–10.

³⁵ Art 4. However, a state can be a party to the 1995 Agreement without being party to UNCLOS: in that limited sense it is a 'stand alone' treaty.

notably in regard to access to high seas stocks and enforcement jurisdiction on the high seas.³⁶ As between parties to the 1995 Agreement there is little doubt that it changes the law, although in a manner envisaged in Article 116 of UNCLOS.³⁷

Is it possible, however, that an implementing agreement, such as the Fish Stocks Agreement, might have a wider impact on UNCLOS itself and on non-parties to the Agreement? It is true that like any other treaty the 1995 Agreement does not bind non-parties, nor, unlike UNCLOS, does it purport to create obligations for 'all states'.³⁸ To that extent it is simply an inter se agreement. However, in accordance with Article 31(3)(a) of the Vienna Convention, and its status as an implementing agreement, could the Fish Stocks Agreement be regarded as 'a subsequent agreement between the parties regarding the interpretation of [UNCLOS] or the application of its provisions'? The 1994 Agreement on the Implementation of Part XI is undoubtedly an agreement of this kind, because it stipulates expressly how certain UNCLOS provisions are to be interpreted and applied and it is generally accepted as such. The ILC commentary to what is now Article 31(3)(a) notes simply that 'an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation'.³⁹ In that capacity, as we shall see below, the Part XI Agreement has changed the 1982 UNCLOS, not simply inter se, but for all UNCLOS parties.

The Fish Stocks Agreement does not purport to interpret UNCLOS in this way, but that alone need not prevent it from constituting an agreement on interpretation of Articles 61–3 and 116–9 of UNCLOS.⁴⁰ The fact that the Fish Stocks Agreement had been negotiated and adopted by consensus, including the major distant water and coastal fishing States, is more important. Nevertheless, at the time of writing it is difficult to say that it does represent an 'agreement between the parties [to UNCLOS]'. Unlike the 1994 Agreement on Part XI, only some 50 States have become parties to the Fish Stocks Agreement, and a number of important fishing States, including Japan, Korea, Chile, and certain other Latin American States, now oppose the Agreement or

³⁶ See Arts 8(4) and 21.

³⁷ Under Art 116(a) high seas freedom of fishing is subject, inter alia, to 'other treaty obligations'. Since Art 118 envisages the negotiation of additional fisheries agreements, it seems reasonable to conclude that Art 116(a) covers future treaties as well as existing ones. See M Nordquist (ed) *UNCLOS 1982: A Commentary* (Nijhoff/The Hague, 1995) vol III 286.

³⁸ See E Franckx 'Pacta Tertiis and the Agreement for Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the UNCLOS' (2000) 8 *Tulane JICL* 49. Of course this does not preclude the possibility that it may in whole or part reflect or become customary law.

³⁹ ILC, 'The Law of Treaties,' commentary to Art 27, at para (14), in Watts (ed) *The ILC* vol II 689.

⁴⁰ These provisions are inherently evolutionary in so far as they set standards for the conservation and management measures states are required to take in the EEZ and on the high seas. See Freestone, in Boyle and Freestone (eds) *International Law and Sustainable Development* at 159–60.

appear to have no intention of participating. While the Fish Stocks Agreement may eventually come to exert a significant influence on the development of international fisheries law and the interpretation of UNCLOS,⁴¹ this is far from certain until there is a greater level of participation or acquiescence than at present exists.

Whether another treaty is regarded as an agreement on interpretation of UNCLOS, or as a guide to the interpretation of inherently evolutionary provisions, or simply as evidence of common understanding of comparable provisions, the level of participation cannot be ignored. Given the express terms of Article 31(3), the ILC commentary thereto, and the particular need for uniformity across all parties to UNCLOS,⁴² it is arguable that a treaty cannot realistically be regarded as an agreement on interpretation or as a 'relevant rule applicable in relations between the parties', unless it has the consensus support of all the parties, or there is no objection.⁴³ This does not mean that all the parties to UNCLOS would have to be party to the other treaty. Thus the 1994 Agreement on the Implementation of Part XI is assumed to be effective on the basis that non-parties have tacitly consented to or acquiesced in the revision of UNCLOS. Alternatively, a treaty rule may also be binding in customary international law, and become applicable between disputing States on that basis.⁴⁴ An agreement lacking such support may still afford some guidance but it will no longer fall strictly within the obligatory terms of Article 31(3)(c), and its persuasive force as a basis for evolutionary interpretation will necessarily be weaker the fewer parties there are.⁴⁵

The obvious conclusion is that the UN Fish Stocks Agreement has changed

⁴¹ See Edeson, in Boyle and Freestone, *ibid.*, at 172–3; Örebeck et al., 'The 1995 UN Straddling and Highly Migratory Fish Stocks Agreement' (1998) 13 *IJMLC*, at 140–141.

⁴² However, the argument for uniformity should not be pushed too far. It remains open to individual States to agree alternative interpretations *inter se*, within the terms of UNCLOS Article 311(3), on which see below. The same point is made in a WTO context by Bartels, Article XX of GATT and the Problem of Extraterritorial Jurisdiction (2002) 36 *Journal of World Trade* 353, at 361.

