

# The Law of the Sea “System” of Institutions

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## I. Introduction

The United Nations Convention on the Law of the Sea (UNCLOS), opened for signature on 10 December 1982 and entered into force on 16 November 1994, is the most complex and far-reaching convention emerging from the over 50 years of work promoted by the world organization to codify and progressively develop international law. Not only is this Convention a very long document encompassing about 400 articles. It deals with a chapter of international law which, even though it is as old as international law itself, has undergone, and will undoubtedly continue to undergo, radical changes brought about by the political, economic and technological evolution of the world. The Convention introduces rules on the limits of the maritime zones of States and on their powers and freedoms within each zone. It also sets out rules regarding matters of common concern for all States, which may involve activities located in areas beyond the limits of national jurisdiction (such as navigation and other activities on the high seas and the exploitation of resources in the International Sea-Bed Area) or located in all areas of the seas, such as the protection and the preservation of the marine environment.

Through these rules the Convention exercises a stabilizing function on the world community. Such a function is enhanced by the very high number of ratifications. For the vast majority of States this branch of the law has acquired the precision and predictability of treaty law. Even for States that are not as yet parties to the Convention, the law of the sea has become heavily influenced by a written text.

The Convention is also a forward looking document. It assumes that its provisions do not envisage every problem that may arise and do not solve every problem these provisions envisage. It is true that even before its entry into force, States adopted new treaty instruments amending or complementing the Convention as regards certain problems concerning

which they considered its provisions insufficient or unsatisfactory<sup>1</sup>. These problems, although sensitive, concern, however, only a relatively limited group of questions. As regards its normal functioning and its adaptation to changes in political attitudes, economic needs and technological capabilities, the Convention relies on international institutions.

The drafters of the Convention were, on the one hand, well aware of the network of international institutions that exists in the world and of their potential for undertaking tasks necessary for the proper implementation of the Convention<sup>2</sup>. On the other hand, they came to the conclusion that, in order to carry out tasks the existing organizations could not undertake, or which in their view they should not undertake, it was necessary to establish new institutions. Thus, while many provisions of the Convention rely on existing international institutions, other provisions set out the obligation for States Parties to establish new institutions to which particular tasks are entrusted. One particular task essential for the proper functioning of the Convention, that of the settlement of disputes which may arise concerning its interpretation or application, was entrusted at the same time to an existing body, the ICJ, and to a new body, the International Tribunal for the Law of the Sea, as well as to arbitration (article 287).

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<sup>1</sup> These are the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted in New York on 28 July 1994, and opened for signature on the 29 July 1994 (the 1994 Agreement), and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1992 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, opened for signature in New York on 4 December 1995 (the 1995 Agreement). Even though their title is similarly drafted, the 1994 Agreement is open only to States which are Parties to the Law of the Sea Convention or which ratify it or accede to it at the same time (article 4 para. 2) while the 1995 Agreement is a separate instrument open to signature, ratification and accession by States and other entities independently of their being parties to the UNCLOS. The 1994 Agreement entered into force on 29 July 1996, while the 1995 Agreement is not in force as yet.

<sup>2</sup> For a recent review see S.N. Nandan, "Existing institutional framework and mechanisms", in: P.B. Papoyo (ed.), *Ocean Governance, Sustainable Development of the Seas*, 1994, 28 et seq.

## II. The Law of the Sea Convention and Existing International Institutions

The rules of the Convention concerning existing international institutions refer to their functions in various ways.

First, the many articles of the Convention which provide for cooperation between States invariably specify that such cooperation should be "in the framework of the competent international organization" or that it shall be conducted "directly or through competent international organizations" or that "States and competent international organizations shall cooperate". One may quote, among others, provisions on straddling stocks, on highly migratory species, on marine mammals (arts 63, 64 and 65), on enclosed and semi-enclosed seas (article 123), on the protection and preservation of the marine environment (arts 197, 200, 201, 202, 210 para. 4, 211, para. 1), on marine scientific research (arts 242, 243, 244), on the development and transfer of marine technology (arts 266, 268, 271, 272).

Secondly, the Convention provides that in certain cases "generally accepted international rules and standards established through *the competent international organization* or general diplomatic conference" should be the criteria for assessing whether domestic rules are in conformity with the Convention. According to article 211 para. 2, the laws and regulations adopted by the flag State for the prevention, reduction and control of pollution from vessels must have "at least the same effect" as that of the rules and standards established through the competent international organization. According to para. 5 of the same article, coastal States may adopt laws and regulations concerning pollution in their economic zone provided that they conform with and give effect to the above mentioned generally accepted rules and standards. Thus, by becoming parties to the UNCLOS, States accept to become bound, at least indirectly, by rules and standards adopted within competent international organizations to which they may not belong, or which they may not have concurred to adopt<sup>3</sup>.

Thirdly, the Convention requires that coastal States, in adopting certain measures concerning areas of the sea under their sovereignty or jurisdiction, take into account the recommendations of the competent international organization, or refer proposals regarding them to such organiza-

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<sup>3</sup> For the present author's analysis of the meaning of the reference to "generally accepted" international rules and standards, cf. T. Treves, "Navigation", in: R.J. Dupuy and D. Vignes (eds), *A Handbook on the New Law of the Sea*, 1991, 835 et seq., at 874-877, with bibliography, to which must be added B. Oxman, "The Duty to Respect Generally Accepted International Standards", *N.Y.U.J.Int'l L. & Pol.* 24 (1991), 109 et seq.

tion and take measures only once the organization has agreed with the proposal and adopted it<sup>4</sup>. The first is the case of the removal of abandoned or disused installations in the exclusive economic zone (article 60 para. 3) and of the designation of sea lanes and the prescription of traffic separation schemes in the territorial sea (article 22 para. 3). The second case concerns measures regarding sea lanes and traffic separation schemes as far as straits used for international navigation and archipelagic waters are concerned (article 41 para. 4, and article 53 para. 9).

Fourthly, international organizations indicated by name are requested to draw up and maintain lists of experts in different fields in order to constitute special arbitral tribunals for the settlement of disputes concerning fisheries, protection and preservation of the marine environment, marine scientific research and navigation including pollution from vessels and by dumping (Annex VIII, article 2). The same lists, according to article 289, may also be used for selecting experts to sit with the court or tribunal competent for the settlement of a dispute concerning the interpretation or application of the Convention.

In all but the last case the organizations are not named, but only indicated as "the competent" ones<sup>5</sup>. Whatever the reasons for this indirect

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<sup>4</sup> On the problems arising from this category of references to the "competent international organization" cf. T. Treves, "La participation de l' 'Organisation internationale compétence' aux décisions de l'Etat côtier dans le nouveau droit de la mer", in: *International Law at the Time of its codification, Essays in honour of Roberto Ago*, Vol. III, 1987, 473 et seq.; and id., "The Role of Universal International Organizations in Implementing the 1982 UN Law of the Sea Convention", in: A.H.A. Soons (ed.), *Implementation of the Law of the Sea Convention Through International Institutions*, (Proceedings 23rd Annual Conference Law of the Sea Institute, 1989), 1989, 14 et seq.

<sup>5</sup> See references in the previous footnote, as well as J.D. Kingham and D.M. McRae, "Competent International Organizations and the Law of the Sea", *Mar.Pol'y* 3 (1979), 106 et seq.; F.H. Paolillo, "The Institutional Arrangements for the International Sea-bed and their Impact on the Evolution of International Organizations", *RdC* 188 (1984), 139 et seq., (162-164); B. Oxman, "Institutional Arrangements and the Law of the Sea", *Lawyer of the Americas* 10 (1978), 687 et seq.; E. Miles, "On Roles of International Organization in the New Ocean Regime", in: Choon-ho Park (ed.), *The Law of the Sea in the 1980s*, 1983, 383 et seq. The United Nations Division for Ocean Affairs and the Law of the Sea has prepared a preliminary table which "attempts to identify international organizations assumed to be competent in respect of activities requested in the UNCLOS". The table does not bear a document number, it is dated 25

approach, it seems to be undisputed, also in the light of article 2 of Annex VIII just mentioned, that for fisheries the competent international organization is the FAO, for the protection and preservation of the marine environment it is the UNEP, for scientific research it is the International Oceanographic Commission and for navigational matters it is the IMO.