⁴³ ILC commentary in Watts (ed.), *The ILC*, vol II, at pp 688–9; J Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go? (2001) 95 *AJIL* 535, at 575–6; McLachlan, n 25 above, para 16, but note his qualifications to this proposition at para 17. Some authors read Article 31(3)(c) as referring to all the parties to a dispute, rather than all the parties to a treaty. Apart from being inconsistent with the ILC Commentary on Article 31(3), this leaves unanswered the question how the article should be applied in other contexts, eg by treaty COPs, the UN, or foreign ministries. It risks a serious Balkanisation of global treaties implemented by regional agreements. See below, section 4.

⁴⁴ In *Shrimp-Turtle* the AB noted that although the US was not a party to UNCLOS, it did accept the relevant provisions as customary law.

⁴⁵ See the *OSPAR Arbitration* (PCA, 2003), at paras 101–5, where the Arbitrators declined even to take into account the Aarhus Convention, which was not in force, and which Ireland had not ratified. However, compare the dissent of Griffith, who notes that an agreement may provide guidance even when it is not in force between the parties. In practice much will depend on whether other non-parties acquiesce or not, and on the issue in dispute. In *Shrimp-Turtle* the United States did not object to the Appellate Body taking the Biological Diversity Convention into account, even though the US is not a party. It is difficult to see how any tribunal could do otherwise, given the almost universal participation by other States in this treaty.

the law between its own parties, but it has not yet changed or reinterpreted UNCLOS in regard to states not party to the Agreement.⁴⁶ Here the limitations of implementing agreements become apparent. The need to secure sufficiently widespread support, and the difficulty of doing so in treaty form, are no less obstacles in this context than they would be if trying to amend UNCLOS using Articles 312 or 313. This leads on to the question whether soft law can provide an alternative and perhaps easier mechanism for effecting change.

III. SOFT LAW AND THE INTERPRETATION OF UNCLOS

Using soft law in its simplest sense to refer to non-binding but potentially normative instruments leads us to consider how far UN General Assembly resolutions, conference declarations, codes of conduct etc. may affect the interpretation and evolution of UNCLOS. Resolutions or declarations of this kind may of course constitute agreed interpretations of a treaty, and to that extent they must be applied under Article 31(3)(a), as we saw above.⁴⁷ It is common practice for conferences of parties to adopt agreed interpretations in this way, and there is no reason in principle why the parties to UNCLOS should not do so. There is no record of them adopting any relevant resolutions to date. However, the Commission on the Limits of the Continental Shelf has done so in regard to Article 9 of Annex II of the Convention.⁴⁸

Soft law instruments have also been used to promote implementation of treaties, including UNCLOS. The best examples are the 1995 FAO Code of Conduct on Responsible Fishing and the 2001 FAO Plan of Action on Illegal, Unreported and Unregulated Fishing. In essence, these non-binding 'voluntary instruments' represent codes to be implemented in national law. Adopted by consensus in FAO,⁴⁹ in part they reiterate, interpret and amplify relevant provisions of UNCLOS and the 1995 Fish Stocks Agreement, although the scope of the Code is much broader than either of these treaties. The FAO Compliance Agreement forms an integral part of the Code; both were negotiated in parallel with the 1995 Fish Stocks Agreement, and all three 'can be viewed as a package of measures that reinforce and complement each other'.⁵⁰ The Plan of Action is another element of the Code. Progress in implementing it will be monitored by FAO.

⁴⁶ See to the same effect Franckx (2000) 8 *Tulane JICL* 49.

⁴⁷ See, eg, 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514 (XV); 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV); *Western Sahara Advisory Opinion* (1975) ICJ Reports 12; *Nicaragua Case* (1986) ICJ Reports 14.

⁴⁸ See 2004 Rules of Procedure of the CLCS, Rule 46 and Annex I, CLCS/40 (2004).

⁴⁹ However some States expressed significant reservations when adopting the Plan of Action: see FAO, *Rept. of the Committee on Fisheries*, 24th Session (2001).

⁵⁰ G Moore, in EHey (ed) *Developments in International Fisheries Law* (Kluwer The Hague 1999) at 91–2.

Use of a soft law form can partly be explained by the opposition of some States to binding agreements. Another reason, however, is that both instruments are in part aimed at regional fisheries organizations and the fishing industry as well as States, and contain some elements which are unlikely to find their way into a treaty. They are also easier to amend or replace than treaties. Reviewing these instruments, together with the 1993 Compliance Agreement and the 1995 Fish Stocks Agreement, Edeson concludes that:

There can be little doubt that the sum total of the changes introduced has substantially strengthened the regime of the 1982 UN Convention, leaving aside the question whether there has been a *de facto* amendment of it in some respect.⁵¹

A third possibility is to treat soft law as a source of general principles. Article 31(3)(c) of the Vienna Convention appears to include general principles as an aid to treaty interpretation.⁵² If that is correct, soft law declarations such as the 1992 Rio Declaration or the 1948 Universal Declaration of Human Rights will have to be taken into account in so far as they articulate general principles agreed by States. The willingness of the ICJ to take sustainable development into account as an 'interstitial norm' illustrates the potential impact of soft law general principles on the interpretation and application of treaties.⁵³

One of the most important examples of soft law general principles relevant to the interpretation of UNCLOS is the precautionary principle, endorsed by consensus in Principle 15 of the 1992 Rio Declaration on Environment and Development. As the *Southern Bluefin Tuna* cases suggest, the fisheries conservation articles of the 1982 UNCLOS may already have been modified by the precautionary approach.⁵⁴ As well as the conservation of fish stocks, the definition of pollution in Article 1; the obligation to do an environmental impact assessment in Article 206; the general obligation to take measures to prevent, reduce and control pollution under Article 194; and the responsibility of States for protection and preservation of the marine environment under Article 235, are all potentially affected by the more liberal approach to proof

⁵¹ In Boyle and Freestone (eds) *International Law and Sustainable Development*, at 165. See also W Edeson 'Soft and Hard Law Aspects of Fisheries Issues' in Nordquist, Moore, and Mahmoudi (eds) *The Stockholm Declaration and Law of the Marine Environment* (Nijhoff The Hague 2003) 165.

⁵² Thus in *Golder* the ECHR referred to access to a court as a 'general principle of law' when interpreting Art 6 of the European Convention on Human Rights. Note, however, that general principles cannot override or amend the express terms of a treaty: see *Beef Hormones Case* (1998) WTO Appellate Body, WT/DS26/AB/R (1997), paras 124–5.

⁵³ See *Gabčíkovo Case* (1997) ICJ Reports 7, at para 140; AV Lowe, in Boyle and Freestone (eds) *International Law and Sustainable Development* at 31.

⁵⁴ See, eg, *Southern Bluefin Tuna Cases (Provisional Measures)* (1999) ITLOS Nos 3 and 4, paras 77–9, and Judges Laing at paras 16–19; Treves at para 9, and Shearer. See also Nordquist (ed) *UNCLOS Commentary*, vol III 288, and Freestone, who makes the same point in Boyle and Freestone (eds) *International Law and Sustainable Development* at 140.

of environmental risk envisaged by Principle 15.⁵⁵ If the parties prefer to formulate a more UNCLOS-specific version of the precautionary principle or the conservation of biological diversity, it is of course open to them to do so.⁵⁶ Such a resolution would then become an agreed interpretation of the Convention. Other contemporary concerns such as the protection of biological diversity or sustainable development can in the same way penetrate older terminology in earlier treaties on the law of the sea, international water-courses, natural heritage, or environmental damage.

What these examples show is that subtle evolutionary changes in existing treaties may come about through the process of interpretation under the influence of soft law. In any system of law the ability to make such changes on a systemic basis is important. For this purpose it is neither necessary nor useful to attempt to turn the precautionary principle into a 'rule' of customary international law, or to enshrine it in a binding treaty. Given the obstacles to formal amendment of UNCLOS, the consensus endorsement by States of an agreed interpretation or a general principle in soft law form is an entirely sensible alternative in appropriate cases. Use of such techniques does not diminish the need for consensus among the parties. On the contrary, while amendments or implementing agreements may limp into force with only partial participation, adopting soft law instruments without consensus support has little if any impact on the law-making process. Soft Law's principal advantage is simply that it avoids the need to go through the process in treaty form. Once adopted, no ratification is necessary and the resolution takes immediate effect for all UNCLOS parties. This does not mean that soft law resolutions are an alternative to amendment or implementation agreements in every case; far from it. Much will depend on what is proposed. But if the issue can be formulated in terms of interpretation of the existing terms of the treaty—as it could be in the case of the precautionary principle—there is no need to go further than soft law.

IV. REGIONAL AGREEMENTS AND THE DEVELOPMENT OF UNCLOS

A. The role of regional agreements in implementing UNCLOS

The law of the sea is inherently global. The International Law Commission assumed as much in its codification of the subject in the 1950s and the words 'region' and 'regional' each appear only once in the four Geneva Conventions

⁵⁵ See PS Rao, *Rept of the ILC* (2000) GAOR A/55/10, para 716, who concludes that the precautionary principle is already included in the principles of prevention and prior authorization, and in environmental impact assessment, 'and could not be divorced therefrom'. As I Brownlie *Principles of Public International Law* (5th edn OUP Oxford, 1998) 285–6 observes, 'The point which stands out is that some applications of the principle, which is based on the concept of foreseeable risk to other states, are encompassed within existing concepts of state responsibility.'

⁵⁶ As for example in the 1995 Fish Stocks Agreement, Art 6.

of 1958.⁵⁷ Nor has there been any suggestion in the case law of the International Court of Justice that it is applying local or regional customary law when adjudicating law of the sea disputes. While the Court's decisions do take account of special circumstances, such as geography or dependence on fisheries,⁵⁸ and naturally pay particular attention to the practice of the parties in dispute, the Court has always been careful to articulate its conclusions in terms of a general law of the sea applicable to all States. The Court's general approach suggests that while there may be, for example, a Latin American perspective on the law of the sea, or Latin American practice contributing to the development of the law of the sea, there can be no Latin American law of the sea distinct from what prevails elsewhere.