These rules are not, of course, directly binding for international organizations, as they are not parties to the Convention. The organizations, however, without objections by the Member States, have made, or are in the process of preparing to make, the "internal changes" concerning their structure, procedures and resource allocation necessary to respond to the challenges set out in the Convention. They have developed cooperation with each other through improved consultation and tried to cope with the new tasks attributed to them. So it is that, for instance, the lists of experts mentioned above have begun to be prepared. Studies have been conducted about the implications of entry into force of the Convention for the different organizations<sup>6</sup>. Some activities envisaged by the Convention have been carried out. For instance, IMO has adopted guidelines on the removal of abandoned or disused installations<sup>7</sup> and started studying questions concerning archipelagic sea lanes<sup>8</sup>. In some cases, the ambition of the Secretariats to rely on entry into force of the Convention in order to claim a widening of the Organization's functions has been trimmed by the

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May 1994 and is entitled "*(Competent) international organizations under the United Nations Convention on the Law of the Sea*."

- <sup>6</sup> See, in particular, the studies of the ICAO, Doc.C-WP/8077 of 1st October 1985 and of the IMO, Doc. LEG/MISC/1 of 10 February 1986, in: *Annual Review of Ocean Affairs: Law and Policy, Main Documents: 1985-87*, 1989, 114 et seq. and 123 et seq. See also, for an up-dated survey, the responses by 14 organizations to a questionnaire sent by the UN in Doc. A/52/491 of 1997. The questionnaire requested the organizations to indicate whether entry into force of the UNCLOS required formal amendments or revisions to treaties under the organization's responsibility, whether it made new tasks or modifications of existing tasks necessary and whether it made necessary or useful new or revised procedures in the work of the organization.
- <sup>7</sup> IMO Assembly Res. A.672. See also the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters of 1972 (London Convention) which includes "any abandonment or toppling at site of platforms or other man-made structures at sea, for the sole purpose of deliberate disposal" in the notion of "dumping" (article 1 para. 4.4), *ILM* 36 (1997), 1 et seq.
- <sup>8</sup> See the detailed summary in 1997 Report of the UN Secretary-General on "Oceans and the Law of the Sea", Doc. A/52/487.

Member States. This seems to have been the case as regards the International Oceanographic Commission<sup>9</sup>.

The Member States of the organizations have accepted, or not opposed, the “internal changes” the Secretariats have proposed for facilitating the task of responding to the requirements of the Convention, even though, as just noted, sometimes they have done so with some reluctance. Nor has there been a great difference of attitude in this regard between Member States that are and those that are not parties to the Convention.

What seems less clear is whether States are really keen to engage in the necessary “external changes”<sup>10</sup>, namely the changes that can be obtained only by State action because they go beyond the limits of the legal autonomy of the secretariats and of the resources available to them. It does not seem that States are ready to commit new financial resources and manpower to the organizations, nor that they are willing to take seriously the task of coordinating the activity of the various organizations in order to avoid overlapping in their activities and the waste of resources it entails. The follow-up of the United Nations Conference on Environment and Development could have been an opportunity for a clarification, at least as far as the marine environment is concerned, but it may have added to the need for new resources and coordination.

### III. The New International Institutions Created by the UN Law of the Sea Convention

The Law of the Sea Convention sets out detailed rules for establishing three institutions:

- the International Sea-Bed Authority;

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<sup>9</sup> See Doc. IOC/INF-1035, Paris 10 June 1996, containing the Summary Report of the Meeting held in Paris on 13–15 May 1996 of an open-ended Working Group (composed of State-designated experts) to consider the possible role of the IOC in relation to the United Nations Convention on the Law of the Sea. A comparison with the IOC Secretariat’s Doc. IOC/WG-LOS-I/6 (used as a basis at the Working Group meeting) shows clearly the difference between the views of the Secretariat and those of the State Experts. See also the IOC Secretariat’s response to UN questionnaire mentioned above: Doc. A/52/491,7–9.

<sup>10</sup> On the distinction between “internal” and “external” changes in international organizations as consequences of entry into force of the UNCLOS, see T.A. Mensah, “The competent international organizations: Internal and external changes”, in: Papoyo, see note 2, 278 et seq.

- the International Tribunal for the Law of the Sea; and
- the Commission on the Limits of the Continental Shelf.

Some provisions of the Convention indicate, however, that another body will play a role: the Meeting of the States Parties.

## 1. The Meeting of the States Parties

It might be questioned whether the Meeting of the States Parties can be classified as an “international institution” if one considers that such a concept involves a certain degree of autonomy and a certain structure. In the light of the Convention, it would seem safe to say that the Meeting of the States Parties is a diplomatic Conference to be convened by the Secretary-General of the United Nations (article 319 para. 1 lit. (e)) to perform certain tasks set out in the Convention. These tasks are twofold: to elect the members of the Tribunal (Annex VI, article 4 para. 4) and of the Commission on the Limits of the Continental Shelf (Annex II, article 2 para. 2) and to decide on the expenses of the Tribunal (Annex VI, article 19 para. 1), including those concerning retirement pensions and refunding of travel expenses for members of the Tribunal (Annex VI, article 18 para. 7).

The tasks assigned to the Meeting of States Parties, in particular those concerning elections and the budget of the Tribunal, have to be performed at regular intervals. This has brought States Parties to adopt elaborate Rules of procedure for the Meeting<sup>11</sup>. The Rules introduce a certain continuity by providing that the officers of the Meeting remain in their positions until replaced at the following session<sup>12</sup>.

The power to adopt the budget of the Tribunal gives the Meeting of the States Parties considerable weight in shaping the way the Tribunal works. In 1997, for instance, the Meeting authorized the Tribunal to hold only two meetings in 1998, while the Tribunal had proposed that three should be held. The close connection between the Meeting and the Tribunal is enhanced by the Rule providing that the provisional Agenda of the Meeting shall contain “any report of the International Tribunal on its

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<sup>11</sup> Doc. SPLOS/2 Rev. 3, and Add. 1 (amendment adopted in 1997: see Doc. SPLOS/24, para. 28).

<sup>12</sup> Rule 19.

work” and “any item proposed by the International Tribunal”<sup>13</sup>. From the practice of the Meetings of the States Parties it would seem to emerge that, in particular because of the power to approve the budget, the Parties discuss more thoroughly the functioning of the Tribunal than the members of the United Nations do when the Report of the ICJ comes up for discussion at the General Assembly.

A possible expansion of the functions of the Meeting of States Parties has to be assessed in the light of the provision of the Convention stating that the Secretary-General of the United Nations convenes “necessary” meetings of States Parties in accordance with the Convention (article 319, para. 2 lit. (e)). Such an expansion, albeit on a question of a non-recurrent nature, may, however, have occurred with the decision taken in one of the early meetings of the States Parties to postpone by more than one year the first election of the members of the International Tribunal for the Law of the Sea<sup>14</sup> and with a similar decision taken later to postpone the election of the members of the Commission on the Limits of the Continental Shelf<sup>15</sup>. Another possible expansion of the Meeting’s functions has been contemplated at the sixth Meeting in March 1997 by including in the agenda an item entitled “Role of the Meeting of the States Parties in reviewing Ocean Law and Law of the Sea Issues”<sup>16</sup>. Notwithstanding “strong support” for the retention of the item on the agenda, the seventh Meeting accepted in May 1997 the argument by the President that such retention was “premature” and that, instead, the President would participate with a report to the General Assembly debate on “Oceans and the Law of the Sea”<sup>17</sup>.

These elements seem to corroborate the conclusion that, even though the Meeting of the States Parties may not be a fully fledged international institution, it certainly is a highly institutionalized form of diplomatic conference.

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<sup>13</sup> Rule 6, para. 3 lit. d and e. In May 1997 an Interim Report on its activities was presented by the Tribunal (Doc. SPLOS/21). The first regular report, covering the period October 1996–December 1997, will be submitted to the Eighth Meeting of the Contracting Parties in May 1998.

<sup>14</sup> Doc. SPLOS/3, para. 16 (Meeting of 21 – 22 November 1995).

<sup>15</sup> Doc. SPLOS/14, para. 41 (Meeting of 24 July – 2 August 1996).

<sup>16</sup> Doc. SPLOS/20, para. 35.

<sup>17</sup> Doc. SPLOS/24, paras 35–41.