The 1982 UN Convention on the Law of the Sea presents a more complex picture, however. On the one hand, as we have seen, its explicit purpose is to articulate a comprehensive, uniform and global legal order for the world's oceans, and it seeks to sustain that legal order in various ways. At the same time, UNCLOS makes specific provision for regional co-operation in the case of enclosed and semi-enclosed seas.⁵⁹ In the case of fisheries management, regional cooperation and regulation are required if the provisions of the 1982 UNCLOS and the 1995 UN Fish Stocks Agreement are to be implemented effectively. Part XII of the Convention, dealing with protection of the marine environment, also makes significant reference to regional rules and standards in various contexts. Article 237 specifically preserves the freedom of States to make further agreements relating to the protection and preservation of the marine environment, provided these are 'concluded in furtherance of the general principles and objectives of this Convention'. The same article also preserves obligations under existing agreements on the marine environment, but requires them to be 'carried out in a manner consistent with the general principles and objectives' of the Convention. Clearly, UNCLOS does not prohibit regional agreements. They have been a significant source of further development of the law of the sea.

Taken too far, regionalism may weaken the consensus on a genuinely global law of the sea. Fragmentation is an inherent risk in any system of law built on the consent of States; in a universal medium such as the oceans it carries special risks. There is, however, no real evidence that this has been the effect of regional cooperation. On the contrary, it has arguably strengthened the 1982 UNCLOS. Regional agreements have been a significant means of implementing the framework provisions of Part XII of the 1982 LOS

⁵⁷ Convention on the Territorial Sea and Contiguous Zone, Art 4(4) (straight baselines) and Convention on the High Seas, Art 12(2) (search and rescue). See Crawford in UN, *International Law on the Eve of the Twenty First Century* (UN New York 1997) 99.

⁵⁸ See, eg, *Norwegian Fisheries Case* (1951) ICJ Reports 116; *Icelandic Fisheries Cases* (1974) ICJ Reports 3 and 175; *North Sea Continental Shelf Case* (1969) ICJ Reports 3.

⁵⁹ Art 122–3. *The MOX Plant Arbitration* (2003) reveals sharply differing views about the implications of these articles for regional cooperation.

Convention, even before its entry into force in 1994. The State practice evident in these agreements is one reason why Part XII has so quickly come to be regarded as a codification of customary law on protection of the marine environment.⁶⁰ At the same time, by facilitating some flexibility in implementation, regional arrangements help accommodate the special needs and varying circumstances of a range of seas with diverse oceanographic and ecological characteristics within a general international law of the sea. Much the same is true of regional fisheries agreements. FAO's regional fisheries agreements and UNEP's regional seas agreements are thus an important contribution to the implementation of UNCLOS.

Moreover, regional agreements also have an important and continuing role in giving effect to Chapter 17 of Rio Agenda 21 and meeting the goals of sustainability and integrated ecosystem management set out there and in the 2002 Johannesburg Declaration and Plan of Implementation.⁶¹ This is certainly the aim of new treaties adopted under regional seas programmes in the Northeast Atlantic, the Mediterranean, the Baltic, and the Caribbean. These treaties evidence a shift away from the older UNCLOS focus on pollution prevention.⁶² Agenda 21 illustrates how 'a more conceptually sophisticated' focus on protection of the marine environment has evolved out of Part XII of UNCLOS.⁶³ Although Agenda 21 does not amend the 1982 UNCLOS, and is not binding on States, it can be taken into account when interpreting or implementing the Convention and it has had the effect of legitimizing and encouraging legal developments based on these new perspectives. As Judge Yankov has observed: 'It is hard to conceive of the development of modern law of the sea and the emerging international law of the environment in ocean-related matters outside the close association and interplay between UNCLOS and Agenda 21.'⁶⁴

B. Inter se agreements inconsistent with UNCLOS

The limitations placed on regional environmental agreements by Article 237

⁶⁰ See Birnie and Boyle *International Law and the Environment*, at 349 and 354–5.

⁶¹ *Rept of the UN Conference on Environment and Development* UN Doc. A/Conf.151/26/Rev 1 (1992) vol I; *Rept of the WSSD UN Doc A/Conf 199/20* (2002).

⁶² Notably in the 1992 OSPAR Agreement, the 1992 Helsinki Agreement, the 1995 Barcelona Convention and its 1996 protocols, and the 1999 Kingston Protocol.

⁶³ A Yankov in Boyle and Freestone (eds) *International Law and Sustainable Development* at 272. Chapter 17 of Agenda 21 introduces several new elements not found in UNCLOS that are intended to modernise its environmental provisions:

- An emphasis on integrated and precautionary approaches to protection of the marine and coastal environment. The precautionary approach requires states to take greater account of scientific uncertainty when regulating environmental risk.
- A broader focus on the prevention of environmental 'degradation' and the protection of marine ecosystems, not limited to control of sources of pollution alone.
- Protection of the exclusive economic zone is linked with sustainable development of coastal areas and sustainable use of marine living resources.

⁶⁴ Boyle and Freestone (eds) *International Law and Sustainable Development* at 272.

have already been noted. For other kinds of agreements, regional or otherwise, the constraints imposed by UNCLOS are more extensive. Article 311(3) specifies that other agreements may modify or suspend provisions of the Convention, 'provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States parties of their rights or the performance of their obligations under this Convention.'⁶⁵

Article 311(3) is modelled on Articles 41 and 58 of the 1969 Vienna Convention on the Law of Treaties,⁶⁶ which deal respectively with *inter se* modification or suspension of multilateral treaties in largely comparable terms. The UNCLOS drafters' concern for the integrity of an interdependent treaty regime thus reflects general treaty law. Moreover, in such cases the residual rules of priority found in Article 30(4) of the Vienna Convention are themselves displaced in favour of Article 41.⁶⁷

The implication of Article 311(3) is that the drafters of the 1982 UNCLOS sought to limit the right of parties to derogate from the Convention in later agreements. The assumption is that, in the event of the kind of conflict envisaged in Article 311 arising, the 1982 UNCLOS will prevail over a later treaty dealing with the same subject matter, notwithstanding the *lex posteriori* rule. When considering such clauses, the ILC commentary concluded:

The chief legal relevance of a clause asserting the priority of a treaty over subsequent treaties which conflict with it therefore appears to be in making explicit the intention of the parties to create a single 'integral' or 'interdependent' treaty regime not open to any contracting out; in short, by expressly forbidding contracting out, the clause predicates in unambiguous terms the incompatibility with the treaty of any subsequent agreement concluded by a party which derogates from the provisions of the treaty.⁶⁸

It has accordingly been suggested that under Article 311(3) the later inconsistent agreement is unenforceable even between the parties to it, not simply illegal as a breach of treaty.⁶⁹

⁶⁵ See also 1995 UN Fish Stocks Agreement, Art 44 of which is in similar terms.

⁶⁶ Nordquist (ed) *UNCLOS Commentary*, vol V at 238–40.

⁶⁷ 1969 VCLT Art 30(5). This includes the *lex posteriori* rule. See generally J Pauwelyn *Conflict of Norms in Public International Law* (CUP Cambridge 2003) 302–15.

⁶⁸ ILC 'Law of Treaties', commentary to draft Art 26, para 7, in Watts *The ILC*, vol II at 678.

⁶⁹ See Pauwelyn *Conflict of Norms* at 312–13, who concludes: 'although the inter se agreement is not invalid or void under the law of treaties, as a result of its illegality grounded in Art.41 or Art.58 and the law of state responsibility, the inter se agreement must be ended and cannot, therefore, be enforced, not even as between the parties to it. . . . This explains why Arts 41 and 58 provide for an exception to the contractual freedom of states.' He relies in part on S Rosenne *Breach of Treaty* (CUP Cambridge 1985) at 89, who argues that such agreements may be invalid. The competing view is that Art 311(3) affects only the priority or applicability of inter se treaties, not their validity: see Pauwelyn op cit at 310–11.

There have been few examples of *inter se* regional agreements contravening Article 311(3), and none has been notified via the Secretary-General as required by Article 311(4). One such agreement has been the subject of dispute between Chile and the EC.⁷⁰ The Galapagos Agreement seeks to control access to high seas fisheries in the southeast Pacific in a manner which the EC regards as inconsistent with the high seas fishing rights of other States under UNCLOS.⁷¹

A global law of the sea *can* accommodate regional approaches to certain problems. There need be no necessary incompatibility with the 1982 UNCLOS, provided any regional arrangements are consistent with the Convention's object and purpose in the terms prescribed by Articles 237 and 311, and in conformity with the relevant substantive articles of the Convention.⁷² With that caveat, further implementation of UNCLOS provisions by regional agreements—or by other forms of *inter se* agreement—remains a viable option, vigorously pursued by UNEP and FAO.

V. TREATY INTEGRATION: UNCLOS AND OTHER MULTILATERAL TREATIES

So far we have considered the relationship between UNCLOS and other *inter se* agreements specifically intended to interpret, implement or otherwise modify the Convention. A larger question is the extent to which UNCLOS may evolve through interaction with global multilateral agreements which are not specifically UNCLOS-related, but which deal with related issues. Two sets of agreements are of particular relevance: the 1992 Convention on Biological Diversity and its Protocols, and the 1994 WTO Agreement. The former is of direct importance because it covers marine biological diversity; the latter only incidentally, in so far as it constrains trade restrictions intended to secure compliance with UNCLOS objectives.

A. UNCLOS and the CBD

The relationship between the 1982 UNCLOS and the 1992 Convention on Biological Diversity (CBD) shows how successive treaties on rather different topics can contribute to the development of an integrated legal regime.⁷³ As

⁷⁰ See *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, ITLOS No 7, Order No 2000/3 (2000).

⁷¹ The 2000 Framework Agreement for the Conservation of the Fishery Resources of the Southeast Pacific High Seas. Negotiated by Chile, Peru and Ecuador, Art 12 of the Agreement gives coastal states preferential voting rights on conservation measures and catch allocation. Following a provisional settlement of the dispute, the Galapagos Agreement has not entered into force. Art 311 was also an issue in the *Southern Bluefin Tuna Cases* (ITLOS Nos 3 and 4 1999 and Arbitral Award ICSID 2000).

⁷² Notably in parts VII, IX, and XII.