## 2. The International Sea-Bed Authority

The International Sea-bed Authority is the institution whose establishment is most closely linked to the very origin of the Third United Nations Conference on the Law of the Sea which adopted the UNCLOS in 1982. Its functions and structure, and the international regime for the exploration for and exploitation of mineral resources of the sea-bed beyond the limits of national jurisdiction (the International Sea-Bed Area, or Area) closely linked with such functions and powers, have been the subject of difficult negotiations at the Conference. The provisions concerning them in the Convention have been considered unsatisfactory from the beginning by the most powerful industrialized States. These provisions have been revised by the Agreement relating to the Implementation of Part XI of the Convention opened to signature on 29 July 1994. On the basis of the amended text of Part XI the Authority started to function in Kingston, Jamaica, on the 16 November 1994, upon entry into force of the UNCLOS. Since then the Authority has held regular sessions, elected its Council, its Secretary-General and two subsidiary organs and concluded a relationship agreement with the United Nations.

The basic characteristics of the Authority as they emerged from the Convention as adopted in 1982 have remained untouched. The Authority remains "the organization through which States Parties shall ... organize and control activities in the Area, particularly with a view to administering the resources of the Area". Its powers and functions remain defined in general terms as those "expressly conferred upon it" by this Convention as well as those "incidental powers, consistent with this Convention, as are implicit in, and necessary for, the exercise of those powers and functions with respect to activities in the Area"<sup>18</sup>. The provision according to which the "Area and its resources are the common heritage of mankind"<sup>19</sup>, as well as that providing that rights with respect to the minerals recovered from the Area shall not be claimed, acquired, exercised or recognized unless the minerals have been recovered in accordance with the Convention,<sup>20</sup> have remained untouched.

Also the structure of the Authority remains almost unchanged. The main organs remain the Assembly, which consists of all the members of the Authority, the Council, a restricted body of 36 members, and the

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<sup>18</sup> Article 157, paras 1 and 2, of the Convention, repeated in article 1 of Sect. 1 of the Annex to the 1994 Agreement.

<sup>19</sup> Article 136.

<sup>20</sup> Article 137 para. 3.

Secretariat. The only new element is the addition of a Finance Committee of 15 members<sup>21</sup>.

Yet, most of the peculiarities that permitted one to say that the Authority as set out in the 1982 Convention was unique among universal international organizations are gone. The Enterprise, the independent operational arm of the Authority, designed to carry out directly exploration and exploitation activities in the Area in competition with private and public enterprises sponsored by States, and which could enter in the competition with substantial privileges, has been transformed — at least for a long time — into an office of the Authority and deprived of the advantages and the financial means set out in the Convention<sup>22</sup>. The Authority as such can no longer participate “in respect of production in the Area” in commodity conferences and in the arrangements or agreements resulting therefrom<sup>23</sup>. Its powers of levying fees and of cashing financial contributions from contractors have been replaced by general principles for the establishment of rules to substitute in the future for the now abrogated financial rules<sup>24</sup>.

The Authority is now to follow the principle of cost-effectiveness<sup>25</sup>. The setting up and functioning of its organs and subsidiary bodies must be “based on an evolutionary approach”<sup>26</sup>. Moreover, the balance of power between the Assembly and the Council and within the Council has been altered. The position of the Council has been enhanced, in particular by stating that “the general policies of the Authority shall be established by the Assembly in collaboration with the Council”<sup>27</sup> and by making it difficult for the Assembly to overrule the recommendations of the Council<sup>28</sup>. Such strengthening of the position of the Council becomes particularly significant in light of the strengthening of the position of industrialized States within the Council. The majority of States sitting in each of the “chambers” representing special interests (those of consumers of the commodities produced from the minerals in the Area, of investors in the deep sea-bed industry, of land-based producers of the categories of minerals to be derived from the Area) can now, by its opposition, block the

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21 1994 Agreement, Annex, Sect. 9.

22 1994 Agreement, Annex, Sect. 2.

23 Article 151, para. 1 lit. (b) which provided for these powers “shall not apply” according to the 1994 Agreement, Annex, Sect. 6, para. 7.

24 1994 Agreement, Annex, Sect. 8.

25 1994 Agreement, Annex, Sect. 1, para. 2.

26 1994 Agreement, Annex, Sect. 1, para. 3.

27 1994 Agreement, Annex, Sect. 3, para 1.

28 1994 Agreement, Annex, Sect. 3, para. 4.

adoption of any decision of the Council, even when the necessary two-thirds majority has been reached<sup>29</sup>.

These changes make the International Sea-Bed Authority which started functioning on 16 November 1994 a much more "normal" organization in comparison with the Authority described in the Convention and opened for signature on 10 December 1982. It is now more difficult than it was in 1982 to find support in the Convention for the view that the Authority has, at least in some measure, powers that can bind Member States even against their will. The changes in the rules on the Enterprise and the abrogation of those on the participation of the Authority to commodity conferences, arrangements and agreements are an obstacle to such argument. In favour of such argument may still be invoked, in particular, the powers recognized by the Authority to grant contracts for the exploration or the exploitation of the Area, to institute proceedings against a State party "alleged to be in violation" of the rules concerning deep sea-bed mining in the Convention or adopted by the Authority, and to issue emergency orders for the prevention of serious harm to the environment. However, the changes to the rules on decision-making in the Council make the position of the States most directly involved in deep sea-bed mining different and stronger than that of the other Member States in opposing the exercise of the powers of the Authority mentioned above.

### 3. The International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea is the judicial body established according to the rules of the Convention. Its members were elected on 1 August 1996 and started their work in October 1996. In 1997 the Tribunal adopted its Rules, as well as Guidelines for the parties and a Resolution on internal judicial practice.

The Tribunal has compulsory jurisdiction on most but not all disputes concerning interpretation and application of the Convention. In most cases this jurisdiction is shared with the ICJ and with arbitral tribunals according to a complex system of preferences to be expressed by its Member States<sup>30</sup>. In some cases, however, such compulsory jurisdiction is exclusive. The most important are the following two. The first concerns jurisdiction as regards a special procedure for obtaining the prompt release, upon the posting of a bond or other financial security, of vessels detained because of alleged violations of certain rules of the UNCLOS especially

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<sup>29</sup> 1994 Agreement, Annex, Sect. 3, para. 5.

<sup>30</sup> Article 287.

concerning fisheries and pollution<sup>31</sup>. The second concerns jurisdiction regarding disputes relating to deep sea-bed mining<sup>32</sup>. Such disputes may involve not only States but also the International Sea-Bed Authority and State enterprises and natural or juridical persons. Jurisdiction concerning sea-bed disputes is vested in the Sea-Bed Disputes Chamber, composed of 11 out of the 21 members of the Tribunal.

The Tribunal is an autonomous institution. It is in the process of negotiating a headquarters agreement with Germany and has concluded a relationship agreement with the United Nations<sup>33</sup>. It has obtained observer status at the United Nations General Assembly<sup>34</sup>. The Agreement on the privileges and immunities of the Tribunal adopted in New York on 23 May 1997 recognizes the legal personality of the Tribunal<sup>35</sup>. The independence granted to its members (UNCLOS Annex VI, article 2 para. 1) and the power to “frame rules for carrying out its functions” including rules of procedure (UNCLOS Annex VI, article 16), confirm this independent status.

The Tribunal has nonetheless close connections with other bodies: the Meeting of the States Parties and the International Sea-Bed Authority<sup>36</sup>. The functions of the Meeting of the States Parties regarding the election of the judges and the finances of the Tribunal have been illustrated above. As regards the International Sea-Bed Authority, its particular relationship with the Sea-Bed Disputes Chamber is at the same time, and in different ways, judicial and institutional.

From the judicial point of view, the Chamber has compulsory contentious jurisdiction on disputes to which the Authority may be a party (article 187). It also has consultative jurisdiction on legal questions submitted to it by the Authority (article 159 para. 10, and article 191) as well as jurisdiction to determine, upon the request of the Authority, as a

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<sup>31</sup> Article 292.

<sup>32</sup> Article 187.

<sup>33</sup> Article 1 of the Agreement on Cooperation and Relationships Between the United Nations and the Tribunal, signed in New York on 18 December 1997, expressly says: “The United Nations recognizes the International Tribunal for the Law of the Sea as an autonomous international judicial body ...”.

<sup>34</sup> A/RES/51/204 of 17 December 1996.