⁷³ See UN/CBD, Study of the Relationship between the CBD and UNCLOS with Regard to the Deep Seabed (2004) UNEP/CBD/SBT/TA/8/INF.

we noted earlier, the 1982 Convention makes no reference to biological diversity. A decade later the 1992 Rio Conference on Environment and Development adopted the CBD, whose provisions apply both to terrestrial and marine biodiversity. Clearly, each agreement is relevant for the purpose of interpreting the other. Equally clearly, the increasingly devastating effect of unsustainable fishing practices on marine biodiversity and ecosystems is a matter that directly affects implementation of the CBD. There is undoubtedly a possibility that implementing the latter treaty could affect rights and obligations under UNCLOS.

The CBD does not give blanket priority to UNCLOS. On marine environmental matters Article 22 specifically requires parties to implement the CBD 'consistently with the rights and obligations of States under the law of the sea'. This suggests that they could not, for example, ignore the rights of ships to freedom of navigation in the EEZ and high seas, whether under UNCLOS or under customary law. To that extent Article 22 of the CBD reinforces the terms of Article 311(3) of UNCLOS. Within these limits UNCLOS will prevail in any conflict. On the other hand, as we saw earlier, agreements relating to the marine environment do not have to conform to Part XII of the Convention, but need only be carried out in a manner consistent with the 'general principles and objectives' of the Convention. This would allow CBD parties much greater latitude to depart from the terms of Part XII than from other parts of the Convention, since as a *lex specialis* Article 237 overrides Article 311(3).⁷⁴ Save in an extreme case, the CBD regime will therefore prevail over Part XII of UNCLOS.

More importantly, however, while Article 22 also provides that existing treaty rights and obligations are not affected by the CBD, this exclusion does not apply where 'the exercise of those rights and obligations would cause serious damage or threat to biological diversity.' While in general terms the effect of Article 22 is to ensure that UNCLOS will normally prevail, States parties to the CBD cannot rely on UNCLOS to justify—or to tolerate—fishing which causes or threatens serious damage to biodiversity. To that extent the CBD may have modified UNCLOS. Is this permissible within the terms of Article 311(3) of UNCLOS?

Here the answer is probably 'yes'. Since conservation of marine living resources and protection and preservation of 'rare or fragile ecosystems' and the habitat of 'depleted, threatened or endangered species and other forms of marine life' are already envisaged by UNCLOS,⁷⁵ the Convention's objects and purposes can readily be interpreted to include measures aimed at protection of marine biodiversity. Thus, for example, the adoption under the CBD of protected zones intended to reduce serious damage to biodiversity on the high seas would not be incompatible with UNCLOS, and would be consistent with

⁷⁴ Nordquist (ed) *UNCLOS Commentary* vol IV 423–6.

⁷⁵ Arts 61, 64–7, 117–20, 194(5).

Article 22 of the CBD. However, such zones would not be opposable to non-parties to the CBD, whose UNCLOS rights Article 311 expressly protects. Thus, any meaningful attempt to regulate marine biodiversity in this way depends in practice principally on the parties to UNCLOS, not on the parties to the CBD.

The relationship between UNCLOS and the CBD is relatively complex, and operates at several different levels. It should be obvious that this relationship could not be reproduced simply on the basis of Vienna Convention rules on the priority of treaties. It clearly had to be negotiated and carefully considered in advance. We can also see how a major law-making treaty such as UNCLOS has an ongoing impact on the structuring of later law-making agreements that affect matters regulated by UNCLOS. This effect is not limited to biodiversity or fisheries, but can also be observed in relation to security,⁷⁶ narcotics control,⁷⁷ trade in hazardous cargoes,⁷⁸ or the protection of cultural heritage,⁷⁹ *inter alia*.

Moreover, this feature of UNCLOS also has implications at an institutional level. By far the most important contribution made by international law to the protection of marine biodiversity to date is the 1995 UN Fish Stocks Agreement. For the first time this agreement brings an environmental and biodiversity perspective to international fisheries regulation.⁸⁰ To a significant extent it gives effect to some of the general objectives of the CBD. Notice however that it is an agreement implementing UNCLOS, not an agreement implementing the CBD. At one level the reason is simply that this was how the UN General Assembly chose to proceed. But at another level, it makes sense, given the priority which UNCLOS enjoys both as a matter of law and of UN policy.⁸¹ The range of matters covered by the 1995 Agreement simply could not have been addressed with the same freedom or priority as an addendum to the CBD.

A final point is that we can see from the relationship between UNCLOS and the CBD that international law on conservation of marine living resources and ecosystems is not the exclusive preserve of either treaty. A coherent and comprehensive understanding of the present law of the sea requires consideration of both treaties.

⁷⁶ 2003 Proliferation Security Initiative. The FCO version states: 'The PSI is consistent with United Nations Security Council Resolution 1540, the first ever resolution on non-proliferation issues, adopted on 28 April 2004. The resolution "calls upon all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials."'

⁷⁷ 1988 Convention against Illicit Traffic in Narcotic Drugs, Arts 4 and 17.

⁷⁸ 1989 Basel, Convention on Transboundary Movement of Hazardous Waste, Art 4(12).

⁷⁹ 2001 Convention on the Protection of Underwater Cultural Heritage, Art 3.

⁸⁰ See references at n 12 above.

⁸¹ See Agenda 21, Ch 17, in UN, Report of the UN Conference on Environment and Development (1992) UNDoc A/Conf 151/26/Rev 1, vol I; UNGA Res 54/33 (1999).