<sup>35</sup> Doc. SPLOS/22. Article 2: “The Tribunal shall possess juridical personality”. Document reprinted in this Vol. See Section – Documents.

<sup>36</sup> See the observations by Judge Fleischhauer, “The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg”, *Max Planck UNYB*, Vol. 1, 1997, 327 et seq., (329).

prerequisite for a decision by the Authority to suspend a Member State from the rights and privileges of membership, that a Member State has "grossly and persistently violated" the provisions of Part XI of the Convention (article 162 para. 2 lit. (u), and article 185 para. 2). Through the exercise of the last mentioned example of jurisdiction as well as of its consultative jurisdiction the Sea-Bed Disputes Chamber can play a role in the functioning of the Authority.

The purely institutional relationship is relatively minor. One aspect of it concerns the Sea-Bed Disputes Chamber, the other the Tribunal as a whole. On the one hand, the "Assembly of the Authority may adopt recommendations of a general nature" relating to the representation of the principal legal systems of the world and equitable geographical distribution of seats of the Chamber (Annex VI, article 35 para. 2). On the other hand, the Authority may be called upon to shoulder a share of the expenses of the Tribunal "in such a manner as shall be decided at meetings of the States Parties" (Annex VI, article 19 para. 1). The Authority did not, however, adopt the above-mentioned recommendations before the first selection of the members of the Sea-Bed Disputes Chamber in February 1997. The Meeting of States Parties in May 1997, as a result of the fact that the Authority has for the time being no autonomous resources, adopted the budget of the Tribunal "without prejudice" to the application of the provisions of the Statute of the Tribunal in respect of the contribution to be made by the Authority<sup>37</sup>.

#### **4. The Commission on the Limits of the Continental Shelf**

The Commission on the Limits of the Continental Shelf is a body of 21 members elected by the Meeting of States Parties among experts in the fields of geology, geophysics or hydrography. The Commission was elected in March 1997 and has started holding regular sessions.

The tasks of the Commission, as outlined in article 76 para. 8, of the Convention and in Annex II thereof, concern the establishment by coastal States of the outer limits of their continental shelves whenever coastal States claim that such outer limit should lie beyond a distance of 200 miles from the baselines. These tasks consist, on the one hand, in considering the data and other material submitted by coastal States to substantiate their claims, and, whenever requested, in providing scientific and technical advice during the preparation of such data (Annex II, article 3 para. 1). On the other hand, the Commission shall make recommendations concerning

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<sup>37</sup> Doc. SPLOS/L.7, para. 5.

the claim submitted by the coastal State (Annex II, article 6). In case of disagreement of the coastal State with the recommendations of the Commission, such State shall make a revised or new submission (Annex II, article 8). Only the limits of the shelf established by a coastal State on the basis of the recommendation of the Commission "shall be final and binding" (article 76 para. 8 and Annex II, article 7). The role of the Commission in regard to the establishment of the outer limits of the continental shelf by a coastal State is very similar to the role, mentioned above, of the "competent international organization" (the IMO) as regards the designation of sea lanes or prescription of traffic separation schemes in straits used for international navigation or in archipelagos.

While the modalities of the election of the members of the Commission (and even those of the decision to postpone such election to March 1997) are very similar to those concerning the International Tribunal for the Law of the Sea, it does not seem possible to say that the Commission is an autonomous institution. Suffice it to mention that:

- there is no explicit provision in the UNCLOS affirming the independence and impartiality of the Commission and of its members;
- the expenses of each member shall be defrayed by the State Party which has submitted his nomination; and
- the secretariat of the Commission shall be provided by the Secretary-General of the United Nations.

As a consequence, the legal character of the Commission seems to be that of a group of experts of the Meeting of States Parties which enjoys the same United Nations facilities as its parent body. Further light as to the status of the Commission might be shed if the question of the applicability to its members of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 were clarified. At its second meeting (September 1997) the Commission decided that in dealing with confidential data it would apply *mutatis mutandis* article VI of this Convention to its members as experts on a mission for the United Nations. At the same time, the Commission requested the Legal Counsel of the United Nations to provide it with a formal opinion as to the applicability of the Convention to the members of the Commission. The ICJ in its Advisory Opinion on the Applicability of Article VI, Section 22, of the *Convention on the Privileges and Immunities of the United Nations* concerning an expert of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights clarified one aspect relevant to the problem by stating that persons not having the status of United Nations officials and which serve in a personal capacity are covered

by the Convention<sup>38</sup>. The Court did not (and could not) address, however, the other question which would seem decisive as regards the members of the Commission on the Limits of the Continental Shelf. This question is whether the concept of “experts on a mission for the United Nations” includes experts on a mission for a commission of *the Meeting of the States Parties* of the United Nations Law of the Sea Convention. In other words — is the relationship between the Meeting of the States Parties and the United Nations such as to support the contention that the members of the Shelf Commission are experts exercising their activity for the United Nations?<sup>39</sup>

#### IV. A Law of the Sea “System” of Institutions?

All the institutions established on the basis of the United Nations Law of the Sea Convention serve the purpose of ensuring the application of the Convention through mechanisms which aim at replacing unilateral action with third party mechanisms. Such mechanisms consist, in concert with the coastal State in the framework of the Commission on the Limits of the Continental Shelf as regards the application of article 76 of the Convention (as it also happens as regards other provisions within the framework of the IMO), in judicial settlement of disputes concerning the application and interpretation of the Convention through the International Tribunal for the Law of the Sea, and in the cooperative and organized implementation of the rules on deep sea-bed mining in the framework of the International Sea-Bed Authority.

The three institutions mentioned above with substantive tasks in the application of the UNCLOS established on the basis of the Convention have, as indicated, certain relationships with each other, with the Meeting of States Parties and with the United Nations. Recalling what was said above in analyzing these relationships, it emerges that the Tribunal and the

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<sup>38</sup> ICJ Reports 1989, 177 et seq., especially para. 48, (194).

<sup>39</sup> The Secretary-General of the United Nations transmitted to the Commission on the Limits of the Continental Shelf its legal opinion on the applicability of the Convention on the Privileges and Immunities of the UN with letter dated 11 March 1998 (Doc. CLCS/5 of the same date). The opinion states that the members of the Commission on the Limits of the Continental Shelf can be considered as Experts on Mission covered by the Convention. The opinion invokes the precedent of “similar treaty organs”, such as the Committee on the Elimination of Racial Discrimination.

Authority are autonomous from the United Nations<sup>40</sup> even though they have certain relationships with each other. The Tribunal and the Commission on the Limits of the Continental Shelf, but not the Authority, are linked to the Meeting of States Parties. Only the Commission is directly linked to the United Nations.

In the light of these relationships, is it possible to speak of a law of the sea "system" of institutions? The common link with the UNCLOS, which entails that all the institutions considered have the same States as a basis<sup>41</sup>, would seem sufficient in order to support an affirmative answer. The "system" is, however, devoid of an institutional centre, as the Meeting of the States Parties can only be considered with regard to the Tribunal and the Shelf Commission. Moreover even here it is an institutional centre in different ways as the degree of autonomy of the Tribunal is far more important than that of the Commission. The "law of the sea system of institutions" is a rather asystematic system, built for the needs of a normative instrument and not for primary institution-building purposes. Its strength does not lie in its structural consistency and cohesiveness, but in its functional destination to the implementation of the Convention.

Another aspect not to be overlooked is the connection with the United Nations. This connection in purely institutional terms is rather weak as it concerns directly only the Commission on the Limits of the Continental Shelf and the Meeting of the States Parties. Historically and "culturally" it is, however, very strong. The Convention was a product of the United Nations. Ever since its adoption in 1982, the United Nations, through the General Assembly and the Secretariat, has maintained a very active role in making the Convention known, in encouraging States to ratify it and in helping to solve the problems that made ratification difficult for a number of States. It would seem likely that this linkage with the United Nations will become even more important if the number of ratifications and accessions, already impressive, expands further.

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<sup>40</sup> This will be true for the Authority as soon as its provisional financing through the UN budget provided by the 1994 Agreement (Annex, Sect. 1, para. 14) will be replaced by financing from contributions of the Member States.

<sup>41</sup> The presence as members "on a provisional basis" in the Authority of States which are not parties to the UNCLOS should, according to the 1994 Agreement (Annex, Sect. 1, para. 12), terminate on 16 November 1998.