B. UNCLOS and World Trade Organisation Agreements

How law-making treaties of different kinds interrelate cannot be determined in any a priori sense. In general international law the relationship between successive treaties is partly governed by the intention of the parties, partly determined by the nature of the treaty, partly regulated by the relationship between special and general rules, partly determined by residual rules based on the time of conclusion of incompatible treaties, and partly dictated by operation of law.⁸² A regime of such complexity is not well suited to ensuring a coherent integration between multilateral law-making treaties.

Given the diversity of law-making institutions, and the varying participation in all such treaties, a measure of incoherence and uncertainty in the relationship between specific treaties may be inevitable. Moreover, the relationship between any two agreements may not be policy-driven or reflect any particular appreciation of priorities on the part of the negotiators. Two treaties which are the result of a different 'legislature'—to use Pauwelyn's description—will also be 'the reflection of a different balance of interests and one state may well have been able to push through its interests more under one treaty than under another.'⁸³ These observations are especially apposite to the relationship between UNCLOS and WTO law. In contrast to the CBD, WTO agreements do not directly address law of the sea matters, and the potential for either conflict or inter-development in either direction is fortunately small. Nevertheless, the interaction of UNCLOS and WTO law has arisen in at least two disputes,⁸⁴ and the question may be important for the development of further UNCLOS-related agreements.

Unlike the CBD, the principal WTO agreement, the General Agreement on Tariffs and Trade (GATT), contains no provision governing its relationship with other treaties. Article 3(2) of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU') provides only that the provisions of the 'covered agreements' are to be clarified 'in accordance with customary rules of interpretation of public international law'. Subject to the proviso that rights and obligations in the covered agreements are not thereby added to or diminished,⁸⁵ this entails interpreting WTO agreements in accordance with Articles 31–3 of the Vienna Convention, and not in accordance with specific GATT canons of interpretation.⁸⁶ As we saw in the section on interpretation, this change has enabled the Appellate Body to take account, inter alia, of the environmental commitments and obligations of States, and to

⁸² See 1969 VCLT, Arts 30, 41, and 53.

⁸³ *Conflict of Norms*, at 369.

⁸⁴ *Swordfish and Shrimp–Turtle*.

⁸⁵ Last sentence of Art 3(2) DSU and Art 19(2) DSU.

⁸⁶ WTO Appellate Body, *Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R. See R Howse, in Weiler (ed), *The EU, the WTO and the NAFTA*, at 54.

try to apply WTO law consistently with general international law, rather than treating it as a closed or self-contained system.⁸⁷

Subsequent WTO case law suggests that implementation of GATT need not interfere with UNCLOS commitments. In *Shrimp-Turtle* the Appellate Body held that unilateral restrictions on trade in marine living resources are more likely to be regarded as arbitrary or discriminatory under GATT if the State concerned has not first sought a cooperative solution through negotiation with other affected States.⁸⁸ Moreover, the failure of the US to negotiate a possible solution made it harder for it to rely convincingly on the exceptions provided for in Article XX. Together, these findings effectively reinforce rather than threaten the duty under UNCLOS Articles 116–19 to cooperate in the conservation and management of high seas marine living resources. Although the WTO ruling did not specifically require further negotiations between the parties, in practice the US found that the easiest way to achieve its objectives was by returning to the negotiating table to conclude a regional conservation agreement for marine turtles. Unilateral trade sanctions remained a legitimate option had other parties refused to negotiate in good faith.

In so far as UNCLOS-related instruments address trade issues directly, notably in the 1994 Agreement on Part XI and the 2001 FAO Plan of Action on IUU Fishing, express provisions ensure that they will be applied consistently with general trade obligations under WTO agreements.⁸⁹ There is no likelihood that compliance with UNCLOS will in any way undermine GATT commitments.

To that extent further consideration of the relationship between UNCLOS and the 1994 GATT is probably academic. If there ever is a conflict, however, then it is important to recall that, as we saw above, unlike the GATT, UNCLOS prevails over both earlier and later treaties to the extent of any inconsistency within the terms of Article 311. As an integral agreement, UNCLOS can be derogated from by the parties to GATT only as provided for in that article. By contrast, in so far as GATT is essentially a series of bilateral trade relationships applicable *inter se* it enjoys no such priority.⁹⁰

It might be argued that a global agreement such as the GATT is not a mere *inter se* agreement, and to that extent Article 311 would then be inapplicable to its relationship with UNCLOS. Even if that is correct UNCLOS will still

⁸⁷ For a much fuller treatment of the applicability of international law within the WTO Dispute Settlement Body, see J Pauwelyn 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 AJIL 535.

⁸⁸ WTO Appellate Body (1998) WT/DS58/AB/R, at paras 166–72. In its *Shrimp-Turtle* Art 21.5 decision WT/DS58/AB/RW (2001) the Appellate Body held that: 'The conclusion of a multi-lateral agreement requires the cooperation and commitment of many countries. In our view, the United States cannot be held to have engaged in "arbitrary or unjustifiable discrimination" under Article XX solely because one international negotiation resulted in an agreement while another did not.'

⁸⁹ 1994 Agreement Relating to Part XI, Annex, s 6(1)(b); 2001 FAO Plan of Action to Prevent IUU Fishing paras 65–8.

⁹⁰ Pauwelyn *Conflict of Norms* at 315–24.

prevail over the later GATT Agreement in so far as it is a *lex specialis*.⁹¹ The issue is then primarily one of interpretation rather than precedence.⁹²

Moreover, on this reasoning, if, at some future date, an UNCLOS-related agreement makes specific provision for trade sanctions otherwise incompatible with GATT commitments, under present law and in the absence of any savings clause, it also follows that the later and no less specific UNCLOS-related trade rule would prevail. To that extent the US is free to promote marine conservation-related trade bans or sanctions through regional or global agreements, notwithstanding GATT. This also explains the need for a GATT savings clause in the 1994 Implementation Agreement and the 2001 FAO Plan of Action.

The conclusions are obvious. First, the relationship between UNCLOS and other treaties has been carefully considered and generally reflects a strong international consensus in favour of UNCLOS. Secondly, there is sufficient uncertainty about the impact of Vienna Convention rules on treaty relationship to make it unwise to rely solely on these to resolve difficulties predictably and with certainty. Thirdly, the only way to ensure systematic integration of law-making treaties is to make express provision in the relevant treaties. If, as in the case of UNCLOS and the CBD, a more complex interrelationship is desired, then it must be negotiated and provided for expressly.

Where the relationship between UNCLOS and other treaties has not been spelt out in this way, there may be another and far simpler approach. It could be summarized by saying that in cases of dispute on such issues the parties shall cooperate to find an agreed solution. The case law certainly points rather strongly in this direction. Most obviously, in the *MOX Plant* case, where the relationship between UNCLOS, EC law and several other treaties was in issue, both the ITLOS and the arbitral award stress the parties' duty to cooperate pending a solution in terms rather stronger than UNCLOS itself would justify.⁹³ In *Southern Bluefin Tuna* the ITLOS also referred to the need for cooperation,⁹⁴ while the arbitral award left the parties with no option but to resume negotiations, based on the 1993 Southern Bluefin Tuna Convention, which they did successfully. Finally, in *Swordfish*, having initiated separate proceedings before the ITLOS and the WTO, the parties rather rapidly concluded that negotiation of a provisional settlement and the resumption of cooperation were preferable to resolution of the admittedly difficult legal

⁹¹ On its own terms the *lex posteriori* rule in Art 30 of the VCLT applies only to successive treaties 'relating to the same subject matter'. P Reuter *Introduction to the Law of Treaties* (KPI London 1995) 132, para 201, thus notes that: 'The rule of article 30 would therefore only apply to treaties with subject matters of a comparable degree of "generality".' See also Aust *Modern Treaty Law and Practice* 183; I Sinclair *The Vienna Convention on the Law of Treaties* (2nd edn MUP Manchester 1984) 96–8; Pauwelyn *Conflict of Norms* 364–6 and 406–9.

⁹² Sinclair *Vienna Convention* 96.

⁹³ Request for Provisional Measures (Order) ITLOS No 10 ((2001) at paras 82–4 and operative para 1.

⁹⁴ Request for Provisional Measures (Order) ITLOS Nos 3 and 4 (1999).

questions posed by a dispute that straddled both UNCLOS and WTO law.⁹⁵ In none of these cases, each of which raises important and interesting matters of UNCLOS law, have the merits been addressed, nor are they ever likely to be. Given the complexities of Article 311 and the Vienna Convention law on the relationship of treaties, a preference for negotiated outcomes may not be so surprising.

VI. CONCLUSIONS

As we can see from this study, even without formal amendment, the further evolution of UNCLOS is possible and has taken place through a wide variety of mechanisms, including legally binding agreements and soft law. It is in that sense no less a dynamic or living instrument than so-called framework agreements, or than human rights treaties. Whatever the mechanism, however, it is obvious that consensus negotiation remains the most effective means of securing generally accepted changes and additions to the corpus of UNCLOS law. There is no evidence that UNCLOS is likely to ossify or become obsolete in the immediate future, provided the parties continue to promote necessary developments within the framework of the Convention. Much will depend on how far, and how long, it continues to represent a balance of interests acceptable to the international community as a whole.

The Convention was intended to have the flexibility to respond to change, and the mechanisms for doing so are available. Because of its negotiating history and near universal approval it is less vulnerable to unilateral or regional challenges than its predecessors. Change, when it comes, is more likely to be based on negotiated multilateral agreement. Evolution, not revolution, is the most probable outcome. However, this happy position is only tenable so long as the parties collectively wish to preserve it. Ultimately, the parties 'are fully competent to abrogate or modify the earlier treaty which they themselves drew up'.⁹⁶ Even the presence of a clause specifically controlling later inconsistent treaties will be ineffective if the parties wish to make it so. UNCLOS has an unusually privileged position among treaties; it shows every sign of being a living instrument, but that does not mean it will be immortal.

⁹⁵ See *Swordfish Case*, ITLOS No 7, Order No 2000/3 (2000), and *EC-Chile: Measures Affecting the Transit and Importation of Swordfish*, WT/DS193 (2000).

⁹⁶ ILC, 'Law of Treaties,' commentary to draft Art 26, at para (7), in Watts *The ILC* vol II at 677.